

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND	)	
PROFESSIONAL REGULATION,	)	
DIVISION OF REAL ESTATE,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 98-5314
	)	
KAREN AKINBIYI,	)	
	)	
Respondent.	)	
<hr/>	)	

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by Administrative Law Judge, William J. Kendrick, held a formal hearing in the above-styled case on March 31, 1999, by video teleconference, with sites in Tallahassee and Fort Lauderdale, Florida.

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:	 Tara G. Intriago, Esquire
	400 Southeast Eighth Street
	Fort Lauderdale, Florida 33316

STATEMENT OF THE ISSUES

At issue in this proceeding is whether Respondent committed the offenses set forth in the Administrative Complaint and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On October 21, 1998, Petitioner issued a two-count Administrative Complaint whereby it alleged that Respondent violated the provisions of Section 475.25(1)(m), Florida Statutes, by obtaining her real estate salesperson license "by means of fraud, misrepresentation, or concealment," and Section 475.25(1)(e), Florida Statutes, by having "failed to disclose arrest or conviction of a crime [in her real estate license application]," as required by Rule 61J2-2.027(2), Florida Administrative Code. The gravamen of the charges was Petitioner's contention that Respondent failed to disclose on her application that "[o]n or about September 6, 1990, Petitioner pled nolo contendere to unlawful sale or possession of cannabis, a felony, in the Circuit Court, in and for Dade County, Florida, . . . [and that for such offense adjudication of guilt was withheld]."

Respondent filed an election of rights which disputed the factual allegations contained in the Administrative Complaint, and averred that "My attorney which was paid [\$]300.00 told me he was expunging it off my record. I had no idea it was still there until being notified by DBPR." 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 no witnesses; however, Petitioner's Exhibits 1 through 3 were received into evidence. Respondent testified on her own behalf, but offered no additional proof.

The transcript of hearing was filed April 19, 1999, and the parties were initially accorded 10 days from that date to file proposed recommended orders; however, at the parties' request the time for filing was extended until May 21, 1999. 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, inter alia, with the responsibility and duty to prosecute administrative complaints pursuant to the laws of the State of Florida, including Chapters 455 and 475, Florida Statutes.

2. Respondent, Karen Akinbiyi, is a licensed real estate salesperson in the State of Florida, having been issued license number SL-0642172.

3. On June 14, 1996, Respondent filed an application (dated May 1996) with the Department for licensure as a real estate salesperson. Pertinent to this case, item 9 on the application

required that Respondent answer "Yes" or "No" to the following question:

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."

If you answered "Yes," attach the details including dates and outcome, including any sentence and conditions imposed, in full on a separate sheet of paper.

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 with an attorney or the Division of Real Estate.

Respondent responded to the question by checking the box marked "No."

4. The application concluded with an "Affidavit of Applicant," which was acknowledged before a Notary Public of the State of Florida, as follows:

The above named, and undersigned, applicant for licensure as a real estate salesperson under the provisions of Chapter 475, Florida Statutes, as amended, upon being duly sworn,

deposes and says that (s)(he) is the person so applying, that (s)(he) has carefully read the application, answers, and the attached statements, if any, and that all such answers and statements are true and correct, and are as complete as his/her knowledge, information and records permit, without any evasions or mental reservations whatsoever; that (s)(he) knows of no reason why this application should be denied; and (s)(he) further extends this affidavit to cover all amendments to this application or further statements to the Division or its representatives, by him/her in response to inquiries concerning his/her qualifications. (Emphasis added.)

5. On September 30, 1996, Respondent passed the salesperson examination and she was issued license number SL-0642172 as an inactive salesperson. From December 30, 1996, through June 4, 1997, Respondent was an active salesperson associated with Home Realty Corporation, a broker corporation trading as ERA Homeland Realty and located at 6051 Miramar Parkway, Miramar, Florida. From June 5, 1997, through the date of hearing, Respondent was "not . . . in compliance to operate in an active status due to no employing broker." (Petitioner's Exhibit 1.)

6. Following approval of Respondent's application, and her licensure as a real estate salesperson, the Department discovered that Respondent had been involved in a criminal incident that was not revealed on her application. According to the proof (Petitioner's Exhibit 3), Respondent was arrested on August 16, 1990, and charged, inter alia, with the purchase of marijuana (cannabis), under 10 grams, in violation of Section 893.13(2)(a)2, Florida Statutes, a felony of the third degree.

On August 28, 1990, an Information was filed, predicated on such offense, and on September 6, 1990, Respondent entered a plea of nolo contendere. By order of the same date, the court noted that Respondent had been found guilty of the charge, but withheld adjudication of guilt. Respondent was sentenced to (accorded credit for) time served (one day), ordered to pay various costs totaling \$225.00, and fingerprinted pursuant to Section 921.241(1), Florida Statutes.

