

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION, DIVISION)
OF FLORIDA LAND SALES,)
CONDOMINIUMS AND MOBILE HOMES,)
)
Petitioner,)
)
vs.) Case No. 98-4143
)
RONALD DeMARCO,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on January 27, 1999, via video teleconference with sites in Tallahassee and Fort Lauderdale, before Eleanor M. Hunter, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: William Oglo, Attorney
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-1007

For Respondent: Fred C. Bamman, III, Attorney
Law Offices of Bamman and Guinta
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STATEMENT OF THE ISSUE

The issue is whether the Respondent is entitled to the issuance of a state license as a yacht and ship broker.

PRELIMINARY STATEMENT

The Respondent, Ronald DeMarco, was a licensed yacht and ship broker in Florida. On April 29, 1996, Mr. DeMarco entered a guilty plea to conspiracy for stealing, altering identification numbers, and then selling certain boats. As a result, Mr. DeMarco's license was revoked on December 18, 1996. Having had his probation terminated early, Mr. DeMarco is again an applicant for a yacht and ship broker's license. On August 4, 1998, the Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums and Mobile Homes (Department) issued a notice of intent to deny license application, which Mr. DeMarco challenged in this proceeding.

At the hearing, the Department presented the testimony of Peter Butler, Sr., Senior Management Analyst II, the head of the Section of General Regulation which administers the Yacht and Ship Brokers' Act of 1988. Without objection, the Department's Exhibits numbered 1-7 and 9-11 were received into evidence. Based on objections, the Department's Exhibits numbered 12 and 13 were not received into evidence. Respondent presented the testimony of Ronald DeMarco and offered no exhibits.

At the conclusion of the final hearing, counsel for the parties agreed to file proposed recommended orders on or before 45 days after the transcript of the final hearing was filed. The Transcript was filed at the Division of Administrative Hearings (DOAH) on March 5, 1999, followed by a Proposed Recommended Order

and Closing Statement received from the Department on April 19, 1999. On May 24, 1999, the Respondent, Mr. DeMarco's Proposed Recommended Order and Closing Argument were received, but were challenged as untimely in the Department's June 1, 1999, Motion to Strike. In a Response to the Motion to Strike, the Respondent asserted that he has never received a copy of the Transcript. In fact, the Transcript demonstrates that only the Department's counsel answered in the affirmative when asked about ordering a Transcript. (Attached to Motion to Strike, T.6.) From a careful reading of the Transcript, however, it is apparent that the parties never stated explicitly that the time for filing proposed recommended orders began when the transcript was filed at DOAH. Based on the ambiguity in the record, the Motion to Strike is denied.

FINDINGS OF FACT

1. Ronald DeMarco is 52 years old, and a resident of Coral Springs, Florida. He is a co-owner of International Yacht Brokers, Inc., in Miami Beach. The company which was opened approximately six or seven years ago, is owned by Mr. DeMarco and a co-owner, Angela Chiarello.

2. Mr. DeMarco moved to South Florida from New York in 1986 and, in May 1991, became a licensed ship and yacht broker. The Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums and Mobile Homes (Department) is the state agency which administers the Yacht and Ship Brokers'

Act, Sections 326.001-326.006, Florida Statutes.

3. Mr. DeMarco was hired, by Anthony Galgano, as an employee of Hidden Harbour Marina. Mr. Galgano was Mr. DeMarco's wife's cousin's brother.

4. After Hidden Harbour Marina was sold, Mr. DeMarco continued to work for the new owner. Mr. Galgano moved to another office at the end of the same yard.

5. Mr. DeMarco entered into a plea agreement signed by a United States District Judge for the Northern District of Ohio, dated April 29, 1996. In the agreement, which was received as Petitioner's Exhibit number 3, Mr. DeMarco acknowledged that the government could prove, beyond a reasonable doubt, that he conspired with Anthony Galgano and Lauren Freidman to steal and obtain by fraud, alter the hull identification number, and sell a 28' Regal boat. In June 1990 Mr. DeMarco notarized false documents purporting to transfer title to the 28' boat.

6. In the plea agreement, Mr. DeMarco also acknowledged his involvement, with Angela Chiarello, Anthony Galgano, and others, in a conspiracy to steal, alter the identity of, and sell in interstate and foreign commerce a 36' Regal Commodore boat. According to the affidavit, Mr. DeMarco directed his co-defendant, Ms. Chiarello, to notarize documents related to the transfer of the 36' boat, in June 1991.

