

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF REAL ESTATE,)
)
Petitioner,)
)
vs.) Case No. 08-3687PL
)
CURT DOUGLAS FRANCIS,)
)
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 September 19, 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: Daniel Villazon, Esquire
1420 Celebration Boulevard, Suite 200
Celebration, Florida 34747

STATEMENT OF THE ISSUES

The issues in this case are whether Respondent, Curt Douglas Francis, committed violations alleged in a three-count Administrative Complaint issued by Petitioner, the Department of Business and Professional Regulation, Division of Real Estate, on April 17, 2007, and, if so, what disciplinary action should be taken against his Florida real estate broker associate license.

PRELIMINARY STATEMENT

On April 17, 2007, the Department of Business and Professional Regulation, Division of Real Estate issued a three-count Administrative Complaint, FDBPR Case No. 2006014394, against Curt Douglas Francis, who holds a Florida real estate broker license, in which it alleged that Respondent had violated the following provisions of Florida Law: Section 475.25(1)(b), Florida Statutes (2005)(Count I); Section 475.25(1)(k), Florida Statutes (2005)(Count II); and Section 475.25(1)(d)1., Florida Statutes (2005)(Count III).

On May 10, 2007, 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.

The final hearing for this matter was scheduled for September 8, 2008, by Notice of Hearing by Video Teleconference but was rescheduled until September 19, 2008, due to severe weather.

At the final hearing, Petitioner presented testimony of Ms. Magaly Grippa and Ms. Jennifer North. Petitioner also admitted Petitioner's Exhibit 1 and Petitioner's Exhibits 5A through 5D. Those Exhibits were filed on August 29, 2008. Respondent testified on his own behalf but did not admit any exhibits.

On October 17, 2008, parties were notified that the Transcript of the final hearing had been filed with the Division of Administrative Hearings. In the Notice of Filing Transcript, the parties were instructed to file proposed recommended orders on or before November 6, 2008. On November 6, Petitioner and Respondent timely filed their respective Proposed Recommended Orders. Both Petitioner's and Respondent's Proposed Recommended Orders were fully considered before issuing this Recommended Order.

All references to Florida Statutes are to the 2005 version, 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 (2008), and charged with the responsibility for the regulation of the real estate industry in Florida pursuant to Chapter 475, Florida Statutes.

2. Respondent, Curt Douglas Francis (hereinafter referred to as "Mr. Francis"), is, and was at the times material to this matter, the holder of a Florida real estate broker license, license number 668736, issued by the Division.

3. At all times relevant, Mr. Francis was the real estate broker for Progressive Real Estate 2000, Corp., located at 16921 North East 6th Avenue, Miami, Florida 33612.

4. At all times relevant, Mr. Francis represented Ms. Velma King as her real estate broker.

5. On or about March 17, 2005, Mr. Francis, on behalf of Ms. Velma King (hereinafter referred to as the "Buyer"), presented an offer to Roland Joachim (hereinafter referred to as the "Seller") for the purchase of real property located at 6904 South West 37th Street, Mirimar, Florida, 33023 (hereinafter referred to as "Subject Property").

6. At the same time, the Buyer and Seller entered into a contract for the purchase and sale of the Subject Property (hereinafter referred to as "the Contract"). (Petitioner's Exhibit 5A).

7. Under the terms of the Contract, the Buyer agreed to place an initial deposit of \$1,000.00 (hereinafter referred to as the "Initial Deposit"), in escrow with Richmond Abstract of Florida (hereinafter referred to as "Escrow Agent") simultaneously with the execution of the Contract. The Buyer agreed further to place an additional deposit of \$4,000.00 in escrow with the Escrow Agent within ten days of the effective date of the Contract.

8. The Buyer timely delivered the Initial Deposit to the Escrow Agent. Mr. Francis, however, instructed the Buyer to retrieve the Initial Deposit after the Escrow Agent informed Mr. Francis that it could not hold the Buyer's monies.

9. Thereafter, Mr. Francis took possession of Buyer's Initial Deposit and placed it in his desk drawer. As of the date of the final hearing in this matter, Mr. Francis continued to hold the Initial Deposit and has failed to place Buyer's monies in an escrow account or any other account.

