

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RICHARD A. BADOLATO,)
)
 Petitioner,)
)
 vs.) Case No. 98-5655
)
 DEPARTMENT OF BUSINESS AND)
 PROFESSIONAL REGULATION,)
 DIVISION OF FLORIDA LAND SALES,)
 CONDOMINIUMS, AND MOBILE HOMES,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on May 3, 1999, in Tallahassee, Florida, before Patricia Hart Malono, the duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Clyde M. Taylor, Esquire
200 West College Avenue
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Tallahassee, Florida 32301

For Respondent: William Oglo
Assistant General Counsel
Department of Business and
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Northwood Centre
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STATEMENT OF THE ISSUE

Whether the Petitioner's application for licensure as a yacht and ship salesman should be approved or denied.

PRELIMINARY STATEMENT

In a Notice of Intent to Deny License Application (Amended) dated November 20, 1998, the Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums, and Mobile Homes ("Division"), notified Richard Anthony Badolato that it intended to take administrative action against him, specifically, to deny his application for licensure. The Division alleged in the notice that Mr. Badolato had been convicted of at least two felony violations of narcotics law; that he had disclosed only one violation on his application for licensure; and that the Division has authority to deny the license of an applicant who does not prove that he or she is of good moral character, of an applicant who does not certify that he or she has never been convicted of a felony, and of an applicant who has falsely sworn on the application to a material statement.

Mr. Badolato timely requested a formal hearing, and the Division referred the matter to the Division of Administrative Hearings for assignment of an administrative law judge. Pursuant to notice, the final hearing was held on May 3, 1999.

At the hearing, Mr. Badolato testified in his own behalf but offered no exhibits into evidence. The Division presented the testimony of Peter P. Butler, Sr., and Robert Badger, both Division employees. Respondent's Exhibits 1A through 1D, 2A through 2E, 3, and 4 were offered and received into evidence.

The transcript of the hearing was filed with the Division of Administrative Hearings, and the Respondent timely filed proposed findings of fact and conclusions of law. The Petitioner filed proposed findings of fact and conclusions of law on June 24, 1999, six days after the deadline for filing proposals.¹ Both proposals have been duly considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing and on the entire record of this proceeding, the following findings of fact are made:

1. The Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums, and Mobile Homes, is the state agency responsible for licensing and regulating yacht and ship brokers and salespersons in Florida. Section 326.003, Florida Statutes (1997).

2. On July 28, 1998, the Division received an application for a yacht and ship salesperson's license from Richard Badolato.

3. Question 13 on the application solicits information of the applicant's criminal history as follows:

Have you ever been convicted of a crime, either pled or been found guilty, or entered a plea of nolo contendere (no contest), even if adjudication was withheld?

NOTE: 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. Your answer to this question will be checked against local and state records. Failure to answer this question accurately could cause denial of licensure.

4. After Question 15 of the application, the following statement appears in bold type: "If your answer to question 13, 14, or 15 is Yes, attach your complete signed statement of the charges and facts, together with the dates, name and location of the court in which the proceedings were held or are pending."

5. Mr. Badolato answered Question 13 in the affirmative, and he signed the application, thereby certifying that "the foregoing information is true and correct to the best of my knowledge and belief."

6. Mr. Badolato did not provide the statement of particulars which must be submitted by those answering Question 13 in the affirmative. In a letter dated July 28, 1998, the Division notified Mr. Badolato that his application was incomplete and that he should, among other things, provide a complete written explanation of his criminal history.

7. In response to this letter, Mr. Badolato provided a signed statement in which he stated: "I was arrested and charged with possession of marj. in 1981." Mr. Badolato also provided a telephone number on the statement, indicating that he could be contacted at that number if the Division had any questions.

8. Pursuant to the provisions of Section 326.004(15), the Division issued a 90-day temporary license to Mr. Badolato,

pending completion of the criminal history analysis that is done on all applicants by the Florida Department of Law Enforcement.

