

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF REAL ESTATE,)
)
Petitioner,)
)
vs.) Case No. 02-1644PL
)
MARVIN L. POPKIN,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in Miami, Florida, on July 23, 2002.

APPEARANCES

For Petitioner: Donna K. Ryan
Senior Attorney
Department of Business and
Professional Regulation
Legal Section--Suite N 308
Hurston Building, North Tower
400 West Robinson Street
Orlando, Florida 32801-1772

For Respondent: Frank M. Marks
Richard J. Diaz, P.A.
3127 Ponce de Leon Boulevard
Coral Gables, Florida 33134

STATEMENT OF THE ISSUES

The issues are whether Respondent is guilty of failing to allow inspection of records, in violation of Sections 475.5015

and 475.25(1)(e), Florida Statutes; failing to comply with a subpoena, in violation of Sections 455.227, 475.42(1)(h), and 475.25(1)(e), Florida Statutes; obstructing the enforcement of Chapter 475, in violation of Sections 475.42(1)(i) and 475.25(1)(e), Florida Statutes; and, if guilty of any of these violations, what penalty should be imposed, pursuant to Rule 61J2-24.001, Florida Administrative Code.

PRELIMINARY STATEMENT

By Amended Administrative Complaint dated August 17, 2001, Petitioner alleged that Respondent was last licensed as a voluntary inactive broker and Lakeview Marketing Group, Inc., was formerly registered as a Florida real estate broker.

The Amended Administrative Complaint alleges that, on February 10, 1998, Respondent, as agent for Flick Investments, Ltd., entered into a Non-binding Reservation and Deposit Receipt Agreement with Vernetta Lovett. The agreement acknowledges that Respondent received a \$500 deposit toward the purchase of a premanufactured home and specified lot. The Amended Administrative Complaint alleges that Respondent failed to place the deposit immediately in his escrow account.

The Amended Administrative Complaint alleges that, on October 27, 1998, Respondent refused to allow Petitioner's investigator to conduct an office inspection and audit. The Amended Administrative Complaint alleges that, on November 3,

1998, Petitioner served Respondent with a subpoena duces tecum seeking bank and reconciliation statements for Respondent's real estate brokerage business. Respondent allegedly failed to comply with the subpoena. The Amended Administrative Complaint alleges that, on February 11, 1999, Respondent again refused to allow Petitioner's investigator to conduct an audit of the escrow account.

Count I of the Amended Administrative Complaint alleges that Respondent has failed to deposit immediately trust funds, in violation Rule 61J12-14.010, Florida Administrative Code, and Section 475.25(1)(e), Florida Statutes.

Count II of the Amended Administrative Complaint alleges that Respondent deposited personal funds with escrow funds, in violation of Rule 61J12-14.008(1)(c), Florida Administrative Code, and Section 475.25(1)(e), Florida Statutes.

Count III of the Amended Administrative Complaint alleges that Respondent failed to allow inspection of records, in violation of Sections 475.5015 and 475.25(1)(e), Florida Statutes.

Count IV of the Amended Administrative Complaint alleges that Respondent failed to comply with a subpoena, in violation of Sections 455.227, 475.42(1)(h), and 475.25(1)(e), Florida Statutes.

Count V of the Amended Administrative Complaint alleges that Respondent obstructed the enforcement of Chapter 475 or the enforcement of any lawful duty by any person acting under the authority of Chapter 475, in violation of Sections 475.42(1)(i) and 475.25(1)(e), Florida Statutes.

Respondent timely requested a hearing.

In the Joint Response to the Pre-Hearing Order filed June 14, 2002, the parties reduced the issues to those stated in Counts III, IV, and V of the Amended Administrative Complaint.

At the hearing, Petitioner called one witnesses and offered into evidence six exhibits: Petitioner Exhibits 1-6.

Respondent called three witnesses and offered into evidence two exhibits: Respondent Exhibits 1-2. All exhibits were admitted.

The court reporter filed the transcript on August 2, 2002. Petitioner filed a proposed recommended order on August 12, 2002.

