

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF REAL ESTATE,)
)
Petitioner,)
)
vs.) Case No. 08-4406PL
)
ROSA FERNANDEZ,)
)
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 November 13, 2008, by video teleconference at sites in Miami 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: Douglas D. Stratton, Esquire
Stratton & Feinstien, P.A.
407 Lincoln Road, Suite 2A
Miami Beach, Florida 33139

STATEMENT OF THE ISSUES

The issues in this case are whether Respondent, Rosa Fernandez, committed the violations alleged in a six-count

Administrative Complaint filed with the Petitioner Department of Business and Professional Regulation on July 17, 2008, and, if so, what disciplinary action should be taken against her Florida real estate broker license.

PRELIMINARY STATEMENT

On July 17, 2008, a six-count Administrative Complaint, FDBPR Case No 2007004262, was filed with Petitioner Department of Business and Professional Regulation against Rosa Fernandez, who holds a Florida real estate broker license. It was alleged in the Administrative Complaint that Respondent had violated the following provisions of Florida law with regard to six separate transactions: Section 475.25(1)(e) Florida Statutes (2004 or 2005), by violating Section 475.5015, Florida Statutes (2004 or 2005), and Florida Administrative Code Rule 61J2-14.012(1).

On or about July 31, 2008, 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 September 8, 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. 08-4406PL and was assigned to the undersigned.

On September 17, 2008, the final hearing of this matter was scheduled for October 17, 2008, by Notice of Hearing by Video Teleconference. The hearing was rescheduled to November 13, 2008, at the request of Respondent.

On November 5, 2008, the parties filed a Pre-Hearing Stipulation. In the Stipulation, the parties stipulated to the accuracy of most of the factual allegations of the Administrative Complaint. Respondent, as she did in her Answer and Affirmative Defenses, denied the allegations of fact of paragraphs 9, 14, 21, 22, 28, 29, 35, 42, 43, and 45. Petitioner withdrew the allegation of fact contained in paragraph 21 and there was no paragraph 44 in the Administrative Complaint.

At the final hearing, Petitioner presented the testimony of Georgia Corbin, Enrique Betancourt, and Derrick Ham. Petitioner also had admitted Petitioner's Exhibits 1 through 13. Respondent offered no evidence.

The Transcript of the final hearing was filed with the Division of Administrative Hearings on December 3, 2008. By Notice of Filing of Transcript entered December 15, 2008, the parties were informed that their proposed recommended orders were to be filed on or before December 29, 2008.

Petitioner filed Petitioner's Proposed Recommended Order timely. Respondent filed Respondent's Proposed Recommended Order on December 31, 2008. It does not appear that Petitioner has been prejudiced in any way by Respondent's late-filing. Accordingly, both proposed orders have been fully considered in preparing this Recommended Order.

All further references to the Florida Statutes in this Recommended Order are to the 2004 and 2005 editions, unless otherwise noted.

FINDINGS OF FACT

A. The Parties.

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. The Division is charged with the responsibility for the regulation of the real estate industry in Florida pursuant to Chapters 455 and 475, Florida Statutes.

2. Respondent, Rosa Fernandez, is, and was at the times material to this matter, the holder of a Florida real estate broker license, license number 3000310, issued by the Division.

3. At all times relevant, Ms. Fernandez was the broker for Vizcaya Realty of Miami, Inc., located at 1630 Southwest 17th Terrace, Miami, Florida 33145.

B. Count One.

4. In August 2005, Ms. Fernandez was the listing agent in the Multiple Listing Service (hereinafter referred to as the "MLS"), for property located at 1827 Southwest 18th Avenue, Miami, Florida 33145 (hereinafter referred to as the "Count One Property"). She also represented the buyer in the sale of the Count One Property.

5. The Count One Property, despite the fact that Ms. Fernandez had listed the property in the MLS for \$285,000.00, was purchased for \$350,000.00, facts which Ms. Fernandez had to be aware of.

