

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF REAL ESTATE,)
)
Petitioner,)
vs.) Case No. 98-5113
)
)
MARCOS ANTONIO ARGUELLES,)
)
Respondent.)
)
)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on July 23, 1999, by video teleconference with the parties appearing from Miami, Florida, before J. D. Parrish, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Nancy P. Campiglia, Esquire
Department of Business and
Professional Regulation
Division of Real Estate
Post Office Box 1900
Orlando, Florida 32802-1900

For Respondent: Thomas Payne, Esquire
3780 West Flagler Street
Miami, Florida 33134

STATEMENT OF THE ISSUES

Whether the Respondent committed the violations alleged in the administrative complaint and, if so, what penalty, should be imposed.

PRELIMINARY STATEMENT

This case began on October 21, 1998, when the Department of Business and Professional Regulation, Division of Real Estate (Department), issued a two-count Administrative Complaint against the Respondent, Marcos Antonio Arguelles. Such complaint alleged that Respondent had falsely answered a question on the application for licensure. As a result, the Department maintained that the Respondent obtained the license by means of fraud, misrepresentation, or concealment in violation of Section 475.25(1)(m), Florida Statutes. Further, the Department averred that the Respondent failed to disclose in his application the information required by Rule 61J2-2.027(2), Florida Administrative Code, in violation of Section 475.25(1)(e), Florida Statutes.

The Respondent timely completed an Election of Rights wherein he disputed the allegations of fact and requested a formal administrative hearing. Thereafter, the matter was forwarded to the Division of Administrative Hearings for formal proceedings.

At the hearing, the Petitioner presented testimony from Brian A. Piper, Sr., an investigator specialist II, employed by the Department's Bureau of Enforcement. The Petitioner's Exhibits numbered 1A, 1B, 2, 3, 4, 5, and 6 were admitted into evidence. The Respondent testified in his own behalf and offered testimony from J.C. Elso and Randall Petre, criminal defense lawyers.

The Transcript of the proceedings was filed on August 23, 1999. The parties were granted two extensions of time to file proposed recommended orders. Both proposed orders have been considered the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Petitioner is the state agency charged with the regulation of real estate licensees in the State of Florida.
2. At all times material to the allegations of this case, the Respondent was a licensed real estate salesman, license number 0646052.
3. On or about July 15, 1996, the Respondent completed an application for licensure as a real estate salesperson that was submitted to the Department. Such application posed several questions to be completed by the Respondent by checking boxes "Yes" or "No."

4. Among such questions was the following:

Have you ever been convicted of a crime, found guilty, or entered a plea of guilty or nolo contendere (no contest), even if adjudication was withheld. This question applies to any violation of the laws of any municipality, county, state or nation, including traffic offenses (but not parking, speeding, inspection, or traffic signal violations), without regard to whether you were placed on probation, had adjudication withheld, paroled, or pardoned. If you intend to answer "NO" because you believe those records have been expunged or sealed by court order pursuant to Section 943.058, Florida Statutes, or applicable law of another state, you are responsible for verifying the expungement or sealing prior to answering "NO."

5. In addition to the foregoing, the question also advised the Respondent as follows:

Your answer to this question will be checked against local, state and federal records. Failure to answer this question accurately could cause denial of licensure. If you do not fully understand this question, consult an attorney or the Division of Real Estate.

6. After reviewing the foregoing question, the Respondent submitted the answer "No" on his application for licensure. The Respondent represented at hearing that prior to submitting the application he consulted an attorney.

7. The Respondent's application for licensure also contained an affidavit wherein the Respondent, after being sworn, represented that he had carefully read the application and that all answers to same are true and correct.

8. The answer the Respondent gave to the above-described question was not accurate. In fact, in Case No. 87-2661-CF before the Circuit Court of Alachua County, Florida, the Respondent was charged with grand theft of the amount of \$4200.00, a felony.

9. The resolution of such charge came when the Respondent entered a plea of nolo contendere. Thereafter the Respondent was placed on probation for a period of three years and was directed to pay court costs and restitution. The court withheld adjudication and the Respondent successfully completed all conditions of the probation.

10. At the time of the foregoing plea the Respondent was represented by counsel, was apprised of his rights regarding the charge pending against him, had no prior convictions, and was approximately 19 years of age with satisfactory mental health.

11. The record of the Respondent's plea and the conditions of his probation have not been sealed nor expunged.

12. The Respondent did not deny the factual allegations in the underlying criminal matter. That is, he has not alleged that the charge of grand theft was untrue. He has asserted that he believed the record would not appear on a background check and that, therefore, he unintentionally failed to disclose the criminal record.

CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings.

14. Section 475.25(1), Florida Statutes, provides, in pertinent part:

(1) 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, if it finds that the licensee, registrant, permittee, or applicant:

* * *

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

* * *

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

15. Rule 61J2-2.027(2), Florida Administrative Code, provides:

The applicant must make it possible to immediately begin the inquiry as to whether the applicant is honest, truthful, trustworthy, of good character, and bears a

good reputation for fair dealings, and will likely make transactions and conduct negotiations with safety to investors and to those with whom the applicant may undertake a relation of trust and confidence. The applicant is required to disclose:

(a) if ever arrested or convicted of a crime, or if any criminal or civil proceeding is pending against the applicant, or if any judgment or decree has been rendered against the applicant in a case wherein the pleadings charged the applicant with fraudulent or dishonest dealings, or

(b) if now a patient of a mental health facility or similar institution for the treatment of mental disabilities, or

(c) if ever called by, or done business under any other name, or alias, than the name signed on the application, with sufficient information to enable the Commission to investigate the circumstances, or

(d) if ever had a broker's or salesperson's license revoked, suspended, or otherwise acted against, or had an application for such licensure denied, by the real estate licensing agency of another state, territory, or country.

16. The Petitioner bears the burden of proof in this cause to establish by clear and convincing evidence the allegations against the Respondent. Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

17. In this case the Petitioner has established by clear and convincing evidence that the Respondent submitted an inaccurate and misleading application for licensure. By virtue

of the misrepresentation as to his past criminal record Respondent received a license. The Respondent's assertions as to his belief that the record would not be released or available to the public have not been deemed persuasive. The clear and unambiguous language of the application directed the Respondent to disclose the nolo plea and resulting probation. He did not. That he could have, should have, or might still obtain an expungement of the record does not negate the misrepresentation of his answer. It was the Respondent's responsibility to verify that the record had been sealed or expunged before answering as he did.

18. Rule 61J2-24.001, Florida Administrative Code, sets forth the guidelines for penalties for violations of Section 475.25(1), Florida Statutes. Pursuant to that rule the penalty for violations of Subsections (e) and (m) range from an administrative fine and suspension to revocation of the license.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Business and Professional Regulation, Division of Real Estate, enter a final order revoking Respondent's license.

DONE AND ENTERED this 15th day of December, 1999, in
Tallahassee, Leon County, Florida.

J. D. PARRISH
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of December, 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.