

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND )  
PROFESSIONAL REGULATION, )  
DIVISION OF REAL ESTATE, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 02-0138PL  
 )  
WAYNE WAGIE, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in Miami, Florida, on May 1, 2002.

APPEARANCES

For Petitioner: Juana Carstarphen Watkins  
Senior Attorney  
Department of Business and  
Professional Regulation  
Division of Real Estate  
400 West Robinson Street  
Orlando, Florida 32801

For Respondent: Wayne Wagie, pro se  
11900 North Bayshore Drive, Unit No. 5  
Miami, Florida 33181

STATEMENT OF THE ISSUES

The issues are whether Respondent is guilty of issuing checks from his escrow account without sufficient funds so as to constitute culpable negligence, breach of trust,

misrepresentation, or concealment, in violation of Section 475.25(1)(b), Florida Statutes; failing to reconcile escrow accounts, in violation of Section 475.25(1)(e) and (k), Florida Statutes, and Rule 61J2-14.012, Florida Administrative Code; employing an unlicensed person, in violation of Section 475.42(1)(c), Florida Statutes; failing to maintain business records, in violation of Section 475.5015, Florida Statutes; and violating a lawful order of the Florida Real Estate Commission by failing to pay a citation within the required time, in violation of Section 475.25(1)(e), Florida Statutes. If Respondent is guilty of any of these allegations, an additional issue is the penalty that should be imposed.

#### PRELIMINARY STATEMENT

By Amended Administrative Complaint dated September 20, 2001, Petitioner alleged that Respondent is a licensed real estate broker and served as the qualifying broker for Express Realty and Investment, Inc.

The Amended Administrative Complaint alleges that on July 15, 1999, Respondent's unlicensed employee, Novellete Hanse, issued two checks to Fidelity Title Company on the account of Express Realty and Investment, Inc. The Amended Administrative Complaint alleges that these checks were in the amounts of \$5940 and \$12,229.08 and were issued in connection with the closing of certain property known as 6360 Southwest

23rd Street in Miramar. The Amended Administrative Complaint alleges that Respondent's escrow account had insufficient funds to pay these checks, and Respondent did not cover the checks until eight days after the closing.

The Amended Administrative Complaint alleges that on August 11, 1999, Petitioner's investigator performed an audit of Respondent's escrow account and found an overage of \$7225.52. The Amended Administrative Complaint alleges that, in response to the investigator's request, Respondent failed to produce records relating to the above-described closing and has never produced these records. The Amended Administrative Complaint alleges that Respondent failed to give the appropriate notices and disclosures, and, on August 23, 1999, Petitioner's investigator issued Respondent a citation requiring payment within 60 days. The Amended Administrative Complaint alleges that Respondent paid the citation on December 23, 1999.

The Amended Administrative Complaint alleges that Respondent admitted during the investigation that Ms. Hanse was performing real estate services for Express Realty and Investment, Inc., while unlicensed.

The Amended Administrative Complaint alleges that on October 20, 1999, Respondent facilitated a sale and purchase contract between Mr. Rowland, as seller, and Mr. and Ms. Thompson, as buyers, for property known as 850 Southwest 9th

Avenue in Hallandale. The Amended Administrative Complaint alleges that Ms. Hanse showed the property to the Thompsons, prepared the contract, and negotiated the counteroffers.

The Amended Administrative Complaint alleges that Respondent resigned as broker of record for Express Realty and Investment, Inc., on January 28, 2000.

Count I alleges that Respondent issued escrow account checks without sufficient funds so as to constitute culpable negligence, breach of trust, misrepresentation, or concealment, in violation of Section 475.25(1)(h), Florida Statutes.

Counts II and IV allege that Respondent failed to reconcile escrow accounts, in violation of Section 475.25(1)(e) and (k), Florida Statutes, and Rule 61J2-14.012, Florida Administrative Code.

Count III alleges that Respondent employed an unlicensed person, in violation of Section 475.42(1)(c), Florida Statutes.

Count V alleges that Respondent failed to maintain business records, in violation of Section 475.5015, Florida Statutes.

