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ADMINISTRATIVE
HEARINGS

By: Sarah Wachman

**STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
DIVISION OF FLORIDA LAND SALES, CONDOMINIUMS, AND MOBILE HOMES**

**DEPARTMENT OF BUSINESS AND
PROFESSIONAL REGULATION,
DIVISION OF FLORIDA LAND SALES,
CONDOMINIUMS, AND MOBILE HOMES,**

ATT

Petitioner,

vs.

**DOAH Case No.: 00-0598
DOCKET NO.: YS 1999230
CASE NO.: 19990712YC31398**

EHP-Clos

JOHN SCALES,

Respondent.

_____ /

FINAL ORDER

The Director of the Division of Florida Land Sales, Condominiums, and Mobile Homes (Division) enters this Final Order in the above referenced matter.

PRELIMINARY STATEMENT

On December 22, 1999, the Division issued a Notice To Show Cause, which alleged that the Respondent, John Scales (Scales), violated section 325.005(1), Florida Statutes (1997), by failing to maintain funds in the broker's escrow account until disbursement. The Notice advised Scales that the agency could take action against his

license by entering a cease and desist order, suspending or revoking his license, imposing a civil penalty of up to \$10,000, and taking any other affirmative action necessary to carry out chapter 326, Florida Statutes. The Notice advised the Scales of his right to request a formal hearing or an informal proceeding pursuant to chapter 120, Florida Statutes. The procedural history of the proceedings before the Division of Administrative Hearings (DOAH) are set out by the Administrative Law Judge (ALJ) in the Recommended Order, which is adopted in full and incorporated in this Final Order. The Recommended Order is attached as exhibit A.

Scales timely requested a formal hearing. Because many of the facts were resolved prior to the initial hearing date, a limited hearing on the single issue of the role the president of the brokerage played in the violation was scheduled. On February 14, 2001 the ALJ entered a Recommended Order finding that Scales had violated section 326.005(1), Florida Statutes (1997), by failing to maintain a consumer's funds in his escrow account until disbursement of the funds. [Recommended Order at 13-14] The ALJ recommended that the agency suspend Scales license for three years and impose a \$5,000 civil penalty. [Recommended Order at 15]

Scales filed exceptions to the penalty in the Recommended Order on March 1, 2001.

RULING ON RESPONDENT'S EXCEPTIONS

Scales claims that rule 61B-60.008, Florida Administrative Code, failed to provide a meaningful range of designated penalties that could be imposed for proscribed conduct, that the penalty imposed was not supported by competent substantial

evidence, and that the penalty was excessive and should be lowered based upon mitigating evidence offered.

The agency sought a revocation of Scales' license and a \$5,000 penalty. [T 30] Peter Butler (Butler) testified for the agency that it considered guidelines set by the administrative rules, which consider aggravating and mitigating factors in seeking the revocation and \$5,000 penalty. [T 34] Butler considered as aggravating factors warranting revocation and a \$5,000 penalty the following factors identified by the rule: that Scales was aware that Lorraine Woods (Woods) had her license suspended for escrow violations; that his conduct was intentional; and that he knew or should have known his actions constituted a violation; and the seriousness of failing to maintain a consumer's funds in escrow until disbursement. [T 34] See rule 61B-60.008(4)(b)3, 6, 7, 9, Fla. Admin. Code. Briefly stated, the ALJ found: (1) that Scales knew of Woods' license suspension; (2) that, even though he gave Butler assurances that the escrow account would be under his sole control, he allowed Woods to control access to the escrow account records; (3) that he gave Woods blank signed checks, which enabled her to withdraw escrow monies from the account and use them to pay operating expenses; (4) that, even though there was presently enough funds in the account to refund Mr. Scott's deposit when he demanded it in person, he told Mr. Scott that he would have to wait for Woods to return to the office to get a refund; and (5) that the refund was delayed 67 days because the escrow account did not have enough funds to cover the refund check. [Recommended Order at 4-10] The ALJ concluded that Scales, as the designated broker, failed to perform his responsibility for safeguarding Mr. Scott's deposit and the escrow funds, which was a violation of section 326.005(1), Florida

Statutes. [Recommended Order at 13-14] The ALJ reduced the penalty sought from revocation to a three year suspension and a \$5,000 penalty. [Recommended Order at 15] The ALJ found that Scales did not have a prior record of disciplinary history, that he had delivered a signatory card with him as sole signatory on the bank account to the bank, that he was unaware that Woods' license had been suspended expressly for using escrow funds to pay operating expenses, and that he was not aware that Woods would use the blank checks to pay operating expenses rather than for the purpose intended. [Recommended Order at 6-14]

Section 326.006, Florida Statutes (1997), authorizes the agency to impose a penalty for each day of a continuing violation up to a maximum of \$10,000 and to suspend or revoke a license. By rule, the agency may consider aggravating and mitigating circumstances in determining the penalty sought. See rule 61B-60.008.

