

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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

Petitioner,

vs.

Case No. 20-3889PL

ARMANDO ADAMES RIVAS,

Respondent.

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FINAL ORDER

On November 19 and 23, 2020, an administrative hearing involving disputed issues of material fact was held in this case via Zoom video teleconference in Tallahassee, Florida, before the Honorable Robert S. Cohen, Administrative Law Judge ("ALJ"), with the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner: Nadia M. Hamade, Esquire
 Amanda Sampaio Bova, Esquire
 Department of Business and
 Professional Regulation
 400 West Robinson Street
 Orlando, Florida 32801

For Respondent: Dwight O. Slater, Esquire
 Cohn Slater, P.A.
 3689 Coolidge Court, Unit 3
 Tallahassee, Florida 32311

STATEMENT OF THE ISSUES

a. Whether Respondent violated section 475.25(1)(b), Florida Statutes, by committing fraud, misrepresentation, concealment, etc., or by violating a duty imposed upon him by law or by the terms of a listing contract and, if so, what is the appropriate penalty;

b. Whether Respondent violated section 475.25(1)(d)1., by failing to timely account or deliver to any person any personal property such as money, funds, deposit, check draft, etc. and, if so, what is the appropriate penalty; and

c. Whether Respondent, a sales associate, registered as an officer, director of a brokerage corporation, or general partner of a brokerage partnership is in violation of Florida Administrative Code Rule 61J2-5.016 and, if so, what is the appropriate penalty.

PRELIMINARY STATEMENT

On June 10, 2020, the Department of Business and Professional Regulation, Division of Real Estate ("Department" or "Petitioner"), filed an Administrative Complaint ("A.C.") against Armando Adames Rivas ("Mr. Rivas" or "Respondent"), alleging three violations of chapter 475 in connection with two contracts, each for the sale and purchase of two distinct real properties, and in connection with the registration and operation of Global Real Estate Holdings of South Florida, LLC ("GREH"), license number CQ 1053189. On August 28, 2020, this case was referred to DOAH for assignment of an ALJ.

This case was noticed for hearing on October 26, 2020, and, after a continuance, was heard on November 19 and 23, 2020, via Zoom conference. On October 20, 2020, upon Petitioner's Motion for Summary Proceedings and after a telephone conference with counsel for both parties, who agreed with

the motion, held by previously assigned ALJ Cathy Sellers, the judge previously assigned, this matter was directed to be heard as a summary proceeding, pursuant to section 120.574, Florida Statutes. The parties stipulated to several facts, which are accepted and included among the findings of fact below. Respondent disputed the allegations contained in the A.C. and elected to proceed with an administrative hearing involving disputed issues of material fact.

Petitioner offered 29 exhibits, Petitioner's Exhibits A through CC, all of which were admitted, with the exception of Exhibit R. Petitioner called 13 witnesses: Mr. Rivas; Souksavanah Mossucco ("Mrs. Mossucco"), a listing sales associate and seller on the second of the two subject contracts; Frank Mossucco ("Mr. Mossucco"), a seller on the second of the two subject contracts; Carlos Rubio, an investigative supervisor with the Department; Michele Weintraub ("Ms. Weintraub"), a title agent handling the second of the two subject contracts; Frederick Breault, a seller on the first of the two subject contracts; Evelyn Breault, a seller on the first of the two subject contracts; Annelyn Sylvain, a buyer under both subject contracts; Carlos Avila ("Mr. Avila"), the licensed, qualifying, real estate broker for GREH, at the time of both subject contracts; Arnauld Sylvain, a buyer under both subject contracts; Michelle Klymko, Esquire, the title attorney handling the first of the two subject contracts; Rodney Henson ("Henson"), the licensed, qualifying, real estate broker for GREH, at the time the A.C. was filed; and Dawn Luchik, an investigator with the Department. Respondent offered 20 exhibits, Respondent's Exhibits 1 through 20, of which Exhibits 1 through 6, 8, 10 through 14, 19A, 19B, and 20 were admitted into evidence. Respondent testified on his own behalf and offered the testimony of Enrique Nieves, III, Esquire.

