

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND )  
PROFESSIONAL REGULATION, )  
DIVISION OF REAL ESTATE, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 98-5315  
 )  
EVERS AURUBIN, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly-designated Administrative Law Judge, William J. Kendrick, held a formal hearing in the above-styled case on February 16, 1999, by video teleconference, with sites in Tallahassee and Miami, Florida.

APPEARANCES

For Petitioner: Geoffrey Kirk, Esquire  
Department of Business and  
Professional Regulation  
Division of Real Estate  
Post Office Box 1900  
Orlando, Florida 32802-1900

For Respondent: Evers Aurubin, pro se  
13540 Northwest 17th Avenue  
Opa Locka, Florida 33054

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 his real estate salesperson license "by means of fraud, misrepresentation, or concealment," and Section 475.25(1)(e), Florida Statutes, by having "failed to disclose in his real estate license application the information required under Rule 61J2-2.027(2), Florida Administrative Code." The gravamen of the charges was Petitioner's contention that Respondent failed to disclose on his application that "on or about February 22, 1991, . . . [he] was convicted of 'obstructing street' (a misdemeanor)."

Respondent filed an election of rights which disputed the factual allegations contained in the Administrative Complaint, and 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 4 were received into evidence. Respondent testified on his own behalf, but offered no additional proof.

The transcript of hearing was filed March 31, 1999, and the parties were accorded 10 days from that date to file proposed

recommended orders. Neither party elected to file such a proposal.

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, Evers Aurubin, is a licensed real estate salesperson in the State of Florida, having been issued license number 0650984.

3. On February 24, 1997, Respondent filed an application (dated February 12, 1997) 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 June 9, 1997, Respondent passed the salesperson examination and he was issued license number 0650984 as an

inactive salesperson. From July 17, 1997, through the date of the hearing, Respondent has been an active salesperson associated with The Keyes Company, a broker corporation located at One Southeast Third Avenue, Miami, Florida.

6. Following approval of Respondent's application, and his licensure as a real estate salesperson, the Department discovered that Respondent had been involved in an incident that was not revealed on his application. According to the Certified Record Search (Petitioner's Exhibit 1), attested to by the Clerk of Courts, Dade County, Florida, their records revealed that Respondent was arrested on February 21, 1991, for "obstructing street," convicted on February 22, 1991, and sentenced to and credited with time served (overnight detention). No further record existed concerning the nature of the charge since, according to the clerk's certification "pursuant to Florida Rules of Criminal Procedure 2.075, Retention of Court Records, the requirement for retaining misdemeanor cases under this rule is 5 years, therefore the file is unavailable." Consequently, there is no record evidence of the specific provision of law Respondent was convicted of violating and, therefore, no showing that the offense was criminal and, if so, the degree of felony or misdemeanor.

7. Upon discovery of such information, the Department apparently apprised Respondent of its discovery and requested an

explanation. Respondent addressed the Department's concerns by letter of July 16, 1998, as follows:

I,m writting (sic) this letter to explain the incident of my arrest and the reason I answer not to the question on my application for the real estate license. There in the Amocco (sic) Gas Station on 27th Avenue close to 135th St., I gas-up there a few time. On the night of 2-21-91 in my way home from work, I stop to gas-up while doing so I noticed a young lady at the stop sign, but previously I thought that I saw her inside the gas station. By curiosity I drove by to talk to her, I asked her how are you doing just to have a conversation with her. She approached and ask me do I have \$20.00 I said I have \$9.00 to my surprise she said can she go with me I laugh then she walk toward the back of the car. All the doors of the car were locked so I did not have any intention of letting her in. I put my head down to look for the stack (sic) shift because my car was not automatic so I can put it on first gear to go, when I raised my head I saw an unmarked car pull in front of me vertically at the same time two to three Police car pull-up behind me, they ordered me out and arrested me, they took me to the Police Station to take me to jail that,s there (sic) I find out she was an under cover cop or working for the Police. I ask one of the officer when will I get out he answer probably the next morning because this is a minor offense. In the morning they took me to the court house the officer there told us, those of us that are there for the first time it is better to plead guilty, if we plead no contest or any other way we will have to come back to the court spend more time since this is a very minor case, plead guilty and we will be out the same day. I was working did not have time to come back, so when the Judge called me and asked me how do I plea I said guilty then they let me out the next (sic) morning.

The cause of the arrest remain unclear to me. Because I find out that they arrested me

for mentioning money, but I did not enter to any agreement what so ever with the lady and I did not mention anything about sex.

Since it was a very minor case practically nothing I never pay any attention to it, that,s why I answer no to the question on the applycation (sic). I regret the incident very deeply and I will not let it happen to me ever again.

