STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF REAL ESTATE,	)	
Petitioner,	)	
vs.	)	Case No. 10-10431PL
ALEXIS ACOSTA,	)	
Respondent.	)	

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case pursuant to sections 120.569 and 120.57(1), Florida Statutes,[1] before Stuart M. Lerner, a duly-designated administrative law judge of the Division of Administrative Hearings (DOAH), on March 4, 2011, by video teleconference at sites in Miami and Tallahassee, Florida.

APPEARANCES

For Petitioner: Patrick J. Cunningham, Esquire
Department of Business and Professional Regulation
Division of Real Estate
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Orlando, Florida 32801

For Respondent: Mariajose Sanchez, Esquire
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STATEMENT OF THE ISSUES

Whether Respondent committed the violations alleged in the Administrative Complaint in the manner specified therein and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On or about September 21, 2010, Petitioner issued an Administrative Complaint against Respondent charging her with: one count of violating section 475.25(1)(b), Florida Statutes, "by misrepresenting to [the] Sellers [in a real estate transaction in which she was representing the Buyer] that the Escrow Agent was holding in escrow the Buyer's $3,000 deposit for purchase of the Subject Property" (Count One); and one count of violating section 475.25(1)(e) "by violating Rule 61J2-14.008(2)(b), F.A.C., when [s]he failed to indicate in the sales and purchase contract for the Subject Property the address for the Escrow Agent and failed to obtain and retain written verification upon delivery of the Buyer's deposit" (Count Two). Respondent thereafter requested an administrative hearing pursuant section 120.57(1). On November 29, 2010, the matter was referred to DOAH for the assignment of an administrative law judge to conduct the hearing Respondent had requested.

As noted above, the hearing was held on March 4, 2011.[2] At the outset of the hearing, Respondent admitted the allegations set forth in numbered paragraphs 1 through 9 of the Administrative Complaint, and she further conceded that she was guilty of the violation alleged in Count Two of the Administrative Complaint. Petitioner's evidentiary presentation at hearing consisted of offering three exhibits (Petitioner's Exhibits 1 through 3), all of which were received into evidence. Respondent testified on her own behalf. She presented no other evidence.

At the conclusion of the evidentiary portion of the hearing, the undersigned announced, on the record, that the deadline for the filing of proposed recommended orders would be ten days from the date of the filing of the hearing transcript with DOAH.

On April 15, 2011, the undersigned issued an Order Requiring Status Report, which provided as follows:

> At the one-day final hearing in the instant case, which was held on March 4, 2011, the undersigned announced on the record that proposed recommended orders had to be filed no later than ten days from the date that the hearing transcript was filed with the Division of Administrative Hearings (DOAH). As of this date, the hearing transcript has yet to be filed with DOAH.
>
> No later than seven days from the date of this Order, the parties shall advise the undersigned in writing as to whether they

> were able, through post-hearing settlement negotiations, to amicably resolve the instant controversy, and, if not, when the hearing transcript is expected to be filed with DOAH. Failure to timely file such a written advisement will result in the conclusion that this matter has been amicably resolved and that therefore there is no longer any need for the DOAH file in this case to remain open.

On April 29, 2011, Petitioner filed a unilateral Status Report, which contained the following advisements:

> 1) Due to a paperwork error, an official transcript was not timely ordered.
>
> 2) The error has been corrected and a transcript has been ordered and will be filed within a week.

As promised, the hearing Transcript (consisting of one volume) was filed with DOAH on May 5, 2011. On May 6, 2011, the undersigned issued a Notice of Filing Transcript, notifying the parties that the hearing transcript had been filed with DOAH on May 5, 2011, and that therefore proposed recommended orders had to be filed with DOAH no later than Monday, May 16, 2011.

To date, neither Petitioner nor Respondent has filed a proposed recommended order.

FINDINGS OF FACT

Based on the evidence adduced at hearing, and the record as a whole, including the admissions made by Respondent at the outset of the final hearing, the following findings of fact are made:

1. Respondent is now, and has been at all times material to the instant case, a Florida-licensed real estate sales associate, holding license number SL-3025826.

2. At no time during the almost nine years Respondent has held this license has any disciplinary action been taken against her.[3]

3. Respondent now works, as she did at all times material to the instant case, as a real estate sales associate for Home Wiz USA, Inc., a Florida-licensed brokerage company located in Miami, Florida.

