

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CLAYTON MONTGOMERY,)
)
 Petitioner,)
)
 vs.) Case No. 97-4408
)
 DEPARTMENT OF BUSINESS AND)
 PROFESSIONAL REGULATION,)
 COMMUNITY ASSOCIATION MANAGERS,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case by telephone conference call on January 23, 1998, with the parties appearing at Fort Lauderdale, Florida, before J. D. Parrish, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Roberto Stanziale, Esquire
6209 West Commercial Boulevard, Suite 2
Fort Lauderdale, Florida 33319

For Respondent: Thomas G. Thomas
Assistant General Counsel
Department of Business and
Professional Regulation
1940 North Monroe Street
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STATEMENT OF THE ISSUE

Whether Petitioner is entitled to approval of his application for licensure by examination.

PRELIMINARY STATEMENT

This case began on August 5, 1997, when the Department of Business and Professional Regulation, Division of Professions (Department) issued a letter advising Petitioner, Clayton M. Montgomery, that his application for licensure as a community association manager by examination was being denied. The Department based the denial on Petitioner's failure to establish good moral character as required by Section 468.433, Florida Statutes, and Rule 61-20.001(5)(a) and (b), Florida Administrative Code. More specifically, the Department alleged that Petitioner's criminal record demonstrates a lack of good moral character as defined by the statute and rule.

In response, Petitioner timely filed a request for an administrative hearing, and disputed the Department's conclusion that he is not of good moral character. This Petition for Formal Hearing was filed on August 29, 1997. This matter was referred to the Division of Administrative Hearings for formal proceedings on September 18, 1997.

At the hearing, the Petitioner presented no witnesses or exhibits. Respondent's Exhibits numbered 1 through 3 have been received into evidence. A transcript of the proceeding has not been filed. The proposed recommended orders filed by the parties have been considered in the preparation of this order.

FINDINGS OF FACT

1. Petitioner is an applicant for licensure by examination to be a community association manager.

2. On June 19, 1997, Petitioner filed an application for license that admitted a criminal arrest for possession of cocaine, diazepam, and marijuana.

3. The arrest noted above resulted in the issuance of a four-count Information for possession of cocaine, possession of diazepam, possession of cannabis, and possession of drug paraphernalia.

4. After an initial plea of not guilty, Petitioner entered a changed plea, and pled nolo resulting in a sentence whereby adjudication of guilt was withheld and two years of probation was imposed.

5. On June 19, 1997, Petitioner's request for the early termination of his probation was granted. Concurrent with this release, Petitioner filed the application for license which is at issue in this proceeding.

6. No other criminal charges or allegations are at issue in this matter. Petitioner does not dispute the accuracy of the foregoing criminal record.

CONCLUSIONS OF LAW

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

8. Section 468.433, Florida Statutes, provides, in pertinent part:

(1) A person desiring to be licensed as a community association manager shall apply to the department to take the licensure examination. Each applicant must file a complete set of fingerprints that have been taken by an authorized law enforcement officer, which set of fingerprints shall be submitted to the Department of Law Enforcement for state processing and to the Federal Bureau of Investigation for federal processing. The cost of processing shall be borne by the applicant. The department shall examine each applicant who is at least 18

years of age and who the department certifies is of good moral character.

(a) Good moral character means a personal history of honesty, fairness, and respect for the rights of others and for the laws of this state and nation.

(b) The department may refuse to certify an applicant only if:

1. There is a substantial connection between the lack of good moral character of the applicant and the professional responsibilities of a community association manager; and

2. The finding by the department of lack of good moral character is supported by clear and convincing evidence.

(c) When an applicant is found to be unqualified for a license because of a lack of good moral character, the department shall furnish the applicant a statement containing its findings, a complete record of the evidence upon which the determination was based, and a notice of the rights of the applicant to a rehearing and appeal.

(Emphasis added.)

9. Rule 61-20.001, Florida Administrative Code, provides, in pertinent part:

(1) Definitions.

(a) "Charge" or "Charges". These terms refer to the official document in any criminal proceeding, whether styled an "Information", "Indictment", or otherwise, which document specifies the charges against the defendant, and which document is filed in any court of Florida, another state or country, or the United States government.

* * *

(c) "Criminal record". An applicant's criminal record, for purposes of this rule, includes any misdemeanor or felony charge filed against the applicant in the courts of any state or federal district or territory, or other country, on any subject matter whether related to community association management or not, concerning which charge

the applicant was found guilty, or pled guilty, or pled no contest, regardless of whether or not there was an adjudication by the court, and regardless of whether the matter is under appeal by the applicant. The phrase includes such charges even where the crime was subsequently pardoned or civil rights have been restored. The phrase does not include criminal convictions which were finally reversed or vacated on appeal; nor does it include charges of which the applicant was found not guilty, or which were finally dismissed; nor does it include matters as to which at time of application an order of sealing or expunction has been issued by a court of competent jurisdiction.

* * *

(5) Good Moral Character.

