

Iowa Department of Inspections and Appeals
Division of Appeals and Fair Hearings
Lucas State Office Building
Des Moines, Iowa 50319

IOWA REAL ESTATE COMMISSION,)

Complainant)

vs.)

JOHN J. SWEENEY (B02741))

Broker-Respondent)

CASE NUMBER 87-038

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
DECISION AND ORDER

On July 21, 1988 the Iowa Real Estate Commission (hereinafter Commission) filed a complaint against John J. Sweeney, a licensed Iowa real estate broker (hereinafter Respondent). The complaint alleged specific acts and alleged these acts constituted a violation of Sections 117.29(2), 117.29(3), 117.29(8), 117.34(1), 117.34(2), 117.34(3), 117.34(4), 117.34(7), and 117.34(8), 1987 Code of Iowa; and 193E Iowa Administrative Code Sections 1.9 and 1.28(117).

On November 17, 1988 the Commission conducted a hearing to determine whether disciplinary action should be imposed against the Iowa real estate license of the Respondent.

The proceedings were conducted by Jenny J. Netcott, Administrative Law Judge, Department of Inspections and Appeals. Commissioners James Berry, Joe Ann Lutz, Jerry Duggan and Marlys Nielsen were present during the proceedings. The Iowa Real Estate Commission was represented by Assistant Attorney General Kathy Skinner. The Respondent appeared at the hearing and was represented by James U. Mellick, Attorney at Law. A full presentation of facts was made by both parties.

A court reporter was present and recorded the proceedings. The hearing was also tape recorded by the Administrative Law Judge. The Administrative Law Judge was instructed by the Commission to prepare the Findings of Fact, Conclusions of Law, and Decision and Order.

FINDINGS OF FACT

The Iowa Real Estate Commission finds as follows:

1. The Iowa Real Estate Commission has jurisdiction of this matter under Iowa Code chapter 17A, 117, and 258A, as well as the administrative rules found in chapter 193E of the Iowa Administrative Code.

2. The Respondent has been at all times relevant to the matters contained herein licensed as an Iowa real estate broker.
3. A husband and wife (clients) employed the services of the Respondent to sell their home (House #1) and purchase a new residence (House #2).
4. On August 23, 1986 the clients listed House #1 with the Respondent at \$30,000.00.
5. The Respondent agreed to purchase House #1 paying \$24,000.00 for the property by giving the clients \$15,000.00 in cash and \$9,000.00 as a down payment on House #2 paid directly to the sellers of House #2.
6. This agreement was not put in writing by the Respondent.
7. A warranty deed from the clients to the Respondent filed on February 6, 1987 shows real estate transfer tax paid of \$15.95 or an approximate price of \$15,000.00 for the property.
8. A closing statement for House #1 was not delivered to the clients at the time of settlement.
9. The Respondent resold the property for \$22,800.00 on contract.
10. The installment contract between the Respondent and the buyers of House #1 was signed on February 3, 1987 which was three days before the Respondent owned the property.
11. The Respondent collected a six percent (6%) real estate commission from the clients on the sale of House #1.
12. The clients believed they were purchasing House #2 for \$59,500.00 - \$50,500.00 by assuming the seller's mortgage and \$9,000.00 which the Respondent was contributing from the sale of House #1 and delivering directly to the sellers of House #2.
13. The offer to buy House #2 prepared by the Respondent shows a purchase price of \$50,000.00. The offer states the following:
 - Real estate taxes would be prorated to the date of possession.
 - Sellers would continue the abstract at their expense and deliver the continued abstract to the buyers. The sellers would deliver merchantable title to the buyers.
 - The sellers would convey the property to the buyers by warranty deed.
14. The sellers of House #2 received no proceeds from the sale but received a promissory note from the Respondent for \$5,000.00 due in three years.

15. There was no closing transaction for House #2.

16. There was no tax proration for House #2.

17. The abstract was not continued and delivered to the client's attorney; in May, 1987 the clients had the abstract brought up to date and discovered a \$6,000.00 mortgage against House #2.

