

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF REAL ESTATE,)
)
Petitioner,)
)
vs.) Case No. 12-0359PL
)
FRANK RHODEN, P.A.,)
)
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 20, 2012, by video teleconference at sites in Lauderdale Lakes and Tallahassee, Florida.

APPEARANCES

For Petitioner: Andrew Rubin Fier, Esquire
Joshua N. Kendrick, Esquire
Department of Business and
Professional Regulation
Division of Real Estate
1940 North Monroe Street, Suite 42
Tallahassee, Florida 32399-2202

For Respondent: Frank Rhoden, pro se
4280 Northwest 61st Court
Coconut Creek, Florida 33073

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 December 22, 2011, Petitioner issued a two-count Administrative Complaint against Respondent, which contains the following factual allegations:

1. Petitioner is the state agency charged with regulating the practice of real estate pursuant to [s]ection 20.165, Florida Statutes, and [c]hapters 120, 455, and 475, of the Florida Statutes.
2. Respondent is licensed as a real estate sales associate having been issued license number SL 557575.
3. Respondent's address of record is 4280 NW 61st Court, Coconut Creek, FL, 33073.
4. At all times material hereto, Respondent's broker of record was All Homes Realty, Inc. ("All Homes").
5. On or about April 28, 2009, Respondent entered into a property management agreement with Gina Brimmell ("Brimmell"), to rent Brimmell's residence in Pompano, Beach, FL, to a third party for a fee.
6. The contract did not require Respondent to stage the Brimmell residence with personal property.
7. All Homes was not a party to the property management agreement.

8. Respondent failed to lease the property, and in or about June 2009, was discovered to have moved personal property into the Brimmell residence.

Count One of the Administrative Complaint alleges that "Respondent violated [s]ection 475.42(1)(b), Florida Statutes, by entering into a property management contract for the Brimmell residence without All Homes," conduct that amounted to "operat[ing] as a broker without requisite licensure." Count Two of the Administrative Complaint alleges that "Respondent violated [s]ection 475.25(1)(b), Florida Statutes, when Respondent moved personal property into the Brimmell home and misrepresented his licensure status." Respondent subsequently requested a "formal hearing" on the allegations against him, and Petitioner thereafter referred the matter to DOAH for the assignment of an administrative law judge to conduct such a hearing.

As noted above, the hearing in the instant case was held on March 20, 2012. Petitioner presented the testimony of two witnesses: William Russell and Gina Brimmell. It also offered four exhibits (Petitioner's Exhibits A through D), which were all received into evidence. Respondent testified on his own behalf. He presented no other evidence in his defense.

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 after the date of the filing of the hearing transcript with DOAH.

Respondent and Petitioner both timely filed their Proposed Recommended Orders,^{2/} the former on March 29, 2012,^{3/} and the latter on April 23, 2012.

FINDINGS OF FACT

1. Respondent has been a Florida-licensed real estate sales associate since March 19, 1990. He holds license number SL-557575. His license has been in the name of his professional association (Frank Rhoden, P.A.), as allowed by Florida Administrative Code Rule 61J2-1.013(1)(f),^{4/} since January 11, 2007. At no time during the period that he has been licensed (from March 19, 1990, to present) has he ever been disciplined.

2. Respondent (operating as a professional association) is now, and was at all times material to the instant case, affiliated with All Homes Realty, Inc. (All Homes), a Florida-registered brokerage corporation.^{5/}

3. Since the late 1970's, Gina Brimmell, a now-retired school teacher,^{6/} has owned a condominium unit--Unit 305--located at 4311 Crystal Lake Drive, Pompano Beach, Florida (Subject Unit).

4. In or around April 2009, Ms. Brimmell asked a representative of the community association management firm

servicing the condominium association to which (by virtue of her ownership of the Subject Unit) she belonged (CAM Firm) to recommend a real estate professional to help her sell or rent the Subject Unit^{7/} and, in response to her request, was given Respondent's name.^{8/}

5. Ms. Brimmell, who was then residing in North Carolina, thereafter contacted Respondent and, on April 28, 2009, met with him in person to discuss the possibility of her using him to market the Subject Unit, which at the time was unoccupied and vacant, except for a television and VCR belonging to Ms. Brimmell that she had left behind (on a built-in shelving unit (Shelving Unit)) when she had moved out of the Subject Unit.