9. The Division subsequently received a report from the Federal Bureau of Investigation which revealed that Mr. Badolato had three drug-related felony convictions, as well as an arrest on June 22, 1977, which resulted in a charge of possession of marijuana with intent to distribute.

a. On August 24, 1981, Mr. Badolato was convicted in federal district court in Brunswick, Georgia, of conspiracy to smuggle marijuana; he was sentenced to ten years in prison and ordered to pay a \$30,000 fine.

b. On October 23, 1981, Mr. Badolato was convicted in federal district court in Miami, Florida, of conspiracy to distribute cocaine; he was sentenced to thirty months in prison, to run consecutively with the ten-year sentence in the Georgia case.

c. On January 31, 1989, Mr. Badolato was convicted in federal district court in Maryland of conspiracy to distribute marijuana; he was sentenced to thirty-six months in prison, to run concurrently with any sentence imposed for a violation of parole.

10. Mr. Badolato was released from prison in 1991 and successfully completed parole in December 1996 with respect to the 1989 conviction.

11. In late 1997, Mr. Badolato received a letter advising him that he might be eligible for clemency. An attorney acting on behalf of Mr. Badolato filed an application for clemency with the Florida Parole Commission. Although Mr. Badolato has never seen this application, he assumes that the file developed during review of the application contains complete information regarding his criminal history.²

12. When the Division received the Federal Bureau of Investigation report, Peter Butler, head of the Division's general enforcement section, contacted Mr. Badolato by telephone, read to him the statement in the application quoted in paragraph 4 above, and asked him if he wanted to amend his application. Because he could not remember the exact dates of his three felony convictions, Mr. Badolato responded by referring Mr. Butler to the Clemency Board if Mr. Butler wanted to obtain further information about Mr. Badolato's criminal history.

13. Mr. Badolato acknowledged in his testimony that he should have been more thorough in completing his application for licensure, that he was lazy and stupid for not being more forthcoming in the application, and that he did not intend to mislead the Division. He believed that, by answering "Yes" to Question 13 and admitting that he was arrested and charged with possession of marijuana in 1981, he had provided enough information to alert the Division that he had a criminal history. He also assumed that it would be very easy for the Division to

obtain complete information about his background merely by running a computer check and by reviewing the information in his clemency application file.

14. From 1991, when he was released from prison, until December 1998, Mr. Badolato was involved in the restaurant business in a managerial capacity, and, as part of his duties, he handled large sums of money. No money in his care was ever found missing, and no adverse employment actions were taken against him during this time. In addition, during the time he was on parole, Mr. Badolato periodically submitted to random drug-testing and never failed a test.

15. The evidence presented by Mr. Badolato is not sufficient to establish that he is of good moral character. He admitted in his answer to Question 13 on the application that he had been convicted of a felony, yet he included in the statement which he filed as part of the application a vague, incomplete, misleading, and inaccurate reference to an arrest and charge of possession of marijuana in 1981.³ Furthermore, Mr. Badolato certified by his signature on the application form that the information he provided was "true and correct to the best of [his] knowledge and belief," when he was certainly fully aware that he had three separate felony convictions.

16. Mr. Badolato presented evidence of his good employment history subsequent to his release from prison in 1991, his successful termination of probation, and his faithful payments on

the \$30,000 fine imposed in 1981, all of which tend to show rehabilitation and good moral character. However, Mr. Badolato's failure to include in his application complete and accurate information regarding his criminal history tends to show lack of rehabilitation and lack of good moral character. On balance, Mr. Badolato's failure to disclose in his application his complete criminal history outweighs the evidence he presented to show rehabilitation and good moral character.

CONCLUSIONS OF LAW

17. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties pursuant to Sections 120.569 and .57(1), Florida Statutes (1997).

18. Mr. Badolato has the burden of proving by a preponderance of the evidence that he is entitled to licensure as a yacht and ship salesperson. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932, 933 (Fla. 1996).

19. Section 326.004(1), Florida Statutes, prohibits anyone from acting as a yacht and ship broker or salesperson without a license. Section 326.004(6), Florida Statutes, provides in pertinent part that the Division

may deny a license to any applicant who does not:

(a) Furnish proof satisfactory to the division that he or she is of good moral character.

(b) Certify that he or she has never been convicted of a felony.

20. Rule 61B-60.003, Florida Administrative Code, contains guidelines which the Division must use to evaluate the good moral character of an applicant and provides in pertinent part:

(3) Review for Good Moral Character.

