STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND
PROFESSIONAL REGULATION,
DIVISION OF REAL ESTATE,

Petitioner,

vs. Case No. 13-2042PL

THERESIA M. HELTON,

Respondent.
_____/

RECOMMENDED ORDER

On September 13, 2013, a final administrative hearing was held in this case by videoconference with sites in Fort Myers and Tallahassee before J. Lawrence Johnston, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

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For Respondent: Daniel Villazon, Esquire
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STATEMENT OF THE ISSUES

The issues in this case are whether, and how, the Florida Real Estate Commission (FREC) should discipline the Respondent, Theresia Helton, on charges that she: failed to account and deliver rental payments and deposits; was culpably negligent and in breach of trust in her dealings regarding rental property; failed to escrow rental payments and deposits; failed to properly reconcile her escrow account; and failed to make transaction agreements and bank statements available for inspection.

PRELIMINARY STATEMENT

The Petitioner, Department of Business and Professional Regulation, Division of Real Estate (Division), filed an Administrative Complaint against the Respondent alleging: in Count I, that she failed to account and deliver rental payments and deposits, in violation of section 475.25(1)(d), Florida Statutes (2013)[1/]; in Count II, that she was culpably negligent and in breach of trust in her dealings regarding the rental property, in violation of section 475.25(1)(b); in Count III, that she failed to escrow rental payments and deposits, in violation of section 475.25(1)(k); in Count IV, that the violations alleged in Count III also violated Florida Administrative Code Rule 61J2-10.010(1) and, therefore, section 475.25(1)(e); in Count V, that she failed to properly reconcile her escrow account, in violation of rule 61J2-14.012(2) and,

therefore, section 475.25(1)(e); and, in Count VI, that she failed to make transaction agreements and bank statements reflecting deposits available to the Division's investigator, in violation of rule 61J2-14.012(1) and, therefore, section 475.25(1)(e). The Respondent disputed the charges and requested an administrative hearing. However, at the final hearing, the Respondent admitted the violations alleged in Counts III, IV, and V.

At the hearing, Petitioner's Exhibits 1 through 14 were admitted in evidence, and the Petitioner called the following witnesses: the Respondent; the owners/lessors, Ernest and Eileen Armitage; the Division's investigator, Richard Kerans; and the lessees, Laurie and James Ungar. The Respondent testified in her case, and Respondent's Exhibit 6 was admitted in evidence.

The Transcript of the final hearing was filed, and the parties filed proposed recommended orders that have been considered.

FINDINGS OF FACT

1. At the time of the events giving rise to the Administrative Complaint in this case, the Respondent, Theresia Helton, held two Florida real estate broker licenses (BK 3077530 and BK 3248280) and was the owner and qualifying broker for 1010 Apartments, Inc., a real estate brokerage firm. However, on May 22, 2013, FREC entered a Final Order suspending those

licenses for five years. The Final Order is on appeal by the Division, which seeks to revoke the Respondent's licenses, as recommended by the Administrative Law Judge in that case.

2. Eileen and Ernest Armitage ("the Armitages") reside in New Jersey and own a condominium located at 15599 Latitude Drive, Bonita Springs, Florida ("the property" or "condo"). In 2010, the Armitages began communicating with the Respondent and asked her to find a tenant for the property. In return for the Respondent's services, the Armitages verbally agreed to pay her a commission of ten percent of the annual gross rent.

3. In September 2010, the Respondent obtained a tenant, Marion Ward Bentson, to rent the property for $1,400 a month and pay a security deposit in the amount of one month's rent. The Respondent filled in a form lease to begin on September 14 of that year. On September 8, 2010, the lease was signed by Ms. Bentson and by the Respondent on behalf of the Armitages (in one place as their agent, and in another as landlord). The Respondent collected the $1,400 security deposit and $700 prorated first month of rent from Ms. Bentson. The lease directed the tenant to mail future rent payments to "Ilene [sic] Armitage/1010 Apartments, Inc." at the brokerage's address in Naples. The Respondent then submitted the lease to the homeowners association (HOA) for approval. The lease was approved by the HOA on September 14, 2010, and became effective

on that date. The Respondent kept the $2,100 collected from the tenant in payment of the $1,680 commission, plus other charges.

4. Some details of the 2010 transactions remain unclear. The Armitages testified that the Respondent sent the lease to them and that they made corrections, signed the corrected lease, and returned it to the Respondent. The Respondent testified that the HOA sent the lease to the Armitages after approval and that no corrected lease signed by the Armitages was returned to her.

5. A corrected lease was introduced in evidence. It indicates that Eileen Armitage corrected the spelling of her name, clarified that the Armitages were the landlord under the lease, clarified that future rent and notices were to be sent to the Armitages in New Jersey, initialed the changes, and signed the corrected lease on September 15, 2010.

