

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. 95-0201
)
JAMES RICH,)
)
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 May 3, 1995, in Fort Lauderdale, Florida.

APPEARANCES

For Petitioner: E. Harper Field, Esquire
Department of Business
and Professional Regulation
1940 North Monroe Street, Suite 60
Tallahassee, Florida 32399-0792

For Respondent: James Rich, pro se
c/o Bob Anslow Yacht Sales
400-B North Flagler Drive
West Palm Beach, Florida 33401

STATEMENT OF THE ISSUE

The issue presented is whether Respondent is guilty of the allegations contained in the Notice to Show Cause filed against him, and, if so, what disciplinary action should be taken against him, if any.

PRELIMINARY STATEMENT

Petitioner filed a Notice to Show Cause alleging that Respondent had violated a rule regulating his conduct as a licensed yacht salesman, and Respondent timely requested a formal hearing regarding that allegation. This cause was thereafter transferred to the Division of Administrative Hearings to conduct a formal proceeding.

Petitioner presented the testimony of James J. Courchaine and Peter P. Butler, Sr. Respondent James Rich testified on his own behalf and presented the testimony of William Fiermonti. Additionally, Petitioner's composite exhibit numbered one was admitted in evidence.

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

FINDINGS OF FACT

1. At all times material hereto, Respondent has been a licensed yacht salesman. At the time of the transaction which is the subject of this proceeding, Respondent was employed by Van Hart Yacht Sales, Inc.

2. Respondent had customers who were interested in purchasing a 37' Irwin sailboat. Respondent checked the computer listings and found that Northside Marine Sales, a yacht brokerage firm, had a listing for a 1979 37' Irwin known as the "Ark Royal". Respondent telephoned Northside and spoke with a secretary. She advised him that the man most familiar with the vessel was not there but that if Respondent sent his customers to Northside, someone would show them the vessel.

3. Respondent's customers, Paul Copeland and Val S. Meeker, went to Northside Marine Sales to look at the boat. When they arrived there, only William Fiermonti was present. Fiermonti was a salesman for new boats at Northside and, accordingly, did not need to be licensed as a yacht broker or salesman, and he was not so licensed. Fiermonti told Copeland and Meeker that he knew nothing about sailboats and could not assist them, but he could let them look at the boat. He then took them to the boat and unlocked it. He told them to lock it when they were finished, and he left them alone to look at the boat.

4. On March 7, 1993, Copeland and Meeker entered into a Purchase Agreement and Deposit Receipt with the owners of the vessel Ark Royal. The contract called for final payment and delivery of the vessel to occur on May 1, 1993. The purchase agreement is a standard form contract on Van Hart Yacht Sales, Inc., letterhead. Paragraph numbered 15 in that contract calls for the seller to pay Van Hart Yacht Sales, Inc., a commission of ten percent of the gross sale price. William Fiermonti witnessed a signature on that contract.

5. On March 23, 1993, Maryland National Bank, the lien holder on the yacht, sent to Fiermonti correspondence stating the bank's agreement to the sale of the vessel. A fax transmittal cover page dated March 24, 1993, reflects that Fiermonti sent something to Respondent with the notation that it was regarding the Ark Royal. On April 6, 1993, Respondent sent a fax transmittal to Fiermonti enclosing the "acceptance of vessel form", suggesting a closing date of April 24, 1993, and suggesting that the closing would probably be scheduled at the bank since the bank was holding the title.

6. The closing statement for the transaction was prepared by Respondent on Van Hart Yacht Sales, Inc., stationery. Respondent took the closing statement to the closing. He handled the closing and gave Northside a check for its share of the commission.

7. Fiermonti had no involvement in the transaction other than witnessing a signature on a document, contacting a bank to obtain a "pay-off" figure, transmitting to Respondent a document by fax, and receiving from Respondent a document by fax. The transmittal and document he received from Respondent, he gave to Robert Skidmore, the owner of Northside Marine Sales and a licensed yacht broker. Fiermonti received no commission as a result of the sale of the Ark Royal and did not expect to receive a commission. He did not attend the

closing. Fiermonti did not solicit the listing for the vessel. He did not offer the vessel for sale or sell it. He did not negotiate the contract for sale and had no involvement in the negotiations. In short, Fiermonti did not act as a salesman or broker as to the Ark Royal trans-action.

8. Similarly, Respondent correctly believed that he had located the yacht in question as a result of a listing by a licensed yacht broker. He further believed that he was "co-brokering" the vessel with Robert Skidmore.

9. A complaint was filed against Robert Skidmore and Northside Marine Sales concerning a different matter. While Petitioner's investigator was investigating that matter, he saw the fax transmittal sheets between Fiermonti and Respondent in Northside Marine Sales' records. The investigator contacted Respondent and requested copies of the documents related to the sale of the Ark Royal. Respondent transmitted the documents to the investigator that same day by fax transmittal. The investi-gator never interviewed Fiermonti regarding his role in the Ark Royal transaction.

10. On April 13, 1994, Petitioner issued a Notice to Show Cause against Robert Skidmore, alleging, among other things, that Skidmore had allowed unlicensed salemen to conduct brokered yacht transactions. In August of 1994 Skidmore and Petitioner entered into a Final Consent Order. That Final Consent Order specifi-cally recites that Skidmore desired to resolve the matter without the necessity of further proceedings and that Skidmore did not admit to any wrongdoing or violation of the statutes and rules regulating his conduct. The Findings of Fact section of that Final Consent Order did not include any finding of wrongdoing on Skidmore's part. Rather, the Findings of Fact section finds as facts only that Petitioner issued a Notice to Show Cause alleging statutory violations and then quotes the allegations made in the Notice to Show Cause. In other words, the factual findings include that a Notice to Show Cause was issued, not that the allegations in that Notice to Show Cause were true.

