

**STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
FLORIDA REAL ESTATE COMMISSION**

DEPARTMENT OF BUSINESS AND
PROFESSIONAL REGULATION,
DIVISION OF REAL ESTATE

Petitioner,

vs.

DAVID L. RHOTEN, II,

Respondent(s).

Final Order No. BPR-2006-07193 Date: **9-28-06**
FILED
Department of Business and Professional Regulation
AGENCY CLERK
Sarah Wachman, Agency Clerk
By: *Brandon M. Nitchel*

DBPR Case Nos. 200083812
200084716
DOAH Case No: 04-4449PL

2006 SEP 29 P 1:30
FILED
DIVISION OF
ADMINISTRATIVE
HEARINGS

FINAL ORDER

THIS CAUSE came before the FLORIDA REAL ESTATE COMMISSION ("Commission") pursuant to Sections 120.569 and 120.57(1), Florida Statutes, on September 20, 2005, in Orlando, Orange County, Florida, for the purpose of considering the Administrative Law Judge's Recommended Order in the above styled cause. A copy of said Recommended Order is attached hereto and incorporated herein as Exhibit "A."

The Petitioner was represented by Mr. Bennett M. Miller, Esquire, Chief Attorney for the Division of Real Estate, Orlando, Orange County, Florida. The Respondent was represented by Lisa Shearer Nelson of Tallahassee, Leon County, Florida. The Commission was represented by Barbara Edwards of Tallahassee, Leon County, Florida. After a review of the complete record in this matter, including consideration of the Administrative Law Judge's Recommended Order and

the arguments of each party, the Commission makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The Administrative Law Judge's findings of fact as set forth in the Exhibit "A" are approved, adopted, and incorporated herein by reference.

2. There is competent, substantial evidence to support the Administrative Law Judge's findings of fact as adopted by the Commission.

CONCLUSIONS OF LAW

3. The Board has jurisdiction of this matter pursuant to Sections 120.569 and 120.57(1), Florida Statutes, Chapter 475, Part I, Florida Statutes, and Chapter 61J2 of the Florida Administrative Code.

4. The Administrative Law Judge's conclusions of law as set forth in Exhibit "A" are approved, adopted, and incorporated herein by reference, as amended and adopted by the rulings on Petitioner's Exceptions by the Commission as set forth below.

5. There is competent, substantial evidence to support the conclusions of law in Exhibit "A", as amended and adopted by the Commission as set forth below.

EXCEPTIONS

6. Petitioner's Exception I was considered and ADOPTED, striking Paragraph 28 from the Recommended Order.

7. Petitioner's Exception II was considered and ADOPTED, striking Paragraph 29 from the Recommended Order.

8. Petitioner's Exception III was considered and ADOPTED, striking from Paragraph 30

the following two sentences: "... However, the attorney accurately characterized as premature the attempt of the Simses to use the financing contingency to cancel the contract. ... Also, the demand of Ms. Bardach's lawyer by letter dated July 20, 2000, and the complaint of Ms. Bardach were not premature because the transaction should have closed by the end of June 2000. ..."

9. Petitioner's Exception IV was considered and ADOPTED. The Commission finds that a more reasonable conclusion of law is that the past disciplinary history of the Respondent is an additional aggravating circumstance.

10. Petitioner's Exception V was considered and ADOPTED.

11. Petitioner's Exception VI was withdrawn by the Petitioner.

DISPOSITION

12. The Commission adopts the Administrative Law Judge's Recommendation, but after a complete review of the record, the Commission substitutes a penalty of revocation.

13. By imposing a penalty of revocation for one violation of Section 475.25 (1)(k), the Commission states with particularity the following reasons and by citing to the record.

a. The Respondent failed to maintain escrow funds and that a shortage of funds occurred due to the repeated theft by an employee that went undetected for a period of time, as found by the Administrative Law Judge in his Recommended Order at his Findings of Fact in Paragraph 17 and his Conclusions of Law at Paragraph 35.

b. The shortage of escrow funds was caused by the Respondent delegating important duties to an employee that led to allowing unauthorized disbursement by allowing an employee to use a rubber stamp to issue checks which was then used for the employee's use, as found by the Administrative Law Judge in his Recommended Order at his Findings of Fact in Paragraph

11 and his Conclusions of Law at Paragraph 35.

c. The Respondent failed to sign each escrow reconciliation statement in the crucial month leading up to the shortage of funds which may have alerted the licensee to the theft and that by delegating this important task to an employee who used a rubber stamp, detection of the theft of funds was prevented, as found by the Administrative Law Judge in his Recommended Order at his Findings of Fact in Paragraph 11 and Conclusions of Law at Paragraph 35.

14. By imposing a penalty of revocation for one violation of Section 475.25 (1)(e), Florida Statutes, by virtue of a violation of Florida Administrative Code Rule 61J2-14.012, the Commission states with particularity the following reasons and by citing to the record:

a. Respondent was not signing reconciliation statements for the Castles escrow account and the last monthly reconciliation statement that Respondent saw was for July 2000, as found by the Administrative Law Judge in his Recommended Order at his Findings of Fact in paragraph 11 and Conclusions of Law at paragraph 36.

b. Respondent issued an insufficient funds check for \$54,000.00 on October 23 or 24, 2000, as found by the Administrative Law Judge in his recommended order at his findings of Fact in paragraph 13 and Conclusions of Law at paragraph 39.

c. Respondent allowed a shortage in his trust account of about \$658,000.00 and allowed his employee, Ms. McMahel to pay herself almost \$400,000.00 on numerous trust account checks, as found by the Administrative Law Judge in his Recommended Order at his Findings of Fact in paragraph 17 and Conclusions of Law at paragraph 35.

15. By imposing a penalty of revocation for another violation of section 475.25(1)(e), Florida Statutes, by virtue of a violation of Florida Administrative Code Rule 61J2-10.032(1)(a),

the Commission states with particularity the following reasons and by citing to the record:

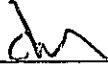
a. Respondent did not timely invoke one of the settlement procedures in the Sims transaction regarding the earnest money, as found by the Administrative Law Judge in his Recommended Order at his Findings of Fact in paragraphs 6, 7, and 8 and Conclusions of Law at paragraphs 30 and 31.

WHEREFORE, it is hereby ORDERED and ADJUDGED that:

1. The Respondent's real estate license is hereby revoked.
2. This Order is effective when filed with the Clerk of the Department of Business and Professional Regulation.

DONE and ORDERED this 8th day of September, 2006.

FLORIDA REAL ESTATE COMMISSION



By Dennis J. Yecke
Deputy Secretary for Professional Regulation

NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this final order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a Notice of Appeal with the agency clerk of the Department of Business and Professional Regulation and a second copy, accompanied by filing fees prescribed by law, with the district court of appeal in the appellate district where the party resides. The Notice of Appeal must be filed within thirty (30) days of rendition of the order to be reviewed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order has been provided by U.S. Mail to Lisa Shearer Nelson, Esq., Holtzman Equels, 433 N. Magnolia Drive, Tallahassee, Florida 32308; Gary J. Nagle, Esq., 14255 US Highway 1, Suite 223, Juno Beach, Florida 33408; Robert E. Meale, Administrative Law Judge, Division of Administrative Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida 32399-3060; James P. Harwood, Chief Attorney, Division of Real Estate, 400 W. Robinson Street, Suite 801N, Orlando, Florida 32801; and Tom Barnhart, Assistant Attorney General, Office of the Attorney General, PL-01, The Capitol, Tallahassee, Florida 32399-1050, on this 28th day of September, 2006.

Sarah Wickman