

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION, DIVISION)
OF REAL ESTATE,)
)
Petitioner,)
)
vs.) Case No. 98-5065
)
BARBARA LYNN CLARKE,)
)
Respondent.)
_____)

RECOMMENDED ORDER

An administrative hearing was conducted on February 25, 1999, in Jacksonville, Florida, by Daniel Manry, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Geoffrey Kirk, Esquire
Department of Business and
Professional Regulation
400 West Robinson Street
Orlando, Florida 32801-1900

For Respondent: Barbara Lynn Clarke
7622 Prayer Court
Jacksonville, Florida 32217

STATEMENT OF THE ISSUES

The issues in this case are whether Respondent violated Section 475.25(1)(m), Florida Statutes (1997), by obtaining a license by fraud, misrepresentation, or concealment; violated Florida Administrative Code Rule 61J2-2.027(2), by failing to disclose material information in her application; and, if so,

what, if any, penalty is appropriate. (All Chapter and Section references are to Florida Statutes (1997) unless otherwise stated. All references to rules are to rules adopted in the Florida Administrative Code in effect on the date of this Order.)

PRELIMINARY STATEMENT

On October 21, 1998, Petitioner filed an administrative complaint against Respondent alleging that Respondent violated Section 475.25(1)(m) and Rule 61J2-2.027(2). Respondent timely requested an administrative hearing.

At the hearing, Petitioner called one witness and submitted three exhibits for admission in evidence. Respondent testified in her own behalf, and submitted one exhibit for admission in evidence.

The identity of the witnesses and exhibits, and the rulings regarding each, are set forth in the Transcript of the hearing filed on March 9, 1999. Petitioner filed its Proposed Recommended Order ("PRO") on March 25, 1999. Respondent did not file a PRO.

FINDINGS OF FACT

1. Petitioner is the state agency responsible for the regulation and discipline of real estate licensees in the state. Respondent is licensed in the state as a real estate broker pursuant to license number 0421942. The last license issued to Respondent was as a broker t/a Action First Realty, 7622 Praver Court, Jacksonville, Florida 32217.

2. On January 9, 1984, Respondent applied for a license as a real estate salesperson. On February 11, 1993, Respondent applied for a license as a real estate broker. On each application, Respondent signed a sworn affidavit that all of her answers were true and correct and:

. . . are as complete as his/her knowledge, information and records permit, without any evasions or mental reservations whatsoever. . . .

3. In relevant part, question six on the sales license asked Respondent whether she had ever been arrested or charged with the commission of an offense against the laws of any municipality or state without regard to whether she was convicted. Question nine on the broker application asked Respondent whether she had ever been convicted of a crime, found guilty, or entered a plea of nolo contendere, even if adjudication was withheld. Respondent answered "no" to both questions. In each case, Petitioner relied on the accuracy of the application and issued a license to Respondent.

4. On November 7, 1978, Respondent was adjudicated guilty of cashing a worthless check in the amount of \$5.00. Respondent wrote the check to Carvel Ice Cream for a birthday cake for her daughter's birthday.

5. Respondent was in the process of moving, and the notice of insufficient funds was not delivered to her. Respondent went to court and paid the \$5.00 check and the court costs. The judge

characterized the charge as frivolous and was perturbed that the charge consumed time in his court.

6. On October 30, 1980, adjudication was withheld on the charge of driving with a suspended license. Respondent attended driving school. The offense does not appear on Respondent's Florida driving record for her entire driving history.

7. Respondent did not willfully misstate a material fact on either application. Respondent testified under oath that she did not consider either offense to be a crime and did not try to lie about either offense. Her testimony was credible and persuasive.

8. Respondent answered "no" to questions six and nine on her applications in the good-faith belief that the offenses were immaterial and not the type of offenses addressed in either question. When Petitioner's investigator interviewed Respondent, Respondent answered all questions fully and truthfully and cooperated in the investigation.

CONCLUSIONS OF LAW

9. The Division of Administrative Hearings has jurisdiction over the subject matter and parties in this proceeding. The parties were duly noticed for the administrative hearing.

10. The burden of proof is on Petitioner. Petitioner must show by clear and convincing evidence that Respondent committed the acts alleged in the administrative complaint and the reasonableness of any proposed penalty. Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

11. Section 475.25(1) provides in relevant part that the Florida Real Estate Commission (the "Commission") can place Respondent on probation, suspend Respondent's license, revoke Respondent's license, or impose a fine of \$1,000 if the Commission finds that Respondent obtained a license by fraud, misrepresentation, or concealment within the meaning of Section 475.25(1)(m).

