

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF FLORIDA LAND SALES)
CONDOMINIUMS AND MOBILE HOMES,)
)
Petitioner,)
vs.) CASE NO. 94-4258
)
THOMAS I. DAVIS, JR.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its designated Hearing Officer, Joyous D. Parrish, held a formal hearing in the above-styled case on January 11, 1995, in Miami, Florida.

APPEARANCES

For Petitioner: E. Harper Field, Senior Attorney
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-1007

For Respondent: David M. Goldstein
LAW OFFICE OF DAVID M. GOLDSTEIN
100 Southeast 2nd Street
Suite 2750 International Place
Miami, Florida 33131

STATEMENT OF THE ISSUES

The central issue in this case is whether Respondent's yacht and ship salesman's license should be disciplined for the reasons set forth in the notice of intent to revoke license dated June 14, 1994.

PRELIMINARY STATEMENT

This case began on June 14, 1994, when the Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums and Mobile Homes (Department) filed a notice of intent to revoke license for the Respondent, Thomas I. Davis, Jr. The notice alleged that Respondent had procured a yacht and ship salesman's license by fraud, misrepresentation, falsification or deceit by failing to disclose information on the application for licensure. More specifically, the Department claimed that Respondent had received a censure and a \$20,000 fine from the National Association of Securities Dealers (NASD) and that such sanction had not been disclosed in the appropriate location on the application.

The notice provided that absent a showing of good cause, Respondent's license would be revoked by the Department. Respondent filed a denial of allegations and request for formal hearing on July 25, 1994. Thereafter, the matter was forwarded to the Division of Administrative Hearings for formal proceedings on July 29, 1994.

At the hearing, the Department presented the testimony of the following witness: Peter P. Butler, a senior management analyst II who is the section head for general regulations over yacht and ship brokers for the Department. Its exhibit numbered 1, the application for a yacht and ship broker or salesman license for the Respondent, and the deposition testimony of Geraldine Harrison were admitted into evidence. The Department requested, and official recognition has been taken, of the following provisions: Chapter 326, Florida Statutes; and Chapter 61B-60, Florida Administrative Code.

The Thomas I. Davis, Jr. and Leroy Sorrell testified on behalf of Respondent. His exhibits numbered 1, 3, 4, 5, and 6 were admitted into evidence. Also included with Respondent's exhibits is Respondent's exhibit A which was filed in support of Respondent's ore tenus motion in limine. Such motion sought to limit Petitioner's evidence to matters addressed by question 12 of the application for licensure and to disallow evidence as to question 11. The motion was denied.

The charging instrument in this case, that is, the notice of intent to revoke license, alleged that Respondent had:

Pursuant to Sections 326.006(2)(f)(1), Florida Statutes, have allegedly procured a Yacht and Ship Salesman's License by fraud, misrepresentation, falsification, or deceit and the Division intends to revoke your Yacht and Ship Salesman's license specifically on the following grounds:

On April 30, 1993, the Section of General Regulation received an application from Thomas I. Davis, Jr. for a Yacht and Ship Salesman's License. A license was issued on May 10, 1993. On May 16, 1994, the Section obtained a report from the Department of Banking and Finance revealing that in 1991 Thomas I. Davis received: A censure, a fine of \$20,000, and a suspension of all capacities from the National Association of Securities Dealers. This was not revealed in the appropriate portion of the application. Further, through omission of the above on said application, it is alleged that a violation of Section 59.791, F.S., pertaining to falsely swearing to a material statement on a license application, has occurred. [Emphasis added.]

No additional information was alleged as to the "appropriate portion" of the application. Respondent assumed, erroneously, that only questions 12(a) and 12(b) applied to the allegation. The Petitioner's unilateral prehearing statement (timely filed in accordance with the order entered in this cause), clearly identified as an issue of fact to be litigated:

Whether Respondent's response in the negative to questions 11 and or 12 on his application is a violation of Section 326.006(2)(f)(1), or Section 559.791, Florida Statutes authorizing the Division to revoke Respondent's license.

Thus, Respondent was on notice of the allegations against him and the underlying facts which reportedly supported Petitioner's claim. Respondent failed to timely respond to the order for prehearing statement. Further, an order granting Petitioner's motion to compel discovery and to show cause was entered after Respondent failed to respond to discovery. Had Respondent complied with the order for prehearing statement, he would have known Petitioner's position as to the "appropriate portion" of the application even earlier.

In connection with Respondent's failure to comply with the orders previously identified, Petitioner sought sanctions in the form of attorneys fees and costs. While a ruling on the request for sanctions was reserved, in light of the recommendation of this case, it is determined that additional sanctions need not be imposed.

The transcript of the proceeding was filed on February 6, 1995. The parties waived the requirements of Rule 28-5.402, Florida Administrative Code, and agreed to submit their proposed findings of fact within fifteen days of the transcript. Specific rulings on the proposed findings of fact are included in the appendix at the conclusion of this order.

FINDINGS OF FACT

1. The Department is the state agency charged with the responsibility to regulate persons pursuant to Chapter 326, Florida Statutes.

2. On April 30, 1993, the Department received an application for a yacht and ship broker or salesman license (the application) submitted by Respondent, Thomas I. Davis, Jr.