4. On or about May 15, 2007, Hector Chaparro (Buyer) signed a contract (Subject Contract) to purchase from Edward J. and Paule F. Schupay (Sellers), as Trustees for the Schupay Revocable Trust dated July 6, 1982, property located at 16643 Saguaro Lane in Spring Hill, Florida (Property). The Sellers signed the Subject Contract on May 18, 2007, but there was never a closing because the appraised value of the Property was not high enough to enable the Buyer to obtain financing.

5. Respondent represented the Buyer in the transaction, and she prepared the Subject Contract, using (at the Sellers' realtor's request) a printed "As Is" Contract for Sale and Purchase form approved by the Florida Association of Realtors and The Florida Bar (Form).

6. Section II.(a) of the Form read as follows: "Deposit held in escrow by _____ (Escrow Agent) in the amount of (checks subject to clearance) $_____." Respondent completed this section of the Form by writing "Secure Close Title" and "3,000.00," respectively, on the lines where the name of the "Escrow Agent" and the dollar amount of the deposit were to be entered. Unaware she was required to do so, Respondent did not, anywhere in the Subject Contract, indicate the address of Secure Close Title (Secure).

7. The Subject Contract replaced a prior contract (Prior Contract) into which the Buyer had entered to purchase the Property from the Sellers. The Prior Contract had also provided for the Buyer to make a $3,000.00 deposit.

8. As both Respondent and the Sellers' realtor were aware, at the time Respondent was preparing the Subject Contract to replace the Prior Contract, the $3,000.00 deposit the Buyer had made (by check) pursuant to the Prior Contract (First Deposit) was being held in escrow, as agreed to by the parties in the Prior Contract, by a Miami title company (Previous Escrow Agent) which had a relationship with the mortgage lender (Elite Home Loans) from whom the Buyer was seeking a loan to purchase the Property. The Sellers' realtor, when he asked Respondent to prepare the Subject Contract to replace the Prior Contract, not only told Respondent that the Sellers wanted the deposit

required by the Subject Contract to be held by Secure (because of Secure's location in Spring Hill, near where the Property was located), he also informed Respondent that he had made arrangements, through Elite Home Loans, to have the First Deposit (that was being held by the Previous Escrow Agent) sent to Secure.

9. Respondent believed that, in writing "Secure Close Title" on the "Escrow Agent" line in Section II.(a) of the Subject Contract, she was merely indicating that the $3,000.00 deposit required by the Subject Contract was to be held by Secure (as the Sellers, through their realtor, had requested). It was not at all her intent to mislead or deceive anyone, including the Sellers or their realtor, concerning the then whereabouts of that deposit (a matter about which the Sellers, through their realtor, knew as much as, if not more than, Respondent did).

10. Although she was advised by Elite Home Loans that it had mailed to Secure the $3,000.00 deposit referred to in Section II.(a) of the Subject Contract (Subject Security Deposit), Respondent never obtained written verification of Secure's receipt of the deposit, an oversight attributable to her not knowing that she had a legal obligation to procure and retain such verification.

11. After it became apparent that the transaction contemplated by the Subject Contract would not be consummated, the Subject Security Deposit was returned to the Buyer.

CONCLUSIONS OF LAW

12. DOAH has jurisdiction over the subject matter of this proceeding and of the parties hereto pursuant to chapter 120.

13. The Florida Real Estate Commission (Commission) is statutorily empowered to take disciplinary action against Florida-licensed real estate sales associates based upon any of the grounds enumerated in section 475.25(1), including "[having] 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" (as described in section 475.25(1)(b)), and "[having] violated any of the provisions of [chapter 475] or any lawful order or rule made or issued under the provisions of [chapter 475] or chapter 455" (as described in section 475.25(1)(e)).

14. Such disciplinary action may include one or more of the following penalties: license revocation; license suspension not exceeding ten years; imposition of an administrative fine not to exceed $5,000.00 for each count or separate offense; issuance of a reprimand; and placement of the licensee on

probation. § 475.25(1). In addition, the Commission "may assess costs related to the investigation and prosecution of the case excluding costs associated with an attorney's time." § 455.227(3)(a).

15. The Commission may take such action only after the licensee has been given reasonable written notice of the charges and an adequate opportunity to request a proceeding pursuant to sections 120.569 and 120.57. See § 120.60(5).

