

BEFORE THE IOWA REAL ESTATE COMMISSION
1918 S.E. HULSIZER
ANKENY, IOWA

IN RE:)	
ROBERT E. HEBERER (BO4614),)	CASE NO. 89-031
Broker)	
)	
MELVIN E. LEE (BO5254),)	DIA NO. 90DOCRE-13
Broker)	
and)	
)	FINDINGS OF FACT,
BOLICK REALTY AND)	CONCLUSIONS OF LAW,
CONSTRUCTION FIRM (F00128))	AND DECISION AND ORDER

On October 4, 1990, K. Marie Thayer, the Acting Executive Secretary of the Iowa Real Estate Commission (hereinafter Commission) filed a Complaint regarding Robert E. Heberer, Melvin E. Lee, and Bolick Realty and Construction Firm (hereinafter Respondents). The Complaint alleged violations of Iowa Code section 117.34(7) (1989) and 193E Iowa Administrative Code section 1.27. Notices of hearing were issued to each Respondent. In an Order, the Commission by its executive secretary, granted a continuance of the hearing in the case.

The hearing for the above case was held on February 21, 1991 in the office of the Real Estate Commission, 1918 S.E. Hulsizer, Ankeny, Iowa. The Respondents Mr. Robert Heberer and Mr. Melvin Lee were present and represented themselves. John Parmeter, Assistant Attorney General, represented the State. The Commission members who were present at the hearing were Commission Chair Joe Ann Lutz, Jerry Duggan, James Berry, Robert Christensen, and Marlys Nielsen. At the conclusion of the hearing, Mr. Robert Christensen had to leave. He did not participate in the deliberation of the Commission nor is he participating in any decisionmaking in this case. Amy Christensen Couch, Administrative Law Judge from the Iowa Department of Inspections and Appeals, presided and was instructed to prepare this decision. The Respondents elected to have the hearing closed to the public under Iowa Code section 258A.6(1). Therefore, the hearing was closed to the public under that Code section. A court reporter was present. Also present were members of the Commission staff and witnesses in the case. After hearing the evidence in the case, the Commission convened in closed session pursuant to Iowa Code section 21.5(1)"f" to deliberate the decision to be rendered in this contested case.

The record in this case includes the above Complaint, Notices, Order, testimony presented at the hearing, State's Exhibits 1 through 3 and Respondents' Exhibit A.

89-031

FINDINGS OF FACT

1. The Respondent, Robert E. Heberer, is licensed as an Iowa real estate broker, license number BO4614. Respondent Melvin E. Lee is licensed as an Iowa real estate broker, license number BO5254. Bolick Realty and Construction Company is the firm Respondent in this case and holds license number F00128. (State's Exhibit 1).
2. In August of 1985, the Respondents in this case, Mr. Heberer, Mr. Lee, and Bolick Realty and Construction Company as the firm, entered into an Informal Settlement and Assurance of Voluntary Compliance with the Iowa Real Estate Commission. The Respondents stipulated with the Commission that Bolick Realty was a corporation licensed as a real estate broker, that Mr. Heberer was a licensed real estate broker and had been a broker officer of the firm Respondent since December 7, 1979. The parties further stipulated that Melvin Lee was a licensed real estate broker and had been a broker-officer of the firm Respondent since June 13, 1972. The parties further stipulated that on May 3, 1983 and April 23 and 24, 1985, Commission staff conducted trust account examinations at the Firm-Respondent's office, and in both of those examinations, the examiners noted that general ledgers were not being maintained for either of the company's two trust accounts. The parties further stipulated that the failure to maintain general ledgers for the company's two trust accounts was a violation of (then) Administration Code sections 700 IAC 1.27 and 4.40(5)(a). The parties agreed through the informal settlement and assurance of voluntary compliance that the Respondent admitted to the facts as described in the statement of facts and to the violations of the Code sections set out, agreed to maintain the required general ledger in the future, and agreed to pay a civil penalty of \$500.00 for failure to maintain the general ledger as required. The parties further agreed that the informal settlement would be made a part of the permanent record of the Respondents and would be considered by the Commission in determining the nature and severity of disciplinary sanctions to be imposed for any future license law violations by the Respondent. (State's Exhibit 1).
3. Ron Rasmussen is an auditor with the Department of Inspections and Appeals. He conducted an audit of the Respondent Bolick Realty and Construction Company on March 28, 1989. Mr. Rasmussen found that there was a deficiency in the trust account maintained by Bolick Realty. That deficiency was that the trust account contained \$1,268.15 for which the Respondents could not account. It is commonly referred to that the account was \$1,258.15 "long" as of the date of the audit. This terminology meant that there were excess funds in the bank trust account for which the Respondents could not account. (State's Exhibit 2; testimony of Mr. Rasmussen).
4. At the trust account examination conducted on March 28, 1989, Mr. Rasmussen discussed with Mr. Heberer that the trust account

