

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND )  
PROFESSIONAL REGULATION, )  
DIVISION REAL ESTATE, )  
 )  
Petitioner, )  
 )  
vs. )  
 ) Case No. 13-0011PL  
GUIRLANDE MARDY, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case on March 11, 2013, by video teleconference at sites in West Palm Beach and Tallahassee, Florida, before Administrative Law Judge June C. McKinney of the Division of Administrative Hearings, pursuant to the authority set forth in sections 120.569 and 120.57(1), Florida Statutes.

APPEARANCES

For Petitioner: Christina Ann Arzillo, Esquire  
Department of Business and  
Professional Regulation  
1940 North Monroe Street  
Tallahassee, Florida 32399-2202

For Respondent: Guirlande Mardy, pro se  
14541 Draft Horse Lane  
Wellington, Florida 33414

STATEMENT OF THE ISSUES

The issues to be resolved in this proceeding are whether Respondent committed the violations alleged in the Amended Administrative Complaint dated February 29, 2013, and, if so, what disciplinary action should be taken against Respondent.

PRELIMINARY STATEMENT

The Department of Business and Professional Regulation, Division of Real Estate ("Division" or "Petitioner"), alleged in an Administrative Complaint dated February 23, 2012, that Guirlande Mardy ("Mardy" or "Respondent") violated standards governing real estate brokers. Respondent disputed the allegations and requested an evidentiary hearing pursuant to section 120.57(1), Florida Statutes, through an Election of Rights form.

On January 4, 2013, the case was referred to the Division of Administrative Hearings and assigned to John G. Van Laningham. On January 14, 2013, the hearing was scheduled for February 27, 2013. On January 29, 2013, Petitioner filed Petitioner's Motion to Amend Administrative Complaint that was granted by Order dated February 7, 2013. The hearing was conducted by the undersigned as scheduled on February 27, 2013.

At hearing, Petitioner presented the testimony of four witnesses: Guirlande Mardy; Jonathan Platt, Investigator; Alix Pasquet; and Patricia Pasquet. Petitioner's Exhibits one

through seven and ten through thirteen were offered and admitted into evidence. Respondent testified on her own behalf but did not offer any exhibits at the hearing.

The proceeding was recorded and transcribed. The Transcript of the final hearing was filed with the Division of Administrative Hearings on March 26, 2013. Petitioner submitted a timely Proposed Recommended Order, which has been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is the state agency charged with the regulation of real estate licensees pursuant to chapter 475, Florida Statutes.

2. At all times material to this case, Mardy was licensed as a Florida Real Estate Broker. Her license number is 3048239. No prior disciplinary action has been brought against Respondent.

3. Mardy has been actively licensed as a broker in Florida since April 6, 2010. From April 8, 2010, to present, Mardy also served as the registered broker with Mardy's Premier Properties, Inc., license number CQ1036525. The brokerage company was located at 12180 Southshore Boulevard Suite 101A, Wellington, Florida 33414.

4. Approximately seven years ago, Mardy assisted Alix and Patricia Pasquet ("Pasquets") with a rental transaction.

5. In 2011, when the Pasquets decided that they wanted to lease a rental residence near their sons' school, they decided to contact Mardy to assist them in obtaining the rental residence since they had been satisfied with her previous service.

6. The Pasquets decided to lease the rental residence at 11188 Millpond Greens Drive, Boynton Beach, Florida 33473, ("Millpond"). The Pasquets made an offer to pay the rent a year in advance to benefit from the reduced rental amount with a full year's payment.

7. Mardy informed the Pasquets that the rental money needed to be in the U.S. instead of Haiti in order to execute the leasing agreement and then the Millpond owner would accept their offer to lease the property if they showed proof of funds in the U.S. prior to April 6, 2012.

8. On or about April 5, 2012, the Pasquets wired Mardy the total rent for the year in the amount of \$33,365.00 to Mardy's Premier Properties, Inc.'s bank, PNC Bank, at Mardy's request. Mardy received the monies in the corporation's operating account ending in 6863.

