

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF REAL ESTATE,)
)
Petitioner,)
)
vs.) Case No. 10-3198PL
)
TERRI JOHNSON,)
)
Respondent.)
_____)

RECOMMENDED ORDER

On August 30, 2010, a final hearing was held by means of video teleconferencing with sites in Jacksonville and Tallahassee, Florida, before Lisa Shearer Nelson, an administrative law judge assigned by the Division of Administrative Hearings.

APPEARANCES

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

For Respondent: Terri Johnson, pro se
Lowell Correctional Institution
11120 North West Gainesville Road
Ocala, Florida 34482

STATEMENT OF THE ISSUES

The issues to be determined are whether Respondent violated Sections 475.25(1)(b), 475.25(1)(e), 475.25(1)(k), and

475.42(1)(d), Florida Statutes (2006), and Florida Administrative Code Rule 63J2-14.009, as alleged in the Administrative Complaint, and if so, what penalty should be imposed?

PRELIMINARY STATEMENT

At some time presumably in December 2009,^{1/} the Department of Business and Professional Regulation, Division of Real Estate (Department) issued a three-count Administrative Complaint against Respondent, alleging the statutory and rule violations described above. Respondent disputed the allegations in the Administrative Complaint and filed a Petition for Formal Administrative Hearing, which was received by the Department on January 25, 2010. On May 26, 2010, counsel for Respondent filed with the Department a Motion to Withdraw as counsel. The Motion to Withdraw, as well as the Administrative Complaint and Petition for Formal Hearing, were filed with the Division of Administrative Hearings on June 14, 2010, with a request that an administrative law judge be assigned.

On July 2, 2010, the case was noticed for a hearing to occur on August 30, 2010. Respondent's counsel's Motion to Withdraw was granted by Order dated July 21, 2010. On August 17, 2010, Petitioner filed a Motion to Permit Witness to Appear by Telephone, and stated in the motion that Respondent was incarcerated. Arrangements were made for Respondent to appear telephonically at the hearing, and she did so.

The hearing commenced and concluded on August 30, 2010, as scheduled. Petitioner presented the testimony of Melanie Malone and Katrin Rabren, and Petitioner's Exhibits 1 and 2 were admitted into evidence. Respondent did not present any witnesses or submit any exhibits.

The one-volume Transcript was filed with the Division on September 16, 2010, and Petitioner filed its Proposed Recommended Order on September 28, 2010. To date, no submission has been received from Respondent. Unless otherwise indicated, all references to Florida Statutes are to the 2006 codification.

FINDINGS OF FACT

1. Petitioner is the state agency charged with the licensing and regulation of the real estate industry in the State of Florida, pursuant to Section 20.165 and Chapters 455 and 475, Florida Statutes.

2. At all times material to this proceeding, Respondent was a licensed real estate sales associate, having been issued license number SL 706026. During the time relevant to this case, Respondent was a sales associate affiliated with Jacksonville Home Finders, Inc., a brokerage company located in Jacksonville, Florida.

3. Katrin Rabren was the broker/owner of Jacksonville Home Finders, Inc. (Homefinders). In approximately 2006, she hired Respondent as a sales associate, and Respondent's license was listed as affiliated with Homefinders in September 2006.

4. In early April 2007, Ms. Rabren received a call from Alvin Reynolds, the owner of some property Homefinders was managing at 3501 Kernan Boulevard, Number 234, in Jacksonville. Mr. Reynolds was calling to ask for his funds from the rental of the property.

5. The property was apparently rented and funds received from the tenant for a security deposit and first month's rent on or about March 12, 2007. However, those funds, totaling \$1,444.99, were not placed in the broker's trust account.

6. Ms. Rabren confronted Respondent about the funds and was told that Respondent spent the money on personal bills. Respondent told Ms. Rabren that she would replace the money.

7. On April 5, 2007, Respondent gave Ms. Rabren a check made out to Jacksonville Homefinders for \$1,489.99. The check was from an account for Winter Property Maintenance, Respondent's husband's company. Ms. Rabren's husband deposited the check in Homefinder's escrow account.

