

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CHESTER EDWARD ZAREMBA,)
)
 Petitioner,)
)
 vs.) CASE NO. 94-1229
)
 DEPARTMENT OF BANKING AND FINANCE,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to Notice, this cause was heard by Linda M. Rigot, the assigned Hearing Officer of the Division of Administrative Hearings, on June 6, 1994, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Richard C. Booth, Esquire
Booth & Associates
Post Office Box 12639
Tallahassee, Florida 32302

For Respondent: Cassandra A. Evans, Esquire
H. Richard Bisbee, Esquire
Department of Banking and Finance
Office of the Comptroller
The Capitol, Suite 1302
Tallahassee, Florida 32399-0350

STATEMENT OF THE ISSUE

The issue presented is whether Petitioner's application for licensure as a mortgage broker should be granted.

PRELIMINARY STATEMENT

By letter dated December 14, 1993, the Department advised Petitioner that his application for licensure as a mortgage broker was denied, and Petitioner timely requested a formal hearing regarding that denial. This cause was thereafter transferred to the Division of Administrative Hearings to conduct a formal proceeding.

Petitioner testified on his own behalf and W. T. Sims testified on behalf of the Department. Additionally, Petitioner's Exhibits numbered 1 and 2, Petitioner's late-filed Exhibit numbered 3, and the Department's Exhibits numbered 1-3 were admitted in evidence.

Both parties submitted post-hearing proposed findings of fact in the form of proposed recommended orders. A specific ruling on each proposed finding of fact can be found in the Appendix to this Recommended Order.

FINDINGS OF FACT

1. Petitioner is 54 years of age and has been a resident of the State of Florida for eighteen years.

2. On January 28, 1983, Petitioner was convicted of six counts of mortgage fraud in the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida, Case No. 81-3411CF. That conviction arose out of certain conduct by Petitioner in approximately 1980. Petitioner was sentenced to five years of confinement, with credit for time served, and twelve years of probation. That conviction was affirmed by the District Court of Appeal on July 5, 1984, and re-hearing was denied on August 1, 1984. *Zaremba v. State*, 452 So.2d 1026 (Fla. 4th Dist. 1984).

3. On February 25, 1987, Petitioner entered a plea of nolo contendere to the offense of grand theft in the Circuit Court of the Twentieth Judicial Circuit in and for Lee County, Florida, Case No. 86-0836CF. On that same date, he was adjudicated guilty and placed on probation for a period of five years to run concurrently with the probation imposed by the Circuit Court of Broward County in Case No. 81-3411CF. That charge arose out of a dispute with his employer, and Petitioner was required to make restitution during his probationary period in the amount of \$16,082 pursuant to an order entered by the Court on March 5, 1987.

4. Petitioner's probation was terminated in Case No. 81-3411CF on October 5, 1993, and in Case No. 86-0836CF on April 12, 1993. Petitioner timely made restitution in the total amount ordered by the Court.

5. For the last eight years Petitioner has been employed by Atlantic Real Estate Company in Pompano Beach, Florida, a developer of time-share properties. As the closing officer for that company, Petitioner reviews the closing documents, including mortgages, deeds, and contracts.

6. As the closing officer, Petitioner also handles the money and has for the last eight years. He accepts down payments and closing costs from people purchasing units by the week. He takes the money home at night and deposits it in the bank the next morning. Although he handles thousands of dollars a week in this manner, none of the money which has come into his possession has ended up "missing," and no one has ever accused him of improperly handling any of that money.

7. Petitioner has been licensed as a real estate salesperson by the State of Florida since 1991. Although his application for that licensure was initially denied as a result of his criminal history, Petitioner requested an informal hearing before the Florida Real Estate Commission, and the Commission granted his application for a license. That real estate salesperson's license is current, having been renewed by the Department of Professional Regulation, Division of Real Estate, on August 7, 1993.

8. Petitioner has also successfully handled monies belonging to others as a member of the Board of Directors of the Silver Seas Beach Club, a time-share resort on the Fort Lauderdale "strip." In that capacity, Petitioner has handled

money from sales and has also operated the front desk on Saturdays receiving money from people renting units in that resort. He has so handled that money for four years.