9. Mardy accepted the Pasquets' rental funds with the direction to use the monies to secure Millpond as a rental residence for the Pasquets.

10. On or about April 9, 2011, the Pasquets signed a lease addendum, which was predated to April 5, 2011. The addendum indicated the rent payment would be wired to the Millpond owner upon commencement of the lease or prior thereto.

11. After the addendum was signed, Mrs. Pasquet tried to follow-up with Mardy to schedule the Millpond walk through that had been discussed at the previous meeting. She attempted to contact Respondent to no avail for about a week to schedule the Millpond walk through. When Mrs. Pasquet finally reached Mardy, Respondent informed her that her unavailability was because of a death in the family since her grandmother had passed.

12. Around April 25, 2011, Mardy informed Mrs. Pasquet that she no longer had the Pasquets' \$33,365.00.

13. Respondent provided several different reasons for use of the Pasquets' monies. All explanations given were for both a personal and improper use, and without the Pasquets' permission. Hence, the undersigned rejects any of Mardy's excuses as valid or credible.

14. Respondent never delivered the Pasquets' rental monies to the Millpond owner nor closed the rental deal with the Millpond owner or his agent for the lease of Millpond.

15. At hearing, Respondent admitted that she used the Pasquets' \$33,365.00 without their permission.

16. On or about April 26, 2011, the Pasquets negotiated a lease directly with Millpond owner and leased Millpond for six months. They did the walk through on or about April 29, 2013, and moved into the Millpond property on or about May 8, 2013.

17. After the Pasquets discovered that Mardy had taken their \$33,365.00, they contacted an attorney to assist them with the matter to try to get the rental monies back.

18. The police also became involved in the attempt of the Pasquets to get their rental monies back. When the police became involved, Respondent agreed to pay the money back to the Pasquets.

19. On or about July 7, 2011, Respondent paid the Pasquets \$10,000.00 with check number 75053315-2.

20. On or about July 8, 2011, Respondent paid the Pasquets \$3,365.00 with check number 75115202.

21. On or about October 27, 2011, Respondent paid the Pasquets \$5,000.00 with check number 0734873625.

22. At the hearing, Mardy had not made a payment since October 2011.

23. The Pasquets have spent thousands of dollars on legal fees trying to get their rental monies back from Respondent. Respondent owes them approximately \$15,000.00. The Pasquets

were forced to withdraw unbudgeted funds from their business in order to pay for the six-month lease for Millpond, which has been a financial hardship for the Pasquets.

24. Jonathan Platt ("Investigator Platt") is employed by the Division as a Lead Investigator. Investigator Platt has worked for the Division for approximately 22 years.

25. Investigator Platt was assigned the complaint regarding the Pasquets' missing rental funds. He interviewed Respondent and requested Respondent's corporation bank records as part of his investigation.

26. Mardy failed to deliver the bank records to Investigator Platt. Respondent also failed to maintain an escrow account or accounting of rent deposited into the corporation's bank account ending in 6863 with PNC Bank.

27. Investigator Platt completed his investigation by obtaining Mardy's requested records directly from PNC Bank with an investigative subpoena duces tecum. Afterwards, the Division issued an Administrative Complaint against Mardy in which it charged violations of sections 475.25(1)(b), 475.42(1)(i), 475.25(1)(d)1, 475.25(1)(e), Florida Statutes (2010); and Florida Administrative Code Rules 61J2-14.012(1) and 61J2-14.010(1).

28. Respondent challenged the Administrative Complaint and requested a hearing. No dispute exists that the request for hearing was timely filed.

CONCLUSIONS OF LAW

29. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the parties thereto pursuant to sections 120.569 and 120.57(1), Florida Statutes (2012).

