STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF REAL ESTATE,	)	
Petitioner,	)	
vs.	)	Case Nos. 97-5041 98-0003
MIZERAL ROBINSON and WAKEFIELD REALTY, INC.,	)	
Respondents.	)	

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Administrative Law Judge, William J. Kendrick, held a formal hearing in the above-styled case on March 25, 1998, by video teleconference.

APPEARANCES

For Petitioner: Geoffrey T. Kirk, Esquire
Department of Business and Professional Regulation
Division of Real Estate
Post Office Box 1900
Orlando, Florida 32802-1900

For Respondents: Donnette Reid, Esquire
Law Offices of Glantz & Glantz
Wellesley Corporate Plaza
7951 Southwest Sixth Street, Suite 200
Plantation, Florida 33324

STATEMENT OF THE ISSUES

At issue in this proceeding is whether Respondents committed the offenses set forth in the Administrative Complaints and, if

so, what penalty should be imposed.

PRELIMINARY STATEMENT

On August 21, 1997, Petitioner issued a five-count Administrative Complaint against Respondents, Mizeral Robinson ("Robinson") and Wakefield Realty, Inc. (Wakefield Realty), for perceived violations of Section 475.25, Florida Statutes. The gravamen of the complaint concerns a $6,000 deposit which, it is alleged, Hubert and Ruth Dobson (the "Buyers") placed with Respondents under the terms of a deposit receipt agreement and which Robinson (Count I) and Wakefield Realty (Count II) failed to account for and deliver, in violation of Section 475.25(1)(d), Florida Statutes. The complaint further alleges that, during the Department's investigation of the Dobson transaction, Robinson (Count III) and Wakefield Realty (Count IV) "failed or were unable to produce to Petitioner's investigator, upon request, the requisite brokerage records and documentation," in violation of Rule 61J2-14.012, Florida Administrative Code, and, therefore, in violation of Section 475.25(1)(e), Florida Statutes. Finally, the complaint alleges (Count V) that, at the time the complaint was issued, Wakefield Realty did not have a duly licensed qualifying broker and had, therefore, failed to maintain an active, valid and current corporate registration, in violation of Rule 61J2-5.018, Florida Administrative Code, and, therefore, in violation of Section 475.25(1)(e), Florida Statutes.

On November 20, 1997, Petitioner issued a second Administrative Complaint against Respondent Robinson for

additional perceived violations of Section 475.25, Florida Statutes. The gravamen of this complaint was a $1,000 deposit by Iran V. Rafiee (the "Buyer"), which Petitioner alleged Robinson failed to timely deposit in escrow, and failed to account for and deliver. The complaint further alleged that Robinson "failed to properly and timely notify Petitioner of any change of address or employer as required by law," and that "Respondent is presently licensed as a broker-salesperson without being properly affiliated with any duly licensed or registered Florida real estate broker." The complaint concluded, based on such allegations, that Robinson was guilty of the following offenses: Count I, "Fraud, misrepresentation, concealment, false promises, false pretenses, dishonest dealing by trick, scheme or device, culpable negligence or breach of trust in any business transaction in this State in violation of § 475.25(1)(b), Fla. Stat."; Count II, "failing to immediately deposit funds in escrow in violation of § 475.25(1)(k), Fla. Stat."; Count III, "failing to account and deliver funds held in escrow, trust or on condition in violation of § 475.25(1)(d), Fla. Stat."; Count IV, "failing to properly and timely notify Petitioner of a change of address or employer in violation of § 475.23, Fla. Stat.," and "operating as a broker without an active, current and valid Florida brokers license, either or both in violation of § 475.25(1)(a)/(e), Fla. Stat."; and, Count V, "failure to maintain trust funds in the real estate brokerage escrow bank

account or some other proper depository until disbursement thereof was properly authorized in violation of § 475.25(1)(k), Fla. Stat."

Respondent filed an election of rights in response to each complaint which raised disputed issues of fact, and the matters were referred to the Division of Administrative Hearings for the assignment of an administrative law judge to conduct a formal hearing pursuant to Sections 120.569 and 120.57(1), Florida Statutes. The first Administrative Complaint, dated August 21, 1997, was assigned DOAH Case No. 97-5041, and the second Administrative Complaint, dated November 20, 1997, was assigned DOAH Case No. 98-0003. By order of January 22, 1998, the cases were consolidated.

