

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF PROFESSIONAL)
REGULATION, DIVISION OF)
REAL ESTATE,)
)
Petitioner,)
vs.) CASE NO. 89-5858
)
DAVID ROSENBERG,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Hearing Officer, Veronica E. Donnelly, held a formal hearing in the above-styled case on April 5, 1990, in Cape Coral, Florida.

APPEARANCES

For Petitioner: Steven W. Johnson, Esquire
Department of Professional
Regulation
Division of Real Estate
Post Office Box 1900
Orlando, Florida 32801

For Respondent: Peter L. Rosenberg
Qualified Representative
1224 Southeast 23rd Place
Cape Coral, Florida 33990

STATEMENT OF THE ISSUES

Whether the Respondent's real estate license in Florida should be disciplined as a result of his criminal conviction of crimes involving moral turpitude in violation of Section 475.25(1)(f), Florida Statutes.

PRELIMINARY STATEMENT

The Department of Professional Regulation (the Department) filed an Administrative Complaint before the Florida Real Estate Commission alleging that Respondent, David Rosenberg (Rosenberg), violated the real estate licensing laws when he entered guilty pleas to eleven counts of felonies and misdemeanors related to the possession of pornography. The Department alleged that the guilty pleas are considered as convictions for purposes of the licensing statutes. As a result, it is alleged that Respondent is guilty of crimes involving moral turpitude in violation of Section 475.25(1)(f), Florida Statutes.

In an Election of Rights Form signed October 9, 1989, Respondent Rosenberg disputed the allegations of fact contained in the Administrative Complaint and requested a formal hearing.

Prior to hearing, the Hearing Officer determined that Peter L. Rosenberg could act as a qualified representative on behalf of Respondent Rosenberg. At hearing, the Department filed four exhibits and rested its case. The Respondent testified in his own behalf and moved fourteen exhibits into evidence. All of the exhibits were received by the Hearing Officer.

A transcript of the proceedings was not ordered. Proposed findings of fact were timely submitted by the Department on April 16, 1990. Respondent's Exhibit 1 contains the proposed findings filed on behalf of the Respondent. Rulings on the proposed findings are in the Appendix to the Recommended Order.

FINDINGS OF FACT

1. At all times material to these proceedings, Respondent Rosenberg has been licensed as a real estate broker in Florida, and has held license number 0308769. The last license issued was as a broker and was sent in care of Monopoly Realty, Inc., 944 Country Club Boulevard, Cape Coral, Florida.

2. On April 7, 1989, the Respondent entered guilty pleas to the eleven criminal charges set forth in an Information filed in Case No. 89-3310-CF10, Brevard County, Florida. Counts I-IV of the Information charged the Respondent with the crimes of unlawful and knowing possession of four different motion pictures containing sexual conduct by children. Counts V-XI of the Information charged the Respondent with possession of seven additional motion pictures or videotapes containing obscene materials. It was alleged that the Respondent intended to sell, show or distribute these videotapes.

3. Upon acceptance of the pleas, the judge found the Respondent guilty of Counts V-VIII and withheld adjudication on all other counts. The Respondent was sentenced to two years of community control followed by three years probation on Counts I-IV. In addition, he received six months probation to run concurrently with the first sentence on all other counts. Other conditions of the community control portion of the sentence required the Respondent to pay \$774.50 in investigative costs to the Organized Crime Division, continue in sexual therapy, and required that he not accept employment in video stores or any establishment where adult magazines or videos are sold.

4. After his pleas were accepted by the Court, the Respondent notified the Florida Real Estate Commission of the court's judgment and sentence by letter on May 3, 1989.

Mitigation

5. In mitigation, the Hearing Officer finds that the Respondent has never had a complaint filed against him during the eleven years he has been licensed and actively engaged in the sale of real estate in Florida.

6. The Respondent realizes that his interest in pornography is prurient, and he is sincerely involved in the sexual therapeutic program.

7. The Respondent has a supportive family which is anxious to assist him in overcoming his problem.

8. The charges filed against the Respondent in the Information were based upon one criminal episode which involved eleven pornographic films or tapes.

CONCLUSIONS OF LAW

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

10. Section 475.25(1)(f), Florida Statutes, empowers the Florida Real Estate Commission to revoke, suspend, or otherwise discipline the real estate license of the Respondent if he "has been convicted or found guilty, regardless of adjudication, of a crime ... which ... involves moral turpitude..."

11. A plea of guilty is considered a conviction for purposes of this statute, and the Florida Real Estate Commission is permitted to use the authenticated records of the court as prima facie evidence of such guilt for purposes of these proceedings. Bruner v. Board of Real Estate, Department of Professional Regulation, 399 So.2d 4 (Fla. 5th DCA 1981).

12. The legal issue which must be determined in these proceedings is whether the knowing possession of the pornographic materials and the intent to show, sell or distribute some of them, is moral turpitude.

