

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF REAL ESTATE,)
)
Petitioner,)
)
vs.) Case No. 10-0749PL
)
JANET HURST,)
)
Respondent.)
_____)

RECOMMENDED ORDER

An administrative hearing was conducted in this case on August 3 and 4, 2010, in DeFuniak Springs, Florida, before James H. Peterson, III, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Joseph A. Solla, Esquire
Department of Business and
Professional Regulation
Division of Real Estate
400 West Robinson Street, Suite N801
Orlando, Florida 32801-1757

For Respondent: Lyndia Padgett Spears, Esquire
7024 State Highway 83, North
DeFuniak Springs, Florida 32433

STATEMENT OF THE ISSUES

I. Whether Janet Hurst (Respondent), as a licensed residential real estate broker, should be subject to

disciplinary action by the Department of Business and Professional Regulation, Division of Real Estate (Petitioner), for failure to direct, control, or manage a sales associate in her employ, in violation of Section 475.25(1)(u), Florida Statutes.^{1/}

II. Whether Respondent, as a licensed residential real estate broker, should be subject to disciplinary action by Petitioner for fraud, misrepresentation, concealment, false promises, false pretences, dishonest conduct, culpable negligence, or breach of trust in any business transaction, in violation of Section 475.25(1)(b), Florida Statutes.

PRELIMINARY STATEMENT

In December 2009, Petitioner filed an administrative complaint (Administrative Complaint) against Respondent and her sales associate, Carol Rosell, alleging that on or about May 3, 2006, Carol Rosell increased the listing price of certain real property from \$199,000 to \$239,000 without the consent or authorization of the sellers and that Respondent violated Section 475.25(1)(u), Florida Statutes, because Respondent failed to direct, control or manage the sales associate by allowing Carol Rosell to make the price change when Respondent knew, or should have known, that the sellers did not authorize or consent to the price increase. The Administrative Complaint further alleges that both Respondent and Carol Rosell violated

Section 475.25(1)(b), Florida Statutes, because they allegedly concealed the price change of the property from the sellers. Carol Rosell entered into a stipulation with Petitioner in settlement of the allegations against her and, although she offered testimony at the final hearing, was not a party to this proceeding. Respondent timely filed an Election of Rights form disputing the allegations and requesting an administrative hearing. In a letter dated February 8, 2010, Petitioner forwarded the case to the Division of Administrative Hearings (DOAH). The case was originally assigned to Administrative Law Judge Lisa Shearer Nelson, but was subsequently transferred to the undersigned to conduct the administrative hearing.

At the administrative hearing in this matter held on August 3 and 4, 2010, Petitioner presented the testimony of Petitioner's investigator, Diana Woods; one of the sellers, Darlene Rosell; and Carol Rosell. Petitioner offered seven exhibits which were received into evidence as Petitioner's Exhibits P-1 through P-7. Respondent presented the testimony of former employees of Respondent's real estate agency, including Sandra Fillingim, Rhonda Turner, Linda Marie Yaun, and Respondent's son, Michael Hurst. Respondent further offered the testimony of Charles Christian, the owner of an Alabama corporation named the Christian Company, doing business as Paradise Realty and Development, and engaged in the sale and

development of real estate. Respondent also testified on her own behalf and offered eleven exhibits that were received into evidence as Respondent's Exhibits R-1 through R-3, R-7, R-8, and R-20 through R-25.

The hearing concluded on August 4, 2010. The proceedings were recorded and a transcript was ordered. The parties were given ten days following the filing of the transcript within which to file their respective Proposed Recommended Orders. A two-volume transcript of the final hearing was filed on September 2, 2010. Petitioner and Respondents timely filed their Proposed Recommended Orders, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is the licensing authority for real estate brokers in Florida, with revocation and disciplinary authority over its licensees pursuant to Section 20.165 and Chapters 455 and 475, Florida Statutes.