(a) Unless the division denies the application for incompleteness under paragraph (4)(a) of this rule, the division shall evaluate the application and make appropriate inquiry to determine the applicant's moral character. Demonstration of all of the following will establish the applicant's good moral character:

1. The completion of a criminal history records check by the Florida Department of Law Enforcement and self-disclosure by the applicant that establishes that the applicant has no criminal record;

* * *

(b) If the applicant has failed to establish good moral character under paragraph (5)(a), the division will then consider the following additional factors to determine whether an applicant has good moral character for purposes of licensure under chapter 468, Part VIII, Florida Statutes:

1. If commission of a second degree misdemeanor is the only reason the applicant did not meet the requirements of paragraph (5)(a) of this rule, the applicant will be considered to have good moral character. However, if there are also other

reasons why the applicant did not meet the requirements of paragraph (5)(a) of this rule, the second degree misdemeanor will be considered along with the other factors in determining the applicant's good moral character;

2. If the applicant has committed a first degree misdemeanor or a felony, and the applicant's civil rights have been restored, this alone shall not preclude a finding of good moral character unless the crime is directly related to the professional responsibilities of a community association manager. Crimes that are deemed to be directly related to the professional responsibilities of a community association manager include, for example, fraud, theft, burglary, bribery, arson, dealing in stolen property, forgery, uttering a forged instrument, sexual battery, lewd conduct, child or adult abuse, murder, manslaughter, assault, battery, and perjury. The applicant has the burden of proving restoration of civil rights by certified true copy of government or court records reflecting such action.

* * *

6. Written evidence the division will consider in determining the applicant's good moral character shall include:

- a. A statement from the applicant explaining the applicant's criminal/unlawful conduct and the reason the applicant believes the division should issue the license;
- b. Evidence as to the length of time since the conduct occurred or the age of the applicant at the time the conduct occurred;
- c. Evidence of successful rehabilitation;
- d. Recommendations from parole or probation employees who have supervised the applicant;
- e. Recommendations from the prosecuting attorney or sentencing judge;
- f. Character references from individuals other than immediate family members, who have know the applicant for 3 years or longer;
- g. Police reports or transcripts which reveal the underlying facts of the crime;
- h. Evidence that the conduct was an isolated occurrence contrary to the applicant's normal

pattern of behavior; and
i. Evidence of community or civil activities with which the applicant has been associated. It is the applicant's responsibility to provide such mitigating evidence to the division.

* * *

(c) If the applicant has failed to meet the requirements of paragraph (5)(a) of this rule and has been unable to present sufficient evidence to establish good moral character pursuant to paragraph (5)(b) of this rule within the time limitations of this rule and section 120.60, Florida Statutes, the application will be denied. However, the applicant will be given an opportunity by the division to waive the time limits of this rule and section 120.60, Florida Statutes, if it appears to the division that, through the submission of additional information or with additional time for investigation and verification, the applicant's good moral character might be established. The applicant bears the burden of affirmatively providing the division with evidence of good moral character.

(6) If the application is denied, the division shall proceed as provided in rule 61B-55.0011(1), Florida Administrative Code. The unsuccessful applicant who requests a hearing for issuance of a license under this rule shall have the burden of proof to establish, by a preponderance of the evidence, entitlement to the requested license.

(Emphasis added.)

10. In this case, there is no dispute that Petitioner was charged and entered the plea noted above. As such, the Department was entitled to rely on the clear and convincing evidence of the Petitioner's criminal history in reaching its conclusion that the Petitioner does not have good moral character.

11. Petitioner bears the burden of proof to establish his entitlement to the license sought. While Petitioner successfully completed the probation from the criminal matter, he has not affirmatively demonstrated good moral character under the guidelines set forth above.

12. Petitioner presented no character evidence. While admitting all of the factual allegations of the notice of denial, Petitioner argues that the Department has misapplied its rule since his civil rights were not removed as a result of the criminal plea. As such, he claims the single incident giving rise to the four criminal charges should not stand as a criminal record disqualifying this applicant from licensure. Since he truthfully disclosed the arrest and charges on his application for licensure, and completed all terms of the sentence imposed, Petitioner maintains he is eligible for licensure.

13. While a criminal record may not stand as a permanent bar to an applicant's right to licensure, in this instance, Petitioner failed to establish good moral character as that term is used in both the statute and rule. Given the presence of the criminal record, the Petitioner must establish good moral character. Petitioner was less than two years in time from the criminal incident when he filed for licensure. He offered no testimony to explain the circumstances of his arrest nor his efforts since to re-establish himself and show rehabilitation. At the time of the arrest, Petitioner was alleged to be in

possession of three illegal substances. That he chose to plead nolo to these charges is not disputed. He has not explained that plea nor offered any evidence to discount the criminal history established by this record.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Business and Professional Regulation, Division of Professions, enter a Final Order denying Petitioner's application for licensure as a community association manager by examination.

DONE AND ENTERED this 25th day of February, 1998, in Tallahassee, Leon County, Florida.

J. D. Parrish
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of February, 1998.

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.