FINDINGS OF FACT

1. Respondent is 71 years old and has been licensed as a real estate broker since 1956. From April 15, 1996, through March 31, 1999, Respondent was an active licensed real estate broker. On April 1, 1999, through the present, Respondent's license became involuntary inactive due to nonrenewal.

2. In early 1998, Respondent, on behalf of another developer, approached Jerry Flick and asked if he wanted to sell

certain land. Mr. Flick replied that he did not, but proposed that Respondent help him sell prefabricated homes. Although he lacked lots on which to place the homes, Mr. Flick stated that local governments would make available "tax-deeded" lots for these affordable homes.

3. Respondent agreed to handle the sales of the prefabricated homes. Respondent hired five sales agents and used brochures supplied him by Mr. Flick and the manufacturer. As instructed by Mr. Flick, Respondent and his staff offered the prefabricated homes, exclusive of lots, at \$69,900 each.

4. About one week after sales started, Respondent opened, under the name of Lakeview Marketing Group, Inc. (Lakeview), one escrow bank account and one business bank account. He allowed Mr. Flick's associate, Ruth Bidash, to handle the banking responsibilities, including the depositing of customers' escrow deposits.

5. From April 15, 1996, through July 14, 1998, Lakeview Marketing Group, Inc. (Lakeview), was a registered broker corporation. Between these dates, Respondent served as the registered, qualifying broker of Lakeview. In this capacity, Respondent and Lakeview have handled the marketing of three real estate projects.

6. In the first 30 days, working seven days a week, Respondent and his sales staff had sold 60 prefabricated homes.

At this time, Mr. Flick told Respondent that the prefabricated homes were more expensive than he had thought, and Respondent and his sales staff needed to raise the unit sale price, even for existing contracts, by \$10,000.

7. The only copies of agreements are between Lakeview, as agent for Flick Investments, Ltd., and Vernetta A. Lovett. The first agreement is a Non-Binding Reservation and Deposit Receipt Agreement for \$69,900 and dated January 21, 1998. The subjects of this agreement are a "house and lot" that are described only as "1320 N.W. 53rd St." and "Model[:] Crestview." The Crestview is a model of prefabricated home that initially sold for \$69,900. This agreement requires purchasers to make escrow checks payable to Lakeview's escrow account.

8. The second agreement is a Purchase and Sale Agreement between Lakeview, as agent for Flick Investments, Ltd., and Lovett for \$69,900 and dated February 10, 1998. The subjects of this agreement are lot 32, block 3, of the Palm Park subdivision, as recorded in Dade County Plat Book 44, page 24, and the "Crestview model dwelling unit which has been constructed by Seller on that lot (the lot and dwelling unit hereafter referred to as the 'Property' . . .)" This agreement requires purchasers to make escrow checks payable to Lakeview.

9. Lakeview held all of the escrow deposits for all of the sales made by Respondent and his staff. Probably, these sales

were exclusively of prefabricated homes. Respondent testified that the sales consisted exclusively of prefabricated homes, although, on its face, the Lovett contract is for a prefabricated home and land. The Lovett contract is for a price probably attributable entirely to the land. Perhaps a local government may have supplied the land for free due to the affordable-housing offered by this program.

10. None of the contracts ever closed. Respondent seems to have borne substantial expenses from this failed venture, even though his participation was limited to 2.5 percent of the sales price. The banking records for Lakeview do not suggest meticulous bookkeeping.

11. Following the receipt of two complaints concerning the failed sales program, including claims of unreturned escrow deposits, Petitioner's investigator contacted Respondent and supplied him with a copy of the complaints, one of which came from Mr. Flick. Respondent refused to allow the investigator to conduct an office inspection and audit. Instead, Respondent agreed to meet the investigator, but only at the office of, and in the presence of, Respondent's attorney. Respondent claimed that Petitioner lacked any jurisdiction because the sales program did not involve real estate.

