

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF REAL ESTATE,)
)
Petitioner,)
)
vs.) Case No. 10-9617PL
)
AMIE LAYNE BENNIS,)
)
Respondent.)
_____)

RECOMMENDED ORDER

On February 9, 2011, a final hearing was held using video teleconferencing with sites in Jacksonville and Pensacola, Florida, before Lisa Shearer Nelson, an Administrative Law Judge appointed by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Patrick Cunningham, Esquire
Department of Business and
Professional Regulation
Division of Real Estate
400 West Robinson Street, Suite N-801
Orlando, Florida 32801

For Respondent: Richard Withers, Esquire
Post Office Box 2807
Orlando, Florida 32802-2807

STATEMENT OF THE ISSUE

The issue to be determined is whether Respondent violated sections 475.42(1)(b) & (d) and 475.25(1)(k) & (d)1., Florida Statutes (2008), and if so, what penalty should be imposed?

PRELIMINARY STATEMENT

On March 17, 2009, Petitioner, Department of Business and Professional Regulation, Division of Real Estate (DBPR or Petitioner), filed a four-count Administrative Complaint against Respondent, Amie Layne Bennis, asserting violations of sections 475.42(1)(b) & (d) and 475.25(1)(k) & (d)1. Respondent disputed the allegations in the Administrative Complaint and requested a hearing pursuant to section 120.57(1), Florida Statutes. On October 12, 2010, the matter was referred to the Division of Administrative Hearings for assignment of an administrative law judge.

On October 27, 2010, a Notice of Hearing was issued scheduling the case for hearing January 3, 2011. At Respondent's request, the case was continued until February 9, 2011, and proceeded as rescheduled.

At hearing, Petitioner presented the testimony of Jack Case, John McGroarty, and Robert Richardson, and Petitioner's Exhibits 1-3 were admitted into evidence. Respondent testified on her own behalf by telephone, but submitted no documents. The Transcript of the proceedings was filed with the Division on February 18, 2011. Petitioner filed its Proposed Recommended Order on February 25, 2011, and Respondent filed a Proposed Recommended Order on March 7, 2011. No objection has been made to date regarding the late-filing of Respondent's Proposed Recommended Order, and both submissions have been considered in the

preparation of this Recommended Order. All references to Florida Statutes are to the 2008 version unless otherwise indicated.

FINDINGS OF FACT

1. Petitioner is the state agency charged with the licensing and regulation of real estate brokers and salespersons in the State of Florida pursuant to section 20.165 and chapters 455 and 475, Florida Statutes.

2. At all times material to the allegations in the Administrative Complaint, Respondent was a licensed real estate sales associate registered with Century 21 Richardson Agency.

3. Respondent's license is currently null and void. Respondent no longer resides in Florida, but lives with her husband who is in the military, stationed in Hawaii.

4. Respondent met John P. McGroarty on a flight from California, during which they struck up a casual conversation. At some point, she believed that they became friends.

5. Respondent began performing "favours" for Mr. McGroarty with respect to rental properties he owned in the Pensacola area, such as placing a "for rent" sign in front of a house.

6. One property owned by Mr. McGroarty was located at 1025 Willow Lake Circle in Pensacola. Respondent assisted in leasing the property to Jennifer and Michael Gosnell for \$1,000 a month.

7. The form used for the lease to the Gosnells was a Florida Association of Realtors form Respondent obtained from her office. In several places, the preprinted form referenced

Century 21 Richardson Agency. In some but not all instances, the reference to Century 21 is lined through and the name Annie Pierce (Respondent's name before she married) is inserted.

8. Mr. McGroarty testified that he should have received \$1,000 a month for a year. However, the written term of the lease was for six months, from May 14, 2006, through November 14, 2006. Mr. McGroarty acknowledged receiving \$5,800 from Respondent.

9. Respondent received cash payments from the tenants for rent and deposited the money in her personal checking account, and then wrote Mr. McGroarty personal checks and on at least one occasion, apparently sent a cashier's check. Mr. McGroarty received what were clearly personal checks and cashed them.

10. Respondent received no compensation for assisting Mr. McGroarty, and did not ask for any. She thought there was a possibility he might buy other property from her, but no promise to that effect was ever made.

11. Respondent did not receive the funds from the tenants or disburse funds to Mr. McGroarty through her broker. In fact, her broker was unaware that she was handling the rental funds related to the Willow Lake Circle property.

12. At some point, the tenants became behind in their rent. There were times when they did not pay the entire amount due, and Respondent had to go to the home to collect the rent. Respondent

told Mr. McGroarty she could no longer continue assisting him with collection of the rent.

13. Mr. McGroarty called Mr. Richardson, Respondent's employer, and complained to him. However, neither Mr. McGroarty nor any of his properties were listed with Century 21.

14. Mr. Richardson confronted Respondent regarding the rental payments, and she told him that she was acting on her own as a friend to Mr. McGroarty, and that she had neither charged nor expected to receive a commission.

15. There was no persuasive evidence that Respondent retained any funds received from the tenants that she should have forwarded to Mr. McGroarty.

CONCLUSIONS OF LAW

16. 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.

17. The Department seeks to discipline Respondent's license as real estate sales associate. It therefore has the burden of proving the allegations of 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).

18. 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).