Count VI alleges that Respondent violated a lawful order of the Florida Real Estate Commission by failing to pay a citation within the required time, in violation of Section 475.25(1)(e), Florida Statutes.

The Amended Administrative Complaint seeks various penalties ranging from a reprimand through revocation, as well as the costs of the investigation.

At the hearing, Petitioner called two witnesses and offered into evidence six exhibits: Petitioner Exhibits 1, 3, 5-7, and 9. Respondent called one witness and offered into evidence no exhibits. All exhibits were admitted except Petitioner Exhibits 6 and 7, which were admitted only to show what the investigator found.

The court reporter filed the transcript on May 23, 2002. Petitioner filed its Proposed Recommended Order on June 11, 2002.

#### FINDINGS OF FACT

1. Respondent became a licensed real estate salesperson in 1987. The following year, he became a licensed real estate broker, and he has remained a broker continuously since that time. From September 30, 1996, through January 30, 2000, Respondent was the qualifying broker of Express Realty and Investments, Inc. (Express Realty).

2. At no time relevant to this case was Novellete Faye Hanse a Florida-licensed real estate broker or real estate salesperson. At all relevant times, Ms. Hanse was the office manager of Express Realty.

3. Respondent formed Express Realty in 1995. Respondent was the sole director and president. Ms. Hanse's son was an officer of Express Realty from the time of its formation.

4. Respondent met Ms. Hanse in 1991. She informed Respondent that she was a licensed mortgage broker. Respondent and Ms. Hanse agreed in late 1991 to form a joint real estate/mortgage broker operation in a single office. However, when Hurricane Andrew struck in 1992, Respondent, who has been a licensed general contractor since 1978, engaged exclusively in construction until 1995.

5. Respondent formed Express Realty to pursue the prior plan of a joint real estate/mortgage broker operation. The two businesses occupied an office building owned by Ms. Hanse, who did not charge Respondent's business any rent. The address was 6306 Pembroke Road in Miramar.

6. Express Realty served as an escrow agent in a contract dated May 9, 1999, for the sale and purchase of real property located at 6360 Southwest 23rd Street in Miramar. In this capacity, Express Realty, held various funds in escrow for the closing.

7. For the closing, Express Realty issued two checks payable to the closing agent, totaling \$19,169.08, and drawn on its escrow account. The checks, which are dated July 15, 1999, and signed by Ms. Hanse, bear the name, "Express Realty &

Investments, Inc. Escrow Account" and bear the address 6306 Pembroke Road in Miramar. The bank failed to pay these checks due to insufficient funds.

8. After receiving a complaint that Express Realty had failed to produce these escrow funds at the closing, Petitioner's investigator conducted an audit of Respondent's escrow account. At the audit, which took place the day prior to the day scheduled, the investigator found Ms. Hanse, but not Respondent, at the Express Realty office. Despite repeated requests on and after the day of the office visit, the investigator could not obtain relevant records from Ms. Hanse or Respondent concerning the real estate transaction for which Express Realty had issued escrow checks with insufficient funds.

9. On August 23, 1999, the Florida Real Estate Commission issued a citation to Respondent at 6306 Pembroke Road in Miramar. The citation was served on Respondent within one week of the date of issuance.

10. The \$100-citation was for the failure to give the required disclosure or notice in a real estate transaction. The citation gave Respondent 30 days to contest the citation or 60 days to pay the citation. After the deadline, the investigator contacted Respondent and asked him about the citation. Respondent stated that he had forgotten about it. When Respondent still failed to pay the citation, the investigator

called again, and Respondent stated that he had mailed the money, but it had been returned due to a faulty address. Respondent paid the citation approximately four months after it had been served on him.

11. Shortly after Respondent belatedly paid the citation, Petitioner received another complaint concerning a contract for the sale and purchase of real property located at 850 Southwest 9th Avenue in Hallandale. In this transaction, Ms. Hanse represented herself to be a licensed real estate broker, showed the property to prospects, and accepted \$5000 in escrow on behalf of Express Realty.

