STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF REAL ESTATE,	)	
Petitioner,	)	
vs.	)	Case No. 98-2878
MERCEDES M. POWERS and PATRICIA A. FLECK,	)	
Respondents.	)	

RECOMMENDED ORDER

Pursuant to notice, this matter was heard on March 23, 1999, in Brooksville, Florida, before Donald R. Alexander, the assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Ghunise Coaxum, Esquire
Division of Real Estate
400 West Robinson Street
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Orlando, Florida 32801-1772

For Respondents: Charlie Luckie, Jr., Esquire
Post Office Box 907
Brooksville, Florida 34605-0907

STATEMENT OF THE ISSUE

The issue is whether Respondents' real estate licenses should be disciplined on the ground that Respondents violated a rule and various provisions within Chapter 475, Florida Statutes,

as alleged in the Administrative Complaint filed by Petitioner on May 20, 1998.

PRELIMINARY STATEMENT

This matter began on May 20, 1998, when Petitioner, Department of Business and Professional Regulation, Division of Real Estate, issued an Administrative Complaint charging that Respondents, Mercedes M. Powers and Patricia A. Fleck, both licensed real estate brokers, had violated a rule and various provisions within Chapter 475, Florida Statutes, when they handled a real estate transaction in 1997.

Respondents denied the allegations and requested a formal hearing under Section 120.569, Florida Statutes, to contest the charges. The matter was referred by Petitioner to the Division of Administrative Hearings on June 29, 1998, with a request that an Administrative Law Judge be assigned to conduct a formal hearing. By Notice of Hearing dated September 4, 1998, a final hearing was scheduled on March 23, 1999, in Brooksville, Florida. On March 22, 1999, the case was transferred from Administrative Law Judge Diane Cleavinger to the undersigned.

At final hearing, Petitioner presented the testimony of George B. Sinden, an agency investigator, and Douglas K. Rogers, the complaining consumer. Also, it offered Petitioner's Exhibits 1-5. All exhibits were received in evidence. Respondents testified on their own behalf and presented the testimony of Mary Giftis, an employee of the real estate firm.

Also, they offered Respondents' Exhibits 1-4. All exhibits were received in evidence.

The Transcript of the hearing was filed on April 22, 1999. Proposed Findings of Fact and Conclusions of Law were filed by Petitioner and Respondents on May 7 and 10, 1999, respectively, and they have been considered by the undersigned in the preparation of this Recommended Order.

FINDINGS OF FACT

Based upon all of the evidence, the following findings of fact are determined:

1. When the events herein occurred, Respondents, Mercedes M. Powers and Patricia A. Fleck, were both licensed as real estate brokers, having been issued license numbers 0151412 and 0027277, respectively, by Petitioner, Department of Business and Professional Regulation, Division of Real Estate (Division). Fleck served as qualifying broker for Patricia A. Fleck Real Estate, 5466 Spring Hill Drive, Spring Hill, Florida, while Powers was employed as a broker-salesperson at the same firm.

2. Douglas K. Rogers, a Spring Hill resident, was interested in purchasing a lot in a Spring Hill subdivision and observed a "for sale" sign on Lot 7 at 12287 Elmore Drive. The lot was owned by Wayne and Faith Ryden, who resided in North Hero, Vermont. Rogers contacted the Rydens by telephone in mid or late March 1997 to ascertain the price of the lot.

3. Rogers had also seen a nearby lot for sale carrying a sign from Respondents' firm. On March 23, 1997, he telephoned Powers and inquired about another lot in the same subdivision. Powers contacted the owners but learned that they did not want to sell. After relaying this advice to Rogers, she told him that she had a listing on Lot 6; however, Rogers was not interested in Lot 6 and merely indicated he would "get back" to her later.

4. On April 3, 1997, Rogers again telephoned Powers and told her he was interested in purchasing Lot 7, which was owned by the Rydens. Powers invited Rogers to come to her office where she would call the sellers. Powers then "ran the public record" and learned that the Rydens owned the lot.

