

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND	)	
PROFESSIONAL REGULATION,	)	
DIVISION OF REAL ESTATE,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 97-4174
	)	
CONNIE B. WHITE,	)	
	)	
Respondent.	)	
<hr/>	)	

RECOMMENDED ORDER

Pursuant to notice, a hearing was held in DeLand, Florida, on January 16, 1998, and February 9, 2000, by Stephen F. Dean, assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Laura McCarthy, Esquire  
Department of Business and  
Professional Regulation  
Division of Real Estate  
Suite North 308  
400 West Robinson Street  
Orlando, Florida 32801-1772

For Respondent: Robert R. Foster, Esquire  
Post Office Box 41  
DeLand, Florida 32721-0041

STATEMENT OF THE ISSUE

The issue in this case is whether the Respondent, Connie B. White, committed violations alleged in the Administrative Complaint.

PRELIMINARY STATEMENT

The Petitioner filed an administrative complaint against the Respondent alleging that the Respondent had obtained renewal of her license fraudulently by renewing her application without complying with the requirements for continuing education.

The Respondent, through counsel, requested a formal hearing, and the Department referred the case to the Division of Administrative Hearings to conduct a formal hearing on the case.

The file was received by the Division of Administrative Hearings on September 8, 1997, and an initial order was issued to the parties on September 12, 1997. A joint response was filed with the Division electronically on September 22, 1997, requesting that the case be heard in Orlando, Florida. Thereafter, a motion was made for change of venue to DeLand, Florida, and the matter was reassigned to the undersigned Administrative Law Judge. The case was sent for hearing on January 16, 1998, by notice of hearing dated October 23, 1997, and heard as noticed.

At the formal hearing the counsel for Petitioner introduced documentary evidence of the Respondent's licensure and filed a prehearing stipulation that had been agreed to by the parties. Pursuant to the stipulation the Petitioner sought to introduce Petitioner's Exhibits 1 through 6; however, the Respondent interposed objections to Petitioner's Exhibits 3 and 4. Petitioner's Exhibit 4 was determined to be admissible and was

received into the record over the objection of the Respondent. Petitioner's Exhibit 3 was subject not only to objection as relevant but also as to authenticity. It appeared that the counsel for the Petitioner had misunderstood the stipulation with the Respondent, and the Petitioner was granted leave to reopen its case-in-chief. At this juncture, Respondent's counsel renewed his motion to dismiss, essentially arguing that even if the documents were authenticated and admitted, they would fail to prove a prima facie case.

Having been fully advised in the premises and having heard the argument of counsel the Respondent's motion was granted; however, upon reviewing the transcript, the exhibits, and the admissions, the undersigned determined that he had erred in granting the motion. In order to permit the Respondent to present a defense, the Respondent was given 10 days to indicate whether she desired to reopen the record. The Respondent requested to re-open the record, and the matter was rescheduled for hearing on August 13, 1998. After several continuances, the hearing was concluded on February 9, 2000.

A Transcript of the proceedings was filed on February 24, 2000, and both parties submitted proposed findings which were read and considered.

#### FINDINGS OF FACT

1. Connie B. White, the Respondent, was a licensee of the Division of Real Estate at all times relevant to the allegations

against her. The Respondent received a renewal notice for her real estate license and completed the information contained thereon and submitted the renewal request together with the applicable fees to the Department.

2. The Petitioner is the state licensing and regulatory agency charged with the responsibility and duty to prosecute licensees pursuant to the laws of the State of Florida.

3. The renewal application provides that "By submitting the appropriate renewal fees to the Department or the agency, a licensee acknowledges compliance with all requirements for renewal." The Respondent submitted to the Petitioner the licensee renewal application together with a check in the amount of \$190, annotated that \$95 was for her renewal fee and \$95 was for her corporation's renewal fee.

4. In response to an inquiry from the Department, the Respondent wrote a letter, Petitioner's Exhibit 3, which was authenticated by Judy Smith, the Department's Investigator. See the transcript of the second hearing, pages 47 and 48. In her letter, the Respondent stated as follows regarding her application:

There was never any attempt to defraud in this case. At worst this was merely a misunderstanding caused by change in the requirements. I did not think I had to have the certificate of successful completion of the continuing education in my hands by m[sic]arch 31, 1996 because of the change in the requirement omitting the need to mail in the certificate with the fee.

