STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF REAL ESTATE,	)	
Petitioner,	)	
vs.	)	Case No. 03-4759PL
PATRICK BOWIE,	)	
Respondent.	)	

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case on April 14, 2004, by video teleconference at sites in West Palm Beach and Tallahassee, Florida, before Stuart M. Lerner, a duly-designated Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Alpheus C. Parsons, Esquire
Department of Business and Professional Regulation
Division of Real Estate
400 West Robinson Street, Suite N-801
Orlando, Florida 32801

For Respondent: No appearance

STATEMENT OF THE ISSUE

Whether Respondent committed the violations alleged in the Administrative Complaint issued against him and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On October 15, 2003, Petitioner issued a two-count Administrative Complaint alleging that, in connection with the sale, in 2001, of "real property commonly known as 3800 South Federal Hwy, Fort Pierce, Florida," Respondent, a Florida-licensed real estate sales associate, acted "in violation of Section 475.42(1)(d), Florida Statutes and, therefore, in violation of Section 475.25(1)(e), Florida Statutes (Count I); and was also "guilty of fraud, misrepresentation, concealment, false promises, false pretenses, dishonest dealing by trick, scheme or device, culpable negligence, or breach of trust . . . in violation of Section 475.25(1)(b), Florida Statutes." Respondent "disputed the allegations of fact contained in the Administrative Complaint" and requested a "formal hearing" pursuant to Section 120.57(1), Florida Statutes. On December 18, 2003, the matter was referred to DOAH for the assignment of an Administrative Law Judge to conduct the "formal hearing" Respondent had requested.

As noted above, the hearing was held on April 14, 2004.[1] Petitioner was represented at the hearing by its counsel of

record. Respondent, on the other hand, did not make an appearance, either in person or through counsel or a qualified representative. At the outset of the hearing, Petitioner requested, and was granted, leave to amend the Administrative Complaint to correct an obvious error in numbered paragraph 11 of the Administrative Complaint's "[e]ssential [a]llegations of [m]aterial [f]act." This portion of the Administrative Complaint (that is, the "[e]ssential [a]llegations of [m]aterial [f]act"), as amended, read as follows:

> 1. Petitioner is a state government licensing and regulatory agency charged with the responsibility and duty to prosecute Administrative Complaints pursuant to the laws of the State of Florida, in particular Section 20.165 and Chapters 120, 455 and 475, of the Florida Statutes and the rules promulgated pursuant thereto.
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> 2. Respondent is and was at all times material hereto a licensed Florida real estate sales associate, issued license number 695252 in accordance with Chapter 475 of the Florida Statutes.
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> 3. The last license listed was as a sales associate with Southern Properties Treasure Coast, 3418 NE Indian River Drive, Jensen Beach, Florida 34957.
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> 4. At all times material, GMAC Realty Unlimited, Inc. ("GRU") was noted in Petitioner's records as Respondent's registered employer.
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> 5. On or about August 7, 2001, Respondent attended a real estate closing on behalf of GRU regarding real property commonly known as 3800 South. Federal Hwy, Fort Pierce,

Florida. A copy of the purchase and sale contract is attached and incorporated as Administrative Complaint Exhibit 1.

6. At all times material, GRU was the escrow agent for the transaction and a cooperating broker.

7. At all times material, Allen Real Estate, Inc. ("Allen") was the listing broker, pursuant to a listing agreement with the seller. A copy of the listing agreement is attached and incorporated as Administrative Complaint Exhibit 2.

8. Pursuant to the listing agreement, Seller was required to pay an 8% commission to Allen for procuring a buyer.

9. Pursuant to the purchase and sale contract, GRU was entitled to a commission as a cooperating broker.

10. On or about August 7, 2001, Respondent's registered broker, Kevin Schevers ("Schevers") instructed Respondent not to deliver the escrow deposit check until the closing documents were changed to indicate that GRU was a cooperating broker entitled to a commission.

11. On or about August 9, 2001, without the authorization of GRU or Schevers, Respondent delivered the deposit check to the closing agent.

12. On or about August 9, 2001, without the authorization of GRU or Schevers, Respondent received a commission check payable to Respondent from the listing broker, Allen Real Estate. A copy of the check is attached and incorporated as Administrative Complaint Exhibit 3.

13. At all times material, GRU did not receive a commission in the above transaction.

During the evidentiary portion of the hearing, Petitioner presented the testimony of three witnesses (Gary Sprauer, Kevin Schevers, and Dawn Luchik) and offered five exhibits, Petitioner's Exhibits 1 through 5, which were all received into evidence.[2]

At the close of the taking of evidence, the undersigned established the deadline for the filing of proposed recommended orders at 15 days from the date of the filing of the hearing transcript.

The hearing transcript (consisting of one volume) was filed on June 15, 2004.

On June 29, 2004, Respondent filed a Proposed Recommended Order, which the undersigned has carefully considered.

To date, Respondent has not filed any post hearing submittal.

FINDINGS OF FACT

Based on the evidence adduced at the "formal hearing," and the record as a whole, the following findings of fact are made:

1. Respondent is now, and has been since October of 2000, a licensed real estate sales associate in the State of Florida, holding license number 695252. He is currently associated with AAA Realty, Inc., a broker corporation doing business in Broward County, Florida.

2. From March 1, 2001, through June 26, 2001, Respondent was an active real estate sales associate with Allen Real Estate, Inc. (Allen), a broker corporation doing business in St. Lucie County, Florida.

3. From June 27, 2001, through August 13, 2001, Respondent was an active real estate sales associate with Realty Unlimited, Inc. (Unlimited), a broker corporation (affiliated with GMAC Real Estate) with offices in Port St. Lucie and Stuart, Florida. Unlimited is now, and has been at all times material to the instant case, owned by Kevin Schevers, a Florida-licensed real estate broker.

4. Gary Sprauer is a Florida-licensed real estate sales associate. He is currently associated with Unlimited.

5. Like Respondent, Mr. Sprauer began his association with Unlimited on June 27, 2001, immediately after having worked for Allen.

