

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. 98-2378  
 )  
NIVARDO BEATON, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on August 21, 1998, in Tallahassee, Florida, before Patricia Hart Malono, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: William Oglo, Esquire  
Department of Business and  
Professional Regulation  
1940 North Monroe Street  
Tallahassee, Florida 32399-1007

For Respondent: Nivardo Beaton, pro se  
14812 Southwest 81st Street  
Miami, Florida 33193

STATEMENT OF THE ISSUE

Whether the Respondent committed the violation alleged in the Notice to Show Cause dated March 30, 1998, and, if so, the penalty which should be imposed.

PRELIMINARY STATEMENT

In a Notice to Show Cause dated March 30, 1998, the Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums and Mobile Homes ("Division"), charged that Nivardo Beaton violated Section 326.004(1), Florida Statutes (1997), because he acted as a yacht broker without a license. Mr. Beaton timely requested a formal administrative hearing, and the Division forwarded this matter to the Division of Administrative Hearings for assignment of an administrative law judge. By Notice of Video Hearing, this case was scheduled for formal hearing on August 21, 1998; at the request of the parties, the video teleconference hearing was cancelled and the hearing was held in Tallahassee, Florida.

At the hearing, the Division presented the testimony of Peter N. Renje, who is employed by the Division as an investigator, and Peter P. Butler, who is head of the Division's General Regulation Section. Petitioner's Exhibits 1A-H, 2, 3A-D, 4, and 5 were offered and received into evidence. Mr. Beaton testified in his own behalf, and Respondent's Exhibits 1 and 2 were offered and received into evidence. The Division presented the testimony of Peter Butler on rebuttal.

The transcript of the proceeding was filed with the Division of Administrative Hearings on September 4, 1998, and the Division timely filed proposed findings of fact and conclusions of law, which have been duly considered.

## FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing and on the entire record of this proceeding, the following findings of fact are made:

1. The Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums and Mobile Homes, is the state agency responsible for licensing and regulating yacht and ship brokers in Florida. Section 326.003, Florida Statutes (1997).

2. Nivardo Beaton is a resident of Miami, Florida. He is not now, and never has been, licensed as a yacht broker or salesperson. The Division has no record of any prior enforcement or disciplinary actions against Mr. Beaton.

3. At the times material to this action, Mr. Beaton worked at Avanti Powerboats, where he did assembly, electrical installation, and motor installation work on the boats built by Avanti Powerboats. Although he was originally a salaried employee of Avanti Powerboats, at the times material to this action, Mr. Beaton worked on a "piece work" basis and was paid a flat fee when he completed rigging a boat. Mr. Beaton also had a verbal agreement with Raul Rodriguez, the owner of Avanti Powerboats, whereby he was to be paid a five-percent commission for each direct sale of an Avanti boat and a one-and-one-half-percent commission for each Avanti boat sold by a dealership he had recruited as an Avanti distributor.

4. An advertisement appeared in the October 17, 1997, edition of South Florida Boat Trader in which "Beaton Boat Sales and Service - Nivardo Beaton" offered three new boats and three used boats for sale. The three new boats were all Avantis; the three used boats were a twenty-one-foot Corona, a thirty-five-foot Contender, and a thirty-three-foot Avanti. Mr. Beaton owned the Corona; the Contender was owned by a friend, and Mr. Beaton did not expect any compensation from the sale of this boat; and the Avanti, an open-decked fishing boat, had been taken in trade by Mr. Rodriguez and was owned by Avanti Powerboats. Pursuant to a verbal agreement with Mr. Rodriguez, Mr. Beaton was to receive a five percent commission on the sale of this used thirty-three-foot Avanti.

5. The advertisement was seen by an employee of the Division, and, when the Division's records revealed that neither Mr. Beaton nor Beaton Boat Sales and Service were licensed to offer yachts for sale, an investigation was initiated. Peter Renje, the Division's investigator, contacted Mr. Beaton on November 19, 1997, and informed him that he could not offer for sale used boats over thirty-two feet in length with the expectation of compensation unless he was licensed as a yacht broker.

6. After Mr. Renje's first visit, Mr. Beaton immediately contacted the South Florida Boat Trader and discontinued the

advertisement. He also provided Mr. Renje with the materials he requested to assist him in his investigation.

7. Mr. Beaton abandoned the idea of doing business under the name of Beaton Boat Sales and Service. Mr. Beaton never sold a boat or transacted any other commercial transaction through this business. The only action Mr. Beaton took under the name of Beaton Boat Sales and Service was placing the advertisement in the October 17, 1997, issue of the South Florida Boat Trader.

8. Mr. Beaton has worked in the management and production areas of the boat-building industry for over twelve years; he began working in sales in 1997. Before working for Avanti Powerboats, he worked for a short time selling Boston Whalers, Zodiac Inflatables, and Key West Boats. He also was employed as a full-time salesman by Fisherman's Paradise, Inc., a division of Warren Craft Distributing, Inc., from January to June 1997.

9. Mr. Beaton was aware at the time he placed the advertisement in the South Florida Boat Trader that a person must have a broker's license in order to sell used yachts. He was not aware at the time he placed the advertisement that he needed to have a broker's license to offer for sale the thirty-three-foot Avanti open fishing boat.