6. In response to a complaint concerning Ms. Fernandez's real estate broker practice, Derrick Ham, an investigator for the Division, met with her. Mr. Ham ordered Ms. Fernandez to make available and deliver the real estate broker records for the sale of the Count One Property. Ms. Fernandez provided Mr. Ham with the records that she had involving the sale of the Count One Property.

7. While the evidence as to Ms. Fernandez's precise role in the sale and purchase of the Count One Property was not clear (there was a letter in the file purporting to discharge her services by the seller of the property, but she still continued to be involved with the transaction thereafter), at no time

while meeting with Mr. Ham did she indicate that she did not act as broker for the property.

8. Upon review of the records provided to Mr. Ham, it was found that the following information or documents were not maintained in Ms. Fernandez's records:

a. A broker's disclosure, an executed sales contract, or a closing statement (HUD1 form);

b. An explanation as to why the sales price (\$350,000.00) exceeded the listing price (\$285,000.00). Nor was there an authorization from the seller authorizing the change in listing price; and

c. A valid listing agreement between the broker and the seller of the Count One Property.

C. Count Two.

9. In April 2005, Ms. Fernandez represented Carlos Damain in the purchase of property owned by Isaac and Teresa Moncarz, which was located at 447 Aragon Avenue, Coral Gables, Florida 33134 (hereinafter referred to as the "Count Two Property").

10. The Count Two Property was purchased for \$595,000.00, although it was listed for sale at \$545,000.00, facts which Ms. Fernandez had to be aware of.

11. Mr. Ham ordered Ms. Fernandez to make available and deliver the real estate broker records for the sale of the Count

Two Property. Ms. Fernandez provided Mr. Ham with the records that she had involving the sale of the Count Two Property.

12. Upon review of the records provided to Mr. Ham, it was found that, while the file contained a sales contract and an HUD1 form for the Count Two Property, the following information or documents were not maintained in Ms. Fernandez's records:

a. A broker disclosure;

b. An explanation as to why the sales price (\$595,000.00) exceeded the listing price (\$545,000.00). While a "bidding war" would explain this discrepancy, there was no evidence in the file that such a bidding war had taken place;

c. While the file contained a sales contract, nothing in the sales contract dealt with any repairs to the Count Two Property in connection with the sale.

D. Count Three.

13. In March 2006, Ms. Fernandez represented Ramon Rubiera in the purchase of property located at 1852 Southwest 10th Street, Miami, Florida 33135 (hereinafter referred to as the "Count Three Property").

14. The Count Three Property, despite the fact that the property was listed for \$450,000.00, was purchased for \$499,000.00, facts which Ms. Fernandez had to be aware of.

15. Pursuant to an addendum to the contract for the sale to Mr. Rubiera of the Count Three Property, the property was

sold to Blanca Dellasera on or about April 12, 2006. The sales price increased to \$515,000.00. The increase in price, according to the contract, was for "repairs."

16. Mr. Ham ordered Ms. Fernandez to make available and deliver the real estate broker records for the sale of the Count Three Property. Ms. Fernandez provided Mr. Ham with the records that she had involving the sale of the Count Three Property.

17. Upon review of the records provided to Mr. Ham, it was found that the following information or documents were not maintained in Ms. Fernandez's records: the HUD1 failed to reflect the terms of the contract without explanation. In particular, the HUD1 indicated a seller's contribution of 3 percent while the contract provided for a 6 percent seller's contribution.

E. Count Four.

18. On or about April 20, 2005, Ms. Fernandez represented the buyer of property located at 903 Red Road, Miami, Florida (hereinafter referred to as the "Count Four Property").

19. The Count Four Property was purchased for \$549,000.00, although it was listed for sale at \$499,000.00, facts which Ms. Fernandez had to be aware of.

20. Mr. Ham ordered Ms. Fernandez to make available and deliver the real estate broker records for the sale of the Count

Four Property. Ms. Fernandez provided Mr. Ham with the records that she had involving the sale of the Count Four Property.