6. Respondent and Mr. Sprauer worked as "partners" at both Allen and Unlimited. They had an understanding that the commissions they each earned would be "split 50-50" between them.

7. On February 7, 2001, Allen, through the efforts of Respondent and Mr. Sprauer, obtained an exclusive listing contract (Listing Contract) giving it, for the period of a year, the "exclusive right to sell," in a representative capacity,

commercial property located at 3800 South Federal Highway that was owned by Vincent and Renee Piazza (Piazza Property). Paragraphs 6 and 7 of the Listing Contract addressed the subjects of "compensation," "cooperation with other brokers," and "dispute resolution," respectively, and provided, in pertinent part as follows as follows:

> 6. COMPENSATION: Seller will compensate Broker as specified below for procuring a buyer who is ready, willing, and able to purchase the Property or any interest in the Property on the terms of this Agreement or on any other terms acceptable to Seller. Seller will pay Broker as follows (plus applicable sales tax):
>
> (a) 8% of the total purchase price or $15,000 maximum, no later than the date of closing specified in the sales contract. However closing is not a prerequisite for Broker's fee being earned.
>
> * * *
>
> (d) Broker's fee is due in the following circumstances: (1) If any interest in the Property is transferred . . . , regardless of whether the buyer is secured by Broker, Seller or any other person.
>
> * * *
>
> 7. COOPERATION WITH OTHER BROKERS: Broker's office policy is to cooperate with all other brokers except when not in the Seller's best interest, and to offer compensation to: __ Buyer's agents, who represent the interest of the buyer and not the interest of Seller in a transaction, even if compensated by Seller or Broker __ Nonrepresentatives __ Transaction brokers.

> __ None of the above (if this box is checked, the Property cannot be placed in the MLS).
>
> * * *
>
> 10. DISPUTE RESOLUTION: This Agreement will be construed under Florida law. All controversies, claim and other matters in question between the parties arising out of or relating to this Agreement or the breach thereof will be settled by first attempting mediation under the rules of the American Arbitration Association or other mediator agreed upon by the parties. . . .

8. Shortly after they left the employ of Allen and began working for Unlimited, Respondent and Mr. Sprauer showed Nicholas Damiano the Piazza Property.

9. Mr. Damiano thereafter made a written offer to purchase the Piazza Property, which the Piazzas accepted, in writing, on July 4, 2001.

10. The sales price was $165,000.00.

11. Mr. Damiano put down a $10,000.00 deposit, which, in accordance with paragraph 2(a) of the contract between Mr. Damiano and the Piazzas (Sales Contract), was "held in escrow by [Unlimited]."

12. The obligations of Unlimited, as escrow agent, were described in paragraph 6 of the Sales Contract, which provided as follows:

> ESCROW. Buyer and Seller authorize GMAC, Realty Unlimited Telephone: . . . Facsimile: . . . Address: . . . to receive

> funds and other items and, subject to clearance, disburse them in accordance with the terms of this Contract. Escrow Agent will deposit all funds received in a non-interest bearing account. If Escrow Agent receives conflicting demands or has a good faith doubt as to Escrow Agent's duties or liabilities under this Contract, he/she may (a) hold the subject matter of the escrow until the parties mutually agree to its disbursement or until issuance of a court order or decision of arbitrator determining the parties' rights regarding the escrow or (b) deposit the subject matter of the escrow with the clerk of the circuit court having jurisdiction over the dispute. Upon notifying the parties of such action, Escrow Agent will be released from all liability except for the duty to account for items previously delivered out of escrow. If a licensed real estate broker, Escrow Agent will comply with applicable provisions of Chapter 475, Florida Statutes. In any suit or arbitration in which Escrow Agent is made a party because of acting as agent hereunder or interpleads the subject matter of the escrow, Escrow Agent will recover reasonable attorneys' fees and costs at all levels, with such fees and costs to be paid from the escrowed funds or equivalent and charged and awarded as court or other costs in favor of the prevailing party. The parties agree that Escrow Agent will not be liable to any person for misdelivery to Buyer or Seller of escrowed items, unless the misdelivery is due to Escrow Agent's willful breach of this Contract or gross negligence.

13. Paragraph 12 of the Sales Contract addressed the subject of "brokers" and provided as follows:

> BROKERS. Neither Buyer nor Seller has utilized the services of, or for any other reason owes compensation to, a licensed real estate broker other than:

(a) Listing Broker: Allen Real Estate, Inc. who is a transaction broker and who will be compensated by x Seller _ Buyer _ both parties pursuant to x a listing agreement _ other (specify)

(b) Cooperating Broker: GMAC Realty Unlimited who is a transaction broker who will compensated by _ Buyer x Seller _ both parties pursuant to _ an MLS or other offer of compensation to a cooperating broker _ other (specify)

(collectively referred to as "Broker") in connection with any act relating to the Property, included but not limited to, inquiries, introductions, consultations and negotiations resulting in this transaction. Seller and Buyer agree to indemnify and hold Broker harmless from and against losses, damages, costs and expenses of any kind, including reasonable attorneys' fees at all levels, and from liability to any person, arising from (1) compensation claimed which is inconsistent with the representation in this Paragraph, (2) enforcement action to collect a brokerage fee pursuant to Paragraph 10, (3) any duty accepted by Broker at the request of Buyer or Seller, which duty is beyond the scope of services regulated by Chapter 475, F.S., as amended, or (4) recommendations of or services provided and expenses incurred by any third party whom Broker refers, recommends or retains for or on behalf of Buyer or Seller.

14. The Damiano/Piazza transaction was originally scheduled to close on July 25, 2001.

15. At the request of the Piazzas, the closing was rescheduled for August 7, 2001.

16. A few days before August 7, 2001, Mr. Sprauer asked Respondent "where the closing was going to take place" and "what

title company" would be handling the matter. Respondent replied that the closing was "going to be delayed again because Mr. Damiano . . . was going to have to have some type of cancer surgery."