3. The application provided, in pertinent part:

11. LICENSES AND CERTIFICATES: Have you now or have you ever been licensed or certified in any other profession such as real estate, insurance, or securities in Florida or any other state?

Yes_____ No_____ If you answered yes, please describe:

Profession License #

First Obtained Status of License

12. (a)Has any license, certification, registration or permit to practice any regulated profession or occupation been revoked, annulled or suspended in this or any other state, or is any proceeding now pending? Yes_____ No_____

(b) Have you ever resigned or withdrawn from, or surrendered any license, registration or permit to practice any regulated profession, occupation or vocation which such charges were pending?
Yes___ No___

If your answer to questions (a) or (b) is Yes, attach a complete, signed statement giving the name and address of the officer, board, commission, court or governmental agency or department before whom the matter was, or is now, pending and give the nature of the charges and relate the facts.

4. In response to the application questions identified above, Respondent entered the following answers: "No" as to questions 11, 12(a), and 12(b).

5. As a result of the foregoing, Respondent was issued a yacht and ship salesman's license on May 10, 1993.

6. Thereafter, the Department learned that Respondent had been censured by the NASD. In a decision entered by that body accepting Respondent's offer of settlement, Respondent was given a censure, a fine of \$20,000.00, and a suspension in all capacities from association with any member for a period of two (2) years with the requirement that at the conclusion of such suspension that he requalify by examination for any and all licenses with the Association.

7. The censure also provided a specific payment plan for the \$20,000 fine which was assessed. To date, Respondent has not complied with that provision of the settlement.

8. From 1973 through 1991, Respondent was registered with several different firms pursuant to Chapter 517, Florida Statutes.

9. Additionally, Respondent has been licensed to sell securities in the following states: California, Colorado, Connecticut, Delaware, Idaho, Illinois, Louisiana, Maine, Maryland, Nevada, and New York. Respondent has also been licensed in Washington, D.C. and Puerto Rico.

10. Respondent has been a licensed stock broker with the Securities and Exchange Commission since 1971.

11. Respondent answered questions 11 and 12 (a) and (b) falsely. Respondent knew he was licensed to sell securities and knew of the sanction from the NASD at all times material to the entry of the answers.

12. Pursuant to Rule 61B-60.003, when the Department receives an application for licensure which is in the acceptable form, it is required to issue a temporary license. Had the Respondent correctly answered questions 11 and 12 on the application, the Department would not have issued Respondent's license.

CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings.

14. The Department has the burden of proof to establish by clear and convincing evidence that the Respondent's license should be revoked.

15. Section 326.006(2)(f)1., Florida Statutes, provides:

The division may suspend or revoke the license of a broker or salesman who has:

1. Procured a license for himself or another by fraud, misrepresentation, falsification, or deceit.

16. The Department has established that by entering false answers to the application, Respondent misrepresented information pertinent to his obtaining the license. Respondent's explanations in this matter have not been deemed credible.

RECOMMENDATION

Based on the foregoing, it is, hereby,

RECOMMENDED:

That the Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums, and Mobile Homes, enter a final order dismissing Respondent's challenge to the notice of intent and revoking his license.

DONE AND RECOMMENDED this 13th day of March, 1995, in Tallahassee, Leon County, Florida.

JOYOUS D. PARRISH
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 13th day of March, 1995.

APPENDIX TO RECOMMENDED ORDER, CASE NO. 94-4258

Rulings on the proposed findings of fact submitted by the Petitioner:

1. Paragraphs 1 through 9, 11, 13, and 15 through 17 are accepted.
2. Paragraph 10 is rejected as repetitive.
3. Except as to findings reached above, paragraphs 12 and 14 are rejected as irrelevant. It is found that Respondent falsely answered question 11.

Rulings on the proposed findings of fact submitted by the Respondent:

Respondent's proposed findings of fact are rejected as they do not comply with Rule 60Q-2.031(3), Florida Administrative Code. However, to the extent findings do not conflict with the findings of fact above, they have been accepted. Such proposed findings of fact are paragraphs: 1, 7 and 8. The remaining paragraphs are rejected as they are not supported by the record cited (none), irrelevant, argument, or contrary to the weight of the credible evidence.

COPIES FURNISHED:

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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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DISTRICT COURT OPINION

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

JULY TERM 1996

THOMAS I. DAVIS, JR.,

Appellant,

NOT FINAL UNTIL THE TIME EXPIRES
TO FILE REHEARING MOTION,
AND, IF FILED, DISPOSED OF.

vs.

CASE NO. 95-2849
DOAH CASE NO. 94-4258

DEPARTMENT OF BUSINESS AND
PROFESSIONAL REGULATION
DIVISION OF FLORIDA LAND
SALES CONDOMINIUMS AND
MOBILE HOMES,

Appellee.

_____ /

Decision filed July 3, 1996

Appeal from the Department of Business and Professional Regulation Division of
Florida Land Sales Condominiums and Mobile Homes; L.T. Case No. 94-4258.

David M. Goldstein of David M. Goldstein P.A., Miami, for Appellant.

Lisa S. Nelson, Deputy General Counsel, Department of Business and Professional
Regulation, Tallahassee, for Appellee.

PER CURIAM

AFFIRMED

GLICKSTEIN, FARMER and GROSS, JJ., concur.