2. Respondent is, and at all material times was, a licensed Florida real estate broker who operated a real estate brokerage named Lake DeFuniak Realty, Inc.

3. Carol Rosell was first licensed as a real estate sales associate in Florida in February or March, 2005, and began her first employment in that capacity in April 2005, at Lake DeFuniak Realty, Inc.

4. Although a newly-licensed real estate sales associate, Carol Rosell was not unsophisticated in financial matters, having been involved in the banking industry for over 20 years prior to becoming licensed as a real estate sales associate.

5. In 2005, Carol Rosell sold over one million dollars in real estate through Lake DeFuniak Realty, Inc., and earned over \$60,000 in real estate commissions.

6. On December 23, 2005, Carol Rosell placed a telephone call to her first cousin in New Jersey, Richard Rosell, and advised him of two parcels of adjacent land on Kings Lake Road near DeFuniak Springs that were for sale. Both Mr. Rosell and his wife, Darlene Rosell, considered the purchase and, after the holidays, advised Carol Rosell that they wanted to purchase one of the parcels.

7. Carol Rosell, who was the listing agent for the sellers of the property through Lake DeFuniak Realty, Inc., advised that the two parcels were to be sold together. Richard and Darlene Rosell decided to purchase both parcels (collectively, "the Property"). Although they intended to visit the Property before closing, the Rosells decided to close on the purchase without viewing the Property. They paid \$182,900 for the Property.

8. After purchasing the Property, Richard and Darlene Rosell visited the Property in February, 2006, and shortly thereafter decided to sell the Property. According to Darlene

Rosell, during that visit, they also met with county officials who indicated that, contrary to the way the Property was advertised, the Rosell's rights in the Property did not include lake access.

9. On February 23, 2006, Richard and Darlene Rosell, as sellers, entered into a written listing agreement (Listing Agreement) giving Lake DeFuniak Realty, Inc., the exclusive right to sell the Property. The Listing Agreement listed Carol Rosell as the listing associate and provides that "[t]he property is offered for sale on the following terms (\$199,500.00), or on other terms acceptable to Seller."

10. The Listing Agreement does not address how price changes are to be authorized by the sellers.

11. According to the Emerald Coast multiple real estate listing (MLS) printout for the Property, after the Rosells entered into the Listing Agreement on February 23, 2006, the MLS listing price for the Property was originally set at \$199,500.

12. Contrary to the allegations of the Administrative Complaint, the price change for the Property reflected on the MLS printout shows that on March 3, 2006, the price change was from \$199,500 to \$299,500, as opposed to \$239,500 as alleged in the Administrative Complaint. The evidence further shows that it was Respondent, not Carol Rosell, who made entry in the MLS listing to increase the price to \$299,500 on May 3, 2006.

13. Real estate agents and sales associates obtain access to the MLS system through a member broker. In this case, both Carol Rosell and Respondent were signed up for MLS access during the pertinent time through Lake DeFuniak Realty, Inc. When signing up, each associate or agent is assigned a unique access code which identifies the agent and given a password to access the MLS system.

14. Once they access the system under their unique access codes and passwords, agents and sales associates can make changes to the MLS list price or note certain other changes in the listing. Changes made by those who access the system show up on the MLS listing history along with the access code of the agent who made the change. Real estate agents and sales associates are prohibited from sharing their passwords, and are subjected to fines if they do.

15. Respondent's access code to the MLS system during the pertinent period was E1705. Carol Rosell's access code was E5619.

16. Entries in the MLS history report for the Property show that Carol Rosell was the listing agent from the time that the Rosells purchased the Property until they sold it.

17. A review of the March 3, 2006, change in the MLS listing price for the Property from \$199,500 to \$299,500, on the MLS history report shows that Respondent, as opposed to Carol

Rosell, was the one who accessed the MLS system and made the change on that date under Respondent's access code number E1705.

