

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND )  
PROFESSIONAL REGULATION, )  
DIVISION OF REAL ESTATE, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 98-4141  
 )  
MAYRA GUZMAN, )  
 )  
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 7, 1998, by video teleconference.

APPEARANCES

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

For Respondent: Frederick H. Wilsen, Esquire  
The Rolls Building  
1999 West Colonial Drive, Suite 211  
Orlando, Florida 32804

STATEMENT OF THE ISSUE

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

PRELIMINARY STATEMENT

By a two-count Administrative Complaint dated August 18, 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 fraud, misrepresentation, or concealment." The gravamen of such charge was Petitioner's contention that when renewing her real estate license in September 1997, Respondent falsely represented that she had 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, constituted a violation of the provisions of Subsection 475.25(1)(e), Florida Statutes.

Respondent filed an election of rights wherein she disputed the allegations of fact contained in the Administrative Complaint. Consequently, 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 Roberto Castro, as a witness, and Petitioner's Exhibits 1 through 5 were received into evidence. Respondent, Mayra Guzman, testified on her own behalf, and Respondent's Exhibits 1 and 2 were received into evidence.

The transcript of the hearing was filed January 13, 1999, and the parties were accorded 20 days from that date to file proposed recommended orders. Consequently, the parties waived the requirement that a recommended order be rendered within 30 days after the transcript has been filed. The parties elected to file such proposals, and they have been duly considered.

#### 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, Mayra Guzman, 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 0582273, in association with Terranova Corporation, a broker corporation, located at 1200 Brickell Avenue, Suite 1500, Miami, Florida.

3. In 1997, the Department provided Respondent with a renewal notice, which reminded her that her salesperson license was due to expire September 30, 1997. 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 renewal notice, as well as the appropriate renewal fee, and the Department renewed her license.

4. At the time Respondent submitted her application, she knew that successful completion of 14 hours of continuing education was a requirement for renewal of her real estate salesperson license.

5. In or about May 1998, the Department conducted a routine office inspection of Terranova Corporation. At that time, the Department requested proof that Respondent had satisfactorily completed 14 hours of continuing education for the period beginning October 1, 1995, and ending September 30, 1997, that would support the renewal of her license in September 1997.

6. Respondent was unable to produce written proof (a report of completion) that she had successfully completed the continuing education requirement prior to renewal; however, she did produce a report from Gold Coast School of Real Estate which noted she started the 14-hour continuing education (correspondence) course on January 1, 1998, and successfully completed the course on January 28, 1998. At the time, Respondent explained her failure to have proof of course completion prior to renewing her license, as follows:

. . . In August of 1997, in order to renew my Florida Real Estate License, I requested the 14-hour course and test from Gold Coast School of Real Estate. I filled out all of the paperwork and returned it to Gold Coast as required.

In September 1997 I sent in the renewal fee to the State.

After a while I realized I hadn't received any confirmation from Gold Coast, so I called them. They stated they couldn't locate my paperwork and I therefore needed to pay for another book and test. I did so and in January 1998 I received confirmation that I had passed. . . .

7. Notwithstanding, on August 18, 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 fraud, 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. . . .<sup>1</sup>

8. At hearing, Respondent reiterated her prior explanation that she had offered for not having written proof of having successfully completed the continuing education course prior to renewal and that, consequently, she had retaken the course in January 1998. Additionally, Respondent offered proof of payment for the course on August 6, 1997 (Respondent's Exhibit 1), and the following explanation of course completion, prior to license renewal, which led her to believe her completion of the course was successful and would lead, in due course, to written acknowledgment of successful completion by the school:

Q. Prior to submitting your signed renewal notice, in order to comply with the

continuing education requirement, did you obtain the correspondence course for the 14 hours from Gold Coast?

A. Yes.

Q. Did the correspondence cost include a course book and a test booklet?

A. Yes, it did.

Q. At the end of each chapter in the course book, was there a progressive quiz?

A. There was a quiz, yes.

Q. Were the answers for the quiz provided at the end of the course book?

A. Yes.

Q. Did you take the progressive quiz after concluding each chapter?

A. Yes, I did.

Q. For the total book, about how many incorrect answers did you have?

A. I don't remember, but there wasn't many. It was fairly easy.

Q. Was the test for continuing education course an open book test?

A. Yes, it was.

Q. After completing the test, did you forward the test booklet to Gold Coast for grading?

A. Yes, I did.

Q. Based upon your performance on the progressive quiz after each chapter, do you have any reason to believe that you had not passed the test?

