

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF REAL ESTATE,)
)
Petitioner,)
)
vs.) Case No. 98-3961
)
RUDOLPH GORDON MIRJAH,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Administrative Law Judge, William J. Kendrick, held a formal hearing in the above-styled case on December 3, 1998, by video teleconference.

APPEARANCES

For Petitioner: Laura McCarthy, Esquire
Department of Business and
Professional Regulation
Division of Real Estate
Post Office Box 1900
Orlando, Florida 32802-1900

For Respondent: Donnette Reid, Esquire
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STATEMENT OF THE ISSUES

At issue is whether Respondent committed the offenses alleged in the Administrative Complaint and, if so, what disciplinary action should be taken.

PRELIMINARY STATEMENT

By a two-count Administrative Complaint dated August 19, 1998, Petitioner charged that Respondent, a licensed real estate salesperson, violated certain provisions of Section 475.25, Florida Statutes. Count I alleged that Respondent violated the provisions of Subsection 475.25(1)(m), Florida Statutes, by having "obtained a license by means of misrepresentation or concealment." The gravamen of such charge was Petitioner's contention that when renewing his real estate license in March 1998, Respondent falsely affirmed that he had successfully completed the necessary continuing education required for renewal. Count II alleged that Respondent's failure to comply with the continuing education requirements of Rule 61J2-3.009, Florida Administrative Code, also constituted a violation of the provisions of Subsection 475.25(1)(e), Florida Statutes.

Respondent filed an election of rights wherein he disputed the allegations of fact contained in the Administrative Complaint. Consequently, on September 4, 1998, Petitioner referred the matter to the Division of Administrative Hearings for the assignment of an administrative law judge to conduct a formal hearing pursuant to Sections 120.569, 120.57(1), and 120.60(5), Florida Statutes.

At hearing, Petitioner called Margaret Hoskins as a witness, and Petitioner's Exhibits 1 through 8 were received into evidence. Respondent testified on his own behalf, and

Respondent's Exhibit 1 was received into evidence.

The transcript of hearing was filed December 21, 1998, and the parties were initially accorded until December 31, 1998, to file proposed recommended orders; however, at Respondent's request, and with Petitioner's acquiescence, the time for filing was extended to January 18, 1999. Consequently, the parties waived the requirement that a recommended order be rendered within 30 days after the transcript has been filed. Rule 28-106.216(2), Florida Administrative Code. The parties elected to file such proposals, and they have been duly considered in the preparation of this recommended order.

FINDINGS OF FACT

1. Petitioner, Department of Business and Professional Regulation, Division of Real Estate (Department), is a state government licensing and regulatory agency charged with the duty and responsibility to prosecute administrative complaints pursuant to the laws of the State of Florida, in particular Section 20.165, Florida Statutes, Chapters 120, 455, and 475, Florida Statutes, and the rules promulgated pursuant thereto.

2. Respondent, Rudolph Gordon Mirjah, is now and has been at all times material hereto a licensed real estate salesperson in the State of Florida, having been issued license number 0589544.

3. Since November 2, 1994, if not before, Respondent has been employed by Post, Buckley, Schuh, and Jernigan, Inc., a broker corporation located at 2001 Northwest 107th Avenue, Miami,

Florida, as a right-of-way agent. Incident to his employment, Respondent works primarily as a consultant for the Florida Department of Transportation to acquire real estate for road improvements. Elements of such activities require his licensure as a real estate salesperson.

4. In or about early 1998, the Department provided Respondent with a renewal notice, which reminded him that his salesperson license was due to expire March 31, 1998. The renewal notice carried the following legend:

IMPORTANT: BY SUBMITTING THE APPROPRIATE RENEWAL FEES TO THE DEPARTMENT OR THE AGENCY, A LICENSEE ACKNOWLEDGES COMPLIANCE WITH ALL REQUIREMENTS FOR RENEWAL.

Respondent submitted the appropriate renewal fee, and the Department renewed his license.

5. By letter of May 22, 1998,¹ the Department advised Respondent that his license had been selected for audit to determine whether he was in compliance with the continuing education requirements for licensure. Pertinent to this case, the letter provided:

Your license number has been selected at random for an audit of the education required to comply with Rule 61J2-3.015(2). By submitting the renewal fee to the Department, you acknowledged compliance of the "Commission-prescribed education" requirements for the license period beginning April 1, 1996, ending March 31, 1998.