A transcript of the proceeding was filed with DOAH on December 8, 2020. The parties agreed that proposed final orders would be submitted on or before December 28, 2020. On that date, counsel for Respondent requested an extension of time for the filing of his proposed final order due to illness. The undersigned granted the motion, over objection by counsel for Petitioner and, since Petitioner had already filed its Proposed Final Order, allowed Petitioner ten days after Respondent submitted his proposed order to file a reply in order to avoid any unfair advantage since Petitioner's Proposed Final Order would be available for public viewing on the DOAH website. Respondent filed his Proposed Final Order on January 15, 2021, followed by Petitioner's Reply on January 25, 2021. The timely-filed post-hearing submittals have been duly considered by the undersigned in writing this Final Order.

Any references to the Florida Statutes are to the version in effect at the time any of the alleged violations subject to these proceedings occurred, unless otherwise specified.

FINDINGS OF FACT

1. The Department is the state agency charged with regulating the practice of real estate pursuant to section 20.165 and chapters 120, 455, and 475, Florida Statutes.
2. DOAH has jurisdiction, pursuant to section 120.574, to render a decision in this matter, which shall be final agency action subject to judicial review under section 120.68.
3. Mr. Rivas is a licensed real estate sales associate, holding license number 3385508, issued by the State of Florida.

Structure of the Brokerage Corporation

4. On or about April 7, 2015, Respondent registered GREH with the State of Florida, Division of Corporations ("Division of Corporations"), identifying himself as the registered agent and manager of GREH.

5. Respondent filed documents on behalf of GREH with the Division of Corporations on the following dates and identified himself with the following titles with GREH:

a. On April 13, 2016, March 14, 2017, and April 17, 2018, Respondent identified himself as the registered agent, managing member, and president;

b. On November 22, 2017, and April 17, 2018, Respondent identified himself as an authorized member;

c. On April 22, 2019, Respondent identified himself as a registered agent, an authorized member, and managing member;

d. On October 23, 2019, Respondent identified himself as registered agent and member;

e. On November 27, 2019, Respondent identified himself as a registered agent, member, and manager;

f. On December 6, 2019, Respondent identified himself as registered agent and shareholder; and

g. On December 10, 2019, Respondent identified himself as registered agent.

6. On March 23, 2017, GREH registered with the Florida Real Estate Commission ("Commission") as a real estate corporation in the State of Florida, having been issued license number CQ 1053189.

7. At no time was Respondent registered with the Commission as a real estate broker in the State of Florida.

8. From November 27, 2017, to October 3, 2019, Mr. Avila, who at that time was a real estate broker in the State of Florida, having been issued license number BK 3401612, was the qualifying broker of GREH.

9. From October 3, 2019, to October 15, 2019, and from November 25, 2019, to December 9, 2019, GREH's license was invalidated due to it not having a qualifying broker.

10. From October 15, 2019, to November 25, 2019, Gamila Murata was the qualifying broker for GREH.

11. From December 9, 2019, to July 29, 2020, Mr. Henson was the qualifying broker for GREH.

12. On August 22, 2019, without the authority of the qualifying broker for GREH, Respondent filed a civil action on behalf of GREH against Arnauld and Annelyn Sylvain (collectively, the "Sylvains") in the Circuit Court of the 15th Judicial Circuit in and for Palm Beach County, Florida, in case number 502019CA008774XXXXMB, seeking, among other things, to recover real estate commissions allegedly claimed due by GREH and Respondent.

13. Respondent subsequently retained attorney Monica Woodard to represent GREH in the civil proceedings, and GREH's complaint was dismissed.

14. On or about November 19, 2019, the Sylvains filed a separate civil action against GREH in the Circuit Court of the 15th Judicial Circuit in and for Palm Beach County, Florida, in case number 502019CC015230XXXXMB, seeking to recover a \$10,000.00 escrow deposit.

15. Respondent failed to inform the qualifying broker of record for GREH, Mr. Henson, who assumed that position shortly after the filing of the civil action, of the pending lawsuit.

16. Respondent opened bank accounts on behalf of GREH, including an account called an "Escrow Account," which was controlled by Respondent and at no time was controlled by a qualifying broker for GREH.

17. Respondent deposited escrow funds into the Escrow Account for GREH, without the authority of the qualifying broker for GREH.

18. Respondent closed the Escrow Account held in the name of GREH and removed funds that were to be held in trust from the account without authority of the qualifying broker for GREH.