16. An evidentiary hearing must be held if requested by the licensee when there are disputed issues of material fact. See Hollis v. Dep't of Bus. & Prof'l Reg., 982 So. 2d 1237, 1239 (Fla. 5th DCA 2008); and §§ 120.569(1) and 120.57(1).

17. At the hearing, Petitioner bears the burden of proving that the licensee engaged in the conduct alleged in the charging instrument. Proof greater than a mere preponderance of the evidence must be presented. Clear and convincing evidence is required. See Dep't of Banking & Fin,, Div. of Sec. & Investor Prot. v. Osborne Stern & Co., 670 So. 2d 932, 935 (Fla. 1996); Walker v. Fla. Dep't of Bus. & Prof'l Reg., 705 So. 2d 652, 655 (Fla. 5th DCA 1998)("The Department had the burden of proving fraud, misrepresentation or concealment by clear and convincing evidence, in order to justify revocation of Walker's license."); and § 120.57(1)(j) ("Findings of fact shall be based upon a preponderance of the evidence, except in penal or licensure

disciplinary proceedings or except as otherwise provided by statute . . . .").

18. Clear and convincing evidence is an "intermediate standard," "requir[ing] more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" In re Graziano, 696 So. 2d 744, 753 (Fla. 1997). For proof to be considered "'clear and convincing' . . . 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 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 a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established." In re Davey, 645 So. 2d 398, 404 (Fla. 1994), quoting, with approval, from Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983); see also In re Adoption of Baby E. A. W., 658 So. 2d 961, 967 (Fla. 1995)("The evidence [in order to be clear and convincing] must be sufficient to convince the trier of fact without hesitancy."). "Although this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous." Westinghouse Electric Corp., Inc. v. Shuler Bros., Inc., 590 So. 2d 986, 989 (Fla. 1st DCA 1991).

19. In determining whether Petitioner has met its burden of proof, it is necessary to evaluate its evidentiary presentation in light of the specific allegations of wrongdoing made in the charging instrument. Due process prohibits an agency from taking penal action against a licensee based on matters not specifically alleged in the charging instrument, unless those matters have been tried by consent. See Trevisani v. Dep't of Health, 908 So. 2d 1108, 1109 (Fla. 1st DCA 2005)("A physician may not be disciplined for an offense not charged in the complaint."); Marcelin v. Dep't of Bus. & Prof'l Reg., 753 So. 2d 745, 746-747 (Fla. 3d DCA 2000)("Marcelin first contends that the administrative law judge found that he had committed three violations which were not alleged in the administrative complaint. This point is well taken. . . . We strike these violations because they are outside the administrative complaint."); Dep't of Rev. v. Vanjaria Enters., 675 So. 2d 252, 254 (Fla. 5th DCA 1996)("[T]the issue must be treated as though it had been raised in the pleadings because the parties tried the issue by consent."); and Delk v. Dep't of Prof'l Reg., 595 So. 2d 966, 967 (Fla. 5th DCA 1992)("[T]he conduct proved must legally fall within the statute or rule claimed [in the administrative complaint] to have been violated.").

20. Furthermore, "the conduct proved must legally fall within the statute or rule claimed [in the charging instrument]

to have been violated." Delk, 595 So. 2d at 967. In deciding whether the statute or rule claimed [in the charging instrument] to have been violated was in fact violated, as alleged by Petitioner, if there is any reasonable doubt, that doubt must be resolved in favor of the licensee. See Djokic v. Dep't of Bus. & Prof'l Reg., Div. of Real Estate, 875 So. 2d 693, 695 (Fla. 4th DCA 2004); Elmariah v. Dep't of Prof'l Reg., Bd. of Med., 574 So. 2d 164, 165 (Fla. 1st DCA 1990); and Lester v. Dep't of Prof'l & Occupational Regs., 348 So. 2d 923, 925 (Fla. 1st DCA 1977).

21. In those cases where the proof is sufficient to establish that the licensee committed the violation(s) alleged in the charging instrument and that therefore disciplinary action is warranted, it is necessary, in determining what disciplinary action should be taken against the licensee, to consult the Commission's "disciplinary guidelines," as they existed at the time of the violation(s). See Parrot Heads, Inc. v. Dep't of Bus. & Prof'l Reg., 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 Orasan v. Ag. for Health Care Admin., Bd. of Med., 668 So. 2d 1062, 1063 (Fla. 1st DCA 1996)("[T]he case was properly decided under the disciplinary guidelines in effect at the time of the alleged violations."); see also State v. Jenkins, 469 So.