21. Upon review of the records provided to Mr. Ham, it was found that the following information or documents were not maintained in Ms. Fernandez's records:

a. An indication that the seller made a contribution to cover buyer's closing costs in the amount of \$32,994.00;

b. An indication that the seller made a contribution to cover repairs in the amount of \$17,000.00;

c. A broker's disclosure; and

d. An explanation as to why the sales price (\$549,000.00) exceeded the listing price (\$499,000.00). While a "bidding war" would explain this discrepancy, there was no evidence in the file that such a bidding war had taken place.

F. Count Five.

22. On or about June 21, 2005, Ms. Fernandez represented the buyer in the purchase of property located at 3707 Le Jeune Road, Coral Gables, Florida (hereinafter referred to as the "Count Five Property").

23. The Count Five Property sold for \$575,000.00 while the asking price was \$525,000.00, facts which Ms. Fernandez had to have been aware of.

24. Mr. Ham ordered Ms. Fernandez to make available and deliver the real estate broker records for the sale of the Count

Five Property. Ms. Fernandez provided Mr. Ham with the records that she had involving the sale of the Count Five Property.

25. Upon review of the records provided to Mr. Ham, it was found that the following information or documents were not maintained in Ms. Fernandez's records:

- a. An indication that the seller made a contribution to buyer for repairs in the amount of \$15,000.00;
- b. A broker's disclosure; and
- c. An explanation as to why the sales price (\$549,000.00) exceeded the listing price (\$499,000.00). While a "bidding war" would explain this discrepancy, there was no evidence in the file that such a bidding war had taken place.

G. Count Six.

26. On or about March 19, 2006, Ms. Fernandez represented the buyer in the purchase of property located at 1631 Southwest 13th Street, Miami, Florida (hereinafter referred to as the "Count Six Property").

27. The Count Six Property sold for \$500,000.00 while the asking price was \$390,000.00, facts which Ms. Fernandez had to have been aware of.

28. Mr. Ham ordered Ms. Fernandez to make available and deliver the real estate broker records for the sale of the Count Six Property. Ms. Fernandez provided Mr. Ham with the records that she had involving the sale of the Count Six Property.

29. Upon review of the records provided to Mr. Ham, it was found that the following information or documents were not maintained in Ms. Fernandez's records:

- a. A copy of an assignment of the sales contract;
- b. A sales and purchase contract signed by Gleen Cabezas;

and

- c. An explanation as to why the sales price (\$500,000.00) exceeded the listing price (\$390,000.00).

H. Ultimate Facts.

30. Ms. Fernandez failed to maintain complete real estate broker records for the transaction on the Count One through Six Properties.

31. Because of the inadequacies of Ms. Fernandez's real estate broker records, the Division, through its representative, Derrick Ham, was unable to ascertain, for any of the properties at issue in this case, the specifics of what had transpired.

32. As a consequence of the foregoing, the Division, through Mr. Ham, was unable to determine whether Ms. Fernandez complied with the requirements of Chapter 475, Florida Statutes.

CONCLUSIONS OF LAW

A. Jurisdiction.

33. 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.

34. The Division seeks to impose penalties against Ms. Fernandez pursuant to the Administrative Complaint that include the suspension or revocation of her real estate broker's 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).

35. 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.

36. Section 475.25, Florida Statutes, authorizes the Division to discipline any Florida real estate broker licensee who commits any of a number of offenses defined therein. In this case, the Division has charged Ms. Fernandez with having committed six violations of Section 475.25(1)(e) Florida Statutes, by having violated Section 475.5015, Florida Statutes, and Florida Administrative Code Rule 61J2-14.012(1).

37. Section 475.25(1)(e), Florida Statutes, defines the following conduct as an offense:

(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.

38. Section 475.5015, Florida Statutes, which the Division alleges Ms. Fernandez violated, describes a real estate broker's duty with regard to maintaining records, in part, as follows:

Each broker shall keep and make available to the department such books, accounts, and records as will enable the department to determine whether such broker is in compliance with the provisions of this chapter. Each broker shall preserve at

least one legible copy of all books, accounts, and records pertaining to her or his real estate brokerage business for at least 5 years from the date of receipt of any money, fund, deposit, check, or draft entrusted to the broker or, in the event no funds are entrusted to the broker, for at least 5 years from the date of execution by any party of any listing agreement, offer to purchase, rental property management agreement, rental or lease agreement, or any other written or verbal agreement which engages the services of the broker. . . .