17. It turned out that the closing was not "delayed again." It took place on August 7, 2001.

18. At the closing were Mr. Damiano, the Piazzas, Respondent, and the closing agent from the title company, First American Title Insurance Company (First American).[3]

19. Neither Mr. Schevers, nor Mr. Sprauer, was in attendance.

20. Mr. Sprauer did not even know that the closing was taking place. He was under the impression, based on what Respondent had told him, that the closing had been postponed. Had he not been misinformed, he would have attended the closing. Respondent did not contact Mr. Sprauer following the closing to let him know that, in fact, the closing had occurred.

21. Mr. Schevers, on the other hand, was made aware that closing would be held on August 7, 2001. He was unable to attend because he had "prior commitments."

22. It was Respondent who informed Mr. Schevers of the August 7, 2001, closing date.

23. The morning of August 7, 2001, Respondent went to Unlimited's Stuart office and asked Mr. Schevers for the

$10,000.00 Unlimited was holding in escrow in connection with the Damiano/Piazza transaction, explaining that he needed it for the closing that was going to be held later that day.

24. Before complying with Respondent's request, Mr. Schevers contacted First American and asked that he be faxed a copy of the United States Department of Housing and Urban Development Settlement Statement (HUD Statement) that First American had prepared for the closing.

25. As requested, First American faxed a copy of the HUD Statement to Mr. Schevers.

26. Upon reviewing the document, Mr. Schevers "immediately noticed that [it indicated that] the entire commission [of $7,000.00] was going to Allen."

27. Mr. Schevers "then proceeded to call First American" and asked why Unlimited was not "reflected on this settlement statement." Mr. Schevers was told that a First American representative "would get right on it and get back to [him]."

28. Mr. Schevers did not wait to hear back from First American before handing an "escrow check" in the amount of $10,000.00 to Respondent. He instructed Respondent, however, to "not give anybody this check unless that statement [the HUD Statement] [was] changed and reflect[ed] [Unlimited's]" share of the commission earned from the sale of the Piazza Property. He

further directed Respondent to telephone him if this change was not made.

29. Respondent did not follow the instructions Mr. Schevers had given him. He delivered the $10,000.00 "escrow check" to the closing agent at the closing, even though the HUD Statement had not been changed to reflect Unlimited's sharing of the commission. At no time during the closing did Mr. Schevers receive a telephone call from Respondent.

30. According to the HUD Statement that Mr. Damiano, the Piazzas, and the closing agent signed at the closing, Allen received a commission of $7,000.00 "from seller's funds at settlement." The document makes no mention of any other commission having been paid as part of the closing.

31. On or about August 9, 2001, Respondent received a "commission check" from Allen. The check was made payable to Respondent and was in the amount of $3,000.00. Under the "DOLLARS" line on the check, the following was typed:

4200 Total Comm[4]
1200 ADVANCE[5]

Typed next to "MEMO" on the bottom left hand corner of the check was "DAMIANO-PIAZZA 165,000 S&L."

32. It has not been shown that the "commission check" Respondent received from Allen was for anything other than the

commission Allen owed Respondent for services performed when Respondent was still employed by Allen.

33. Mr. Schevers' consent to Respondent's receiving this $3,000.00 "commission check" was neither sought nor given.

34. Less than a week after the closing, having spotted Mr. Damiano mowing grass on a vacant lot that Mr. Damiano owned, Mr. Sprauer walked up to him and asked "how his surgery [had gone]." Mr. Damiano "acted very surprised [like] he didn't know what [Mr. Sprauer] was talking about." Mr. Damiano's reaction to his inquiry led Mr. Sprauer to believe "that the closing had probably taken place." He "immediately contacted [Mr. Schevers] and asked him to check into it."

35. Mr. Schevers subsequently learned from First American that Allen "had gotten all of the [commission] check" at the closing.

36. Mr. Schevers then telephoned Respondent. This was the first communication he had had with Respondent since before the closing. Respondent told Mr. Schevers that "he got the check" and "he would be right over with it." Respondent, however, did not keep his promise.

37. After his telephone conversation with Respondent, Mr. Schevers discovered that Allen "had cut [Respondent] a check and [Respondent] had gone immediately and deposited it."

38. This discovery prompted Mr. Schevers to place another

telephone call to Respondent. This telephone conversation ended with Mr. Schevers telling Respondent "he was terminated."

39. Mr. Schevers thereafter notified Petitioner in writing that Respondent was no longer associated with Unlimited. He also filed with Petitioner a complaint against Respondent alleging that Respondent had "acted inappropriately" in connection with the Damiano/Piazza transaction.

40. Mr. Schevers had expected Unlimited to receive, for the role it played in the Damiano/Piazza transaction, "50 percent of the total commission," or $3,500.00, in accordance with the provisions of the "multiple listing service for St. Lucie County."[6] He holds Respondent responsible, at least in part, for Unlimited's not receiving these monies.[7]

41. At the time of the Damiano/Piazza transaction, Unlimited had contracts with its sales associates which provided that the associates would receive "70 percent of the net" of any commission Unlimited earned as a result of the associates' efforts. Had Unlimited received a commission as a result of the Damiano/Piazza transaction, it would have "split" it with Respondent and Mr. Sprauer as required by the contracts it had with them.[8]

CONCLUSIONS OF LAW

42. DOAH has jurisdiction over the subject matter of this proceeding and of the parties hereto pursuant to Chapter 120, Florida Statutes.

43. The Florida Real Estate Commission (Commission) is statutorily empowered to take disciplinary action against Florida-licensed real estate sales associates[9] based upon any of the grounds enumerated in Section 475.25(1), Florida Statutes.

44. Such disciplinary action may include one or more of the following penalties: license revocation; license suspension (for a period not exceeding ten years); imposition of an administrative fine not to exceed $1,000.00 for each count or separate offense; issuance of a reprimand; and placement of the licensee on probation. § 475.25(1), Fla. Stat.

45. The Commission may take such action only after the licensee has been given reasonable written notice of the charges and an adequate opportunity to request a proceeding pursuant to Sections 120.569 and 120.57, Florida Statutes. § 120.60(5), Fla. Stat.

