STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, REAL ESTATE COMMISSION,

Petitioner,

vs. Case No. 15-6775PL

BRENDA W. SMITH,

Respondent.
_____/

RECOMMENDED ORDER

An administrative hearing was conducted in this case on March 22, 2016, in Pensacola, Florida, before James H. Peterson, III, an Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Brande L. Miller, Esquire
Crystal D. Stephens, Esquire
Department of Business and Professional Regulation
2601 Blair Stone Road
Tallahassee, Florida 32399

For Respondent: Brenda W. Smith, pro se
Post Office Box 15453
Panama City, Florida 32406-8503

STATEMENT OF THE ISSUES

Whether Respondent, Brenda W. Smith, violated sections 475.25(1)(b) and 475.25(1)(d)1., Florida Statutes (2013),[1/] as

alleged in the Administrative Complaint and, if so, what is the appropriate penalty.

PRELIMINARY STATEMENT

On April 13, 2015, Petitioner, Department of Business and Professional Regulation (Petitioner or the Department), filed a two-count Administrative Complaint before the Florida Real Estate Commission against Respondent, Brenda W. Smith (Respondent), alleging certain violations of chapter 475, Florida Statutes, in connection with Respondent's rental management of real property located at 3803 Long John Drive, Panama City Beach, Florida 32408. Respondent timely filed an Election of Rights form disputing the allegations and requesting an administrative hearing.

On December 1, 2015, the Department referred the case to the Division of Administrative Hearings (DOAH) for assignment of an administrative law judge. The case was originally assigned to Administrative Law Judge Lisa Shearer Nelson and scheduled for an administrative hearing to be held by video teleconference on February 19, 2016. The case was subsequently transferred to the undersigned to conduct the hearing. By Order dated February 17, 2016, the hearing was continued and rescheduled for a hearing to be held live in Panama City on March 22, 2016.

At hearing, official recognition was taken of chapters 120 and 475, Florida Statutes, and Florida Administrative Code

Rule 61J2-24.001. The Department presented the testimony of Department investigator, Jack Case; the owner of the subject rental property, Dorothy Roberts[2/]; and one of the tenants of the subject property, Lori Pridgen. The Department offered 10 exhibits which were received into evidence as Petitioner's Exhibits P-1 through P-4, P-6, P-8, P-18, P-22, P-25, and P-26. Respondent testified on her own behalf and presented the testimony of her husband, Jesse Smith. Respondent also introduced 15 exhibits received into evidence as Exhibits R-1 through R-15.

The proceedings were recorded and a transcript was ordered. The parties were given 45 days from the filing of the transcript within which to file proposed recommended orders. A two-volume Transcript of the proceeding was filed April 29, 2016. The parties timely filed their respective Proposed Recommended Orders, which were considered in preparing this Recommended Order.

FINDINGS OF FACT

1. Petitioner is the state agency charged with the responsibility and duty to prosecute real estate licensees, pursuant to section 20.165 and chapters 120, 455, and 475, Florida Statutes.

2. Respondent is licensed by Petitioner as a real estate broker in the state of Florida, license BK 534400.

3. Respondent's address of record with Petitioner is Post Office Box 15453, Panama City, Florida 32406.

4. Respondent's brokerage, Spirits Realty, Inc., is a registered for-profit corporation in the state of Florida with its principal place of business listed as 3812 Dolphin Drive, Panama City Beach, Florida 32408, and a mailing address listed as Post Office Box 15453, Panama City, Florida 32406.

5. On May 31, 2012, Respondent, on behalf of her brokerage, Spirits Realty, Inc., entered into a property management agreement (Property Management Agreement) with Ronald W. Roberts to manage the rental of Mr. Roberts' property located at 3803 Long John Drive, Panama City Beach, Florida 32408.[3/] The term of the Property Management Agreement was for one year, beginning May 31, 2012, and provided:

> THIS PROPERTY MANAGEMENT AGREEMENT is made on the 31st day of May 2012 and is effective 31 May 2012 by and between Ronald W. Roberts whose address is 3555 Walden Land, Acworth, Ga 30102, hereinafter referred to as "Owner" and SPIRITS REALTY INC., BRENDA SMITH, LICENSED REAL ESTATE BROKER, Post Office Box 15453, Panama City, Florida 32406, hereinafter referred to as "Agent". WITNESSETH in consideration of the mutual promises and covenants herein contained, the Owner and Agent agree as follows:
>
> 1. The Owner represents to the Agent as follows: (a) The Owner is the sole owner and holder of marketable record title to the following described property: 3803 Long John Drive, Panama City Beach, Florida 32408. The Owner hereby appoints the Agent

> as the sole and exclusive Agent to Lease and manage the premises known as 3803 Long John Drive.
>
> 2. This Agreement is for 1 year beginning 31 May 2012. Agent to enter into an agreement for 1 year lease, $1000 per month rental, tenant to pay Jun/July rent in advance (non-refundable); & $1000 security deposit. The owner agrees to the following: Spirits Realty Inc. Commission of 10% of the rents collected in each calendar month (which shall be deducted from rents collected each month). Spirits Realty Inc., Hancock Bank, holds the security deposit (for liquidated damages) and advanced last months [sic] rent in Escrow. If Agent is not available, Jesse Smith, Admin, is authorized signer.
>
> 4. [sic] Owner authorizes the broker to secure tenant; and enter into a 1 year lease. Manage tenant relations collecting, give receipts, holding and disbursing rents to owner, serving notices, initiating eviction & damage actions. Agent will receive and forward $2500 check from tenant to Ron Roberts, for sale agreement of furniture and furnishings, on site.

6. The Property Management Agreement was signed by Ronald W. Roberts and notarized in Cherokee County, Georgia, on May 31, 2012.

7. Notably, the Property Management Agreement does not require advanced notice on the part of the Owner to terminate the Property Management Agreement.

8. On May 31, 2012, Respondent and/or Spirits Realty Inc., ostensibly acting on behalf of Mr. Roberts, entered into a four-page residential lease agreement drafted by Respondent (Lease)

with Allen Pridgen and Lori Roark (n/k/a Lori Pridgen), as tenants, for the rental of Mr. Roberts' property located at 3803 Long John Drive, Panama City Beach, Florida 32408 (the Premises). The term of the Lease was for one year, from June 1, 2012, through June 30, 2013.

9. Curiously, instead of naming Mr. Roberts as the lessor, the first sentence on the first page of the Lease names "Spirits Realty Inc., Brenda Smith, Lic. Real Estate Broker, Agent" as "Lessor." The bottom of the first page of the Lease states "Page 1 of 1." In addition, page four of the Lease submitted by Respondent as part of her Exhibit R-7 (which page was not included in the copy of the Lease submitted by Petitioner as part of Exhibit P-2) is signed by Respondent and Spirits Realty, Inc., on and below the signature line labeled "Lessor," respectively.

10. By comparing the signatures of the "Lessees" on the last page of the Lease (page four) with the signatures on the exhibit entitled "Security Deposit/Advance Last Months [sic] Rent Receipt" (Deposit Receipt), it is apparent that Allen and Lori Pridgen both signed page four of the Lease on May 31, 2012, as Lessees.

11. As documented by the Deposit Receipt, on May 31, 2012, Respondent collected from Allen and Lori Pridgen a $1,000 cash security deposit, plus $1,000 as the last month's rental payment

under the Lease. The Deposit Receipt, signed by both of the Pridgens, as well as Respondent, provides that the monies collected would be held in a "non-interest bearing account Spirits Realty, Inc. Escrow" with Hancock Bank in Panama City Beach, Florida.

12. Mr. Roberts signed a typed statement on May 31, 2012, printed on paper with a fax number, date, and time in the top margin, stating: "The four page Residential Lease on Long John Drive, Panama City Beach, Florida, is hereby agreed upon and approved by the property owner Ronald W. Roberts."

13. The next year, Respondent prepared a document entitled "Lease Renewal Agreement" (Lease Renewal) for renewal of the Lease for another seven months, from June 1, 2013, to January 1, 2014. The initial paragraph of the Lease Renewal listed the parties as:

> Lessor[4/]: Allen Pridgen & Lori [Pridgen]
>
> Agent: Spirits Realty Inc., Lic. Real Estate Broker

14. The Lease Renewal kept all terms of the Lease in effect and provided that the Security Deposit and last month's rent would continue to be held in Hancock Bank. The Lease Renewal also stated:

> That tenants shall pay a monthly rental of $1,000 for each month by the 1st of each month to Spirits Realty, Inc., for the Renewal Term. Tenants agree to give 60 days

written notice prior to vacating property, Or give notice of intent to renew lease for up to one year.