19. Respondent controlled all communications regarding certain real estate transactions on behalf of GREH, without the knowledge or authority of the qualifying broker for GREH.

Contract 1

20. On or about March 4, 2019, an "AS IS" Residential Contract for Sale and Purchase ("Contract 1") was entered into between the Sylvains, as buyers, and Frederick F. Breault and Evelyn Breault (the "Breaults"), as sellers, for property located at 16595 93rd Road North, Loxahatchee, Florida 33470 ("Subject Property 1").

21. Respondent facilitated Contract 1 on behalf of the Sylvains.

22. Pursuant to the requirements of Contract 1, the Sylvains deposited \$10,000.00 with GREH, to be held in escrow as the initial deposit.

23. The escrow funds were delivered to Respondent in the form of a certified check drawn from SunTrust Bank in the amount of \$10,000.00 and purchased by Mr. Sylvain on March 4, 2019 ("SunTrust Certified Check").

24. The \$10,000.00 escrow funds were deposited into a bank account held in the name of GREH.

25. The SunTrust Certified Check was deposited into a bank account over which Respondent had sole control.

26. The GREH account in which the SunTrust Certified Check was deposited was at no relevant time controlled by a Florida licensed real estate broker.

27. Contract 1 provided that the Sylvains had 20 days from the effective date to obtain loan approval ("Loan Approval Period").

28. Paragraph 18(F) of the Contract provided as follows:

TIME: Calendar days shall be used in computing time periods. Time is of the essence in this

Contract. Other than time for acceptance and Effective Date as set forth in Paragraph 3, any time periods provided for or dates specified in this Contract, whether preprinted, handwritten, typewritten or inserted herein, which shall end or occur on a Saturday, Sunday, or a national legal holiday (see 5 U.S.C. 6103) shall extend to 5.:]00 p.m. (where the Property is located) of the next business day.

29. Because 20 days from the effective date fell on a Sunday, the Loan Approval Period expired on Monday, March 25, 2019.

30. Paragraph 8(b)(i) of Contract 1 provided that: "Buyer [the Sylvains] shall ... use good faith and diligent effort to obtain approval of a loan meeting the Financing terms ('Loan Approval') and thereafter to close this Contract."

31. Paragraph 8(b)(v) of the Contract further provided that if neither party timely cancelled the Contract pursuant to paragraph 8, the financing contingency would "be deemed waived."

32. Paragraph 8(b)(vii) finally provided that "[i]f Loan Approval has been obtained, or deemed to have been obtained, as provided above, and Buyer fails to close this Contract, then the Deposit shall be paid to Seller"

33. The parties agreed to close Contract 1 by April 10, 2019.

34. The Sylvains did not obtain final loan approval ("clear to close") within the Loan Approval Period.

35. The loan was not denied for any of the exceptions set forth in paragraph 8(b)(vii), to release of the escrow deposit to the seller.

36. The Sylvains did not terminate the contract within the Loan Approval Period.

37. After the Loan Approval Period expired, the Sylvains sought to extend Contract 1, without consideration for the extension.

38. The Breaults countered the Sylvains' request to extend with an offer that an extension would be granted for consideration that the Sylvains agree to forfeit the earnest money deposit.

39. The parties never reached an agreement to extend Contract 1 and Contract 1 failed to close.

40. On or about May 2, 2019, the Sylvains's loan application for Contract 1 was denied.

41. On May 8, 2019, the Breaults executed a Release and Cancellation of Contract demanding release of the \$10,000.00 escrow deposit on Contract 1, which Respondent received by email on that date from Betty Khan, the sales associate representing the Breaults.

42. The Sylvains also executed a Release and Cancellation of Contract seeking return of the \$10,000.00 escrow deposit on Contract 1, which Respondent communicated to Ms. Khan on May 8, 2019.

43. Also, on May 8, 2019, Respondent informed the Sylvains of the Breaults's claim on the earnest money deposit.

44. Despite knowing that there were conflicting demands for the escrowed funds, Respondent failed to inform Mr. Avila, the qualifying broker for GREH at the time, or the Department, of the escrow dispute.

45. The Breaults were never informed of any escrow dispute filed with the Department, were never sued in relation to the escrow deposit, and never went to mediation or arbitration with regard to the escrow deposit, despite making a demand for the escrow deposit.

