

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF REAL ESTATE,)
)
Petitioner,)
)
vs.) Case No. 10-1609PL
)
MICHAEL JACOB PIWKO,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case by video teleconference on May 6, 2010, with the parties to appear from Orlando, Florida, before J. D. Parrish, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

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

For Respondent: No Appearance

STATEMENT OF THE ISSUES

Whether Michael Jacob Piwko (Respondent), committed the violations alleged in the Administrative Complaint dated December 15, 2009, and, if so, what penalties should be imposed.

PRELIMINARY STATEMENT

The Department of Business and Professional Regulation, Division of Real Estate (Petitioner) filed a four-count Administrative Complaint against Respondent that alleged violations of Subsection 475.25(1), Florida Statutes (2008). The alleged violations stemmed from Respondent's dealings with one individual who allegedly deposited funds with Respondent in the course of real estate transactions that ultimately were not completed. All references to law are to Florida Statutes (2008) unless otherwise stated.

On or about January 15, 2010, Respondent, through counsel, forwarded a Notice of Appearance, Answer, Request for Investigative File, Request for Formal Hearing, Motion to Dismiss for Lack of Subject Matter Jurisdiction and Request for Attorneys Fees. Thereafter, the matter was forwarded to the Division of Administrative Hearings (DOAH) for formal proceedings. Timely with the referral, an Initial Order was issued on March 25, 2010.

On March 31, 2010, a Notice of Withdrawal was filed by Respondent's counsel followed by Petitioner's Unilateral

Response to Initial Order on April 1, 2010. An Order on the Notice of Withdrawal was entered on April 6, 2010, that provided, in pertinent part:

A Notice of Withdrawal has been filed by Heather Rutecki, Esquire, counsel for Respondent, in this case. The Notice fails to comply with Florida Administrative Code Rule 28-106.105(3):

On written motion served on the party represented and all other parties of record, the presiding officer shall grant counsel of record . . . leave to withdraw for good cause shown.

The Notice fails to include a certificate of service indicating that Respondent or counsel for Petitioner have been served with the Notice and is not in the form of a motion. No action to remove Ms. Rutecki as counsel of record will be taken until Florida Administrative Code Rule 28-106.105(3) is complied with.

On April 14, 2010, a Notice of Hearing by Video Teleconference and an Order of Pre-hearing Instructions were entered. The case was set for hearing for May 6, 2010.

A second Notice of Withdrawal was filed by Respondent's counsel on May 3, 2010. It is more fully addressed in the conclusions of law below as is the Motion for Emergency Relief Where Final Hearing Held in [sic] Absent of Both Respondent and Counsel for Respondent.

At the hearing, Petitioner presented the testimony of Joaquin Inigo and Arthur Soule. The documents attached to the

Administrative Complaint were admitted into evidence as Exhibits 1-3. The Transcript of the proceedings was filed with DOAH on June 10, 2010. Petitioner timely filed a Proposed Recommended Order.

FINDINGS OF FACT

1. Petitioner is an agency of the State of Florida created by Section 20.165, Florida Statutes. Petitioner is charged with the responsibility of regulating the real estate industry in Florida pursuant to Chapters 455 and 475, Florida Statutes. As such, Petitioner is fully authorized to prosecute disciplinary cases against real estate licensees.

2. Respondent was at the times material to this matter, the holder of a Florida real estate associate license, license number 707518, issued by Petitioner. As last known, Respondent was an active sales associate with All Star Investment Realty, Inc., 9425 Sunset Drive #180, Miami, Florida 33173.

3. From January 2008 through May 2008, Respondent was employed as a sales associate with Enrique Piwko, the qualifying broker for All Star Investment Realty, Inc.

4. In January of 2008, Joaquin Inigo, a buyer, sought to purchase a condominium in Tampa, Florida. He gave Respondent a deposit for the purchase, but was later advised the deal had "fallen through."

5. On or about May 17, 2008, Mr. Inigo executed a contract for purchase and sale seeking to acquire a second condominium, unit number 208, at 310 Crestwood Circle, Royal Palm Beach, Florida 33411. As part of the transactions with Respondent, Mr. Inigo tendered approximately \$77,000.00 to Respondent to be applied to the purchase price of unit 208.

6. Monies were tendered to Respondent directly because Mr. Inigo expected Respondent to get an employee discount related to the sale and pass that on to him.

7. The closing date in July passed without unit 208 being conveyed to Mr. Inigo. Efforts to achieve a refund of the deposit monies were fruitless.

8. Upon investigation of the matter, Petitioner discovered that Respondent never deposited Mr. Inigo's funds in escrow with his broker. Petitioner did not negotiate the purchase of unit 208. Petitioner did not refund the deposit monies.

9. All monies provided by Mr. Inigo to Respondent were for the purchase of unit 208 and were not a personal loan to Respondent.

10. Respondent asserted in pleadings that the monies from Mr. Inigo were a personal loan. Respondent did not, however, present written evidence of the alleged loan or its terms and declined to respond to the investigatory efforts made by Petitioner.

11. Petitioner did not present evidence regarding the cost of investigating this matter.

CONCLUSIONS OF LAW

12. DOAH 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 (2009).

13. Petitioner seeks to impose administrative penalties against Respondent that include the suspension or revocation of his real estate license. Therefore, Petitioner 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).

14. 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).

15. Section 475.25, Florida Statutes, authorizes Petitioner to discipline any Florida real estate licensee who commits any of a number of offenses defined by the statute. Pertinent to this case, however, are the following provisions that Petitioner alleged Respondent violated:

(1) The commission may deny an application for licensure, registration, or permit, or renewal thereof; 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 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 or may contract with public or private entities for mediation services. However, the mediation process must be successfully completed within 90 days following the last demand or the licensee shall promptly employ one of the other escape procedures contained in this section. Payment for mediation will be as agreed to in writing by the parties. The department may adopt rules to implement this section.

