

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ROGER WOZNIAK,)
)
 Petitioner,)
)
 vs.) CASE NO. 88-0188
)
 FLORIDA REAL ESTATE COMMISSION,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, final hearing in the above-styled case was held on April 8, 1988, in West Palm Beach, Florida, before Robert E. Meale, Hearing Officer of the Division of Administrative Hearings.

The representatives of the parties were as follows:

For Petitioner: Roger Wozniak, pro se
14 Hickory Hill Road
Tequesta, Florida 33469

For Respondent: Lawrence S. Gendzier, Esquire
Assistant Attorney General
Department of Legal Affairs
400 West Robinson Street, Room 212
Orlando, Florida 32801

BACKGROUND

On or about November 2, 1987, Petitioner submitted an application for licensure as a real estate salesman.

By letter filed December 9, 1987, Respondent notified Petitioner that his application for licensure as a real estate salesman had been denied on the grounds that Petitioner failed to meet the requirement that he be "honest, truthful, trustworthy, and of good character, and shall have a good reputation for fair dealing." The letter based this determination, in part, on Petitioner's disclosure in his application that he had been convicted in 1985 of 13 counts of filing false FHA and VA loan applications.

By letter dated December 2, 1987, Petitioner requested a formal hearing on Respondent's denial of licensure, which decision was made the same date although not communicated to Petitioner in writing until December 9.

Petitioner presented one witness, himself. Respondent presented none. Petitioner offered into evidence 11 exhibits. Respondent offered into evidence two exhibits. All exhibits were admitted into evidence, except for Petitioner's Exhibit Numbers 3, 6, 8, and 9. None of these exhibits, except for Petitioner's Exhibit Number 9, was relevant. The single excluded relevant exhibit was a

summary of the legal requirements for taking the Florida examination for contracting. This exhibit was excluded because it is not the best evidence of the legal requirements, which are set forth in applicable statutory, decisional, and regulatory law. At the hearing, ruling was reserved on Petitioner's Exhibit Number 10, which is Petitioner's application for licensure with the Construction Industry Licensing Board. This exhibit has been admitted.

Petitioner and Respondent filed a proposed recommended order. All of the proposed findings are adopted, except that Petitioner's Paragraphs 1-5 and 14, and Respondent's Paragraphs 1 and 8 -11, are rejected as unnecessary.

FINDINGS OF FACT

1. In January, 1985, Petitioner was convicted of thirteen felony counts involving 12 fraudulent applications for FHA and VA loans, obstruction of justice, and failure to report income for federal income tax purposes. For the counts involving a conspiracy to defraud agencies of the federal government in connection with loan applications, obstruction of justice, and falsifying an income tax return, Petitioner received a sentence of two years. This sentence was later modified, and Petitioner was given five years' probation for all counts. Petitioner's probation ends in about two years.

2. The criminal acts concerning the loan applications were done in order to assist a real estate brokerage firm in Illinois owned by Petitioner and his wife, who was also named in the indictment, to sell homes with VA and FHA guaranteed and insured financing. Petitioner was convicted of knowingly causing the making of loan applications showing inflated purchase prices and nonexistent gifts as sources of downpayments. The net effect of these practices was to leave the mortgage lender undersecured.

3. On or about November 2, 1987, Petitioner submitted an application for licensure as a real estate salesman. In his application, he disclosed the above felony convictions, the revocation of his Illinois real estate broker's license which took place as a result of the convictions, and the denial of an earlier application for Florida licensure as a real estate salesman which denial was due to his convictions and the revocation of his Illinois broker's license.

4. By letter filed December 2, 1987, Respondent notified Petitioner that his application for licensure as a real estate salesman had been denied because he failed to meet the requirements that he be "honest, truthful, trustworthy, and of good character, and shall have a good reputation for fair dealing." The letter cited as reasons for this determination the same reasons cited in the earlier denial plus a recommended order filed on July 27, 1987, in DOAH Case No. 87-2018, in which it was recommended that the application be denied.

5. Although Petitioner has not regained his Illinois real estate broker's license, he received an Illinois real estate salesman's license in the fall of 1986.

6. Since his conviction, Petitioner has taken various educational programs useful in the real estate business. On March 17, 1987, Petitioner graduated with a Bachelor of Science degree in Business Administration from California Coast University. On November 1, 1987, Petitioner completed the Florida Real Estate Commission Course #1 sponsored by the Gold Coast School of Real Estate.

7. By letter dated November 30, 1987, L. Edward Holmes, a licensed real estate broker, notified Respondent that he was willing to supervise personally Petitioner if he were granted a license.

8. By letter dated March 10, 1987, V. A. Indovina, M.D., who is staff psychiatrist with the DuPage County (Illinois) Health Department, notified Respondent that he (or she) felt that Petitioner has learned the consequences of his past behavior and will not engage in illegal behavior in the future.

9. On or about November 24, 1987, Petitioner applied for a Florida contractor's license with the Construction Industry Licensing Board. He clearly disclosed his convictions in the application. Shortly prior to the hearing, the Construction Industry Licensing Board informed Petitioner that he was eligible to take the next contractor's examination.