18. Respondent testified that she accessed the MLS system and increased the MLS listing price of the Property to \$299,500 on March 3, 2006, only after she had spoken to Carol Rosell and someone on the telephone identified by Carol Rosell as Darlene Rosell to confirm that the change in the price was authorized.

19. Respondent further explained that she had previously asked Carol Rosell to obtain permission from the sellers, Richard and Darlene Rosell, for the price increase. Respondent said, after she discovered that the Rosells wanted to sell the Property, she did some research regarding the zoning and recommended the price increase for the Property based upon her discovery of a similar-sized parcel listed for \$299,000 with the same development potential just one-tenth of a mile away from the Property.

20. The only change in the MLS listing price for the Property under Respondent's access code E1705 was the increase to \$299,500 made on March 3, 2006. After that, the only changes in the MLS listing price for the Property while the Rosells had it listed with Lake DeFuniak Realty, Inc., were made under Carol Rosell's access code number E5619, including a decrease to \$199,500 and then increase back to \$299,500 on April 18, 2006; a

decrease to \$199,500, and then an increase to \$259,500 on May 1, 2006; and a decrease to \$239,000 on July 18, 2006.

21. The evidence demonstrated that the price was increased to \$299,500, as opposed to \$239,500 on March 3, 2006, and that the change on that date was made by Respondent, as opposed to Carol Rosell as erroneously alleged in the Administrative Complaint. Nevertheless, in her settlement stipulation with Petitioner, Carol Rosell "admits the factual allegations in all counts of the Administrative Complaint and that such allegations constitute a violation(s) of the count(s)."^{2/}

22. Under the terms of her settlement stipulation with Petitioner, Carol Rosell's real estate license was placed on probation for a period of one year, and Carol Rosell agreed to pay costs in the amount of \$264, and agreed to pay a fine in the sum of \$500. Petitioner, however, waived the fine imposed against Carol Rosell, and she agreed to testify in this proceeding on behalf of Petitioner.

23. In further contravention of the Administrative Complaint and the plain terms of the settlement stipulation with Petitioner's main witness, Carol Rosell, Petitioner's counsel stated during his opening at the final hearing that it was Respondent who changed the price of the Property "as part of a scheme to make an illegal profit," and that Carol Rosell "never changed the price."

24. There is no mention in the Administrative Complaint of a scheme to make an illegal profit and the evidence produced at final hearing does not support such a finding, nor does it support a finding that Carol Rosell never changed the MLS listing price of the Property.

25. At the final hearing, Carol Rosell testified that she did not recall making any of the changes to the MLS listing price. Carol Rosell attempted to explain the fact that her access code appears next to numerous MLS listing price or other changes made to the Property's MLS listing by testifying that she may have left her MLS access code and password on Respondent's computer at a time when she had to share a computer with Respondent, and that Respondent may have used them in making the price changes.

26. Carol Rosell's testimony was refuted by a number of former employees of Lake DeFuniak Realty, Inc., who explained that Carol Rosell never had to share a computer, and that all agents knew not to give out their passwords to the MLS system.

27. In addition, during cross-examination, while Carol Rosell testified that she did not "recall changing prices like that," she did not deny it. Further, in apparent contradiction of her earlier testimony, Carol Rosell remembered "changing the price back to one ninety-nine five," and testified that she had no proof that Respondent was the one who changed the prices.

28. In view of Carol Rosell's settlement stipulation, the documentary evidence of the use of her access code on numerous occasions, her inconsistent testimony, and the credible testimony of other witnesses regarding passwords and whether she shared a computer, it is found that, other than the change made by Respondent on May 3, 2006, increasing the price to \$299,500, all of the other price and listing changes to the MLS listing for the Property made during the time that the Rosells owned the Property were made by Carol Rosell.

29. While not mentioned in the Administrative Complaint, Petitioner, through the testimony of Carol Rosell, attempted to show that Respondent changed the listing price of the Property to make an illegal profit.