7. Mr. DeMarco testified that he was 45 years old when he notarized the document at issue. Despite the description of his

activities in the plea agreement, Mr. DeMarco also testified that he was only charged with one count of notarizing a fraudulent document, that related to the 28' Regal, and that he only pleaded to that one count. (T. 192.)

8. As a result of the plea agreement, in 1996, Mr. DeMarco was placed on probation for three years and fined \$2,000. The Judgment, dated April 29, 1996, was received in evidence as Petitioner's Exhibit number 2. On June 24, 1998, Mr. DeMarco's probation was terminated early.

9. According to Mr. DeMarco, he accepted the plea agreement because he did not have money for an attorney, although he did have a public defender. He also testified that he spoke to Peter Butler, the head of the section of the Department which regulates ship brokers, while he was considering accepting the offer of a plea. Mr. Butler told Mr. DeMarco that his license would be the subject of a Notice of Intent to Revoke as a result of a plea. According to Mr. DeMarco, Mr. Butler also told him that he would get his license back " . . . as soon as all my commitments were done, probation and community service and stuff like that" (T. 188.)

10. Mr. Butler testified, refreshing his memory with contemporaneously taken notes of their telephone conversation on June 29, 1998, that he told Mr. DeMarco that anyone could apply but he should review applicable rules and statutes, and that the Department would review his application. He denied telling

Mr. DeMarco that he would be eligible to get his license back when his probation was terminated.

11. Mr. Butler testified that some convicted felons are licensed by the state as yacht and ship brokers. Of approximately 3,800 licenses issued, with 1,700 currently active, Mr. Butler would guess that fewer than 100 of those licenses are issued to persons with felony convictions. By error, Mr. Butler issued a license to a convicted felon who was living in a halfway house at the time. After Mr. DeMarco brought that matter to Mr. Butler's attention, the Department issued a Notice of Intent to Revoke the license. (T.62-6 and 95.)

12. Under the Yacht and Ship Brokers' Act, the Department does not regulate the selling and buying of new boats of any size or used boats equal to or smaller than 32 feet or in excess of 300 gross tons. The buying or selling of one of the vessels described in Mr. DeMarco's plea agreement would not be regulated under the Act.

13. In his cross-examination of Peter Butler, the Respondent's counsel also established that Mr. Butler did not check Mr. DeMarco's letters of reference, and could not refute their representations concerning Mr. DeMarco's good moral character and integrity. Five of the eight letters of reference submitted to the Department by Mr. DeMarco were dated prior to the date of his conviction.

14. Mr. Butler noted, in his testimony during cross-

examination, that Rule 61B-60.003(3)(a)7., Florida Administrative Code, provides in pertinent part:

c. Except as provided in sub-sub-paragraph 6.d. of this rule, no information relating to criminal, administrative or civil actions shall be considered if more than 5 years has elapsed from the satisfaction of the terms of any order, judgment, restitution agreement, or termination of any administrative or judicially-imposed confinement or supervision of the applicant, whichever is more recent.

d. Any action, proceeding, or grievance filed against the applicant, individually or otherwise, which relates to the applicant's prospective duties, responsibilities, and obligations of licensure under chapter 326,

Florida Statutes, may be considered with no limitation as to time.

15. In reviewing Mr. DeMarco's application, Mr. Butler determined that the application failed to demonstrate that the applicant is of good moral character. He also determined that not more than five years have elapsed subsequent to the completion of his "penalty phase" and that his crime was "industry-related". (T. 66.) Following a review by a staff investigator, Mr. Butler's recommendation to deny a license is reviewed in the Department by someone on the legal staff, the bureau chief, and ultimately signed by the Division Director. (T. 52, 53 and 93.)

CONCLUSIONS OF LAW

16. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding, pursuant to Sections 120.57 and 120.60, Florida Statutes.

17. The Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums and Mobile Homes (Department) is the agency of the State of Florida authorized to administer the Yacht and Ship Brokers' Act, Chapter 326, Florida Statutes.

