

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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

Petitioner,

vs.

Case No. 13-4244PL

ALFONSO MIRANDA,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was conducted before Administrative Law Judge Mary Li Creasy by video teleconference at sites in Tallahassee and Miami, Florida, on January 31, 2014.

APPEARANCES

For Petitioner: Christina Ann Arzillo, Esquire
Daniel Brackett, Esquire
Department of Business and
Professional Regulation
Suite 42
1940 North Monroe Street
Tallahassee, Florida 32399-2202

For Respondent: Samuel B. Reiner, II, Esquire
Reiner and Reiner, P.A.
Suite 901
9100 South Dadeland Boulevard
Miami, Florida 33156-7815

STATEMENT OF THE ISSUES

The issues to be determined are whether Respondent violated sections 475.25(1)(e), 475.42(1)(b), and 475.42(1)(d), Florida Statutes (2011), and Florida Administrative Code Rule 61J2-14.009, as alleged in the Administrative Complaint, and, if so, what penalty should be imposed?

PRELIMINARY STATEMENT

On July 15, 2013, Petitioner, Department of Business and Professional Regulation, Division of Real Estate ("Department"), issued a three-count Administrative Complaint ("Complaint") against Respondent, Alfonso Miranda, alleging the statutory and rule violations described above. Respondent disputed the allegations in the Complaint and filed a Petition for Formal Administrative Hearing ("Petition"), which was received by the Department on August 19, 2013. The Complaint and Petition were filed with the Division of Administrative Hearings on October 30, 2013, with a request that an Administrative Law Judge be assigned.

At the final hearing, which took place on January 31, 2014, the Department called the following witnesses: Alfonso Miranda, Francesca Palmeri, Santo Palmeri, Ricardo Aleman, and Raul Aleman. Petitioner's Exhibits 1 through 10 were admitted in evidence. Respondent testified on his own behalf, and Respondent's Exhibit 6 was admitted.

The final hearing Transcript was filed on March 3, 2014. The Department and Respondent timely filed proposed recommended orders that have been considered in the preparation of this Recommended Order.

Unless otherwise noted, citations to the Florida Statutes and Florida Administrative Code refer to the 2011 version.

FINDINGS OF FACT

1. The Department is the state agency charged with the licensing and regulation of the real estate industry in the state of Florida, pursuant to section 20.165 and chapters 455 and 475, Florida Statutes.

2. At all times material to this proceeding, Respondent was a licensed real estate sales associate having been issued license number 3101946. During the time relevant to this case, Respondent was a sales associate affiliated with Bahia Real Estate ("Bahia"), a brokerage company owned by Raul and Ricardo Aleman, with offices located in Miami, Orlando, and Tampa, Florida. Respondent was employed in Bahia's Miami location.

3. In 2010, Respondent acted as a sales associate on behalf of Michael Perricone for a real estate transaction involving the purchase of a condominium in the Blue Lagoon Towers ("Blue Lagoon") in Miami which was purchased as an investment. Mr. Perricone's sister, Francesca Palmeri, and her husband, Santo Palmeri, were present at the closing where they met Respondent

for the first and only time. During the closing, which lasted approximately one hour, the Palmeris indicated to Respondent that they would be interested in making a similar purchase of investment property if another comparable condominium unit became available at Blue Lagoon.

4. The Palmeris had no further interaction with Respondent until he contacted them at their home in Pueblo, Colorado, in 2011 to advise them of the availability of a condominium for sale at Blue Lagoon.

5. On or about October 6, 2011, Respondent faxed a partially completed Bahia form "'AS IS' Residential Contract for Sale and Purchase" to Mrs. Palmeri for the Palmeris to use in making an offer on a condominium unit located at 5077 Northwest Seventh Street, Miami, Florida. Prior to forwarding the document to Mrs. Palmeri, Respondent wrote on the form the property description, the escrow agent name and address, the initial escrow deposit amount and additional deposit, the time for acceptance, the closing date, and listed himself as the "Cooperating Sales Associate" with "Bahia Realty Group, LLC."

6. The Palmeris decided to offer a \$125,000.00 purchase price. Respondent directed Mrs. Palmeri to complete the contract and provide a ten percent escrow deposit. Mrs. Palmeri entered a purchase price of \$125,000.00, initialed each page, and signed the form as "Buyer."