18. The clients received a quit claim deed not a warranty deed for House #2.

CONCLUSIONS OF LAW

What The Law Says

Iowa Code Section 117.29 (1987) states:

"A license to practice the profession of real estate broker and salesperson may be revoked or suspended when the licensee is guilty of the following acts or offenses:

"2. Professional incompetency.

"3. Knowingly making misleading, deceptive, untrue or fraudulent representations in the practice of the profession or engaging in unethical conduct or practice harmful or detrimental to the public. Proof of actual injury need not be established.

8. Willful or repeated violations of the provisions of this Act."

Iowa Code 117.34 (1987) states the Commission "may suspend or revoke any license issued under the provisions of this chapter . . . if the licensee is found to be guilty of:

"1. Making any substantial misrepresentation.

"2. Making any false promise of a character likely to influence, persuade or induce.

"3. Pursuing a continued and flagrant course of misrepresentation, or making of false promises through agents or salespersons or advertising or otherwise.

"4. Acting for more than one party in a transaction without the knowledge of all parties for whom the licensee acts.

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

"8. Being unworthy or incompetent to act as a real estate broker or salesperson in such manner as to safeguard the interests of the public."

700 Iowa Administrative Code Section 1.9(117) states:

"A licensee shall not acquire any interest in any property nor shall the licensee sell any property in which the licensee has an interest without first making licensee's true position clear to

the other party. Satisfactory proof of this fact must be produced by the licensee upon request of the Board."

700 Iowa Administrative Code Section 1.28(117) states in relevant part:

"It shall be mandatory for every broker to deliver to the seller in every real estate transaction, at the time the transaction is consummated, a complete detailed statement, showing all of the receipts and disbursements handled by the broker. Also, the broker shall at the same time deliver to the buyer a complete statement showing all moneys received in the transaction from the buyer and how and for what the same were disbursed. The broker shall retain all trust account records and a complete file on each transaction for a period of at least five (5) years after the date of the closing which shall include one copy of the listing, any offers to purchase, all correspondence pertinent to the transaction, and the closing statement . . ."

Application of Law

On August 23, 1986 the Respondent's clients entered into a real estate listing contract to sell House #1. The Respondent verbally agreed to pay his clients \$24,000.00 for the property by giving them \$15,000.00 in cash and making a \$9,000.00 down payment on House #2 which his clients wished to purchase. The verbal agreement was not reduced to writing by the Respondent. A warranty deed on this transaction was filed on February 6, 1987 which shows that \$15.95 in real estate transfer tax was paid. This amounts to a \$15,000.00 consideration given to purchase House #1 by the Respondent and not the \$24,000.00 amount quoted to his clients. The \$9,000.00 down payment was not delivered to the sellers of House #2 but they were given a promissory note of \$5,000.00 due in three years. A closing statement was not delivered to the Respondent's clients at the time of the closing on House #1.

The Real Estate Commission finds that by knowingly misrepresenting the purchase price of House #1 in which the Respondent paid \$15,000.00 plus a \$5,000.00 promissory note rather than the \$24,000.00 amount quoted to his clients, by failing to reduce the agreement to purchase House #1 to writing, and by failing to deliver a closing statement to his clients at the time of settlement of this transaction, the Respondent violated Iowa Code Sections 117.29(2), 117.29(3), 117.34(1), 117.34(2), 117.34(3), 117.34(7), 117.34(8), and 193E Iowa Administrative Code Section 1.28(117).

On February 3, 1987 the Respondent entered into a real estate installment contract on House #1. However, the warranty deed for this property was filed for record on February 6, 1987. By selling House #1 three days before he actually owned it, the Respondent violated Iowa Code Sections 117.29(2), 117.29(3), 117.34(1), and 117.34(8).

The Respondent prepared an offer to buy House #2 in which the purchase price was \$50,500.00. However, he misled the buyers into believing they were paying \$59,500.00 for the house (i.e., \$50,500.00 + \$9,000.00 down payment to be paid directly by the Respondent to the sellers of House #2). By misrepresenting the purchase price of House #2, the Respondent violated Iowa Code Sections 117.29(3), 117.34(1), 117.34(2), and 117.34(8).