12. In July 2000, Petitioner's investigator conducted an audit of Express Realty's escrow account. Again, the investigator was unable to find any documents by which he could undertake an independent reconciliation of the account or otherwise document the role of Express Realty in the subject transaction.

13. At the hearing, Respondent claimed that he was unaware that Ms. Hanse had been conducting real estate business without his authority in the name of Express Realty. Although he admitted that she was an employee of Express Realty, he disclaimed any knowledge that she had removed him from the escrow account and otherwise taken over the management of the real estate broker company. However, Respondent could not



explain why, after his claimed discovery of these misdeeds in the summer of 1999, he did nothing to prevent Ms. Hanse from continuing to use Express Realty as the means by which to conduct unlicensed real estate activities, as she did a few months later. Under the circumstances, Petitioner proved that Respondent was at all times aware that Ms. Hanse was conducting unlicensed real estate activities through Express Realty.

#### CONCLUSIONS OF LAW

14. The Division of Administrative Hearings has jurisdiction over the subject matter. Section 120.57(1), Florida Statutes. (All references to Sections are to Florida Statutes.)

15. Section 475.25(1)(b), (e), and (k) states:

The commission may deny an application for licensure, registration, or permit, or renewal thereof; may place a licensee, registrant, or permittee on probation; 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:

(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; has

violated a duty imposed upon her or him by law or by the terms of a listing contract, written, oral, express, or implied, in a real estate transaction; has aided, assisted, or conspired with any other person engaged in any such misconduct and in furtherance thereof; or has formed an intent, design, or scheme to engage in any such misconduct and committed an overt act in furtherance of such intent, design, or scheme. It is immaterial to the guilt of the licensee that the victim or intended victim of the misconduct has sustained no damage or loss; that the damage or loss has been settled and paid after discovery of the misconduct; or that such victim or intended victim was a customer or a person in confidential relation with the licensee or was an identified member of the general public.

(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; or has failed, if a salesperson, to immediately place with her or his registered employer any money, fund, deposit, check, or draft entrusted to her or him by any person dealing with her or him as agent of the registered employer. The commission shall establish rules to provide

for records to be maintained by the broker and the manner in which such deposits shall be made.

16. Section 475.42(1)(c) provides:

No broker shall employ, or continue in employment, any person as a salesperson who is not the holder of a valid and current license as salesperson; but a license as salesperson may be issued to a person licensed as an active broker, upon request and surrender of the license as broker, without a fee in addition to that paid for the issuance of the broker's active license.

17. Section 475.5015 provides:

Each broker shall keep and make available to the department such books, accounts, and records as will enable the department to determine whether such broker is in compliance with the provisions of this chapter. Each broker shall preserve at least one legible copy of all books, accounts, and records pertaining to her or his real estate brokerage business for at least 5 years from the date of receipt of any money, fund, deposit, check, or draft entrusted to the broker or, in the event no funds are entrusted to the broker, for at least 5 years from the date of execution by any party of any listing agreement, offer to purchase, rental property management agreement, rental or lease agreement, or any other written or verbal agreement which engages the services of the broker. If any brokerage record has been the subject of or has served as evidence for litigation, relevant books, accounts, and records must be retained for at least 2 years after the conclusion of the civil action or the conclusion of any appellate proceeding, whichever is later, but in no case less than a total of 5 years as set above. Disclosure documents required under ss. 475.2755 and 475.278 shall be retained by the real estate

licensee in all transactions that result in a written contract to purchase and sell real property.

18. Rule 61J2-14.012, Florida Administrative Code, provides:

61J2-14.012 Broker's Records.

(1) A broker who receives a deposit 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.

(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.

(3) Whenever the trust liability and the bank balances do not agree, the reconciliation shall contain a description or explanation for the difference(s) and any corrective action taken in reference to shortages or overages of funds in the account(s). Whenever a trust bank account record reflects a service charge or fee for a non-sufficient check being returned or whenever an account has a negative balance, the reconciliation shall disclose the cause(s) of the returned check or negative balance and the corrective action taken.