was long \$1,268.15, and provided instructions to Mr. Heberer regarding that amount. Further, the two discussed that the Respondents were not maintaining a personal funds ledger as required by the Iowa Code. Mr. Heberer agreed at that time to use a personal funds ledger sheet. (State's Exhibit 2; testimony of Mr. Rasmussen).

5. At the time of the audit, the Respondents did not show Mr. Rasmussen, the investigator, a personal funds ledger sheet. (testimony of Mr. Rasmussen, Mr. Heberer, Mr. Lee).

6. At the time of the audit in 1989, the Respondents were unable to explain where the \$1,268.15 came from, because they were maintaining inadequate records for their trust account. (testimony of Mr. Rasmussen, Mr. Heberer, Mr. Lee; State's Exhibit 2).

7. The Respondents maintained a personal ledger sheet from May 31, 1984 through February 28, 1986. In 1985 or 1986, the Respondents had to reduce staff. From that time forward, they had a series of part-time secretaries who maintained the firm's books. Mr. Heberer testified that at the time, he thought the books were being maintained correctly. However, at the hearing, the Respondents did not contest the fact that the books were not being maintained in a proper manner. After the March 1989 audit by Mr. Rasmussen, in June of 1989, the Respondents started working with an accounting firm to maintain their ledgers in the proper manner. The Respondents consulted with the accounting firm in an attempt to follow the required rules. The Respondents agree that they were not maintaining proper records of their trust account prior to June of 1989. They have attempted since June of 1989 to work with the accounting firm to maintain ledgers as required by the Iowa statute and the Commission rules. (testimony of Mr. Heberer, Mr. Lee; Respondents' Exhibit A).

8. On January 17, 1991, Mr. Heberer wrote a letter to the Department of Inspections and Appeals in an attempt to explain the identification of the sources of the \$1,268.15 overage in the trust account fund. In the letter, Mr. Heberer stated that \$702.70 was paid to the State of Iowa treasurer because the funds escheated to the State under Iowa law. Mr. Heberer further wrote that \$122.50 should be paid to Mr. Bernard Thie for rent proceeds on property, \$375.00 should be paid to Bolick Realty and Construction Company for rental fees, \$84.39 was deposited in the account for a reserve against check charges, and \$15.84 for check charges should be subtracted from the reserve amount. (testimony of Mr. Heberer, Mr. Rasmussen; State's Exhibit 3).

9. From the evidence at the hearing, it appears that the above explanation of the sources of the funds was correct, with the exception that the evidence at the hearing showed the \$375.00 was in fact a rental deposit owed to a Mr. Fisher. The Respondents testified at the hearing that they did not know at the current time where Mr. Fisher was, but they would attempt to locate him

and pay him back the \$375.00. The reason the \$702.70 was paid to the State of Iowa, was because those funds were identified as being an overage during the 1985 audit performed by the State. Mr. Heberer testified that he was under the mistaken belief that once those funds had been identified as unexplainable funds during that audit, that after the three-year period was over, the State would request the Respondents to remit that amount to the Iowa State Treasurer. Therefore, he testified, the \$702.70 remained in the trust account of the Respondent until it was paid out in December 1990. (testimony of Mr. Heberer, Mr. Lee, Mr. Rasmussen; State's Exhibits 2, 3; Respondent's Exhibit A)

10. The Respondents were not paying proper attention or taking proper care with regard to their professional trust account. (testimony of Mr. Rasmussen, Mr. Heberer, Mr. Lee; State's Exhibits 1 through 3; Respondent's Exhibit A).

