

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
FLORIDA REAL ESTATE COMMISSION,)
)
Petitioner,)
)
vs.) Case No. 99-1265
)
FAZAL ALI,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case before Larry J. Sartin, a duly designated Administrative Law Judge of the Division of Administrative Hearings, on June 29, 1999.

APPEARANCES

For Petitioner: Ghunise Coaxum, Senior Attorney
Division of Real Estate
Department of Business and Professional
Regulation
Hurston North Tower, Suite N308
400 West Robinson Street
Orlando, Florida 32801-1772

For Respondent: Rodney G. Gregory, Esquire
Rodney G. Gregory, P.A.
3900 Atlantic Boulevard
Jacksonville, Florida 32207

STATEMENT OF THE ISSUE

The issue in this case is whether Respondent, Fazal Ali, committed the offenses alleged in an Administrative Complaint issued against him on December 16, 1998.

PRELIMINARY STATEMENT

On December 16, 1998, Petitioner, the Department of Business and Professional Regulation, issued an Administrative Complaint alleging that Respondent, Fazal Ali, violated Sections 475.25(1)(b),(d)1, and (g), Florida Statutes (by failing to make disclosure regarding agency as required by Section 475.278, Florida Statutes). Mr. Ali disputed the allegations of fact of the Administrative Complaint by an Election of Rights dated March 2, 1999.

A copy of the Administrative Complaint and the Election of Rights were filed with the Division of Administrative Hearings on March 22, 1999, by Petitioner with a request that the matter be assigned to an Administrative Law Judge. The matter was assigned to the undersigned.

The formal hearing of this case was conducted by video conferencing equipment. The undersigned was located in a hearing room of the Division of Administrative Hearings located in Tallahassee. Petitioner, Respondent, the court reporter, and all the witnesses were located in Video Room 300, Building A, Duval Regional Service Center, in Jacksonville, Florida.

Petitioner presented the testimony of James E. Pierce, J. Earline Lamb, and Herbert Ray Lively. Petitioner's Exhibits 3 through 6 were accepted into evidence.

Respondent testified on his own behalf and presented the testimony of Angela Lorraine Lively and Karen Gray. Respondent's Exhibits 1 and 2 were accepted into evidence.

A Transcript of the hearing was filed on July 13, 1999. Proposed orders were, therefore, due on or before August 2, 1999. Petitioner filed a proposed order on August 2, 1999. No proposed order was filed by Respondent. Petitioner's proposed order has been fully considered in entering this Recommended Order.

FINDINGS OF FACT

1. Petitioner, the Department of Business and Professional Regulation, Division of Real Estate (hereinafter referred to as the "Division"), is an agency of the State of Florida. The Division is charged with the responsibility for, among other things, regulating the practice of persons holding real estate brokers' and real estate salespersons' licenses in Florida. Section 20.165, and Chapters 455 and 475, Florida Statutes (1997).

2. Respondent, Fazal Ali, is now, and at all times relevant to this matter has been, licensed as a real estate salesperson in Florida. Mr. Ali holds license number 0604229.

3. Prior to and during September and October 1997 Mr. Ali was employed as a salesperson by S & J Enterprise of Jacksonville, Inc., t/a/ Re/Max Alpha Realty (hereinafter referred to as "Re/max").

4. During September 1997 Re/Max had listed a parcel of real property located at 3444 Deer Street, Jacksonville, Florida (hereinafter referred to as the "Deer Street Property").

5. In or about September 1997 Herbert and Angela Lively contacted Re/Max about the Deer Street Property. Mr. Ali was designated as the salesperson to assist the Livelys.

6. At the time that Livelys inquired about the Deer Street Property, a contract for sale was already pending on the property. In the event that the pending contract fell through, Mr. Ali prepared a back-up contract on the Deer Street Property for the Livelys. The Livelys gave Mr. Ali a check made payable to Re/Max in the amount of \$500.00 to be used as a deposit on the contract.

7. The contract on the Deer Street Property ultimately was carried out. Thereafter Mr. Ali continued to show the Livelys other property, including a parcel at 1602 East 10th Street, Jacksonville, Florida (hereinafter referred to as the "10th Street Property").