15. According to dates next to their signatures, the Lease Renewal was signed by Alan and Lori Pridgen on May 30, 2013; by Brenda Smith for "Spirits Realty Inc and Brenda Smith, Lic Real Estate Broker" on May 31, 2013; and by Dorothy and Ronald Roberts as "Property Owner" on June 4, 2013.

16. In late 2013, the Roberts decided to terminate the Property Management Agreement and manage the rental of the Premises themselves. The decision to terminate the agreement was made a short time after the tenants had a problem with a water leak and a faulty water heater. Because the tenants considered the problem to be an emergency, they dealt directly with the Roberts, who, as owners, authorized the tenants to pay for the required repairs directly and take the payment off the rent.

17. On December 1, 2013, Mr. Roberts spoke to Respondent on the telephone and advised her that the Roberts no longer wanted to use Respondent's brokerage, Sprits Realty, Inc., for property management services and that they were going to terminate the Property Management Agreement. Ms. Roberts was present with her husband during the telephone conversation and overheard the discussions. During the conversation, Respondent told Mr. Roberts that they needed to give her at least a 60-day

notice of termination, and Mr. Roberts advised Respondent that their termination of the Property Management Agreement would be effective February 1, 2014.

18. The next day, December 2, 2013, the Roberts sent a letter by certified mail to Respondent, at her address, and to Spirits Realty, Inc., at its address. The letter was signed by both Mr. and Ms. Roberts, witnessed and notarized, and stated:

> Dear Mrs. Smith,
>
> Per our conversation on December 1, 2013, please accept this letter as a 60 day formal notification that we wish to terminate the contract we currently have with Spirit Realty for Property Management Services. As of 2/1/2014, we will no longer require your services in handling the property management for 3803 Long John Drive, Panama City, Florida, 32408.
>
> Please forward the security deposit that you collected from the tenant, Alan Pridgen in 2012 and are currently holding in an escrow account. You can mail it to Ronald & Dorothy Roberts at 3555 Walden Lane, Acworth, Georgia 30102.
>
> We appreciate your time and services since Mr. Pridgen began occupying the property.

19. Although multiple attempts were made to deliver the letters, they were returned unaccepted.

20. The Roberts made additional attempts to contact Respondent by telephone, but were unable to do so.

21. By another letter sent by certified mail to Respondent dated January 16, 2014, Mr. and Ms. Roberts again requested in writing that Respondent forward to them the $2,000 identified in the Deposit Receipt. The letter reiterated the fact that in a telephone conversation on December 1, 2013, Respondent was advised that the Roberts were terminating the Property Management Agreement. The letter was returned unaccepted.

22. Although the Roberts letters to Respondent dated December 1, 2013, and January 16, 2014, were returned unaccepted, Respondent's own exhibit, a copy of a certified letter that Respondent allegedly sent to the tenants on December 11, 2013, acknowledges that Mr. Roberts called on December 1, 2013, regarding both the Lease and the Property Management Agreement. The first paragraph on the third page of Respondent's December 11, 2013, letter to the tenants states:

> 1 Dec 2013 Ron Roberts called SRI [Spirits Realty, Inc.] agent saying Alan [Pridgen] paid over $900 in improvement costs having to do with the air conditioner and hot water heater - & Alan would not be paying rent due 1 Jan 2014 – SRI would not receive a management fee – triggering liquidated damages clause. Breach of lease. Lease – Agreement/relationship of landlord & tenant (real property) or lessor and lessee – specifes [sic] 10% rent compensation.

23. Further, during her cross-examination of Ms. Roberts at the final hearing, Respondent acknowledged that she had spoken on the telephone with Mr. Roberts on December 2, 2013,

and that during the conversation the subject of breaking a contract with a real estate person was discussed. While it is found that the telephone conversation occurred on December 1, 2013, as opposed to December 2, 2013, it is evident that the conversation indeed occurred.