9. Petitioner was considered to be "an exemplary probationer" by his probation officer. Petitioner also enjoys a reputation for being competent, honest, reliable, and trustworthy in his handling of money belonging to other persons and in his business dealings, as evidenced by letters from his employer, from the management at Silver Seas, and from a local practicing attorney who was formerly employed by the State of Florida as a prosecutor.

10. Petitioner has rehabilitated himself since the time of his activities which resulted in his two convictions. Petitioner has shown himself to be trustworthy and of good character.

11. On July 29, 1993, Petitioner submitted to the Department his application for licensure as a mortgage broker. In that application he disclosed his two convictions and has provided to the Department all information requested relative thereto. That application reveals that Petitioner has complied with all procedures prerequisite to licensure, including filing the application, paying the appropriate application fee, providing fingerprints, attending the required mortgage broker education courses, and successfully passing the examination for licensure. By letter dated December 14, 1993, the Department denied Petitioner's application for licensure based solely on Petitioner's convictions.

12. In denying Petitioner's application, the Department did not conduct any investigation as to Petitioner's rehabilitation or good character. Rather, the Department relied on its "policy" that no application for licensure as a mortgage broker will be granted if the applicant has ever been convicted of a crime involving fraud, dishonest dealing, or acts involving moral turpitude.

CONCLUSIONS OF LAW

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

14. The Department's letter of denial recites that Petitioner's application for licensure is denied based on Section 494.0041(2)(a), Florida Statutes. Section 494.0041 provides, in part, as follows:

- (1) Whenever the department finds a person in violation of an act specified in subsection (2), it may enter an order imposing one or more of the following penalties against the person:
 - (a) Revocation of a license or registration.
 - (b) Suspension of a license or registration subject to reinstatement upon satisfying all reasonable conditions that the department specifies.
 - (c) Placement of the licensee, registrant, or applicant on probation for a period of time and subject to all reasonable conditions that the department specifies.
 - (d) Issuance of a reprimand.

(e) Imposition of a fine in an amount not exceeding \$5,000 for each count or separate offense.

(f) Denial of a license or registration.

(2) Each of the following acts constitutes a ground for which the disciplinary actions specified in subsection (1) may be taken:

(a) Being convicted or found guilty, regardless of adjudication, of a crime in any jurisdiction which involves fraud, dishonest dealing, or any other act of moral turpitude.

15. Accordingly, the Department is authorized to deny a license to a person who had been convicted of a crime involving fraud, dishonest dealing, or any other act of moral turpitude. Petitioner has offered no evidence or argument that his convictions were not for crimes of that nature. Petitioner's position in this proceeding is that he is entitled to licensure due to the lapse of time since his wrongful conduct and his subsequent rehabilitation and good character.

16. The statutory language provides that the Department may deny a license. That language is not mandatory; rather, it authorizes the Department to exercise its discretion on a case-by-case basis. The Department has not done so in this case. Instead, the Department has relied on its "policy" which automatically makes the presence of such a conviction a bar to licensure. There is no such statutory bar in that statute.

17. No evidence was offered as to the dates of the activities which formed the basis for the criminal charges. The appellate court opinion in the case involving mortgage fraud does recite one count from the Information filed in that case, which alleges Petitioner's wrongful conduct as occurring on February 29, 1980. All of the activities complained of in that case necessarily occurred prior to early 1981, as reflected by the case number 81-3411CF. Similarly, the date of the conduct complained of in the case in which Petitioner pled nolo contendere to the offense of grand theft necessarily occurred prior to early 1986 as reflected by that case number 86-0836CF. Accordingly, the most recent criminal activity engaged in by Petitioner occurred at least eight years, and maybe more, prior to the final hearing in this cause.

18. The evidence is uncontroverted that Petitioner served his sentence of confinement, successfully completed his probationary periods and made full restitution as required by the courts which determined the appropriate punishment by which Petitioner would pay his debt to society for his criminal conduct. Petitioner has done so. Further, over the last eight years Petitioner has repeatedly been entrusted with substantial sums of money belonging to other persons, with no resulting allegations of wrongdoing. He has also achieved for himself a reputation for being a person who is honest, reliable, trustworthy, and of good character. Petitioner's evidence that he has rehabilitated himself is uncontroverted. The Department offered no evidence to contradict Petitioner's evidence; the Department simply relied on its "policy" that such a conviction prevents a person from ever becoming licensed as a mortgage broker. The Department's position is not reasonable, nor is it supported by the facts in this case.

