

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

RICHARD E. PARKER, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 97-0809  
 )  
 DEPARTMENT OF BUSINESS AND )  
 PROFESSIONAL REGULATION, )  
 DIVISION OF FLORIDA LAND SALES, )  
 CONDOMINIUMS, AND MOBILE HOMES, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a Section 120.57(1) hearing was held in this case on October 14, 1997, in Tallahassee, Florida, before Stuart M. Lerner, a duly designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Stephen Marc Slepín, Esquire  
Slepín and Slepín  
114 East Park Avenue  
Tallahassee, Florida 33201-2684

For Respondent: Stephen S. Godwin, Esquire  
Department of Business and  
Professional Regulation  
Office of the General Counsel  
1940 North Monroe Street  
Tallahassee, Florida 32399-1007

STATEMENT OF THE ISSUES

Whether Petitioner's application for licensure as a yacht salesperson should be granted.

PRELIMINARY STATEMENT

On January 17, 1997, the Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums, and Mobile Homes (Department) issued a Notice of Intent to Deny License Application, which advised Petitioner of the following:

You are hereby notified by the Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums, and Mobile Homes, State of Florida, that the agency has been presented with evidence which, if true, is good and sufficient cause for it, pursuant to chapter 326, Florida Statutes, to deny your [yacht salesperson's] license application, and/or take affirmative action which in the judgment of the Division will carry out the purpose of chapter 326, Florida Statutes, said cause being for the following allegation(s):

1. On September 20, 1996, an application for a yacht salesperson's license was received from Richard Parker. Attachments to the application show he was convicted in the United States District Court, Southern District of Florida, of conspiracy to import cocaine. As such pursuant to Section 326.04(6)(a), [Parker] has failed to demonstrate good moral character.
  
2. The application for a yacht salesperson's license received from Richard Parker failed to contain all required information. The Division forwarded a letter noting the deficiencies to Richard Parker on October 1, 1996. The Division received a response from John J. Lynch, Esquire, on Richard Parker's behalf, on December 17, 1996, which corrected the deficiencies in the application.

The Department's Notice of Intent to Deny License Application further advised Petitioner of his right to request a Section

120.57(1) hearing on the Department's proposed action. On February 12, 1997, Petitioner, through counsel, filed with the Department a request for such a hearing. On February 18, 1997, the matter was referred to the Division of Administrative Hearings for the assignment of an administrative law judge to conduct the hearing Petitioner had requested.

As noted above, the hearing was held on October 14, 1997.<sup>1</sup> Three witnesses testified at the hearing: Peter Butler, head of the Department's Section of General Regulation; Petitioner; and Arthur Mass, Esquire, an acquaintance of Petitioner's.<sup>2</sup> In addition to the testimony of these three witnesses, eleven exhibits (Joint Exhibits 1 through 5, Petitioner's Exhibits 1 through 5, and Respondent's Exhibit 9) were offered and received into evidence.

At the conclusion of the evidentiary portion of the final hearing, the undersigned announced on the record that the deadline for filing proposed recommended orders was 15 days from the date of the filing with the Division of Administrative Hearings of the transcript of the final hearing. The hearing transcript was filed with the Division of Administrative Hearings on November 3, 1997. Petitioner and the Department timely filed their Proposed Recommended Orders on November 24, 1997. In making the recommendation contained in this Recommended Order, the undersigned has given careful consideration to these Proposed Recommended Orders.

Accompanying Petitioner's Proposed Recommended Order was a document entitled "Petitioner's Post-Hearing Proffer," which reads as follows:

Petitioner herewith proffers the October 13, 1997 letter to Peter P. Butler, Sr. from Assistant U.S. Attorney John C. Schlessinger re: Richard Parker.

Although this letter was purportedly sent to Mr. Butler that day prior to hearing herein of 10-14-97, and was supplied to opposing counsel by letter of 10-15-97,

Schlessinger's October 13, 1997, letter, which was appended to Petitioner's Post-Hearing Proffer, reads as follows:

I am writing on behalf of Richard Parker, an applicant for a license before the Dept. of Business & Professional Regulation.

Mr. Parker sought to cooperate with the United States Government and the DEA shortly after his arrest in 1991, and continued to render assistance in the investigation and prosecution of persons involved in narcotics trafficking for a period of several years. His efforts were outstanding, and included a mission outside of the United States that was accomplished at significant personal risk.

As a prosecutor in the case against Mr. Parker, I participated in numerous debriefings through which I became well acquainted with him and can render fair assessment of this man. It is my sincere belief that Mr. Parker is a person of good moral character and would be a credit to the profession that he now seeks to join. I hope that in reviewing his application you will consider his substantial efforts to repay his debt to society by any means. If you have any questions about Mr. Parker please feel free to give me a call . . . .