At hearing, Petitioner called as witnesses Iran Rafiee, Juanita Palacio, Ruth Dobson, Hubert Dobson, and Monroe Berger. Petitioner's Exhibits 2 through 24 were received into evidence.[1] Respondent Mizeral Robinson testified on her own behalf, and Respondent's Exhibits 1 through 8 were received into evidence.[2]

The transcript of hearing was filed April 15, 1998, and the parties were initially accorded ten days from that date to file proposed recommended orders. Thereafter, at Respondents' request and with Petitioner's acquiescence, the time for filing proposed recommended orders was extended to May 15, 1998. Consequently, the parties waived the requirement that a recommended order be rendered within thirty days after the transcript is filed. Rule 60Q-2.011, Florida Administrative Code. Petitioner elected to file such a proposal, and it has been duly considered in the preparation of this order.

FINDINGS OF FACT

Preliminary matters

1. Petitioner, Department of Business and Professional Regulation, Division of Real Estate (Department), is a state government licensing and regulatory agency charged, inter alia, with the responsibility and duty to prosecute administrative complaints pursuant to the laws of the State of Florida, including Chapters 455 and 475, Florida Statutes.

2. Respondent, Mizeral Robinson (Robinson), is now and was at all times material hereto a licensed real estate broker in the State of Florida, having been issued license number 0484257.

3. From July 18, 1988, through January 5, 1997, Robinson was registered with the Department as a broker/officer of Wakefield Realty, Inc. (Wakefield Realty), a broker-corporation, and from January 6, 1997, through June 30, 1997, Robinson was registered as an active broker-salesperson with Township Realty, Inc., a broker-corporation located at 1333 South State Road 7, North Lauderdale, Florida. Since June 30, 1997, Robinson has been registered as a broker-salesperson without a current employer, with an address of 6372 Harbor Bend, Margate, Florida.

4. From July 18, 1988, through January 6, 1997, Wakefield Realty was registered with the Department as a broker-corporation (registration number 0255869), with an address of 4699 North State Road 7, Fort Lauderdale, Florida. However, in October 1996, without notice to the Florida Real Estate Commission,

Wakefield Realty relocated its offices to 2240 Woolbright Road, Boynton Beach, Florida. On January 6, 1997, the license of its corporate broker, Robinson, was reissued as a broker-salesperson with Township Realty, Inc., and, no active broker having been appointed to fill the vacancy within 14 calendar days, Wakefield Realty's corporate registration was cancelled. Rule 61J2-5.018, Florida Administrative Code.

The Dobson contract and related matters
(DOAH Case No. 97-5041)

5. On October 31, 1995, Respondents, Robinson and Wakefield Realty, as agents for Hubert and Ruth Dobson, the Buyers, presented a written offer to purchase a house owned by Adrienne and Nancy Cutler, the Sellers, at 951 Southwest 88th Terrace, Pembroke Pines, Florida.

6. On November 7, 1995, following negotiations, the Dobsons' offer was accepted by the Sellers. The agreed purchase price was $123,480, with the method of payment as follows: a $2,000 deposit tendered with the offer; an additional deposit of $4,000 "due within 10 United States banking days after date of acceptance"; the proceeds ($117,306) of a new conventional mortgage to be secured by the buyers; and, a balance of $174 to be paid by the buyers at closing. All deposits were to be held in escrow by Wakefield Realty.

7. In addition to the provisions of the agreement relating to the deposits, discussed supra, the agreement contained the following pertinent provisions:

D. NEW MORTGAGES:

. . . if this Contract provides for Buyer to obtain a new mortgage, then Buyer's performance under this Contract shall be contingent upon Buyer's obtaining said mortgage financing upon the terms stated, or if none are stated, than upon the terms generally prevailing at such time in the county where the property is located. The buyer agrees to apply within 5 banking days . . . and to make a good faith, diligent effort to obtain the mortgage financing. In the event a commitment for said financing is not obtained within 45 banking days . . . from the date of this Contract, then the other party may terminate this Contract by delivery of written notice to the other party or his agent, the deposit shall be returned to the Buyer and all parties shall be released from all further obligations hereunder. This right of termination shall cease upon the Buyer obtaining a written commitment letter for mortgage financing at the rate and terms of payment previously specified herein prior to the delivery of the notice of termination.

* * *

X. DEFAULT: In the event of default of either party, the rights of the non-defaulting party and the broker shall be as provided herein and such rights shall be deemed to be the sole and exclusive rights in such event; (a) If Buyer fails to perform any of the covenants of this Contract, all money paid or deposited pursuant to this Contract by the Buyer shall be retained by or for the account of the Seller as consideration for the execution of this Contract as agreed and liquidated damages and in full settlement of any claims for damages and specific performance by the Seller against the Buyer. . . .