18. Ronald DeMarco, as an applicant for licensure whose license was preliminarily denied by the Department, bears the ultimate burden of demonstrating, at hearing, by a preponderance of the evidence, his entitlement to a license. See Pershing

Industries, Inc. v. Department of Banking and Finance, 591 So. 2d 991, 994 (Fla. 1st DCA 1991); Cordes v. Department of Environmental Regulation, 582 So. 2d 652, 654 (Fla. 1st DCA 1991); Department of Transportation v. J.W.C., Co., 396 So. 2d 778, 787 (Fla. 1st DCA 1981); Department of Health and Rehabilitative Services v. Career Service Commission, 289 So. 2d 412, 414-15 (Fla. 4th DCA 1974).

19. The Department issued a Notice of Intent to Deny License Application to Mr. DeMarco based on his failure to certify that he has never been convicted of a felony. Subsection 326.004(6)(b), Florida Statute. Rule 61B-60.003(3)(a), Florida Administrative Code, lists factors for consideration of good moral character, and is as follows:

(3) Review for Good Moral Character.

(a) When the application has been determined to be in acceptable form, the division shall evaluate the application and make appropriate inquiry to determine the applicant's moral character. For the purposes of this rule, the following factors bear upon good moral character:

1. The completion of a criminal history check by the Florida Department of Law Enforcement that reveals no convictions of a felony, no convictions of a misdemeanor involving moral turpitude, and no pleas of nolo contendere, pleas of guilty, or verdicts of guilty to a felony charge or of any non-felonious offense involving moral turpitude, fraud, theft, dishonesty, assault and battery, or false statement; and
2. Civil lawsuits and administrative actions bearing upon moral character (e.g., fraud, misrepresentation, theft, assault and battery); and

3. Applicant's prior history of unlicensed brokering or sales activity in the State of Florida subject to the provisions of chapter 326, Florida Statutes; and

4. Tendering to the division a bank or other depository check for payment of any fee, which check lacks sufficient funds on deposit in or credit with such bank or depository with which to pay the same on presentation, where the applicant, upon notification of same by the bank or division, fails to redeem the check or otherwise pay the fee within 21 days of such notification; and

5. Other relevant information generated in the course of the application process which bears upon the applicant's moral character, including but not limited to those acts described by section 326.006(3), (4), Florida Statutes; and

6. Failure of the applicant to provide full and complete disclosure, or to provide accurate information, on the application for licensure.

7. The foregoing factors shall be considered in determining whether an applicant is of good moral character for purposes of licensure under chapter 326, Florida Statutes, if they comply with the following guidelines:

a. The disposition of criminal charges shall be considered if such constitutes a felony, or if such constitutes a misdemeanor involving moral turpitude, fraud, theft, dishonesty, assault and battery, or false statement.

b. The disposition of any administrative action or of any civil litigation involving fraud, misrepresentation, theft, assault and battery, or moral turpitude shall be considered if such results in a determination against the interests of the applicant.

c. Except as provided in sub-sub-paragraph 7.d. of this rule, no information relating to

criminal, administrative or civil actions shall be considered if more than 5 years has elapsed from the satisfaction of the terms of any order, judgment, restitution agreement, or termination of any administrative or judicially-imposed confinement or supervision of the applicant, whichever is more recent.

d. Any action, proceeding, or grievance filed against the applicant, individually or otherwise, which relates to the applicant's prospective duties, responsibilities, and obligations of licensure under chapter 326, Florida Statutes, may be considered with no limitation as to time.

e. Other considerations such as termination of probation, compliance with and satisfaction of any judgment or restitution agreement may be considered as evidence of rehabilitation of the applicant's good moral character.

20. The arguments presented on behalf of the Respondent are as follows:

(a) that he was not in fact guilty of all or some of charges included in the plea agreement;

(b) that Mr. Butler assured him that he would be issued a need license at the end of his sentence;

(c) that Mr. Butler did not check his references;

(d) that the Department has licensed other convicted felons;

(e) that his crime was committed more than five years and was not industry-related; and

(f) that he has been fully punished and has traveled the road toward rehabilitation for obtaining a yacht brokers' license.

21. In response to the attempt to dispute facts included in

the plea agreement, the Department cited McGraw v. Department of State, Division of Licensing, 491 So. 2d 1193 (Fla. 1st DCA 1986). In McGraw, the Court held that the Department correctly denied a request for a formal hearing in which a licensee admitted a conviction, but sought to present an exculpatory version of the facts. 495 So. 2d 1194.

22. By a preponderance of the evidence the Department demonstrated that Mr. Butler's recollection of his conversation with Mr. DeMarco is accurate and that he made no assurances about the timing for his re-licensure.