19. Moreover, in disciplinary proceedings, the statutes and rules for which a violation is alleged must be strictly construed in favor of Respondent. Elmariah v. Dep't of Prof'l Reg., 574 So. 2d 164 (Fla. 1st DCA 1990); Taylor v. Dep't of Prof'l Reg., 534 So. 782, 784 (Fla. 1st DCA 1988).

20. The Administrative Complaint in this case contains four separate counts. Count One charges Respondent with having operated as a broker while licensed as a sales associate in violation of section 475.42(1)(b), and therefore, in violation of section 475.25(1)(e).

21. Section 475.42(1)(b) provides that "[a] person licensed as a sales associate may not operate as a broker or operate as a sales associate for any person not registered as her or his employer." Section 475.25(1)(e) makes it a disciplinary offense to violate any of the provisions of chapter 475.

22. In order to prove that Respondent acted as a broker in violation of section 475.42(1)(b), Petitioner must demonstrate that Respondent's actions are within the definition "broker" in

section 475.01. The Legislature has defined the term "broker" as follows:

(1) (a) "Broker" means a person who, for another, and for a compensation or valuable consideration directly or indirectly paid or promised, expressly or impliedly, or with an intent to collect or receive a compensation or valuable consideration therefor, appraises, auctions, sells, exchanges, buys, rents, or offers, attempts or agrees to appraise, auction, or negotiate the sale, exchange, purchase, or rental of business enterprises or business opportunities or any real property or any interest in or concerning the same, including mineral rights or leases, . . . or who takes any part in the procuring of sellers, purchasers, lessors, or lessees of business enterprises or business opportunities or the real property of another, or leases, or interest therein, including mineral rights, or who directs or assists in the procuring of prospects or in the negotiation or closing of any transaction which does, or is calculated to, result in a sale, exchange, or leasing thereof, and who receives, expects, or is promised any compensation or valuable consideration, directly or indirectly therefor; . . . (Emphasis supplied.)

23. There is no clear and convincing evidence that Respondent acted as a broker, because there is no competent, substantial evidence that she received or expected to receive any compensation for collecting the rent on Mr. McGroarty's property and forwarding the proceeds to him. The best that can be said is that she hoped that, by helping Mr. McGroarty out with his rental property, she might have the prospect of a future sale. However, the evidence on this issue was more in the form of a vague hope than any real expectation of compensation.

24. Mr. McGroarty acknowledged that there was no property agreement and that he did not pay Respondent anything for her assistance. Moreover, his claim that he believed Century 21 Richardson Agency was representing his interests is not particularly credible. He acknowledged that he only dealt with Respondent, and that he received and cashed checks from her personal account. He claimed to be owed \$12,000 when the lease only covered a six-month period at \$1,000 a month. He was willing to take advantage of free services and only complained when those services were no longer forthcoming. While there was evidence presented that Respondent continued to collect rent and forward it to Mr. McGroarty for a few months after the lease expired, there is no evidence that Respondent collected any rent that she did not forward, or that she had any obligation to collect the rent at all, much less to do so after the expiration of the lease.

25. Without some form of payment or agreement to pay, or expectation on Respondent's part that she will be compensated for her services, she has not acted as a broker. Panton & Co. Realty, Inc. v. Wood, 958 So. 2d 541 (Fla. 4th DCA 2007). An argument could be made that where, as here, a person is licensed as a real estate professional, any actions dealing with the sale or rental of property should come within the parameters of regulation by the Florida Real Estate Commission. However, the element of consideration is an essential statutorily-mandated

requirement in proving the violations charged against Respondent. Count One has not been demonstrated by clear and convincing evidence.

26. Count Two charges Respondent with violating section 475.42(1)(d), and therefore violating section 475.25(1)(e).

Section 475.42(1)(d) provides as follows:

475.42(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.

As stated in paragraph 21, section 475.25(1)(e) makes it a disciplinary offense to violate any of the provisions of chapter 475.

27. There is no clear and convincing evidence that Respondent violated section 475.42(1)(d) because there is no evidence that she engaged in a real estate brokerage transaction, given the failure to prove that she received or expected any compensation for collecting rent on the Willow Lake Circle property. There was no evidence that Respondent ever attempted to maintain any action against anyone for a commission related to the property. Count Two has not been proven.

28. Count Three charges Respondent with failing to maintain trust funds in the real estate brokerage escrow account or some other proper depository until disbursement thereof was properly authorized in violation of section 475.25(1)(k). This subsection makes a disciplinary violation where a licensee:

(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. . . . (Emphasis supplied.)

29. Because the Department did not prove by clear and convincing evidence that Mr. McGroarty was dealing with Respondent as an agent of Century 21 Richardson Agency, Count Three has not been proven by clear and convincing evidence.

30. Finally, Count Four charges Respondent with failing to account or deliver funds in violation of section 475.25(1)(d)1. This subsection makes it a violation when a person

(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.

31. This charge has not been proven by clear and convincing evidence. The problem with Count Four is not the failure to demonstrate that Respondent received or expected compensation, but rather the absence of evidence that there were any funds that she received from the tenants that she did not in fact forward to Mr. McGroarty.

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 dismissing the Administrative Complaint.

DONE AND ENTERED this 18th day of March, 2011, in
Tallahassee, Leon County, Florida.



LISA SHEARER NELSON
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 18th day of March, 2011.

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.