8. On or about September 26, 1997, Mr. Ali completed an offer to purchase the 10th Street Property on behalf of the Livelys. The contract specified that the Livelys had deposited a \$500.00 binder deposit on the property. Mr. Ali agreed to use the check for \$500.00 check previously given to him by the Livelys on the Deer Street Property as the binder deposit on the 10th Street Property.

9. Mr. Ali failed to provide the Livelys with required agency disclosures at the time the offer on the 10th Street Property was completed.

10. Mr. Ali also failed to remit the \$500.00 binder deposit to Re/Max. Instead, Mr. Ali kept the check in his possession.

11. The Livelys' offer was accepted and a contract for the sale of the 10th Street Property to the Livelys was executed on September 30, 1997. The \$500.00 deposit check was still not deposited by Mr. Ali.

12. When J. Earline Lamb, Re/Max's registered real estate broker, learned that there was a contract on the 10th Street Property and that the \$500.00 binder deposit had not been remitted by Mr. Ali, she contacted the Livelys and Mr. Ali.

13. Mr. Ali admitted to Ms. Lamb that he had the \$500.00 binder deposit check and some financial documents that belonged to the Livelys. Mr. Ali agreed to retrieve and return the check and documents to Ms. Lamb.

14. On or about October 20, 1997, Mr. Ali returned the \$500.00 check which the Livelys had given him in September to Ms. Lamb. The original check was destroyed.

15. On or about October 17, 1997, the Livelys wrote a new \$500.00 check for the binder deposit. That check was deposited by Re/Max.

16. The contract for sale of the 10th Street Property eventually closed. The Livelys purchased the property for the

purchase price agreed to after the offer prepared by Mr. Ali on their behalf had been submitted.

17. The Livelys were satisfied with Mr. Ali's assistance. The evidence failed to prove that the Livelys suffered any harm as a result of the failure of Mr. Ali to deposit their binder deposit check or his failure to provide them with agency disclosures.

18. The evidence failed to prove why Mr. Ali failed to deposit the Livelys' \$500 check with Re/Max. The evidence also failed to prove that Mr. Ali attempted to gain any advantage from his failure to deposit the check.

19. Prior to October 1997 Mr. Ali decided to leave the employ of Re/Max. On October 2, 1997, Mr. Ali filed a form 400.5 with the Division reporting a change in employment. Mr. Ali reported that he was employed by Results Real Estate Investments Corp. Mr. Ali certified on the form that "I have notified my former broker of this change"

20. Mr. Ali did not inform anyone at Re/Max that he was resigning or that he was employed by Results Real Estate Investments Corp. Mr. Ali also retained the \$500.00 binder deposit check which he had received while employed by Re/Max.

21. On October 16, 1997, Ms. Lamb informed Mr. Ali that he was terminated from Re/Max because of his failure to deposit the \$500.00 binder deposit from the Livelys. Mr. Ali did not inform Ms. Lamb that he had already filed a form 400.5 with the Division

reporting his association with Results Real Estate Investments Corp.

22. Ms. Lamb learned of Mr. Ali's association with Results Real Estate Investments Corp. after filing a form 400.5 with the Division reporting Mr. Ali's termination by Re/Max.

23. The evidence failed to prove why Mr. Ali failed to timely report to Re/Max his new association with Results Real Estate Investments Corp. The evidence also failed to prove that Mr. Ali gained or attempted to gain anything from his failure to disclose. The evidence also failed to prove that Re/Max or Results Real Estate Investments Corp. suffered any harm from Mr. Ali's failure to disclose.

24. The evidence failed to prove that Mr. Ali has had any other disciplinary actions brought against him by the Division.

CONCLUSIONS OF LAW

25. The Division of Administrative Hearings has jurisdiction of the parties to, and the subject matter of, this proceeding. Section 120.57, Florida Statutes (1997).