2d 733, 734 (Fla. 1985)("[A]gency rules and regulations, duly promulgated under the authority of law, have the effect of law."); Buffa v. Singletary, 652 So. 2d 885, 886 (Fla. 1st DCA 1995)("An agency must comply with its own rules."); and Williams v. Dep't of Transp., 531 So. 2d 994, 996 (Fla. 1st DCA 1988)(agency is required to comply with its disciplinary guidelines in taking disciplinary action against its employees).

22. The Commission's "disciplinary guidelines" are set forth in Florida Administrative Code Rule 61J2-24.001. At all times material to the instant case, they provided, in pertinent part, as follows:

> (1) Pursuant to Section 455.2273, F.S., the Commission sets forth below a range of disciplinary guidelines from which disciplinary penalties will be imposed upon licensees guilty of violating Chapter 455 or 475, F.S. The purpose of the disciplinary guidelines is to give notice to licensees of the range of penalties which normally will be imposed for each count during a formal or an informal hearing. For purposes of this rule, the order of penalties, ranging from lowest to highest, is: reprimand, fine, probation, suspension, and revocation or denial. Pursuant to Section 475.25(1), F.S., combinations of these penalties are permissible by law. Nothing in this rule shall preclude any discipline imposed upon a licensee pursuant to a stipulation or settlement agreement, nor shall the range of penalties set forth in this rule preclude the Probable Cause Panel from issuing a letter of guidance.
>
> (2) As provided in Section 475.25(1), F.S., the Commission may, in addition to other

disciplinary penalties, place a licensee on probation. The placement of the licensee on probation shall be for such a period of time and subject to such conditions as the Commission may specify. Standard probationary conditions may include, but are not limited to, requiring the licensee: to attend pre-licensure courses; to satisfactorily complete a pre-licensure course; to attend post-licensure courses; to satisfactorily complete a post-licensure course; to attend continuing education courses; to submit to and successfully complete the state-administered examination; to be subject to periodic inspections and interviews by a DBPR investigator; . . . .

(3) The penalties are as listed unless aggravating or mitigating circumstances apply pursuant to subsection (4). The verbal identification of offenses is descriptive only; the full language of each statutory provision cited must be consulted in order to determine the conduct included.

* * *

(c) VIOLATION[:] Section 475.25(1)(b), F.S.- Guilty of . . . misrepresentation . . . .

* * *

RECOMMENDED RANGE OF PENALTY: In the case of . . . misrepresentation . . . , the usual action of the Commission shall be to impose a penalty of revocation.[4]

* * *

(f) VIOLATION[:] Section 475.25(1)(e), F.S.- Violated any rule or order or provision under Chapters 475 and 455, F.S.

RECOMMENDED RANGE OF PENALTY: The usual action of the Commission shall be to impose a penalty from an 8 year suspension to

> revocation and an administrative fine of $1,000.[5]
>
> * * *
>
> (4)(a) When either the Petitioner or Respondent is able to demonstrate aggravating or mitigating circumstances . . . to a Division of Administrative Hearings [administrative law judge] in a Section 120.57(1), F.S., hearing by clear and convincing evidence, the . . . [administrative law judge] shall be entitled to deviate from the above guidelines in . . . recommending discipline . . . upon a licensee. . . .
>
> (b) Aggravating or mitigating circumstances may include, but are not limited to, the following:
>
> 1. The degree of harm to the consumer or public.
>
> 2. The number of counts in the Administrative Complaint.
>
> 3. The disciplinary history of the licensee.
>
> 4. The status of the licensee at the time the offense was committed.
>
> 5. The degree of financial hardship incurred by a licensee as a result of the imposition of a fine or suspension of the license.
>
> 6. Violation of the provision of Chapter 475, F.S., wherein a letter of guidance as provided in Section 455.225(3), F.S., previously has been issued to the licensee.

23. The Administrative Complaint issued in the instant case contains two counts. Count One alleges that Respondent

violated section 475.25(1)(b) by "misrepresenting to the seller that the Escrow Agent was holding in Escrow the Buyer's $3,000 deposit for the purchase of the Subject Property." Count Two alleges that Respondent violated Florida Administrative Code Rule 61J2-14.008(2)(b), and therefore also section 475.25(1)(e), "when [s]he failed to indicate in the [Subject Contract] the address for the Escrow Agent and failed to obtain and retain written verification upon delivery of the Buyer's deposit."