46. Respondent claimed that he applied the \$10,000.00 escrow funds to another contract under which the Sylvains were buyers.

47. Respondent closed the GREH Escrow Account, removing the \$10,000.00 from the account, without consent of either the Sylvains or the Breaults.

Contract 2

48. On or about May 2, 2019, an "AS IS" Residential Contract for Sale and Purchase (Contract 2) between the Sylvains, as buyers, and the Mossuccos, as sellers, for property located at 7584 Apache Boulevard, Loxahatchee, Florida 33470 ("Subject Property 2").

49. Respondent facilitated Contract 2 on behalf of the Sylvains.

50. In relation to Contract 2, specifically paragraph 2(a), which required an earnest money deposit in the amount of \$10,000.00, Respondent requested that the Sylvains provide him a check in the amount of \$10,000.00 to show the Mossuccos.

51. On or about May 6, 2019, the Sylvains then drew a check from a business account held with TD Bank in the amount of \$10,000.00 and payable to Global Business Financial Investment ("TD Bank Check"), which the Sylvains delivered to Respondent.

52. Respondent took a photograph of the check and promised the Sylvains that the check would not be cashed or deposited.

53. On or about May 6, 2019, Miledy Garcia, now known as Miledy Rivas, Respondent's spouse, a Florida licensed real estate sales associate, having been issued license number SL 3383271, issued an escrow deposit receipt for \$10,000.00 for Contract 2 on a GREH form ("May 6, 2019, GREH Receipt").

54. The TD Bank Check was never deposited or cashed by Respondent; rather, the Sylvains immediately issued a stop payment order on the check to TD Bank.

55. Despite having never deposited the TD Bank Check, Respondent communicated the May 6, 2019, GREH Receipt and a photo of the TD Bank Check to Mrs. Mossucco and Ms. Weintraub.

56. The \$10,000.00 escrow funds from Contract 1 were the escrow funds represented on Contract 2.

57. Respondent represented that the \$10,000.00 escrow funds were applied to Contract 2, prior to cancellation of Contract 1, and continued to represent the same, even after Respondent knew the Breaults were making a claim against the funds.

58. Contract 2 failed to close.

59. After Contract 2 failed to close, the Mossuccos and Sylvains agreed to cancel Contract 2 and release each other from liability under the terms of

Contract 2, and further agreed that any earnest money deposit could be returned to the Sylvains.

60. Respondent failed to deliver the escrow funds to the Sylvains.

61. Rather, Respondent believed that the funds belonged to him (or one of his companies) and that he was entitled to remove the escrow funds and use them as he (or his company) saw fit.

62. Respondent testified that he submitted a notice of escrow dispute, dated "9-30-2019," to the Department, identifying the parties to the transaction as the Mossuccos and the Sylvains, and the subject property as 7584 Apache Boulevard, Loxahatchee, Florida 33470.

63. Respondent gave conflicting testimony, including, for example:

a. First testifying that he believed the \$10,000.00 escrow funds belonged to him (or his company) to be spent as he saw fit; then, after a break in the proceedings and on re-direct by his counsel, changing his story by saying that counsel for Petitioner put words in his mouth and that he meant only that there was a "dispute on the funds."

b. First testifying that Mr. Avila was a signatory on the GREH "Escrow Account," then admitting that Mr. Avila was not a signatory on the account.

64. There was also conflicting testimony between Respondent and several of the witnesses; however, where there were inconsistencies, Petitioner's witnesses' testimony was substantially consistent and supported by the documentary evidence presented. Parts of Respondent's testimony were inconsistent with documentary evidence admitted into evidence by stipulation of the parties.

Facts Concerning Aggravation or Mitigation of Penalties

65. Respondent collected escrow funds and deposited them into an account that he, only a licensed real estate sales associate, controlled, rather than one that was controlled by the qualifying broker for GREH.

66. Respondent admittedly removed escrow funds in the amount of \$10,000.00 from the bank account in which they were deposited, without all parties having a claim to the escrow funds executing a release.

67. Respondent testified that he believed the escrow funds belonged to him (or one of his companies) and that he had a right to do with the funds as he (or he through one of his companies) saw fit.

68. Respondent used vulgar language, threats, and demeaning language toward his clients, other real estate professionals, and title agents to attempt to coerce those individuals into submitting to his demands.