"Petitioner's Post-Hearing Proffer will be treated as a

motion to reopen the evidentiary record for purposes of receiving Schlessinger's October 13, 1997, letter into evidence. The motion is hereby denied inasmuch as the letter contains inadmissible opinion evidence concerning Petitioner's "good moral character" and otherwise provides no pertinent information that the record does not already reveal. See Wyatt v. State, 578 So. 2d 811, 813 (Fla. 3d DCA 1991)("[Section 90.405, Florida Statutes] does not permit evidence of character to be made by opinion."); Berry v. Department of Environmental Regulation, 530 So. 2d 1019, 1022 (Fla. 4th DCA 1988)(hearing officer "not compelled to reopen the hearing to accept . . . testimony" which "would be merely cumulative of other testimony" that was elicited at hearing); Southland Corporation v. Anaya, 513 So. 2d 203 (Fla. 1st DCA 1987)("[W]e conclude that there was no abuse of discretion by the deputy commissioner (dc) in failing to allow the e/c [employer/carrier] to reopen the case in order that additional evidence be presented" inasmuch as "[t]he evidence the e/c sought to introduce was merely cumulative, as considerable evidence on the same subject had already been introduced at the hearing.").

#### FINDINGS OF FACT

Based upon the evidence adduced at hearing and the record as a whole, the following findings of fact are made:

1. Petitioner is a 47-year old resident of Hollywood, Florida.

2. He is married and has a five-year old step-daughter.

3. His wife's father is the minister of the First Methodist Church in Hollywood.

4. Petitioner is an active member of his father-in-law's church. In recent years, he has volunteered a significant amount of his time to perform tasks on behalf of the church.

5. Petitioner is now, and has been since June of 1997, employed as a salesperson by Rex Yacht Sales (Rex) in Fort Lauderdale.

6. As a salesperson for Rex, he sells new boats and he also sells used boats that are 32 feet or less in length.<sup>3</sup>

7. Approximately, 75 percent of the sales he makes are of used boats.

8. Petitioner specializes in the sale of sailboats.

9. He possesses a considerable amount of knowledge concerning sailboats as a result of the years (since he was a young child) that he has devoted to sailing.

10. Petitioner owned, lived aboard, and captained a sailboat named the "Wave Dancer" from 1975 until the late 1980's.

11. He acquired the "Wave Dancer" in return for his participation in an illicit drug smuggling operation.

12. In 1975, when he was still living in his hometown of Port Washington, New York, Petitioner was approached by a childhood friend, Dan Locastro. Locastro advised Petitioner that he (Locastro) and his associates wanted to buy a sailboat to use

to transport marijuana from St. Thomas in the Virgin Islands to the New England coast. Locastro promised Petitioner that, if Petitioner were able locate a sailboat for them to purchase and if he thereafter successfully captained the newly purchased sailboat on its journey to and from the Virgin Islands, Petitioner could keep the sailboat.

13. Approximately a month later, Petitioner notified Locastro that he had located a sailboat for Locastro and his associates. The sailboat was the "Wave Dancer."

14. Locastro and his associates subsequently purchased the "Wave Dancer." They purchased the boat in the name of Richard Harrison.

15. Following the purchase of the "Wave Dancer," Petitioner, accompanied by Locastro, sailed the boat to an island near St. Thomas. There, 500 pounds of marijuana were loaded onto the "Wave Dancer." Petitioner then sailed the boat to the New England coast, where he delivered the marijuana.

16. Petitioner participated in this illicit smuggling operation because he wanted his own sailboat.

17. He was neither arrested, nor charged, for having participated in this operation.

18. As promised, Petitioner was allowed by Locastro and his associates to keep the "Wave Dancer" after the conclusion of operation.

19. The boat was subsequently titled in Petitioner's name.

20. For approximately 12 or 13 years, Petitioner (who was then single) lived in the Caribbean aboard the "Wave Dancer." He earned a living by taking tourists (usually one couple at a time) out in the water on his boat.

21. In the late 1980's, Petitioner decided to return to the United States to live with and care for his parents, who, because of their advanced age, required his assistance.

22. Before moving back to the United States, Petitioner put the "Wave Runner" up for sale.

23. He was unsuccessful in his efforts to sell the boat.

24. He discussed with a friend of his, Ken Fish, the possibility of Fish purchasing the boat for \$50,000.00, but no sale was consummated.

25. Petitioner was still the owner the "Wave Runner" when he flew to the United States and moved in with his parents (in their home).

26. He left the "Wave Runner" behind in the Virgin Islands in the care of his friend Fish.

27. Approximately nine months after he left the Virgin Islands, Petitioner received a telephone call from Fish, who indicated that he was having financial difficulty and that he wanted to use the "Wave Runner" in a "marijuana scheme."