Please submit this letter along with the proof of the Commission approved course or equivalency education required at the time of you renewal, no later than 10 days from the

date of this letter. (Emphasis in original.)

6. In response to the Department's request, Respondent provided a certificate (reflecting 14 hours of continuing education), dated January 21, 1996. The Department responded (by letter of June 15, 1998) that the tendered certificate reflected proof of 14 hours of continuing education for the period beginning April 1, 1994, and ending March 31, 1996, and, therefore, evidenced satisfactory completion of the continuing education requirement for renewal of Respondent's license March 31, 1996, and not the renewal of March 31, 1998. The Department again requested evidence that Respondent had satisfactorily completed 14 hours of continuing education for the period beginning April 1, 1996, and ending March 31, 1998, that would support the renewal of his license for March 31, 1998.

7. By letter of June 19, 1998, Respondent replied to the Department's request, as follows:

This letter is in reference to the attached letter from the Department of Business & Professional Regulation dated June 15, 1998, and our recent telephone conversation. I honestly was not aware that I have to take the 14 hour Continuing Education course every renewal period, although you stated it on the renewal notice. I thought this was a reminder to take the course which I had already taken.

When I had completed this 14 hour course with Gold Coast School of Real Estate, I asked the instructor if I had to take any additional courses, and he told me that was the last course. It was a misunderstanding on my part. I apologize to the Department for not fulfilling this requirement, but ask

for an extension to complete the course.

8. On June 20, 1998, Respondent enrolled with Gold Coast School of Real Estate for 14 hours of continuing education (to fulfill his prior obligation), and on June 26, 1998, successfully passed the examination and was awarded a certificate of completion. Notwithstanding, on August 19, 1998, the Department filed the Administrative Complaint which is the subject matter of this case and charged that Respondent violated Subsection 475.25(1)(m), Florida Statutes, by having "obtained a license by means of misrepresentation or concealment," and Subsection 475.25(1)(e), Florida Statutes, by having failed to satisfy the continuing education requirements prescribed by Rule 61J2-3.009, Florida Administrative Code. According to the complaint, the disciplinary action sought for each count or separate offense

. . . may range from a reprimand; an administrative fine not to exceed \$5,000.00 per violation; probation; suspension of license, registration or permit for a period not to exceed ten (10) years; revocation of the license, registration or permit; and any one or all of the above penalties as provided for by § 455.227 and § 475.25(1), Fla. Stat. and Fla. Admin. Code R. 61J2-24.001. . . .²

9. At hearing, Respondent acknowledged his failure to take a continuing education course during the renewal period at issue, and reiterated that the cause for such failure was his misunderstanding of the statement (heretofore noted) made by the instructor at the course he completed in January 1996. Here, Respondent's testimony was candid, and the explanation offered

for his failure to complete a continuing education course during the subject renewal period is credited. Consequently, it is resolved that, at the time he submitted his renewal application, Respondent did not intend to mislead or deceive the Department, nor did he act with reckless disregard for the truth.

10. In so concluding, it is observed that following licensure, Respondent duly completed the 45 hours post-licensing educational course requirement prior to the first renewal following licensure, as required by Rule 61J2-3020(1), Florida Administrative Code (Petitioner's Exhibit 6), and 14 hours of continuing education (classroom hours) prior to the second renewal of his license, as required by Rule 61J2-3009(1), Florida Administrative Code (Petitioner's Exhibit 5). It was during the later course that Respondent received the information (that this was the last course he was required to take) which he now understands he misunderstood to apply to any future educational requirements, as opposed to merely that renewal period. Also pertinent to the foregoing conclusion, it is observed that during the period of Respondent's licensure, as well as before, he actively pursued self-improvement in his profession through attendance at numerous educational courses presented by the International Right of Way Association. Such continuing education included a 16-classroom-hour course in Land Titles (completed November 5, 1993); an 80-classroom-hour course in Principles of Real Estate Acquisition (completed December 8,