46. An evidentiary hearing must be held if requested by the licensee when there are disputed issues of material fact. §§ 120.569(1) and 120.57(1), Fla. Stat.

47. At the hearing, Petitioner bears the burden of proving that the licensee engaged in the conduct, and thereby committed

the violations, alleged in the charging instrument. It must do so even if, as the instant case, the licensee fails to appear at the hearing. See Scott v. Department of Professional Regulation, 603 So.2d 519, 520 (Fla. 1st DCA 1992)("The appellant is a registered nurse who challenges an administrative order by which her license was suspended after a hearing before the Board of Nursing. The appellant did not appear at the hearing, and did not otherwise respond to the complaint against her. However, the appellant's failure to appear or respond does not relieve the appellee of its obligation to substantiate the charges by presenting sufficient evidence.").[10]

48. Proof greater than a mere preponderance of the evidence must be presented by Petitioner to meet its burden of proof. Clear and convincing evidence of the licensee's guilt is required. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932, 935 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292, 294 (Fla. 1987); Pou v. Department of Insurance and Treasurer, 707 So. 2d 941 (Fla. 3d DCA 1998); and Section 120.57(1)(j), Florida Statutes ("Findings of fact shall be based upon a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute . . . .").

49. Clear and convincing evidence "requires more proof

than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" In re Graziano, 696 So. 2d 744, 753 (Fla. 1997). It is an "intermediate standard." Id. For proof to be considered "'clear and convincing' . . . the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established." In re Davey, 645 So. 2d 398, 404 (Fla. 1994), quoting, with approval, from Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983). "Although this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous." Westinghouse Electric Corporation, Inc. v. Shuler Bros., Inc., 590 So. 2d 986, 989 (Fla. 1st DCA 1991).

50. In determining whether Petitioner has met its burden of proof, it is necessary to evaluate Petitioner's evidentiary presentation in light of the specific factual allegations made in the charging instrument. Due process prohibits an agency from taking disciplinary action against a licensee based upon conduct not specifically alleged in the charging instrument, unless those matters have been tried by consent. See Jones v.

Department of Business and Professional Regulation, 29 Fla. L. Weekly D1273, 2004 WL 1175267 *1 (Fla. 5th DCA May 28, 2004); Aldrete v. Department of Health, 29 Fla. L. Weekly D967a, 2004 WL 825514 *1 (Fla. 1st DCA April 19, 2004); Shore Village Property Owners' Association, Inc. v. Department of Environmental Protection, 824 So. 2d 208, 210 (Fla. 4th DCA 2002); Hamilton v. Department of Business and Professional Regulation, 764 So. 2d 778 (Fla. 1st DCA 2000); Lusskin v. Agency for Health Care Administration, 731 So. 2d 67, 69 (Fla. 4th DCA 1999); Ghani v. Department of Health, 714 So. 2d 1113, 1114-15 (Fla. 1st DCA 1998); Cottrill v. Department of Insurance, 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996); Delk v. Department of Professional Regulation, 595 So. 2d 966, 967 (Fla. 5th DCA 1992); and Wray v. Department of Professional Regulation, Board of Medical Examiners, 435 So. 2d 312, 315 (Fla. 1st DCA 1983); cf. Montalbano v. Unemployment Appeals Commission, 873 So. 2d 417 (Fla. 4th DCA 2004)("The UAC argues that appellant had notice, generally, that she was discharged for misconduct connected with work and it is inconsequential that her employer was allowed to change his mind during the hearing as to the exact conduct which led to appellant's termination. We reject that argument. Appellant attended the hearing with the understanding that she would have to defend the allegation that she falsified documents and not the allegation

that she argued with her employer and was insubordinate on the day she was fired.").

51. Furthermore, "the conduct proved must legally fall within the statute or rule claimed [in the charging instrument] to have been violated." Delk v. Department of Professional Regulation, 595 So. 2d 966, 967 (Fla. 5th DCA 1992). In deciding whether "the statute or rule claimed [in the charging instrument] to have been violated" was in fact violated, as alleged by Petitioner, if there is any reasonable doubt, that doubt must be resolved in favor of the licensee. See Whitaker v. Department of Insurance and Treasurer, 680 So. 2d 528, 531 (Fla. 1st DCA 1996); Elmariah v. Department of Professional Regulation, Board of Medicine, 574 So. 2d 164, 165 (Fla. 1st DCA 1990); and Lester v. Department of Professional and Occupational Regulations, 348 So. 2d 923, 925 (Fla. 1st DCA 1977).

52. In those cases where the proof is sufficient to establish that the licensee committed the violation(s) alleged in the charging instrument and that therefore disciplinary action is warranted, it is necessary, in determining what disciplinary action should be taken against the licensee, to consult the Commission's "disciplinary guidelines," as they existed at the time of the violation(s). See Parrot Heads, Inc. v. Department of Business and Professional Regulation, 741 So. 2d 1231, 1233 (Fla. 5th DCA 1999)("An administrative agency is

bound by its own rules . . . creat[ing] guidelines for disciplinary penalties."); and Orasan v. Agency for Health Care Administration, Board of Medicine, 668 So. 2d 1062, 1063 (Fla. 1st DCA 1996)("[T]he case was properly decided under the disciplinary guidelines in effect at the time of the alleged violations."); see also State v. Jenkins, 469 So. 2d 733, 734 (Fla. 1985)("[A]gency rules and regulations, duly promulgated under the authority of law, have the effect of law."); Buffa v. Singletary, 652 So. 2d 885, 886 (Fla. 1st DCA 1995)("An agency must comply with its own rules."); and Williams v. Department of Transportation, 531 So. 2d 994, 996 (Fla. 1st DCA 1988)(agency is required to comply with its disciplinary guidelines in taking disciplinary action against its employees).