28. Approximately six months later, Fish again telephoned Petitioner. This time he told Petitioner that he wanted "to do a cocaine smuggling venture with [the "Wave Runner]." At first,



Petitioner told Fish that he (Fish) was "out of his mind." Later during the conversation, however, Petitioner relented and agreed to allow Fish to use the "Wave Runner" in the proposed "cocaine smuggling venture." Petitioner gave his permission without receiving any promise from Fish that he (Petitioner) would receive anything in return.

29. The "cocaine smuggling venture" was unsuccessful.

30. The "Wave Runner" was seized by authorities in Martinique.

31. In the spring of 1991, in United States District Court for the Southern District of Florida Case No. 91-349-CR-HIGHSMITH, Petitioner was criminally charged by the United States government for his role in the "cocaine smuggling venture" with conspiracy to import cocaine into the United States.

32. Petitioner's role in the "cocaine smuggling venture" was limited to permitting Fish to use the "Wave Runner" to transport cocaine into the United States.

33. After his arrest in May of 1991, Petitioner agreed to, and he subsequently did, cooperate with federal authorities by participating in federal undercover drug enforcement operations under the supervision of federal agents. At times during these operations, he was required to place himself in situations where his personal safety was compromised.

34. In or around January of 1994, pursuant to a plea agreement, Petitioner entered a plea of guilty in United States

District Court for the Southern District of Florida Case No. 91-349-CR-HIGHSMITH to one count of conspiracy to import cocaine.

35. On January 30, 1995, Petitioner was adjudicated guilty of said crime and, as punishment, placed on probation for five years and fined \$17,500.00.

36. Such punishment constituted a substantial downward departure from the range provided in the United States Sentencing Guidelines.

37. At the sentencing hearing, the sentencing judge explained that he was "constrained to substantially modify the sentence in this case downward" because of the risks Petitioner had taken to assist federal authorities in their drug-fighting efforts.

38. Although under no legal obligation to do so, Petitioner continued to provide similar assistance to federal authorities (at a substantial personal risk) after his sentencing.

39. In September of 1996, Petitioner filed with the Department an application for licensure as a yacht salesperson.

40. Question 13 on the application form read as follows:

CRIMINAL HISTORY: Have you ever been convicted of a crime, either pled or been found guilty, or entered a plea of nolo contendere (no contest), even if adjudication was withheld?

NOTE:

This question applies to any violation of the law of any municipality, county, state, or nation, including traffic offenses (but not parking, speeding, inspection or traffic

signal violations), without regard to whether you were placed on probation, had adjudication withheld, paroled, or pardoned. Your answer to this question will be checked against local and state records. Failure to answer this question accurately could cause denial of licensure.

Yes \_\_\_\_\_ No \_\_\_\_\_

41. The application form instructed those applicants whose answer to Question 13 was "Yes" to "attach [their] complete signed statement of the charges and facts, together with the dates, name and location of the court in which the proceedings were held or [were] pending."

42. On the application form that he submitted to the Department, Petitioner answered "Yes" to Question 13, but he did not attach the required signed statement. He merely appended to the application form a copy of the judgment entered in United States District Court for the Southern District of Florida Case No. 91-349-CR-HIGHSMITH.

43. On or about October 1, 1996, the Department sent the following letter to Petitioner:

The Department of Business and Professional Regulation, Section of General Regulation is in receipt of your application for a yacht Salesman. A review of your application has disclosed the following deficiencies:

You answered Yes to question 13 which asked "Have you been convicted of a crime, either pled or been found guilty, or entered a plea of nolo contendere (no contest), even if adjudication was withheld?"

The paragraph under question 15 further states "If your answer to question 13, 14, 15

is Yes, attach your complete signed statement of the charges and facts, together with the dates, name and location of the court in which the proceedings were held or are pending."

You will need to submit a signed statement of the charges and facts, within twenty-one (21) days to this office before your application can be checked for form.

Should you have any questions, please contact me.

44. After receiving the Department's October 1, 1996, letter, Petitioner telephonically requested additional time to respond.

45. By letter dated December 13, 1996, Petitioner's attorney, John J. Lynch, Esquire, responded on Petitioner's behalf to the Department's October 1, 1996, letter. Lynch's letter, which was received by the Department on December 17, 1996, read as follows:

I represent the Applicant, Richard E. Parker. In response to concerns raised by Richard Parker's application's disclosure of charges and crimes and the results thereof, please consider the following as part of the application process:

The subject matter was limited to involvement in a conspiracy to import controlled substances. Mr. Parker voluntarily entered a guilty plea in the U.S. District Court, Southern District of Florida, Miami, Florida, in an action entitled, "United States v. Richard Parker" Criminal No. 91-349-CR-Highsmith.