1995); an 8-classroom-hour course in Ethics and the Right of Way Profession (completed September 27, 1996); a 24-classroom-hour course in Communications in Real Estate Acquisition (completed February 14, 1997); a 16-classroom-hour course in Eminent Domain Law Basics for Right of Way Professionals (completed November 14, 1997); and a 24-classroom-hour course in Interpersonal Relations in Real Estate (completed July 10, 1998). Moreover, between November 1996 and November 20, 1997, Respondent took and passed examinations offered by the International Right of Way Association in Law, Negotiations, Appraisals, and Engineering, and on October 15, 1998, Respondent was approved for registration as a Senior Member of the International Right of Way Association. Given the commitment reflected by Respondent's educational efforts to improve his skills as a right-of-way agent, it is most unlikely that, absent a misunderstanding, Respondent would not have complied with the Department's continuing education requirement. Consequently, given Respondent's candor and history, it must be concluded that the proof fails to support the conclusion that Respondent "obtained [his] license by means of misrepresentation or concealment," as alleged in the Administrative Complaint.

CONCLUSIONS OF LAW

11. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of these proceedings. Sections 120.569, 120.57(1), and 120.60(5), Florida Statutes

(1997).

12. Where, as here, the Department proposes the take punitive action against a licensee, it must establish grounds for disciplinary action by clear and convincing evidence. Section 120.57(1)(h), Florida Statutes (1997), and Department of Banking and Finance v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996). "The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established." Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983). Moreover, the disciplinary action taken may be based only upon the offenses specifically alleged in the administrative complaint. See Kinney v. Department of State, 501 So. 2d 129 (Fla. 5th DCA 1987); Sternberg v. Department of Professional Regulation, Board of Medical Examiners, 465 So. 2d 1324 (Fla. 1st DCA 1985); and Hunter v. Department of Professional Regulation, 458 So. 2d 844 (Fla. 2d DCA 1984). Finally, in determining whether Respondent violated the provisions of Section 475.25(1), as alleged in the Administrative Complaint, one "must bear in mind that it is, in effect, a penal statute. . . . This being true, the statute must be strictly construed and no conduct is to be regarded as included within it that is not reasonably proscribed by it." Lester v. Department of Professional and Occupational Regulations, 348 So. 2d 923, 925 (Fla. 1st DCA 1977).

13. Pertinent to this case, Section 475.25(1), Florida Statutes, provides that the Florida Real Estate Commission may discipline a licensee, if it finds that the licensee:

(e) Has violated any of the provisions of . . . any rule made or issued under the provisions of this chapter or chapter 455.

* * *

(m) Has obtained a license by means of fraud, misrepresentation, or concealment.

14. Also pertinent to this case, Rule 61J2-3.009, Florida Administrative Code, provides:

Continuing Education for Active and Inactive Broker and Salesperson licenses.

(1) All persons holding active or inactive license as brokers or salespersons must satisfactorily complete a minimum of 14 classroom hours of instruction of 50 minutes each as prescribed or approved by the Commission during each license renewal period excluding the first renewal period of their current license.

15. Here, there is no dispute that Respondent violated the provisions of Subsection 475.25(1)(e), Florida Statutes, by having failed to satisfy the continuing education requirement prescribed by Rule 61J2-3.009, Florida Administrative Code, as alleged in Count II of the Administrative Complaint. What is at issue is whether, by submitting his application for renewal (which "acknowledged compliance with all requirements for renewal"), when he had not completed the continuing education requirement, constituted a violation of Subsection 475.25(1)(m), Florida Statutes.

16. To establish that a licensee committed a violation of Subsection 475.25(1)(m), the Department must show not only that the licensee provided false or misleading information on his application, but that he did so knowingly and intentionally. Munch v. Department of Professional Regulation, 592 So. 2d 1136, 1143 (Fla. 1st DCA 1992) ("[A]pplying to the words used [in Section 475.25(1)(m)] their usual and natural meaning, it is apparent that it is contemplated that an intentional act be proved before a violation may be found."). Accord Walker v. Department of Business and Professional Regulation, 23 Fla. L. Weekly D292 (Fla. 5th DCA 1998). See also Gentry v. Department of Professional and Occupational Regulations, 293 So. 2d 95, 97 (Fla. 1st DCA 1974) (statutory provision prohibiting licensed physicians from "[m]aking misleading, deceptive and untrue representations in the practice of medicine" held not to apply to "representations which are honestly made but happen to be untrue"; "[t]o constitute a violation, . . . the legislature intended that the misleading, deceptive and untrue representations must be made willfully (intentionally)"); and Naekel v. Department of Transportation, 782 F.2d 975, 978 (Fed. Cir. 1986) ("[A] charge of falsification of a government document [in this case, an employment application] requires proof not only that an answer is wrong, but also that the wrong answer was given with intent to deceive or mislead the agency. The fact of an incorrect response cannot control the question of intent. Were a