24. Based on the evidence, it is found that on December 1, 2013, the Roberts effectively communicated their desire to terminate the Property Management Agreement, effective February 1, 2014. Further, although the certified letters were refused, it is found that the Roberts timely asked Respondent for return of the $2,000 reflected in the Deposit Receipt.

25. In addition to the letters that the Roberts sent to Respondent, after speaking to the Roberts, Ms. Pridgen prepared a letter, at the Roberts' request, for her husband to send to Respondent, dated December 1, 2013, which stated:

> Brenda,
>
> This letter is to inform you that I no longer wish to continue my contract with you and the Roberts. I have been renting this property since June of 2012, the original contract was for one year. I agreed to rent the property for an additional 6 months which is now up. I no longer wish to continue this contract with Spirits Realty Inc.
>
> Thank you
> Allen D. Pridgen

26. The letter was sent to Respondent by certified mail on December 4, 2013, but Respondent never picked it up.

27. Shortly after her conversation with Mr. Roberts on December 1, 2013, Respondent called the police and tried to have the Pridgens evicted from the Premises. The Roberts explained over the phone to the police officer that they, not Respondent, were the owners of the Premises. The Pridgens were not evicted.

28. Ms. Pridgen's credible testimony explained that they did not intend to vacate the Premises, but rather planned to continue to rent it directly from the Roberts. As of the date of the final hearing, the Pridgens were still leasing the Premises from Ms. Roberts.

29. To date, Respondent has not returned to Ms. Roberts, as owner with responsibilities over the Lease, either the $1,000 Security Deposit or the $1,000 Advanced Rent she collected from the tenants. Instead, Respondent has retained the entire $2,000 and characterizes the funds as "liquidated damages" for the Roberts' wrongful termination of the Property Management Agreement.

30. The Property Management Agreement has no specific requirement for the manner in which it is to be terminated. Nevertheless, Respondent transferred the $2,000 reflected in the Deposit Receipt into Spirits Realty, Inc.'s, operating account at Hancock Bank.

31. Respondent argues that she is entitled to retain the $2,000 because Ms. Roberts did not make a timely claim upon the escrow deposit following receipt of Respondent's expressed intent to keep the escrow monies as "liquidated damages." Respondent bases her argument on the Roberts' alleged breach of the Property Management Agreement. As there was no breach and the Roberts' request for return of the escrow funds was timely made, Respondent's belief that she is entitled to liquidated damages has no merit.

32. Respondent also suggests that she is entitled to retain the $2,000 reflected in the Deposit Receipt because the tenants failed to give 60 days' notice of their intent to terminate the Lease. Respondent's suggestion is premised upon the fact that she and her brokerage are erroneously named as the "Lessor" in the Lease that Respondent drafted. Respondent's argument evinces that she either has a misunderstanding of her role as agent for the Roberts, or intended to take advantage of her position in a manner inconsistent with her obligations under the Property Management Agreement.

33. Although erroneously listed as the "Lessor" under the Lease, neither Respondent nor her brokerage was a proper party to the Lease. Rather, in accordance with the Property

Management Agreement, Respondent and her brokerage were only authorized as agents for Mr. Roberts in dealing with the Premises.

34. Under the circumstances, even if the tenants had breached the Lease (which they did not), Mr. Roberts and his successor in interest, Ms. Roberts, not Respondent and her brokerage, would be entitled to make a claim against the tenants as the owners and actual lessors under the Lease.

35. Incredibly, at the final hearing, Respondent submitted into evidence a copy of a document entitled "Lease Addendum" dated May 31, 2012, which was purportedly signed by the tenants, Alan Pridgen and Lori Pridgen. The purported "Lease Addendum" provides:

> Lease Addendum 31 May 2012
>
> FS 83.575, 83.595 breach, liquidated damages, and termination
>
> FS 83.595(4) Tenant statue [sic] contains two liquidated damages provisions allowing the landlord (Lessor) an opportunity to impose liquidated damages on the tenant for early termination or for failure to give notice of intent not to renew lease. Lessor, Spirits Realty Inc. will receive the $2,000 advance fees, "early termination fee", out of escrow, if a breach of the lease occurs.
>
> X I agree as provided in the lease agreement, $2,000 security (an amount that does not exceed 2 months rent) as liquidated damages or an early termination fee if I elect to terminate the lease agreement and

> Lessor waives the right to seek additional rent beyond the month in which landlord takes possession.
>
> FS 83.575 Lessee is required to give 60 days notice of intent not to renew the lease or Lessor, Spirits Realty Inc will receive the $2,000 advance fees security deposits as "liquidated damages". Spirits Realty Inc is entitled to 5% real estate fee at close.