13. The case of State ex rel. Tullidge v. Hollingsworth, 146 So. 666 (Fla. 1933), defines "moral turpitude" as follows:

Moral turpitude involves the idea of inherent baseness or depravity in the private social relations or duties owed by man to man or man to society.

* * *

It has also been defined as anything done contrary to justice, honesty, principle or good morals...

14. As stated previously, Counts I through IV of the Information charged the Respondent with unlawful and knowing possession of four motion pictures containing sexual conduct by children. Although there are no Florida cases which describe the possession of such materials as "moral turpitude," Section 827.071(5), Florida Statutes, makes it clear that knowing possession of such materials is a crime. If individuals do not attempt to procure such materials, it is reasonable to conclude that fewer children will be subjected to such exploitation and mistreatment. Adults owe a duty to children not to debauch them by placing them in pornographic films. The support of the child pornography market is morally despicable or abhorrent, and meets Florida's definition of "moral turpitude."

15. In the Matter of Wolff, 490 A.2d 1118 (Wash. D.C. App. 1985), the Federal District Court determined that the sale of photographs depicting minors in sexual acts by an attorney to an undercover police officer was moral turpitude. The court looked to the specific facts of the case and found that "... his distribution of the photographs and the surrounding circumstances constituted conduct contrary to justice, modesty, and good morals." Because the findings of the court in Wolff meet a definition of "moral turpitude" which is similar to the standard that has been established in Florida for fifty-seven

years, it is reasonable to conclude that Respondent Rosenberg committed a crime involving moral turpitude when he knowingly procured the movies containing sexual conduct by children.

16. The allegations set forth in the Information which state that the Respondent intended to sell, show, or distribute the obscene materials described in Counts V-XI, do not make him guilty of moral turpitude. It was alleged that these films or videotapes lacked serious literary, artistic, political, or scientific value, and they are considered to be obscene materials in Florida. The Florida definition of "moral turpitude" involves ethical values and a general conformity to the principles of right and wrong. Respondent's intent to show, sell, or distribute these obscene materials in violation of the obscenity laws makes the possession of the films and videotapes described in Counts V-XI of the Information crimes of moral turpitude for the purposes of this proceeding.

17. Chapter 21V-24, Florida Administrative Code, set forth the disciplinary guidelines which are applied to discipline cases. The minimum penalty for a violation of Section 475.25(1)(f), Florida Statutes, is a reprimand and/or a fine up to \$1,000.00 per count. The maximum penalty is up to 7 years suspension or revocation.

RECOMMENDATION

Based upon the foregoing, and having reviewed the mitigating factors presented by Respondent at hearing, it is recommended:

1. That Respondent David Rosenberg be found guilty of having violated Section 475.25(1)(f), Florida Statutes, as set forth in the Administrative Complaint.

2. That the Respondent's real estate broker's license be suspended for a period of four years in accordance with the guidelines set forth in Rule 21V-24.001, Florida Administrative Code. This recommendation aligns itself with the sentence of the circuit court judge who has given Respondent the opportunity to be placed in a community control program with probation over a five-year period in order to receive sexual therapy and repay his debt to society for having committed crimes which violate Florida's obscenity laws. As one year of the sentence imposed by the court has passed, the recommended four-year suspension would run concurrently with the remaining term of the Respondent's sentence.

RECOMMENDED this 7th day of May, 1990, in Tallahassee, Leon County, Florida.

VERONICA E. DONNELLY
Hearing Officer
Division of Administrative Hearings
1230 Apalachee Parkway
Tallahassee, FL 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of May, 1990.

APPENDIX TO RECOMMENDED ORDER, CASE NO. 89-5858

Petitioner's proposed findings of fact are addressed as follows:

1. Accepted.
2. Accepted. See HO #1.
3. Accepted. See HO #2.
4. Accepted. See HO #2 and #3.
5. Rejected. Irrelevant.

Respondent's proposed findings of fact are addressed as follows:

1. Rejected. Improper legal conclusion and irrelevant.
2. Rejected. Immaterial and Irrelevant.
3. Rejected. Irrelevant. A collateral attack on Respondent's plea is improper as this is not the proper forum for such review.
4. Rejected. Irrelevant.
5. Accept that adjudication was withheld on all but Counts V-VIII in the Information. See HO #3. Accept that Respondent will be receiving therapy. See HO #3. Accept that Respondent has no prior arrests. The state of Respondent's future record once he successfully completes his sentence is irrelevant and is rejected as irrelevant. The assertion that child pornography is a victimless crime is rejected as contrary to fact.
6. Accept subparagraphs 6(a) - (d). See HO #4 and HO #5. Reject subparagraph 6(e). Contrary to fact. See HO #2 and HO #3.

COPIES FURNISHED:

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