

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND )  
PROFESSIONAL REGULATION, )  
DIVISION OF REAL ESTATE, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 99-3309  
 )  
MIKE J. ZORC, )  
 )  
Respondent, )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on March 22, 2000, by telephone conference call before Claude B. Arrington, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Ghunise Coaxum, Esquire  
Department of Business and  
Professional Regulation  
Division of Real Estate  
400 West Robinson Street, Suite N-308  
Orlando, Florida 32801

For Respondent: Eugene J. O'Neill, Esquire  
Gould, Cooksey, Fennell, O'Neill,  
Marine, and Carter, P.A.  
979 Beachland Boulevard  
Vero Beach, Florida 32963

STATEMENT OF THE ISSUE

Whether Respondent, a licensed real estate broker, committed the violations alleged in the Administrative Complaint and, if so, the penalties that should be imposed.

PRELIMINARY STATEMENT

Respondent is a licensed real estate broker and a licensed general contractor. His real estate license is placed with his company, Zorcorp Builders, Inc. On May 21, 1999, Petitioner filed an Administrative Complaint against Respondent that contained two counts. Count I charged Respondent with depositing or intermingling personal funds with funds being held in escrow in violation of Rule 61J2-14.008(1)(c), Florida Administrative Code, and in violation of Section 475.25(1)(e), Florida Statutes. Count II charged Respondent with failing to prepare monthly written reconciliation statements of his escrow account in violation of Rule 61J2-14.012(2) and (3), Florida Administrative Code, and Section 475.25(1)(e), Florida Statutes.

Respondent timely challenged the allegations of the Administrative Complaint, the matter was referred to the Division of Administrative Hearings, and this proceeding followed. On October 19, 1999, the undersigned entered an Order Granting Continuance and Placing Case in Abeyance based on the representation that the parties had entered into a settlement agreement they wanted to present to the Florida Real Estate

Commission (FREC). The settlement agreement was subsequently rejected by FREC, and the matter was rescheduled for final hearing.

At the final hearing, Petitioner presented the testimony of Dawn Luchik (an investigator employed by Petitioner) and offered four exhibits, each of which was accepted into evidence. Respondent testified on his own behalf, but presented no other testimony and no exhibits.

A Transcript of the proceedings was filed on April 19, 2000. At the request of the parties, the time for filing post-hearing submissions was set for May 31, 2000. Petitioner filed a Proposed Recommended Order, which has been duly considered by the undersigned in the preparation of this Recommended Order. Respondent advised at the final hearing that he would rest on the arguments he made during the course of the final hearing.

#### FINDINGS OF FACT

1. Petitioner is a licensing and regulatory agency of the State of Florida charged with the responsibility and duty to prosecute administrative complaints pursuant to Chapters 455 and 475, Florida Statutes, and Chapter 61J2, Florida Administrative Code.

2. At all times pertinent to this proceeding, Respondent was a licensed real estate broker in accordance with Chapter 475, Florida Statutes. The last license issued to Respondent,

license number 0325134, was issued to him in care of Zorcorp Builders, Inc., 2208 Buena Vista Boulevard, Vero Beach, Florida 32960.

3. Respondent is also a licensed general contractor. Both his real estate business and his contracting business are operated out of his residence.

4. On August 13, 1998, Dawn Luchik, an investigator employed by Petitioner, conducted a routine inspection of Respondent's real estate offices. As part of her inspection, Ms. Luchik audited Respondent's escrow account. 1/

5. As of August 13, 1998, Respondent's escrow account contained the sum of \$8,909.76. Ms. Luchik determined that the total trust liability was \$8,140.00, which included a bank charge in the amount of \$7.46. Deducting the total trust liability and the bank charge from the amount in the account revealed an overage in the escrow account in the amount of \$769.76. Respondent testified that the overage represented earned commissions that he left in the escrow account in an effort to keep enough money in the account to avoid bank charges. Those earned commissions constituted Respondent's personal or brokerage business funds.

6. Rule 61J2-14.010(2), Florida Administrative Code, provides as follows:

A broker is authorized to place and maintain up to \$200 of personal or brokerage business funds in the escrow account for the purpose of opening the account, keeping the account open, and/or paying for ordinary services.

7. Respondent testified that he was unaware of Rule 61J2-14.010(2), Florida Administrative Code, before Ms. Luchik's inspection. After he learned of that Rule, Respondent immediately withdrew the sum of \$600 from his escrow account, leaving an overage of less than \$200.