bare inaccuracy controlling on the question of intent, the 'intent' element of the charge would be subsumed within the distinct inquiry of whether the employee's answer adheres to the true state of facts. A system of real people, pragmatic in their expectations, would not easily tolerate a rule under which the slightest deviation from truth would sever one's tenuous link to employment. Indeed, . . . [the employment application] does not require absolute accuracy. Instead an employee must certify that the answers are 'true, complete and correct to the best of my knowledge and belief, and are made in good faith.' No more than that can reasonably be required. The oath does not ask for certainty and does not preclude a change in one's belief.")

17. Here, it is undisputed that Respondent's representation on the renewal application (that he was in "compliance with all requirements for renewal") was inaccurate; however, the evidence adduced at hearing (specifically the unrebutted testimony of Respondent on the subject, which the undersigned has credited) establishes that, in affirming in the manner he did, Respondent did not intend to deceive or defraud anyone about his eligibility for renewal, but rather responded in a manner he believed, in good faith, was appropriate. Consequently, the charge, as alleged in Count I, that Respondent "obtained [his] license by means of misrepresentation or concealment in violation of Section 475.25(1)(m)," Florida Statutes, must be dismissed.

18. Having resolved that Respondent committed the offense

set forth in Count II of the Administrative Complaint, it remains to resolve the appropriate penalty that should be imposed. Pertinent to this issue, Subsection 427.25(1), Florida Statutes, authorizes the Florida Real Estate Commission to impose one or more of the following penalties when it finds a licensee guilty of an offense proscribed by that subsection:

The commission may deny an application for licensure, registration, or permit, or renewal thereof; may place a licensee, registrant, or permittee on probation; may suspend a license, registration, or permit for a period not exceeding 10 years; may revoke a license, registration, or permit; may impose an administrative fine not to exceed \$1,000 for each count or separate offense; and may issue a reprimand, and any or all of the foregoing. . . .

19. Also pertinent to the penalty phase of this proceeding, Section 455.2273, Florida Statutes, provides:

(1) Each board, or the department when there is no board, shall adopt, by rule, and periodically review the disciplinary guidelines applicable to each ground for disciplinary action which may be imposed by the board, or the department when there is no board, pursuant to this part, the respective practice acts, and any rule of the board or department.

(2) The disciplinary guidelines shall specify a meaningful range of designated penalties based upon the severity and repetition of specific offenses, it being the legislative intent that minor violations be distinguished from those which endanger the public health, safety, or welfare; that such guidelines provide reasonable and meaningful notice to the public of likely penalties which may be imposed for proscribed conduct; and that such penalties be consistently applied by the board.

(3) A specific finding of mitigating or

aggravating circumstances shall allow the board to impose a penalty other than that provided for in such guidelines. If applicable, the board, or the department when there is no board, shall adopt by rule disciplinary guidelines to designate possible mitigating and aggravating circumstances and the variation and range of penalties permitted for such circumstances.

(4) The department must review such disciplinary guidelines for compliance with the legislative intent as set forth herein to determine whether the guidelines establish a meaningful range of penalties and may also challenge such rules pursuant to s. 120.56.

(5) The administrative law judge in recommending penalties in any recommended order, must follow the penalty guidelines established by the board or department and must state in writing the mitigating or aggravating circumstances upon which the recommended penalty is based.

20. In response to the legislative requirements imposed by Section 455.2273, Florida Statutes, the Florida Real Estate Commission (Commission) adopted Rule 61J2-24.001, Florida Administrative Code, titled "Disciplinary Guidelines." That rule provides, in pertinent part, as follows:

(1) Pursuant to s. 455.2273, Florida Statutes, the Commission sets forth below a range of disciplinary guidelines from which disciplinary penalties will be imposed upon licensees guilty of violating Chapters 455 or 475, Florida Statutes. The purpose of the disciplinary guidelines is to give notice to licensees of the range of penalties which normally will be imposed for each count during a formal or an informal hearing. For purposes of this rule, the order of penalties, ranging from lowest to highest, is: reprimand, fine, probation, suspension, and revocation or denial. Pursuant to s. 475.25(1), Florida Statutes, combinations of these penalties are permissible by law. Nothing in this rule shall preclude any

discipline imposed upon a licensee pursuant to a stipulation or settlement agreement, nor shall the range of penalties set forth in this rule preclude the Probable Cause Panel from issuing a letter of guidance.