36. In addition, Respondent submitted into evidence a second document entitled "Lease Addendum" purportedly signed by the now-deceased Mr. Roberts. That second "Lease Addendum" provides:

> Lease Addendum 31 May 2012
>
> I agree with the Lease Addendum. Spirits Realty Inc will receive the $2,000 security deposits advanced fees out of escrow if there is a breach in the lease. Spirits Realty Inc will receive 5% real estate fee when the property closes. Lessor is acting as a Transaction Broker to lease/sale property.

37. Ms. Roberts and Lori Pridgen credibly testified during the hearing that neither they nor Mr. Roberts, prior to his death, signed a separate Lease Addendum. Ms. Pridgen testified that she would not have signed any type of document which essentially gave up any and all rights to the escrow monies. Further, Ms. Roberts explained that her late husband, Mr. Roberts, who had an understanding of real estate matters, would not have signed such a document.

38. Moreover, the documents presented as lease addenda are suspect. The type font is remarkably different from other documents obtained on May 31, 2012, in connection with the Lease and Property Management Agreement. Further, the paper signed by Mr. Roberts on May 31, 2012, in which he agreed to the Lease, has a fax number, date, and time at the top, but the purported lease addendum does not. Finally, the signatures on the lease addenda appear to have been copied from other signatures and taped into place. While reviewing the purported lease addendum during her cross-examination by Respondent at the final hearing, Ms. Pridgen testified:

> Okay. First of all, this is not the -- this has never been seen in our paperwork. The whole time that we've been doing paperwork with you for all these years, this was never ever seen till Brande sent it up here in the paperwork she had.
>
> And besides that, the print is not the same as any of your paperwork. And also, you can tell by the signature that they have been copied and paste onto the amendment.
>
> If the – somebody will just look at them, you didn't clean up your work under your tape before you put it right there. So you - - you needed to clean your work up when you tape something like that because we've done it before. You have to clean up your work, or people can tell it when you look at it.

39. Other than evincing Respondent's nefarious intent to justify her retention of the $2,000, the purported lease addenda are given no evidentiary value.

40. The evidence does not justify Respondent's retention of the $2,000. The evidence adduced at the final hearing otherwise clearly and convincingly showed that Respondent wrongfully retained the $2,000 identified in the Deposit Receipt.

CONCLUSIONS OF LAW

41. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding. See §§ 120.569, 120.57(1), 120.60(5), and 455.225(5), Fla. Stat. (2016).

42. Petitioner, through its Division of Real Estate, is responsible for prosecuting disciplinary cases against licensed real estate brokers. See § 475.021(1), Fla. Stat.

43. The Florida Real Estate Commission (the Commission) is statutorily empowered to take disciplinary action against Florida-licensed real estate brokers based upon any of the grounds enumerated in chapter 475.

44. 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 for each count or separate offense; issuance of a reprimand; and placement of the licensee on probation. § 475.25(1), Fla. Stat. 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), Fla. Stat.

45. Petitioner, as the party asserting the affirmative in this proceeding, has the burden of proof. See, e.g., Balino v. Dep't of Health & Rehab. Servs., 348 So. 2d 349 (Fla. 1st DCA 1977). Because Petitioner is seeking to prove violations of a statute and impose administrative fines or other penalties, it has the burden to prove the allegations in the complaint by clear and convincing evidence. Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

46. Clear and convincing evidence:

> [r]equires that 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.

