

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION, DIVISION)
OF REAL ESTATE,)
)
Petitioner,)
)
vs.) Case No. 98-2785
)
ALEXANDER CALDERONE,)
)
Respondent.)
_____)

RECOMMENDED ORDER

A hearing was held in this case in Sarasota, Florida, on October 16, 1998, before Arnold H. Pollock, an Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Steven W. Johnson, Esquire
Department of Business and
Professional Regulation
Division of Real Estate
400 West Robinson Street
Suite N-308
Post Office Box 1900
Orlando, Florida 32802-1900

For Respondent: Thomas S. Hudson, Esquire
1800 Second Street
Suite 960
Sarasota, Florida 34236

STATEMENT OF THE ISSUES

The issue for consideration in this case is whether Respondent's license as a real estate salesperson in Florida should be disciplined because of the matters alleged in the Administrative Complaint filed herein.

PRELIMINARY MATTERS

By Administrative Complaint dated May 20, 1998, Richard T. Farrell, Secretary of the Department of Business and Professional Regulation, charged Respondent with having obtained his license as a real estate salesperson by fraud, misrepresentation, or concealment, in violation of Section 475.25(1)(m), Florida Statutes, by indicating on his application for licensure that he had never been convicted of, found guilty of, or entered a plea of nolo contendere to a crime. In his answer to the administrative complaint, Respondent's counsel requested formal hearing and this hearing ensued. At the hearing, Petitioner presented the testimony of the Respondent. Respondent also testified in his own behalf.

No transcript of the proceedings was furnished. At the hearing, counsel for both parties submitted post-hearing matters which were carefully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. At all times pertinent to the issues herein, Petitioner, Division of Real Estate, was the state agency responsible for the licensing of real estate professionals and the regulation of the real estate profession in Florida. Respondent was licensed as, or applied for licensure as, a real estate salesperson.

2. On an evening in January 1980, when a young man of 29, Respondent approached an undercover deputy sheriff in a public

park in Orlando, Florida, and suggested a homosexual act. Though there was no sexual contact between Respondent and the officer, the deputy identified himself and Respondent was arrested.

3. Respondent did not deny the contact and subsequently pleaded nolo contendere to a misdemeanor charge of assignation for a lewd act. He claims he did not know the legal ramifications of his plea, and though he was placed on probation for six months and fined \$125.00 plus costs, he did not realize he had been found guilty of the offense charged. He was also instructed to obtain a letter from a psychiatrist prior to the end of his probation, but saw only a general physician. He was released from probation at the end of the six-month period without providing the letter.

4. Respondent has had no involvement with the law since that time. On April 12, 1996, some 15 1/2 years after the offense, Respondent applied for licensure as a real estate salesperson. Question 9 of the application form asks whether the applicant had ever been convicted of a crime, found guilty, or entered a plea of nolo contendere, even if adjudication was withheld. Respondent answered "no" to that question. He also signed the affidavit appearing on the application form which indicated that he had carefully read the application and that all his answers were true and correct as his knowledge, information and records permitted. Thereafter, in reliance on Respondent's application, the Division issued Respondent a license as a real estate salesperson.

5. Respondent claims he believed at the time he read the form in issue his answer was correct. Though he had not completely forgotten the incident, the application form did not call it to mind. He asserts he did not intentionally falsify the application or provide misleading answers, and claims he did not know he could go to the Division for clarification, notwithstanding this option is clearly stated on the application. His claim is disingenuous and not believable.

6. Respondent has no disciplinary record with the Division of Real Estate. He has worked for Lauren H. Meadows, a real estate broker, in her office for over two years. She is familiar with his character and his reputation for honesty and finds him honest to a fault. He is always thorough and has no problems with his co-workers. He is a giving and helpful person. Ms. Meadows claims she has a lot of respect for the Respondent and has never seen any indication of baseness or depravity in him which would interfere with his practice of real estate.

CONCLUSIONS OF LAW

7. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter in this case. Section 120.57(1), Florida Statutes.

8. Petitioner seeks to revoke Respondent's license as a real estate salesperson because, it alleges, he obtained his license by misrepresentation when he failed to indicate a prior conviction for a misdemeanor on his application form, in violation of Section 475.25(1)(m), Florida Statutes.

9. The burden of proof rests upon the Petitioner to establish Respondent's commission of the offense alleged by clear and convincing evidence, Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

10. The evidence of record clearly establishes that Respondent inaccurately answered question number 9 on his application for licensure as a real estate salesperson. He denied having been convicted of, found guilty of or entered a plea of guilty of nolo contendere to a crime. Respondent might reasonably contend he did not know that he had been found guilty, an action by the court, because he did not serve any time in prison after the trial. However, the entry of the plea of nolo contendere was his act, and while he may not have known the effect of his plea, it is impossible to reasonably believe he did not know what his plea was. The form specifically referred to a plea of nolo contendere, and that is how the Respondent pleaded. His answer of "No" to the question in issue was, therefore, false and constitutes misrepresentation.

11. Respondent argues that conviction of an offense involving moral turpitude is required to deny a license under Section 475.25, Florida Statutes, and that a misdemeanor offense "which [does] not show a 'baseness or depravity' which impugns [a license holder's] ability to deal fairly with the public" does not warrant denial of a license. Citing Nelson v. Dept. of Business and Professional Regulation, 707 So. 2d 378 (Fla. 5th DCA 1998); Pearl v. Florida, Board of Real Estate, 394 So. 2d 189

(3rd DCA 1981).

12. Assuming, arguendo, that Respondent's assignation for a lewd act does not constitute moral turpitude, it was not for his plea to or conviction of that offense that he was denied licensure. It was the fact that, having been clearly explained the necessity for accurately answering the question on the application form, and having been clearly afforded an opportunity

to explain a "Yes" answer, Respondent chose to falsely answer the question and thereafter sign an affidavit that his answers were correct.

13. Chapter 61J2-2.027(2), Florida Administrative Code, specifically states the significance of the application for licensure. It is to make immediately possible an

... inquiry as to whether the applicant is honest, truthful, trustworthy, of good character, and bears a good reputation for fair dealings, and will likely make transactions and conduct negotiations with safety to investors and to those with whom the applicant may undertake a relation of trust and confidence.

14. Respondent's misrepresentation interferes with the Division's ability to make that important determination and creates a serious question as to whether he is sufficiently honest, trustworthy, and of good character, as to not constitute a threat to the public. Taken alone, such misconduct would clearly support denial or revocation of a salesperson's license, as Petitioner suggests. However, the misconduct of misrepresentation took place more than two years ago, and the underlying misconduct took place many years before that. In the interim and since licensing, Respondent has apparently performed in a creditable manner and earned the trust of his broker who speaks highly of him. The Petitioner, in seeking revocation, indicates Respondent should have the right to reinstate his license after two years. Under the circumstances, it would appear more appropriate to place Respondent's license on probation for a period of two years.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is recommended that the Florida Real Estate Commission enter a Final Order finding Respondent guilty of obtaining his license by misrepresentation, and placing his license on probation, under such terms and conditions as are deemed appropriate by the Commission, for a period of two years.

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

ARNOLD H. POLLOCK
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of November, 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.