6. In introducing himself at the April 28, 2009, meeting, Respondent handed Ms. Brimmell his business card, which indicated that he was working for All Homes. After "interview[ing]" Respondent, an impressed Ms. Brimmell (who was aware of Respondent's affiliation with All Homes and that Respondent was not his own "boss"^{9/}) let Respondent know that she wanted to use his services. Respondent thereupon presented to Ms. Brimmell, for her consideration and signature, the following Property Management Agreement (PMA):

PROPERTY MANAGEMENT AGREEMENT:

Owner of: 4311 Crystal Lake Drive, #305,
Pompano Beach, Fl. 33064

Authorizes Frank Rhoden P.A. To manage, rent and maintain the above property for a fee of 10% of the annual rental and 10% per month of the rent for management services.

Frank Rhoden PA will provide electricians, plumbers, painters, and ensure that property is well maintained and rent collected in a timely manner. Owner authorizes the payment of rental fees, management fees, repairs and maintenance out of rent collected.

Frank Rhoden PA and Attorney will evict tenants who fail to pay rent in a timely manner, disturb the peace or fail to maintain the excellent condition of the condo as rented.

Agreed to By:

Owner

Frank Rhoden PA

After reviewing the PMA, Ms. Brimmell wrote the following handwritten language (Handwritten Addition) underneath the signature lines on the PMA:

10% fee up front to rent (equal to one month's rent) then 10% per month to manage property.

Then, Ms. Brimmell and Respondent signed and dated the PMA (on the appropriate signature lines), and they both placed their initials beneath the Handwritten Addition.^{10/} During their meeting, Ms. Brimmell and Respondent also executed a listing

agreement for the sale of the Subject Unit (Listing Agreement).^{11/}

7. Before the meeting ended, Ms. Brimmell gave Respondent the key to the Subject Unit so that he would be able to show it to prospective buyers and renters. She instructed him to market the unit, which had been cleaned, "as is." At no time did she ask or authorize him to bring and leave any item in the unit, be it for staging the unit or for any other purpose.

8. Respondent was not the only one, aside from Ms. Brimmell, in possession of a key to the Subject Unit. Ms. Brimmell had also given keys to the condominium association and to her good friend, William Russell.

9. Mr. Russell resided year-round in a unit (Unit 309) down the hall from the Subject Unit. Ms. Brimmell had given him a key when she had moved away and asked him to, every now and then, go inside the Subject Unit to make sure nothing was amiss, a responsibility he had agreed to undertake.

10. True to his word, every month or two following Ms. Brimmell's move to North Carolina, Mr. Russell inspected the inside of the Subject Unit. During one such visit on or about June 22, 2009, he observed numerous items in the Subject Unit that had not been there during his last inspection (Unfamiliar Items), including books, paintings, and "knickknacks" on the Shelving Unit; clothing and a suitcase in the unit's walk-in

closet; bags, boxes, bins, and containers with various articles in them; and large, blue industrial-looking barrels or drums.^{12/} Although Mr. Russell did not know it at the time, Respondent was using the Subject Unit to store things (without Ms. Brimmell's knowledge or authorization).

11. Later that same day, Mr. Russell telephoned Ms. Brimmell and told her about the Unfamiliar Items he had found in the Subject Unit, commenting that it looked like someone had moved in to the unit. Two days later, he went back into the Subject Unit, took digital photographs of the Unfamiliar Items, and electronically sent these photographs to Ms. Brimmell.

12. After viewing the photographs, Ms. Brimmell telephoned the CAM Firm, All Homes,^{13/} and Respondent to find out what, if anything, they knew about the Unfamiliar Items' presence in the Subject Unit.

13. Ms. Brimmell was unable to reach Respondent, so she left messages for him. After a time, Respondent called her back and spoke to her. During their discussion, Respondent admitted to Ms. Brimmell that he was "storing stuff" in the Subject Unit, and he apologized to her for doing so. Ms. Brimmell, who was "extremely upset," advised Respondent that she was terminating the PMA and the Listing Agreement (neither of which had produced the result Ms. Brimmell had hoped for--rental of the Subject

Unit in the case of the PMA, and sale of the Subject Unit in the case of the Listing Agreement), and she demanded that he return the key to the Subject Unit she had given him.