* * *

(CHECK and COMPLETE THE ONE APPLICABLE)
(X) IF A WRITTEN LISTING AGREEMENT IS CURRENTLY IN EFFECT:

> Seller agrees to pay the Broker named above including cooperating sub-agents and/or cooperating Buyers Agents named, according to the terms of an existing, separate written agreement;
>
> * * *
>
> If Buyer fails to perform and deposit(s) is retained, 50% thereof, but not exceeding the Broker's fee above provided, shall be paid Broker, as full consideration for Broker's services including costs expended by Broker, and the balance shall be paid to Seller.

8. To finance the purchase, Robinson submitted an application on the Dobsons' behalf for a conventional residential mortgage loan with Citizens Federal Bank. That application was denied January 8, 1996.

9. Following the denial of their application, the Dobsons made demand of Respondents, under the mortgage contingency provision of the purchase agreement, for the return of their $6,000 deposit.[3] Respondents, notwithstanding the rejection of the Dobsons' application for financing and the Sellers' execution of a release of deposit, which directed the escrow agent to disburse the escrow deposit of $6,000 to the Dobsons, failed and refused to return any portion of the deposit to the Dobsons. To date, such failure continues, and the proof is compelling that Respondents have converted the deposit to their own use and benefit.[4]

The Rafiee contract and related matters
(DOAH Case No. 98-0003)

10. On October 25, 1996, Respondent, Mizeral Robinson,

procured a written offer from Iran Rafiee to purchase a triplex owned by Henry Sweigart, located at 11460 Northwest 39th Street, Coral Springs, Florida. The stated purchase price was $195,000, with the method of payment as follows: a $1,000 deposit tendered with the offer; an additional deposit of $9,000 "due within 5 United States banking days after date of acceptance"; the proceeds ($156,000) of a new conventional mortgage to be secured by the buyer; and, a balance of $30,000 [sic] to be paid by the buyer at closing. All deposits were to be held by Wakefield Realty, Inc., Mizeral Robinson, escrow agent.

11. According to the "Deposit Receipt and Contract for Sale and Purchase," Rafiee's offer was accepted on what appears to be October 27, 1996 (Petitioner's Exhibit 12), and Rafiee's initial deposit, which was in Robinson's possession by at least October 25, 1996,[5] was deposited on October 30, 1996.[6] Accepting October 25, 1996, as the date Robinson received the check, the check was deposited "no later than the end of the third business day following receipt."[7] Rule 61J2-14.008(d), Florida Administrative Code.

12. In addition to the provisions of the agreement relating to the deposits, discussed supra, the agreement contained the following pertinent provisions:

> 29. DEFAULT: In the event of default of either party, the rights of the non-defaulting party and the broker shall be as provided herein and such rights shall be deemed to be the sole and exclusive rights in such event. If Buyer fails to perform any of

> the covenants of this Contract, all money paid or to be paid as deposits pursuant to this Contract by the Buyer shall be retained by or for the account of the Seller as consideration for the execution of this Contract as agreed and liquidated damages and in full settlement of any claims for damages and specific performance by the Seller against the Buyer.
>
> * * *
>
> (CHECK AND COMPLETE THE ONE APPLICABLE)
> (X) IF A WRITTEN LISTING AGREEMENT IS CURRENTLY IN EFFECT:
> Seller agrees to pay the Broker(s) named above according to the terms of an existing, separate written professional service fee agreement;
>
> * * *
>
> If Buyer fails to perform and deposit(s) is retained, 50% thereof, but not exceeding the Broker's fee above provided, shall be paid Broker, as full consideration for Broker's services including costs expended by Broker, and the balance shall be paid to Seller.

13. Within days of the acceptance of her offer, Ms. Rafiee decided that she no longer desired to purchase the property and, on or about October 31, 1996, notified Robinson of her decision and requested the return of her deposit. At the time, Robinson was noncommittal and, observing that the check had only recently been deposited and likely had not yet been paid, stated they would have to speak of the matter at a later date.

14. Thereafter, when pressed regarding the return of Ms. Rafiee's deposit, Robinson informed her that the deposit had been given to the seller, as required by the contract. Nevertheless, when Ms. Rafiee voiced her intention to pursue the

matter further, Robinson agreed to pay her $800 (the parties agreeing that Robinson was entitled to $200 for her efforts) by December 20, 1996. Following the passage of a number of deadlines, and one check returned for insufficient funds, Robinson, in or about May 1997, eventually paid Ms. Rafiee the $800.00.