23. In Richard E. Parker v. Department of Business and Professional Regulation, Division of Florida Land Sales, Condominium and Mobile Homes, DOAH Case No. 97-0809, the Administrative Law Judge explained, in footnotes 7 and 8, to the Recommended Order, the use of the applicant's own testimony to establish his good moral character, as follows:.

⁷ Petitioner testified in his own defense concerning his post-criminal episode rehabilitation. His testimony was credible and unrebutted by the Department. Notwithstanding its self-serving nature, the testimony of an applicant for licensure, like that given by Petitioner in the instant case, may be considered and relied upon as competent substantial evidence, even if it is uncorroborated and contrary to the evidence adduced by the licensing agency. See Falk v. Beard, 614 So. 2d 1086, 1089 (Fla. 1993) ("It would be an anomalous situation indeed if the testimony of the one against whom a complaint is lodged could never form the basis for competent substantial evidence."); Florida Publishing Company v. Copeland, 89 So. 2d 18, 20 (Fla. 1956) ("There is no doubt that the

testimony of the plaintiff, although uncorroborated, '. . . if reasonable on its face, and believed and accepted by the jury as true can carry the burden of proof.');" Martuccio v. Department of Professional Regulation, Board of Optometry, 622 So. 2d 607, 609-10 (Fla. 1st DCA 1993)(expert testimony of applicant for licensure was not incompetent and could be relied upon "as competent substantial evidence to support [hearing officer's] conclusions"); Raheb v. Di Battisto, 483 So. 2d 475, 476 (Fla. 3d DCA 1986)("We are not persuaded, as urged, that the testimony of the plaintiff . . . should have been rejected by the trial court as inherently incredible; it was the trial court's function, not ours, to weigh the testimony and evidence adduced in the cause based on its observation of the bearing,

demeanor, and credibility of the witnesses appearing in the cause.").

⁸ The purpose of this proceeding is to determine whether Petitioner presently meets the "good moral character" requirement for licensure as a yacht salesperson, not to determine whether the Department was correct, based upon the information it then had available to it, to preliminarily deny Petitioner's application for licensure on the ground that he lacked "good moral character." See Beverly Enterprises-Florida, Inc. v. Department of Health and Rehabilitative Services, 573 So. 2d 19, 23 (Fla. 1st DCA 1990)("A request for a formal administrative hearing commences a de novo proceeding intended to formulate agency action, and not to review action taken earlier or preliminarily.").

24. Despite having the burden to do so, the Respondent presented no evidence of rehabilitation or good moral character other than the passage of time (of approximately a month before the application and six months before the hearing), and the early termination of his probation. The fact that the Department failed to check references is not affirmative proof at hearing of their accuracy, credibility, and continuing relevance. Although, as described above, the Respondent's testimony could have formed the basis for establishing his rehabilitation and good moral character, his testimony about his current circumstances were as follows:

I, basically, need a license to make a living. It's a hardship. I don't think Mr. Butler or the State of Florida is being fair and judging me as an individual.
(T. 189.)

25. Although the Respondent's counsel elicited testimony

concerning a guess of the number of convicted felons with ship and yacht brokers' licenses, he made no showing of comparable factual situations in any of those cases either at the hearing or in any citations within his Proposed Recommended Order.

26. Pursuant to Section 326.004, Florida Statutes, as implemented by Rule 61B-60.003, Florida Administrative Code, a convicted felon may be licensed as a yacht broker, notwithstanding his prior felony conviction, if he presents sufficient evidence to establish the rehabilitation of [his] good moral character. Regardless of whether the provision relating to 5 years is applicable, the Respondent has made no such showing. Absent an affirmative showing at hearing, of good moral character in support of the application, the issue of whether Subsection c. or d. of Rule 61B-60.003(3)(a)7, Florida Administrative Code is applicable, is deemed irrelevant to the disposition of this proceeding.

27. While demonstrating that the applicant has been punished, counsel for the Respondent elicited testimony that demonstrates that the purpose of the statute is consumer protection not continued punishment. There is no evidence to the contrary. Specifically, no evidence that the Department through its employees acted arbitrarily, capriciously, or to further punish the applicant.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of

Law, it is RECOMMENDED that the Department issue a final order denying the Respondent's application for a yacht and ship brokers' license.

DONE AND ENTERED this 22nd day of July, 1999, in
Tallahassee, Leon County, Florida.

ELEANOR M. HUNTER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 22nd day of July, 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.