6. The corrected lease apparently was not presented to the HOA for approval, and it is not clear what happened to it. It is, however, clear from the evidence that the parties' subsequent conduct was consistent with the corrected lease, and that the Armitages had no complaints about the Respondent's conduct with respect to the Bentson lease.

7. In July 2011, Ms. Bentson stopped paying rent and gave notice that she was moving out. The Armitages contacted the Respondent and asked her to help them find a tenant to replace Ms. Bentson. It was agreed verbally, or assumed, that the

Respondent again would be paid a commission of ten percent of the annual gross rent. The Armitages testified that there also was a verbal agreement that the commission on the Bentson lease would be prorated, entitling the Armitages to a refund. The Respondent denied that there was any agreement to prorate the Bentson lease commission. On this disagreement, the Respondent's testimony was more believable. The Armitages remained in communication with the Respondent while she attempted to find a new tenant.

8. At the end of August 2011, Laurie Ungar contacted the Respondent regarding the Armitage property, and the Respondent arranged for Mrs. Ungar to see the condo. Mrs. Ungar noted that there were scuff marks on the walls, trash that needed to be removed, and carpet and a patio deck that needed cleaning. She expressed her interest in renting the condo, if those items were corrected. The Respondent reported to the Armitages, who were under the impression that the condo already was in good condition and did not agree to spend money for additional repairs. The Respondent decided to proceed with the lease negotiations and arrange for whatever work would be needed to satisfy the Ungars.

9. The Respondent met with Mrs. Ungar on August 31, 2011, and negotiated on behalf of the Armitages. The Respondent filled in a form lease to begin on September 21, 2011. Mrs. Ungar signed for herself and her husband and gave the Respondent a check for $75 for the HOA application fee. The lease identified

"Ilene [sic] Armitage" as landlord and provided for notices to be sent to her, although no contact information was included for her. The Respondent signed as landlord in one place on the form and as agent in another. She also initialed the lease as landlord. By checks dated September 1, 2011, Mrs. Ungar gave the Respondent $500 for the first month's prorated rent, $1,500 for the following month's rent, a security deposit in the amount of $1,500, and a pet security deposit in the amount of $250.

10. The Respondent reported to the Armitages that the Ungars signed the lease. She then sent someone to touch up the scuff marks on the walls and clean up the apartment. Either the Armitages or the HOA apparently asked for a pet fee from the Ungars, which they delivered to the Respondent by check dated September 13, 2011. The Respondent then submitted the lease to the HOA for approval. The lease was approved by the HOA on September 19, 2011. The Ungars moved in at 3 a.m. on September 21, 2011.

11. When the Ungars arrived, they still were dissatisfied with the condition of the condo. The walls had been touched up with the wrong color paint, so it looked like graffiti. There was still trash at the condo, and the patio deck and carpet still needed cleaning, in their opinion. They contacted the Respondent, who came over with a can of paint and removed some of

the trash. The Ungars remained very dissatisfied with the condition of the condo.

12. Shortly after the Ungars moved in, the Armitages began asking the Respondent for a copy of the lease. For reasons not clear from the testimony, they did not receive the lease or any money from the Respondent and became increasingly agitated about it.

13. At the end of the month, the Armitages received a final bill from the utility company. When they inquired, they were told that the utilities had been transferred to another payor, who was occupying the condo. They contacted the Ungars directly, and the Ungars told them that they still were dissatisfied with the condition of the condo and wanted to terminate the lease at the end of October and get their deposits refunded. The Armitages told them that they did not have the deposits, as the Respondent still had not forwarded them any money. Mr. Ungar went to the Respondent's office, told her about the conversation with the Armitages, and demanded a refund of the deposits. She told him she already had sent the money to the Armitages.

14. On October 6, 2011, the Respondent emailed the Armitages to report her conversation with Mr. Ungar and tell them it was up to them if they wanted to let the Ungars out of the lease, but that she had earned her commission. She stated that she had cleaned up the condo for the Ungars after the Armitages

had declined and had mailed the Armitages a check for $1,500, which was what was left of the moneys paid by the Ungars after deducting her commission in the amount of $1,800, a cleaning fee of $150, another $150 for pressure-washing the patio deck, a painting fee of $200, and another fee of $200 for cleaning and hauling out trash. There was no evidence that those sums actually were incurred by the Respondent or that any of the work had been done, except for the poor touch-up of the scuff marks on the walls.

15. After the Respondent sent the email, she thought better of sending the $1,500 check since both the Armitages and the Ungars were claiming it. The money remained in her operating account. She believed she was entitled to keep the balance of the $4,000 paid by the Ungars. She did not notify FREC of any deposit dispute.

16. On October 7, 2011, the Armitages emailed the Respondent to again ask for a copy of the signed lease and listing agreement. On October 10, 2011, they emailed to again ask for the signed lease and ask for the invoices for the work done (or at least contact information for the vendors). By email dated October 12, 2011, they followed up to again request the information. They got no response from the Respondent, except to say that she did not mail the check referred to in the email on October 6, 2011.