69. Respondent failed and refused to comply with the direction of the qualifying broker with supervisory responsibility over Respondent and GREH.

70. Respondent failed to keep the qualifying broker of GREH apprised of the real estate transactions in which Respondent was involved.

71. There was significant testimony establishing that Respondent was performing tasks that are only allowed to be performed by a licensed real estate broker, not a real estate sales associate, mortgage broker, or mortgage loan originator.

Additional Facts Raised by Respondent

72. In his proposed conclusions of law, Respondent raises, as a matter of fact, that the "Department failed to plead sufficient facts underpinning its argument" regarding the handling of escrow funds. In paragraph 25 of his Proposed Final Order, Respondent states:

Nowhere in the administrative complaint does the Department allege that Mr. Rivas falsely represented that GREH received the TD Bank Check as earnest money for Contract 2, or that he falsely represented to the Sylvains that the Breaults did not have a legitimate claim against the \$10,000.00 escrow funds deposited by the Sylvains toward Contract 1, or that he misrepresented to the Sylvains that the \$10,000.00

funds from the SunTrust Certified Check could be and were applied to Contract 2.

73. Respondent further argued that none of the "facts relevant to aggravation or mitigation" set forth in the Department's Proposed Final Order were pled in the A.C., in violation of Respondent's due process rights. Both of these arguments are rejected as set forth in paragraphs 108 and 109 below.

Additional Facts Concerning Department Costs

74. The Department presented competent evidence that it incurred investigative costs in the amount of \$1,551.00.

CONCLUSIONS OF LAW

75. DOAH has jurisdiction over the subject matter and the parties to this proceeding pursuant to section 120.574.

76. Chapters 455 and 475 apply to real estate licensees.

77. Commission rules applicable to real estate licensees are set forth in Florida Administrative Code Chapters 61J2-1 through 61J2-24.

78. Section 475.25(1) authorizes the Commission to impose penalties if the Commission finds that Respondent has violated any of the provisions of chapter 475, or any lawful order or rule made or issued under the provisions of chapters 455 or 475.

79. Petitioner seeks to take disciplinary action against Respondent's real estate sales associate license. A proceeding to impose discipline against a professional license is penal in nature, and Petitioner bears the burden to prove the allegations in the A.C. 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); *McKinney v. Castor*, 667 So. 2d 387, 388 (Fla. 1st DCA 1995).

80. "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 in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

S. Fla. Water Mgmt. Dist. v. RLI Live Oak, LLC, 139 So. 3d 869, 872-73 (Fla. 2014)(citing *In Re Davey*, 645 So. 2d 398, 404 (Fla. 1994) (quoting *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

81. Disciplinary statutes and rules "must always be construed strictly in favor of the one against whom the penalty would be imposed and are never to be extended by construction." *Griffis v. Fish & Wildlife Conserv. Comm'n*, 57 So. 3d 929, 931 (Fla. 1st DCA 2011). Any ambiguities must be construed in favor of the licensee. *Lester v. Dep't of Prof'l Reg.*, 348 So. 2d 923, 925 (Fla. 1st DCA 1977).

82. The undersigned ALJ, as the finder of fact, has discretion to make "[d]eterminations regarding the weight of evidence or the credibility of witnesses," which, generally, "will not be disturbed on appeal," when supported by competent evidence. *M.A.B. v. Dep't of HRS*, 630 So. 2d 1252, 1254 (Fla. 1st DCA 1994), citing *Clegg v. Chipola Aviation, Inc.*, 458 So. 2d 1186 (Fla. 1st DCA 1984); see also *Petion v. State*, 48 So. 3d 726, 730 (Fla. 2010), holding, "In a non-jury trial, the factual findings of the judge are entitled to the weight of a jury verdict."; *Oertel v. State*, 82 So. 3d 152, 156-57 (Fla. 4th DCA 2012), holding, "'When a decision in a non-jury trial is based on findings of fact from disputed evidence, it is reviewed on appeal for competent, substantial evidence' because 'the trial judge is in the best position to evaluate and weigh the testimony and evidence based upon its observation of the bearing, demeanor and credibility of the witnesses.'"