30. Carol Rosell testified that Respondent told her that she had a verbal contract with Charles "Chuck" Christian and that there was a secret deal with him to inflate the reported sales price of the property and the profit would be split among Respondent, Mr. Christian, and Carol Rosell.

31. Carol Rosell's testimony regarding the alleged transaction, however, was not credible. At the final hearing, the exchange between Petitioner's counsel and Carol Rosell regarding that alleged secret deal was as follows:

Q. [MR. SOLLA]. Did you enter into a listing agreement on behalf of DeFuniak

Springs Realty with Darlene Rosell and her husband?

A. [CAROL ROSELL]. Yes I did.

Q. And what was the listing price in that agreement?

A. At the time, it was one ninety-nine five (\$199,500).

Q. Okay. Did there come a time when the price changed?

A. Yes.

Q. How did that happen? How did it arise?

A. The first price change was done by Janet Hurst, the initial price change. And at the time, I didn't know it was being done. After the fact, she indicated that she had changed it because of interest that she had from individuals, investors, out of south Florida who were concerned about the price at one ninety-nine five (\$199,500). They felt that it was too low, and they were concerned that there were problems with the property.

Q. Did she explain to you at some point that she intended for the buyer to resell the property and to profit?

A. Later on yes, we had that discussion. She told me that, essentially, buy low, sell high. She said that she had somebody that was interested in the property, that they were going to purchase it on paper for the one ninety-nine five (\$199,500). And I'm not sure of the exact amount. It was one ninety-nine or one ninety-five. And then they were going to turn around and flip it and sell it for two ninety-nine or three fifty. And again, I can't remember exactly what the initial amount was, but they were going to sell it for a higher price.

Q. So raising the listing price would make it appear that the property was worth more?

MS. SPEARS: Objection, Your Honor, he's leading his own.

THE COURT: I'll sustain that objection.
BY MR. SOLLA:

Q. Why would they raise the listing price? Why would Janet Hurst raise the listing price

A. She told me that this way it looked like they were paying more for the property, so when they sold it for more than the listing price, they were showing a profit that they were making, and it looked better for business purposes. Those weren't her exact words, but that was what she was saying.

Q. And did she agree to share some of that profit with you?

A. She did. Initially, she said that we would split it three ways, and she went cha ching, cha ching. And then she said, well, I can't give you - - I can't split it because you're a realtor. I can give you a bonus. And that's how it was left.

Q. Did you let Darlene Rosell know that the price had been changed?

A. I honestly don't remember if I did initially. I know we had that conversation, I'm going to say, about a week after the price - - after I realized it had been done. And I called Darlene. Because at the time, we had a verbal contract with - - or Janet had a verbal contract with an individual. And the way it was presented to me was that he was going to pay the one ninety-nine - - he was going to pay two ninety-nine (\$299,000) for it, and he was going to sell it and flip it. And I remember saying to her, that's great, they'll be happy. They're going to get more than they even asked for it. And then she explained to me that they weren't going to get that price, they would still get the amount that they had listed it for, but the other individual was going to show that it was more than what he was paying for it so that he could sell it.

32. Aside from the rambling, convoluted nature of the testimony, there are other reasons to question its credibility.

At the final hearing, Mr. Christian took the witness stand and denied the alleged scheme. Respondent also denied it, and the credible testimony of Respondent's former employees indicated that Lake DeFuniak Realty, Inc., was not involved in "flipping" property.

33. In addition, the alleged scheme is illogical. It is unlikely that Respondent would tell Carol Rosell that she planned to make an illegal profit from the proceeds of a sale from property owned by Carol Rosell's relatives. Carol Rosell testified that she would not do anything illegal. Carol Rosell also testified that she told Darlene Rosell of all the details of the verbal agreement, and yet, later, Darlene Rosell and her husband entered into a contract with Mr. Christian's company. These factors, together with Carol Rosell's lack of clear recall of prices or the timing of her revelation of the price changes to Darlene Rosell, as well as the fact that Carol Rosell was required to testify against Respondent in exchange for a favorable settlement stipulation with Petitioner, make Carol Rosell's testimony regarding the alleged scheme untrustworthy.