The offer to buy House #2 stated that real estate taxes would be prorated, that the abstract would be continued by the sellers at their expense and delivered to the buyers and that a warranty deed would be filed. None of the above occurred. This constitutes misrepresentation and incompetency by the Respondent in violation of Iowa Code Sections 117.29(3), 117.34(1), and 117.34(8).

By failing to provide a closing statement to the buyers of House #2, the Respondent violated Iowa Code Sections 117.29(2), 117.29(3), 117.34(7), and 117.34(8) as well as 193E Iowa Administrative Code Section 1.28(117).

The Real Estate Commission concludes that the Respondent was employed by more than one party as real estate agent regarding transactions on both House #1 and House #2. The Respondent violated his fiduciary responsibility to his clients by failing to ensure that their best interests were maintained at all times. The "best interest" of his clients means to their satisfaction or effecting the most desirable results. The sellers of House #1, who were also the purchasers of House #2, were certainly not satisfied with the results of the Respondent's representation and assistance and the outcome of the two transactions was not desirable. It is clear that the Respondent had his own best interests in mind and not those of his clients insofar as he collected a commission on House #1 and also realized a profit on resale. Accordingly, the Respondent violated Iowa Code Sections 117.29(3), 117.34(4) and 117.34(8).

In the case at hand, it is clear that both parties were unsophisticated in the specifics of real estate transactions. The Respondent's clients, with regard to both House #1 and House #2, relied solely upon his expertise and knowledge with the expectation of effecting a smooth and trouble free sale of both properties. By placing their trust in the Respondent's ability and honesty, it was incumbent upon the Respondent to place their interests above his own even though he was the initial purchaser of House #1.

The Commission finds that the foregoing transactions on House #1 and House #2 were fraught with misrepresentation and deception by the Respondent and that he intentionally failed to prepare and distribute necessary documents to all parties involved. Accordingly, the Respondent violated Iowa Code Sections 117.29(2), 117.29(3), 117.29(8), 117.34(1), 117.34(2), 117.34(3),

117.34(4), 117.34(7), 117.34(8) and 193E Iowa Administrative Code Section 1.9(117) and 1.28(117).

DECISION AND ORDER

Based on the foregoing findings of fact and conclusions of law, the Commission finds that the Respondent violated Iowa Code Sections 117.29(2), 117.29(3), 117.29(8), 117.34(1), 117.34(2), 117.34(3), 117.34(4), 117.34(7), 117.34(8), 1987 Code of Iowa and 193E Iowa Administrative Code Sections 1.9(117) and 1.28(117).

It is therefore ORDERED by the Iowa Real Estate Commission that the Iowa real estate broker license of the Respondent be suspended for two years beginning February 1, 1989, and ending January 31, 1991.

Immediately following the period of suspension, the Respondent shall be on probation for one year ending January 31, 1992. If Respondent violates or fails to comply with any real estate law or rule during the period of probation, he will be afforded the same administrative procedure as any licensee not on probation. However, if the Commission after hearing finds the Respondent guilty, the Commission may consider the probationary status in assessing the penalty.

Respondent shall pay a civil penalty of \$1,000.00. Payment shall be made no later than March 31, 1989.

Respondent shall also successfully complete a twelve hour course approved by the Commission as a broker pre-license course on the subject of Real Estate Law, Contract Law, and Agency Law (see 700 Iowa Administrative Code section 3.2(3)(117)). These hours shall be in addition to all other real estate continuing education hours required by law for license renewal. Respondent must submit the original certificate of attendance for the course to the Commission no later than January 31, 1991, as evidence of satisfaction of this requirement. The certificate must come under a cover letter and the cover letter must refer to Case Number 87-038.

Executed this 23rd day of December, 1988.



JAMES R. BERRY, CHAIR
IOWA REAL ESTATE COMMISSION

JENNY F. NETCOTT
ADMINISTRATIVE LAW JUDGE

Date: December 22, 1988

Date: December 21, 1988

Issued this 23rd day of December, 1988



KENNETH L. SMITH
EXECUTIVE SECRETARY
IOWA REAL ESTATE COMMISSION

JJN/jmm

PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause by depositing a copy thereof in the U. S. Mail, postage prepaid, in envelopes addressed to each of the attorneys of record herein at their respective addresses disclosed on the pleadings, on 12-23 19 88