24. At all times material to the instant case, section 475.25(1)(b) has authorized the Commission to take disciplinary action against a Florida-licensed real estate sales associate who:

> [h]as been guilty of . . . misrepresentation . . . in any business transaction in this state or any other state, nation, or territory. 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.

25. For there to be "misrepresentation" in violation of section 475.25(1)(b), there must be wrongful intent or scienter. See Munch v. Dep't of Prof'l Reg., 592 So. 2d 1136, 1143-44 (Fla. 1st DCA 1992)("It is clear that Section 475.25(1)(b) Florida Statutes, which, in its first clause, authorizes the

Commission to discipline a licensee 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 is penal in nature. As such, it must be construed strictly, in favor of the one against whom the penalty would be imposed. . . . Reading the first clause of Section 475.25(1)(b) (the portion of the statute which appellant was charged with having violated in Count I of the complaint), and applying to the words used their usual and natural meaning, it is apparent that it is contemplated that an intentional act be proved before a violation may be found."); and Morris v. Dep't of Prof'l Reg., 474 So. 2d 841, 843 (Fla. 5th DCA 1985)(grounds of "'fraud, misrepresentation, concealment, false promises, dishonest dealing by trick, scheme or device, culpable negligence and breach of trust in a business transaction in violation of section 475.25(1)(b) . . . alleged by the complaint all require a finding of wrongful intent or scienter . . . ."); cf. Fla. Bar v. Lanford, 691 So. 2d 480, 480-481 (Fla. 1997)("In order to find that an attorney acted with dishonesty, misrepresentation, deceit, or fraud, the Bar must show the necessary element of intent. An attorney's lack of intent to defraud or deceive a client supports a referee's finding that the attorney's conduct

did not constitute dishonesty, misrepresentation, deceit or fraud.")(citation omitted).

26. The wrongful intent or scienter required to establish a violation of section 475.25(1)(b) may be proven by circumstantial evidence. See Inquiry Concerning a Judge (Allen), 998 So. 2d 557, 562 (Fla. 2008)("Although there is no direct evidence presented that animus was the motive for Judge Allen's concurring opinion, motive and intent are generally proven through circumstantial evidence."); Baker v. State, 639 So. 2d 103, 104 (Fla. 5th DCA 1994)("Intent is an operation of the mind and is not subject to direct proof, however, intent can be proven by circumstantial evidence."); and Grover v. State, 581 So. 2d 1379, 1380 (Fla. 4th DCA 1991)("It is black-letter of course that intent, being a state of mind, is rarely if ever susceptible of direct proof. Almost inevitably, as here, it must be shown solely by circumstantial evidence."). For instance, it may be inferred from the licensee's actions. See Swanson v. State, 713 So. 2d 1097, 1101 (Fla. 4th DCA 1998)("Appellant's actions are sufficient to show intent to participate."); and State v Breland, 421 So. 2d 761, 766 (Fla. 4th DCA 1982) ("Actions manifest intent.").

27. At all times material to the instant case, section 475.25(1)(e) has authorized the Commission to take disciplinary action against a Florida-licensed real estate sales associate

who "[h]as violated any . . . rule made . . . under the provisions of [chapter 475]." Among the rule provisions that have been adopted pursuant to chapter 475 is Florida Administrative Code Rule 61J2-14.008(2)(b), which, at all times material to the instant case, provided as follows:

> When escrow funds are placed with a title company or an attorney, the licensee shall indicate on the sales contract the name and address of said entity. The licensee shall obtain and retain written verification of said deposit upon delivery of the funds to the title company or attorney.[6]

28. Because of their penal nature, the foregoing statutory and rule provisions must be strictly construed, with any reasonable doubts as to their meaning being resolved in favor of the licensee. See Camejo v. Dep't of Bus. & Prof'l Reg., 812 So. 2d 583, 583-84 (Fla. 3d DCA 2002)("'Statutes such as those at issue authorizing the imposition of discipline upon licensed contractors are in the nature of penal statutes, which should be strictly construed.'"); Munch, 592 So. 2d at 1143 ("It is clear that [s]ection 475.25(1)(b) is penal in nature. As such, it must be construed strictly, in favor of the one against whom the penalty would be imposed."); and McClung v. Crim. Just. Stds. & Training Comm'n, 458 So. 2d 887, 888 (Fla. 5th DCA 1984) ("[W]here a statute provides for revocation of a license the grounds must be strictly construed because the statute is penal in nature. No conduct is to be regarded as included within a

penal statute that is not reasonably proscribed by it; if there are any ambiguities included, they must be construed in favor of the licensee.").