34. Therefore, in addition to the fact that the alleged scheme is beyond the pleadings of the Administrative Complaint, it is found that Petitioner failed to show that Respondent changed the price of the Property as part of an alleged scheme to make an illegal profit.

35. Moreover, it is further found that Petitioner failed to provide evidence of any incentive for Respondent to change the MLS listing. The only credible explanation for the price change to \$299,000 on March 3, 2006, was provided by Respondent when she explained that she made the change for the benefit of the sellers to better reflect a nearby comparative listing.

36. Finally, it is alleged that Respondent concealed from the sellers the fact that the listing price for the Property was changed. For this allegation, Petitioner relies upon the testimony of Carol Rosell, as well as the testimony of Darlene Rosell. Carol Rosell's testimony in this regard does not support a finding that the price change was concealed from the sellers. When asked when she advised Darlene Rosell of the first price change, Carol Rosell testified, "I honestly don't remember if I did initially. I know we had that conversation, I'm going to say, about a week after the price - - after I realized it had been done." In fact, Carol Rosell's indefinite testimony could arguably support a finding that she "initially" told the sellers of the price change.

37. Darlene Rosell testified at the final hearing that she was not advised of the March 3, 2006, price change until April, 2006, when Carol Rosell called and told her that "the broker" had changed the price to \$239,000.

38. In contrast, according to Respondent, once she had decided that the sales price listed for the Property was too low, but before changing the MLS listing price, she asked Carol Rosell to find the contact numbers for the sellers. Respondent testified that Carol Rosell then came into Respondent's office with a telephone to her ear and then handed it to Respondent, explaining that Darlene Rosell was on the phone. Respondent further testified that, during that telephone conversation, she discussed with the person identified as Darlene Rosell that she would try listing the Property at a higher price and then go down if it was not selling.

39. Then, according to Respondent, she asked Carol Rosell to get written confirmation of the sellers' price change authorization by having Darlene Rosell fax something into the office. While Respondent introduced a copy of the Listing Agreement that apparently had been faxed from Lake DeFuniak Realty, Inc., with changes to the listing price, only the original date of the listing agreement, as opposed to the date of the price change authorization, is evident on the copy provided, and thus no weight is given to the document.

40. While Respondent did not introduce reliable evidence of written authorization from Darlene Rosell, Respondent recalled that Carol Rosell provided written proof of Darlene Rosell's authorization at the time Respondent made the change on

March 3, 2006. In addition, there is evidence that Carol Rosell often did not keep up with her work files at office, and that the file Carol Rosell assembled for the Property in the possession of Lake DeFuniak Realty, Inc., was incomplete.

41. Even without written confirmation, Respondent's version is the only credible version of the facts under the circumstances, and Respondent's testimony that she informed someone identified as Darlene Rosell of the fact that she intended to make the price change on the Property is credited.

42. Even without Respondent's testimony, Carol Rosell's equivocal testimony that she does not recall "initially" contacting the sellers about the price change is inadequate evidence to show that there was a delay between Respondent's change of the price on March 3, 2006, and the sellers' receipt of information informing them of the price change.

43. Moreover, it is clear that the sellers were contacted within weeks of the March 3, 2006, price change. Petitioner produced no evidence, through expert testimony or otherwise, indicating that a week or so delay in informing a client of a MLS listing price change would constitute a violation of a Florida real estate license standard.

44. Although Carol Rosell testified that Respondent was sometimes hard to reach or unavailable to answer questions that Carol Rosell may have had regarding her duties, the evidence was

insufficient to show that Respondent did not properly direct, control, or manage Carol Rosell while she was a sales associate with Lake DeFuniak Realty, Inc. In fact, with regard to the Property, the evidence indicates that Respondent went out of her way to help Carol Rosell with the listing for the Property by making recommendations for a price increase based upon Respondent's independent investigation. Moreover, contrary to the testimony of Carol Rosell, the credible testimony of Respondent and former employees of Lake DeFuniak Realty, Inc., demonstrated that Respondent offered continued education and provided mentoring to sales associates, all of whom worked with Lake DeFuniak Realty, Inc., as independent contractors.