7. Respondent provided Mrs. Palmeri with instructions on how to wire the funds for the escrow deposit. On October 7, 2011, Mr. Palmeri wired \$12,000.00 to J.P. Morgan Chase, which was then deposited in an account for Bonaventure Enterprises, LLC ("Bonaventure").^{1/}

8. The Palmeris had no knowledge of Bonaventure, but, based upon the representations of Respondent, they understood the money they were asked to wire to the J.P. Morgan Chase account of Bonaventure was an escrow deposit for the property they intended to purchase at Blue Lagoon.

9. The Palmeris had no discussion with Respondent regarding the reason for sending the escrow deposit to Bonaventure. They assumed that Bonaventure was somehow related to the seller or its title company. The condominium unit in question was bank owned; however, the Palmeris were not informed of this.

10. No evidence was presented that Respondent had an ownership interest in Bonaventure. However, Bonaventure is owned by Respondent's brother and sister-in-law. At all times material hereto, Respondent was the managing member of Bonaventure. Bonaventure is not a licensed real estate broker.

11. Bahia does not maintain an escrow account, and its sales associates are authorized to use title companies of their choice for receipt of escrow deposits.

12. Respondent was aware that he was unable to accept the escrow deposit of the Palmeris in his own name, because, as a licensed real estate sales associate, he is prohibited from receiving the money associated with a real estate transaction in the name of anyone other than his broker or employer. In fact, Respondent was disciplined in 2010 for a similar violation.^{2/}

13. Respondent claims that the Palmeris entrusted him with their \$12,000.00 to hold for possible investments, not necessarily related to real estate transaction, and he was doing it as a favor for them as "friends."

14. Respondent contradicted himself by stating his intention in directing the Palmeris to deposit their money into the Bonaventure account was to help them have cash on hand in Florida in order to meet the Blue Lagoon condominium seller's requirements to make the escrow deposit with the seller's title company within 24 hours after an offer was accepted. The Palmeris had no knowledge of the seller's unique restrictions on the escrow money. Further, Respondent's asserted motive in requesting the \$12,000.00 to have cash on hand in Florida is undermined by the fact that, if the Palmeris could wire \$12,000.00 to Bonaventure's bank account, they could also wire the funds directly to a title company chosen by the selling bank after acceptance of their offer.

15. Shortly after returning the contract to Respondent and sending the escrow deposit, Mrs. Palmeri discussed increasing the purchase price by \$1,000.00 for a total of \$126,000.00. Based upon the language of the proposed contract, the Palmeris expected a response to their offer within 24 hours.

16. Immediately thereafter, Respondent told the Palmeris that they were "in negotiations." However, almost a month passed before they heard from Respondent regarding the status of the purchase of the condominium.

17. On or about November 4, 2011, Respondent contacted Mrs. Palmeri and stated that he had "good news." He indicated that the seller would be willing to sell the property for a price of \$129,500.00. According to Respondent, the seller requested documentation from the Palmeris' bank indicating their ability to pay. Mrs. Palmeri indicated that this was not an acceptable counter-offer. Respondent suggested that he could negotiate a sales price of \$129,000.00, but he needed the Palmeris to send an additional \$9,000.00 to put into escrow. Mrs. Palmeri told Respondent that she was no longer interested in the property because their maximum offer was \$126,000.00.

18. During the same conversation, Mrs. Palmeri asked for the return of her deposit. Respondent expressed agitation that she was retreating from the possible purchase because he had done

"so much work." Respondent clearly anticipated he would receive a commission if the deal was consummated.

19. The Palmeris did not get an immediate return of their escrow deposit. Mrs. Palmeri called Respondent repeatedly and received no answer. She also sent an e-mail to J.P. Morgan Chase trying to find out the status of the deposit and received no reply.

20. Mrs. Palmeri again attempted to contact Respondent on November 18, 2011, and left him a message that he needed to call her regarding the deposit. After receiving no response, she contacted Bahia and spoke with Ricardo Aleman. Mrs. Palmeri explained to Aleman that she had signed a real estate contract with Respondent on October 6, 2011. She no longer wanted to pursue this real estate transaction and wanted the escrow deposit returned. Aleman was unaware that Respondent was negotiating a real estate transaction for the Palmeris or had accepted their deposit money.

21. Aleman contacted Respondent who confirmed by email that the Palmeris were no longer interested in purchasing the condominium at Blue Lagoon. Respondent wrote, "After a month of hard work . . . the client decided to drop. It was a little bit problematic. I lost time and money because the offer was already accepted and she had no reason to negotiate." Respondent assured Aleman he would return the deposit to the Palmeris.