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

47. Disciplinary statutes, such as section 475.25(1) are penal in nature, and must be construed against the authorization of discipline and in favor of the individual sought to be penalized. Munch v. Dep't of Bus. & Prof'l Reg., 592 So. 2d 1136 (Fla. 1st DCA 1992). A statute imposing a penalty is never

to be construed in a manner that expands the statute. Hotel & Rest. Comm'n v. Sunny Seas No. One, 104 So. 2d 570, 571 (1958).

48. In determining whether Petitioner has met its burden of proof, the evidence presented should be evaluated in light of the specific factual allegations in the Administrative Complaint. Disciplinary actions against licensees may only be based upon those offenses specifically alleged in the charging document. See, e.g., Trevisani v. Dep't of Health, 908 So. 2d 1108 (Fla. 1st DCA 2005).

49. The charging instrument in the instant case, the Administrative Complaint, charges Respondent with two violations of real estate license law.

50. Count One of the Administrative Complaint charges Respondent with violating section 475.25(1)(b). That section subjects a real estate licensee to discipline if the licensee:

> 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; has violated a duty imposed upon her or him by law or by the terms of a listing contract, written, oral, express, or implied, in a real estate transaction; has aided, assisted, or conspired with any other person engaged in any such misconduct and in furtherance thereof; or has formed an intent, design, or scheme to engage in any such misconduct and committed an overt act in furtherance of such intent, design, or scheme. 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.

51. An intentional act must be proven before a violation of a statute prohibiting real estate brokers or salespersons from engaging in activities involving fraud, misrepresentation, concealment, false promises, false pretenses, dishonest dealing by trick, scheme or device, culpable negligence, or breach of trust in business transaction(s) may be found. Munch v. Dep't of Prof'l Reg., Div. of Real Estate, 592 So. 2d 1136 (Fla. 1st DCA 1992). Culpable negligence has been defined as a "reckless indifference to the rights of others which is equivalent to an intentional violation of them." Cannon v. State, 107 So. 360, 363 (Fla. 1926). See also Carraway v. Revell, 116 So. 2d 16 (Fla. 1959).

52. Petitioner proved, by clear and convincing evidence, that Respondent violated section 475.25(1)(b). Respondent had a legal duty to perform for the Roberts under the Property Management Agreement terms and, upon the Roberts' termination of that Agreement, Respondent deliberately chose not to fulfill her duty. On December 1, 2013, Mr. Roberts advised Respondent that the Property Management Agreement was being terminated effective

February 1, 2014, and that the Roberts would thereafter manage the Lease. Under the circumstances, Respondent should have transferred the escrowed funds to the Roberts upon the effective date that they began managing the Lease so that the Roberts could hold the funds for the benefit of the tenants. See § 83.49(7), Fla. Stat.[5/] Instead, Respondent wrongfully classified the tenants' money as "liquidated damages" and distributed the funds that were being held in escrow into her brokerage's operating account.

53. Further, Respondent submitted multiple unfounded justifications for her actions, none of which mitigate or justify her intentional taking of the escrow funds. In fact, the evidence indicates that Respondent created false documents, i.e. the lease addenda, with wrongful intent to validate her claim to the funds. Even without Respondent's manufacture of false documents, Respondent's actions breached her clients' (the Roberts) trust and, at the very least, constituted actions taken in a culpably negligent manner. Therefore, based upon clear and convincing evidence, it is concluded that Respondent breached her clients' trust and, at a minimum, acted in a culpably negligent manner in a business transaction in violation of section 475.25(1)(b).

54. Count Two of the Administrative Complaint charges Respondent with violating section 475.25(1)(d)1. Section

475.25(1)(d)1. subjects a real estate licensee to discipline if the licensee:

> 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.

55. The evidence adduced at the final hearing also clearly and convincingly demonstrated that Respondent violated section 475.25(1)(d)1. Respondent intentionally transferred the tenants' escrow monies into her brokerage's operating account as "liquidated damages" based upon her assertion that it was justified because the Roberts had breached the Property Management Agreement. Respondent's assertion was further confounded by her argument that she was entitled to retain the funds as "lessor" because the tenants failed to give 60 days' notice to her of their intention to terminate their lease with

her and her brokerage. The only basis for Respondent's argument that she or her brokerage was the "lessor" is because of an obvious error in the designation of the parties to the Lease drafted by Respondent.