(quoting *Acoustic Innovations, Inc. v. Schafer*, 976 So. 2d 1139, 1143 (Fla. 4th DCA 2008)); and *Harrington v. State*, 238 So. 3d 294, 297 (Fla. 4th DCA 2018).

83. When Mr. Rivas gave conflicting testimony about entitlement to the escrow funds, his initial testimony that he believed the escrow funds belonged to him, or his company, to be spent as he, or his company, saw fit, is found to be more credible than his subsequent testimony that he meant he believed there was a dispute.

84. Contract 1 expressly noted that: "[t]ime is of the essence," which means that performance by one party within the time specified is an essential element of the real estate contract. *See Garcia v. Alfonso*, 490 So. 2d 130 (Fla. 3d DCA 1986). With regard to Contract 1, the Sylvains failed to notify the Breaults of their intent to cancel within the 20-day Loan Approval period, resulting in a waiver of the financing contingency. *See Bellon v. Acosta*, 10 So. 3d 1165 (Fla. 3d DCA 2009).

85. Since the loan approval contingency was waived by the Sylvains's failure to give timely notice of cancellation, the Sylvains were contractually obligated to tender the full purchase price. Where a contract includes a "time is of the essence" provision and the buyer fails to timely tender required payment on the agreed upon closing date, that failure is a material breach. *See Nacoochee Corp. v. Pickett*, 948 So. 2d 26 (Fla. 1st DCA 2006). The Breaults had a valid claim for the \$10,000.00 escrow deposit.

Count One

86. The A.C. alleges that Respondent violated section 475.25(1)(b) by misrepresenting the status of escrow funds purportedly held by GREH, a company owned by Respondent. Section 475.25(1)(b) subjects a real estate licensee to discipline for committing:

[F]raud, 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

87. Petitioner proved that Respondent violated section 475.25(1)(b). The facts clearly establish that Respondent transmitted, by email to Mrs. Mossucco and Ms. Weintraub, the May 6, 2019, GREH Receipt and TD Bank Check, falsely representing that GREH received the TD Bank Check as earnest money for Contract 2. Additionally, the facts clearly establish that Respondent falsely represented to the Sylvains that the Breaults did not have a legitimate claim against the \$10,000.00 escrow funds deposited by the Sylvains toward Contract 1. Next, the facts clearly establish that Respondent misrepresented to the Sylvains that the \$10,000.00 funds from the SunTrust Certified Check could be and were applied to Contract 2. Finally, the facts clearly establish that Respondent violated a duty imposed by law by failing to report the escrow dispute between the Sylvains and the Breaults to the qualifying broker for GREH, Mr. Avila, and/or to the Department and/or to the Commission.

Count Two

88. The A.C. further alleges that Respondent violated section 475.25(1)(d)1., by failing to account and deliver escrowed funds and/or by failing to notify the Commission of conflicting demands on escrowed funds, pursuant to that section. Section 475.25(1)(d)1. subjects a real estate licensee to discipline where 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 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:

a. Request that the commission issue an escrow disbursement order determining who is entitled to the escrowed property;

b. With the consent of all parties, submit the matter to arbitration;

c. By interpleader or otherwise, seek adjudication of the matter by a court; or

d. With the written consent of all parties, submit the matter to mediation

89. Rule 61J2-10.032 requires written notification to the commission 15 days of receipt of the conflicting demands.

90. Petitioner proved that Respondent violated section 475.25(1)(d)1. The facts clearly and convincingly establish that Respondent received conflicting demands from the Breaults and the Sylvains for the \$10,000.00 escrow deposit made on Contract 1. Additionally, the facts clearly and convincingly establish that Respondent failed to notify the Department or the Commission of the conflicting demands between the Breaults and the Sylvains over the escrow deposit made in relation to Contract 1. Further, regarding Contract 1 and, specifically, regarding the escrow dispute between the Breaults and the Sylvains, the facts clearly and convincingly establish that Respondent failed to request that the Commission issue an escrow disbursement order, submit the matter to arbitration, seek adjudication of the matter by a court through interpleader or otherwise, or submit the matter to mediation.

91. Regarding Contract 2 and the escrow dispute between Respondent's companies (GREH and Global Business Financial Investment, Inc.), the Mossuccos, and the Sylvains, Respondent claims to have specifically notified the Department of an escrow dispute. However, the evidence presented at hearing clearly and convincingly establishes that Respondent failed to promptly do so in compliance with rule 61J2-10.032, as Respondent's companies' lawsuit was filed on August 12, 2019, and the purported notice was dated September 30, 2019, well past the 15-business day requirement in the rule.

