

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF REAL ESTATE,)
)
Petitioner,)
)
vs.) Case No. 11-0069PL
)
CLIFFORD ESTERSON,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Edward T. Bauer, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing on March 24, 2011, by video teleconference at sites in Tallahassee and Lauderdale Lakes, Florida.

APPEARANCES

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

For Respondent: Clifford Esterson, pro se
3648 San Simeon Circle
Weston, Florida 33331

STATEMENT OF THE ISSUES

Whether Respondent committed the violations alleged in the Administrative Complaint, and, if so, the penalty that should be imposed.

PRELIMINARY STATEMENT

On November 18, 2010, Petitioner Department of Business and Professional Regulation, Division of Real Estate, filed an Administrative Complaint against Respondent, Clifford Esterson. The Administrative Complaint, which consists of three counts, alleges violations of various statutes and rules governing Florida real estate sales associates. Respondent timely filed a request for a formal administrative hearing, which was forwarded to the Division of Administrative Hearings ("DOAH") on January 10, 2011. This cause was initially assigned to Administrative Law Judge John G. Van Laningham, who scheduled a final hearing for March 24, 2011, at 1:00 p.m.

On March 1, 2011, Respondent filed a motion to continue the final hearing. Petitioner objected to the request, arguing that Respondent was "put on notice of the formal hearing by service in January 2011 . . . [and] Respondent's failure to timely prepare is not a valid reason for a continuance." On March 9, 2011, Judge Van Laningham denied the motion by written order. The instant matter was subsequently transferred to the undersigned for further proceedings.

At the outset of the March 24, 2011, final hearing, Petitioner requested a continuance on the ground that James Gilchrest, a witness residing in South Carolina who was critical to its case, would not be able to offer sworn testimony by

telephone because the witness had not been advised that it was necessary for a notary public to administer an oath to him at the remote location.¹ Noting that Petitioner had previously objected to Respondent's motion for continuance, as well as the fact that such a dilemma could have been avoided had Petitioner discussed the issue with the witness prior to the day of the hearing, the undersigned denied Petitioner's request to continue. The undersigned did, however, allow Petitioner a reasonable amount of time to confer with Mr. Gilchrest by telephone and assist him in locating a notary.

After a brief recess, Petitioner's counsel advised the undersigned that Mr. Gilchrest, who was en route to a local bank to locate a notary, would be calling into the hearing shortly. In the meantime, Petitioner presented the testimony of one witness, Ms. Krystal Cordo, an investigator employed by the Department of Business and Professional Regulation. Petitioner also introduced two exhibits into evidence, numbered 5 and 6.

Following the presentation of Ms. Cordo's testimony, Mr. Gilchrest and a notary public telephoned the final hearing location. Strangely, the notary informed the undersigned and the parties that although he wanted to help Mr. Gilchrest, he did not believe that South Carolina notaries public were authorized to administer oaths. After a short discussion, at the conclusion of which the notary unequivocally stated that he

could not place Mr. Gilchrest under oath, the undersigned ended the call.

A few minutes later and with the undersigned's consent, counsel for the Petitioner telephoned the bank and unsuccessfully attempted to convince the bank manager—by referencing the appropriate section of the South Carolina notary handbook—that notaries are indeed authorized to administer oaths. At that point, Petitioner's counsel excused Mr. Gilchrest, indicating that he did not wish to inconvenience him further. Petitioner renewed its request to continue the hearing, which the undersigned again denied on the basis that Petitioner's issue with Mr. Gilchrest could have easily been avoided.

Following the denial of the renewed motion to continue, Petitioner correctly conceded that the evidence at its disposal was insufficient to prove the material allegations of the Administrative Complaint, and that the undersigned could prepare an order recommending that the charges against Respondent be dismissed. Petitioner further agreed, in light of its concession, that it did not intend to order a copy of the transcript or file a proposed recommended order.

At the conclusion of the hearing, the undersigned advised the parties that a recommended order would be issued by Tuesday, March 29, 2011.

FINDINGS OF FACT

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

2. At all times material to this action, Respondent was licensed a real estate sales associate in the State of Florida.

3. On November 18, 2010, Petitioner filed an Administrative Complaint against Respondent, which reads in pertinent part:

5. On or about October 5, 2007, Respondent prepared a sales purchase contract on behalf of Anne Vincent (Buyer) and Donald Gilchrest (Seller) for a property known as 6521 SW 9th Street, Pembroke Pines, Florida 33023 for \$250,000.

6. Respondent represented in the sales and purchase contract for the Subject Property that a \$2,000 deposit was held in escrow by Title Sense Inc.