5. On Friday, April 4, 1997, in the presence of Rogers, Powers telephoned Mrs. Ryden and spoke with her for three or four minutes. In response to an inquiry from Mrs. Ryden, Powers indicated that if the Rydens listed the property with her, she would represent the sellers; otherwise, she would represent the buyer in the transaction. Based on Mrs. Ryden's response, Powers was led to believe that the Rydens wanted Powers to represent them in the transaction. Accordingly, she explained the arrangement to Rogers, and he voluntarily signed an Agency Disclosure form which acknowledged that he understood, and agreed with, that arrangement.

6. With Powers' assistance, that same day Rogers executed a contract for the sale and purchase of Lot 7 for a price of

$8,500.00. The contract called for the sellers to accept the offer no later than April 7, 1997, or three days later, and that the contract would close by May 15, 1997, unless extended by the parties. The contract further called for Rogers to provide a $200.00 cash deposit, which was "to be placed in escrow by 4-7-97." The contract, listing agreement, and expense report were all sent by overnight mail to the Rydens the same day.

7. Because Rogers did not have sufficient cash for a deposit with him, he advised Powers that he would return with a check the following Monday, or April 7. Notwithstanding the language in the contract, he gave Powers specific instructions that when he delivered a check, she was to hold it until the Rydens signed the contract, and then deposit the money. This is confirmed by a contemporaneous note made by Powers which read: "Mr. Rogers will bring check Monday. Then to hold until Rydens sign contract, then deposit it."

8. Rogers testified that he delivered check no. 3497 in the amount of $200.00 to a receptionist in Respondents' office approximately two hours after he executed the contract. He also says he got the receptionist to make a copy of the face of the check, which has been received in evidence as Petitioner's Exhibit 5.

9. If in fact a check was actually delivered to a receptionist that day, that person lost the check and never advised Powers or Fleck (or anyone else) that one had been

delivered. Indeed, until June 6, 1997, Respondents were not aware that one was purportedly delivered, and they never saw a copy of the face of the check until they received the Administrative Complaint, with attached exhibits, in May 1998. The original check has never surfaced, and it was never presented for payment to the bank. Under these circumstances, it was impossible for Respondents to deposit the check in the firm's escrow account, as required by rule and statute.

10. According to a Division investigator, there have been other instances where a realtor denies receiving a deposit from the buyer. It can be fairly inferred from his testimony that when this occurs, if the realtor's denial is accepted as being true, the realtor will not be held accountable.

11. At no time did Respondents ever intend to violate any rule or statute governing the deposit of escrow funds; had they known that a check had been delivered to the firm, it would have been handled in an appropriate manner.

12. The contract technically expired on April 7, 1997, when the Rydens had not yet accepted the offer. However, on April 8, 1997, Powers again contacted Mrs. Ryden by telephone since Powers had not received a reply. Based on that conversation, which led Powers to believe that the Rydens may not have received the first set of documents, Powers re-sent by overnight mail copies of the contract, agency disclosure, and expense sheet to the Rydens with a request that they either accept or refuse the contract, but in

either event, to return the contract and let her know their decision. The Rydens, however, never extended her the courtesy of a reply. It is fair to infer from the evidence that by now, Rogers had again contacted the Rydens by telephone about purchasing the lot in a separate transaction so that the parties would not have to pay a realtor's commission.

13. Rogers telephoned Powers once or twice in April or May 1997 to ask if the contract had ever been returned by the Rydens. He made no mention of his check. Those inquiries are somewhat puzzling since Rogers was well aware of the fact that the parties intended to negotiate a separate agreement. In any event, on the reasonable belief that the contract had never been accepted, and no deposit had ever been made by Rogers, Powers did nothing more about the transaction until June 6, 1997, when Rogers telephoned her at home that evening asking for "his check." By then, he had a separate binding contract with the Rydens for the sale of the lot; he had already stopped payment on the check a week earlier; and he knew that it had never been deposited.

14. Powers advised Rogers that if in fact his check was at the office, he could drop by the next day at 10:30 a.m. and get it from the broker. Rogers came to the office the next morning, but he arrived at around 8:45 a.m., or well before Powers expected him. In Powers' absence, the on-duty receptionist was unsuccessful in locating his file (which was in Powers' office)

and the check.