53. At all times material to the instant case, the Commission's "disciplinary guidelines" have been set forth in Florida Administrative Code Rule 61J2-24.001, and have provided, in pertinent part, as follows:

> Pursuant to s. 455.2273, Florida Statutes, the Commission sets forth below a range of disciplinary guidelines from which disciplinary penalties will be imposed upon licensees guilty of violating Chapters 455 or 475, Florida Statutes. The purpose of the disciplinary guidelines is to give notice to licensees of the range of penalties which normally will be imposed for each count during a formal or an informal hearing. For purposes of this rule, the order of penalties, ranging from lowest to highest, is: reprimand, fine, probation,

suspension, and revocation or denial. Pursuant to s. 475.25(1), Florida Statutes, combinations of these penalties are permissible by law. Nothing in this rule shall preclude any discipline imposed upon a licensee pursuant to a stipulation or settlement agreement, nor shall the range of penalties set forth in this rule preclude the Probable Cause Panel from issuing a letter of guidance.

* * *

(3) The penalties are as listed unless aggravating or mitigating circumstances apply pursuant to paragraph (4). The verbal identification of offenses is descriptive only; the full language of each statutory provision cited must be consulted in order to determine the conduct included.

* * *

(c) 475.25(1)(b) Guilty of fraud, misrepresentation, concealment, false promises, dishonest dealing by trick, scheme, or device, culpable negligence or breach of trust. . . . - In the case of fraud, misrepresentation and dishonest dealing, the usual action of the Commission shall be to impose a penalty of revocation. In the case of concealment, false promises, and false pretenses, the usual action of the Commission shall be to impose a penalty of a 3 to 5 year suspension and an administrative fine of $1,000. In the case of culpable negligence and breach of trust, the usual action of the Commission shall be to impose a penalty from a $1,000 fine to a 1 year suspension. . . .

* * *

(f) 475.25(1)(e) Violated any rule or order or provision under Chapters 475 and 455, F.S.- The usual action of the Commission shall be to impose a penalty from

an 8 year suspension to revocation and an administrative fine of $1,000.

* * *

(z) 475.42(1)(d) A sales associate shall not collect any money in connection with any real estate brokerage transaction except in the name of the employer- The usual action of the Commission shall be to impose a penalty of an administrative fine of $1,000 to a 3 year suspension.

* * *

(4)(a) When either the Petitioner or Respondent is able to demonstrate aggravating or mitigating circumstances . . . to a Division of Administrative Hearings [Administrative Law Judge] in a s. 120.57(1), Florida Statutes, hearing by clear and convincing evidence, the . . . [Administrative Law Judge] shall be entitled to deviate from the above guidelines in . . . recommending discipline . . . upon a licensee. . . .

(b) Aggravating or mitigating circumstances may include, but are not limited to, the following:

(b) Aggravating or mitigating circumstances may include, but are not limited to, the following:

1. The degree of harm to the consumer or public.

2. The number of counts in the Administrative Complaint.

3. The disciplinary history of the licensee.

4. The status of the licensee at the time the offense was committed.

> 5. The degree of financial hardship incurred by a licensee as a result of the imposition of a fine or suspension of the license.
>
> * * *

54. The Administrative Complaint issued in the instant case alleges that, in connection with the sale of the Piazza Property to Mr. Damiano, Respondent acted in violation of Section 475.25(1)(b), Florida Statutes, and Section 475.42(1)(d), Florida Statutes (thereby also violating Section 475.25(1)(e), Florida Statutes).

55. The statutory provisions that Petitioner claims Respondent has violated are "in effect, . . . penal statute[s] . . . This being true the[y] must be strictly construed and no conduct is to be regarded as included within [them] that is not reasonably proscribed by [them]. Furthermore, if there are any ambiguities included such must be construed in favor of the . . . licensee." Lester v. Department of Professional and Occupational Regulations, 348 So. 2d 923, 925 (Fla. 1st DCA 1977); see also Djokic v. Department of Business and Professional Regulation, Division of Real Estate, 29 Fla. L. Weekly D1370, 2004 WL 1196563 *2 (Fla. 4th DCA June 2, 2004)("We follow, of course, the well established rule that penal statutes--which this [Section 475.25(1)(d)1, Florida Statutes] surely is--are construed in favor of the licensee and

against the regulatory authority.); Whitaker v. Department of Insurance and Treasurer, 680 So. 2d 528, 531 (Fla. 1st DCA 1996)("Because the statute [Section 626.954(1)(x)4, Florida Statutes] is penal in nature, it must be strictly construed with any doubt resolved in favor of the licensee."); and Elmariah v. Department of Professional Regulation, Board of Medicine, 574 So. 2d 164, 165 (Fla. 1st DCA 1990)("Although it is generally held that an agency has wide discretion in interpreting a statute which it administers, this discretion is somewhat more limited where the statute being interpreted authorizes sanctions or penalties against a person's professional license. Statutes providing for the revocation or suspension of a license to practice are deemed penal in nature and must be strictly construed, with any ambiguity interpreted in favor of the licensee.").

56. At all times material to the instant case, Section 475.25(1)(b), Florida Statutes, has authorized the Commission to take disciplinary action against a Florida-licensed real estate sales associate who "[h]as 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. . . ."

57. For there to be a violation of Section 475.25(1)(b), Florida Statutes, there must be wrongful intent or scienter, or reckless indifference, on the part of the licensee. See Munch v. Department of Professional Regulation, 592 So. 2d 1136, 1143-44 (Fla. 1st DCA 1992)("It is clear that Section 475.25(1)(b) [Florida Statutes, which, in its first clause, authorizes the Commission to discipline a licensee 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] is penal in nature. As such, it must be construed strictly, in favor of the one against whom the penalty would be imposed. . . . Reading the first clause of Section 475.25(1)(b) (the portion of the statute which appellant was charged with having violated in Count I of the complaint), and applying to the words used their usual and natural meaning, it is apparent that it is contemplated that an intentional act be proved before a violation may be found."); Morris v. Department of Professional Regulation, 474 So. 2d 841, 843 (Fla. 5th DCA 1985)(grounds of "'fraud, misrepresentation, concealment, false promises, dishonest dealing by trick, scheme or device, culpable negligence and breach of trust in a business transaction in violation of section 475.25(1)(b) . . . alleged by the complaint all require a finding of wrongful intent or scienter . . . .");

and Department of Professional Regulation, Division of Real Estate v. Powell, No. 92-3751, 1993 WL 943473 *7 (Fla. DOAH 1993)(Recommended Order)("'Culpable negligence' has been defined as 'that reckless indifference to the rights of others which is equivalent to an intentional violation of them.'").