22. In accordance with Bahia's policies and procedures, its sales associates are required to complete a deposit form at the time of receipt of funds for escrow. No such receipt was received by Bahia from Respondent with regard to the transaction involving the Palmeris. However, it was not unusual for Bahia not to receive information regarding real estate transactions conducted by their sales associates until the time of closing.

23. After discussing the matter with Aleman, Respondent advised the Palmeris that he could return their money within ten days. Respondent advised Mrs. Palmeri that he would send her two checks for the total amount--one check which she could cash immediately and a second check which would be postdated. In order to get a return of their deposit, Mrs. Palmeri agreed.

24. On or about November 28, 2011, the Palmeris received two checks, each in the amount of \$6,000.00, including one postdated for December 16, 2011. These checks were written on the account of Bonaventure and signed by Respondent.

CONCLUSIONS OF LAW

A. Jurisdiction

25. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with sections 120.569 and 120.57(1), Florida Statutes (2013).

B. The Burden and Standard of Proof

26. The Department is seeking to take disciplinary action against Respondent's license. Because of the penal nature of the proceeding, the Department bears the burden of proof to demonstrate the allegations in the Complaint 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).

27. As stated by the Florida Supreme Court:

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).

28. Section 475.25(1)(e) subjects a licensee to discipline for violating any of the provisions of chapter 475 or any lawful order or rule made or issued under the provisions of chapters 455 or 475.

C. Count One: Alleged Violation of Section 475.25(1)(e) Due to Violation of Section 475.42(1)(b)

29. Count One of the Complaint charges Respondent with a violation of section 475.42(1)(b), which prohibits a licensed

sales associate from operating as a broker or operating as a sales associate for any person not registered as her or his employer.

30. To prove that Respondent acted as a broker in violation of section 475.42(1)(b), the Department must demonstrate that Respondent's actions are within the definition of "broker" in section 475.01. Section 475.01 defines a "broker" 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 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; . . .

31. Count One of the Complaint alleges that Respondent operated as a broker and was not under the direction, control, or management of his broker:

a. By facilitating the purchase of the subject property by [Santo] Palmeri without notifying Bahia Real Estate.

b. By collecting Escrow Deposit in Bonaventure's name.

c. By failing to deliver Escrow Deposit to Bahia Real Estate.

32. Respondent argues that he cannot be considered acting as a "broker" because he did not receive, and did not expect to receive, any compensation for assisting the Palmeris in acquiring the condominium unit at Blue Lagoon.

33. While it is true Respondent received no compensation because the transaction was not completed, Respondent's testimony, that he was assisting the Palmeris as "a friend" and that he had no expectation of being paid, is simply not credible. As explained by the Palmeris, had the transaction closed, Respondent would have received his commission from the seller.

34. Further, Respondent's representation, that he had no expectation of being compensated, is contrary to competent, substantial evidence. Respondent only met the Palmeris once for an hour in person, contacted them regarding the property in question, suggested a ten percent deposit on the property, identified himself as the buyer's licensed sales associate on the

sales contract, and, when confronted by his broker about the transaction, Respondent expressed frustration that the deal would not close because he lost "time and money" attempting to negotiate a deal over the course of a month.

35. Based on the foregoing, Respondent violated section 475.25(1)(e) by violating section 475.42(1)(b) when Respondent, acting as a licensed real estate sales associate, attempted to facilitate the purchase of real property by the Palmeris. Accordingly, Count One has been demonstrated by clear and convincing evidence.

D. Count Two: Alleged Violation of Section 475.42(1)(d)

36. Count Two of the Complaint charges Respondent with a violation of section 475.42(1)(d), which prohibits a licensed "sales associate" from collecting "any money in connection with any real estate transaction, whether as a commission, deposit, payment, rental or otherwise, except in the name of the employer and with the express consent of the employer."

37. Respondent asserts there can be no violation of section 475.42(1)(d) because the Palmeris' money was not collected by Respondent, but rather by Bonaventure, which is not a sales associate or licensee.

38. Respondent's semantic gyrations are inconsistent with competent, substantial evidence. Although Bonaventure is not a licensee, the Palmeris' money was certainly "collected" by

Respondent. At all times material hereto, Respondent was the manager of Bonaventure. Respondent had signature authority on the bank account of Bonaventure in which the Palmeris' money was deposited. Respondent is the individual who provided instruction on where the money for the deposit was to be wired. But for Respondent's wiring instruction, the Palmeris had no information regarding Bonaventure. When collecting the Palmeris' deposit, Respondent acted as an agent for the business enterprise (Bonaventure) of which he was a principal.