12. After not obtaining any business records from Respondent voluntarily, on October 30, 1998, Petitioner served

Respondent with a subpoena duces tecum, demanding various documents by November 20, 1998. The subpoena states that it is issued pursuant to Section 455.223, Florida Statutes, and that the recipient "shall respond to this subpoena as directed unless excused by the party who requested the issuance of the subpoena or by order of [Petitioner]." The only response that Petitioner received was a motion to quash subpoena, which Respondent's attorney filed with Petitioner. The record does not reveal when the motion was served or filed. The motion again asserted that Lakeview and Popkin were not engaged in the practice of real estate. The record does not reveal what, if any, action Petitioner took in response to the motion.

13. Neither Petitioner nor any other authority ever excused compliance with the subpoena. When Petitioner's investigator attempted to pursue the matter with Respondent, after the deadline for production had passed, Respondent threatened a personal lawsuit against him and told him to go "fuck" himself. (Respondent apologized at the hearing for his intemperate remark.)

14. On December 22, 1998, Petitioner subpoenaed the Lakeview bank records directly from the bank. The bank supplied the subpoenaed information.

15. The sole evidence that Petitioner produced for the cost of the investigation is 16 hours of the investigator's

time. The cost of this time is \$32 per hour, for a total of \$512.

CONCLUSIONS OF LAW

16. 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.)

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. Section 455.227(1)(q) provides that the Florida Real Estate Commission may impose discipline if a licensee is guilty of:

Violating any provision of this chapter, the applicable professional practice act, a rule of the department or the board, or a lawful order of the department or the board, or failing to comply with a lawfully issued subpoena of the department.

19. Section 475.42(1)(h) and (i) provides:

(h) No person shall fail or refuse to appear at the time and place designated in a subpoena issued with respect to a violation of this chapter, unless because of facts that are sufficient to excuse appearance in response to a subpoena from the circuit court; nor shall a person who is present before the commission or a member thereof or one of its authorized representatives acting under authority of this chapter refuse to be sworn or to affirm or fail or refuse to answer fully any question propounded by the commission, the member, or such representative, or by any person by the authority of such officer or appointee; nor shall any person, so being present, conduct herself or himself in a disorderly, disrespectful, or contumacious manner.

(i) No person shall obstruct or hinder in any manner the enforcement of this chapter or the performance of any lawful duty by any person acting under the authority of this chapter or interfere with, intimidate, or offer any bribe to any member of the commission or any of its employees or any person who is, or is expected to be, a witness in any investigation or proceeding relating to a violation of this chapter.

20. Section 475.25(1)(e) provides that the Florida Real Estate Commission may impose discipline for any violation of Chapter 455 or 475, Florida Statutes. Section 455.227(3)(a) authorizes the imposition of costs:

In addition to any other discipline imposed pursuant to this section or discipline imposed for a violation of any practice act, the board, or the department when there is no board, may assess costs related to the investigation and prosecution of the case excluding costs associated with an attorney's time.

21. 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).

22. Petitioner has proved that Respondent failed to allow inspection of records, in violation of Sections 475.5015 and 475.25(1)(e).

23. Respondent contends that Petitioner had no right to inspect these records because Respondent and Lakeview were not engaged in the sale of real estate and, thus, Petitioner's investigator lacked the jurisdiction to inspect the records. The Lovett contract, on its face, involves real estate. This fact alone suffices to allow Petitioner's investigator to obtain access to the records to investigate a complaint. Although Petitioner has not proved the contract, or any other, actually

involved real estate, the apparent involvement of real estate must be sufficient to vest Petitioner with jurisdiction to inspect the records. For this reason, it is unnecessary to address Petitioner's alternative contention, which is that it always has jurisdiction to inspect any and all records of all licensed real estate entities.

24. Petitioner has failed to prove that Respondent failed to comply with a subpoena, in violation of Sections 455.227, 475.42(1)(h), and 475.25(1)(e). This is a separate and distinct alleged violation from the failure to allow inspection of records, but the proof fails to establish the elements of this offense.