58. The wrongful intent or scienter required to establish a violation of Section 475.25(1)(b), Florida Statutes, may be proven by circumstantial evidence. See Walker v. Department of Business and Professional Regulation, 705 So. 2d 652, 654 (Fla. 5th DCA 1998)("DBPR presented undisputed circumstantial evidence that Walker's acts were intentional."); and Baker v. State, 639 So. 2d 103, 104 (Fla. 5th DCA 1994)("Intent is an operation of the mind and is not subject to direct proof, however, intent can be proven by circumstantial evidence."). For instance, it may be inferred from the licensee's actions. See Swanson v. State, 713 So. 2d 1097, 1101 (Fla. 4th DCA 1998)("Appellant's actions are sufficient to show intent to participate."); State v Breland, 421 So. 2d 761, 766 (Fla. 4th DCA 1982) ("Actions manifest intent."); G. K. D. v. State, 391 So. 2d 327, 328-29 (Fla. 1st DCA 1980)("Appellant testified that he did not intend to break the window, but the record indicates that he did willfully kick the window, and he may be presumed to have intended the probable consequences of his actions."); State v. West, 262 So. 2d 457, 458 (Fla. 4th DCA 1972)("[Intent] is not

usually the subject of direct proof. It is inferred from the acts of the parties and from the surrounding circumstances."); and Rolex Watch U.S.A., Inc. v. Dauley, 1986 WL 12432 (N.D. Cal. 1986)("A finding of wrongful intent may be inferred from defendant's actions.").

59. The mere failure to fulfill a promise or obligation, without more, does not constitute a violation of Section 475.25(1)(b), Florida Statutes. See Capital Bank v. MVB, Inc., 644 So. 2d 515, 521 (Fla. 3d DCA 1994)("[F]ailure to perform a promise does not constitute fraud, unless the bank intended not to perform the contract at the time it was entered."); John Brown Automation, Inc. v. Nobles, 537 So. 2d 614, 618 (Fla. 2d DCA 1988)("[W]ell accepted precedent leaves no doubt that the mere failure to perform a promise does not constitute fraud. The result we reach would, of course, be different if the record disclosed a specific purpose in the appellants not to perform the contract at the time it was entered."); Steyr Daimler Puch of America v. A & A Bicycle Mart, Inc., 453 So. 2d 1149, 1150 (Fla. 4th DCA 1984)("As a general rule fraud cannot be predicated upon a mere promise not performed."); Department of Professional Regulation v. Boyd, No. 89-6718, 1991 WL 833017 *31 (Fla. DOAH 1991)(Recommended Order)("[F]ailure to perform according to a contract of service is not tantamount to fraud regardless of who the parties to the contract are."); and

Department of Professional Regulation, Division of Real Estate v. O'Neill, No. 87-1210, 1988 WL 618039 *6 (Fla. DOAH 1988)(Recommended Order)("A promise that is merely unfulfilled, however, is not necessarily a false promise which would justify disciplinary action against the broker who makes it.").

60. At all times material to the instant case, Section 475.25(1)(e), Florida Statutes, has authorized the Commission to take disciplinary action against a Florida-licensed real estate sales associate who "[h]as violated any of the provisions of this chapter [Chapter 475, Florida Statutes] or any lawful order or rule made or issued under the provisions of this chapter or chapter 455."

61. Among the provisions of Chapter 475, Florida Statutes, is Section 475.42(1)(d), Florida Statutes, which provides as follows:

> A sales associate may not collect any money in connection with any real estate brokerage transaction, whether as a commission, deposit, payment, rental, or otherwise, except in the name of the employer and with the express consent of the employer; and no real estate sales associate, whether the holder of a valid and current license or not, shall commence or maintain any action for a commission or compensation in connection with a real estate brokerage transaction against any person except a person registered as her or his employer at the time the sales associate performed the act or rendered the service for which the commission or compensation is due.

The version of Section 475.42, Florida Statutes, in effect in August of 2001, when Respondent allegedly violated Section 475.42(1)(d), Florida Statutes, was, in all material respects, substantially identical to the current version.[11]

62. Section 475.42(1)(d), Florida Statutes, does not prohibit a real estate sales associate who has changed brokers-employers from receiving from his former broker-employer, without the "express consent" of his present broker-employer, a check, made payable to the associate, for services rendered by the associate during the associate's employment with the former broker-employer. See Mitchell v. Frederich, 431 So.2d 727, 728 (Fla. 3d DCA 1983)("The evidence is without dispute that the contract between the broker and his salesman was that a salesman who procured an exclusive right of sale listing would be entitled to 60% of that which the broker received. Section 475.42 Florida Statutes (1979) cannot prevent Mitchell as a salesman from receiving the benefit of the commission to be paid under the exclusive right of sale agreement which he negotiated simply because he is no longer in the employ of the broker, through no fault of either of the parties.").

63. The specific conduct alleged to constitute the violations of Section 475.25(1)(b), Florida Statutes, and Section 475.42(1)(d), Florida Statutes, of which Respondent is accused in the Administrative Complaint is identified in

numbered paragraphs 11 and 12 of the Administrative Complaint's "[e]ssential [a]llegations of [m]aterial [f]act," which read as follows:

> 11 On or about August 9, 2001, without the authorization of GRU or Schevers [and contrary to Schevers' express instructions[12]] Respondent delivered the deposit check to the closing agent.
>
> 12. On or about August 9, 2001, without the authorization of GRU or Schevers, Respondent received a commission check payable to Respondent from the listing broker, Allen Real Estate.