30. In a proceeding, such as this one where the Division seeks to discipline Respondent's license and/or to impose an administrative fine, the Division has the burden of proving the allegations charged in the Administrative Complaint against the Respondent by clear and convincing evidence. Dep't of Banking and Fin. v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996). (citing Ferris v. Turlington, 510 So. 2d 292, 294-95 (Fla. 1987)); Nair v. Dep't of Bus. & Prof'l Reg., 654 So. 2d 205, 207 (Fla. 1st DCA 1995).

31. Regarding the standard of proof, in Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983), the Court of Appeal, Fourth District, canvassed the cases to develop a "workable definition of clear and convincing evidence" and found that of necessity such a definition would need to contain "both qualitative and quantitative standards." The court held that:



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 explicit and the witnesses must be lacking 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. Id.

32. The Amended Administrative Complaint dated February 29, 2013, charges Respondent with five counts. At hearing, the Division dismissed Count 2.

33. Respondent is alleged to have violated the following provisions of section 475.25(1):

475.25 Discipline.—

(1) The commission may deny an application for licensure, registration, or permit, or renewal thereof; may place a licensee, registrant, or permittee on probation; may suspend a license, registration, or permit for a period not exceeding 10 years; may revoke a license, registration, or permit; may impose an administrative fine not to exceed \$5,000 for each count or separate offense; and may issue a reprimand, and any or all of the foregoing, if it finds that the licensee, registrant, permittee, or applicant:

\* \* \*

(b) Has been guilty of fraud, misrepresentation, concealment, false promises, false pretenses, dishonest dealing by trick, scheme, or device, culpable negligence, or breach of trust in any business transaction in this state or any other state, nation, or territory. . . .

\* \* \*

(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. However, if the licensee, in good faith, entertains doubt as to what person is entitled to the accounting and delivery of the escrowed property, or if conflicting demands have been made upon the licensee for the escrowed property, which property she or he still maintains in her or his escrow or trust account, the licensee shall promptly notify the commission of such doubts or conflicting demands and shall promptly:

(e) Has violated any of the provisions of this chapter or any lawful order or rule made or issued under the provisions of this chapter or chapter 455.

34. Respondent is also charged with violating rules 61J2-14.012(1) and 61J2-14.010(1).

35. Rule 61J2-14.012(1) provides in pertinent part:

(1) A broker who receives a deposit as previously defined shall preserve and make available to the BPR, or its authorized representative, all deposit slips and statements of account rendered by the depository in which said deposit is placed, together with all agreements between the parties to the transaction. In addition, the broker shall keep an accurate account of each deposit transaction and each separate bank account wherein such funds have been deposited. All such books and accounts shall be subject to inspection by the DBPR or its authorized representatives at all reasonable times during regular business hours.

36. Rule 61J2-14.010(1) provides in pertinent part:

(1) Every broker who receives from sales associates, principals, prospects, or other persons interested in any real estate transaction, any deposit, fund, money, check, draft, personal property, or item of value shall immediately place the same in a bank, savings and loan association, trust company, credit union or title company having trust powers, in an insured escrow or trust account. The broker must be a signatory on all escrow accounts. If the brokerage entity has more than one broker licensee, then one broker licensee may be designated as the signatory. If the deposit is in securities, intended by the depositor to be converted into cash, the conversion shall be made at the earliest practical time, and the proceeds shall be immediately deposited in said account.

37. In this case, the Division proved by clear and convincing evidence that Respondent collected \$33,365.00 in rent monies from the Pasquets but failed to remit the rent payment to

the Millpond owner because Respondent chose to use the monies without the Pasquets' authorization. By acting dishonestly, Respondent violated section 475.25(1)(b) as alleged in Count 1 of the Amended Administrative Complaint.

38. Furthermore, the evidence is clear and convincing and demonstrates that Respondent received and accepted the Pasquets' rental funds by wire into her business account ending in 6863 and failed to deliver the funds when the Pasquets requested the monies be transferred to the Millpond owner in violation of section 475.25(1)(d)1 as alleged in Count 3 of the Administrative Complaint.