15. At hearing, Robinson averred that because of Ms. Rafiee's default, she and the seller were, under the terms of the contract, each entitled to 50% of the $1,000 deposit, and that she disbursed the deposit accordingly. As for her offer to pay Ms. Rafiee $800, it was Robinson's view that such offer was made to appease Ms. Rafiee, since Robinson expected to secure further business from her, and should not be considered an admission that Ms. Rafiee was entitled to the return of any of her deposit.

16. Given Ms. Rafiee's default under the purchase agreement, it must be concluded that Robinson, as the broker, had apparent authority to retain 50% ($500) of the deposit and to remit the remaining 50% ($500) to the seller. This is what Robinson avers she did and, given the proof or, stated differently, the lack thereof, it cannot be resolved, with the requisite degree of certainty, that she did otherwise.[8]

CONCLUSIONS OF LAW

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

these proceedings. Sections 120.569, 120.57(1), and 120.60(5), Florida Statutes.

18. Where, as here, the Department proposes to take punitive action against a licensee, it must establish grounds for disciplinary action by clear and convincing evidence. Section 120.57(1)(h), Florida Statutes (1997), and Department of Banking and Finance v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996). That standard requires that "the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit; and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established." Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983). Moreover, the disciplinary action taken may be based only upon the offenses specifically alleged in the administrative complaint. See Kinney v. Department of State, 501 So. 2d 129 (Fla. 5th DCA 1987); Sternberg v. Department of Professional Regulation, Board of Medical Examiners, 465 So. 2d 1324 (Fla. 1st DCA 1985); and Hunter v. Department of Professional Regulation, 458 So. 2d 844 (Fla. 2d DCA 1984). Finally, in determining whether Respondent violated the provisions of section 475.25(1), as alleged in the Administrative Complaint, one "must bear in mind that it is, in effect, a penal

statute. . . . This being true, the statute must be strictly construed and no conduct is to be regarded as included within it that is not reasonably proscribed by it." Lester v. Department of Professional and Occupational Regulations, 348 So. 2d 923, 925 (Fla. 1st DCA 1977).

The Dobson transaction (DOAH Case No. 97-5041)

19. Pertinent to the charges pending under DOAH Case No. 97-5041, Section 475.25(1), Florida Statutes, provides that the Florida Real Estate Commission 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:
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> * * *
>
> (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. . .
>
> * * *
>
> (e) Has violated any of the provisions of this chapter or any lawful order or rule made or issued under the provisions of this chapter or chapter 455.

20. Pertinent to the charges which rely on a perceived

violation of Subsection 475.25(1)(e), Florida Statutes, are the provisions of Rule 61J2-14.012(1), Florida Administrative Code, which provides:

> (1) A broker who receives a deposit[9] as previously defined shall preserve and make available to the BPR, or its authorized representative, all deposit slips and statements of account rendered by the depository in which said deposit is placed, together with all agreements between the parties to the transaction. In addition, the broker shall keep an accurate account of each deposit transaction and each separate bank account wherein such funds have been deposited. All such books and accounts shall be subject to inspection by the DPR or its authorized representatives at all reasonable times during regular business hours.

Also pertinent to a perceived violation of subsection 427.25(1)(e) are the provisions of Rule 61J2-5.018, Florida Administrative Code, which provide as follows:

> (1) A corporation shall have at all times registered the name(s) of its officer(s) and director(s). In the event that a corporation has but one active broker, and such broker dies, resigns, or is otherwise removed from the position as the active broker, then, in such event, such vacancy shall be filled within 14 calendar days during which no new brokerage business may be performed by the corporation or a licensee registered with the corporation until a new active broker is appointed and registered with the corporation. It shall be the duty of the corporation to immediately notify the Commission of such vacancy and of the steps taken to fill this vacancy.
> (2) Failure to appoint another active broker within 14 calendar days will result in the automatic cancellation of the corporate registration, and the licenses of all its officer(s), director(s) and salesperson(s) will become involuntarily inactive.

21. Here, the proof (as noted in the findings of fact and corresponding endnotes) demonstrated, with the requisite degree of certainty, that Respondents, Mizeral Robinson and Wakefield Realty, Inc., failed to account for and deliver up the Dobson deposit as required by law. Consequently, Counts I and II of the Administrative Complaint (DOAH Case No. 97-5041) have been sustained.

22. The proof (as noted in the findings of fact and corresponding endnotes) further demonstrated that Respondents failed to maintain or make available to the Department or its authorized representative, all deposit slips and statements of account rendered by the depository in which the Dobson deposit was placed, and failed to keep an accurate account of each deposit transaction and each separate bank account wherein the Dobsons' funds were deposited. Indeed, the brokerage ledger Respondents produced was a fabrication; no records were produced which would account for each deposit the Dobsons tendered; and no records were produced which would explain the disposition of the Dobson deposits. Consequently, Counts III and IV of the Administrative Complaint have been sustained.

