

FILED September 1, 2016 (Date)
IREC
Board / Commission
M. L.
Signature, Executive Officer

BEFORE THE REAL ESTATE COMMISSION
OF THE STATE OF IOWA

IN THE MATTER OF

CASE NO. 15-265

WILLIAM L. WITTIG
Broker (B35670000)

DIA NO. 16REC001

Elite First Realty Iowa City, Inc.
2616 1st Avenue NE
Cedar Rapids, IA 52402

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
DECISION AND ORDER

Respondent

On July 1, 2016, the Iowa Real Estate Commission (Commission) found probable cause to file a Notice of Hearing and Statement of Charges against William L. Wittig (Respondent). The Statement of Charges alleged that Respondent engaged in a practice harmful or detrimental to the public and/or failed to diligently exercise reasonable skill and care in providing brokerage services to all parties to a transaction by failing to properly effectuate the terms of an executed purchase agreement, in violation of Iowa Code sections 543B.29(1)(d), 543B.34(1), 543B.56(1)(b)(2015) and 193E IAC 12.3(1)(a), 12.3(1)(b), and 18.14(5)(s).

The hearing was held on August 4, 2016 at 9:30 a.m. Respondent William L. Wittig appeared and was self-represented. Assistant Attorney General John Lundquist represented the state of Iowa. The following Commission members presided at the hearing: Terry Duggan, Broker, Chair; John Goede, Broker; Helen Kimes, Broker; Dennis Stolk, Broker; Janet DeMott, Salesperson; and Michael Telford, public member. Administrative Law Judge Margaret LaMarche assisted the Commission in conducting the hearing. A certified court reporter recorded the proceedings. The hearing was closed to the public at Respondent's request, pursuant to Iowa Code section 272C.6(1)(2015).

After hearing the testimony and examining the exhibits, the Commission convened in closed executive session, pursuant to Iowa Code section 21.5(1)(f)(2015), to deliberate its decision. The Commission instructed the administrative law judge to draft Findings of Fact, Conclusions of Law, Decision and Order, in conformance with their deliberations.

THE RECORD

The record includes the state's Prehearing Conference Report; the testimony of William Wittig, Colleen Goddard, and John Stark; State Exhibits 1-10 (See Exhibit Index for description) and Respondent Exhibits A and B.

FINDINGS OF FACT

1. Respondent's Iowa real estate broker license (B35670000) was first issued on January 5, 2001 and is in full force and effect through December 31, 2018. Respondent was a licensed salesperson for six years prior to receiving his broker license. At all times relevant to this matter, Respondent was a licensed real estate broker officer assigned to Elite First Realty Iowa City, Inc. (F05728000), which is located in Cedar Rapids, Iowa. Respondent is a part owner of Elite First Realty, which was initially licensed in November 2014. (Testimony of Respondent; State Exhibits 3, 4)
2. Elite First Realty Iowa City does not maintain a real estate trust account. This decision was made due to the cost, overhead, and risks associated with maintaining a trust account. When Respondent receives earnest money or other client funds, those funds are deposited in the "Anderson Law Client Trust Account." At hearing, Respondent explained that Steve Anderson is a title company attorney. Respondent has previously acted as the courier for the checks and has delivered them to Mr. Anderson. Recently, however, all checks have been sent directly to Mr. Anderson. (Testimony of Respondent; State Exhibit 4)
3. Colleen Goddard has been the Commission's trust account auditor for eight years, and she is responsible for conducting audits in Iowa's 99 counties. Audits are typically announced, and Ms. Goddard will ask the licensee to provide bank statements, their last reconciliation, any open ledgers, and the files for any open or closed sales transactions. On September 25, 2015, Ms. Goddard visited Elite First Realty Iowa City, Inc. in Cedar Rapids for the purpose of conducting an audit. Since Elite First Realty Iowa City does not maintain a broker's trust account, Ms. Goddard asked to review its open and closed transaction files. Ms. Goddard reviewed seven real estate transaction files using her usual protocol. (Testimony of Colleen Goddard; State Exhibit 5)

One of the files reviewed by Ms. Goddard was for the sale of a residential property at 1131 Meadlowlark in Iowa City. Elite First Realty and the property owners, David and Marsha Grady, entered into a written Listing Agreement-Exclusive Right to Sell Real Property on April 15, 2015. The initial listing price of the property was \$674,900.