8. There was a conflict in the evidence as to whether Respondent reconciled his escrow account on a regular basis. Ms. Luchik testified that she found no evidence that Respondent attempted to reconcile his escrow account on a monthly basis. Respondent testified that he used a very simple method to reconcile his escrow account each month, but he conceded that his method did not comply with the requirements imposed by Petitioner. 2/ Respondent's testimony established that he failed to properly reconcile his escrow account on a monthly basis.

#### CONCLUSIONS OF LAW

9. The Division of Administrative Hearings has jurisdiction of the parties to and the subject of this proceeding. Section 120.57(1), Florida Statutes.

10. Petitioner has the burden of proving by clear and convincing evidence the allegations against Respondent. See Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); Evans Packing Co. v. Department of Agriculture and Consumer Services, 550 So. 2d 112 (Fla. 1st DCA 1989); and Inquiry Concerning a Judge, 645 So. 2d 398 (Fla. 1994).

11. Petitioner established by clear and convincing evidence that Respondent violated the provisions of Rule 61J2-14.008(1)(c), Florida Administrative Code, by maintaining an overage of more than \$200 in his escrow account. This violation constitutes a violation of Section 475.25(1)(e), Florida Statutes, as alleged in Count I of the Administrative Complaint.

12. Petitioner also established by clear and convincing evidence that Respondent failed to properly reconcile his escrow account in violation of Rule 61J2-14.012(2), Florida Administrative Code. This violation constitutes a violation of Section 475.25(1)(e), Florida Statutes, as alleged in Count II of the Administrative Complaint.

13. Rule 61J2-24.001, Florida Administrative Code, provides disciplinary guidelines pertinent to this proceeding. Rule 61J2-24.001(3)(f), Florida Administrative Code, provides that the usual action of the Petitioner for a violation of Section 475.25(1)(e), Florida Statutes, shall be to impose a penalty from an eight-year suspension to revocation and an

administrative fine of \$1,000. Rule 61J2-24.001(2), Florida Administrative Code, authorizes the Petitioner to place Respondent on probation and to require, as a condition of probation, that he be required to successfully complete appropriate post-licensure courses.

14. Rule 61J2-24.001(4), Florida Administrative Code, authorizes Petitioner to deviate from the penalty guidelines in cases where aggravating or mitigating circumstances exist. The severity of the offense, whether the Respondent has been previously disciplined, and whether there was harm to the public can be aggravating or mitigating circumstances.

15. In recommending the penalty to be imposed, the undersigned has considered the relatively small amount of the overage, the source of those funds, the reason those funds were left in the escrow account, and the immediate steps taken by Respondent to correct the overage and to institute an appropriate reconciliation procedure. The undersigned has also considered that there was no harm to any member of the public and that the Respondent has no prior disciplinary history. The undersigned has further considered that any violation involving mismanagement of an escrow account is a serious offense. On balance, it is concluded that the penalty imposed should be less than that set forth in the disciplinary guideline.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Petitioner enter a final order finding Respondent guilty of the violations alleged in Counts I and II of the Administrative Complaint. It is further RECOMMENDED that an administrative fine in the amount of \$250 be imposed for each Count (for a total fine of \$500), and that Respondent's licensure be placed on probation for a period of six months for each violation, to run concurrently. It is further RECOMMENDED that as a condition of probation, Respondent be required to complete an appropriate continuing education course in escrow account management.

DONE AND ENTERED this 14th day of June, 2000, in Tallahassee, Leon County, Florida.

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CLAUDE B. ARRINGTON  
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 June, 2000



ENDNOTES

1/ Rule 61J2-14.008(1)(c), Florida Administrative Code, provides as follows:

(c) "Trust" or "escrow" account means an account in a bank or trust company, title company having trust powers, credit union, or a savings and loan association within the State of Florida. Only funds described in this rule shall be deposited in trust or escrow accounts. No personal funds of any licensee shall be deposited or intermingled with any funds being held in escrow, trust or on condition except as provided in Rule 61J2-14.010(2), Florida Administrative Code.

2/ Rule 61J2-14.012(2), Florida Administrative Code, provides as follows:

(2) Once monthly, a broker shall cause to be made a written statement comparing the broker's total liability with the reconciled bank balance(s) of all trust accounts. The broker's trust liability is defined as the sum total of all deposits received, pending and being held by the broker at any point in time. The minimum information to be included in the monthly statement-reconciliation shall be the date the reconciliation was undertaken, the date used to reconcile the balances, the name of the bank(s), the name(s) of the account(s), the account number(s), the account balance(s) and date(s), deposits in transit, outstanding checks identified by date and check number, an itemized list of the broker's trust liability, and any other items necessary to reconcile the bank account balance(s) with the balance per the broker's checkbook(s) and other trust account books and records disclosing the date of receipt and the source of the funds. The broker shall review, sign and date the monthly statement-reconciliation.

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.