8. Thereafter, on October 21, 1998, the Department filed the Administrative Complaint at issue in this proceeding which, based on Respondent's failure to disclose the aforesaid incident on his 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 in his real estate license application the information required under Rule 61J2-2.027(2), Fla. Admin. Code, and therefore, 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:

. . . [T]he 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>

9. Consistent with the explanation he offered the Department in his letter of July 16, 1998, Respondent explained, at hearing, that his response to item 9 on the application was,

at the time, an accurate reflection of his understanding of the significance of the charge. According to Respondent, who was not represented in the matter, it was his understanding that the charge ("obstructing street") was a non-criminal matter; that he was unfamiliar with the process, as well as scared; that he pled guilty to the charge so he would not have to return; and thereafter was released with credit for time served (an evening of incarceration). There was no other penalty imposed for the incident (no fine or probation), and Respondent has never been charged with any other offense.

10. Here, Respondent's explanation for his failure to disclose the information regarding his arrest and conviction is credited, and it is resolved that, at the time he submitted his application, Respondent did not intend to mislead or deceive those who would be reviewing his application. In so concluding, it is observed that Respondent's testimony was candid, the nature of the incident was not shown to be significant, and Respondent's understanding of the matter as non-criminal was, given the nature of the charge and Respondent's lack of experience with the judicial system, reasonable. Moreover, as heretofore noted, the court record fails to disclose, and the Department offered no proof to demonstrate, the provision of law violated or its significance.<sup>2</sup>



## CONCLUSIONS OF LAW

11. 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).

12. 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).

13. 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.

14. 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. . . .

15. 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.<sup>3</sup> 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)); and Naekel v. Department of Transportation, 782 F.2d 975, 978 (Fed. Cir. 1986) ("[A] charge of falsification of a government document [in this case, an employment application] requires proof not only that an answer is wrong, but also that the wrong answer was given with intent to deceive or mislead the agency. The fact of an incorrect response cannot control the question of intent. Were a bare inaccuracy controlling on the question of intent, the 'intent' element of the charge would be subsumed within the distinct inquiry of whether the employee's answer adheres to the true state of facts. A system of real people, pragmatic in their expectations, would not easily tolerate a rule under which the slightest deviation from truth would sever one's tenuous link to employment. Indeed, an SF-171 does not require absolute accuracy. Instead an employee must certify that the answers are 'true, complete and correct to the best of my knowledge and belief, and are made in good faith.' No more than that can reasonably be required. The oath does not ask for certainty and does not preclude a change in one's belief.")

16. Here, given the Department's failure to demonstrate the provision of law violated or its significance, it cannot be said that Respondent's answer to the inquiry made in item 9 of the application was inaccurate. Moreover, the evidence adduced at hearing (specifically the unrebutted testimony of Respondent on the subject, which the undersigned has credited) establishes

that, in responding to the question in the manner he did, Respondent did not intend to deceive or defraud anyone about his past, but rather responded in a manner he believed, in good faith, was appropriate. Finally, given the nature of the offense and the time that elapsed since its occurrence, it is unlikely (there being no proof to the contrary) that the Department's decision (to approve Respondent's application for licensure) would have been altered, had it known of Respondent's conviction. Consequently, the charge that Respondent "obtained [his] license by means of fraud, misrepresentation, or concealment in violation of Section 475.25(1)(m), Florida Statutes," as alleged in Count I of the Administrative Complaint, must be dismissed. Similarly, there being no competent proof to demonstrate with any degree of certainty that the offense with which Respondent was convicted was criminal in nature, the Department has failed to demonstrate that Respondent violated the provisions of Rule 61J2-2.027(2), Florida Administrative Code, and, therefore, Subsection 475.25(1)(e), Florida Statutes. Consequently, Count II of the Administrative Complaint must also be dismissed.

#### RECOMMENDATION

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

RECOMMENDED that a final order be rendered dismissing the Administrative Complaint.

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

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WILLIAM J. KENDRICK  
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 April, 1999.

ENDNOTES

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.

2/ Research discloses a number of possible statutes that would support a charge of "obstructing street." For example, the provisions of law at Sections 316.2035, 316.2045, 861.01, and 861.011, Florida Statutes (1989); however, those provisions do not appear to encompass the circumstances of the incident in question. Other possible provisions of law, include Sections 316.194 and 316.1945, Florida Statutes (1989), as well as unknown municipal or county ordinances, relating to improper parking. Here, to resolve the nature or significance of the infraction lodged against Respondent, whether criminal or non-criminal, would be pure speculation.

3/ Subsection (2) of Section 475.25, Florida Statutes (a statutory provision not cited by the Department in the Administrative Complaint issued in the instant case), provides that a licensed real estate salesperson's "license may be revoked or cancelled if it was issued through the mistake or inadvertence of the commission." This subsection, in contrast to Subsection (1)(m) of Section 475.25, Florida Statutes (the subsection upon which the Department is relying in seeking the revocation of Respondent's license), authorizes the Commission to revoke a license that was issued based upon erroneous information provided

by the licensee concerning the licensee's qualification, regardless of whether the licensee, in providing such information, had the intent to deceive.

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.