45. In sum, Petitioner did not prove that Respondent failed to appropriately direct, control or manage a sales associate, or that Respondent concealed the change of the listing price of the Property from the sellers.

CONCLUSIONS OF LAW

46. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding. See §§ 120.569, 120.57(1), 120.60(5), and 455.225(5), Fla. Stat. (2010).

47. Petitioner is responsible for prosecuting disciplinary cases against licensed real estate brokers. See § 475.021(1), Fla. Stat. (2009).

48. Petitioner, as the party asserting the affirmative in this proceeding, has the burden of proof. See, e.g., Balino v. Dept. of Health & Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977). Because the Petitioner is seeking to prove violations of a statute and impose administrative fines or other penalties, it has the burden to prove the allegations in the complaint by clear and convincing evidence. Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

49. Clear and convincing evidence:

[r]equires that evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking 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 a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In re Henson, 913 So. 2d 579, 590 (Fla. 2005), quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

50. Disciplinary statutes, such as Section 475.25(1), Florida Statutes, are penal in nature, and must be construed against the authorization of discipline and in favor of the individual sought to be penalized. Munch v. Dep't of Bus. & Prof'l Reg., 592 So. 2d 1136 (Fla. 1st DCA 1992). A statute imposing a penalty is never to be construed in a manner that

expands the statute. Hotel & Restaurant Comm'n v. Sunny Seas No. One, 104 So. 2d 570, 571 (1958).

51. In determining whether Petitioner has met its burden of proof, the evidence presented should be evaluated in light of the specific factual allegations in the administrative complaint. Disciplinary actions against licensees may only be based upon those offenses specifically alleged in the administrative complaint. See, e.g., Trevisani v. Dep't of Health, 908 So. 2d 1108 (Fla. 1st DCA 2005).

52. In this case, the Administrative Complaint specifically alleged that Carol Rosell made the price change on March 3, 2006, whereas the facts show that it was Respondent, not Carol Rosell who made that change. In addition, although the Administrative Complaint alleges that the price change was concealed from the sellers, the evidence indicates that Carol Rosell, either initially or within weeks from March 3, 2006, advised Darlene Rosell that the listing price of the Property had been increased.

53. In addition to factual allegation deficiencies, the allegation in the Administrative Complaint that Respondent violated Section 475.25(1)(u), Florida Statutes, is problematic as a matter of law. That is because subsection (1)(u) of Section 475.25, Florida Statutes, did not come into effect until July 1, 2006, over three months after the March 3, 2006, price

change. See Ch. 2006-210, §§ 4, 19 at 2232, 2241, Laws of Fla., codified at § 475.25(1)(u), Fla. Stat (2006).

54. Therefore, to the extent that the allegation relies on facts that occurred prior to the effective date of the law, Respondent cannot be charged with a violation of Section 475.25(1)(u), Florida Statutes. See Delk v. Dep't of Prof'l Reg., 595 So. 2d 966, 967 (5th DCA 1992) ("This is basic due process of law and means that not only must the proof at trial or hearing be that conduct charged in the accusatorial document, but also that the conduct proved must legally fall within the statute or rule claimed to have been violated.").

55. Even if Section 475.25(1)(u), Florida Statutes, were effective during the time of the alleged facts, Petitioner failed to prove a violation of that provision.

56. Section 475.25(1)(u), Florida Statutes (2006), authorizes Petitioner to take action against real estate brokers where is shown that the broker:

(u) Has failed, if a broker, to direct, control, or manage a broker associate or sales associate employed by such broker. A rebuttable presumption exists that a broker associate or sales associate is employed by a broker if the records of the department establish that the broker associate or sales associate is registered with that broker. A record of licensure which is certified or authenticated in such form as to be admissible in evidence under the laws of the

state is admissible as prima facie evidence of such registration.
Id.

