

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF REAL ESTATE,)
)
Petitioner,)
)
vs.) Case No. 98-5063
)
DAVID L. LEWIS,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on January 19, 1999, by video teleconference at sites in Key West and Tallahassee, Florida, before Michael M. Parrish, an Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

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

For Respondent: David L. Lewis, pro se
c/o All Keys, Inc.
1720 North Roosevelt Boulevard
Key West, Florida 33040

STATEMENT OF THE ISSUES

This is a license discipline case in which Respondent is charged with violation of Section 475.25(1)(e), Florida Statutes,

by reason of failing to complete required continuing education courses prior to renewal of his license.

PRELIMINARY STATEMENT

By Administrative Complaint filed October 21, 1998, and amended January 15, 1999, Petitioner, Department of Professional Regulation, Division of Real Estate (Petitioner), alleged that Respondent violated the aforementioned statute in that Respondent failed to complete the required continuing education prior to renewing his real estate salesperson's license for the period beginning October 1, 1996, yet submitted the required fee August 1, 1996, thereby implying that he had completed the required education.

Respondent disputed the allegations of fact and requested an evidentiary hearing. In accordance with Section 120.68(8), Florida Statutes, and Rule 28-106.201, Florida Administrative Code, a final hearing was held on January 19, 1999, by video teleconference. At the hearing, Petitioner called one witness: Barbara Kiphart, Investigative Specialist, Division of Real Estate. Petitioner's Exhibits 1 through 4 were received into evidence.

Respondent participated in this hearing and testified on his own behalf. Respondent did not call any additional witnesses, nor did he offer any additional exhibits.

At the conclusion of this hearing, the parties requested, and were granted, twenty days from the date of the hearing within

which to file their Proposed Recommended Orders. Neither party filed a transcript of the hearing.

On February 3, 1999, Petitioner filed a timely Proposed Recommended Order containing proposed findings of fact and conclusions of law.¹ As of the date of this Recommended Order, Respondent has not filed any post-hearing documents.

FINDINGS OF FACT

1. Respondent David L. Lewis is, and was at all times material hereto, a licensed real estate salesperson in the State of Florida having been issued license number 053344 in accordance with Chapter 475, Florida Statutes. The last license issued was as a salesperson c/o All Keys, Inc., 1720 North Roosevelt Boulevard, Key West, Florida 33040.

2. By renewal notice, Petitioner notified Respondent his real estate salesperson's license would expire September 30, 1996. The renewal notice advised Respondent that "by submitting the appropriate renewal fees to the Department or the agency, a licensee acknowledges compliance with all requirements for renewal."

3. On or about August 1, 1996, Respondent submitted the required fee to renew his real estate salesperson's license for the period commencing October 1, 1996. As of that date, he had not completed the continuing education requirement.

4. Relying upon Respondent's representation that he had completed all requirements, Petitioner renewed Respondent's

salesperson's license.

5. Petitioner discovered the Respondent's status in an audit. In response to Petitioner's request for proof of education for the renewal period commencing October 1, 1996, Respondent submitted a certificate of completion of a continuing education classroom course finished October 2, 1996.

6. By letter dated August 14, 1998, addressed to Petitioner's Investigator Barbara A. Kiphart, Respondent informed Petitioner that the Bert Rodgers School of Real Estate received the correspondence course October 1, 1996.

7. According to the course report, Respondent finished the 14-hour continuing education requirement for the 1996 period on October 2, 1996, two days late.

8. Respondent mailed the correspondence course materials to the Bert Rodgers School of Real Estate sometime during the last few days of September of 1996. At the time he mailed those materials, Respondent believed they would arrive in time to be processed prior to the September 30, 1996, deadline. As a result of some unknown vagary of the mail, the materials arrived on October 1, 1996, and were processed the next day.

CONCLUSIONS OF LAW

9. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. Section 120.57, Florida Statutes.

10. 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, in particular, Section 20.165, Florida Statutes; Chapters 120, 455, and 475, Florida Statutes; and the rules promulgated pursuant thereto.

11. In a case of this nature, Petitioner bears the burden of proving, by clear and convincing evidence, all disputed issues of material fact. In this case, it has met that burden.² It is also clear that the facts in this case establish that Respondent failed to comply with the requirements of Rule 61J2-3.009, Florida Administrative Code, and that by such failure, Respondent violated Section 475.25(1)(e), Florida Statutes, as charged in the Administrative Complaint. What remains to be addressed is the matter of what constitutes an appropriate penalty for the violation proved in this case.

12. At page 7 of its Proposed Recommended Order, Petitioner proposes a penalty consisting of a requirement that Respondent complete an additional 45 hours of education courses and also pay an administrative fine in the amount of five hundred dollars (\$500.00). On that same page, Petitioner also notes: "In mitigation, it appears the Respondent did make an effort to comply, and fell short by two days." For the reasons mentioned below, it appears that the proposed penalty is more than is warranted by the facts in this case.

13. Reduced to its most basic terms, this is what might

best be described as an "accidental late paper work" case. Respondent completed the required education courses before the deadline and Respondent completed the required examination before the deadline. His only shortcoming was his failure to turn in the paperwork on time. This one failure resulted from his failure to take into account the fact that mail delivery schedules are somewhat unpredictable. While it was certainly an exercise of poor judgment for Respondent to procrastinate so long in the fulfillment of his required education courses, his two day tardiness in turning in the paperwork is no more than a minor transgression. Such a small transgression warrants no greater penalty than a reprimand.

RECOMMENDATION

On the basis of all of the foregoing it is RECOMMENDED that a final order be issued in this case concluding that Respondent committed the violation charged in the Administrative Complaint and imposing as the only penalty a written reprimand.

DONE AND ENTERED this 23rd day of February, 1999, in Tallahassee, Leon County, Florida.

MICHAEL M. PARRISH
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 23rd day of February, 1999.

ENDNOTES

1/ Petitioner's Proposed Recommended Order presents a very balanced and accurate discussion of the facts and law at issue in this case. In preparing this Recommended Order, I have drawn extensively from all of Petitioner's proposals, with the exception of Petitioner's proposed penalty.

2/ This case presents very little in the way of disputed issues of material fact. This primary dispute concerns whether the facts in this case warrant the imposition of a penalty, and, if so, the determination of an appropriate penalty.

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.