39. The record also clearly demonstrates that Respondent failed to maintain an accounting for real estate funds that were deposited. And, at the hearing two years after the incident, Respondent was still unable to provide any explanation about any accounting of the funds. Hence, the Division demonstrated Mardy failed to keep an accurate account of rent delivered for the lease of the rental property in violation of rule 61J2-14.012(1) and section 475.25(1)(e) as alleged in Count 4 of the Administrative Complaint.

40. Additionally, when Respondent had the monies wired to her account, she placed the Pasquets' rental monies into a non-escrow account. Mardy admitted at the hearing that she has never held an escrow account. By failing to put the Pasquets'

rental monies into an insured escrow account, Respondent violated rule 61J2-14.010(1) and section 475.25(1)(e) as alleged in Count 5 of the Amended Administrative Complaint.

41. As to penalty, rule 61J2-24.001 sets forth disciplinary guidelines applicable in this proceeding. The penalty for Respondent's violation of section 475.25(1)(b) ranges from a 30-day suspension to revocation and an administrative fine between \$1,000.00 to \$2,500.00 pursuant to rule 61J12-24.001(3)(c).

42. The penalty for Respondent's violation of section 475.25(1)(d)<sup>1</sup> ranges from suspension to revocation and an administrative fine between \$250.00 to \$1,000.00 pursuant to rule 61J2-24.001(3)(e).

43. The penalty for Respondent's violations of rules 61J2-14.012(1) and 61J2-14.010(1), which violate section 475.25(1)(e) ranges from suspension to revocation and an administrative fine between \$250.00 to \$1000.00 pursuant to rule 61J2-24.001(3)(f).

44. Mardy was dishonest and stole the Pasquets' \$33,365.00 when she took the rental monies they wired her and used the funds without their permission, instead of providing the money to the Millpond owner as directed to pay for the rental residence. In its Proposed Recommended Order, the Division correctly points out that Respondent's actions showed little regard for the duties she promised to uphold as a licensee in

the State of Florida. The Division also detailed the following harm caused to the Pasquets by Respondent after she used their rental monies: the Pasquets had to raise the rental monies a second time to rent Millpond and were only able to rent it for six months instead of the planned year at the discounted amount; the Pasquets had to pay thousands of dollars for an attorney; and Respondent did not repay the Pasquets what was owed after she agreed to do so. The Division characterizes Respondent's harmful actions as "aggravating factors for which revocation would be the most appropriate discipline." The undersigned considers the penalty of revocation appropriate under the circumstances of this case.

#### RECOMMENDATION

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

RECOMMENDED that the Department of Business and Professional Regulation, Division of Real Estate, enter a final order:

1. Finding Guirlande Mardy violated Counts 1, 3, 4, and 5 of the Amended Administrative Complaint; and
2. Imposing revocation of Guirlande Mardy's license identified herein.

DONE AND ENTERED this 30th day of April 2013, in  
Tallahassee, Leon County, Florida.

*June C. McKinney*

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

Filed with the Clerk of the  
Division of Administrative Hearings  
this 30th day of April, 2013.

COPIES FURNISHED:

Christina Ann Arzillo, Esquire  
Department of Business and  
Professional Regulation  
1940 North Monroe Street  
Tallahassee, Florida 32399

Guirlande Mardy  
14541 Draft Horse Lane  
Wellington, Florida 33414

Juana Watkins, Director  
Division of Real Estate  
400 W Robinson Street, N801  
Orlando, Florida 32801

Darla Furst, Chair  
Real Estate Commission  
Department of Business  
and Professional Regulation  
400 W Robinson Street, N801  
Orlando, Florida 32801

J. Layne Smith, General Counsel  
Department of Business  
and Professional Regulation  
Northwood Centre  
1940 North Monroe Street  
Tallahassee, Florida 32399-0792

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.