23. Finally, the proof demonstrated that as of January 6, 1997, Wakefield Realty, Inc., failed to have at least one officer or director with an active broker's license and failed, within 14 calendar days thereafter, to appoint another active broker. Consequently, Count V of the Administrative Complaint has been

sustained. However, the proof further reflected that the consequences of such failure, cancellation of Wakefield Realty's corporate registration, has already occurred. Consequently, no further penalty need be assessed for such violation.

The Rafiee transaction (DOAH Case No. 98-0003)

24. Pertinent to the charges pending under DOAH Case No. 98-0003, Section 475.25(1), Florida Statutes, provides that the Florida Real Estate Commission may take disciplinary action against a licensee when she:

> (b) Has been guilty of fraud, misrepresentation, concealment, false promises, false pretenses, dishonest dealing by trick, scheme, or device, culpable negligence, or breach of trust in any business transaction in this state . . .
>
> * * *
>
> (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. . .
>
> * * *
>
> (e) Has violated any of the provisions of this chapter or any lawful order or rule made or issued under the provisions of this chapter or chapter 455.
>
> * * *
>
> (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. . . .

25. Pertinent to the perceived violation of subsection 475.25(1)(e),[10] Section 475.23, Florida Statutes, provides:

> A license shall cease to be in force whenever a broker changes her or his business address . . . The licensee shall notify the commission of the change no later than 10 days after the change, on a form provided by the commission.

26. Pertinent to the perceived violation of subsection 475.25(1)(k), Rule 61J2-14.008(d), Florida Administrative Code, provides:

> (d) "Immediately" means the placement of a deposit in an escrow account no later than the end of the third business day following receipt of the item to be deposited. Saturdays, Sundays and legal holidays shall not be considered as business days.

27. Here, based on the findings and observations noted in the findings of fact, as well as the corresponding endnotes, it must be concluded that the Department failed to demonstrate, by clear and convincing evidence, that Robinson is guilty of the violations alleged in Counts I, II, III, and V of the Administrative Complaint (DOAH Case No. 98-0003). With regard to Count IV, the proof does demonstrate that Robinson is guilty of

"failing to properly and timely notify Petitioner of a change of address . . . in violation of § 475.23, Fla. Stat.," and that, as a consequence of such change of address, she "operate[d] as a broker without an active, current and valid Florida brokers license."

The penalty

28. Having reached the foregoing conclusions, it remains to resolve the appropriate penalty that should be imposed. Pertinent to this issue, Rule 61J2-24.001, Florida Administrative Code, provides the disciplinary guidelines on which disciplinary penalties will be based, as well as the aggravating or mitigating circumstances which may be considered to support a deviation from the guidelines.

29. Giving due consideration to the Department's disciplinary guidelines, as well as the aggravating and mitigating circumstances, it must be concluded that the appropriate penalty for the violations demonstrated in these proceedings is, as suggested by the Department, revocation of licensure. In so concluding, it is observed that real estate brokerage is a business greatly affected by the public trust. As observed in Shelton v. Florida Real Estate Commission, 120 So. 2d 191, 194 (Fla. 2d DCA 1960):

> . . . A real estate broker occupies a privileged position wherein those of his profession enjoy a monopoly to engage in a lucrative business. . . . The statutes regulating the activities of real estate brokers in their business were designed to

> protect the public and to safeguard those persons who put their money and trust in the hands of real estate brokers. Ahern v. Florida Real Estate Commission, 1942, 149 Fla. 706, 6 So. 2d 857. Anyone who deals with a licensed broker may assume that he is dealing with an honest and ethical person. . . .

Moreover, the holder of a brokerage license stands in a fiduciary relationship with her client. See United Homes, Inc. v. Moss, 154 So. 2d 351 (Fla. 2d DCA 1963). Where such relationship is shown to exist, as it was in the Dobson transaction, the law extracts a high standard of loyalty on the part of an agent toward her principal, requiring of the agent the utmost good faith toward her principal in all matters connected with the employment. See generally 2 Fla. Jur.2d, Agency and Employment, Sections 84 and 89. Here, Robinson's lack of good faith has been clearly demonstrated, and evidences Robinson's lack of the requisite good character necessary for licensure as a real estate broker in the State of Florida.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that a Final Order be entered revoking Respondents' licensure and eligibility for licensure.

DONE AND ENTERED this 29th day of May, 1998, in Tallahassee, Leon County, Florida.

WILLIAM J. KENDRICK
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of May, 1998.