25. Section 455.223 provides:

For the purpose of any investigation or proceeding conducted by the department, the department shall have the power to administer oaths, take depositions, make inspections when authorized by statute, issue subpoenas which shall be supported by affidavit, serve subpoenas and other process, and compel the attendance of witnesses and the production of books, papers, documents, and other evidence. The department shall exercise this power on its own initiative or whenever requested by a board or the probable cause panel of any board. Challenges to, and enforcement of, the subpoenas and orders shall be handled as provided in s. 120.569.

26. Section 120.569(2)(k)1. provides:

Any person subject to a subpoena may, before compliance and on timely petition, request

the presiding officer having jurisdiction of the dispute to invalidate the subpoena on the ground that it was not lawfully issued, is unreasonably broad in scope, or requires the production of irrelevant material.

27. Respondent referred the subpoena to his attorney, who filed a motion to quash. Although the record is silent as to whether the motion was timely, Petitioner has failed to prove that it was untimely. Without resolving the legal defense raised by Respondent's attorney, Petitioner cannot predicate discipline on the failure of Respondent or his attorney to produce documents.

28. Petitioner has failed to prove that Respondent otherwise obstructed the enforcement of Chapter 475 or the enforcement of any lawful duty by any person acting under the authority of Chapter 475, in violation of Sections 475.42(1)(i) and 475.25(1)(e). The obstructive incidents are those discussed immediately above.

29. Admitting that it did not prove Count I, Petitioner contends in its proposed recommended order that it proved the allegations of Count II--that Respondent deposited personal funds with escrow funds, in violation of Rule 61J12-14.008(1)(c), Florida Administrative Code, and Section 475.25(1)(e). The Joint Response to the Pre-Hearing Order did not preserve this issue.

30. Rule 61J2-24.001, Florida Administrative Code, provides the applicable penalty guidelines for these violations. Rule 61J2-24.001(4)(f) applies to the violation of any provision of Chapter 475 or 455, Florida Statutes. The penalties under Rule 61J2-24.001(4)(f) range from an eight-year suspension to revocation and a \$1000 fine. However, Rule 61J2-24.001(4)(cc) best describes the offense proved in this case because it applies to the failure to respond to a subpoena, which is a violation of Section 475.42(1)(h). Refusing to comply with a subpoena is comparable to refusing to allow an inspection and audit. The penalties under Rule 61J2-24.001(4)(cc) range from a \$1000 fine and a six-month suspension to a five-year suspension.

31. Respondent is obviously nearing the end of a long professional career, which, to this point, has not been blemished by the imposition of any discipline. These years of good service provide the context for his belligerence with Petitioner's investigator and, thus, for the appropriate discipline, which should not exceed a \$1000 administrative fine, 30-day suspension, and costs of \$512.

RECOMMENDATION

It is

RECOMMENDED that the Florida Real Estate Commission enter a final order finding Respondent guilty of failing to allow inspection of records, in violation of Sections 475.5015 and

475.25(1)(e), Florida Statutes, but not of the other charges in the Amended Administrative Complaint, and imposing a 30-day suspension, \$1000 administrative fine, and \$512 cost assessment.

DONE AND ENTERED this 14th day of August, 2002, in Tallahassee, Leon County, Florida.

ROBERT E. MEALE
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 14th day of August, 2002.

COPIES FURNISHED:

Jack Hisey, Deputy Division Director
Division of Real Estate
Department of Business and
Professional Regulation
400 West Robinson Street
Post Office Box 1900
Orlando, Florida 32802-1900

Dean Saunders, Chairperson
Florida Real Estate Commission
Department of Business and
Professional Regulation
400 West Robinson Street
Post Office Box 1900
Orlando, Florida 32802-1900

Hardy L. Roberts, III, General Counsel
Department of Business and
Professional Regulation
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-2202

Donna K. Ryan
Senior Attorney
Department of Business and
Professional Regulation
Legal Section--Suite N 308
Hurston Building North Tower
400 West Robinson Street
Orlando, Florida 32801-1772

Frank M. Marks
Richard J. Diaz, P.A.
3127 Ponce de Leon Boulevard
Coral Gables, Florida 33134

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.