56. The Roberts requested in writing on more than one occasion that Respondent forward the tenants' escrow monies to them following their termination of the Property Management Agreement. Respondent cannot reasonably argue that she had no notice of those requests because she refused to accept the certified letters from the Roberts.[6/]

57. Further, considering the fact that Respondent was on actual notice from her telephone conversation with Mr. Roberts on December 1, 2013, that the Property Management Agreement was going to be terminated effective February 1, 2014, her lack of review of the Roberts' letters does not relieve Respondent from her statutory obligation to forward the escrowed funds to the Roberts to hold for the benefit of the tenants. See endnote 5. Therefore, it is concluded that Respondent violated section 475.25(1)(d)1. by failing to account and deliver, as required by law, as well as upon demand, the escrowed funds to her clients, the Roberts, which she is not legally entitled to retain.

58. In conclusion, it is evident from the record that Respondent intentionally chose to keep the disputed escrow monies in the amount of $2,000 and did so wrongfully and

unlawfully. Respondent's attempted justification of her actions provided no excuse for her violation of real estate license law which she, as a licensed real estate broker, is expected to understand and implement. Disciplinary action against Respondent is warranted.

59. In this case, there is clear and convincing evidence establishing that Respondent committed the violations alleged in the charging instrument and that disciplinary action is warranted. In determining the appropriate disciplinary action, it is necessary to consult the disciplinary guidelines set forth in Florida Administrative Code Rule 61J-24.001, which impose restrictions and limitations on the exercise of Petitioner'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."); and Buffa v. Singletary, 652 So. 2d 885, 886 (Fla. 1st DCA 1995)("An agency must comply with its own rules.").

60. Rule 61J2-24.001(1)(c) provides for a disciplinary penalty consisting of a $1,000 to $2,500 administrative fine and 30-day suspension to revocation of the license for a first-time violation of section 475.25(1)(b).

61. Rule 61J2-24.001(1)(e) provides for a disciplinary penalty consisting of a $250 to $1,000 administrative fine and

suspension to revocation of the license for a first-time violation of section 475.25(1)(d)1.

62. Respondent offered no proof of mitigating circumstances and none are so found.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered by the Department of Business and Professional Regulation, Florida Real Estate Commission, finding that Respondent violated sections 475.25(1)(b) and 475.25(1)(d)1. as charged in the Administrative Complaint, imposing an administrative fine in the amount of $3,500, assessing reasonable costs pursuant to section 455.227(3)(a), and revoking Respondent's license to practice real estate.

DONE AND ENTERED this 29th day of July, 2016, in Tallahassee, Leon County, Florida.

JAMES H. PETERSON, III
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of July, 2016.

ENDNOTES

[1/] Unless otherwise noted, all references to the Florida Statutes or Florida Administrative Code are to the 2013 versions effective at the time of the alleged violations.

[2/] Ms. Roberts appeared telephonically.

[3/] On November 9, 2012, due to his declining health, Mr. Roberts executed a Quit Claim Deed granting his complete ownership of the property located at 3803 Long John Drive, Panama City Beach, Florida 32408, to his wife, Dorothy Roberts. Mr. Roberts passed away in 2015.

[4/] The Lease Renewal erroneously lists the tenants, Allen and Lori Pridgen, as "Lessor." The correct designation of a tenant under a lease is "lessee." See Blacks Law Dictionary 812 (5th ed. 1979)(defines lessee as "[o]ne who rents property from another. In the case of real estate, the lessee is also known as the tenant." Lessor is defined as "[o]ne who grants a lease. One who rents property to another. In case of real estate, the lessor is also known as the landlord.").

[5/] Section 83.49(7), Florida Statutes, provides, in pertinent part, that "upon a change in the designated rental agent, any and all security deposits or advance rents being held for the benefit of the tenants shall be transferred to the new owner or agent, together with any earned interest and with an accurate accounting showing the amounts to be credited to each tenant account."

[6/] Cf., Fields v. Turlington, 481 So. 2d 960, 962 (Fla. 4th DCA 1986)("A party cannot prevail in an argument attacking the sufficiency of service by certified mailing (in those cases in which certified mailing is appropriate) when the party has taken affirmative action to avoid the acceptance of the certified mailing.").

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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.