10. Respondent entered a final order on August 19, 1987, adopting the recommended order of June 17, 1987, in DOAH Case No. 87-2018, and denying Respondent's earlier application for licensure as a real estate salesman.

CONCLUSIONS OF LAW

11. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties. Section 120.57(1), Florida Statutes.

12. Respondent is charged with the responsibility of reviewing applications for licensure as a real estate broker or salesman in Florida, denying applicants found unqualified, and certifying to the Department of Professional Regulation applicants found qualified so the Department of Professional Regulation may issue the appropriate license. Sections 475.181 and 475.25(1), Florida Statutes.

13. Petitioner has the burden of proving by a preponderance of the evidence that he is entitled to be certified as qualified for licensure as a real estate salesman. Florida Department of Transportation v. J. W. C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

14. "An applicant for licensure . . . shall be . . . honest, truthful, trustworthy, and of good character and shall have a good reputation for fair dealing." Section 475.17(1)(a), Florida Statutes.

15. Respondent may deny licensure to an applicant who has been "guilty of fraud, misrepresentation, concealment, false promises, false pretenses, dishonest dealing by trick, scheme, or device, . . . or breach of trust in any business transaction in this state or any other state . . .; . . . 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." Section 475.25(1)(b), Florida Statutes.

16. Respondent may deny licensure to an applicant who has been "convicted . . . of a crime in any jurisdiction which directly relates to the activities of a licensed broker or salesman or involves moral turpitude or fraudulent or dishonest dealing." Section 475.25(1)(f), Florida Statutes.

17. Respondent may deny licensure to an applicant who has had "a broker's or salesman's license revoked, suspended, or otherwise acted against . . ." Section 475.25(1)(g), Florida Statutes.

18. If the applicant has been guilty of conduct that is grounds for revocation or suspension, he shall be deemed unqualified for licensure "unless, because of lapse of time and subsequent good conduct and reputation, or other reason deemed sufficient, it appears to the commission that the interest of the public and investors will not likely be endangered by the granting of registration." Section 475.17(1)(a), Florida Statutes.

19. Petitioner's felony convictions provide ample grounds for denial of licensure. The sole issue is whether Petitioner is entitled to licensure under the above-cited provision allowing evidence of rehabilitation.

20. In light of the three-year period over which Petitioner's numerous criminal acts took place, a little over three years since his conviction is not a very long period of time to evaluate Petitioner's subsequent behavior. The lapse of time since Petitioner's conviction is not particularly long given the seriousness of the offenses. All of the offenses directly relate to Petitioner's honesty and character and all, except possibly the convictions concerning falsification of tax returns and obstruction of justice, directly relate to the practice of real estate.

21. Petitioner offered evidence of his subsequent educational accomplishments. While these are laudable, they are not reliable indications of Petitioner's trustworthiness. Petitioner's integrity and character are at issue, not his competence.

22. In a similar vein, Petitioner offered evidence of his overcoming bouts of depression and reentering the work force. Certainly, anyone who through hard work and perseverance is able to overcome the tremendous impediments of numerous felony convictions is to be commended. However, renewed commercial activity does not show subsequent good conduct and honest reputation, especially when Petitioner's problems stem from less a lack, but perhaps an excess, of ambition. Rather, such activity gives Petitioner the opportunity to demonstrate his good conduct and earn an improved reputation.

23. There is little evidence of good conduct and honest reputation beyond the conclusory and uncorroborated assertions of good character by Petitioner. The letter from Petitioner's psychiatrist does not set forth the grounds for the opinion that Petitioner will not engage in illegal behavior in the future. It may have been based solely upon the statements of Petitioner during the course of his treatment. Without knowing if this is so and, if so, the number and duration of sessions, it is impossible to give much weight to this letter. The letter from Mr. Holmes offering to supervise Petitioner similarly offers little reason for giving it much weight. Mr. Holmes does not address any character issues; his reference to "all the aspects of [Petitioner's] background" may refer only too competency considerations.

24. There is no evidence that the action of the Construction Industry Licensing Board in allowing Petitioner to take the contractor's examination means that they have reached a final determination that he is of "good moral character," as required by Section 489.111(2)(b), Florida Statutes.

25. Even if the Construction Industry Licensing Board has made such a determination, it would have no bearing on whether Petitioner satisfies the requirements for licensure as a real estate salesman. Section 489.111(3)(a) allows the Construction Industry Licensing Board to deny certification for good moral character "only if [t]here is a substantial connection between the lack of

good moral character of the applicant and the professional responsibilities of a certified contractor." The Construction Industry Licensing Board may have determined, for its purposes, that such a connection does not exist, even though it clearly does with respect to real estate licensure. Also, Section 489.111(3)(b) requires that the Construction Industry Licensing Board's finding of a lack of good moral character be supported by clear and convincing evidence. The standard of proof in the present case is a preponderance of the evidence, and, more importantly, it is on the applicant, not the licensing board.

RECOMMENDATION

Based on the foregoing, it is hereby

RECOMMENDED that a Final Order be entered denying the application of Petitioner for licensure as a real estate salesman.

DONE and RECOMMENDED this 10th day of May, 1988, in Tallahassee, Florida.

ROBERT E. MEALE
Hearing Officer
Division of Administrative Hearings
The Oakland Building
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Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of May, 1988.

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