CONCLUSIONS OF LAW

11. The Division of Administrative Hearings has juris-diction over the parties hereto and the subject matter hereof. Section 120.57(1), Florida Statutes.

12. Chapter 326, Florida Statutes, authorizes Petitioner to license yacht and ship brokers and salesmen. Under the statutory definitions, licensure is only required when vessels which exceed 32' in length and which weigh less than 300 gross tons are bought or sold on behalf of another person, that is, used vessels. The sale of new vessels of any size or of used vessels 32' in length or less requires no licensure. Sections 326.002(1) and (4), Florida Statutes. The Notice to Show Cause filed herein alleges that Respondent from March 7, 1993, through May 1, 1993, co-brokered a yacht transaction for a 1979 37' Irwin sailboat with William Fiermonti, a salesman who was not licensed by Petitioner, in violation of Rule 61B-60.001(3)(a), Florida Administrative Code. Petitioner has failed to meet its burden of proof that such violation occurred.

13. It is uncontroverted that the Ark Royal is a used ves-sel of sufficient size requiring licensure of any broker involved in its sale and purchase. It is also uncontroverted that Fiermonti was not a licensed yacht broker or salesman at the time of the transaction in which Respondent, a licensed salesman, par-ticipated. Rule 61B-60.001(3)(a), Florida Administrative Code, provides that brokers and salesmen licensed by Petitioner will be deemed to have violated Chapter 326, Florida Statutes, ". . . if they transact business

with unlicensed brokers or salesmen otherwise subject to jurisdiction of chapter 326, Florida Statutes." Accordingly, the dispositive issue in this proceeding is whether Fiermonti acted as a broker or salesman as defined in Chapter 326. Section 326.002(1) and (3) provide the definitions which are controlling in this case, as follows:

(1) "Broker" means a person who, for or in expectation of compensation: sells, offers, or negotiates to sell; buys, offers, or negotiates to buy; solicits or obtains listings of; or negotiates the purchase, sale, or exchange of yachts for other persons.

* * *

(3) "Salesman" means a person who, for or in expectation of compensation, is employed by a broker to perform any acts of a broker.

14. Fiermonti does not meet the statutory definition of a salesman requiring licensure since the evidence is uncontroverted that Fiermonti neither received compensation nor expected to receive compensation, and no evidence was offered that Fiermonti was employed by his broker "to perform" the acts of a broker. Similarly, Fiermonti does not meet the definition of a broker since the evidence is uncontroverted that he did not receive compensation; that he did not expect to receive compensation; that he did not sell, offer to sell or negotiate the sale of the Ark Royal; that he did not buy, offer to buy, or negotiate to buy the Ark Royal, and that he did not solicit or obtain the listing on the Ark Royal. Rather, Fiermonti unlocked the boat, witnessed a signature, called a bank for a "pay-off figure", sent a document to a licensed yacht salesman at a licensed yacht broker-age firm, and received a fax transmittal. None of those activities is covered by Chapter 326, Florida Statutes.

15. Rather, as Respondent correctly argues, any person can act as a witness to a legal document, make a telephone call to a bank, and operate a fax machine without a license. The activities performed by Fiermonti are activities which are performed at any brokerage business, whether it be a yacht broker or a mortgage broker or a real estate broker, by a secretary or receptionist. The statutory definitions of broker and of salesman contemplate persons who negotiate the sale or purchase of a qualifying vessel with or on behalf of the buyer or the seller. There is no evidence that Fiermonti had any contact with the owner/seller of the vessel other than witnessing a signature, an act which could have been performed by even a stranger on the street. Similarly, there is no evidence that Fiermonti negotiated with the purchaser of the vessel or had any contact with the purchaser other than unlocking the boat, and telling the purchaser he could not be of assistance and to lock the boat when the purchaser was finished looking at it. Petitioner's strained construction of the term broker or salesman which it contends applies to Fiermonti is without basis in law or logic.

16. Since there is no evidence that Fiermonti acted as a broker or salesman subject to the jurisdiction of Chapter 326, Florida Statutes, there is no evidence that Respondent "co-brokered" the transaction with Fiermonti. Although on some level Fiermonti became Respondent's contact at Northside Marine Sales regarding this transaction, the statute only requires licensure of those persons in contact with the buyer or the seller and acting on behalf of either of them. Moreover, no evidence was offered as to who negotiated with the seller or with the purchaser during the Ark Royal transaction.

17. Finally, Petitioner's argument that Skidmore admitted in his Final Consent Order that he allowed Fiermonti to broker the Ark Royal transaction is contrary to the clear language of the Final Consent Order, which states the opposite.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a Final Order be entered finding Respondent not guilty of the allegations and dismissing the Notice to Show Cause filed against him.

DONE and ENTERED this 24th day of July, 1995, 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 24th day of July, 1995.

APPENDIX TO RECOMMENDED ORDER

1. Petitioner's proposed findings of fact numbered 2, 3, 5, and 6 have been adopted either verbatim or in substance in this Recommended Order.
2. Petitioner's proposed finding of fact numbered 1 has been rejected as not constituting findings of fact but rather as constituting a conclusion of law.
3. Petitioner's proposed finding of fact numbered 4 has been rejected since it is not supported by the evidence in this cause.
4. Respondent's first unnumbered paragraph has been rejected as not constituting a finding of fact but rather as constituting a conclusion of law.
5. Respondent's second unnumbered paragraph has been adopted either verbatim or in substance in this Recommended Order.

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.