14. Some time shortly after Respondent's and Ms. Brimmell's telephone conversation, the Unfamiliar Items were removed from the Subject Unit.

CONCLUSIONS OF LAW

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

16. 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).

17. 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).

18. 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).

19. 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).

20. 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").

21. 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).

22. 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); Marcelin v. Dep't of Bus. & Prof'l Reg., 753 So. 2d 745, 746-747 (Fla. 3d DCA 2000); Dep't of Rev. v. Vanjaria Enters., 675 So. 2d 252, 254 (Fla. 5th DCA 1996); and Delk v. Dep't of Prof'l Reg., 595 So. 2d 966, 967 (Fla. 5th DCA 1992).

23. 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," which impose restrictions and limitations on the exercise of the Commission's disciplinary authority. 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."). The "disciplinary guidelines" that must be consulted and applied are those that were in effect at the time the proven violation(s) were committed. See Orasan v. Ag. for Health Care Admin., 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.").

24. At all times material to the instant case, the Commission's "disciplinary guidelines" were set forth in Florida Administrative Code Rule 61J2-24.001 and provided, in pertinent part, as follows^{14/}:

(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 fraud, misrepresentation, concealment, false promises, false promises, false pretenses, dishonest dealing by trick, scheme or device, culpable negligence or breach of trust.

RECOMMENDED RANGE OF PENALTY:

In the case of . . . misrepresentation . . . , the usual action of the Commission shall be to impose a penalty of revocation.

* * *

In the case of . . . breach of trust, the usual action of the Commission shall be to impose an administrative fine not to exceed \$5,000 and to a 1 year suspension.

* * *

(z) VIOLATION[:] Section 475.42(1)(b), F.S.- Practicing beyond scope as a sales associate.

RECOMMENDED RANGE OF PENALTY:

The usual action of the Commission shall be to impose a 3 year suspension to revocation.

* * *

(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.

25. The Administrative Complaint issued in the instant case contains two counts. Count One alleges that "Respondent violated [s]ection 475.42(1)(b), Florida Statutes, by entering into a property management contract for the [Subject Unit] without All Homes." Count Two alleges that "Respondent violated

[s]ection 475.25(1)(b), Florida Statutes, when Respondent moved personal property into the [Subject Unit] and misrepresented his licensure status."

26. At all times material to the instant case, section 475.25(1)(a) has authorized the Commission to take disciplinary action against a Florida-licensed real estate sales associate who "[h]as violated any provision of . . . s. 475.42," including the following provision found in subsection (1)(b) of that statute:

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.

"Broker" and "sales associate," as those terms are used in section 475.42 and elsewhere in part I of chapter 475, are defined in subsections (1)(a) and (1)(j), respectively, of section 475.01 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 advertises or holds out to the public by any oral or printed solicitation or representation that she or

he is engaged in the business of appraising, auctioning, buying, selling, exchanging, leasing, or renting business enterprises or business opportunities or real property of others or interests therein, including mineral rights, 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; and all persons who advertise rental property information or lists. A broker renders a professional service and is a professional within the meaning of s. 95.11(4) (a). Where the term "appraise" or "appraising" appears in the definition of the term "broker," it specifically excludes those appraisal services which must be performed only by a state-licensed or state-certified appraiser, and those appraisal services which may be performed by a registered trainee appraiser as defined in part II. The term "broker" also includes any person who is a general partner, officer, or director of a partnership or corporation which acts as a broker. The term "broker" also includes any person or entity who undertakes to list or sell one or more timeshare periods per year in one or more timeshare plans on behalf of any number of persons, except as provided in ss. 475.011 and 721.20.

(1) (j) "Sales associate" means a person who performs any act specified in the definition of "broker," but who performs such act under the direction, control, or management of another person. A sales associate renders a

professional service and is a professional within the meaning of s. 95.11(4) (a).

27. 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 broker who "[h]as 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; 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." For there to be a 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) ("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) "all require a finding of wrongful intent or scienter"). 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.") 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.").