Upon being aware of potential liability, he cooperated fully with the U.S. Government.

During a four-year period, he provided extensive assistance to the U.S. Government in ongoing investigations and provided training and resources to special agents.

Mr. Parker's participation as a Government agent put him at considerable risk. His case remains under court seal to protect information which may be used by the Government in future criminal prosecutions. I cannot provide a complete transcript of the court proceedings without jeopardizing Mr. Parker's safety.

To appreciate Mr. Parker's significant assistance to the U.S. Government, a portion of the Honorable Judge Highsmith's sentencing comments has been enclosed. Pages 11, 12, 14 and 15 of the sentencing memorandum specify the efforts made by Mr. Parker, and recognized by the Court to rectify his prior conduct. (Note: All individuals, other than Mr. Parker, have been redacted to preserve a measure of safety since the matter remains under court seal).

In recognition of [his] assistance, Mr. Parker was placed on probation for five years and fined on January 30, 1995. The fine was paid and probation has commenced.

I trust this supplemental response answers concerns regarding this unfortunate episode in Mr. Parker's life.

46. As his attorney asserted in the foregoing letter, as of the date of the letter, Petitioner had paid the \$17,500.00 fine imposed in United States District Court for the Southern District of Florida Case No. 91-349-CR-HIGHSMITH.

47. On January 17, 1997, the Department issued its Notice of Intent to deny Petitioner's application for licensure.

48. On February 12, 1997, Petitioner requested a Section 120.57(1) hearing on the matter.

49. On August 12, 1997, Petitioner filed a motion in United States District Court for the Southern District of Florida Case No. 91-349-CR-HIGHSMITH requesting that "his period of probation [be reduced] from a term of 60 months to a term of 32 months thereby terminating his probation on September 30, 1997." In support of his motion, he stated the following:

1. On January 30, 1995, Richard Parker was sentenced by this Court to five years probation for his participation in a cocaine conspiracy. The Court imposed this lenient sentence because of the extraordinary cooperation Richard Parker had rendered (a transcript of the sentencing is attached hereto as Exhibit A). As part of his cooperation Parker had gone to Columbia in a sailboat, at great personal risk and with no protection from law enforcement, and developed a case involving significant arrests, convictions, and seizure of cocaine.

2. Since sentencing Parker has remarried and complied with all terms of probation. Parker had promised the agents and the Court that his cooperation would continue regardless of the sentence imposed by the Court. True to his word, following sentencing, at the request of the DEA, Richard Parker traveled alone to Columbia and negotiated the location in the Caribbean Sea for an air drop of 300 kilos of cocaine. Parker then captained a sailboat and traveled to Dominica and Barbados, St. Kitts and the British Virgin Islands with DEA agents on board and participated in the recovery of the 300 kilos of cocaine as it was dropped from a plane in 50 kilogram packages. Parker received no payment for this cooperation. Parker rendered substantial assistance to the Government after sentencing because of his moral commitment to cooperation as a form of restitution, because of his sense of obligation and gratitude, and because he had given his word to the Government and this Court.

3. It is now over 2 1/2 years since Parker was sentenced. Parker has complied fully with all conditions of probation. Parker has committed himself to building a productive law-abiding life. The Court may well recall that Parker's marriage ended during his cooperation and sentence. Parker has recently married again becoming the father of a four-year old in the process. Parker has spent his life working on and sailing boats.

4. Parker has applied to the State of Florida for a license to be a yacht salesman. The issuance of these licenses in Florida is regulated by the Department of Business and Professional Regulation (DBPR). The DBPR has denied Parker's request for a license citing Parker's conviction as irrefutable proof of moral turpitude as a basis for denial. Parker has petitioned for review and a hearing before an administrative law judge is scheduled for October 14, 1997. Undersigned counsel has been advised that the hearing scheduled for October 14, 1997, will be the final hearing regarding Parker's petition for a license to sell boats in the State of Florida. Regarding this issue, undersigned counsel has become aware of an administrative decision where an application for a license as a yacht and ship salesman was granted by DBPR to an applicant who had been convicted of a drug felony, sentenced to probation and had been terminated from probation. Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums and Mobile Homes v. Orr, Docket No. YS95025 (Final Order No. BPR-95-03991, 7/20/95). It is respectfully submitted that evidence of successful completion of probation by Parker prior to the time of final hearing on October 14, 1997, will either result in the DBPR rescinding their denial of Parker's application or a reversal of DBPR's denial by the administrative law judge.

5. Assistant United States Attorney John Schlessinger has conferred with the United States Probation Officer Anthony Gagliardi

regarding this motion and has authorized undersigned counsel to state that the United States has no objection to a reduction of probation from 60 months to 36 months.