19. Petitioner has shown he is entitled to licensure. This conclusion is buttressed by the fact that Petitioner has been licensed by another state agency, the Department of Professional Regulation, Division of Real Estate, as a real estate salesperson in the State of Florida after the Florida Real Estate Commission considered Petitioner's application on its merit and Petitioner's presentation at the informal hearing conducted by the Commission. Petitioner has been licensed since 1991 in a profession closely related to that of mortgage broker. There is no suggestion that the fiduciary responsibilities of mortgage brokers handling money and documents evidencing ownership are greater than the fiduciary responsibilities of real estate salespersons engaging in those activities.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a Final Order be entered granting Petitioner's application for licensure as a mortgage broker.

DONE and ENTERED this 3rd day of August, 1994, at Tallahassee, Florida.

LINDA M. RIGOT
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of August, 1994.

APPENDIX TO RECOMMENDED ORDER DOAH CASE NO. 94-1229

1. Petitioner's proposed findings of fact numbered 9-13 have been adopted either verbatim or in substance in this Recommended Order.
2. Respondent's proposed findings of fact numbered 1, 8 and 9 have been adopted either verbatim or in substance in this Recommended Order.
3. Respondent's proposed findings of fact numbered 2-7 and 11 have been rejected as being irrelevant to the issues under consideration in this cause.
4. Respondent's proposed finding of fact numbered 10 has been rejected as being unnecessary for determination of the issues involved herein.
5. Respondent's proposed findings of fact numbered 12 and 13 have been rejected as not constituting findings of fact but rather as constituting argument of counsel.

COPIES FURNISHED:

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Honorable Gerald Lewis
Department of Banking and
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Comptroller, State of Florida
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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to this Recommended Order. All agencies allow each party at least 10 days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should contact the agency that will issue the final order in this case concerning agency rules on the deadline for filing exceptions to this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.

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AGENCY FINAL ORDER

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CHESTER EDWARD ZAREMBA,

Petitioner,

vs.

DOAH Case No: 94-001229
Administrative Proceeding
No. 3244-F-1/94

DEPARTMENT OF BANKING
AND FINANCE,

Respondent.

_____ /

FINAL ORDER AND NOTICE OF RIGHTS

This matter has come before the undersigned as Head of the Department of Banking and Finance, Division of Finance ("Department") for the entry of a Final Order in the above- referenced proceeding. Upon a review of the entire record of this proceeding and due consideration thereof, the Recommended Order by the Hearing Officer is adopted in part and rejected in part, as more particularly set forth hereinafter.

BACKGROUND

This matter arose when the Department issued its Denial of Application for Licensure as a Mortgage Broker on December 14, 1993. Petitioner Chester Edward Zaremba ("Zaremba") filed his Petition for Formal Proceeding dated December 23, 1993. Petitioner Zaremba's Petition for Formal Proceeding was granted, and this matter was transferred by the Department to the Division of Administrative Hearings for the assignment of a Hearing Officer to conduct the formal hearing. A formal hearing was held in Tallahassee, Florida on June 6, 1994. On August 3, 1994, the Hearing Officer from the Division of Administrative Hearings submitted her Recommended Order ("Recommended Order") in this proceeding, a copy of which is attached hereto as Exhibit "A". Said Recommended Order recommended that the Department enter a Final Order granting Petitioner Zaremba's request for a mortgage broker's license.

On August 18, 1994, the Department filed its Exceptions to the Recommended Order, a copy of which is attached hereto as Exhibit "B". No exceptions were filed by the Petitioner.

Based on a complete review of the record presented in this proceeding, the following rulings on exceptions, findings of fact, conclusions of law and final agency action are entered herein.

RULINGS ON THE EXCEPTIONS OF THE DEPARTMENT

First Exception: The Department's exception to paragraph (12) of the Findings of Fact of the Hearing Officer's Recommended Order is hereby rejected. *Heifetz v. Department of Business Regulation*, 475 So.2d 1277, (Fla. 1st DCA 1985).