21. Under the established guidelines there is not a discrete penalty for a failure to comply with the continuing education requirement imposed by Rule 61J2-3.009(1), Florida Administrative Code; however, the guidelines do establish a generic guideline for a violation of Subsection 475.25(1)(e), Florida Statutes (the violation of "any rule or order or provision under Chapters 475 and 455, F.S."), as follows:

(f) The usual action of the Commission shall be to impose a penalty from an 8 year suspension to revocation and an administrative fine of \$1,000.

Rule 61J2-24.001(1)(f), Florida Administrative Code.

22. Finally, Rule 61J2-24.001(4), Florida Administrative Code, sets forth the aggravating and mitigating circumstances which may be considered in determining the appropriate penalty, as follows:

(b) Aggravating or mitigating circumstances may include, but are not limited to, the following:

1. The severity of the offense.
2. The degree of harm to the consumer or public.
3. The number of counts in the Administrative Complaint.
4. The number of times the offenses previously have been committed by the licensee.
5. The disciplinary history of the licensee.
6. The status of the licensee at the time the offense was committed.

7. The degree of financial hardship incurred by a licensee as a result of the imposition of a fine or suspension of the license.

8. Violation of the provision of Chapter 475, Florida Statutes, where in a letter of guidance as provided in s. 455.225(3), Florida Statutes, previously has been issued to the licensee.

23. Here, given the circumstances, it must be concluded that the "usual" penalty prescribed by the Commission's rule bears no reasonable relationship to the violation shown.³ In so concluding, it is observed that Respondent's failing was shown to result from a misunderstanding, as opposed to an intentional act; no aggravating factors were offered by the Department; and, to the extent pertinent, the mitigating circumstances of record compel a departure from the established norm.⁴ At the most, the record supports, as a penalty for the violation alleged in Count II of the Administrative Complaint, the imposition of a reprimand.⁵

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that:

1. Count I of the Administrative Complaint be dismissed.
2. Respondent be found guilty of violating the provisions of Subsection 475.25(1)(e), Florida Statutes, as alleged in Count II of the Administrative Complaint, and that for such violation Respondent receive, as a penalty, a reprimand.

DONE AND ENTERED this 20th day of January, 1999, in
Tallahassee, Leon County, Florida.

WILLIAM J. KENDRICK
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of January, 1999.

ENDNOTES

1/ The letter was attached to the Administrative Complaint as Exhibit 2, and was not a matter disputed by Respondent's election of rights.

2/ The complaint also sought an award of costs as provided for by Section 455.227(3), Florida Statutes; however, the Department offered no proof, at hearing, regarding what costs, if any, it incurred. Consequently, there is no record basis on which to address such an award.

3/ The Department apparently concurs that Respondent's conduct does not warrant the imposition of the usual penalty; however, it offers no explanation of how it derived the penalty it proposed. See Petitioner's Proposed Recommended Order, pages 9 through 11.

4/ Consideration of the mitigating factors reveals that the offense is not severe; that immediately upon notice of his oversight, Respondent successfully completed the required course; there was no harm to a consumer or the public; Respondent was only shown to have been guilty of one count in the Administrative Complaint; there was no showing that Respondent had committed any other offense or had any disciplinary history, including a letter of guidance; Respondent was actively employed at the time of the offense; and suspension or other restriction on his license would adversely impact Respondent's employment.

5/ In assessing the penalty in this case, deference has been accorded the Commission's rules. Section 455.2273(5), Florida

Statutes, and Gadsden State Bank v. Lewis, 348 So. 2d 343, 345 (Fla. 1st DCA 1977) ("[A]gencies must honor their own substantive rules until, pursuant to . . . [Section 120.56, Florida Statutes (1997)], they are amended or abrogated.") Contrast Arias v. Department of Business and Professional Regulation, Division of Real Estate, 23 Fla. L. Weekly D1026b (Fla. 3d DCA 1998), appeal to the Florida Supreme Court (Case No. 93,500), dismissed July 28, 1998, as untimely.

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.