

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION, DIVISION)
OF REAL ESTATE,)
)
Petitioner,)
)
vs.) Case No. 98-3608
)
EULAUIA S. HARRIS,)
)
Respondent.)
_____)

RECOMMENDED ORDER

A hearing was held in this case by video teleconference on December 10, 1998, before Arnold H. Pollock, an Administrative Law Judge with the Division of Administrative Hearings. The Administrative Law Judge attended from Tallahassee, while Respondent, counsel for both parties, all witnesses, and the court reporter attended from Tampa.

APPEARANCES

For Petitioner: Steven W. Johnson, Esquire
Department of Business and
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Division of Real Estate
Post Office Box 1900
Orlando, Florida 32802-1900

For Respondent: Frederick H. Wilsen, Esquire
Frederick H. Wilsen & Associates, P.A.
1999 West Colonial Drive
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Orlando, Florida 32804

STATEMENT OF THE ISSUE

The issue for consideration in this case is whether

Respondent's license as a real estate broker 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, the Division of Real Estate of the Department of Business and Professional Regulation alleged that Respondent obtained her license as a real estate broker in Florida by fraud, misrepresentation, or concealment, and had been found guilty of a crime which relates directly to the activities of a real estate salesperson, when she indicated on her application for licensure as a broker in 1996 that she had never been convicted of a crime, been found guilty, or entered a plea of guilty or nolo contendere, even if adjudication was withheld, in violation of Section 475.25(1)(m), Florida Statutes. Respondent, through counsel, by letter dated July 30, 1998, requested formal hearing on the allegations and this hearing ensued.

At the hearing, Petitioner presented the testimony of Michael L. Day, an investigative specialist with the Department of Business and Professional Regulation (Department), and introduced Petitioner's Exhibits 1 through 3. Respondent testified in her own behalf and presented the testimony of Laconia Palmer, her niece. Respondent also introduced Respondent's Exhibits 1 through 3.

No transcript of the proceedings was furnished. Subsequent to the hearing only counsel for Petitioner submitted matters in writing, which were carefully considered in the preparation of

this Recommended Order.

FINDINGS OF FACT

1. At all times pertinent to the issues herein, the Department's Division of Real Estate was the state agency in Florida responsible for the licensing of real estate salespersons and brokers in Florida and for the presentation of disciplinary cases regarding those individuals on behalf of and before the Florida Real Estate Commission. The Respondent was a licensed Florida real estate broker having been issued license number 0453845. Respondent was a broker at Quality Home Realty Inc., located at 8319 North 40th Street in Tampa.

2. On or about June 10, 1996, Respondent, who was then licensed as a real estate salesperson in Florida, submitted an application for licensure as a real estate broker in this state. Respondent answered "no" to question 9 of the application, which reads, in pertinent part:

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? . . . If you intend to answer "NO" because you believe those records have been expunged or sealed by court, . . . you are responsible for verifying the expungement or sealing prior to answering "NO."

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 fully understand this question, consult with an attorney or the Division of Real Estate.

As a result of this application and her passing the brokers' examination, Respondent was licensed as a real estate broker in

Florida.

3. In fact, however, on January 13, 1992, Respondent had pleaded nolo contendere in County Court in Hillsborough County to a charge of obtaining property by worthless check. Respondent was licensed as a salesperson at the time. Adjudication was withheld and Respondent was ordered to make restitution and pay a fine and costs of \$87.00, which she did.

4. Respondent does not deny that she entered the plea as alleged. She contends, however, that at the time the check was issued, she was in the hospital receiving treatment for chemical damage to her lungs. She alleges that she had given several personal checks on her account, signed in blank, to her niece, Ms. Palmer, who was supposed to pay her bills with them after first depositing sufficient funds, which Respondent had also given her, to the bank to cover the checks. Respondent contends that her niece did not make the deposits on time and the check in issue, written to pay for automobile repairs, was dishonored. The repair man did not contact her to obtain reimbursement, but the check was, nonetheless, subsequently redeemed. Respondent's factual allegations in this regard were confirmed by Ms. Palmer, and they are so found.