6. Richard Parker has applied to the State of Florida for a yacht salesman license so that he can support himself and his family. Richard Parker, through his cooperation, has rebutted any presumption of moral turpitude that attached to his conviction and has affirmatively and courageously demonstrated good moral character; Richard Parker has honored and will continue to honor his pledge to the United States and to this Honorable Court never to break the law again. . . .

50. The Final Order in the Orr case, which was referenced in Petitioner's Motion to Modify Probation, contained the following "findings of fact" and "conclusions of law":

FINDINGS OF FACT

1. The Division is the state agency charged with enforcing Section 326.004, Florida Statutes (1993), concerning Yacht and Ship Brokers, and the administrative rules promulgated thereunder.

2. On or about October 18, 1994, the Section of the General Regulation received an application from Geoffry Orr for a Yacht and Ship Salesman's license wherein he stated that he had no prior arrests or convictions.

3. On December 27, 1994, the Section of General Regulation received a criminal history report from the Federal Bureau of Investigation revealing a 1988 arrest and conviction on two counts of narcotics violations in the state of California.

4. An informal hearing was held and Respondent stated that he would send supporting documentation of his outstanding



record regarding the sentence he served for the conviction.

5. Documents were received from the Los Angeles County Probation Department stating that Respondent has served his sentence in an outstanding manner.

6. Peter P. Butler, Sr. also spoke with Respondent's probation officer.

7. There is competent, substantial evidence to support the Division's findings of fact.

#### CONCLUSIONS OF LAW

1. The Division has jurisdiction over the parties and the subject matter of this case, pursuant to Section 326.004(10), Florida Statutes (1993).

2 Pursuant to Section 326.004, Florida Statutes, the Division can issue a license to Respondent.

3. There is competent substantial evidence to support the Division's conclusions of law.

The records that the Department had received from the Federal Bureau of Investigation (referenced in Finding of Fact 3 of the Department's Final Order) revealed that Orr had been arrested on December 28, 1988, by the Los Angeles County (California) Sheriff's Office for "poss narc controlled sub for sale" and "poss marijuana/hashish for sale." The documents from the Los Angeles County Probation Department (referenced in Finding of Fact 5) indicated that Orr's three-year period of probation had expired on September 9, 1993 (approximately 22 months before the issuance of the Final Order).

51. On August 12, 1997, an Order on Defendant Richard Parker's Motion to Modify Probation was issued in United States District Court for the Southern District of Florida Case No. 91-349-CR-HIGHSMITH. It provided as follows:

On Richard Parker's Motion to Modify Probation, the Court being fully advised of the premises herein and noting that Richard Parker has fully complied with all conditions of probation and that Richard Parker, since the imposition of sentence on January 30, 1995, has through his cooperation with the Government demonstrated good moral character, it is hereby

ORDERED AND ADJUDGED that the 60-month term of probation imposed on January 30, 1995 is hereby reduced to 32 months.

52. Petitioner recognizes that it was wrong for him to allow his boat to be used in the "cocaine smuggling venture." He is repentant and remorseful.

53. Petitioner has not committed any similar unlawful acts in the more than 6 years that have passed since he engaged in such wrongdoing.

54. It appears that he has rehabilitated himself and that he is now of good moral character and firmly rooted on the right side of the law.

#### CONCLUSIONS OF LAW

55. Petitioner is seeking to be licensed by the Department as a yacht salesperson.

56. The licensing of yacht salespersons is governed by

Section 326.004, Florida Statutes,<sup>4</sup> which provides, in pertinent part, as follows:

(6) The [Department] may deny a [yacht salesperson's] license to any applicant who does not:

(a) Furnish proof satisfactory to the [Department] that he or she is of good moral character.

(b) Certify that he or she has never been convicted of a felony. . . .

"Moral character" is

not only the ability to distinguish between right and wrong, but the character to observe the difference; the observance of the rules of right conduct, and conduct which indicates and establishes the qualities generally acceptable to the populace for positions of trust and confidence.

Zemour, Inc. v. State Division of Beverage, 347 So. 2d 1102, 1105 (Fla. 1st DCA 1977). An individual demonstrates a lack of "good moral character" when that individual engages in "acts and conduct which would cause a reasonable man to have substantial doubts about [the] individual's honesty, fairness, and respect for the rights of others and for the laws of the state and nation." Florida Board of Bar Examiners Re: G. W. L., 364 So. 2d 454, 458 (Fla. 1978).

57. The Department has adopted rule provisions implementing Section 326.004, Florida Statutes. Among them are the following provisions found in Rule 61B-60.003, Florida Administrative Code:

(2) Review for Form.