19. Petitioner must prove the material allegations by clear and convincing evidence. Department of Banking and Finance v. Osborne Stern and Company, Inc., 670 So. 2d 932 (Fla. 1996) and Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

20. Petitioner has proved Count I of the Amended Administrative Complaint. Respondent is guilty of culpable negligence in the issuance of checks from his escrow account without sufficient funds, in violation of Section 475.25(1)(b). Respondent's claims of ignorance and fraud are rebutted factually by his failure to take any corrective action after the summer of 1999--when he could no longer deny knowledge of Ms. Hanse's actions--and legally by the nondelegable nature of this duty regarding his escrow account.

21. Petitioner has proved Counts II and IV of the Amended Administrative Complaint. Respondent is guilty of failing to

properly reconcile his escrow accounts, in violation of Rule 61J2-14.012, Florida Administrative Code, and Section 475.25(1)(e) and (k). Respondent's claims of ignorance and fraud are rebutted factually and legally for the reasons stated in the preceding paragraph.

22. Petitioner has proved Count III of the Amended Administrative Complaint. Respondent is guilty of employing an unlicensed salesperson to perform activities requiring a license, in violation of Section 475.52(1)(c). Respondent's claims of ignorance and fraud are rebutted factually and legally for the reasons stated in the preceding paragraph.

23. Petitioner has failed to prove Count V, on the one hand, and Counts II and IV, on the other hand, largely overlap because the failure to reconcile the escrow account is largely driven by an absence of records with which to perform a reconciliation.

24. Petitioner has proved Count VI of the Amended Administrative Complaint. Respondent did not timely pay the \$100 citation, in violation of Section 475.25(1)(e).

25. Rule 61J2-24.001, Florida Administrative Code, sets forth the disciplinary guidelines for most of the violations. For a violation of Section 475.25(1)(b) in the form of culpable negligence, Rule 61J2-24.001(c) provides that the usual penalties range from \$1000 to a one-year suspension. For a

violation of Section 475.25(1)(e), Rule 61J2-24.001(f) provides that the usual penalties range from a fine of \$1000 to an eight-year suspension. For a violation of Section 475.25(1)(k), Rule 61J2-24.001(k) provides that the usual penalties range from a 90-day suspension and \$1000 fine to revocation. For a violation of Section 475.42(1)(c), Rule 61J2-24.001(y) provides that the usual penalties range from a 90-day suspension and \$1000 fine to a two-year suspension. The rules do not expressly provide for a usual range of penalties for a failure to maintain business records.

26. In its proposed recommended order, Petitioner seeks a \$1000 fine and three-year suspension. Although the remedy imposed cannot be greater than that sought in an administrative complaint, see, e.g., Beverly Enterprises-Florida, Inc. v. Agency for Health Care Administration, 710 So. 2d 106 (Fla. 2d DCA 1998), no judicial authority extends such a principle to the remedy sought in a proposed recommended order. As noted above, the Amended Administrative Complaint seeks penalties up through revocation.

27. At all material times, Respondent knew that Ms. Hanse was unlicensed and practicing real estate without a license through Express Realty. By the summer of 1999, Respondent knew that she was doing so recklessly and in a way that endangered the public. Respondent's failure to take effective action to

stop Ms. Hanse from using Express Realty is a serious aggravating circumstance.

28. The minimum reasonable penalty in this case is \$1000 fine for each of the five separate violations and a three-year suspension; provided, however, if Respondent fails to pay the fine in full within 180 days of the final order, his license shall be revoked without further notice.

RECOMMENDATION

It is

RECOMMENDED that the Florida Real Estate Commission enter a final order finding Respondent guilty of the allegations contained in Counts I-IV and VI of the Amended Administrative Complaint, imposing a \$5000 administrative fine, and suspending his license for three years; provided, however, if Respondent fails to pay the fine in full within 180 days of the final order, his license shall be revoked without further notice.



DONE AND ENTERED this 9th day of July, 2002, in  
Tallahassee, Leon County, Florida.

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ROBERT E. MEALE  
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Filed with the Clerk of the  
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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 must be filed with the agency that will issue the final order in this case.