5. Respondent also contends that several years later, by the time she filled out the application form for licensure as a broker, she had forgotten about the incident because, she claims, the judge had advised her the charge against her would be dismissed upon her making restitution and her payment of the fine and costs. She claims she did not believe she had a criminal

conviction which had to be listed. She also contends that since the incident was a matter of public record, she had no reason to hide it, and that her failure to list it on the application was the result of a simple mistake. Her claim of mistake is rejected.

6. Respondent has been a licensed real estate professional since being licensed as a salesperson in January 1995. To her knowledge, no complaints have ever been lodged against her, nor has any other disciplinary action ever been taken against her. The records of the Division reflect no complaints or any prior disciplinary action. However, Respondent admits that several years prior to her licensure as a salesperson, she was arrested for assault. That charge was dismissed.

7. Respondent is presently active as a real estate broker and derives all her support from her practice. She claims to love the real estate business and contends she has a good reputation in the business community. In that regard, four individuals, including two real estate brokers, a deputy sheriff, and a long-standing friend and associate, submitted letters in support of Respondent's continued licensure. The two brokers attest to her honesty, integrity, and professionalism, as did the deputy, who also works in the profession. The friend, an associate in community activities, attests to Respondent's extensive involvement in youth reclamation activities and her church, and describes Respondent as a role model for the youth of the community. All support her maintaining her license and her

continued participation in the profession.

CONCLUSIONS OF LAW

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

9. Petitioner seeks to discipline Respondent's license as a real estate broker because, it alleges, at the time she submitted her application for licensure as a broker, she falsely claimed never to have pleaded nolo contendere to a crime, in violation of Section 475.25(1)(m), Florida Statutes. The burden to establish Respondent's guilt of the offense alleged by clear and convincing evidence rests upon the Petitioner. Department of Banking and Finance v. Osborne Stern and Company, 670 So. 2d. 932 (Fla. 1996), Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

10. The evidence shows that at the time Respondent entered the plea alleged, she was licensed as a salesperson in Florida. It is also clear that when she made application for licensure as a broker, some years later, she failed to acknowledge her prior plea of nolo contendere, and her answer to the question in issue was incorrect. Counsel for Petitioner admits, however, that the evidence is not clear that Respondent knew that sufficient funds were not available at the time the dishonored check was written by her niece, and it was this offense to which Respondent pleaded nolo contendere.

11. Nonetheless, the standard for culpability in those offenses alleging fraud, misrepresentation, or concealment is that the licensee engaged in an intentional act of misconduct.

Walker v. Florida Department of Business and Professional Regulation, 705 So. 2d 652 (Fla. 5th DCA 1998). The significance of the questions asked on the application form can be found in Rule 61J2-2.027, Florida Administrative Code. The rule indicates that the license application must be answered honestly so that an inquiry may be made to determine whether the applicant demonstrates those characteristics of honesty, truthfulness, and trustworthiness necessary to ensure safety to investors.

12. Respondent claims that she did not intend to misrepresent or conceal her prior court appearance; yet, after she appeared in court, entered a plea in open court, and paid a fine and costs, it is unrealistic to claim she did not remember that incident or think she had to report it on the application. There is nothing confusing about the terms of the question on the application form or the explanation of what is required. Under the circumstances of this case, the agency has met its burden of proving the violation.

13. Petitioner suggests as penalty here that Respondent's license be revoked, but with right to reinstate it after two years. To be sure, Respondent committed the acts attributed to her. However, under the circumstances of this case, it does not appear that her actions over many years of exemplary practice, with no indication of any impropriety related to her real estate activities, justify excluding her from the practice of the profession, even for 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 Eulauia S. Harris guilty of a violation of Section 475.25(1)(m), Florida Statutes, and placing her license on probation for a period of two years.

DONE AND ENTERED this 8th day of January, 1999, 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 8th 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.