

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF REAL ESTATE,)
)
Petitioner,)
)
vs.) Case No. 08-2165PL
)
JUAN C. CHAVARRIAGA,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case before Larry J. Sartin, an Administrative Law Judge of the Division of Administrative Hearings, on June 30, 2008, by video teleconference at sites in Lauderdale Lakes and Tallahassee, Florida.

APPEARANCES

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

For Respondent: Alan Glenn, Esquire
14629 Southwest 104th Street, No. 432
Miramar, Florida 33186

STATEMENT OF THE ISSUES

The issues in this case are whether Respondent, Juan C. Chavarriaga, committed the violations alleged in a four-count Administrative Complaint issued by Petitioner, the Department of Business and Professional Regulation, Division of Real Estate, on January 17, 2008, and, if so, what disciplinary action should be taken against his Florida real estate broker associate license.

PRELIMINARY STATEMENT

On January 17, 2008, the Department of Business and Professional Regulation, Division of Real Estate issued a four-count Administrative Complaint, FDBPR Case No 2007004262, against Juan C. Chavarriaga, who holds a Florida real Estate broker associate license, in which it alleged that Respondent had violated the following provisions of Florida law: (a) Section 475.25(1)(b) Florida Statutes (2006)(Count I); Section 475.25(1)(e), Florida Statutes (2006), by violating Section 475.42(1)(b), Florida Statutes (2006)(Count II); Section 475.25(1)(e), Florida Statutes (2006), by violating Section 475.42(1)(d), Florida Statutes (2006)(Count III); and Section 475.25(1)(e), Florida Statutes (2006), by violating Florida Administrative Code Rule 61J2-14.009 and Section 475.25(1)(k), Florida Statutes (2006)(Count IV).

Respondent executed an Election of Rights form disputing the material facts of the Administrative Complaint and requesting a formal administrative hearing. Through counsel, Respondent also filed an Answer and Affirmative Defenses in response to the Administrative Complaint.

On May 2, 2008, Petitioner filed the Administrative Complaint, Respondent's request for hearing, Respondent's Answer and Affirmative Defenses, and a letter requesting that an administrative law judge be assigned to hear the matter. The request for hearing was designated DOAH Case No. 08-2165PL and was assigned to the undersigned.

On May 12, 2008, the final hearing of this matter was scheduled for June 30, 2008, by Notice of Hearing by Video Teleconference.

On June 10, 2008, Respondent filed Respondent's Motion for a Continuance to Prevent Material Prejudice to the Respondent, and Supporting Memorandum of Law. In the Motion, counsel for Respondent represented that on or about April 4, 2008, he had been informed by Respondent's spouse that she believed that Respondent had been taken into custody by the United States Immigration and Naturalization Service (hereinafter referred to as the "INS") and that Respondent's whereabouts were unknown. Counsel for Respondent, therefore, requested a continuance of the final hearing until Respondent is located.

On June 16, 2008, Petitioner filed Petitioner's Objection to Respondent's Motion for Continuance to Prevent Material Prejudice to the Respondent. In the Objection, Petitioner represented that Respondent will be/or has been deported from the United States and attached an order entered by the United States Court of Appeals for the Eleventh Circuit in the case of Juan Carlos Chavarriaga Orozco v. U.S. Attorney General, Case No 07-13430, denying a Petitioner for Review of a Decision of the Board of Immigration Appeals, a decision denying Respondent's motion to reopen his removal proceedings.

On June 25, 2008, a hearing was held by telephone on the motion for continuance. After hearing argument from the parties, it was concluded that Respondent has been deported back to Columbia and that it was not likely that he would be returning to the United States any time in the near future. Therefore, the motion for continuance was denied. Counsel for Respondent was informed, however, that Respondent would be given an opportunity to file a post-hearing deposition (in person or by telephone) of his testimony. It was also agreed that Petitioner would be given the opportunity to file the deposition testimony of one of its witnesses and file it post-hearing.