17. The Armitages and Ungars renegotiated the lease. The Armitages reduced the monthly rent to pay the Ungars for painting, cleaning, and other work they did at the condo to make it satisfactory to them.

18. The Armitages sued the Respondent and settled for $2,700, which was paid by check dated July 12, 2012. The Armitages used $2,000 from the settlement to return deposits to the Ungars.

19. During the Division's investigation, the Respondent was asked to provide a copy of her agreement with the Armitages and her escrow bank account records. There were no such records. Later, a subpoena was issued for the records for the Respondent's operating account, which were produced. There was no evidence that the Division asked for the records for the operating account before issuing the subpoena.

20. The Respondent's license is suspended until May 21, 2018, because the Division proved charges that in the fall of 2010, she was culpably negligent, in violation of section 475.25(1)(b), and failed to account and deliver, in violation of section 475.25(1)(d)1.

21. The Respondent is the single mother of two daughters, whom she was supporting by income earned as a real estate broker, as well as child support payments.

22. The Division has incurred costs in the amount of $825 in prosecuting this case against the Respondent.

CONCLUSIONS OF LAW

23. Since this is a license discipline case, the Division must prove its allegations by clear and convincing evidence. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). The Supreme Court has stated:

> Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and lacking in confusion as to the facts in issue. The evidence must be of such a weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In re Henson, 913 So. 2d 579, 590 (Fla. 2005)(quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

24. In Count I, the Division charged the Respondent with failure to account and deliver with respect to the Armitage-Unger transaction, in violation of section 475.25(1)(d). The evidence was clear and convincing that the Respondent violated this statute, which required a better accounting than given by the Respondent and also required the Respondent to notify FREC of the deposit dispute.

25. In Count II, the Division charged the Respondent with violating 475.25(1)(b) by culpable negligence or breach of trust. This offense requires proof on an intentional act. See Munch v. Dep't of Prof. Reg., Div. of Real Estate, 592 So. 2d 1136 (Fla. 1st DCA 1992). The evidence was clear and convincing that the Respondent intentionally engaged in the conduct that constituted culpable negligence and breach of trust, in violation of the statute.

26. In Count III and IV, the Division alleged that the Respondent failed to escrow rental payments and deposits, in violation of section 475.25(1)(k) and rule 61J2-10.010(1) and, therefore, section 475.25(1)(e). In Count V, it was alleged that the Respondent failed to properly reconcile her escrow account, in violation of rule 61J2-14.012(2) and, therefore, section 475.25(1)(e). The Respondent admitted those violations.

27. In Count VI, the Division alleged that the Respondent failed to make transaction agreements and bank statements reflecting deposits available to the Division's investigator, in violation of rule 61J2-14.012(1) and, therefore, section 475.25(1)(e). The Respondent had no escrow account. The Respondent produced the deposit slips and statements from her operating account in response to a subpoena. The Division contends that the operating account records were not produced upon request, prior to the subpoena, but there was no proof of

that. There were no transaction agreements. For these reasons, it was not proven that the Respondent violated rule 61J2-14.012(1) or, therefore, section 475.25(1)(e).

28. Under the disciplinary guidelines in rule 61J2-24.001(3), the normal range of discipline for the proven violations are: for Count I, which is a second violation of section 475.25(1)(d), from suspension to revocation and an administrative fine from $1,000 to $5,000, under paragraph (e); for Count II, which is a second violation of 475.25(1)(b), from a six-month suspension to revocation and an administrative fine from $2,500 to $5,000, under paragraph (c); and for Counts III and IV, from a 30-day suspension to revocation and an administrative fine from $250 to $1,000, under paragraph (l), for each violation.

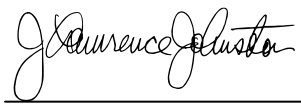
29. Under rule 61J2-24.001(4), aggravating or mitigating circumstances that can justify a departure from the normal range of discipline, if proven by clear and convincing evidence, include: the degree of harm to the consumer or public; the number of counts in the administrative complaint; the licensee's disciplinary history; the status of the licensee at the time of the offense; the degree of financial hardship incurred by the licensee from a fine or suspension; and a previous letter of guidance.

30. The facts of this case justify a penalty at the top of the normal range of discipline--specifically, revocation. The Division appears to take into consideration the financial hardship on the Respondent and her children from the imposition of a fine, in that no fine is being sought in addition to the requested revocation of her license.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Real Estate Commission enter a final order: finding the Respondent guilty as charged in Counts I through V of the Administrative Complaint; revoking her licenses; and assessing costs in the amount of $825.

DONE AND ENTERED this 21st day of November, 2013, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of November, 2013.

ENDNOTE

[1/] Unless otherwise noted, all statutory references are to Florida Statutes (2013), which reflects the statutes in effect during the relevant conduct of the Respondent. Likewise, all rule references are to the version of the rule in effect during the relevant time period.

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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.