A. Absolutely not. I had no doubt that I passed the course.

Q. Did you think that you had successfully completed the course?

A. Yes.

Q. Did you then submit the license renewal notice to the Division of Real Estate?

A. Yes, I did.

Q. After you received your license, did you realize that you had not received a course report certificate from Gold Coast?

A. Immediately I didn't think about it. After awhile, I thought, "Shouldn't I have gotten something back from the school telling me this?" But at the time, I thought that the school also sent it directly to the State, notifying them that I had passed the school. But I always like to keep proof of things, so I called the school and I asked

them to see if they could send me the completion and they -- that's when I learned that I -- they didn't have anything. So I did it again.

9. Here, Respondent's explanation was plausible, and her demeanor not wanting of candor or sincerity. Consequently, Respondent's testimony is credited, and it is resolved that, at the time she submitted her renewal application, Respondent did not intend to mislead or deceive the Department, nor did she act with reckless disregard for the truth.

#### CONCLUSIONS OF LAW

10. 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).

11. 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).

12. 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.

13. 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.

\* \* \*

(5) . . .

(b) Satisfactory completion of the Commission prescribed continuing education course or courses by correspondence study is demonstrated by achieving a grade of 80% or higher on the Commission approved course final examination prepared and administered by the Florida institution or licensed real

estate school offering such correspondence course after completing the correspondence study material. . . .

14. Giving due regard to the continuing education requirements of Rule 61J2-3.009, Florida Administrative Code, it is apparent that "satisfactory completion" of a course requires a passing grade on a final examination that is graded (administered) by the institution, and not the student, to demonstrate that the student has learned the essential facts and concepts of the course. Respondent's course having failed to progress to "satisfactory completion" (as evidenced by the institution's grading and approval of her performance), it must be concluded that Respondent violated the provisions of Subsection 475.25(1)(e), Florida Statutes, by having failed to "satisfactorily complete" the continuing education requirement prescribed by Rule 61J2-3.009, Florida Administrative Code, as alleged in Count II of the Administrative Complaint. Such conclusion does not, however, resolved whether, by submitting her application for renewal (which "acknowledged compliance with all requirements for renewal"), when (unbeknown to her) the course work had not been received or graded by the school, and proof of course completion had not been issued by the school, constituted a violation of Subsection 475.25(1)(m), Florida Statutes.

15. 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 her

application, but that she 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.")

16. Here, it is undisputed that Respondent's representation on the renewal application (that she 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 she did, Respondent did not intend to deceive or defraud anyone about her eligibility for renewal, but rather responded in a manner she believed, in good faith, was appropriate. Consequently, the charge, as alleged in Count I, that Respondent "obtained [her] license by means of fraud, misrepresentation or concealment in violation of Section 475.25(1)(m)," Florida Statutes, must be dismissed.

17. 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. . . .

18. 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.

19. 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.

20. 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.

21. 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.

22. 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.<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup>

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 12th day of February, 1999, in Tallahassee, Leon County, Florida.

---

WILLIAM J. KENDRICK  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(850) 488-9675 SUNCOM 278-9675  
Fax Filing (850) 921-6847  
www.doah.state.fl.us

Filed with the Clerk of the  
Division of Administrative Hearings  
this 12th day of February, 1999.

ENDNOTES

1/ The Department also sought an award of costs as provided for by Section 455.227(3), Florida Statutes; however, it offered no proof, at hearing, regarding what costs, if any, it incurred.

Consequently, there is no record basis on which to make a recommendation concerning any cost award.

2/ 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, page 10.

3/ Consideration of the mitigating factors reveals that the offense is not severe; that immediately upon realizing the oversight, Respondent retook and 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; and there was no showing that Respondent had committed any other offense or had any disciplinary history, including a letter of guidance.

4/ 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:

Ghunise Coaxum, Esquire  
Department of Business and  
Professional Regulation  
Division of Real Estate  
Post Office Box 1900  
Orlando, Florida 32802-1900

Frederick H. Wilsen, Esquire  
The Rolls Building  
1999 West Colonial Drive, Suite 211  
Orlando, Florida 32804

Mayra Guzman  
10030 Southwest 51st Terrace  
Miami, Florida 33165

James Kimbler  
Acting Division Director  
Division of Real Estate  
Department of Business and  
Professional Regulation  
Post Office Box 1900

Orlando, Florida 32802-1900

Lynda L. Goodgame, General Counsel  
Department of Business and  
Professional Regulation  
1940 North Monroe Street  
Tallahassee, Florida 32399-0792

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.