29. Evaluating Petitioner's evidentiary presentation in light of the foregoing, the undersigned finds that, given the absence of a clear and convincing showing of wrongful intent or scienter on Respondent's part, Petitioner failed to meet its burden of proving Respondent's guilt of the violation of section 475.25(1)(b) alleged in Count One of the Administrative Complaint.

30. The record evidence, however, clearly and convincingly establishes--and even Respondent herself has acknowledged--that she violated rule 61J2-14.008(2)(b) and, derivatively, section 475.25(1)(e) "when [s]he failed to indicate in the [Subject Contract] the address for the Escrow Agent and failed to obtain and retain written verification upon delivery of the Buyer's deposit," as alleged in Count Two of the Administrative Complaint.

30. While the "usual [disciplinary] action of the Commission," under the "disciplinary guidelines" in effect at the time of her violation of section 475.25(1)(e), was "to impose a penalty from an 8 year suspension to revocation and an administrative fine of $1,000" for such a violation, the facts

of the instant case justify imposing a lesser penalty, outside this "usual" range.

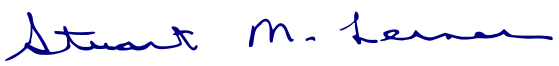
31. Mitigating against the imposition of a penalty as harsh as one within the "usual" range is that Respondent's violation was an isolated unintentional, technical one that did not harm anyone. A further mitigating factor is that, in the almost nine years she has held her license, she has never before been disciplined. In view of these mitigating circumstances, a more appropriate penalty is to fine Respondent $250.00 and to place her on probation for a period of 90 days, during which time she must take and pass an appropriate real estate education course.

RECOMMENDATION

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

RECOMMENDED that the Commission issue a Final Order (1) dismissing Count One of the Administrative Complaint; and (2) finding Respondent guilty of Count Two of the Administrative Complaint and disciplining her therefor by fining her $250.00 and placing her on probation for a period of 90 days, during which time she shall take and pass an appropriate real estate education course.

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



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Filed with the Clerk of the
Division of Administrative Hearings
this 18th day of May, 2011.

ENDNOTES

[1] Unless otherwise noted, all references in this Recommended Order to Florida Statutes are to Florida Statutes (2010).

[2] The hearing was originally scheduled for February 25, 2011, but was continued at Respondent's request.

[3] From April 1, 2002, through April 15, 2002, Respondent's license was "invalid [by operation of law] due to non-renewal."

[4] The current version of rule 61J2-24.001 provides that, for a "first violation" of section 475.25(1)(b) by "misrepresentation," the "penalty range" is a "$1,000 to $2,500 administrative fine and 30-day suspension to revocation," and, for a "second and subsequent violations," the "penalty range" is a "$2,500 to $5,000 administrative fine and 6 month suspension to revocation."

[5] The current version of rule 61J2-24.001 provides that, for a "first violation" of section 475.25(1)(e), the "penalty range" is a "$250 to $1,000 administrative fine and suspension to revocation," and, for a "second and subsequent violations," the "penalty range" is a "$1,000 to $5,000 administrative fine and suspension to revocation."

[6] Rule 61J2-14.008(2)(b) currently provides as follows:

> When a deposit is placed or to be placed with a title company or an attorney, the licensee who prepared or presented the sales contract ("Licensee"), shall indicate on that contract the name, address, and telephone number of such title company or attorney. Within ten (10) business days after each deposit is due under the sales contract, the Licensee's broker shall make written request to the title company or attorney to provide written verification of receipt of the deposit, unless the deposit is held by a title company or by an attorney nominated in writing by a seller or seller's agent. Within ten (10) business days of the date the Licensee's broker made the written request for verification of the deposit, the Licensee's broker shall provide Seller's broker with either a copy of the written verification, or, if no verification is received by Licensee's broker, written notice that Licensee's broker did not receive verification of the deposit. If Seller is not represented by a broker, then Licensee's broker shall notify the Seller directly in the same manner indicated herein.

Were the current version of rule 61J2-14.008(2)(b) in effect at the time of the operative events of the instant case, Respondent, as a real estate sales associate, would not have been required by the rule to have obtained and retained written verification of Secure's receipt of the Subject Security Deposit.

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.