(a) The [Department] shall review the

application within 10 days of its receipt to determine if it is in acceptable form, meaning that the application form is completed in its entirety and the application fee, the \$33 fingerprint processing fee, a complete set of fingerprints, and bond or letter of credit conforming to the requirements of rule 61B-60.004, Florida Administrative Code, have been received by the [Department]. If the application is in acceptable form, the [Department] shall issue a temporary 90-day license, DBR form 31-011.<sup>5</sup>

(b) If the application is deficient for form in any way and thereby unacceptable, the [Department] shall notify the applicant of the nature of the deficiency, and the applicant shall have 21 days from receipt of the deficiency notice to correct the deficiencies. If an applicant fails to correct the deficiencies within this period of time, the [Department] shall issue a notice of intent to reject license application.

(c) The applicant will subsequently have 10 days from receipt of said notice to correct the referenced deficiencies. If the referenced deficiencies are not corrected within the allotted time frame, the subject application shall be rejected and the applicant shall be so notified by certified mail without requiring any further proceeding.

(d) Rejection shall not prejudice any prospective reapplication; however, such would then be processed subject to the requirements as set forth for any initial filing.

(3) Review for Good Moral Character.

(a) When the application has been determined to be in acceptable form, the [Department] shall evaluate the application and make appropriate inquiry to determine the applicant's moral character. For the purposes of this rule, the following factors bear upon good moral character:

1. The completion of a criminal history check by the Florida Department of Law Enforcement that reveals no convictions of a felony, no convictions of a misdemeanor involving moral turpitude, and no pleas of nolo contendere, pleas of guilty, or verdicts of guilty to a felony charge or of any non-felonious offense involving moral turpitude, fraud, theft, dishonesty, assault and battery, or false statement; and
2. Civil lawsuits and administrative actions bearing upon moral character (e.g., fraud, misrepresentation, theft, assault and battery); and
3. Applicant's prior history of unlicensed brokering or sales activity in the State of Florida subject to the provisions of chapter 326, Florida Statutes; and
4. Tendering to the [Department] a bank or other depository check for payment of any fee, which check lacks sufficient funds on deposit in or credit with such bank or depository with which to pay the same on presentation, where the applicant, upon notification of same by the bank or division, fails to redeem the check or otherwise pay the fee within 21 days of such notification; and
5. Other relevant information generated in the course of the application process which bears upon the applicant's moral character, including but not limited to those acts described by section 326.006(3), (4), Florida Statutes; and
6. Failure of the applicant to provide full and complete disclosure, or to provide accurate information, on the application for licensure.
7. The foregoing factors shall be considered in determining whether an applicant is of good moral character for purposes of licensure under chapter 326, Florida Statutes, if they comply with the following

guidelines:

a. The disposition of criminal charges shall be considered if such constitutes a felony, or if such constitutes a misdemeanor involving moral turpitude, fraud, theft, dishonesty, assault and battery, or false statement.

b. The disposition of any administrative action or of any civil litigation involving fraud, misrepresentation, theft, assault and battery, or moral turpitude shall be considered if such results in a determination against the interests of the applicant.

c. Except as provided in sub-sub-paragraph 7.d. of this rule, no information relating to criminal, administrative or civil actions shall be considered if more than 5 years has elapsed from the satisfaction of the terms of any order, judgment, restitution agreement, or termination of any administrative or judicially-imposed confinement or supervision of the applicant, whichever is more recent.

d. Any action, proceeding, or grievance filed against the applicant, individually or otherwise, which relates to the applicant's prospective duties, responsibilities, and obligations of licensure under chapter 326, Florida Statutes, may be considered with no limitation as to time.

e. Other considerations such as termination of probation, compliance with and satisfaction of any judgment or restitution agreement may be considered as evidence of rehabilitation of the applicant's good moral character.

(b) Within 15 days after the Department has determined that the application is in acceptable form, the [Department] shall apply for a criminal history record with the Florida Department of Law Enforcement.

(c) After receipt of the criminal history check, the [Department] shall complete its

evaluation of the moral character of the applicant. As used herein, "criminal history check" shall include verification of the nature and disposition of all criminal charges and all civil or administrative actions initiated against the applicant. Specifically, the inquiry may include the following:

1. National fingerprint processing;
2. Status as to any supervision of the applicant (e.g., confinement, probation, community service requirements);
3. Status as to any restitution agreements;
4. Status as to any civil judgments or final orders; and
5. Contact with arresting agencies and responses to requests for clarification by the[Department].

The applicant shall assist the [Department] in acquiring the foregoing information.

(d) If upon completion of its evaluation of the moral character of an applicant, the [Department] concludes that the applicant does possess good moral character, the [Department] shall issue the applicant a license, DBR form 31-003, YACHT AND SHIP BROKER LICENSE, effective 11-25-90, incorporated by reference, upon payment of all fees owed to the[Department], if any.

