

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF REAL ESTATE,)
)
Petitioner,)
)
vs.) Case No. 98-0438
)
ROSEMARY NIXON,)
)
Respondent,)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on May 12, 1998, at West Palm Beach, Florida, before Claude B. Arrington, a duly designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Geoffrey T. Kirk, Esquire
Department of Business and Professional
Regulation, Division of Real Estate
400 West Robinson Street, N-308
Orlando, Florida 32802

For Respondent: Rosemary Nixon, pro se
6565 Parkview Drive
Boca Raton, Florida 33433

STATEMENT OF THE ISSUES

Whether Respondent, a licensed real estate salesperson, committed the offenses alleged in the Administrative Complaint, and the penalties, if any, that should be imposed.

PRELIMINARY STATEMENT

Petitioner filed an Administrative Complaint against Respondent that alleged certain facts as to the application she submitted to renew her license as a real estate salesperson and thereafter alleged two separate violations of the laws and rules regulating the practice of real estate. In Count I, Petitioner alleged that Respondent obtained a license by misrepresentation in violation of Section 475.25(1)(m), Florida Statutes. In Count II, Petitioner alleged that Respondent failed to comply with the continuing education requirements contained in Rule 61J2-3.009, Florida Administrative Code, thereby violating the provisions of Section 475.25(1)(e), Florida Statutes.

Petitioner timely challenged the allegations of the Administrative Complaint, the matter was referred to Division of Administrative Hearings, and this proceeding followed.

At the formal hearing, Petitioner presented the testimony of one witness (an investigator) and presented six exhibits, each of which was accepted into evidence. Respondent testified on her own behalf, but presented no other testimony and no exhibits.

A transcript of the proceedings has been filed. The Petitioner filed a proposed recommended order, which has been duly considered by the undersigned in the preparation of this Recommended Order. Respondent did not submit a proposed recommended order.

FINDINGS OF FACT

1. Petitioner is a state licensing and regulatory agency

charged with the responsibility and duty to prosecute administrative complaints pursuant to the laws of the State of Florida, in particular, Chapters 455 and 475, Florida Statutes, and Title 61J2, Florida Administrative Code.

2. Respondent has been a duly licensed real estate sales person in the State of Florida at all times pertinent to this proceeding.

3. Prior to March 31, 1997, Petitioner mailed to Respondent a renewal notice that reminded her that her license would expire on March 31, 1997.

4. Accompanying the renewal notice was an insert that contained the following caveat:

In order to renew, the RENEWAL NOTICE MUST BE RETURNED WITH THE APPROPRIATE FEE. By submitting the appropriate fee to the department, you are affirming that you have "COMPLETED" the required classroom education.

5. Respondent submitted her renewal card along with the requisite fee without having completed a 14-hour continuing education course required by Rule 61J2-3.009, Florida Administrative Code. Respondent's license was thereafter renewed by Petitioner, effective March 31, 1997.

6. Respondent discovered from a discussion with her broker that she should have taken the continuing education course before she submitted her renewal application.

7. By letter dated June 12, 1997, Respondent advised Petitioner that she sent in the paperwork for the renewal of her

license before she had taken the continuing education course.

8. Respondent successfully completed the required 14-hour continuing education course on June 18, 1997.

9. Respondent testified without contradiction that she did not intend to misrepresent the status of her continuing education.

CONCLUSIONS OF LAW

10. The Division of Administrative Hearings has jurisdiction of the parties to and the subject of this proceeding. Section 120.57(1), Florida Statutes.

11. Petitioner has the burden of proving by clear and convincing evidence the allegations against Respondent. See Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); Evans Packing Co. v. Department of Agriculture and Consumer Services, 550 So. 2d 112 (Fla. 1st DCA 1989).

12. Section 475.25, Florida Statutes, provides, in pertinent part, as follows:

(1) The commission may deny an application for licensure, registration, or permit, or renewal thereof; may place a licensee, registrant, or permittee on probation; may suspend a license, registration, or permit for a period not exceeding 10 years; may revoke a license, registration, or permit; may impose an administrative fine not to exceed \$1,000 for each count or separate offense; and may issue a reprimand, and any or all of the foregoing, if it finds that the licensee, registrant, permittee, or applicant:

* * *

(e) Has violated any of the provisions of

this chapter or any lawful order or rule made or issued under the provisions of this chapter or chapter 455.

* * *

(m) Has obtained a license by means of fraud, misrepresentation, or concealment.

13. Rule 61J2-3.009, Florida Administrative Code, required Respondent to ". . . satisfactorily complete a minimum of 14 classroom hours of instruction of 50 minutes each as prescribed by the Commission . . ." prior to the renewal of her license.

14. A misrepresentation within the meaning of Section 475.25(1)(m), Florida Statutes, can be the result of an intentional act or as the result of a reckless or careless act. See Walker v. Florida Department of Business and Professional Regulation, 705 So. 2d 652 (Fla. 5th DCA 1998), and Ocean Bank of Miami v. Inv-Uni Investment Corp., 599 So. 2d 694, 697 (Fla. 3d DCA 1992).

15. Respondent had the responsibility to read the renewal form and to truthfully represent to the Petitioner her qualifications for renewal. The insert on the renewal notice clearly advised Respondent that, by submitting the appropriate fee to the Petitioner, she was affirming she had completed the required classroom education. Respondent knew or should have known that the Petitioner would rely on that representation. Respondent's act of submitting the application for renewal without having taken the required continuing education course was not intentional, but it was a careless misrepresentation. Based

on the foregoing, it is concluded that Petitioner established by clear and convincing evidence that Respondent obtained the renewal of her license as the result of a misrepresentation in violation of Section 475.25(1)(m), Florida Statutes.

16. Petitioner also established that Respondent failed to comply with Rule 61J2-3.009, Florida Administrative Code, thereby violating Section 475.25(1)(e), Florida Statutes.

17. Rule 61J2-24.001(3), Florida Administrative Code, contains disciplinary guidelines pertinent to this proceeding.

For a violation of Section 475.25(1)(m), Florida Statutes, the guideline provides as follows:

In the case of a licensee who renews the license without having complied with Rule 61J2-3.009 and the act is discovered by the BPR, the usual action of the Commission shall be to impose a penalty of revocation. In the case of a licensee who renews the license without having complied with Rule 61J2-3.009 and the licensee brings the matter to the attention of the BPR, the usual action of the Commission shall be to impose a penalty of a \$1,000 administrative fine.

18. Rule 61J2-24.001(3), Florida Administrative Code, provides the following guideline for a violation of Section 475.25(1)(e), Florida Statutes:

. . . from an 8 year suspension to revocation and an administrative fine of \$1,000.

19. The recommended penalty is consistent with the disciplinary guideline adopted by Petitioner for a violation of Section 475.25(1)(m), Florida Statutes. No separate penalty is recommended for the violation of Section 475.25(1)(e), Florida Statutes, because the conduct that established that violation also established the violation of Section 475.25(1)(m), Florida Statutes.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Petitioner find Respondent guilty of violating the provisions of Sections 475.25(1)(e) and (m), Florida Statutes, and imposes an administrative fine in the amount of \$1,000.00.

DONE AND ENTERED this 9th day of June, 1998, in Tallahassee,
Leon County, Florida.

CLAUDE B. ARRINGTON
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
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Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of June, 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.