10. The evidence presented by the Division is sufficient to establish that Mr. Beaton, doing business as Beaton Boat Sales and Service, offered for sale a used boat over thirty-two feet in length and that he expected to earn a commission if he sold the

boat. The evidence is also sufficient to establish that Mr. Beaton worked with Avanti Powerboats as an independent contractor, that he cooperated with the Division in its investigation, that he immediately cancelled the subject advertisement, and that he did not do any business as Beaton Boat Sales and Service.

11. Mr. Beaton's testimony that he was not aware that a thirty-three-foot open-decked fishing boat fell within the statutory definition of a yacht is accepted as credible. Although Mr. Beaton had a few months' experience in boat sales, there is no evidence to establish that he engaged in the sale of used boats or that he sold boats in excess of thirty-two feet in length. The evidence presented by the Division is, therefore, not sufficient to permit the inference that Mr. Beaton knew or should have known that offering for sale a used boat over thirty-two feet in length without a broker's license violated Chapter 326. Likewise, the evidence presented by the Division is not sufficient to permit the inference that Mr. Beaton intended to violate Chapter 326.

12. There was no evidence presented by the Division to establish that any member of the public suffered any injury as a result of Mr. Beaton's action in advertising for sale the used Avanti.

#### CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Section 120.569 and .57(1), Florida Statutes (1997).

14. In Section 326.002(1), Florida Statutes (1997), a broker is defined as "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."

15. A "yacht" is defined in Section 329.002(4), Florida Statutes (1997), as "any vessel which is propelled by sail or machinery in the water which exceeds 32 feet in length, and which weighs less than 300 gross tons."

16. Section 326.004, Florida Statutes (1997), provides in pertinent part

(1) A person may not act as a broker or salesperson unless licensed under the Yacht and Ship Brokers' Act. . . .

(2) A broker may not engage in business as a broker under a fictitious name unless his or her license is issued in such name.

(3) A license is not required for:

(a) A person who sells his or her own yacht.

\* \* \*

(d) A transaction involving the sale of a new yacht.

17. On the basis of the facts found herein, the Division has proven by clear and convincing evidence that Mr. Beaton violated Section 326.004(1).

18. Section 326.006(2)(d)4. provides that the Division "may impose a civil penalty . . . against an unlicensed person . . . , for any violation of this chapter or a rule adopted under this chapter. A penalty may be imposed for each day of a continuing violation, but in no event may the penalty for any offense exceed \$10,000."

19. In determining the recommended penalty in this case, consideration has been given to the aggravating and mitigating factors set forth in Rule 61B-60.008, Florida Administrative Code, which provides in pertinent part:

(4) Guidelines for Determining Civil Penalties:

(a) To assure consistency with respect to the amount of any civil penalty to be assessed in a consent order or final order, the following guidelines have been established. Aggravating or mitigating circumstances, when considered, may increase or decrease the respective amount of any civil penalty.

(b) Examples of aggravating or mitigating circumstances may include the following:

1. Criminal record of licensee;
2. Civil litigation history bearing upon issues relating to the administration of chapter 326, Florida Statutes;
3. Administrative action history, either formal or informal, bearing upon issues relating to the administration of chapter 326, Florida Statutes;
4. Cooperation of respondent relating to the Division's investigation and prosecution of the instant matter;



5. Whether the Division required the assistance of external parties in preparation of the Division's case;
6. Whether the licensee's conduct was intentional;
7. Whether the licensee, or any agent engaged by the licensee, knew or should have known that the subject misfeasance or malfeasance constituted a violation of chapter 326, Florida Statutes, or the rules promulgated thereunder, or any other law or rule having impact upon the respective proceeding;
8. Circumstances precipitating the investigation;
9. Nature of the violation;
10. History of similar violations; and
11. Any combination of any of the above factors.

Based on the findings of fact herein, there are no aggravating factors present in this case, but there are several mitigating factors that would support a lesser penalty than the \$2,500 standard penalty for a violation of Section 326.004(1), Florida Statutes.

20. In determining the recommended penalty in this case, consideration has also been given to the penalties imposed in the consent orders and the final orders submitted by the Division. In this respect, it is significant that two of the orders are Consent Orders reflecting negotiated penalties, one order is a Final Order on Default, and one order is a Final Order entered after an informal hearing at which the respondent failed to make an appearance. There is no indication in these orders that consideration was given to the aggravating and mitigating factors

set forth in Rule 61D-60.003(4)(b) in determining the penalties imposed therein.

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 Florida Land Sales, Condominiums and Mobile Homes, enter a final order finding Nivardo Beaton guilty of violating Section 326.004(1), Florida Statutes (1997); ordering Mr. Beaton to cease and desist from any other violations of Chapter 326, Florida Statutes, and the rules promulgated thereunder; and imposing a civil penalty in the amount of \$250.

DONE AND ENTERED this 13th day of October, 1998, in  
Tallahassee, Leon County, Florida.

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PATRICIA HART MALONO  
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 13th day of October, 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.