ENDNOTES

1/ Petitioner's Exhibit 1 was a copy of the checks received as Petitioner's Exhibit 20. Apparently, because of the duplicity, Petitioner did not move its Exhibit 1 into evidence.

2/ According to the transcript, Respondents' Exhibit 6 was to have been a composite exhibit, which was to include Respondent's bank statement for November 30, 1995, and December 29, 1995. (Transcript, pages 131-134). Exhibit 6, as filed with the Division of Administrative Hearings only included the November 30, 1995, bank statement. Respondent's testimony regarding the content of the December 29, 1995, bank statement has, however, been credited. (See Endnote 3, paragraph 9).

3/ At hearing, Robinson disputed that the Dobsons had paid the $6,000 required by the terms of the purchase agreement. However, having considered the evidence offered, including a comparison of Respondents' "brokerage ledger" (Petitioner's Exhibit 6), the bank statement of November 1995 for Respondents' trust account (Respondents' Exhibit 6), the Dobsons' bank statement for November 1995 (Petitioner's Exhibits 21 through 23), and the checks tendered by the Dobsons for the deposit (Petitioner's Exhibit 20), it is apparent that the Dobsons did pay to Respondents the $6,000 deposit required by the agreement, and that Robinson's testimony and other proof to the contrary is unworthy of belief.

In reaching the foregoing conclusion, it is first observed that the proof is compelling that Robinson is not hesitant to

prevaricate or create false documents when her personal interests are at stake. A patent example of this behavior is the letter she presented to the Department's investigator which purported to bear the Dobsons' signatures and which sought to withdraw their complaint (Petitioner's Exhibit 5). The document was a sham, and was not prepared or signed by the Dobsons.

Further proof of Robinson's duplicity may be found in an examination of Respondents' "brokerage ledger" for November and December 1995 (Petitioner's Exhibit 6), and a comparison of the ledger with the bank statement of November 1995 for Respondents' trust account (Respondents' Exhibit 6), the Dobsons' bank statement for November 1995 (Petitioner's Exhibits 21 through 23), and the checks tendered by the Dobsons for the deposit (Petitioner's Exhibit 20).

Notably, if one accepted Respondents' "brokerage ledger" as an accurate record of the Dobsons' deposit history, one could only conclude that they had not paid one dollar towards the deposit because every check they tendered was returned unpaid for not sufficient funds. However, a comparison of the ledger with other evidence noted supra demonstrates that the ledger does not accurately portray the Dobsons' deposit history, and that Robinson's testimony is not worthy of belief.

In reaching the foregoing conclusion the following observations are made. First, Respondents' ledger reflects that the Dobsons' initial deposit of $2,000 (check number 453, dated October 31, 1995) was deposited November 1, 1995, returned for "NSF" (not sufficient funds) November 6, 1995, re-deposited November 7, 1995 (Petitioner's November bank statement does not show a deposit for November 7, but does show one for November 9, 1995), and returned for "NSF" November 13, 1995. Except for the initial deposit of the Dobsons' check on November 1, 1995, the remaining entries which attribute returns and re-deposits of this check are false. Such conclusion is apparent from the face of the Dobsons' check (number 453) which was paid, and never returned "NSF." Such is also apparent from the Dobsons' November bank statement which, contrary to the events depicted on Respondents' ledger, reflects no returns or re-deposits for Dobsons' check number 453. Clearly, the activity the ledger seeks to portray or conform to activities on Respondent's bank statement of November 1995 (the return NSF of November 6, 1995, the re-deposit of November 9, 1995, and the return NSF of November 13, 1995) is not related to the Dobson transaction, and Respondents' portrayal of the activity as so related is false.

Further evidence of the unreliability of Robinson's testimony and the Respondents' documentation is evident from Respondents manipulation of the balance of the deposit the Dobsons tendered on

November 9, 1995. That tender consisted of two checks payable to Wakefield Realty, Inc., with the first check (number 457) in the sum of $2,325 (this check included funds for a $325.00 mortgage processing fee), and the second check (number 458) in the sum of $2,000. Both checks were received by Robinson, endorsed Wakefield Realty, and deposited at NationsBank (Respondents' bank) on November 13, 1995; however, there is no entry in Respondents' ledger reflecting the deposit of check number 458 for $2,000, and no entry on the November bank statement for Respondents' trust account reflecting that deposit. Obviously, Respondents deposited check number 458 to an account, other than their trust account, at NationsBank.