12. Disciplinary statutes such as Section 475.25(1)(m) are penal in nature and must be strictly interpreted against the authorization of discipline and in favor of the person sought to be penalized. Munch v. Department of Business and Professional Regulation, 592 So. 2d 1136, 1143 (Fla. 1st DCA 1992); Fleischman v. Department of Business and Professional Regulation, 441 So. 2d 1121, 1133 (Fla. 3rd DCA 1983.) A statute imposing a penalty is never to be construed in a manner that expands the statute. Hotel and Restaurant Commission v. Sunny Seas No. One, 104 So. 2d 570, 571 (Fla. 1958.)

13. Florida courts have uniformly held that the appropriate culpability standard for those portions of Section 475.25(1) prohibiting conduct "by means of fraud, misrepresentation or concealment" is that the licensee engaged in an intentional act of misconduct. Walker v. Florida Department of Business, 705 So. 2d 652, 654 (Fla. 5th DCA 1998); Munch v. Department of Professional Regulation, supra, 592 So. 2d at 1143-1144; Morris v. Department of Professional Regulation, 474 So. 2d 841, 843

(Fla. 5th DCA 1985.) Intent is a state of mind. It is not subject to direct proof but must be inferred from the circumstances. Skold v. State, 263 So. 2d 627 (Fla. 3d DCA 1972).

14. The evidence submitted by Petitioner showed that Respondent submitted a false application. However, Petitioner did not charge Respondent with submitting a "false" application, as that term is used in Section 475.25(1)(1).

15. The evidence submitted by Petitioner provides a basis for drawing an inference that Respondent possessed the culpable intent required as an essential element of the charge against Respondent. However, such an inference is a rebuttable inference.

16. If a false application were determined to be synonymous with culpable intent, it would have the effect of transforming the inference drawn from a false application into an irrefutable inference. Similarly, if the testimony of the applicant and the applicant's witnesses could never overcome the inference drawn from documentary evidence, the inference would have the effect of an irrefutable inference.

17. Respondent's failure to correctly answer questions six and nine on her applications was the result of miscomprehension rather than dishonesty. At worst, Respondent was careless when she answered "no" to each question.

18. The evidence is less than clear and convincing that Respondent had a specific intent to commit fraud, misrepresentation, or concealment. Respondent's testimony was credible and persuasive.

19. Respondent violated Rule 61J2-2.027(2). Respondent failed to disclose in her applications information required by the rule.

20. Respondent demonstrated mitigating circumstances within the meaning of Rule 61J2-24.001(4). Respondent did not intend to mislead Petitioner. The harm to Petitioner and the public is de minimis. Respondent made restitution for the worthless check. She has no previous disciplinary history and has never sought to avoid accountability for the two past offenses or the charge in this proceeding. Petitioner failed to demonstrate any aggravating circumstances.

21. Petitioner seeks a penalty "in accordance with Rule 61J2-24.001(3)." Petitioner's PRO at 8. The disciplinary guidelines prescribed in Rule 61J2-24.001 are expressly limited, by the terms of Rule 61J2-24.001(1), to violations of "Chapters 455 or 475."

22. Petitioner failed to show by clear and convincing evidence that Respondent violated Section 475.25(1)(m). Rule 61J2-24.001(3)(n) prescribes a penalty only for violations of Section 475.25(1)(m).

23. Rule 61J2-24.001 prescribes no discipline for Respondent's violation of Rule 61J2-2.027(2). Rule 61J2-2.027(2) does not relate to Section 475.25(1)(m). The specific authority for Rule 61J2-2.027 is Section 475.05. The laws implemented by the rule are Sections 475.17, 475.175, and 475.451. The administrative complaint does not charge Respondent with violations of Sections 475.17, 475.175, or 475.451.

24. Respondent is not guilty of violating Section 475.25(1)(m), within the meaning of Rule 61J2-24.001(3)(n). Rule 61J2-24.001(3) prescribes no penalty for Respondent's violation of Rule 61J-2.027(2).

RECOMMENDATION

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

RECOMMENDED that the Commission enter a Final Order finding Respondent not guilty of violating Section 475.25(1)(m), finding Respondent guilty of violating Rule 61J2-2.027(2), and imposing no penalty.

DONE AND ENTERED this 31st day of March, 1999, in Tallahassee, Leon County, Florida.

DANIEL MANRY
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

Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of March, 1999.

COPIES FURNISHED:

Geoffrey Kirk, Esquire
Department of Business and
Professional Regulation
400 West Robinson Street
Orlando, Florida 32801-1900

Barbara Lynn Clarke
7622 Prayer Court
Jacksonville, Florida 32217

James Kimbler, Acting Division Director
Division of Real Estate

Department of Business and
Professional Regulation
Post Office Box 1900
Orlando, Florida 32802-1900

William Woodyard, Acting 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.