Second Exception: The Department's exception to paragraph (17) of the Conclusions of Law of the Hearing Officer's Recommended Order is hereby accepted. Sections 494.0041(1)(f) and (2)(a), Florida Statutes provide that the Department may deny a license request where an applicant has been "convicted or found guilty, regardless of adjudication, of a crime in any jurisdiction which involves fraud, dishonest dealing, or any other act of moral turpitude." The Hearing Officer's conclusion that no evidence was offered as to the dates of the activities which formed the basis for the criminal charges is irrelevant with respect to the statutory grounds for denial. The agency's interpretation of the statute must be upheld if it is not unreasonable or outside the range of possible interpretations. *Pershing Industries v. Department of Banking and Finance*, 591 So.2d 991 (Fla. 1st DCA 1991); *Motel 6, Operating L. P. v. Department of Business Regulation*, 560 So.2d 1322 (Fla. 1st DCA 1990)

Third Exception: The Department's exception to paragraph (18) of the Conclusions of Law of the Hearing Officer's Recommended Order is hereby accepted. The denial was authorized pursuant to Sections 494.0041(1)(f) and (2)(a), Florida Statutes. Further, the Petitioner stipulated within the Prehearing Stipulation Agreement that he had been convicted of six counts of mortgage fraud and the offense of grand theft. Therefore, in accordance with Sections 494.0041(1)(f) and (2)(a), Florida Statutes, the Department's initial denial of Petitioner's Application for Licensure as a Mortgage Broker was statutorily authorized, was reasonable, and was supported by the case facts.

Fourth Exception: The Department's exception to paragraph (19) of the Conclusions of Law of the Hearing Officer's Recommended Order is hereby accepted. The nature of the review process engaged in by the Department of Professional Regulation, Division of Real Estate ("DPR") with respect to Petitioner's real estate sales person license application, and the fact that Petitioner was subsequently licensed by DPR has no relevance whatsoever with respect to the Department's evaluation of whether Petitioner should be granted the requested mortgage broker's license. The Department is charged with the responsibility of regulating mortgage brokers for the welfare of the general public. Petitioner was previously convicted of six counts of mortgage fraud, directly related to the area of the Department's licensure provisions. Whether the DPR deems it appropriate to license Petitioner has no bearing on whether the Department should make the same determination. Further, Petitioner's presentation at the DPR hearing has no relevance with respect to this case. Accordingly, the Department's exception to paragraph (19) of the Conclusions of Law of the Hearing Officer's Recommended Order is hereby accepted.

FINDINGS OF FACT

The Hearing Officer's Findings of Fact as contained within the Recommended Order, paragraphs (1) - (12) are accepted as true and correct and are adopted as the Findings of Fact of this Final Order and Notice of Rights.

CONCLUSIONS OF LAW

The Hearing Officer's Conclusions of Law, paragraphs (13) - (16) of the Recommended Order are adopted herein as the Conclusions of Law of this Final Order and Notice of Rights.

Paragraph (18) of the Hearing Officer's Conclusions of Law of the Recommended Order is hereby adopted in part and rejected in part as set forth within the third exception, *infra*.

Paragraphs (17) and (19) of the Hearing Officer's Conclusions of Law are rejected, as set forth in the second and fourth exceptions, *infra*.

STATEMENT OF FINAL AGENCY ACTION

Having ruled on all of the exceptions filed by the Department, and having reviewed the complete record, including the proposed Recommended Orders filed by the parties, it is accordingly ORDERED:

Petitioner's Application for Licensure as a Mortgage Broker is hereby GRANTED.

DONE and ORDERED this 16th day of September, 1994, in Tallahassee, Leon County, Florida.

GERALD LEWIS, as Comptroller
and Head of the Department of
Banking and Finance, Division
of Finance

COPIES FURNISHED:

Linda G. Dilworth, Director
Division of Finance

H. Richard Bisbee
Deputy General Counsel

NOTICE OF RIGHT TO JUDICIAL REVIEW

PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE DIVISION OF ADMINISTRATIVE HEARINGS AND A SECOND COPY, ACCOMPANIED BY FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, OR WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Final Order with Notice of Rights was furnished by Regular U.S. Mail to Richard C. Booth, Esquire, Booth & Associates, Post Office Box 12639, Tallahassee, Florida 32308, this 16th day of September, 1994.

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