At the final hearing, Petitioner presented the testimony of German Ocampo and Veronica Hardy. Petitioner also had admitted Petitioner's Exhibits 1 through 3. Respondent had admitted

Respondent's Exhibits 1 and 2. Those exhibits were filed August 27, 2008.

At the close of the final hearing, the parties were given until July 31, 2008, to inform the undersigned whether the authorized late-filed depositions would be taken. During a subsequent telephone conference call, the parties were given until August 1, 2008, to inform the undersigned of their respective decisions. Absent notice of a decision to file a post-hearing deposition, the parties were informed that they had until August 18, 2008, to file proposed recommended orders.

Neither party informed the undersigned of their intent to file post-hearing depositions. Petitioner filed Petitioner's Proposed Recommended Order on August 14, 2008. That proposed order has been fully considered.

On August 20, 2008, Respondent filed "Petitioner's [sic] Motion for Enlargement of Time to Complete Proposed Order." Counsel for Respondent represented that he had not been able to timely file a proposed order due to Tropical Storm Fay. On August 25, 2008, Respondent filed Respondent's Proposed Recommended Order. Counsel for Respondent obviously considered and responded to Petitioner's Proposed Recommended Order in preparing Respondent's Proposed Recommended Order. Therefore, counsel for Petitioner was contacted by the undersigned's administrative assistant to determine whether he had any

objection to Respondent's Proposed Recommended Order being considered. Counsel for Petitioner indicated he had no objection. Therefore, the Motion for additional time to file a proposed recommended order filed by Respondent is hereby granted. Respondent's Proposed Recommended Order has been fully considered before issuing this Recommended Order.

All further references to the Florida Statutes in this Recommended Order are to the 2006 edition, unless otherwise noted.

FINDINGS OF FACT

1. Petitioner, the Department of Business and Professional Regulation, Division of Real Estate (hereinafter referred to as the "Division"), is an agency of the State of Florida created by Section 20.165, Florida Statutes, and charged with the responsibility for the regulation of the real estate industry in Florida pursuant to Chapter 475, Florida Statutes.

2. Respondent, Juan C. Chavarriaga, is, and was at the times material to this matter, the holder of a Florida real estate broker associate license, license number 3130017, issued by the Division.

3. At all times relevant, Mr. Chavarriaga was employed as a real estate associate with Ocampo & Alvarez Realty LLC.

4. On or about March 30, 2006, Mr. Chavarriaga rented real property (hereinafter referred to as the "Subject Property") to

Carlos Alvarez for an annual lease amount of \$18,000.00 or \$1,500.00 per month (Pre-hearing Stipulation). The Subject Property was rented pursuant to a Residential Lease for Single Family Home and Duplex agreement (hereinafter referred to as the "Lease") which was entered into on or about March 30, 2006 (Petitioner's Exhibit 5).

5. Mr. Chavarriaga, according to an admission he made to Veronica Hardy, a Division investigator, received rent paid for the rental of the Subject Property pursuant to the Lease.

6. According to an admission of Mr. Chavarriaga, the Subject Property was owned by Claudia Mejia.

7. Mr. Chavarriaga's real estate broker employer was unaware of the Lease or Mr. Chavarriaga's involvement therein.

8. The Lease was entered into without written permission from Ms. Mejia, according to another admission of Mr. Chavarriaga. The evidence failed to prove, however, that Ms. Mejia was unaware of the Lease or that she had not verbally authorized Mr. Chavarriaga to rent the Subject Property on her behalf.

9. Mr. Chavarriaga also admitted to Ms. Hardy that he received rents pursuant to the Lease which were deposited with a company named Maux Management. What Maux Management is was not proved. Nor was it proved that Mr. Chavarriaga owned Maux Management.

10. As to what was done with moneys received pursuant to the Lease, the only competent substantial evidence again consists of an admission by Mr. Chavarriaga: he told Ms. Hardy that the rents were deposited with Maux Management, which then paid part of the proceeds for reasonable expenses related to the Lease and deposited the remainder in the account of Ms. Mejia.