15. On June 14, 1997, Rogers sent a complaint to the Division. That complaint triggered this proceeding. It is fair to infer that Rogers filed the complaint to gain leverage in the event Respondents ever brought an action against him to recover their lost real estate commission.

16. Unknown to Respondents, on June 10, 1997, the sale was completed, and the Rydens executed and delivered a warranty deed to Rogers and his wife conveying the property in question.

17. For all their efforts in attempting to accommodate Rogers, Respondents were deprived of a real estate commission through the covert acts of the buyer and seller, and they were saddled with the legal costs of defending this action.

18. In terms of mitigating and aggravating factors, it is noted that Fleck was never involved with this transaction until the demand for the check was made in June 1997. There is no evidence that Powers has ever been disciplined by the Real Estate Commission on any prior occasion. On an undisclosed date, however, Fleck received a fine and was required to complete a 30-hour broker management course for failing to adequately supervise a "former rental manager" and failing to "timely notify FREC of deposit dispute." Neither Rogers or the Rydens suffered any harm by virtue of the deposit check being lost, and the parties completed the transaction on their own without paying a

commission. During the course of the investigation, Respondents fully cooperated with the Division's investigator.

CONCLUSIONS OF LAW

19. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

20. Because Respondents' professional licenses are at risk, Petitioner bears the burden of proving by clear and convincing evidence that the allegations in the Administrative Complaint are true. See, e.g., Ramsey v. Dep't of Prof. Reg., Division of Real Estate, 574 So. 2d 291 (Fla. 5th DCA 1991).

21. In the single count involving Powers, she is charged with failing to immediately place with her registered employer money entrusted to her as agent of the employer in violation of Rule 61J2-14.009, Florida Administrative Code, and Section 475.25(1)(k), Florida Statutes. By violating the rule and statute, it is charged that she also violated Section 475.25(1)(e), Florida Statutes.

22. Count II of the Administrative Complaint charges that Fleck is "guilty of failure to immediately deposit trust funds" in violation of Rule 61J2-14.010, Florida Administrative Code, which constitutes a violation of Section 475.25(1)(e), Florida Statutes. Count III alleges that Fleck "is guilty of having failed to properly supervise the activities of Respondent's salespersons," as required by Section 475.01(1)(d), Florida

Statutes. By violating that statute, it is alleged that Fleck also violated Section 475.25(1)(e), Florida Statutes.

23. As to Count I, the more credible evidence shows that Powers had no knowledge that a check was purportedly delivered to her firm; thus, she was never entrusted with money from Rogers. Under these circumstances, she cannot be held accountable for failing to immediately place with her registered employer money entrusted to her as an agent of her employer, as charged in the Administrative Complaint. Therefore, Count I must necessarily fail.

24. Under the same rationale, Fleck cannot be held accountable for failing to immediately deposit trust funds, as required by Rule 61J2-14.010, Florida Administrative Code. Like Powers, Fleck had no knowledge that a check had been purportedly delivered by Rogers to the firm, and she never had money entrusted to her as a broker. Therefore, Count II should be dismissed.

25. Finally, there is less than clear and convincing evidence that Fleck failed to properly supervise Powers during the aborted transaction. This is because Powers violated no statute or rule during her brief participation in the aborted transaction, and thus there is no wrongdoing that can be imputed to her broker. Therefore, Count III should also fail.

26. Although the undersigned has recommended dismissal of all charges, paragraph (4) of Rule 61J2-24.001, Florida

Administrative Code, identifies aggravating and mitigating circumstances which, if present, entitle the Commission to deviate from the suggested disciplinary guidelines. Relevant to this proceeding are the mitigating circumstances set forth in Finding of Fact 18, which clearly justify a downward deviation from the penalty guidelines, assuming arguendo that a rule or statute had technically been violated.

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 dismissing the Administrative Complaint, with prejudice.

DONE AND ENTERED this 14th day of May, 1999, in Tallahassee, Leon County, Florida.

DONALD R. ALEXANDER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of May, 1999.

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 Florida Real Estate Commission.