Regarding the further handling of those checks the proof demonstrates that they were both presented for payment to the Dobsons' bank on November 14, 1995, and that check number 458 ($2,000) was paid and check number 457 ($2,325) was rejected by Dobsons' bank for NSF. Check number 457 ($2,325) was re-deposited to Respondents' trust account on November 17, 1995, and again rejected by Dobsons' bank on November 20, 1995, for NSF.

At this point, the Respondents had received $4,000 of the $6,000 deposit required by the contract; however, only $2,000 was placed in Respondents' trust account. For the balance of the deposit, and in replacement of check number 457 ($2,325), the Dobsons tendered two checks to Respondents. The first check (number 465) dated November 22, 1995, was payable to Wakefield Realty, Inc., in the sum of $2,000 and represented the balance of the deposit due under the contract. The second check (number 467) dated November 28, 1995, was made payable, at her request, to Robinson and represented reimbursement for the mortgage processing fee.

Respondents deposited Dobsons' check number 456 ($2,000) to their trust account on November 22, 1995, and the check was rejected by the Dobsons' bank on November 24, 1995, for NSF. At hearing, Ms. Robinson testified that this check (number 456) was never re-deposited and Respondents never received its proceeds. As proof, Respondents pointed to their ledgers for November and December 1995 and trust account statements for November and December 1995, which reflect no further activity regarding check number 456. (Petitioner's Exhibit 6; Respondent's Exhibit 6; and Transcript, page 133). However, the Dobsons' bank statement for November 1995 clearly reflects that check number 465 ($2,000) was re-deposited, and Dobsons' bank honored (paid) the check on November 30, 1995. Again, the only logical conclusion to draw is that Respondents re-deposited the check to an account other than their trust account at NationsBank. The Dobsons' check number 467 for the mortgage processing fee was paid by its bank on November 29, 1995.

Consequently, by November 30, 1995, the Dobsons had paid the

entire $6,00 deposit to Respondents; however, only $2,000 of that amount was placed in their trust account. Of note, Respondents' trust account was closed on December 30, 1995, with a balance of $207.00. (Petitioner's Exhibit 6). Here, Respondents have failed to produce any record, provide any explanation, or otherwise account for the disposition of the $2,000 they were holding in their trust account, or the $4,000 they received in trust that was not deposited to their trust account.

Following the denial of their mortgage application, Robinson prepared a "Release of Deposit Receipt." (Petitioner's Exhibit 8). According to Robinson, she prepared the release at the Sellers' request, because the time for closing had passed, and they wished to proceed with a sale to another buyer. (Transcript, page 177). The denial of the Dobsons' mortgage application was, most likely, the dispositive issue.

The release prepared by Robinson provided:

> WITNESSETH:
>
> That each of the parties hereto in consideration of each of the parties releasing all of the other parties from the aforesaid Deposit Receipt, do hereby release each of the other parties to said Deposit Receipt from any and all claims, actions or demands whatsoever which each of the parties hereto may have up to the date of this agreement against any of the other parties hereby by reason of said Deposit Receipt.
>
> It is the intention of this agreement that any responsibility or obligations or rights arising by virtue of said Deposit Receipt are by this release declared null and void and of no further affect when signed by all of the above named parties.
>
> The escrow agent holding the deposit under the terms of said Deposit Receipt is hereby directed and instructed forthwith to disburse said deposit held in escrow in the following manner:
>
> $ 6,000.00 to Ruth and Hubert Dobson
>
> * * *
>
> IN WITNESS WHEREOF the parties have

> hereunto set their hands and seals the day and year below written.

The release was signed by Robinson on what appears to be January 10, 1996, two days after the denial of the Dobsons' mortgage loan application, and by the Sellers on January 15, 1996. Oddly, the release also bears what appear to be the signatures of the Dobsons; however, they deny having signed the document. Clearly, the Dobsons would have no reason to refuse to sign the release, if presented.

According to Robinson, the circumstances surrounding the preparation of the release were as follows:

> HEARING OFFICER KENDRICK: Mrs. Robinson, if you didn't receive $6,000 from the Dobsons why did you execute the release of deposit receipt?
>
> THE WITNESS: The sellers had called me and said that they had a buyer for their home and they want -- the time for closing was finished. The Dobsons hadn't closed. They did not wish to continue with this contract anymore but they wanted to close it out because they wanted to sell their home to the potential buyer that they had.
> I merely went into my file, saw that the contract said 6,000 and went ahead and prepared the documents and faxed it down to the agent. At the time I was very ill. I must admit that I did not go through all of my documentations. When this document came back to me and I decided to go ahead and disburse to the Dobsons the 6,000 and then went through the file to see where the funds were, that's when I discovered or it came back to my attention that in fact the checks did not all clear and I tried to sit with them and discuss this and they keep refusing that if I did not have $6,000 to give to them, they did not wish to speak to me. (Transcript, pages 177 and 178).

