

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF REAL ESTATE,)
)
Petitioner,)
)
vs.) Case No. 98-3051
)
JUAN CARLOS BONITTO,)
)
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 October 14, 1998. The following appearances were entered:

APPEARANCES

For Petitioner: Laura McCarthy, Chief Deputy Attorney
Department of Business and
Professional Regulation
400 West Robinson Street
Orlando, Florida 32801-1772

For Respondent: No appearance

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 (1995).

PRELIMINARY STATEMENT

By Administrative Complaint filed November 20, 1997,

Petitioner, Department of Business and Professional Regulation, Division of Real Estate ("Petitioner") alleged that Juan Carlos Bonitto (Respondent) violated the aforementioned statute in that Respondent failed to disclose his plea of no contest in a criminal matter on his 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 October 14, 1998, by video teleconference. Diligent search and inquiry was made to locate the Respondent but he could not be located. Respondent did not appear at the hearing. After a reasonable time the hearing was convened. Petitioner called no witnesses. Petitioner's Exhibits 1 through 5 were received into evidence. No evidence was offered on behalf of Respondent. The hearing was recorded, but not transcribed. Petitioner filed a Proposed Recommended Order on October 23, 1998. No proposals have been offered on behalf of Respondent.

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. He was issued licensed number 0625149 in accordance with Chapter 475, Florida Statutes. His license is currently inactive.

3. On or about April 6, 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 his 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. On or about July 6, 1989, Respondent, going by the name of Pablo Alfaro, pled no contest to misdemeanor "joyriding" in Case No. 93CM04225, in Santa Ana, California.

7. Respondent admitted to pleading no contest to a "joyriding" charge.

8. By letter dated August 27, 1997, addressed to Petitioner, Respondent's employer at the time, John Maizie, Executive Sales Director of Cypress Pointe Resort, wrote that Respondent was an ethical and valued employee.

CONCLUSIONS OF LAW

9. 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.

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

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

12. 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).

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

14. Respondent admitted in writing that he had pled no contest to the charge of "joyriding" as alleged in the Administrative Complaint. Respondent's admissions are sufficient to prove the facts alleged. See Section 90.803(18)(a), Florida Statutes (1997).

15. It is clear from the record that Respondent had actual or constructive knowledge that he was making a material misstatement when he answered "NO" to question number 9 on the application. This constituted misrepresentation and concealment on his 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 654 (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).

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

17. Disciplinary actions under Chapter 475, Florida Statutes, have as their primary purpose protection of "the general public from unscrupulous or dishonest real estate operators." Brod v. Jernigan, 188 So. 2d 575 (Fla. 1st DCA 1966) quoting Horne v. Florida Real Estate Commission, 163 So. 2d 515 (Fla. 1st DCA 1964). Petitioner has shown by clear and convincing evidence that Respondent was dishonest with regard to this criminal history when he answered "NO" to question number 9 on the application.

18. 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.

19. 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.

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 be revoked.

DONE AND ENTERED this 3rd day of November, 1998, in Tallahassee, Leon County, Florida.

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 3rd 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.