92. Finally, the facts clearly and convincingly establish that Respondent removed the \$10,000.00 from the account where the escrow funds were to be held in trust, under the auspices that he could do with the funds as he pleased, failing to account for and/or deliver the funds to the Sylvains.

Count Three

93. The A.C. finally alleges that, because Respondent, a Florida licensed real estate sales associate, was registered as an officer and/or director of GREH, he violated section 475.25(1)(e) through a violation of rule 61J2-5.016.

94. Section 475.25(1)(e) subjects a licensee to discipline if the licensee "[h]as 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." Rule 61J2-5.016 provides that "[n]o sales associate or broker associate may be registered as an officer, director of a brokerage corporation or general partner of a brokerage partnership."

95. Respondent violated section 475.25(1)(e) through a violation of rule 61J2-5.016. Petitioner clearly and convincingly demonstrated that Respondent, a licensed real estate sales associate, not a licensed real estate broker, registered himself as an officer and/or director of GREH.

Other Issues Raised by Respondent

96. Respondent presented testimony at the hearing that he believed the Sylvains and the Mossuccos were acting in bad faith with regard to

conversations relating to Contract 2. In doing so, Respondent erroneously relied upon rule 61J2-14.011 for his contention that the alleged bad faith of the Sylvains and the Mossuccos relieved Respondent of his obligation to comply with section 475.25(1)(d)1.

97. Rule 61J2-14.011 applies to "[a] broker who receives a deposit" and requires that, even "where the parties act in bad faith with intent to deprive the broker of a commission, ... the broker shall proceed as provided in section 475.25(1)(d)1., Florida Statutes." Respondent is admittedly, and by competent evidence proven that he is not a licensed real estate broker, but rather is a licensed real estate sales associate, and, therefore, lacks standing to invoke rule 61J2-14.011.

98. Even if Respondent were a broker, he could claim that he was due any portion of the \$10,000.00 earnest money deposit, or could in any other way rely upon rule 61J2-14.011, he still could not avoid the obligation to comply with section 475.25(1)(d)1., because there was an escrow dispute between the Breaults and the Sylvains over the funds deposited pursuant to Contract 1 that preceded any disputes regarding Contract 2, and further because rule 61J2-14.011 expressly requires compliance with section 475.25(1)(d)1.

99. Respondent further testified that an alleged prior case against him concerning alleged violations and facts relating to Count Three was dismissed without prosecution by the Department. However, this claim was not shown to be relevant, as there is no evidence that any prior case, if it existed, was dismissed with prejudice. Further, Petitioner presented substantial evidence that Respondent was not only registered as an officer and/or director of GREH, but also, acted in that capacity and held himself out to the public in that capacity.

100. Finally, Respondent's allegations that the Department failed to plead sufficient facts to support its claims that Respondent violated the numerous statutory and rule provisions set forth above is without merit. The Administrative Procedure Act requires that an administrative complaint

"afford reasonable notice to the licensee of facts or conduct which warrant the intended action." § 120.60(5), Fla. Stat. Allegations in an administrative complaint:

need not be stated with the technical nicety or formal exactness required of pleadings in the court, [but] the charges should be specific, informing the accused with reasonable certainty of the nature and cause of the accusation against him so as to be given reasonable opportunity to defend against those charges.

Robins v. Fla. Real Estate Comm'n, 162 So. 2d 535, 537 (Fla. 3d DCA 1964).

101. In the A.C., the Department specifically alleges that Respondent facilitated Contract 1 (paragraph 9); collected the initial \$10,000.00 escrow deposit (paragraph 10); controlled the account where the funds were held (paragraph 11); that the loan for Contract 1 was ultimately denied on May 2, 2019 (paragraph 12); that the Sylvains sought to terminate Contract 1 (paragraph 15); that Respondent notified the Sylvains on May 8, 2019; that the Breaults (sellers under Contract 1) made a claim against the deposit (paragraph 16); that Respondent failed to inform his broker or the Department of the escrow dispute (paragraph 17); that Respondent failed to account and deliver (paragraph 22); and that Respondent violated subsection (1)(b) and (1)(d)1. of section 475.25 (Counts One and Two). These facts were sufficiently specific to put Respondent on notice of the charges against him relating to Contract 1.