39. Florida Administrative Code Rule 61J2-14.012(1), which the Division alleges Ms. Fernandez violated, provides further specification as to a real estate broker's duty to maintain records:

(1) A broker who receives a deposit as previously defined shall preserve and make available to the BPR, or its authorized representative, all deposit slips and statements of account rendered by the depository in which said deposit is placed, together with all agreements between the parties to the transaction. In addition, the broker shall keep an accurate account of each deposit transaction and each separate bank account wherein such funds have been deposited. All such books and accounts shall be subject to inspection by the DBPR or its authorized representatives at all reasonable times during regular business hours.

D. The Division's Proof.

40. The Division proved clearly and convincingly that Ms. Fernandez's real estate broker records for the sale and

purchase of the Count One through Six Properties were not complete.

41. Therefore, the Division proved clearly and convincingly that Ms. Fernandez failed, as required by Section 475.5015, Florida Statutes, to "keep and make available to the department such books, accounts, and records as will enable the department to determine whether such broker is in compliance with the provisions of this chapter."

42. Having violated Section 475.5015, Florida Statutes, Ms. Fernandez "violated any of the provisions of this chapter" in violation of Section 475.25(1)(e), Florida Statutes, as alleged in the Administrative Complaint.

43. The Division failed to prove or explain how Ms. Fernandez violated Florida Administrative Code Rule 61J2-14.012(1).

E. The Appropriate Penalty.

44. 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 Ms. Fernandez for the violations the Division 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.

45. The penalty guideline for a violation of Section 475.25(1)(e), Florida Statutes, is a suspension of eight years to revocation and a fine not to exceed \$5,000.00. Fla. Admin. Code R. 61J2-24.001(3)(f).

46. Florida Administrative Code Rule 61J2-24.001(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.

47. In Petitioner's Proposed Recommended Order, it has been suggested that the recommended penalty should be the revocation of Ms. Fernandez's license or, in the alternative, a suspension of her license and the payment of a fine. Why revocation would be an appropriate penalty has not been explained. Nor do the facts of this case support such a penalty.

48. Although the penalty guidelines for this violation range from a low of an eight-year suspension, such a suspension does not appear justifiable from the facts of this case. The only thing the Division alleged and proved in this case is that Ms. Fernandez's records were incomplete. The Division did not

allege or prove that any of the transactions were in anyway improper, despite the fact that the increase in actual selling price over asking price may be puzzling.

49. Consequently, given the lack of any proof that Ms. Fernandez is guilty of anything other than poor record keeping, probation, conditioned upon the successful completion of continuing education courses on record keeping, and a fine would appear to be a more appropriate penalty.

RECOMMENDATION

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

1. Finding that Ms. Fernandez is guilty of the violation alleged in Counts One through Six of the Administrative Complaint as found in this Recommended Order;

2. Placing Ms. Fernandez's real estate broker license on probation for a period of five years, conditioned on her successful completion of continuing education courses on record-keeping in an amount to be determined by the Commission. Should she fail to complete the continuing education, her license should be suspended until the courses are completed; and

3. Requiring that she pay an administrative fine of \$3,000.00.

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



LARRY J. SARTIN
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of January, 2009.

COPIES FURNISHED:

Patrick J. Cunningham, Esquire
Department of Business and
Professional Regulation
400 West Robinson Street
Hurston Building-North Tower, Suite N801
Orlando, Florida 32801

Douglas D. Stratton, Esquire
Stratton & Feinstien, P.A.
407 Lincoln Road, Suite 2A
Miami Beach, Florida 33139

Thomas W. O'Bryant, Jr., Director
Division of Real Estate
Department of Business and
Professional Regulation
400 West Robinson Street
Hurston Building-North Tower, Suite N802
Orlando, Florida 32801

Ned Luczynski, General Counsel
Department of Business and
Professional Regulation
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-0792

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.