The agency is adopting the ALJ's factual findings and legal conclusions. The agency may accept the recommended penalty, but it may not increase or decrease the penalty without a review of the complete record. See § 120.57(1)(l), Fla. Stat. (2000). Based upon a review of the record and the seriousness of the violation, the agency adopts the ALJ's recommended penalty. See id.

The agency rejects Scales' exceptions. The administrative rules set out the guidelines to be considered when a penalty is imposed. See rule 61B-60.008, Fla. Admin. Code. Butler testified as to how he arrived at the penalty being sought--revocation and a \$5,000 fine--under the rule. Because the agency has created guidelines for the penalty imposed and the ALJ determined the recommended penalty based on the facts, the statute, and the rule, the penalty is reasonable and based upon

competent substantial evidence in the record. The agency may exercise its discretionary authority to impose a penalty within the statutory range. See Florida Real Estate Comm'n v. Webb, 367 So. 2d 201 (Fla. 1978); Tomberg Realty, Inc. v. Board of Real Estate, 392 So. 2d 998 (Fla. 4th DCA 1981) (upholding agency's suspension of license even though broker did not receive commission and monies were immediately paid to purchasers); Weiss v. Department of Bus. and Prof. Reg., 677 So. 2d 98 (Fla. 5th DCA 1996) (upholding agency's discretion to suspend license and impose fine for failing to maintain funds in trust account until disbursement).

The agency also rejects Scales' second exception that the record facts support further mitigation of the penalty. The ALJ considered the mitigation offered and reduced the penalty sought from a revocation to a suspension. The agency accepts the ALJ's determination as based upon competent substantial evidence and as being within the range of penalties allowed by section 326.006, Florida Statutes.

FINDINGS OF FACT

1. The Division adopts and incorporates by reference the Findings of Fact set forth in the Recommended Order.

CONCLUSIONS OF LAW

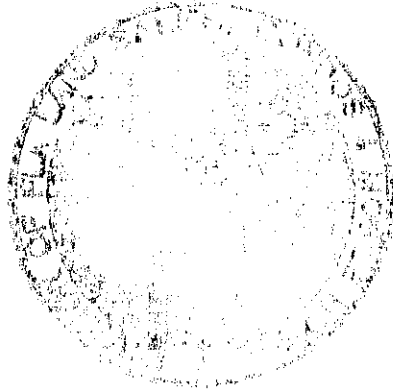
2. The Division adopts and incorporates by reference the Conclusions of Law set forth in the Recommended Order.


ORDER

Based on the foregoing findings of fact and conclusions of law, it is **ORDERED** that:

1. Respondent cease and desist from any further violations of chapter 326, Florida Statutes;
2. Respondent's Yacht and Ship Broker's License No. 1322 is suspended for three years beginning with the date of this order; and
3. Respondent shall pay a penalty of \$5,000 by cashier's check or money order made payable to Treasurer, State of Florida, Department of Business and Professional Regulation within 45 days of the date of this Order, which Respondent shall mail by certified mail to Peter Butler, Department of Business and Professional Regulation, 1940 North Monroe Street, Tallahassee, Florida 32399-1030.

DONE AND ORDERED in Tallahassee, Leon County, Florida, this 25th day of April, 2001.




ROSS FLEETWOOD, Director
Division of Florida Land Sales,
Condominiums, and Mobile Homes
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-1030

NOTICE OF RIGHT OF APPEAL

THIS FINAL ORDER CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED BY ANY PARTY SUBSTANTIALLY AFFECTED BY THIS FINAL ORDER PURSUANT TO SECTION 120.68, FLORIDA STATUTES, AND RULE 9.110, FLORIDA RULES OF APPELLATE PROCEDURE, BY FILING A NOTICE OF APPEAL CONFORMING TO THE REQUIREMENTS OF RULE 9.110(d), FLORIDA RULES OF APPELLATE PROCEDURE, BOTH WITH THE APPROPRIATE DISTRICT COURT OF APPEAL, ACCOMPANIED BY THE APPROPRIATE FILING FEE, AND WITH THE AGENCY CLERK, DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, AT 1940 NORTH MONROE STREET, TALLAHASSEE, FLORIDA 32399-1007 WITHIN THIRTY (30) DAYS OF THE RENDITION OF THIS ORDER.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Certified Mail to Tracy J. Sumner, Esquire, 1307 Leewood Drive Tallahassee, Florida 32312, this _____ day of _____, 2001.

BEATRICE PRUITT, Docket Clerk

Copies furnished to:

Division of Administrative Hearings
Janis Sue Richardson, Office of the General Counsel
Peter Butler, Chief, Bureau of Compliance