

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND )  
PROFESSIONAL REGULATION, )  
DIVISION OF REAL ESTATE, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 98-2874  
 )  
 )  
CAROL S. DOVE, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

A formal hearing was held by the Division of Administrative Hearings, before Daniel M. Kilbride, Administrative Law Judge, in Orlando, Florida, on November 17, 1998. The following appearances were entered:

APPEARANCES

For Petitioner: Geoffrey T. Kirk, Senior Attorney  
Department of Business and  
Professional Regulation  
400 West Robinson Street  
Orlando, Florida 32801-1772

For Respondent: William J. Sheaffer, Esquire  
609 East Central Boulevard  
Orlando, Florida 32801

STATEMENT OF THE ISSUE

Whether Respondent is guilty of obtaining a license by means of fraud, misrepresentation or concealment, in violation of Section 475.25(1)(m), Florida Statutes (1997).

PRELIMINARY STATEMENT

By Administrative Complaint filed October 24, 1997, Petitioner, Department of Business and Professional Regulation, Division of Real Estate ("Petitioner"), alleged that Carol S. Dove (Respondent) violated the aforementioned statute in that Respondent failed to disclose her plea of guilty in a criminal matter on her real estate salesperson's licensure application. Respondent disputed the allegations of fact and requested a formal hearing.

This matter was referred to the Division of Administrative Hearings and a formal hearing was scheduled. Notice was sent to the parties at the address provided. A formal hearing was held on November 17, 1998, by video teleconference. After the hearing was convened, Petitioner called one witness. Petitioner's Exhibits 1 through 3 were received into evidence. Respondent testified in her own behalf. No additional evidence was offered. The hearing was recorded and the transcript was filed on December 17, 1998. Petitioner filed its Proposed Recommended Order on December 24, 1998. Respondent filed her proposals on December 21, 1998. Both proposals have been given careful consideration in the preparation of this 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.

2. Respondent is and was at all times material to this proceeding a licensed Florida real estate salesperson. She was issued Licensed No. 0627131 in accordance with Chapter 475, Florida Statutes. Her license is currently active.

3. On or about May 9, 1995, Respondent submitted an application for licensure as a real estate salesperson.

4. Question number 9 on the application read as follows:

Have you ever been convicted of a crime, found guilty, or entered a plea of guilty or nolo contendere (no contest), even if adjudication was withheld? This question applies to violation of the laws of any municipality, county, state or nation, including traffic offenses (but not parking, speeding, inspection, or traffic signal violations), without regard to whether you were placed on probation, had adjudication withheld, paroled, or pardoned. If you intend to answer "NO" because you believe those records have been expunged or sealed by court order pursuant to Section 943.058, Florida Statutes, or applicable law of any other state, you are responsible for verifying the expungement or sealing prior to answering "NO."

If you answered "Yes," attach details including dates and outcome, including sentence and conditions imposed, in full on a separate sheet of paper.

Your answer to this question will be checked against local, state and federal records, Failure to answer this question accurately could cause denial of licensure. If you do not understand the question, consult with an attorney or the Division of Real Estate.

5. Respondent marked the "NO" box beside question number 9. Respondent then signed the "Affidavit of Applicant" which read above her signature:

The above named, and undersigned, applicant for licensure as a real estate salesperson under the provisions of Chapter 475, Florida Statutes, as amended, upon being duly sworn, deposes and says that (s)(he) is the person applying, that (s)(he) has carefully read the application, answers, and the attached statements, if any, and that all such answers and statements are true and correct, and are as complete as his/her knowledge, information and recollection permit, without any evasions or mental reservations whatsoever, that (s)(he) knows of no reason why this application should be denied; and (s)(he) further extends this affidavit to cover all amendments to this application or further statements to the Division or its representatives, by him/her in response to inquiries concerning his/her qualifications.

6. The purpose of Question 9 is to assist the Division of Real Estate in assessing the applicant's propensity for honesty, trustworthiness, and good morals.

7. Petitioner relied on the information and answers contained in Respondent's application in deciding to issue her a real estate salesperson's license.

8. On July 10, 1995, Respondent passed the real estate salesperson examination and was issued License No. 0627131.

9. From July 10, 1995, through the present, Respondent was an active salesperson in association with various brokers in the Central Florida area. Respondent is presently an active salesperson in association with Summer Bay Partnership, an owner/developer trading as Summer Bay Resort, located at 17805 U.S. Highway 192, Clermont, Florida 34711.

10. On May 21, 1993, in Kissimmee, Osceola County, Florida,

Respondent pled guilty to and was adjudicated guilty of the offense of driving while under the influence (DUI) of alcoholic beverage to the extent that her normal faculties were impaired, Osceola County Case No. 93-006486.