10. Neither Mr. Francis nor Progressive Real Estate Corp. maintains an escrow account.

11. Mr. Francis received no other monies from the Buyer relevant to the purchase and sale of the Subject Property.

12. On or around April 4, 2005, the listing agent for the Seller, ERA Realty (hereinafter referred to as the "Listing Agent"), received a letter via facsimile transmission affirming

that "Progressive Real Estate has received from Velma King for the total amount of \$5,000.00 in the form of a check as deposit on the [Subject Property]." The letter is written on Progressive Real Estate 2000, Corp.'s letterhead and purports to be authored and signed by Mr. Francis.

13. Mr. Francis denied signing the letter or ever communicating to the Seller or the Listing Agent that the Buyer deposited the total amount of the deposit (\$5,000.00) with Mr. Francis or Progressive Real Estate, Corp. His testimony, which is credited, was unrefuted by the Division.

14. Mr. Francis further denied representing to Seller or the Listing Agent that Progressive Real Estate, Corp., was the escrow agent for purposes of the purchase and sale of the Subject Property. Again, this unrefuted testimony is credited.

15. The Buyer and Seller did not close on the Contract for the sale and purchase of the Subject Property. The circumstances surrounding the failure to close were not proved.

16. Mr. Francis, after the failure of the sale and purchase of the Subject Property to close, attempted unsuccessfully to contact the Buyer several times to address the return of her Initial Deposit. Mr. Francis believed that the Buyer was entitled to the Deposit, a belief which was not refuted by the evidence.

17. After unsuccessfully attempting to contact the Buyer, Mr. Francis then made several unsuccessful attempts to contact the Listing Agent regarding the Initial Deposit. Precisely why Mr. Francis attempted to the contact the Listing Agent was not explained by the evidence.

18. Mr. Francis was contacted by an attorney regarding the return of the deposit. It is unclear what party, if any, the attorney represented.

19. Mr. Francis was unable to resolve the question of what to do with the Initial Deposit, which remained in his possession at the time of the final hearing of this case.

CONCLUSIONS OF LAW

Jurisdiction

20. 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).

The Burden and Standard of Proof

21. The Division seeks to impose penalties against Mr. Francis pursuant to the Administrative Complaint that include the suspension or revocation of his real estate license. Therefore, the Division has the burden of proving the specific allegations of fact that support its charges by clear and convincing evidence. See Dep't of Banking and Fin., Div. of

Sec. & Investor Prot. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); and Pou v. Dep't of Ins. & Treasurer, 707 So. 2d 941 (Fla. 3d DCA 1998).

22. What constitutes "clear and convincing" evidence was established by the court in Evans Packing Co. v. Dep't of Agric. & Consumer Servs., 550 So. 2d 112, 116, n.5 (Fla. 1st DCA 1989).

In the words of the court:

. . . [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); Walker v. Florida Dep't of Bus. & Prof'l Regulation, 705 So. 2d 652 (Fla. 5th DCA 1998) (Sharp, J., dissenting).

Charges of the Administrative Complaint

23. 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. Francis 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)(k), Florida Statutes (Count II); and Section 475.25(1)(d), Florida Statutes (Count III).

24. Section 475.25(1)(b), (k), and (d), 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.

. . . .

(d)1. Has failed to account or deliver to any person, including a licensee under this chapter, at the time which has been agreed

upon or is required by law or, in the absence of a fixed time, upon demand of the person entitled to such accounting and delivery, any personal property such as money, fund, deposit, check, draft, abstract of title, mortgage, conveyance, lease, or other document or thing of value, including a share of a real estate commission if a civil judgment relating to the practice of the licensee's profession has been obtained against the licensee and said judgment has not been satisfied in accordance with the terms of the judgment within a reasonable time, or any secret or illegal profit, or any divisible share or portion thereof, which has come into the licensee's hands and which is not the licensee's property or which the licensee is not in law or equity entitled to retain under the circumstances. However, if the licensee, in good faith, entertains doubt as to what person is entitled to the accounting and delivery of the escrowed property, or if conflicting demands have been made upon the licensee for the escrowed property, which property she or he still maintains in her or his escrow or trust account, the licensee shall promptly notify the commission of such doubts or conflicting demands and shall promptly:

- a. Request that the commission issue an escrow disbursement order determining who is entitled to the escrowed property;
- b. With the consent of all parties, submit the matter to arbitration;
- c. By interpleader or otherwise, seek adjudication of the matter by a court; or
- d. With the written consent of all parties, submit the matter to mediation. The department may conduct mediation

. . . .

