

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND )  
PROFESSIONAL REGULATION, DIVISION )  
OF REAL ESTATE, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 97-4938  
 )  
MARIA E. VACA, t/a VACA REALTY, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held by video teleconference with the parties appearing in Fort Lauderdale on May 6, 1998, before J. D. Parrish, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Laura McCarthy, Esquire  
Department of Business and  
Professional Regulation  
Division of Real Estate  
400 West Robinson Street  
Orlando, Florida 32802

For Respondent: Lloyd H. Falk, Esquire  
600 Southwest 4th Avenue  
Fort Lauderdale, Florida 33315

STATEMENT OF THE ISSUES

Whether the Respondent committed the violations alleged in the Administrative Complaint and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

This case began on May 22, 1997, when the Department of Business and Professional Regulation, Division of Real Estate (Department) issued an Administrative Complaint against the Respondent, Maria E. Vaca. Such complaint alleged, in part, that the Respondent had failed to place a deposit submitted with a contract into an escrow account and had failed to comply with rules regulating escrow disputes. The Respondent denied the allegations and requested a formal hearing.

The matter was forwarded to the Division of Administrative Hearings for formal proceedings on October 20, 1997. Thereafter, the case was scheduled for hearing by video teleconference.

At the hearing, the Department presented testimony from Donald Wilker and John C. Lee. Its Exhibits numbered 1 through 9 were admitted in to evidence.

Respondent testified in her own behalf. Respondent's Exhibit 1 was also been received into evidence.

The transcript of the proceeding was filed on June 3, 1998. A corrected transcript was filed on June 23, 1998. Both parties filed Proposed Recommended Orders which have been considered in the preparation of this order.

FINDINGS OF FACT

1. The Petitioner is the state agency charged with the responsibility of regulating real estate licensees in the State of Florida.

2. At all times material to the allegations of this case, Respondent was licensed as a real estate broker, license number 0333239, doing business at 120 East Oakland Park Boulevard, Suite 105, Fort Lauderdale, Florida, as Vaca Realty.

3. On or about February 12, 1996, Respondent obtained a contract for sale and purchase on a property owned by Daryl Cohen. The purchasers, Donald H. Wilker and Patricia C. Wilker, executed the contract and tendered an initial deposit of \$100.

4. Respondent held the listing on the Cohen home and upon receipt of the signed contract, placed the initial deposit as well as a second deposit in the amount of \$1,900 into the Vaca Realty operating account.

5. The \$2,000 deposit was never placed into a real estate escrow account or other proper depository.

6. The contract between the Wilkers and Cohen was scheduled to close April 1, 1996.

7. Prior to closing, the Wilkers notified Respondent that they were canceling the contract due to the condition of the roof. The parties were unable to agree as to the condition of the roof and the buyers announced their intention to not accept the home with the defects depicted in the roof inspection they had received.

8. On April 2, 1996, Respondent sent a release of deposit form to the Wilkers, which they refused to execute. Such release

would have authorized Respondent to release the deposit with \$1,000 going to the Seller, Mr. Cohen, and \$1,000 going to Vaca Realty.

9. Thereafter, the Respondent was aware that the parties retained legal counsel with regard to the contract dispute.

10. Despite her knowledge of the ongoing disagreement, Respondent did not notify the Florida Real Estate Commission regarding the deposit issue.

11. On or about August 23, 1996, the Seller executed a Release and Cancellation of Contract form that directed Respondent to disburse \$1,500 to the Wilkers and \$500 to Daryl Cohen. This agreement had been signed by the Wilkers on August 13, 1996.

12. Notwithstanding the terms of the foregoing agreement, on September 18, 1996, Respondent issued two checks from her operating account: one to the Wilkers in the amount of \$1,500 and the other to Cohen in the amount of \$250.

13. Respondent is currently on a suspension as a result of a Final Order entered in DBPR Case No. 94-82411, which was affirmed by the Fourth District Court of Appeals, Case No. 97-1069, on December 17, 1997, mandate issued January 5, 1998.

CONCLUSIONS OF LAW

14. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings.

15. Section 475.25(1), Florida Statutes, provides, in pertinent part:

475.25 Discipline.-

(1) The commission may deny an application for licensure, registration, or permit, or renewal thereof; may place a licensee, registrant, or permittee on probation; may suspend a license, registration, or permit for a period not exceeding 10 years; may revoke a license, registration, or permit; may impose an administrative fine not to exceed \$1,000 for each count or separate offense; and may issue a reprimand, and any or all of the foregoing, if it finds that the licensee, registrant, permittee, or applicant:

\* \* \*

(d)1. Has failed to account or deliver to any person, including a licensee under this chapter, at the time which has been agreed upon or is required by law or, in the absence of a fixed time, upon demand of the person entitled to such accounting and delivery, any personal property such as money, fund, deposit, check, draft, abstract of title, mortgage, conveyance, lease, or other document or thing of value, including a share of a real estate commission if a civil judgment relating to the practice of the licensee's profession has been obtained against the licensee and said judgment has not been satisfied in accordance with the terms of the judgment within a reasonable time, or any secret or illegal profit, or any divisible share or portion thereof, which has come into the licensee's hands and which is not the licensee's property or which the licensee is not in law or equity entitled to

retain under the circumstances. However, if the licensee, in good faith, entertains doubt as to what person is entitled to the accounting and delivery of the escrowed property, or if conflicting demands have been made upon the licensee for the escrowed property, which property she or he still maintains in her or his escrow or trust account, the licensee shall promptly notify the commission of such doubts or conflicting demands and shall promptly:

- a. Request that the commission issue an escrow disbursement order determining who is entitled to the escrowed property;
- b. With the consent of all parties, submit the matter to arbitration;
- c. By interpleader or otherwise, seek adjudication of the matter by a court; or
- d. With the written consent of all parties, submit the matter to mediation. The department may conduct mediation or may contract with public or private entities for mediation services. However, the mediation process must be successfully completed within 90 days following the last demand or the licensee shall promptly employ one of the other escape procedures contained in this section. Payment for mediation will be as agreed to in writing by the parties. The department may adopt rules to implement this section.

If the licensee promptly employs one of the escape procedures contained herein, and if she or he abides by the order or judgment resulting therefrom, no administrative complaint may be filed against the licensee for failure to account for, deliver, or maintain the escrowed property.

2. Has failed to deposit money in an escrow account when the licensee is the purchaser of real estate under a contract where the contract requires the purchaser to place deposit money in an escrow account to be applied to the purchase price if the sale is consummated.

\* \* \*

(k) Has failed, if a broker, to immediately place, upon receipt, any money, fund,

deposit, check, or draft entrusted to her or him by any person dealing with her or him as a broker in escrow with a title company, banking institution, credit union, or savings and loan association located and doing business in this state, or to deposit such funds in a trust or escrow account maintained by her or him with some bank, credit union, or savings and loan association located and doing business in this state, wherein the funds shall be kept until disbursement thereof is properly authorized; or has failed, if a salesperson, to immediately place with her or his registered employer any money, fund, deposit, check, or draft entrusted to her or him by any person dealing with her or him as agent of the registered employer. The commission shall establish rules to provide for records to be maintained by the broker and the manner in which such deposits shall be made.

16. Rule 61J2-10.032(1), Florida Administrative Code, provides:

Notice Requirements.

(1)(a) A real estate broker, upon receiving conflicting demands for any trust funds being maintained in the broker's escrow account, must provide written notification to the Commission within 15 business days of the last party's demand, and the broker must institute one of the settlement procedures as set forth in s. 475.25(1)(d)1., Florida Statutes, within 30 business days after the last demand.

(b) A broker, who has a good faith doubt as to whom is entitled to any trust funds held in the broker's escrow account, must provide written notification to the Commission within 15 business days after having such doubt and must institute one of the settlement procedures as set forth in s. 475.25(1)(d)1., Florida Statutes, within 30 business days after having such doubt. The determination of good faith doubt is based upon the facts of each case brought before the Commission. Based upon prior decisions of the Commission, good faith doubt shall be deemed to exist in

the following situations:

1. the closing or consummation date of the sale, lease, or other real estate transaction has passed, and the broker has not received conflicting or identical instructions from all of the parties concerning the disbursement of the escrowed funds;

2. the closing or consummation date of the sale, lease, or other transaction has not passed, but one or more of the parties has expressed its intention not to close or consummate the transaction and the broker has not received conflicting or identical instructions from all of the parties concerning disbursement of the escrowed funds; and

(c) If one of the parties to a failed real estate sales transaction does not respond to the broker's inquiry as to whether that party is placing a demand on the trust funds or is willing to release them to the other party, the broker may send a certified notice letter, return receipt requested, to the non-responding party. This notice should include the information that a demand has been placed by the other party, that a response must be received by a certain date, and that failure to respond will be construed as authorization for the broker to release the funds to the other party. Before releasing said trust funds, the broker must have the return receipt as proof the notice was delivered.

17. The Petitioner bears the burden of proof in this case to establish by clear and convincing evidence the allegations against this Respondent. It has met that burden.

18. Respondent did not deposit the funds tendered by the Wilkers into an escrow account or other appropriate depository pending closing on the contract. This is a basic requirement of real estate law. Had Respondent reconciled her escrow account at the end of the month, this oversight (as she claims) would have been readily discovered. In general terms Respondent was not



required to maintain an escrow account; however, as the listing agent and recipient of the deposit, it was her duty to assure that the deposit was placed in an appropriate escrow or trust account. She did not do so.

19. Secondly, when the contract did not close, there was a dispute as to the rightful owner of the deposit. Respondent was required by law to alert the Florida Real Estate Commission of this dispute. Further, she was required to hold the funds in an escrow account until their disbursement would be authorized.

20. When she finally released the funds (almost a month after the parties had signed the form), she had no authority to retain \$250 since Mr. Cohen had not authorized that withholding.

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Real Estate Commission enter a Final Order suspending Respondent's license for six months, require Respondent to complete additional courses in escrow management, and direct that Respondent's escrow account be audited, at Respondent's expense, for at least one year after the reinstatement of her license.

DONE AND ENTERED this 30th day of June, 1998, in  
Tallahassee, Leon County, Florida.

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J. D. Parrish  
Administrative Law Judge  
Division of Administrative Hearings  
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1230 Apalachee Parkway  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 30th day of June, 1998.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.