CONCLUSIONS OF LAW

A. Jurisdiction.

11. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2008).

B. The Burden and Standard of Proof.

12. The Division seeks to impose penalties against Mr. Chavarriaga pursuant to the Administrative Complaint that include the suspension or revocation of his real estate associate license. Therefore, the Division has the burden of proving the specific allegations of fact that support its charges by clear and convincing evidence. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); and Pou v. Department of Insurance and Treasurer, 707 So. 2d 941 (Fla. 3d DCA 1998).

13. What constitutes "clear and convincing" evidence was described by the court in Evans Packing Co. v. Department of Agriculture and Consumer Services, 550 So. 2d 112, 116, n. 5 (Fla. 1st DCA 1989), as follows:

. . . [C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the evidence 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 the firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established. Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

See also In re Graziano, 696 So. 2d 744 (Fla. 1997); In re Davey, 645 So. 2d 398 (Fla. 1994); and Walker v. Florida Department of Business and Professional Regulation, 705 So. 2d 652 (Fla. 5th DCA 1998)(Sharp, J., dissenting).

C. The Charges of the Administrative Complaint.

14. Section 475.25, Florida Statutes, provides the Division with authority to discipline a licensee for committing any of a number of offenses defined therein. In this case, the Division has charged Mr. Chavarriaga with having violated the following provisions of Section 475.25, Florida Statutes: (a) Section 475.25(1)(b) Florida Statutes (Count I); Section 475.25(1)(e), Florida Statutes, by violating Section 475.42(1)(b), Florida Statutes(Count II); Section 475.25(1)(e),

Florida Statutes, by violating Section 475.42(1)(d), Florida Statutes (Count III); and Section 475.25(1)(e), Florida Statutes, by violating Florida Administrative Code Rule 61J2-14.009 and Section 475.25(1)(k), Florida Statutes (Count IV).

15. Sections 475.25(1)(b), (e), and (k), Florida Statutes, define the following offenses:

(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) [H]as failed, if a sales associate, 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. . . .

16. Section 475.42, Florida Statutes, defines further "violations." Relevant to this case, Sections 475.42(1)(b) and (d), Florida Statutes, define the following violations:

(b) A person licensed as a sales associate may not operate as a broker or operate as a sales associate for any person not registered as her or his employer.

. . . .

(d) 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.

17. Florida Administrative Code Rule 61J2-14.009 provides the following:

Every sales associate who receives any deposit, as defined in Rule 61J2-14.008, Florida Administrative Code, shall deliver the same to the broker or employer no later than the end of the next business day

following receipt of the item to be deposited.

18. The Division's case consisted primarily of hearsay evidence; statements made to the Division's investigator. See § 90.801, Fla. Stat. (2008). Although "[h]earsay evidence my used for the purpose of supplementing or explaining other evidence," presented in this matter, "it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." § 120.57(1)(c), Fla. Stat. (2008). Other than admissions against interest made by Mr. Chavarriaga, hearsay evidence presented by the Division was not subject to any exception to the hearsay rule and was not sufficient in itself to support a finding of fact. See § 90.804(2)(c), Fla. Stat. (2008). Therefore, the only facts proved by the Division were that Mr. Chavarriaga was involved in the rental of the Subject Property; that he received rental payments pursuant to the Lease which he did not deposit with his employing real estate broker; and his employing real estate broker was not aware of the Lease. The Division's allegations that Mr. Chavarriaga rented the Subject Property without authorization from the owner and that he directed rental proceeds to a company he owned were not proven.

D. Count I: Alleged Violation of Section 475.25(1)(b), Florida Statutes.

19. The evidence failed to prove that Mr. Chavarriaga is guilty of any misrepresentation, dishonest dealing by trick, scheme or device, culpable negligence, or breach of trust in any business transaction as alleged in Count I of the Administrative Complaint.