57. Unlike a charge of violating a statute or rule which requires no proof of a standard of care, the charge against Respondent under Section 475.25(1)(u), Florida Statutes, necessarily required evidentiary proof of some standard of professional conduct regarding a real estate broker's supervisory obligations, as well as deviation therefrom. Generally, in order to establish deviation from an applicable standard of care in an administrative case against a licensee, expert testimony or other competent evidence of the applicable standard is necessary to establish the standard. Cf., Purvis v. Dep't of Bus. & Prof'l Reg., 461 So. 2d 134, 136 (Fla. 1st DCA 1984) (proof of standard of care required prior to establishing that a veterinarian was guilty of negligence and incompetence in the practice of veterinary medicine).

58. In this case, Petitioner failed to offer any expert testimony or other evidence of a broker's supervisory or management duties over a sales associate under Section 475.25(1)(u), Florida Statutes, or the manner in which Respondent deviated from those duties.

59. In addition, rather than supporting the allegation that Respondent failed to adequately supervise a sales associate, the evidence adduced at the final hearing showed that

Respondent provided appropriate supervision and training for Carol Rosell.

60. Petitioners also failed to prove concealment under Section 475.25(1)(b), Florida Statutes. That Section authorizes disciplinary action against brokers in cases where a broker:

(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.

Id.

61. In order to prove a violation of Section 475.25(1)(b), Florida Statutes, an intentional act must be proven. See Munch v. Dep't of Prof'l Reg., 592 So. 2d 1136, 1143-44 (Fla. 1st DCA 1992) ("it is apparent that it is contemplated that an

intentional act be proved before a violation [of Section 475.25(1) (b)] may be found." (italics in original).

62. The evidence does not support a finding that Respondent intentionally concealed the price change from the sellers. Rather, the credible evidence supports the finding that Respondent believed that the sellers were aware of her recommendation that the listing price for the Property be increased and that Respondent believed that Darlene Rosell authorized the price change.

63. In sum, Petitioner failed to prove by clear and convincing evidence that Respondent violated Section 475.25(1) (u), Florida Statutes, or Section 475.25(1) (b), Florida Statutes. Therefore, the Administrative Complaint against Respondent should be dismissed.

RECOMMENDATION

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

RECOMMENDED that the Department of Business and Professional Regulation, Division of Real Estate, enter a Final Order dismissing the Administrative Complaint.

DONE AND ENTERED this 29th day of October, 2010, in
Tallahassee, Leon County, Florida.



JAMES H. PETERSON, III
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of October, 2010.

ENDNOTES

^{1/} Unless otherwise indicated, all references to Florida Statutes, except for Section 475.25(1)(u), Florida Statutes, are to the 2005 version in effect at the time of the alleged violations. As discussed in the Conclusions of Law Section, Section 475.25(1)(u), Florida Statutes, was not effective until July 1, 2006. See discussion at Conclusions of Law paragraphs 53 and 54, supra.

^{2/} Paragraph 4 of the Administrative Complaint alleges that "[o]n or about March 3, 2006 Respondent Carol Jean Rosell increased the sale price for the Subject Property to \$239,000.00.

COPIES FURNISHED:

Joseph A. Solla, Esquire
Department of Business and
Professional Regulation
400 West Robinson Street, Suite 801N
Orlando, Florida 32801-1757

Lyndia Padgett Spears, Esquire
7024 State Highway 83, North
Defuniak Springs, Florida 32433

Thomas W. O'Bryant, Jr., Director
Division of Real Estate
Department of Business and
Professional Regulation
400 West Robinson Street, Suite 801N
Orlando, Florida 32801-1757

Reginald Dixon, 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 this case.