7. Based on such incident, the Department filed the Administrative Complaint at issue in this proceeding which, based on Respondent's failure to disclose the criminal incident on her application, charged that "Respondent has obtained a license by means of fraud, misrepresentation, or concealment in violation of [Section] 475.25(1)(m), Fla. Stat." (Count I), and that "Respondent has failed to disclose arrest or conviction of a crime as required by . . . [Rule 61J2-2.027(2), Florida Administrative Code] and, therefore, is in violation of [Section] 475.25(1)(e), Fla. Stat." (Count II). According to the complaint, the disciplinary action sought for such violations was stated to be as follows:

. . . The penalty 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. . . .<sup>1</sup>

8. At hearing, Respondent offered the following explanation regarding the criminal incident and her failure to disclose it on her application for licensure:

DIRECT EXAMINATION

\* \* \*

Q. . . . Ms. Akinbiyi, do you recall being arrested for unlawful purchase of cannabis?

A. Yes, I do.

\* \* \*

Q. And what happened after the arrest?

A. After the arrest I was let go. I went to the phone book, looked up an attorney, talked to him over the phone, briefly told him what it is I wanted him to do. He told me to come to his office. I went to his office. He told me what he was going to do. He told me that he needed \$300 to do it. I gave it to him. He gave me a receipt. He gave me a rubber stamp on the receipt, and I left.

Q. Okay, and when he said he was going to take care of it, what did you believe that to mean?

A. Well, I believed it to mean that it had been dismissed, and he was going to just erase it off my record, period, expunge it, take it away.

Q. Okay, after that day did you have any more contact with this attorney?

A. No, I didn't have any need to, because I paid him to do a job I thought he did.

Q. Okay, when was the first time that this arrest was brought up again?

A. When I got the letter from the Real Estate Commission, telling me that they see that I've been arrested, and I didn't answer properly to the application. . . .

\* \* \*

Q. . . . when you answered the question on the application did you believe that you had been -- did you know what a withhold of adjudication was at the time?

A. At the time, no. I just knew that I paid this lawyer, and everything was supposed to be okay.

Q. Okay, at the time that you answered the question did you believe your criminal charge had been dismissed?

A. Yes, I did.

Q. . . . at any time when you were responding to the question regarding, have you ever been convicted or pled no contest to a crime, were you intending to conceal or misrepresent this crime?

A. No, I was not.

\* \* \*

#### CROSS EXAMINATION

\* \* \*

Q. Ms. Akinbiyi --

A. Uh-huh (positive response.)

Q. -- you testified that when you were filling out the application for your real estate license that you believed that your record have been sealed or expunged by your attorney, correct?

A. Exactly.

Q. Do you recall reading the last paragraph to Question Number 9, which reads, "if you intend to answer no because those records have been expunged or sealed by the Court, you are responsible for verifying expungement or sealing prior to answering no"?

A. Well, it wasn't a problem, because I knew where the attorney's office was, and if I needed him I could just go back there and say, remember me, I paid you. This is my case number, and he can go ahead and look it up.

Q. So did you ever actually verify that your records were sealed or expunged before answering that?

A. No, I did not. No, I did not, but I just assumed it was since I paid him.



Q. At the time that you were filling out this application you did have a recollection of this criminal charge?

A. Yes, I did.

\* \* \*

THE COURT: Let me ask you a question. You were in jail for one evening; is that correct?

THE WITNESS: That's correct.

THE COURT: Okay, and when you were released the next morning is when you called the lawyer?

THE WITNESS: Yes, it is.

THE COURT: And you went to see him the same day?

THE WITNESS: Yes, I did.

THE COURT: And at that time you paid him \$300, and he gave you a receipt for the money?

THE WITNESS: Yes, he did, that's correct.

\* \* \*

THE COURT: Did you ever see the lawyer again after that date?

THE WITNESS: No, I didn't.

THE COURT: Did you ever appear in Court?

THE WITNESS: No.

THE COURT: Did you ever have any contact with the criminal justice system after your release from jail on this charge?

THE WITNESS: No, sir.

\* \* \*

[RE-CROSS EXAMINATION]

Q. Do you remember going to court and entering a plea of no contest to this charge. . .

A. I really don't . . . After I went to -- after I just spent the night, I believe the next day we did go to court. I don't know, because it was like a whole group of us. Everybody, they just said their name,

and it wasn't like a one person deal. It was everybody collectively standing up going to court. So I could have. To be honest with you, I can't remember.

Q. Do you remember talking to the judge?

A. I remember I was in a courtroom, and then they said time served, and I said okay. And I went home, I called my husband, looked in the phone book, got an attorney and went straight to his office.