I am sure that I did not obtain a license by means of fraud, misrepresentation or concealment.

Enclosed is a copy of certificate of proof of successful completion of the continuing education course start date April 26, 1996, finish date May 28, 1996.

5. While it is uncontroverted that the Respondent was issued a license as a broker in response to her 1996 application, no evidence was presented that the Department "relied" upon the Respondent's "representations" regarding her qualifications as a condition to issuing her license.

6. The Respondent thought that she did not have to complete the continuing education coursework prior to submitting the fee for the renewal of her license.

7. Respondent took and failed the course in March of 1996, and re-enrolled in the next available course, which she passed.

8. The Respondent thought it was up to her to complete the necessary coursework.

9. The Respondent renewed after sending her answers to be graded, but before receiving the results. The Respondent subsequently learned that she had not passed the course, and re-enrolled in the course as stated above.

#### CONCLUSIONS OF LAW

10. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter in this case. This Recommended Order is entered pursuant to the provisions of Section 120.57(1), Florida Statutes.

11. The Petitioner alleges in its one-count administrative complaint that the Respondent obtained her license by means of fraud, misrepresentation, or concealment contrary to Section 475.25(1)(m), Florida Statutes, by submitting a renewal application with a check for the requisite fees thereby acknowledging compliance with all licensing requirements for renewal when Respondent had not successfully completed the 14 hours of continuing education required by Section 475.182, Florida Statutes. The Petitioner has the burden of proof.

12. At the first hearing, the Petitioner did not call any witnesses and sought to introduce Exhibits 1 through 6. The parties had introduced a pre-hearing stipulation in which they agreed to the facts set forth in paragraphs 1, 2, 4, and 5 of the Administrative Complaint. The pre-hearing stipulation identified Petitioner's Exhibits 1 through 6, as follows:

P-1 Respondent's Response to Election of Rights Form, dated June 13, 1997.

P-2 A copy (of) Petitioner's renewal notice, submitted by Respondent and received by Petitioner April 9, 1996.

P-3 The letter submitted by Respondent to Petitioner in response to the complaint against her, dated August 21, 1996.

P-4 A copy of the course certificate, submitted by Respondent, indicating 14 hour course taken with Institute of Florida Real Estate Careers.

P-5 Respondent's original response to request for admissions and interrogatories propounded by Petitioner.

P-6 A certified copy of Respondent's licensure documents.

13. The pre-hearing stipulation indicates that the Respondent objected to Petitioner's Exhibits 3 and 4 on the basis of relevance.

14. At hearing, the Respondent raised an additional objection to Petitioner's Exhibit 2 on the basis of authenticity as well as the relevancy objections to Petitioner's Exhibits 3 and 4. Having determined that Respondent had made these objections, the undersigned announced that the hearing would proceed, and counsel for Petitioner could call her witnesses and present her evidence. Thereafter, Respondent could present its evidence. See Transcript, page 6. Whereupon, counsel for the Petitioner announced that she had submitted her documents and pleadings, and would be presenting her argument in her proposed order. When questioned about authenticating Petitioner's Exhibit 2, Petitioner's counsel stated she would not authenticate it. When asked if she was withdrawing it, Petitioner's Counsel indicated that she was not withdrawing it, and considered it self-authenticating. See Transcript, page 6, line 25.

15. The undersigned indicated that he would determine at a later time the admissibility of Petitioner's Exhibit 2. See Transcript, page 7, line 19. I find that it is admissible.

16. Thereafter, the Petitioner rested, and the Respondent moved to dismiss the administrative complaint for failure to prove a prima facie case. The Petitioner was afforded the

opportunity to respond, and indicated that the documents presented proved the factual allegations. This lead to a discussion of Petitioner's Exhibit's 3 and 4, to which Respondent raised the added objection of authenticity.