E. Count II: Alleged Violation of Section 475.25(1)(e), Florida Statutes, Due to Violation of Section 475.42(1)(b), Florida Statutes.

20. The Division alleged in Count II of the Administrative Complaint that Mr. Chavarriaga was guilty of having operated as a broker while licensed as a sales associate in violation of Section 475.42(1)(b), Florida Statutes, and therefore, in violation of Section 475.25(1)(e), Florida Statutes. The evidence failed to support this allegation.

F. Count III: Alleged Violation of Section 475.25(1)(e), Florida Statutes, Due to Violation of Section 475.42(1)(d), Florida Statutes.

21. The Division proved clearly and convincingly that Mr. Chavarriaga collected money in connection with a real estate brokerage transaction without the express consent of his employer and without collecting the money in his employer's name.

22. Mr. Chavarriaga is, therefore, guilty of having violated Section 475.25(1)(e), Florida Statutes, by reason of his violation of Section 475.42(1)(d), Florida Statutes.

G. Count IV: Alleged Violation of Section 475.25(1)(e), Florida Statutes, Due to Violation of Florida Administrative Code Rule 61J2-14.008 and Section 475.42(1)(k), Florida Statutes.

23. The evidence failed to prove that Mr. Chavarriaga received any "deposit" related to the Lease. Therefore, Mr. Chavarriaga did not violate Florida Administrative Code Rule 61J2-14.008 as alleged in the Administrative Complaint.

24. The Division did prove, however, that Mr. Chavarriaga failed to deposit rental payments he collected under the Lease to his employing real estate broker in violation of Section 475.25(1)(k), Florida Statutes.

H. The Appropriate Penalty.

25. The only issue remaining for consideration is the appropriate disciplinary action which should be taken by the Florida Real Estate Commission (hereinafter referred to as the "Commission"), against Mr. Chavarriaga for the violations that were proved. To answer this question it is necessary to consult the "disciplinary guidelines" of the Commission set forth in Florida Administrative Code Chapter 61J2-24. Those guidelines effectively place restrictions and limitations on the exercise of the Commission's disciplinary authority. 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 § 455.2273(5), Fla. Stat.

26. In addition to the imposition of discipline pursuant to the guidelines, Florida Administrative Code Rule 61J2-24(2) authorizes the Commission to place a licensee on probation for a period of time and subject to such conditions as the Commission specifies.

27. Finally, Florida Administrative Code Rule 61J2-42(4) provides for the consideration of certain aggravating and mitigating circumstances, but only if proper notice is given. No such notice was provided in this proceeding.

28. The Division has proved that Mr. Chavarriaga violated Section 475.25(1)(e), Florida Statutes, by reason of having violated Section 475.42(1)(d), Florida Statutes (Count III). The penalty range for this violation provided in Florida Administrative Code Rule 61J2-24.001(3)(z) is a three-year suspension to revocation.

29. The Division has also proved that Mr. Chavarriaga violated Section 475.25(1)(e), Florida Statutes, by reason of having violated Section 475.42(1)(k), Florida Statutes (Count IV). The penalty range for this violation provided in Florida Administrative Code Rule 61J2-24.001(3)(hh) is an administrative fine not to exceed \$5,000.00 to a six month suspension.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered by the Department of Business and Professional Regulation, Division of Real Estate:

1. Dismissing Counts I and II of the Administrative Complaint;
2. Finding that Mr. Chavarriaga is guilty of the violation alleged in Counts III and IV of the Administrative Complaint; and
3. Suspending Mr. Chavarriaga's real estate associate license for a period of one year and requiring that he pay an administrative fine of \$1,000.00.

DONE AND ENTERED this day of 8th day of September, 2008, in Tallahassee, Leon County, Florida.



LARRY J. SARTIN
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of September, 2008.

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 should be filed with the agency that will issue the final order in these cases.