7. Respondent communicated to the Sellers that he had received a check in the amount of \$2,000 from the Buyer.

* * *

10. Respondent failed to place with Respondent's registered employer any funds entrusted to Respondent by the Buyer for the Subject Property.

* * *

12. Respondent failed to deliver a copy of the sales and purchase contract to Respondent's Broker, Edgar Rhenals.

4. Based upon the foregoing, Petitioner alleged that Respondent violated section 475.25 (1)(b), (1)(e), and (1)(k), Florida Statutes, as well as Florida Administrative Code Rule 61J2-14.009.

5. As discussed in the preliminary statement of this Recommended Order, Petitioner's sole witness at the final hearing was Ms. Krystal Cordo, an investigator employed with the Division of Real Estate. Other than Ms. Cordo's description of statements made by Respondent during the investigation—in which Respondent denied all wrongdoing—Ms. Cordo's testimony and investigative report consisted entirely of hearsay, with no applicable hearsay exceptions. In light of the complete absence of incriminating non-hearsay evidence, Petitioner properly conceded that Respondent's guilt could not be established in connection with any of the charges.²

6. Accordingly, the undersigned finds, as a matter of ultimate fact, that Respondent is not guilty of Counts I, II, and III of the Administrative Complaint.

CONCLUSIONS OF LAW

7. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this cause, pursuant to section 120.57(1), Florida Statutes.

8. This is a disciplinary proceeding against Respondent's license. Accordingly, Petitioner must prove the allegations in the Administrative Complaint by clear and convincing evidence. Dep't of Banking and Fin., Div. of Secs. & Investor Prot. v. Osborne Sterne, Inc., 670 So. 2d 932, 935 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292, 294 (Fla. 1987).

9. 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 Davey, 645 So. 2d 398, 404 (Fla. 1994) (quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

10. In Count I of the Administrative Complaint, Petitioner alleges that Respondent violated section 475.25(1)(b), which subjects a real estate licensee to discipline for committing "fraud, misrepresentation, concealment, false promises, false pretenses, dishonest dealing by trick, scheme, or device, culpable negligence, or breach of trust in any business transaction."

11. In Count II, Petitioner alleges that Respondent violated Florida Administrative Code Rule 61J2-14.009—which

requires a real estate sales associate who receives a deposit to deliver it to the broker or employer by the end of the next business day—and is therefore subject to discipline pursuant to section 475.25(1)(e).

12. As its final charge, Petitioner alleges in Count III that Respondent violated section 475.25(1)(k), which requires, in relevant part, that a real estate sales associate place a deposit with his or her registered employer.

13. Based upon the findings of fact contained herein, Petitioner failed to demonstrate Respondent's guilt by clear and convincing evidence. Accordingly, Respondent is not guilty of Counts I, II, and III of the Administrative Complaint.

RECOMMENDATION

Based upon the foregoing findings of fact and conclusions of law, it is

RECOMMENDED that Petitioner enter a final order dismissing the Administrative Complaint against Respondent.

DONE AND ENTERED this 28th day of March, 2011, in
Tallahassee, Leon County, Florida.



EDWARD T. BAUER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of March, 2011.

ENDNOTES

¹ To his credit, Petitioner's counsel was aware of Florida Administrative Code Rule 28-106.213(5)(b), which provides that for "any testimony taken by means of . . . telephone, a notary public must be physically present with the witness to administer the oath." From counsel's comments, however, it seems that at some point prior to the day of the final hearing, the witness called a telephone number listed on the subpoena and received erroneous information from an unknown person. Petitioner's phone number is one of those listed on the subpoena.

² Diequez v. Fla. Dep't of Law Enf., Crim. Just. Stands. & Training Comm'n, 947 So. 2d 591, 594 (Fla. 3d DCA 2007) ("Under [section 120.57(1)(c)], the evidence which can support a factual finding includes evidence which is not hearsay, and evidence which is admissible under a hearsay objection").

COPIES FURNISHED:

Patrick J. Cunningham, Esquire
Department of Business and
Professional Regulation
400 West Robinson Street, Suite N-801
Orlando, Florida 32801

Clifford Esterson
3648 San Simeon Circle
Weston, Florida 33331

Reginald Dixon, General Counsel
Department of Business and
Professional Regulation
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-0792

Thomas W. O'Bryant, Jr., Director
Division of Real Estate
Department of Business and
Professional Regulation
400 West Robinson Street, Suite N801
Orlando, Florida 32801

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 must be filed with the agency that will issue the final order in this case.