11. The Respondents' accounting firm spent a considerable amount of time working with the firm's records in an attempt to identify the source of the \$1,268.15 unidentified funds in the trust account. (testimony of Mr. Heberer, Mr. Lee).

12. The Respondents conceded at the hearing that they had not maintained records as required by the State. (testimony of Mr. Heberer, Mr. Lee).

13. The firm is currently doing monthly reconciliation of its trust account. (testimony of Mr. Heberer, Mr. Lee; Respondent's Exhibit A).

14. As late as January 17, 1991, the Respondents were claiming that the \$375.00 should be paid out to them as rental fees. The Respondents conceded at the hearing that the \$375.00 was a rental deposit belonging to Mr. Fisher. (testimony of Mr. Rasmussen, Mr. Heberer, Mr. Lee; State's Exhibit 3).

15. The \$84.39 amount came into the trust account when the Respondents closed out another one of the firm's trust accounts and deposited the remaining money in this trust account. (testimony of Mr. Heberer, Mr. Lee; State's Exhibit 3).

16. The Respondents have attempted since June of 1989 to correct the deficiencies in their trust account ledgers by consulting and working with their accounting firm. (testimony of Mr. Heberer, Mr. Lee).

17. It does not appear from any evidence at the hearing that the Respondents were attempting to misappropriate funds not belonging to them. At all times, the monies were left in the trust account. It appears that the reasons for the confusion were the failure to maintain adequate records, and the Respondents' ignorance of how to maintain adequate records. (testimony of Mr. Rasmussen, Mr. Heberer, Mr. Lee; State's Exhibits 1 through 3; Respondent's Exhibit A).

18. It appears that the confusion regarding the \$375.00 amount was confusion between Mr. Heberer, Mr. Lee, and the accounting firm. It also appears that records were inadequate, so that the Respondents could not identify the source of these funds in an adequate manner. (testimony of Mr. Heberer, Mr. Lee, Mr. Rasmussen; State's Exhibit 3).

CONCLUSIONS OF LAW

1. Iowa Code section 117.34(7) (1989) states the following:

The real estate commission may . . . suspend or revoke a license issued under this chapter at any time if the licensee . . . is found to be guilty of any of the following: . . .

7. Failing, within a reasonable time, to account for or to remit any monies coming into the licensee's possession which belong to others.

The Respondents are guilty of a violation of this Code section because they were unable to account for the \$1,268.15 overage in their trust account as of March 28, 1989 when their trust account was examined by Mr. Rasmussen. Further, the Respondents failed within a reasonable time to remit the \$375.00 to Mr. Fisher which should have been returned to him. Since there was no evidence of when Mr. Fisher's money should have been returned to him, it is unclear the length of time which has passed. However, the Respondents do not even know where Mr. Fisher is at the current time, and therefore, there is a violation of this statute.

2. 193 Iowa Administrative Code section 1.27 provides:

Earnest payments, rents collected, property management funds, and other trust funds received by the broker shall be deposited in an identified "trust" account in a bank, savings and loan association, savings bank, or credit union located in Iowa. A broker shall maintain in the broker's office a general ledger for the trust account and an account ledger for each account or transaction which shall provide a complete record of all moneys received on real estate transactions, rents and management funds, including the sources of the money, the date of receipt, depository, and date of deposit; and when a transaction has been completed, the final disposition of the moneys.