(k) Has failed, if a broker, to immediately place, upon receipt, any money, fund, deposit, check, or draft entrusted to her or him by any person dealing with her or

him as a broker in escrow with a title company, banking institution, credit union, or savings and loan association located and doing business in this state, or to deposit such funds in a trust or escrow account maintained by her or him with some bank, credit union, or savings and loan association located and doing business in this state, wherein the funds shall be kept until disbursement thereof is properly authorized . . .

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

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

26. Although the Division established that the Listing Agent received a letter via facsimile indicating that Progressive Real Estate Corp., had received \$5,000.00 as the total deposit required by the Contract, the Division failed to prove by clear and convincing evidence that Mr. Francis sent the letter to the Listing Agent or that the letter was sent at his direction. The sole witness for the Division could not confirm the source of the facsimile and Mr. Francis credibly presented un-refuted testimony that the signature on the letter was not his. Because the Division did not properly authenticate the letter in question, it failed to meet its burden of proving that

Mr. Francis made representations regarding his status as an escrow agent or that he received or deposited the full deposit amount of \$5,000.00.

Count II: Alleged Violation of Section 475.25(1)(k), Florida Statutes.

27. The Division proved clearly and convincingly that Mr. Francis collected the Initial Deposit received from the Buyer without immediately depositing the monies in an escrow account. Mr. Francis is, therefore, guilty of having violated Section 475.25(1)(k), Florida Statutes.

Count III: Alleged Violations of Section 475.25(1)(d), Florida Statutes.

28 Pursuant to Section 475.25(1)(d), Florida Statutes, a real estate licensee is required to do one of two things with money which comes into the licensee's hands: (a) "account or deliver" the money to the person entitled to it, with or without demand; or (b) where in good faith, the licensee entertains doubt as to who is entitled an accounting or delivery of the money or if their are conflicting demands for it, notify the Florida Real Estate Commission (hereinafter referred to as the "Commission"), of such doubts or conflicting demands and then take one of four steps defined in the statute.

29. While Mr. Francis has failed to deliver the Initial Deposit to the Buyer, the person he believes is entitled to the

money, and has failed to take notify the Commission, he is not guilty of having violated Section 475.25(1)(d), Florida Statutes. Section 475.25(1)(d), Florida Statutes, only applies to funds which a real estate licensee holds in "escrow." It does not by its terms apply to the facts of this case, where the funds were never placed in escrow.

30. While the initial reference to the type of property which must be returned does not specifically mention "escrowed property," the type of property covered is described more precisely in outlining what must be done by a licensee where doubt as to who is entitled to the property arises: ". . . if the licensee, in good faith, entertains doubt as to what person is entitled to the accounting and delivery of the escrowed property"

31. Clearly Mr. Francis is not entitled to the Initial Deposit. While his failure to place the Initial Deposit in escrow constitutes an offense and his failure to return the funds may constitute some other violation of Chapter 475, his failure to return the Initial Deposit under the facts of this case does not constitute a violation of Section 475.25(1)(b), Florida Statutes.

The Appropriate Penalty.

32. The only issue remaining for consideration is the appropriate disciplinary action which should be taken by the

Commission against Mr. Francis for the violation that was 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.

33. Finally, Florida Administrative Code Rule 61J2-24(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.

34. The Division has proved that Mr. Francis violated Section 475.25(1)(k), Florida Statutes (Count II). The penalty range for this violation provided in Florida Administrative Code Rule 61J2-24.001(3)(1) is a fine not to exceed \$5,000.00 and a 90-day suspension to revocation.

RECOMMENDATION

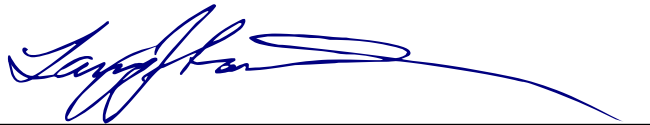
Based on the foregoing Findings of Fact and Conclusions of Law, it is recommended that a final order be entered:

1. Dismissing Counts I and III of the Administrative Complaint;

2. Finding that Mr. Francis is guilty of the violation alleged in Count II of the Administrative Complaint; and

3. Suspending Mr. Francis's real estate broker license for a period of 90 days and requiring that he pay an administrative fine of \$1,000.00.

DONE AND ENTERED this 25th day of November, 2008, in Tallahassee, Leon County, Florida.



LARRY J. SARTIN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 25th day of November, 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 this case.