Q. Do you remember being fingerprinted when you were in court?

A. . . . not in court. When I got arrested I got fingerprinted.

Q. Okay, but you weren't fingerprinted in court again?

A. No, I wasn't.

Q. Okay. Just one more question. Do you remember having to pay any costs to the Court for this charge?

A. No. . . . I don't recall any charges that I had to pay myself.

9. Having carefully considered Respondent's testimony at hearing, and having reflected further on her explanation for failing to disclose the criminal incident on her application (that she employed an attorney to expunge or seal her record, and she assumed he had done so when completing the application), it must be resolved that Respondent's explanation was lacking in sincerity or genuineness, as well as substance, and must be rejected as unpersuasive. In so concluding, it is initially observed that Respondent's version of her exposure to the criminal justice system does not conform with the objective proof of record. (Petitioner's Exhibit 3.) Notably, Respondent avers that she employed an attorney to expunge or seal her record on August 17, 1990 (the day she was released from jail, and the day

after her arrest), and that she had no further contact with her lawyer or the criminal justice system after that date; however, the objective proof demonstrates that the Information did not issue until August 28, 1990, and that it was not until September 6, 1990, that Respondent, accompanied by her attorney, entered a plea of nolo contendere. The objective proof further reflects that on the same date (September 6, 1990) the court noted her guilty of the charge, but withheld adjudication of guilt and sentenced her to time served, ordered her to pay various costs totaling \$225.00, and oversaw that she was fingerprinted in open court. Clearly, Respondent's version of the event does not comport with the objective proof, and it is most unlikely that a person would confuse or forget an appearance in court on a felony charge, the entry of a plea to a felony charge, or being fingerprinted in open court. Moreover, it is most unlikely that Respondent would engage an attorney the day after her arrest, and before the Information had been filed or resolved, to expunge or seal her record. Finally, had she made such a request of her attorney at anytime, it is most improbable that she would not contact or inquire further of her attorney to ascertain whether her record had been successfully expunged or sealed. In sum, Respondent's testimony that her response to item 9 on the application was, at the time, an accurate reflection of her understanding of the status of the criminal incident (that the record had been expunged or sealed) is improbable and

unworthy of belief. Consequently, it must be resolved that Respondent's failure to disclose the incident was intentional.

#### 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 to 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 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 chapter 455.

\* \* \*

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

13. Pertinent to the perceived violation of Subsection 475.25(1)(e), Florida Statutes, Rule 61J2-2.027(2), Florida Administrative Code, provides:

(2) 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. . . .

14. To establish that a licensee committed a violation of Subsection 475.25(1)(m), as alleged in Count I of the Administrative Complaint, the Department must show not only that the licensee provided false or misleading information on his application, but that he 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))."

15. Here, as observed in the findings of fact, the Department has demonstrated that the misleading, deceptive, and untrue representation contained in Respondent's application was made willfully (intentionally). See Ellis v. State, 425 So. 2d 201 (Fla. 5th DCA 1983), approved, 442 So. 2d 213 (Fla. 1983) (circumstantial evidence is sufficient to prove intent). See also Ocean Bank of Miami v. Inv-Uni Investment Corp., 599 So. 2d 694, 697 (Fla. 3d DCA 1992)("Scienter, or guilty knowledge, is an element of intentional misconduct, which can be established by showing actual knowledge, or that the defendant was reckless or careless as to the truth of the matter asserted"). Consequently, it has been shown, as alleged in Count I of the Administrative Complaint, that Respondent violated the provisions of Subsection 475.25(1)(m), Florida Statutes. Such conduct also supports the conclusion that, as alleged in Count II of the Administrative Complaint, Respondent violated the provisions of Subsection 475.25(1)(e), Florida Statutes, by failing to comply with the disclosure requirements of Rule 61J2-2.027(2), Florida Administrative Code.

16. Having reached the foregoing conclusion, it remains to resolve the appropriate penalty for Respondent's offense. Here, the Department suggests, as a penalty for the violation found, that Respondent's license be revoked. That proposal is consistent with Section 475.25(1), Florida Statutes, and the Department's penalty guidelines (Rule 61J2-24.001(3)(n), Florida Administrative Code). C.f. Williams v. Department of Transportation, 531 So. 2d 994 (Fla. 1st DCA 1988) (Agency is required to comply with its disciplinary guidelines in taking disciplinary action against its employees.) Consequently, there being no apparent reason to deviate from the Department's recommendation, its proposed penalty is accepted as appropriate. Walker v. Department of Business and Professional Regulation, supra (Penalty imposed was within Florida Real Estate Commission's statutory authority and would not be disturbed.)

#### RECOMMENDATION

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

RECOMMENDED that a final order be rendered which finds Respondent guilty of violating Subsections 475.25(1)(e) and (m), Florida Statutes, as alleged in the Administrative Complaint.

It is further RECOMMENDED that for such violations, the final order revoke Respondent's license.



DONE AND ENTERED this 21st day of May, 1999, in Tallahassee,  
Leon County, Florida.

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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  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 21st day of May, 1999.

ENDNOTE

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.

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.