- The transaction file included a Residential Real Estate Purchase Agreement dated July 20, 2015 for a purchase price of \$640,000, and provided for an earnest money payment of "\$5,000 upon acceptance with this offer to be deposited upon acceptance of this offer, in the trust account of Elite First Realty Iowa City, Inc." This purchase agreement, which was signed by the buyer, had a proposed closing date of September 18, 2015. (State Exhibit 7-1 to 7-4)
- The transaction file also included two written counter-offers. On July 20, 2015, the sellers counter-offered a purchase price of \$654,900 with a closing date of August 31, 2015, but proposed no other changes to the initial purchase agreement. The buyers rejected this counter-offer. (State Exhibit 7-5)
- On July 21, 2015, the buyers counter-offered a purchase price of \$650,000 and a closing date of August 31, 2015. This counter offer was accepted by the sellers on July 21, 2015 at 1:00 p.m. The signed counter-offer made no changes to the earnest money requirement of \$5,000 and made no changes to the original provision that the earnest money would be deposited into the trust account of Elite First Realty Iowa City, Inc. (State Exhibits 7-6, 7-1 to 7-4)
- The file also included a copy of the buyer's check for \$5,000, which was dated July 22, 2015 and was made out to the order of "Anderson Law Client Trust Acct." The memo section of the check states "Earnest \$1131 Meadowlark." (State Exhibit 8)

After reviewing this closed transaction file, Ms. Goddard prepared a Trust Account Examination Deficiency Report. The report noted that although Respondent does not have a real estate trust account, the auditor found one purchase agreement that stated that the \$5000 earnest money was deposited in the "Elite First Realty Iowa City Inc.", when in reality the earnest money went to Anderson Law Client Trust Account. At hearing, Ms. Goddard stated that the other six transaction files that she examined all had any necessary addendums to the purchase agreement to correctly identify where the earnest money was going to be deposited. (Testimony of Colleen Goddard; State Exhibits 5-8)

4. John Stark is a licensed broker who is also a certified residential specialist and a certified residential broker manager. Mr. Stark has served as a peer reviewer for the Commission for eight years. Mr. Stark was asked to review the documentation from Respondent's file for the sale of the property at 1131 Meadowlark and to prepare a peer review report. In his report, Mr. Stark found that:

- while it was clear that Respondent had communicated to the cooperating broker to make out the earnest money check to Anderson Law Client Trust Account, neither party amended the purchase agreement to reflect this change;
- the purchase agreement is a contract between the buyer and the seller, and the brokers must act as their represented party's fiduciary, which includes assuring all parties that contracts are written and amended as needed to reflect the wishes of their client;
- should a conflict arise, the purchase agreement is the very first place the parties will look to for resolution. By not amending the contract to reflect the location of the deposit when he knew that the deposit was to be held by his attorney, Respondent misstated a material fact; and
- Respondent did not provide brokerage services to all parties when he failed to clarify the terms of the contract which may have had the effect of making the contract null and void, causing harm to the public (buyers and sellers).

In Mr. Stark's opinion, Respondent failed to diligently exercise reasonable care when he failed to ensure that the purchase agreement was amended to show the accurate location for the deposit of the earnest money. (Testimony of John Stark; State Exhibit 9)

5. All of Respondent's communications with the buyers were through the buyer's agent, Karla Davis. At hearing, Respondent submitted a copy of the email that he sent to Ms. Davis, on July 20, 2015 at 11:53 a.m. This email asked if Ms. Davis had a "pre-approval letter from lender and copy of earnest money check?" It further stated "Earnest money check should be written to Anderson Law Client Trust Account; sorry about not sharing earlier." (Respondent Exhibit B) Respondent admits that he never obtained written consent from the buyers or the sellers to change the terms of the purchase agreement to allow the earnest money check to be deposited in the Anderson Law Client Trust Account. (Testimony of Respondent)

The sellers were located in Alabama and all of Respondent's communications with them were by email. Respondent recalled that the original counter-offer was sent to the sellers by email with items 1, 2, and 3 left blank for them to fill in. Respondent believes that he verbally told the sellers to add a provision to the counter-offer that the earnest money check was to go to the Anderson Law Client Trust Account, but he admits this was never done. The seller's original counter-offer states "NONE" in the section for "other changes." (Testimony of Respondent; State Exhibit 7-5)

6. In a letter to the Commission dated July 31, 2016, the sellers state that they received a copy of the earnest money check via email. They further state that they were

at all times aware that Elite First Realty was not holding the earnest money, that they knew that Elite First Realty did not have a trust account, and that they knew that the funds would be held by Anderson Law Client Trust Account. In the opinion of the sellers, no harm or negligence occurred, and they believed that Respondent exercised reasonable skill and care. (Respondent Exhibit A)

CONCLUSIONS OF LAW

Iowa Code section 543B.29 provides, in relevant part:

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

...

d. ...engaging in unethical conduct or practice harmful or detrimental to the public. Proof of actual injury need not be established.

