

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF REAL ESTATE,)
)
Petitioner,)
)
vs.) Case No. 08-3688PL
)
MARIAN LEMON COAXUM,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on September 8, 2008, via teleconference at sites in Tallahassee and Orlando, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Jason W. Holtz, Esquire
Department of Business and
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400 West Robinson Street, Suite 801-N
Orlando, Florida 32801-1757

For Respondent: Gavin D. Burgess, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether Respondent is guilty of dishonest dealing by trick, scheme or device in any business transaction in violation of Subsection 475.25(1)(b), Florida Statutes (2008),¹ and if so, what penalty should be imposed.

PRELIMINARY STATEMENT

Petitioner, Department of Business and Professional Regulation, Division of Real Estate, filed an Administrative Complaint against Respondent, Marian Lemon Coaxum, on March 27, 2008, alleging certain violations of Respondent's real estate sales associate license. Respondent filed an Election of Rights form requesting a formal administrative hearing to contest the allegations in the Administrative Complaint. The Administrative Complaint and request for hearing were forwarded to the Division of Administrative Hearings ("DOAH") on July 28, 2008, and assigned to the undersigned Administrative Law Judge.

The matter was scheduled for final hearing on September 8, 2008. On September 5, 2008, Respondent filed a Motion to Continue Final Hearing; Petitioner filed an objection to the motion. Inasmuch as no emergency was cited in the motion, it was denied, and the hearing went forward as scheduled.

At final hearing, Petitioner called two witnesses: Lynn Murray Watson, an Investigative Specialist II with Petitioner; and Willie Belle Lewis, the consumer. Petitioner offered

12 exhibits into evidence, each of which was accepted.

Respondent called one witness: Marian Lemon Coaxum. No exhibits were offered into evidence by Respondent.

At the conclusion of the final hearing, the parties advised that a transcript of the hearing would be ordered. The Transcript of the hearing was filed on October 27, 2008. The parties were given ten days from the date the Transcript was filed at DOAH to submit proposed findings of fact and conclusions of law. Each party timely submitted a Proposed Recommended Order and each were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is the state agency responsible for issuing real estate sales associate licenses and monitoring compliance with all statutes, rules, and regulations governing such licenses.

2. Respondent was at all times relevant to this proceeding a licensed real estate sales associate in the State of Florida and held License No. 3115665.

3. In March 2006, Respondent was introduced to Willie Belle Lewis (Lewis) by a mutual acquaintance. Lewis was interested in selling her house, and Respondent agreed to work for Lewis in that regard. On March 13, 2006, Lewis and Respondent entered into an Exclusive Right of Sale Listing

Agreement (the "Agreement"). Under the Agreement, Respondent was to act as Lewis' sales agent for sale of the house. Pursuant to paragraph 7 of the Agreement, Respondent was to receive a commission of six percent of the purchase price. Respondent initially requested a seven percent commission which was the ordinary and customary amount at that time, but agreed to six percent in deference to Lewis' request (and due to the fact that Lewis had recently lost her grandmother and Respondent empathized with her, having just lost her mother).

4. In one version of the Agreement admitted into evidence, there is a notation that any cooperating real estate agent (presumably a buyer's agent) would receive a commission equal to three percent of the purchase price, i.e., one-half of Respondent's six percent commission. Another version of the Agreement admitted into evidence did not address sharing the commission with a cooperating agent.

5. At some point in time (which was not clearly defined during testimony at final hearing) Lewis and Respondent re-negotiated the amount of Respondent's commission.² Lewis maintains that the re-negotiated commission was three percent; Respondent says the re-negotiated commission was four percent. Respondent's testimony was more credible on this point. The amount of the new commission was not reduced to writing or indicated on either version of the Agreement. There is no

indication, for example, what Respondent's commission would have been if a cooperating agent had been involved. It is highly unlikely that Respondent or any other agent would agree to a two percent commission, i.e., one-half of four percent (or 1.5 percent, one-half of three percent).

6. Once the Agreement was signed, Respondent immediately began efforts to sell the Lewis house. Respondent invited Lewis to her (Respondent's) house and offered Lewis plants and flowers from Respondent's yard. Respondent and Lewis dug up various plants and transferred them to Lewis' yard to generate some "curb appeal," i.e., to dress it up for potential buyers.

7. Within days, a potential buyer was found. A Contract for Sale and Purchase (the "Contract") was entered into between Lewis and Mrs. Bibi Khan. Respondent was listed as the seller's agent; no agent was indicated for the buyer. In fact, Respondent agreed to act as buyer's agent as well, performing services as both an agent and a broker.

8. Again, there were two versions of the sales Contract admitted into evidence. On one version, Respondent's signature included only her first name; on the other it included her first and last name.

9. On one version of the Contract, there appears to be "white-out" on Respondent's signature line. Contained and legible under the whited-out portion of the signature is the

phrase "3%." Respondent admits she whited out the three percent figure, but that it was done after the closing occurred. The three percent figure appearing at that place in the Contract is confusing. It only makes sense if that was meant to represent Respondent's portion of a six percent commission split between a buyer's agent and a seller's agent.

10. Respondent explained that she whited out the figure because it was not written in both places it was supposed to be. Rather than going through the process of re-doing the entire Contract and re-distributing it to all pertinent parties, she whited it out in one place. The explanation is plausible. However, it seems an unnecessary action inasmuch as the closing had already occurred.