Any violation found by the Commission in this case must be based on these alleged acts described in the Administrative Complaint and no other conduct (including any misrepresentations Respondent may have made to Mr. Sprauer, Mr. Schevers, or anyone else or Respondent's failure to have shared with Mr. Sprauer[13] the commission he received from Allen as a result of the sale of the Piazza Property.). See Jones v. Department of Business and Professional Regulation, 2004 WL 1175267 *1; Aldrete v. Department of Health, 2004 WL 825514 *1; Shore Village Property Owners' Association, Inc. v. Department of Environmental Protection, 824 So. 2d at 210; Hamilton v. Department of Business and Professional Regulation, 764 So. 2d at 778; Lusskin v. Agency for Health Care Administration, 731 So. 2d at 69; Ghani v. Department of Health, 714 So. 2d at 1114-15; Cottrill v. Department of Insurance, 685 So. 2d at 1372; Delk v.

Department of Professional Regulation, 595 So. 2d at 967; and Wray v. Department of Professional Regulation, Board of Medical Examiners, 435 So. 2d at 315.

64. Petitioner clearly and convincingly established that, as alleged in the Administrative Complaint, "Respondent delivered the deposit check to the closing agent" contrary to the instructions Mr. Schevers had given him to "not . . . deliver" the check until the HUD Statement was "changed to indicate that [Unlimited] was a cooperating broker entitled to a commission." Petitioner contends that, in engaging in such conduct, Respondent acted in derogation of his fiduciary relationship with Unlimited and thus violated Section 475.25(1)(b), Florida Statutes. It is true that a real estate sales associate "owes a duty of loyalty to the broker with whom he associates" and must act diligently to carry out the broker's reasonable directives. Re/Max International, Inc. v. Smythe, Cramer Co., 265 F. Supp. 2d 882, 898 (N.D. Ohio 2003). An associate's failure to act in accordance with this obligation, however, is outside the regulatory sphere of Chapter 475, Florida Statutes. As the Fourth District of Appeal recently stated:

> Chapter 475, was enacted for the purpose of protecting the public in dealings with real estate agents. The role of the judiciary is usurped if the commission is permitted to decide charges which are predicated upon

> factual matters pertaining solely to the internal business affairs of a real estate agency. The administrative processes of the commission should be directed at the dishonest and unscrupulous operator, one who cheats, swindles or defrauds the *General* public in handling real estate transactions.

(internal quotations omitted). Djokic v. Department of Business and Professional Regulation, Division of Real Estate, 2004 WL 1196563 *2, quoting from Cannon v. Florida Real Estate Commission, 221 So. 2d 240, 241 (Fla. 4th DCA 1969).

65. Moreover, the directive that Mr. Schevers gave Respondent was not a reasonable one. Had Respondent followed Mr. Schevers' instructions and "not . . . deliver[ed]" the check, thereby holding up the closing contrary to the best interests of the buyer and seller, then there would have been a "breach of trust" of the type contemplated by Section 475.25(1)(b), Florida Statutes. See Wallace v. Odham, 579 So. 2d 171, 174-76 (Fla. 5th DCA 1991)("Odham steadfastly maintains that his only purpose in addressing the school board at its June 10, 1988, meeting was to protect his commission. Unquestionably, Odham was entitled to protect his commission and to address the school board. However, while doing so, he had the primary obligation to exercise his fiduciary[14] duty to his principal. Florida courts elevate the level of duty of a broker to that of an attorney or banker in that the broker's relation to the public exacts the highest degree of trust and

confidence. . . . [Odham's] misdirected efforts to protect his commission went beyond the bounds of propriety when he insisted that, if the terms desired by him were not inserted in the purchase agreement, there should be no negotiated purchase but an acquisition by condemnation. A broker has no superior right to insist upon terms to be inserted in a contract between seller and buyer. The listing agreement even provides that, while the broker was receiving an exclusive listing agreement, the terms of sale had to be acceptable to the seller. Odham also lost sight of the rather obvious fact that, absent his signature on the purchase agreement, that document could not change the terms of his agreement with Wallace. Odham's proper course of action was simple: allow the transaction to close without attempting to thwart the sale, thereby entitling him to a commission in accordance with the requirement of his listing agreement that a sale take place. If the amount of the commission is unacceptable or inaccurate under the broker's interpretation of the listing agreement, the court system is still available to resolve the differences."); and Hayber v. Department of Consumer Protection, 36 Conn. L. Rptr. 603, 2004 WL 574662 *4-5 (Conn. Super. Ct. March 8, 2004)("Plaintiff Hayber was a party to the commission agreement. However, he was not a party to the escrow agreement. The Sale and Purchase Agreement contained three separate agreements: (a) the underlying real estate agreement;

(b) the escrow agreement; and (c) the broker's commission agreement. Regarding the escrow agreement, Hayber was a fiduciary to the parties, but he was not a party and his consent was not required to release the funds. Simply because Hayber was a party to the broker's commission agreement, he was not a party to the escrow agreement. Therefore, his consent was not needed to release the funds in escrow. The escrow agreement was created by the parties to facilitate the administration of the real estate transaction. Hayber's acceptance of his duties as an escrow agent do not make him a party to the Agreement or permit him to condition the discharge of the escrow to the payment of his disputed commission. Nothing in the escrow agreement requires Hayber's consent as a condition for the discharge of the funds. . . . Hayber breached his fiduciary duties as an escrow agent by withholding the funds in escrow against the agreement of the parties. The Real Estate Commission has ordered Hayber to return the $16,000.00 and has imposed statutory sanctions to discipline Hayber. For the foregoing reasons, the decision of the Real Estate Commission is affirmed and Plaintiff Hayber's appeal is dismissed."). To find Respondent guilty of a Section 475.25(1)(b) violation for failing to follow Mr. Schevers' instructions to "withhold[] the funds in escrow against the agreement of the parties" if the HUD Statement was not changed to reflect that Unlimited was

"entitled to a commission" would turn the statute on its head and would serve to encourage the very activity it was designed to deter. Instructing Respondent to request that the HUD Statement be changed to reflect Unlimited's share of the commission was not inappropriate.[15] Mr. Schevers, however, crossed the line of propriety when he directed Respondent to "withhold[] the funds in escrow" if the requested change was not made, particularly inasmuch as the contents of the HUD Statement did not affect Unlimited's entitlement to share the commission resulting from the sale of the Piazza Property (as provided for in the Sales Contract). See Hampden Real Estate, Inc. v. Metropolitan Management Group, 2003 WL 23206072 *5 (E.D. Pa. 2003)("The regulatory genesis of the HUD-1 Statement, coupled with the fact that a closing agent prepared the document, and the absence of case law giving the HUD-1 contractual force, supports the conclusion that this is simply a disclosure document and not a contractual amendment to the Agreement of Sale.").