8. On April 6, 2007, the check was returned for insufficient funds.

9. Ms. Rabren paid the property owner out of her personal funds. Respondent has not replaced the funds or delivered funds to the employer/broker for deposit into the escrow account.

CONCLUSIONS OF LAW

10. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this

action in accordance with Sections 120.569 and 120.57(1), Florida Statutes (2010).

11. Petitioner is seeking to take disciplinary action against Respondent's license. Because of the penal nature of the proceeding, Petitioner bears the burden of proof to demonstrate the allegations in the Administrative Complaint by clear and convincing evidence. Department of Banking and Finance v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

12. As stated by the Florida Supreme Court:

Clear 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 testimony must be precise and lacking in confusion as to the facts in issue. The evidence must be of such a 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. 797, 800 (Fla. 4th DCA 1983).

13. Count One of the Administrative Complaint charges Respondent with failing to immediately place with a registered employer any money, fund, deposit, check or draft entrusted to her as agent of the registered employer in violation of Florida Administrative Code Rule 61J2-14.009 and Sections 475.25(1)(e) and 475.25(1)(k), Florida Statutes.

14. Florida Administrative Code Rule 61J2-14.009 provides as follows:

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.

15. Section 475.25, Florida Statutes, provides in pertinent part:

(1) The commission 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 . . . :

* * *

(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 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

16. Petitioner has proven the violations charged in Count One by clear and convincing evidence. Respondent received funds intended for a security deposit and first month's rent which were required to be deposited in her broker's escrow account. She did not deliver the funds to her employer, and the check designed to replace the funds was returned for insufficient funds.

17. Count Two of the Administrative Complaint charges Respondent with a violation of Section 475.25(1)(b), Florida Statutes, which makes it a disciplinary offense when a licensee:

(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.

18. Clear and convincing evidence was presented to establish that Respondent violated the charge in Count Two. Respondent committed a breach of trust when she accepted funds

meant for a real estate client and failed to deposit those funds into the trust account, using them for her own purpose instead.

19. Count III charges Respondent with violating Section 475.25(1)(e), which is quoted above, and with violating Section 475.42(1)(d), which provides:

(1)(d) A sales associate may not collect any money in connection with any real estate brokerage transaction, whether as a commission, deposit, payment, rental, or otherwise, except in the name of the employer and with the express consent of the employer; and no real estate sales associate, whether the holder of a valid and current license or not, shall commence or maintain any action for a commission or compensation in connection with a real estate brokerage transaction against any person except a person registered as her or his employer at the time the sales associate performed the act or rendered the service for which the commission or compensation is due.

20. For the same reasons expressed with respect to Counts One and Two, the Department has proven the allegations in Count III by clear and convincing evidence.

21. As required by Section 455.2273, Florida Statutes, the Florida Real Estate Commission has adopted disciplinary guidelines which provide a range of penalties for violations of Chapters 455 and 475, Florida Statutes, and the rules adopted pursuant thereto. Fla. Admin. Code R. 61J2-24.001. For each of the offenses committed here, the penalties range from a fine of varying amounts to suspension or revocation.

22. The undersigned has considered the number of violations proven, and the harm to the complaining witness as well the potential harm to the public. The Department has asked for revocation of Respondent's license, and that penalty is appropriate. No fine has been requested and none is recommended.

RECOMMENDATION

Upon consideration of the facts found and conclusions of law reached, it is

RECOMMENDED:

That the Florida Real Estate Commission enter a Final Order finding that Respondent has violated the provisions of Sections 475.25(1)(b), 475.25(1)(e), 475.25(1)(k), 475.42(1)(d), Florida Statutes (2006), and Florida Administrative Code Rule 63J2-14.009, as alleged in the Administrative Complaint, and revoking Respondent's license as a real estate sales associate.

DONE AND ENTERED this 20th day of October, 2010, in Tallahassee, Leon County, Florida.



LISA SHEARER NELSON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of October, 2010.

ENDNOTE

^{1/} The Administrative Complaint is neither signed nor dated, and there is no file stamp indicating that it was filed with the Clerk of the Agency. However, it is clear that the document was supplied to Respondent and she filed a response disputing its contents.

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.