26. The burden of proof in this proceeding was on the Division, the party asserting the affirmative of the issue: that Respondent committed violations of Section 475.25(1), Florida Statutes. See Florida Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981); Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977). The Division was required to meet its

burden by clear and convincing evidence. Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

27. Section 475.25, Florida Statutes (1997), authorizes the Florida Real Estate Commission to take disciplinary action against the license of any real estate broker or real estate salesperson if the licensee commits certain specified acts. Of the specified acts of Section 475.25, Florida Statutes (1997), Respondent was charged with violating the following:

. . .

(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 or any other state, nation, or territory

. . . .

(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 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 the 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. . . .

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.

. . . .

(q) Has violated any provision of s. 475.276 or s. 475.278, including the duties owed under those sections.

28. Rule 61J2-14.009, Florida Administrative Code, requires that:

Every salesperson who receives any deposit, as defined in Rule 61J2-14.008, Florida Administrative Code, shall deliver the same to the broker or employer no later than the end of the next business day following receipt of the item to be deposited. Saturdays, Sundays and legal holidays shall not be construed as business days. . . .

29. The evidence in this case proved that Mr. Ali, in his capacity as a real estate salesperson, received a "deposit" as defined in Rule 61J2-14.008, Florida Administrative Code, in the amount of \$500.00 from the Livelys. The evidence also proved

that Mr. Ali did not deliver the deposit to Re/Max within the time require by Rule 61J2-14.009, Florida Administrative Code.

30. Having failed to deliver the \$500.00 check to Re/Max as required by Rule 61J2-14.009, Florida Administrative Code, Mr. Ali violated Section 475.25(1)(d)1, Florida Statutes (1997), as alleged in Count 1 of the Administrative Complaint.

31. Mr. Ali's failure to disclose his dual association with Re/Max and Results Real Estate Investments Corp. constituted a beach of trust in a business transaction in violation of Section 475.25(1)(b), Florida Statutes (1997).

32. Mr. Ali's failure to make the agency disclosures required by Section 475.278, Florida Statutes (1997).

33. The Division has requested that Mr. Ali be placed on probation for a period of one year from the entry of the final order in this case; that he be required to successfully complete a -hour escrow management course for real estate brokers; and that he be required to pay an administrative fine of \$1,000.00.

34. The punishment recommended by the Division is consistent with Rule 61J2-24.001, Florida Administrative Code. The Division, however, has failed to take into account the mitigating factors of Rule 61J2-24.001(4), Florida Administrative Code, or the disciplinary guidelines of Rule 61J2-24.002, Florida Administrative Code, in recommending a fine of \$1,000.00. A fine of \$500.00 is more reasonable when the fact that the evidence failed to prove that Mr. Ali committed any of the violations for

financial reward is taken into account and the fact that no one was financially harmed by Mr. Ali's actions is taken into account.

RECOMMENDATION

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

RECOMMENDED that a final order be entered by Petitioner finding that Respondent has violated Sections 475.25(1)(b), (d)1, and (q), Florida Statutes, as alleged in the Administrative Complaint issued against Respondent. It is further

RECOMMENDED that Respondent be placed on probation for a period of one year from the entry of the final order; that he be required to successfully complete a 45-hour post-licensure course; and that he be required to pay an administrative fine of \$500.00.

DONE AND ENTERED this 10th day of August, 1999, in Tallahassee, Leon County, Florida.

LARRY J. SARTIN
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of August, 1999.

COPIES FURNISHED:

Ghunise Coaxum, Senior Attorney
Division of Real Estate
Department of Business and
Professional Regulation
Hurston North Tower, Suite N308
400 West Robinson Street
Orlando, Florida 32801-1772

Rodney G. Gregory, Esquire
Rodney G. Gregory, P.A.
3900 Atlantic Boulevard
Jacksonville, Florida 32207

Herbert S. Fecker, Division Director
Division of Real Estate
Department of Business
and Professional Regulation
400 West Robinson Street
Post Office Box 1900
Orlando, Florida 32802-1900

William Woodyard, General Counsel
Department of Business
and Professional Regulation
1940 North Monroe Street
Northwood Centre
Tallahassee, Florida 32933-1920

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.