11. When the parties arrived at closing on April 17, 2006, the closing documents--including the HUD Settlement Statement--indicated a six percent commission for Respondent (as originally stated on the Agreement). Lewis vehemently objected to the commission, saying that it should be three percent as verbally agreed to by her and Respondent.³ Respondent acquiesced at closing and, in front of witnesses, said the commission should be three percent. She asked that a letter be drafted by the closing agent reflecting a three percent commission. In effect, Respondent re-negotiated her commission at that time. She rues

having done so and says she was confused, but she did so nonetheless.

12. The closing was only the third closing Respondent had taken part in since becoming licensed. She was not very experienced with the process and seemed to be thinking she was getting a four percent commission, even when three percent was being discussed.⁴ It is clear, however, that Respondent did verbally agree to a three percent commission during the closing.

13. The closing agent told Lewis to return on Monday and she would re-calculate the commission and provide Lewis with a final check in the appropriate amount. Meanwhile, Respondent attempted to contact Lewis over the weekend to discuss the discrepancy. Respondent wanted to remind Lewis they had agreed on four percent despite what she said at the closing. All attempts at communication with Lewis over the weekend were futile.

14. When Lewis returned to the closing office on the following Monday, she found the check to still be in error as it reflected a four percent commission instead of a three percent commission. Apparently when Respondent advised the closing agent about her mistake regarding the amount of the commission, Respondent still maintained that the verbal agreement was for four percent. This was contrary to her statements during the closing and is not substantiated by any written documentation.

15. Respondent directed the closing agent to issue a check reflecting a four percent commission, instead of the six percent commission reflected on the Agreement.

16. Lewis ultimately, under protest, accepted her \$74,264.92 check reflecting a four percent commission to Respondent. The check contained a shortage of \$1,600, if a three percent commission had been applied.

17. Lewis continued to seek repayment of the \$1,600 she believed she was entitled to receive. Subsequently, Respondent discussed the entire dispute with her sales team and decided that the disputed amount (\$1,600) was not worth fighting about. A check was then sent to Lewis in that amount.

CONCLUSIONS OF LAW

18. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to Section 120.569 and Subsection 120.57(1), Florida Statutes.

19. The Department has authority to take this action against Respondent pursuant to Subsection 475.25(1)(b), Florida Statutes, which states:

(1) The commission may deny an application for licensure, registration, or permit, or renewal there; may place a licensee, registrant, or permittee on probation; may suspend a license, registration, or permit for a period not exceeding 10 years; may revoke a license,

registration, or permit; may impose an administrative fine not to exceed \$5,000 for each count or separate offense; and may issue a reprimand, and any or all of the foregoing, if it finds that the licensee, registrant, permittee, or applicant:

(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 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 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.

20. The standard of proof in a professional licensure revocation case is clear and convincing evidence. Osborne Stern and Co., Inc. v. Department of Banking and Finance, 647 So. 2d 245, 248 (Fla. 1st DCA 1994). The burden of proof is on the party asserting the affirmative of the issue; in this case, Petitioner. Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

21. The evidence does not establish that Respondent intentionally attempted to defraud, misrepresent, conceal, or otherwise mislead Lewis. The evidence does not show that Respondent engaged in dishonest dealing by trick or scheme or breached the trust between her and her client.

22. The evidence does indicate the absence of a clear meeting of the minds and a good bit of confusion between the parties as to what was expected. The short duration of the professional relationship, infused almost immediately with a level of almost familial closeness, created some discord concerning the arrangement. Respondent and Lewis seemed to "infer" each other's intent, rather than substantively discuss and reduce the matter to writing. Further, Respondent's relative inexperience contributed to a very loose contractual deal.

23. Petitioner proved by clear and convincing evidence that Respondent's acquiescence to a three percent commission during the closing was followed by Respondent's unilateral taking of a four percent commission. (It is immaterial that the additional one percent was ultimately returned to the seller.) This action, while justified in Respondent's mind and possibly what the parties had agreed to, was contrary to Respondent's unequivocal statements at the closing.

24. Subsection 475.25(1), Florida Statutes, allows for a range of penalties including revocation or suspension of a license or imposition of a fine. Revocation or suspension would be too draconian under the facts of this case. A penalty would be warranted, however, because of Respondent's unilateral change of her commission after the closing had occurred.

RECOMMENDATION

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

RECOMMENDED that a final order be entered by Petitioner, Department of Business and Professional Regulation, Division of Real Estate, imposing a fine of One Thousand Dollars (\$1,000) against Respondent, Marian Lemon Coaxum.

DONE AND ENTERED this 26th day of November, 2009, in Tallahassee, Leon County, Florida.



R. BRUCE MCKIBBEN
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of November, 2009.

ENDNOTES

^{1/} Unless specifically stated otherwise herein, all references to Florida Statutes shall be to the 2008 version.

^{2/} Lewis had suffered some personal losses which necessitated additional cash. Respondent, who had suffered similar losses, agreed to reduce her commission in order to accommodate Lewis' needs.

^{3/} Lewis seems to believe that the reference to a cooperating agent's three percent commission in the Agreement is evidence that Respondent agreed to only three percent, but the plain language of the document does not support her belief.

^{4/} A three percent commission was usual and customary when two agents were involved in a sale, so Respondent was used to hearing and discussing three percent when talking about transactions.

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.