28. Because of their penal nature, the foregoing statutory 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 at the final hearing in light of the above, the undersigned finds that Petitioner failed to meet its burden of proving, by clear and convincing evidence, Respondent's guilt of the violation of section 475.42(1)(b) (and, derivatively, section 475.25(1)(a)) alleged in Count One of the Administrative Complaint. While the record evidence does establish that Respondent did execute the PMA, as alleged, an insufficient showing was made that he did so outside the "direction, control, or management" of All Homes.^{15/} That the PMA was in Respondent's, not All Home's, name does not compel a contrary conclusion, inasmuch as "Florida authority establishes that a party [such as All Homes] may contract in the name of an agent." Impossible Elec. Techniques, Inc. v.

Wackenhut Protective Sys., Inc., 610 F.2d 371, 372 (5th Cir. 1980); see also Love v. Brown Dev. Co., 131 So. 144 (Fla. 1930) ("A principal has the right to do business in his own name or in the name of his agent."); CC-Aventura, Inc. v. Weitz Co., LLC, No. 06-21598-CIV, 2007 U.S. Dist. LEXIS 53743 *12 (S.D. Fla. July 25, 2007) ("[T]here is no requirement under Florida law that a principal be specifically identified in a contract entered into by its agent in order for the principal to be bound by the contract. To the contrary, a principal may enter into agreements in its own name or that of its agent.").

30. Petitioner's proof at the final hearing likewise fell short of clearly and convincingly establishing the allegation made in Count Two of the Administrative Complaint that Respondent, in his dealings with Ms. Brimmell, violated section 475.25(1)(b) by "misrepresent[ing] his licensure status." A review of the complete evidentiary record leaves the undersigned unable to find, without hesitancy, that Respondent represented himself to be anything other than what he actually was: a licensed real estate sales associate working for All Homes.

31. Petitioner, however, did present clear and convincing proof of Respondent's guilt of the remaining allegation made in Count Two of the Administrative Complaint--that "Respondent violated [s]ection 475.25(1)(b), Florida Statutes, when Respondent moved personal property into the [Subject Unit]" and

thereby breached the trust of Ms. Brimmell, who had given Respondent access to the Subject Unit only for purposes of facilitating its rental or sale. That proof consisted of, not only circumstantial evidence, but also compelling, direct evidence, in the form of Ms. Brimmell's persuasive hearing testimony that Respondent apologized to her for "storing stuff" in the Subject Unit (which testimony the undersigned has credited^{16/}). See J.J.N. v. State, 877 So. 2d 806, 809 n.1 (Fla. 5th DCA 2004) ("We note that J.J.N. made an admission at the Center and that evidence of an inculpatory statement is direct, not circumstantial, evidence."); and Jorge v. State, 861 So. 2d 1279, 1280 (Fla. 3d DCA 2003) ("The defendant takes the view that only circumstantial evidence supported defendant's knowledge that cocaine was in the bag, but that is not so. At a minimum the defendant's inculpatory statement is direct, not circumstantial, evidence establishing guilty knowledge."). Respondent's using the Subject Unit for this unauthorized purpose constituted a breach of trust, in violation of section 475.25(1)(b), as alleged in Count Two of the Administrative Complaint. See Dep't of Bus. & Prof'l Reg., Div. of Real Estate v. Hampton, No. 96-4384, 1997 Fla. Div. Adm. Hear. LEXIS 5258 *11 (Fla. DOAH Apr. 25, 1997; FREC July 28, 1997) ("[T]he wrongful diversion is an act which constituted a breach of trust

by the Respondent and his corporation as soon as the moneys were put to an unauthorized use.").

32. Having considered the facts of the instant case in light of the pertinent and applicable provisions of Florida Administrative Code Rule 61J2-24.001 set forth above, it is the view of the undersigned that, as punishment for having engaged in this breach of trust in violation of section 475.25(1)(b), Respondent should be fined \$1,500.00, his license should be suspended for a period of six months, and he should be directed to pay, pursuant to section 455.227(3)(a), investigative and non-attorney prosecutorial costs related to this violation in an appropriate amount to be determined in accordance with chapter 120.