66. Finally, it cannot be said, without hesitation, that Respondent's failure to do as he was told by Mr. Schevers was the product of ill intent, especially given the lack of clear and convincing evidence establishing that Respondent had any evil motive, financial[16] or otherwise, to disobey his employer and thereby place his employment in jeopardy. While, as noted

above, wrongful intent may be proven by circumstantial evidence, the circumstances shown to be present in the instant case do not constitute clear and convincing proof that Respondent acted with such wrongful intent when he failed to comply with the directive he had been given by Mr. Schevers.

67. With respect to the other alleged act of misconduct, Respondent's "receiv[ing] a commission check payable to Respondent from the listing broker, Allen," Petitioner established by clear and convincing evidence that Respondent engaged in such conduct. His receiving this check, however, did not constitute a violation of Section 475.42(1)(d), Florida Statutes, as alleged by Petitioner, since these monies were for services rendered by Respondent for Allen at a time when Allen was his employer and he therefore did not need the "express consent" of Unlimited, his employer at the time he was given the check by Allen, to receive, in his own name, these monies that Allen owed him. See Mitchell v. Frederich, 431 So.2d at 728.

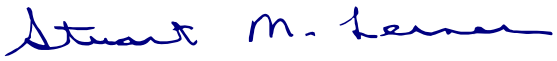
68. In view of the foregoing, both counts of the Administrative Complaint must be dismissed.

RECOMMENDATION

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

RECOMMENDED that the Commission issue a final order dismissing the Administrative Complaint issued against Respondent in the instant case in its entirety.

DONE AND ENTERED this 7th day of July, 2004, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of July, 2004.

ENDNOTES

[1] The hearing was originally scheduled for February 26, 2004, but was continued at Respondent's request.

[2] Petitioner's Exhibit 5 is Respondent's response to Petitioner's First Request for Admissions. In his response, Respondent admitted the matters asserted in numbered paragraphs 2, 3, 7 (first sentence), 9, 12 (first sentence) and 13 of the Administrative Complaint.

[3] None of these attendees testified at the final hearing in this case.

[4] $4,200.00 is 60 percent of the $7,000.00 commission Allen received on the sale of the Piazza Property.

[5] Respondent had "borrowed money on quite a few occasions" from the owner/broker of Allen. These loans were in the form of "advances" of anticipated commissions. (Respondent had also "requested advances [during his employment with Unlimited), but [Mr. Schevers had routinely] refused" to grant these requests.)

[6] Although the Sales Contract did indicate that Unlimited would be paid a commission as the "cooperating broker," it neither specified how much Unlimited would receive, nor described how the amount would be determined.

[7] It is not clear from the evidentiary record what direct steps, if any, Mr. Schevers has taken (on behalf of Unlimited) to recover this $3,500.00 (which Unlimited has still not been paid).

[8] The evidentiary record does not reveal what amount the "net" would have been, and it therefore cannot be determined whether Respondent's and Mr. Sprauer's percentage take (as a team) of the $3,500.00 would have been greater than, less than, or the same as their percentage take of the $7,000.00 commission Allen received.

[9] Prior to July 1, 2003, the effective date of Chapter 2003-164, Laws of Florida, real estate "sales associates" were referred to in Chapter 475, Florida Statutes, as real estate "salespersons."

[10] In Scott, "[t]he only evidence which the appellee presented at the hearing was a hearsay report which would not have been admissible over objection in a civil action." The court held that "this evidence was not sufficient in itself to support the Board's findings," notwithstanding that that there was no objection to its admission into evidence by the licensee (who was absent from the hearing)." Id.; see also Yost v. Unemployment Appeals Commission, 848 So. 2d 1235, 1238 (Fla. 2d DCA 2003)(unobjected to hearsay evidence insufficient, standing alone, to support a finding of fact); Brown v. International Paper Co., 710 So. 2d 666, 668 (Fla. 2d DCA 1998)(same); Doyle v. Florida Unemployment Appeals Commission, 635 So. 2d 1028, 1032 (Fla. 2d DCA 1994)(same); and Harris v. Game and Fresh

Water Fish Commission, 495 So. 2d 806, 809 (Fla. 1st DCA 1986)(same).

[11] It read, in pertinent part, as follows:

> No salesperson shall collect any money in connection with any real estate brokerage transaction, whether as a commission, deposit, payment, rental, or otherwise, except in the name of the employer and with the express consent of the employer; and no real estate salesperson, whether the holder of a valid and current license or not, shall commence or maintain any action for a commission or compensation in connection with a real estate brokerage transaction against any person except a person registered as her or his employer at the time the salesperson performed the act or rendered the service for which the commission or compensation is due.

[12] These instructions are described in numbered paragraph 10 of the Administrative Complaint's "[e]ssential [a]llegations of [m]aterial [f]act."

[13] Mr. Sprauer is not even mentioned, by name or otherwise, in the Administrative Complaint.

[14] A "fiduciary," as that term is used in Chapter 475, Part I, Florida Statutes, is defined in Section 475.01(1)(f), Florida Statutes, as follows:

> "Fiduciary" means a broker in a relationship of trust and confidence between that broker as agent and the seller or buyer as principal. The duties of the broker as a fiduciary are loyalty, confidentiality, obedience, full disclosure, and accounting and the duty to use skill, care, and diligence.

[15] The evidentiary record does not reveal whether Respondent made such a request at the closing.

[16] See endnote 8, supra.

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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.