39. Clear and convincing evidence demonstrates that the Palmeris' funds for the purchase of the Blue Lagoon condominium were not collected in the name of Bahia or with the express consent of Bahia. But for Mrs. Palmeri's telephone call to Aleman to find out the status of her deposit, Aleman and Bahia would have been completely unaware of the transaction.

40. Based on the foregoing, Respondent violated section 475.25(1)(d), and Count Two has been demonstrated by clear and convincing evidence.

E. Count Three: Alleged Violation of Section 475.25(1)(e) Due to Violation of Florida Administrative Code Rule 61J2-14.008

41. Count Three alleges that Respondent violated Florida Administrative Code Rule 61J2-14.009, which provides, "every sales associate who receives any deposit, as defined in rule 61J2-14.008, Florida Administrative Code, shall deliver the

same to the broker or employer no later than the end of the next business day following receipt of the item to be deposited."

42. Rule 61J2-14.008 defines a deposit as, "a sum of money, or its equivalent, delivered to a real estate licensee, as earnest money, or payment, or part payment, in connection with any real estate transaction named or described in section 475.01(1) (a), F.S."

43. The \$12,000.00 forwarded to Bonaventure, as directed by Respondent, is clearly a "deposit" within the meaning of rule 61J2-14.008. As discussed above, the fact that the money was arguably "delivered" to the bank account of Bonaventure, rather than Respondent, does not negate the fact that Respondent was acting in his own interest rather than for his broker or employer. At no time was the deposit forwarded to Bahia, and at all times, the Palmeris' money was within the control of Respondent.

44. Although evidence was presented that Bahia did not have its own escrow account and that its sales associates usually place escrow money with the title company designated for a real estate transaction, Respondent's obligations pursuant to the rules governing his license are not negated.

45. Based on the foregoing, Respondent violated rule 61J2-14.009, and Count Three has been demonstrated by clear and convincing evidence.

F. The Appropriate Remedy

46. Rule 61J2-24.001 sets forth the penalty guidelines established by the FREC "from which disciplinary penalties will be imposed upon licensees guilty of violating Chapter 455 or 475, F.S."

47. The penalties for the violations proven by the Department in this case are as follows:

a. Pursuant to rule 61J2-24.001(3)(x), a second and subsequent violation of section 475.42(1)(b) carries a penalty of an administrative fine ranging from \$1,000.00 to \$5,000.00 and suspension to revocation.

b. Pursuant to rule 61J2-24.001(3)(z), a violation of section 475.42(1)(d) carries a penalty of an administrative fine ranging from \$250.00 to \$1,000.00 and suspension to revocation.

c. Pursuant to rule 61J2-24.001(3)(f), a second and subsequent violation of section 475.25(1)(e) carries a penalty of an administrative fine ranging from \$1,000.00 to \$5000.00 and suspension to revocation.

48. The penalties recommended herein fall within the ranges set forth in the penalty guidelines:

a. Count One: A penalty of \$2,500.00 for violation of section 475.42(1)(b).

b. Count Two: A penalty of \$1,000.00 for violation of section 475.42(1)(d).

c. Count Three: A penalty of \$2,500.00 for violation of section 475.25(1(e)).

d. Suspension of Respondent's license for a period of two years.

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 imposing on Alfonso Miranda an administrative fine in the amount of \$6,000.00 and suspending the real estate sales associate license of Alfonso Miranda for a period of two years.

DONE AND ENTERED this 2nd day of April, 2014, in Tallahassee, Leon County, Florida.



MARY LI CREASY
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 April, 2014.

ENDNOTES

^{1/} The Palmeris credibly testified that Mr. Palmeri incorrectly calculated the deposit due as \$12,000.00 rather than \$12,500.00.

^{2/} By Final Order of the Florida Real Estate Commission (FREC) dated October 22, 2010, Respondent was fined \$1,500.00, assessed administrative costs of \$471.90, placed on probation for six months, and required to attend a two-day FREC meeting for violating sections 475.42(1)(b), 475.25(1)(e), and 475.42(1)(a). These penalties were assessed because in 2006, Respondent negotiated sales and purchase contracts for real estate, accepted an "escrow deposit," and claimed commission entitlement when he was not the holder of a valid and current active real estate license.

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.