The Respondents violated 193E Iowa Administrative Code section 1.27 when they failed to maintain an individual ledger sheet for the amount of personal funds in their trust account. The Respondents failed to adequately maintain records of their trust account. If they had maintained adequate records, they would have known who the money belonged to, and where it should have gone. Furthermore, the Respondents never returned the \$375.00 to

Mr. Fisher when the transaction was completed. This is a further violation of this rule.

3. The Commission has the authority to impose a civil penalty on a Respondent who is found guilty of maintaining inadequate transaction records such as individual account ledgers and failing to retain records on file. 193 Iowa Administrative Code section 4.40(5)"b" and "c". The Respondents maintained inadequate transaction records, specifically individual account ledgers, and failed to retain records on file. Therefore, the Commission has the authority to impose a civil penalty on these Respondents.

DECISION AND ORDER

It does not appear that these Respondents intentionally withheld moneys not belonging to them. Nor does it appear that they attempted to benefit from receipt of funds which did not belong to them. However, this is the second time the Respondents have been disciplined for maintaining inadequate records regarding their trust fund. The Respondents entered into a prior Stipulation with the Commission. This should have put the Respondents on notice that they had to maintain a very careful account of their trust funds. The Respondents do not appear to know how to maintain the records which are required, nor do they appear fully cognizant of the Commission's rules regarding their trust fund. The Commission may consider in determining the nature and severity of disciplinary action the relative seriousness of the violation, the facts of the particular violation, and the number and seriousness of prior violations. Furthermore, the Commission may consider whether remedial action has been taken. 193E Iowa Administrative Code section 4.3. The Respondents were previously fined in the amount of \$500.00. It appears that the \$500.00 fine was inadequate to get the Respondent's attention, and to have them make the required corrections to their procedures.

The Commission considers as a mitigating factor that the Respondents have attempted to rectify, albeit in a tardy manner, the violations with respect to their trust account. The Commission further considers that the violations by the Respondents were repeated violations of inadequate record keeping.

It is therefore the ORDER of the Iowa Real Estate Commission that the Respondent firm, Bolick Realty and Construction, is fined in the amount of \$750.00.

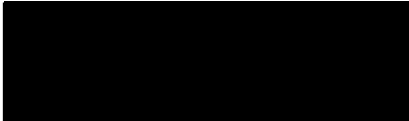
It is the further ORDER of the Iowa Real Estate Commission that the Respondents Robert E. Heberer and Melvin E. Lee are required to take 12 hours of continuing education above and beyond the normal continuing education which is required for maintenance of licensure. The Respondents must take the twelve-hour Trust Accounts and Closing Procedures portion of the broker prelicense

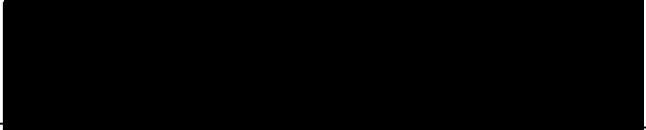
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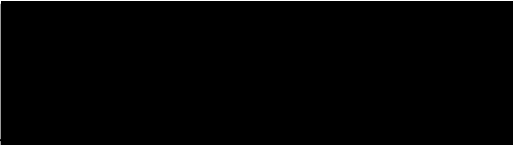
mandatory courses. The Respondents may choose specifically which school they will take the course from, and must submit their choice to the Commission for its approval. The Respondents must successfully complete this course within 13 months of the date of the issuance of this Decision and Order. The Respondents may not count this 12 hours as their regular continuing education.

It is the further ORDER of the Iowa Real Estate Commission that the Respondents will return the \$375.00 rental trust deposit to Mr. Fisher. The Respondents will make every attempt to locate Mr. Fisher. If the Respondents are unable to locate Mr. Fisher, they will notify the Commission of such fact within 30 days of the issuance of this decision.

Dated this 21st day of MARCH, 1991.


E. Joe Ann Lutz, Chair
Iowa Real Estate Commission


Amy Christensen Couch
Administrative Law Judge
Iowa Department of Inspections and Appeals


Roger L. Hansen
Executive Secretary
Iowa Real Estate Commission

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