RECOMMENDATION

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

RECOMMENDED that the Florida Real Estate Commission issue a Final Order (1) finding that, as alleged in Count Two of The Administrative Complaint, "Respondent violated [s]ection 475.25(1)(b), Florida Statutes, when Respondent moved personal property into the [Subject Unit]" and disciplining him therefor by fining him \$1,500.00, suspending his license for a period of six months, and directing him to pay, pursuant to section 455.227(3)(a), investigative and non-attorney prosecutorial

costs related to this violation in an appropriate amount to be determined in accordance with chapter 120; and (2) dismissing the remaining allegations of professional misconduct made in the Administrative Complaint.

DONE AND ENTERED this 2nd day of May, 2012, in Tallahassee, Leon County, Florida.



STUART M. LERNER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 2nd day of May, 2012.

ENDNOTES

^{1/} Unless otherwise noted, all references in this Recommended Order to Florida Statutes are to that version of Florida Statutes in effect at the time of the occurrence of the particular event or action being discussed.

^{2/} The Transcript of the hearing (consisting of one volume) was filed with DOAH on April 13, 2012.

^{3/} Appended to Respondent's Proposed Recommended Order were documents that were neither offered nor received into evidence at the final hearing. The following day (March 30, 2012), two other such non-record documents were filed with DOAH by Respondent. Because these documents are outside the scope of the evidentiary record in this case, they cannot provide a basis

for any finding of fact. See General Development Utilities, Inc. v. Hawkins, 357 So. 2d 408, 409 (Fla. 1978) ("The Commission selected a ratio which nowhere appears in the record, apparently fabricating one for the company based on information it has compiled for water companies generally. The arbitrary selection of this ratio as a 'fact' comes from outside the record of the proceeding and plainly violates the notions of agency due process which are embodied in the administrative procedure act."); and Section 120.57(1)(j), Florida Statutes ("Findings of fact . . . shall be based exclusively on the evidence of record and on matters officially recognized.").

^{4/} Rule 61J2-1.013(1)(f) provides as follows:

Registration in the following categories shall show the name, the business address, effective and expiration date:

Active Professional Association

see also Fla. Admin. Code R. 61J2-1.011(5)(a) ("The following fees shall be charged for the following purposes: Change of Individual License to Professional Association or Professional Association to Individual License \$30.00.").

^{5/} Section 475.15, Florida Statutes, requires any corporation that "acts as a broker" to register with the Florida Real Estate Commission. See Meteor Motors, Inc. v. Thompson Halbach and Assocs., 914 So. 2d 479, 482 (Fla. 4th DCA 2005).

^{6/} Ms. Brimmell retired from teaching in 2006.

^{7/} The Subject Unit had been on the market "on and off" since 2006, and the "two or three different realtors" with whom the unit had been listed during these times had been unable to produce a sale.

^{8/} The CAM Firm and All Homes (the brokerage corporation with which Respondent was affiliated) had common ownership.

^{9/} Ms. Brimmell testified at hearing that, before meeting with Respondent, "[Respondent's] boss [had] told [her] that he was his boss."

^{10/} The undersigned has rejected Respondent's hearing testimony that he did not sign, and had "nothing to do with," the PMA, in

favor of Ms. Brimmell's more credible hearing testimony to the contrary.

^{11/} The evidentiary record does not shed any further light on the contents of this agreement (which was not offered into evidence and is not part of the evidentiary record).

^{12/} By any reasonable standard, the presence of the Unfamiliar Items, with the possible exception of those on the Shelving Unit, detracted from the appearance of the Subject Unit, and it is inconceivable that any reasonable real estate professional would have placed these items in the unit for staging purposes.

^{13/} That Ms. Brimmell contacted All Homes is further evidence of her understanding that Respondent was working for All Homes.

^{14/} The instant case involves violations alleged to have been committed in 2009, prior to the July 21, 2010, effective date of the current version of Florida Administrative Code Rule 61J2-24.001. The provisions set forth below are those of that version of the rule in effect from December 25, 2007, until July 20, 2010.

^{15/} No one from All Homes testified at the final hearing.

^{16/} In his hearing testimony, Respondent unconvincingly denied making such an apology to Ms. Brimmell, claiming instead that, if he apologized to Ms. Brimmell for anything, it was to "express that [he was] sorry that the [Subject Unit] wasn't rented" (a claim that is difficult to reconcile with the equally unconvincing testimony that he had given earlier in his examination, referenced in endnote 10 above, concerning the PMA).

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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.