

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND )  
PROFESSIONAL REGULATION, )  
DIVISION OF REAL ESTATE, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 09-0953PL  
 )  
MYAVA L. RODRIGUEZ, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the final hearing of this case for the Division of Administrative Hearings (DOAH) on April 22, 2009, in Kissimmee, Florida.

APPEARANCES

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

For Respondent: (No appearance)

STATEMENT OF THE ISSUES

The issues are whether Respondent violated Subsections 475.25(1)(e) and (u) and Section 475.5015, Florida Statutes (2006),<sup>1</sup> respectively, by failing to preserve and make available books, records, and supporting documents; failing to keep an

accurate account of all trust fund transactions; and failing to direct, control, or manage a sales associate, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

Petitioner filed an Administrative Complaint against Respondent on September 16, 2008. Respondent timely requested a formal hearing, and Petitioner referred the matter to DOAH to conduct the hearing.

At the hearing, Petitioner presented the testimony of one witness and submitted six exhibits for admission into evidence. Respondent did not appear and did not present any evidence. The identity of the witness and exhibits, and the rulings regarding each, are reported in the Transcript of the hearing filed with DOAH on June 22, 2009.

Petitioner timely filed its Proposed Recommended Order (PRO) on June 19, 2009. On June 22, 2009, Petitioner requested that the time for filing PROs be extended to June 19, 2009. The ALJ granted the motion. Respondent did not file a PRO.

FINDINGS OF FACT

1. Petitioner is the state agency responsible for regulating the practice of real estate in the state. Respondent is licensed as a real estate broker pursuant to license number 674853.

2. Respondent operates a real estate brokerage office in the name of Sky Land Realty Group, LLC. (Sky Land). The principal place of business of Sky Land is 4248 Town Center Boulevard, Number 5, Orlando, Florida. Respondent's duties include the supervision of Ms. Jamicell Janet Perez, a licensed real estate sales associate, referred to hereinafter as the sales associate.

3. On May 22, 2007, Respondent and the sales associate represented Mr. Edwin Torres and Ms. Meary Ann Berrios (the Buyers) in the purchase of a residential property located at 7471 Wayland Boulevard, Orlando, Florida (the property). The Buyers submitted a written offer to purchase the property. In relevant part, the offer included an earnest money deposit of \$500.00.

4. On May 22, 2007, the owners of the property, in relevant part, verbally rejected the Buyers' offer and counter offered to sell the property, if the earnest money deposit were increased to \$2,000.00. Changes to the written contract are initialed by the owners and dated May 23, 2007.

5. The sales associate did not deliver the \$500.00 deposit to Respondent but shredded the check after receiving the verbal counter offer from the owners on May 22, 2007. The record does not show whether the Buyers replaced the destroyed check with a check for \$2,000.00; accepted any other terms of the counter

offer; or purchased the property. It is undisputed that the listing broker for the owners of the property is the complaining witness in this proceeding, but the broker did not testify at the hearing.

6. At some future date, an investigator for Petitioner requested Respondent's relevant business records. Respondent failed to retain a copy of the \$500.00 deposit check. Respondent failed to supervise the sales associate by requiring her to deliver the check to Respondent so that Respondent could deliver the check to the listing broker.

#### CONCLUSIONS OF LAW

7. DOAH has jurisdiction over the parties to and subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2008). DOAH provided the parties with adequate notice of the final hearing.

8. Petitioner bears the burden of proof. Petitioner must show by clear and convincing evidence that Respondent committed the acts alleged in the Administrative Complaint and the reasonableness of any penalty. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932, 935 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); State ex rel. Vining v. Florida Real Estate Commission, 281 So. 2d 487 (Fla. 1973).

9. Petitioner satisfied its burden of showing that Respondent violated Subsection 475.25(1)(u) by failing to supervise the sales associate to ensure the sales associate delivered the check to Respondent so that Respondent could deposit the check into the appropriate escrow account. The evidence is also clear and convincing that Respondent violated Subsection 475.25(1)(e) and Florida Administrative Code Rule 61J2-14.012(1), which requires an accurate accounting of all trust fund transactions, by failing to retain a copy of the deposit check of \$500.00 in Respondent's business records of the transaction.

10. The evidence is less than clear and convincing that Respondent failed to deliver any other records to Petitioner. The evidence is also less than clear and convincing that the sales associate retained the deposit check of \$500.00 until June 8, 2007, as alleged in paragraph number 6 of the Administrative Complaint.

11. The Administrative Complaint does not allege that the sales associate held the deposit check of \$500.00 and shredded it on the same day it was written. Petitioner cannot find the sales associate guilty of acts not alleged in the Administrative Complaint. Ghani v. Department of Health, 714 So. 2d 1113 (Fla. 1st DCA 1998); Cotrill v. Department of Insurance, 685 So. 2d 1371 (Fla. 1st DCA 1996). However, the allegations in the

Administrative Complaint against the sales associate are rendered moot by a settlement agreement entered into at the hearing between Petitioner and the sales associate.<sup>2</sup>

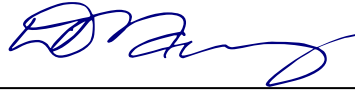
12. Petitioner submitted no evidence of prior disciplinary history against Respondent. There is no evidence that the violations resulted in financial harm to any person. There is no factual basis to support Petitioner's request in its PRO for revocation of Respondent's license or the imposition of a \$5,000.00 fine.

#### RECOMMENDATION

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

RECOMMENDED that Petitioner enter a final order finding that Respondent failed to supervise a sales associate and failed to retain a copy of a deposit check of \$500.00; imposing a fine of \$1,000.00; and requiring Respondent to pay fees pursuant to Subsection 455.227(3).

DONE AND ENTERED this 29th day of June, 2009, in  
Tallahassee, Leon County, Florida.



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DANIEL MANRY  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 29th day of June, 2009.

ENDNOTES

<sup>1/</sup> References to subsections, sections, and chapters are to Florida Statutes (2006), unless otherwise stated.

<sup>2/</sup> The Administrative Complaint names Respondent and Respondent's sales associate as co-respondents in the Complaint. Count III of the Administrative Complaint makes allegations against the sales associate. The sales associate was never named as a respondent in this proceeding against the real estate broker. Petitioner entered into a settlement agreement with the sales associate in DOAH Case No. 09-0952, which renders moot the allegations in Count III of the Administrative Complaint against the sales associate in DOAH Case No. 09-0953.

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.