17. Because the Respondent's objections to relevance had not been ruled upon, the undersigned heard the argument of both counsel on both relevance and authenticity, and held that Respondent had not reserved in the pre-hearing stipulation the objection to authenticity; therefore, it was waived. The Respondent argued that authenticity was part of the general predicate that he had expected the Petitioner to prove at hearing. The undersigned held that if the Respondent's stipulation did not include agreeing to the authenticity of the documents, then the Petitioner would be permitted to re-open her case for that purpose, and the Respondent's counsel agreed. See Transcript, page 11. The objections to relevance were overruled, and the Petitioner was permitted to re-open to present evidence on authenticity.

18. At this juncture, the Respondent's counsel renewed his motion to dismiss, essentially arguing that even if the documents were authenticated and admitted, they would fail to prove a prima facie case. See Transcript, page 13, line 8 et seq., and page 15, line 1 et seq.

19. The Respondent raised two arguments, one based upon the facts and the other upon the law. The factual argument is based



upon the failure of the Petitioner to present any evidence that the fee was remitted by Respondent. The legal argument was that the Petitioner failed to prove a prima facie case based upon the fact that the Petitioner must prove the Respondent presented the correct fees and by doing so knowingly and intentionally misrepresented her qualifications.

20. The Respondent's motion was granted; however, upon reviewing the transcript, the exhibits, and the admissions, the undersigned determined that he had erred in granting the motion. In order to permit the Respondent to present a defense, the Respondent was given 10 days to indicate whether she desired to reopen the record. The Respondent requested to reopen the record, and after several continuances, the hearing was concluded on February 9, 2000.

21. The issue presented is whether the Respondent obtained her license by fraudulently representing that she met all the criteria for re-licensure.

22. The application stated that by submitting the appropriate fee the applicant acknowledged compliance with all the licensing requirements.

23. However, fraud is an offense of specific intent. See Munch v. Department of Professional Regulation, Division of Real Estate, 592 So. 2d 1136, (1DCA-1992). The Petitioner must show the accused intentionally made a statement that the accused knew was false for the purpose of inducing the person to whom the

statement was made to give up something of worth. Conceding that performance of an act, under some circumstances, may be taken as "statement," the party with the burden of proof must show through the circumstances that the actor's principle intent was to knowingly and falsely obtain a benefit from another by the performance of the act.

24. In the Munch case, cited above, the court held that under circumstances in which a real estate salesperson believed he received commissions for his activities as a condominium association manager, he did not intentionally conceal receipt of these commissions from his broker and did not intentionally commit a fraud. The lack of intent related to the person's misapprehension of his status, and, therefore, his obligations, not to the failure to reveal receipt of the commissions.

25. In the instant case, Petitioner presented evidence that the Respondent submitted a check for \$190, of which \$95 was for her brother's license, and \$95 was for her corporate license. Assuming arguendo that the "appropriate" fee was tendered, under the principles set out in Munch, the Petitioner would have been obligated to show that the Respondent submitted the fees intentionally and knowingly for the purpose of misrepresenting compliance with the licensure requirements.

26. The Respondent stated in her letter of August 21, 1996, that she did not think she had to have the certificate of successful completion of her course work in hand on the date of

renewal. This letter was consistent with her testimony that she renewed, found out she had failed after renewing, and re-enrolled in the next course which she completed successfully.

Consequently, the Respondent did not "intentionally" misrepresent her status. Further, the fee is required for licensing and is separate and apart from acknowledging completing continuing education requirements. Therefore, there is another reason for submitting the fees. In the presence of this alternative reason for submitting the fees, evidence must be presented to specifically show the Respondent submitted the fees intentionally and knowingly to falsely represent her compliance with the continuing education requirements. 1/

27. The Petitioner, having failed to show the Respondent's intent to fraudulently misrepresent her qualifications, failed to prove a prima facie case.

#### RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law set forth herein, it is,

RECOMMENDED:

That the Administrative Complaint against the Respondent be DISMISSED.

DONE AND ENTERED this 20th day of April, 2000, in  
Tallahassee, Leon County, Florida.

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STEPHEN F. DEAN  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 20th day of April, 2000.

ENDNOTE

1/ Following the requirements outlined in Rule 61J2-3.015(2),  
Florida Administrative Code, requiring an affirmation that  
applicant has satisfied the course requirements avoids the  
difficulty of proofing intent.

COPIES FURNISHED:

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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.