(e) The effective date of the original license will be the date that the license is actually issued by the[Department]. The expiration date will be a date 2 years from date of issuance.

(f) If upon completion of its evaluation of the moral character of an applicant, the [Department] concludes that the applicant does not possess good moral character, the division shall proceed as provided in rule 61B-60.002(6), Florida Administrative Code.

In determining whether an applicant is eligible for licensure as a yacht salesperson, the Department must examine the applicant's application for licensure in light of the foregoing standards set forth in Rule 61B-60.003, Florida Administrative Code. See State v. Jenkins, 469 So. 2d 733, 734 (Fla. 1985)("[Agency rules and regulations, duly promulgated under the authority of law, have the effect of law."); Buffa v. Singletary, 652 So. 2d 885, 886 (Fla. 1st DCA 1995)("An agency must comply with its own rules.");

Decarion v. Martinez, 537 So. 2d 1083, 1084 (Fla. 1st 1989)("Until amended or abrogated, an agency must honor its rules.").

58. An applicant for licensure as a yacht salesperson whose application is preliminarily denied by the Department bears the ultimate burden (in a Section 120.57(1) hearing on the Department's preliminary action) of demonstrating, by a preponderance of the evidence, entitlement to such licensure. See Pershing Industries, Inc., v. Department of Banking and Finance, 591 So. 2d 991, 994 (Fla. 1st DCA 1991); Cordes v. Department of Environmental Regulation, 582 So. 2d 652, 654 (Fla. 1st DCA 1991); Department of Transportation v. J.W.C., Co., 396 So. 2d 778, 787 (Fla. 1st DCA 1981); Department of Health and Rehabilitative Services v. Career Service Commission, 289 So. 2d 412, 414-15 (Fla. 4th DCA 1974). The applicant, however, need address only those entitlement issues raised in the Department's



notice of intent to deny the applicant's application. See Woodholly Associates v. Department of Natural Resources, 451 So. 2d 1002 (Fla. 1st DCA 1984).

59. In the Notice of Intent to Deny License Application it issued in the instant case, the Department indicated that it intended to deny Petitioner's licensure application because "he was convicted in the United States District Court, Southern District of Florida, of conspiracy to import cocaine" and therefore, "pursuant to Section 326.004(6)(a), [Florida Statutes, he] has failed to demonstrate good moral character."

60. Pursuant to Section 326.004, Florida Statutes, as implemented by Rule 61B-60.003, Florida Administrative Code, a convicted felon may be licensed as a yacht salesperson, notwithstanding his prior felony conviction, if he presents sufficient evidence to establish the "rehabilitation of [his] good moral character," regardless of whether "more than 5 years has elapsed from the satisfaction of the terms of any order, judgment, restitution agreement, or termination of any administrative or judicially-imposed confinement or supervision of the applicant."<sup>6</sup>

61. Petitioner has made such a showing. He has demonstrated, primarily through his own testimony,<sup>7</sup> that he has rehabilitated himself since having engaged (more than six years ago) in the conduct that led to his felony conviction of

conspiracy to import cocaine (in United States District Court for the Southern District of Florida Case No. 91-349-CR-HIGHSMITH) and that he is now of "good moral character."<sup>8</sup>

62. Accordingly, Petitioner should not be deprived of licensure as a yacht salesperson because of his prior felony conviction.<sup>9</sup> See Albert v. Florida Department of Law Enforcement, Criminal Justice Standards and Training Commission, 573 So. 2d 187 (Fla. 3d DCA 1991); Aquino v. Department of Professional Regulation, 430 So. 2d 598 (Fla. 4th DCA 1983).

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Department issue a final order granting Petitioner's application for licensure as a yacht salesperson.

DONE AND ENTERED this 9th day of December, 1997, in Tallahassee, Leon County, Florida.

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STUART M. LERNER  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 9th day of December, 1997.

## ENDNOTES

<sup>1</sup> The hearing was originally scheduled to commence on June 27, 1997, but was continued at the request of both parties.

<sup>2</sup> Although Robert Badger, the Department investigator who initially reviewed Petitioner's application for licensure, did not testify at the hearing, the undersigned, pursuant to the stipulation of the parties, received into evidence, in lieu of Badger's live testimony, a proffer made by counsel for the Department as to the facts he would have elicited from Badger if Badger had been called to the stand to testify at the hearing.

<sup>3</sup> A license from the Department is not required, under Chapter 326, Florida Statutes, to make such sales. Petitioner, however, must have a license from the Department to be able, in his capacity as a salesperson for Rex, to sell used boats that are "propelled by sail or machinery in the water" and which exceed 32 feet in length and weigh less than 300 gross tons. Obtaining such a license would substantially increase his earning potential as a Rex salesperson.