If the licensee promptly employs one of the escape procedures contained herein and abides by the order or judgment resulting therefrom, no administrative complaint may be filed against the licensee for failure to account for, deliver, or maintain the escrowed property. Under certain circumstances, which the commission shall set forth by rule, a licensee may disburse property from the licensee's escrow account without notifying the commission or employing one of the procedures listed in sub-subparagraphs a.-d. If the buyer of a

residential condominium unit delivers to a licensee written notice of the buyer's intent to cancel the contract for sale and purchase, as authorized by s. 718.503, or if the buyer of real property in good faith fails to satisfy the terms in the financing clause of a contract for sale and purchase, the licensee may return the escrowed property to the purchaser without notifying the commission or initiating any of the procedures listed in sub-subparagraphs a.-d.

2. Has failed to deposit money in an escrow account when the licensee is the purchaser of real estate under a contract where the contract requires the purchaser to place deposit money in an escrow account to be applied to the purchase price if the sale is consummated.

(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.

* * *

(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; or has failed, if a sales associate, to immediately place with her or his registered employer any money, fund, deposit, check, or draft entrusted to her or him by any person dealing with her or him as

agent of the registered employer. The commission shall establish rules to provide for records to be maintained by the broker and the manner in which such deposits shall be made. A broker may place and maintain up to \$5,000 of personal or brokerage funds in the broker's property management escrow account and up to \$1,000 of personal or brokerage funds in the broker's sales escrow account. A broker shall be provided a reasonable amount of time to correct escrow errors if there is no shortage of funds and such errors pose no significant threat to economically harm the public. It is the intent of the Legislature that, in the event of legal proceedings concerning a broker's escrow account, the disbursement of escrowed funds not be delayed due to any dispute over the personal or brokerage funds that may be present in the escrow account.

16. Additionally, Petitioner maintains that Respondent violated Florida Administrative Code Rule 61J2-14.009. That regulation provides:

Every sales associate who receives any deposit, as defined in Rule 61J2-14.008, Florida Administrative Code, shall deliver the same to the broker or employer no later than the end of the next business day following receipt of the item to be deposited. Saturday, Sundays and legal holidays shall not be construed as business days. Receipt by a sales associate or any other representative of the brokerage firm constitutes receipt by the broker for purposes of paragraph 61J2-14.008(1)(d), Florida Administrative Code.

17. Based upon the undisputed testimony in this cause, Respondent was given deposit monies that were not applied for the benefit of the buyer. Respondent did not promptly deposit

the monies into his broker's account, did not refund those monies when requested, and did not negotiate the sales transaction to assure that the funds would be appropriately applied to the purchase price.

18. Based upon the foregoing, Petitioner has established by clear and convincing evidence that Respondent violated the provisions of law cited by the Administrative Complaint.

19. Next, it is necessary to decide Respondent's Motion for Emergency Relief where Final Hearing Held in [sic] Absent of Both Respondent and Counsel for Respondent. Essentially, the motion seeks to re-notice the hearing for trial and afford the Respondent with additional notice of the proceedings. The basis for the request stemmed from counsel's continuing effort to withdraw in this matter and Respondent's alleged refusal to contact counsel or to participate in the defense of the cause. As indicated above, counsel for Respondent was advised by order dated April 6, 2010, of the requirements in order to consider a motion for withdrawal. The pleading filed on May 3, 2010, some three days before the scheduled hearing, represented that a copy of the document had been provided to Respondent on or about April 21, 2010. The docket of this case has been available on-line at all times. Respondent and counsel for Respondent could easily review the docket to determine if a ruling had been

entered on the "Notice of Withdrawal" filed May 3, 2010. A continuance of the May 6, 2010, hearing date was not requested.

20. Finally, Respondent did not bear the burden of proof in this cause. Petitioner was obligated to go forward and to present its evidence to support the allegations of the Administrative Complaint. Had Respondent sought to provide information regarding his side of the matter, he could have done so during the investigatory period of the case or in advance of the hearing. Respondent was not required to prove anything. Subsequent to the hearing date Respondent, individually, did not seek relief of any kind. Based upon the foregoing, Respondent's request for emergency relief is denied. Having treated the second "Notice of Withdrawal" as a motion for same, it is hereby granted.

21. 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 Respondent for the violations noted in the Administrative Complaint and proven as indicated above. After consulting the "disciplinary guidelines" of the Commission set forth in Florida Administrative Code Chapter 61J2-24, it is noted that the guidelines place restrictions and limitations on the exercise of the Commission's disciplinary authority. See also 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.

22. In accordance with the guidelines, it is therefore recommended that Respondent be fined not less than \$2,000.00 and have his license suspended for not less than five years.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered by the Florida Real Estate Commission finding Respondent in violation of the provisions of law set forth in the Administrative Complaint as alleged by Petitioner, imposing an administrative fine in the amount of \$2,000.00, and imposing a suspension of Respondent's real estate license for a period of five years.

DONE AND ENTERED this 18th day of June, 2010, in Tallahassee, Leon County, Florida.



J. D. PARRISH
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 18th day of June, 2010.

COPIES FURNISHED:

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

Heather A. Rutecki, Esquire
Rutecki & Associates, P.A.
Bank of America Tower
100 Southeast Second Street, Suite 4600
Miami, Florida 33131

Roger P. Enzor, Chair
Real Estate Commission
Department of Business and
Professional Regulation
400 West Robinson Street, N801
Orlando, Florida 32801

Thomas W. O'Bryant, Jr., Director
Division of Real Estate
400 West Robinson Street, N801
Orlando, Florida 32801

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 these cases.