Having considered the proof, Robinson's explanation for her failure to disburse the proceeds to the Dobsons is unworthy of belief. Clearly, by November 30, 1995, the Dobsons had paid the entire $6,000 deposit to Respondents. Notwithstanding that payment, and notwithstanding the Sellers' release, Respondents wrongfully failed to release any portion of the deposit to the

Dobsons.

Finally, given the foregoing, it is apparent that the records Respondents produced for the Department's investigator, as well as at hearing, do not represent an accurate account of each deposit transaction and each separate bank account where the Dobson funds were deposited, as required by Rule 61J2-14.012, Florida Administrative Code. Consequently, it must be concluded that Respondents either failed to maintain such records or refused to make them available on demand.

4/ At hearing, Robinson testified that she retained the monies deposited by the Dobsons under the default provision of the sales contract. According to Robinson, since the Dobsons did not pay the last $2,000 of the deposit they were in default and she, as the broker, was entitled to retain 50 percent of the deposit. Given the conclusion that the Dobsons deposited the full $6,000, Respondents' explanation for retaining any of their money is unpersuasive. Moreover, even assuming only $4,000 was deposited, Respondents' claim would be limited to $2,000, with the balance to the Sellers or, pursuant to the release, the Dobsons. Here, Respondents retained the entire deposit.

Robinson also suggested at hearing, that the lateness of the Dobsons' deposit provided a basis to claim a default under the provisions of the sales contract, which required the balance of the deposit "within 10 United States banking days after date of acceptance." The short answer to Robinson's suggestion is that the Dobsons' deposit monies were accepted, late or not, no default was called, and their mortgage application processed for an anticipated closing. Clearly, the tardiness of the Dobsons' deposit was never an issue, and Robinson's suggestion that the lateness of their deposit constituted a default warranting retention of the deposit is unpersuasive. Moreover, even if warranted, Respondents were not authorized to retain the entire deposit.

5/ Although the proof suggests that Robinson may have been given the check some time before, with regard to another property or offer, it is unclear when this occurred. Consequently, to ascribe any date, other than October 25, 1996, would be speculative.

6/ Petitioner introduced in evidence a copy of a bank statement for Wakefield Realty, Inc., for the period of October 1, 1996, to October 30, 1996. (Petitioner's Exhibit 13). That statement reflects a deposit on October 28, 1996, of $1,000; however, that statement is for account number 32111878106. Rafiee's check was deposited October 30, 1996, to account number 316090392310. (Petitioner's Exhibit 11).

7/ October 25, 1996, was a Friday. Consequently, the third business day following receipt was Wednesday, October 30, 1996.

8/ Robinson's letter of November 7, 1996 (Respondents' Exhibit 8), as well as the money order that purportedly accompanied it, have, most likely, been fabricated. In so concluding, it is observed that the explanation Robinson offered for tendering 50% of the deposit to the seller (that Ms. Rafiee lied about the reason she could not proceed with the purchase) was not true. Moreover, the money order is facially suspect. First, the date of the money order "November 6, 96" appears to have been typed with two different instruments and, instead of reading 1996, as one would expect on a negotiable instrument, it reads "96," suggesting an alteration. Further suspect is the "500" following Mr. Sweigart's name, which was also prepared by a different instrument. Finally, rendering the money order further suspect, is the name "Henry Sweigart" and "Re: Wakefield Realty," which were apparently affixed by yet a third instrument, and the fact that such entries appear at an angle to the other entries. Suspicion of Respondent's proof is not, however, an adequate basis on which to premise a conclusion that the agency has sustained its charges. Rather, it is the Department's burden throughout this proceeding to demonstrate by clear and convincing evidence the charges it has made against Respondents. This, with regard to the Rafiee transaction, the Department has failed to do. Notably absent from the Rafiee case, as contrasted to the Dobson Case, was a charge that Respondents failed to maintain or produce on demand records which evidenced an accurate accounting of the deposit.

9/ Rule 61J2-14.008 Definitions.

> (1)(a) A "deposit" is a sum of money, or its equivalent, delivered to a real estate licensee, as earnest money, or a payment, or a part payment, in connection with any real estate transaction named or described in s. 475.01(1)(c), Florida Statutes. . . .

10/ The Administrative Complaint, Count IV, also alleges that the same misconduct which supports a violation of Subsection 475.25(1)(e), Florida Statutes, also supports a violation of Subsection 475.25(1)(a), Florida Statutes. Such charge is duplicative and need not be addressed.

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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.