Iowa Code section 543B.56(1)(b) provides that a licensee shall diligently exercise reasonable skill and care in providing brokerage services to all parties to a transaction.

193E IAC 12.3 provides, in relevant part, that a licensee representing a seller as an exclusive seller's agent shall have the following duties and obligations:

- a.* Perform the terms of the written agreement made with the seller...
- b.* Exercise reasonable skill and care for the seller...

193E IAC 18.14(5)(s) provides, in relevant part:

18.14(5) *Violations for which civil penalties may be imposed.* The following is a nonexclusive list of violations for which a civil penalty may be imposed:

...

s. Violating any of the remaining provisions in 193E-Chapters 1-20 inclusive, which have not heretofore been specified in this rule.

The preponderance of the evidence established that Respondent engaged in a practice harmful or detrimental to the public, failed to perform the terms of a written agreement with the seller, and failed to diligently exercise reasonable skill and care, in violation of Iowa Code sections 543B.29(1), 543B.56(1)(b), and 193E IAC 12.3(1)(a), (b) and 193E IAC 18.14(5)(s) when he failed to amend the July 20, 2015 purchase agreement to show that

the earnest money would be deposited in the Anderson Law Client Trust Account. As pointed out by the Commission's peer reviewer, the purchase agreement (together with any written amendments accepted by both the buyer and the sellers) is the enforceable contract between the parties. It is the broker's responsibility to ensure that the written purchase agreement and any properly executed amendments to that document accurately reflect the agreed upon terms of the contract.

The location and control of the earnest money is an essential part of the purchase agreement should a problem arise prior to closing. It was Respondent's responsibility to ensure that the purchase agreement was properly amended, in writing, to reflect the parties' understanding that the earnest money would be deposited in the Anderson Law Client Trust Account and not in the Elite First Realty Iowa City, Inc. trust account, which did not exist. Respondent apparently recognized the importance of amending the purchase agreement and testified that he has always done so if the initial purchase agreement erroneously listed Elite First Realty trust account. Respondent admits that he failed to ensure that the purchase agreement was properly amended for this particular transaction.

The Commission understands that when the earnest money check was written following the acceptance of the final counter-offer, both the sellers and the buyers were informed that the earnest money check would be made out to and placed in the "Anderson Law Client Trust Account" and not in the "Elite First Realty Iowa City, Inc." trust account, as stated in the purchase agreement. This fact was considered by the Board as a mitigating factor when it determined the appropriate sanction for Respondent's violation. The Board believes that Respondent fully understood his obligations as a broker and that the failure to amend the purchase agreement in this case was an oversight on his part and certainly not intentional.

Nevertheless, it is not necessary for actual harm or detriment to the parties to occur in order to find a violation of the broker's duties to the sellers. The fact remains that it is the broker's duty to pay careful attention to the details of the transaction and to ensure that the purchase agreement and any amendments fully reflect the parties' agreement and the essential elements of the contract. The transaction file did not include any indication, in writing, that the parties both agreed to the placement of the earnest money into the Anderson Law Client trust account. It is Respondent's choice not to maintain a broker's trust account and to deposit clients' funds into an attorney's trust account. It is incumbent on Respondent to make this clear, in writing, to all parties to the transaction and to ensure that the purchase agreement, as amended, indicates that

the parties have agreed to it. Respondent's oversight in this case could have resulted in harm or detriment to the parties if there had been a problem with the closing.

DECISION AND ORDER

IT IS THEREFORE ORDERED that Respondent William L. Wittig shall pay a civil penalty of \$500 for his violation of Iowa Code sections 543B.29(1)(d), 543B.34(1), 543B.56(1)(b)(2015) and 193E IAC 12.3(1)(a), 12.3(1)(b), and 18.14(5)(s). The civil penalty shall be paid within thirty (30) days of receipt of this decision.

IT IS FURTHER ORDERED, pursuant to Iowa Code section 272C.6 and 193 IAC 7.41, that Respondent shall pay \$75.00 within thirty (30) days of receipt of this decision for fees associated with conducting the disciplinary hearing. If the Commission issues a separate order assessing additional costs or expenses, the Respondent shall promptly comply with the terms of that order.

Dated this 1st day of September, 2016.



Terry Duggan, Chair
Iowa Real Estate Commission

cc: William L. Wittig, Elite First Realty Iowa City, Inc., 2616 1st Avenue NE, Cedar Rapids, IA 52402 (CERTIFIED)

John Lundquist, Assistant Attorney General, Hoover State Office Building (LOCAL)

Judicial review of the commission's action may be sought in accordance with the Iowa administrative procedure act, from and after the date of the commission's order. Any judicial review petition must be filed with the district court within 30 days after the issuance of the commission's final decision. 193 IAC 7.37.