102. The Department further alleged in the A.C. that on May 6, 2019, Respondent received an additional \$10,000.00 (paragraph 14). After it became apparent through discovery that the second check was never deposited, and that Respondent (inappropriately) applied the funds from Contract 1 to Contract 2, Petitioner's counsel discussed this issue with Respondent's counsel, who ultimately stipulated to that version of the facts,

to avoid the necessity of amending the complaint, and which was ultimately reflected in the Joint Pre-hearing Stipulation.

103. The facts specifically mentioned in the foregoing two paragraphs, as well as an examination of the A.C. in its totality, confirm that Respondent was fully put on notice of the specific charges against him. Therefore, Respondent's claim that he was denied due process by not being fully informed of the charges for which he has been prosecuted is not supported by the evidence and testimony he presented at hearing. In fact, based upon the foregoing, the clear and convincing evidence adduced at hearing is that Respondent was fully noticed of the charges against him and vigorously defended himself at hearing.

Penalty

104. The Commission adopted disciplinary guidelines in rule 61J2-24.001 for the imposition of penalties authorized by section 475.25(1). Rule 61J2-24.001(3)(e) provides that a \$1,000.00 to \$2,500.00 administrative fine and 30-day suspension to revocation is the appropriate penalty range for the first offense of failing to account or deliver escrowed property to any person as required by agreement or law in violation of section 475.25(1)(b).

105. Rule 61J2-24.001(3)(e) provides that a \$250.00 to \$1,000.00 administrative fine and license suspension to revocation is the appropriate penalty range for the first offense of committing misrepresentation, concealment, etc. in violation of section 475.25(1)(d). Rule 61J2-24.001(3)(e) also provides that a \$250.00 to \$1,000.00 administrative fine and license suspension to revocation is the appropriate penalty range for the first offense of violating any rule or provision under chapter 475 in violation of section 475.25(1)(e).

106. Section 455.227(3)(a) provides that, in addition to any other discipline, the Commission may assess costs related to the investigation and prosecution of the case, excluding costs associated with an attorney's time.

107. Rule 61J2-24.001(4)(b) provides that clear and convincing proof of aggravating or mitigating circumstances entitles the Commission or ALJ to deviate from the penalty guidelines. The rule provides that aggravating or mitigating circumstances may include, but are not limited to:

1. The degree of harm to the consumer or public.
2. The number of counts in the Administrative Complaint.
3. The disciplinary history of the licensee.
4. The status of the licensee at the time the offense was committed.
5. The degree of financial hardship incurred by a licensee as a result of the imposition of a fine or suspension of the license.
6. Violation of the provision of Chapter 475, F.S., wherein a letter of guidance as provided in Section 455.225(4), F.S., previously has been issued to the licensee.

108. Petitioner properly noticed and clearly demonstrated aggravating circumstances that warrant deviation from the wide range of penalties already permitted within the guidelines.

109. Upon consideration of the foregoing Findings of Fact and Conclusions of Law, pursuant to authority set forth in section 120.574, the undersigned ALJ finds Respondent Rivas in violation of sections 475.25(1)(b), 475.25(1)(d)1., and 475.25(1)(e), as charged in the A.C. The undersigned ALJ further finds that the evidence and factors set forth in this Final Order constitute sufficient aggravating factors for which revocation is the most appropriate discipline; and clearly supports fines within the guideline amounts of \$2,000.00 for Count 1, \$1,000.00 for Count 2, and \$1,000.00 for Count 3 (for a total of \$4,000.00 in fines), plus assessment of the costs of the Department's investigation in the amount of \$1,551.00.

ORDER

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

1. The real estate sales associate license of Respondent, Armando Rivas, is hereby revoked.
2. Respondent shall pay a fine of \$4,000.00 to the Commission within 30 days of the date of this Final Order.
3. Respondent shall pay costs of \$1,551.00 to the Commission within 30 days of the date of this Final Order.

DONE AND ORDERED this 31st day of March, 2021, in Tallahassee, Leon County, Florida.



ROBERT S. COHEN
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of March, 2021.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the district court of appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.