11. Respondent was sentenced, inter alia, to a term of one (1) year supervised probation, a suspension of driving privileges for six (6) months, DUI counter-attack school, fines and court costs.

12. Petitioner's investigation following the filing of the application yielded that Respondent had either misrepresented or erroneously answered question number 9 and, therefore, had gained her Real Estate License by fraud, misrepresentation or concealment.

13. Respondent testified that she checked "NO" to question number 9 stating that she had never been convicted of a crime as she was advised by her attorney in 1993 that DUI was a traffic violation, not a criminal offense. Further Respondent testified that when she thought of a crime, she thought of murder, rape and robbery, not a traffic violation.

14. Respondent testified that she did not intentionally lie, misrepresent or conceal her past conviction for DUI in order to gain a Real Estate License.

15. Respondent submitted finger print exemplars with her application, aware that there would be a background check done.

16. Respondent stated that she only became aware of the

fact that a DUI was a crime when she received notification from the Respondent.

#### CONCLUSIONS OF LAW

17. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this cause, pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

18. The parties were duly noticed pursuant to the notice provisions of Chapter 120, Florida Statutes.

19. The Petitioner's authority to prosecute Administrative Complaints is derived from Chapter 475, Florida Statutes.

20. Revocation of license proceedings are penal in nature. State ex rel. Vining v. Florida Real Estate Commission, 281 So. 2d 487 (Fla. 1973). The Petitioner bears the burden of proving, by clear and convincing evidence, that acts alleged in the Administrative Complaint occurred. Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987), Department of Banking and Finance v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996).

21. Petitioner satisfied its burden of proof. Petitioner demonstrated that Respondent violated Section 475.25(1)(m), Florida Statutes, by obtaining her license through fraud, misrepresentation or concealment.

22. Respondent admitted that she had pled guilty to the charge of "DUI" as alleged in the Administrative Complaint. Respondent's admissions are sufficient to prove the facts alleged.

23. It is clear from the record that Respondent had actual or constructive knowledge that she was making a material misstatement when she answered "NO" to question number 9 on the application. This constituted misrepresentation and concealment on her part. Misrepresentation is ". . . conduct which amounts to an assertion not in accordance with the truth." Nagashima v. Busch, 541 So. 2d 783 (Fla. 4th DCA 1989), citing Comment (b) to Section 525, Restatement (Second) of Torts. Misrepresentation naturally includes the element of intent. Walker v. Department of Business and Professional Regulation, 705 So. 2d at 652 (Fla. 5th DCA 1998). Wrongful intent "can be established by a showing of actual knowledge," or by a showing that one "was reckless or careless as to the truth of the matter asserted." Ocean Bank of Miami v. Inv-Uni Inv. Corp., 599 So. 2d 694, 697 (Fla. 3d DCA), rev. den. 606 So. 2d 1165 (Fla. 1992).

24. Rule 61J2-2.027(2), Florida Administrative Code, describes the significance of the licensure application. It says that "[t]he 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." By answering "NO" to question number 9 in the application, Respondent made this difficult and obtained a license without giving the Department of Business and Professional Regulation the opportunity to evaluate

her for fitness to deal with the public in an honest manner.

25. Petitioner's proof is clear and convincing, and sufficient to justify the imposition of a penalty within the range of those provided for in the above-cited statutory authority.

26. Section 475.25(1), Florida Statutes, allows for revocation of a license when the licensee has obtained the license by means of fraud, misrepresentation, or concealment.

27. At the hearing, Respondent testified her failure to include her DUI conviction in the answer sheet was a mistake, based upon misinformation given to her by an attorney representing her on the DUI charge in 1993. In addition, she stated that she did not view DUI as a crime.

28. However, Respondent's explanation regarding her error on her real estate license application, even if true, is not sufficient. Question number 9 on the applicant clearly states that "[t]his Question applies to violation of the laws . . . including traffic offenses. . ." It also instructs the applicant to consult with an attorney or the Petitioner if she misunderstood the question. Respondent's conduct demonstrated that she was reckless or careless as to the truth of the answer given and is, therefore, guilty of misrepresentation or concealment.

29. Respondent's explanation and her conduct since the



issuance of her license in 1995 is sufficient to show mitigation in this case and that a penalty other than revocation should be imposed.

RECOMMENDATION

Upon the foregoing findings of fact and conclusions of law, it is

RECOMMENDED that Respondent be found guilty of violating Section 475.25(1)(m), Florida Statutes, as charged in the Administrative Complaint, and that Respondent's license should not be revoked but that a lesser discipline be imposed within the range set forth in Rule 61J2-24.001(3), Florida Administrative Code.

DONE AND ENTERED this 4th day of January, 1999, in Tallahassee, Leon County, Florida.

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DANIEL M. KILBRIDE  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings

this 4th day of January, 1999.

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.