<sup>4</sup> In his Proposed Recommended Order, Petitioner argues that Section 326.004(6)(a), Florida Statutes, is unconstitutional. The undersigned, however, is without authority to, and therefore will not, pass upon the constitutionality of this statutory provision. See Palm Harbor Special Fire Control District v. Kelly, 516 So. 2d 249, 250 (Fla. 1987)("[I]t is axiomatic that an administrative agency has no power to declare a statute void or otherwise unenforceable."); Myers v. Hawkins, 362 So. 2d 926, 928 n.4 (Fla. 1978)("Generally speaking, administrative agencies are not the appropriate forum in which to consider questions of constitutional import."); Dade County v. Overstreet, 59 So. 2d 862, 865 (Fla. 1952)("[The constitutionality of statutes, ordinances or resolutions] should not and cannot be adjudicated by the Beverage Director, or any other Board or Bureau, as these are clearly judicial questions for determination by the Circuit Courts."); Holmes v. City of West Palm Beach, 627 So. 2d 52, 53 (Fla. 4th DCA 1993)("[A]ppellee correctly contends that because it is an administrative agency, rather than a court, it cannot circumvent unambiguous statutory provisions in the interest of fairness and due process considerations. . . . It lacks the power to declare a statute void or otherwise unenforceable."); Long v. Department of Administration, Division of Retirement, 428 So. 2d 688, 692-93 (Fla. 1st DCA 1983)("The agency [Florida Division of Retirement] and hearing officer also lacked jurisdiction to hear appellant's constitutional argument.").

<sup>5</sup> In the instant case, Petitioner's initial submission to the Department was not in "acceptable form" as to form because he failed to append to his application for licensure a "complete

signed statement of the charges [ against him in United States District Court for the Southern District of Florida Case No. 91-349-CR-HIGHSMITH] and facts, together with the dates, name and location of the court in which the proceedings were held or [were] pending." He therefore did not receive a "temporary 90-day license, DBR form 31-011."

<sup>6</sup> Neither the statute, nor the rule, prescribes a minimum period of time which must pass before a convicted felon may be eligible for licensure following his conviction.

<sup>7</sup> Petitioner testified in his own defense concerning his post-criminal episode rehabilitation. His testimony was credible and unrebutted by the Department. Notwithstanding its self-serving nature, the testimony of an applicant for licensure, like that given by Petitioner in the instant case, may be considered and relied upon as competent substantial evidence, even if it is uncorroborated and contrary to the evidence adduced by the licensing agency. See Falk v. Beard, 614 So. 2d 1086, 1089 (Fla. 1993)("It would be an anomalous situation indeed if the testimony of the one against whom a complaint is lodged could never form the basis for competent substantial evidence."); Florida Publishing Company v. Copeland, 89 So. 2d 18, 20 (Fla. 1956)("There is no doubt that the testimony of the plaintiff, although uncorroborated, '. . . if reasonable on its face, and believed and accepted by the jury as true can carry the burden of proof.'"); Martuccio v. Department of Professional Regulation, Board of Optometry, 622 So. 2d 607, 609-10 (Fla. 1st DCA 1993)(expert testimony of applicant for licensure was not incompetent and could be relied upon "as competent substantial evidence to support [hearing officer's] conclusions"); Raheb v. Di Battisto, 483 So. 2d 475, 476 (Fla. 3d DCA 1986)("We are not persuaded, as urged, that the testimony of the plaintiff . . . should have been rejected by the trial court as inherently incredible; it was the trial court's function, not ours, to weigh the testimony and evidence adduced in the cause based on its observation of the bearing, demeanor, and credibility of the witnesses appearing in the cause.").

<sup>8</sup> The purpose of this proceeding is to determine whether Petitioner presently meets the "good moral character" requirement for licensure as a yacht salesperson, not to determine whether the Department was correct, based upon the information it then had available to it, to preliminarily deny Petitioner's application for licensure on the ground that he lacked "good moral character." See Beverly Enterprises-Florida, Inc. v. Department of Health and Rehabilitative Services, 573 So. 2d 19, 23 (Fla. 1st DCA 1990)("A request for a formal administrative hearing commences a de novo proceeding intended to formulate agency action, and not to review action taken earlier or preliminarily.").

<sup>9</sup> The evidence presented by Petitioner concerning the Orr case has played no role in the undersigned's recommended disposition of the instant case. Had Petitioner not submitted proof establishing that he has rehabilitated himself and that he is now of "good moral character," the undersigned would have recommended that Petitioner be denied licensure, even if the Department had previously granted licensure to a similarly situated applicant. The Department is not required to grant licensure to an applicant who does not possess "good moral character" simply because it erroneously did so in a prior case.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.