(a) When the application has been determined to be in acceptable form, the division shall evaluate the application and make appropriate inquiry to determine the applicant's moral character. For the purposes of this rule, the following factors bear upon good moral character:

1. The completion of a criminal history check by the Florida Department of Law Enforcement that reveals no convictions of a felony, no convictions of a misdemeanor involving moral turpitude, and no pleas of nolo contendere, pleas of guilty, or verdicts of guilty to a felony charge or of any non-felonious offense involving moral turpitude, fraud, theft, dishonesty, assault and battery, or false statement;

* * *

6. Failure of the applicant to provide full and complete disclosure, or to provide accurate information, on the application for licensure.

7. The foregoing factors shall be considered in determining whether an applicant is of good moral character for purpose of licensure under chapter 326, Florida Statutes, if they comply with the following guidelines:

a. The disposition of criminal charges shall be considered is [sic] such constitutes a felony, or if such constitutes a misdemeanor involving moral turpitude, fraud, theft, dishonesty, assault and battery, or false statement.

* * *

c. Except as provided in sub-sub-paragraph 7.d. of this rule, no information relating to criminal, administrative, or civil actions shall be considered if more than 5 years has elapsed from the satisfaction of the terms of any order, judgment, restitution agreement, or termination of any administrative or judicially-imposed confinement or supervision of the applicant, whichever is more recent.

* * *

e. Other considerations such as termination of probation, compliance with and satisfaction of any judgment or restitution agreement may be considered as evidence of rehabilitation of the applicant's good moral character.

21. Based on the findings of fact herein, and upon consideration of the factors set out above, Mr. Badolato has failed to prove his good moral character by a preponderance of the evidence because the uncontroverted evidence establishes that he failed to disclose his complete criminal history in his application for licensure. See Gentile v. Department of Business and Professional Regulation, Board of Medical Examiners, 448 So. 2d 1087 (1st DCA 1984). In addition, Mr. Badolato, cannot certify that he has not been convicted of a felony because five years have not elapsed since his parole was terminated in December 1996 and because he has not finished paying the \$30,000 fine ordered in 1981. See Rule 61B-60.003(3)(a)7.c., Florida Administrative Code. Accordingly, the Division should exercise its discretion and deny Mr. Badolato's application for licensure as a yacht and ship salesperson pursuant to Section 326.004(6)(a) and (b), Florida Statutes.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Business and Professional Regulation, Division of Land Sales, Condominiums, and Mobile Homes, enter a final order denying Richard Badolato's application for licensure as a yacht and ship salesperson.

DONE AND ENTERED this 16th day of August, 1999, in Tallahassee, Leon County, Florida.

PATRICIA HART MALONO
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of August, 1999.

ENDNOTES

¹ The Department filed a Motion to Strike the Petitioner's proposed order on the grounds that it was not timely filed. The Department did not assert in the motion that it would be prejudiced by the late filing, and, after considering the grounds for the motion and the record in this case, the undersigned can discern no such prejudice. The motion is DENIED, with a reminder to Mr. Badolato's counsel that "motions for extensions of time shall be filed prior to the expiration of the deadline sought to be extended and shall state good cause for the request." Rule 28-106.204, Florida Administrative Code.

^{2/} Although the Department presented evidence regarding the disposition of Mr. Badolato's application for clemency, such disposition is not relevant to the issues to be resolved in this proceeding.

^{3/} In his trial in Miami federal district court in 1981, Mr. Badolato was acquitted of the charge of possession of cocaine with intent to distribute.

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.

¹ The Respondent filed a Motion to Strike the Petitioner's proposed order on the grounds that it was not timely filed. The Respondent did establish in the motion that it would be prejudiced by the late filing, and, after considering the grounds for the motion and the record in this case, the undersigned can discern no such prejudice. The motion is DENIED, with a reminder to Mr. Badolato's counsel that "motions for extensions of time shall be filed prior to the expiration of the deadline sought to be extended and shall state good cause for the request." Rule 28-106.204, Florida Administrative Code.

² Although the Department presented evidence regarding the disposition of Mr. Badolato's application for clemency, such disposition is not relevant to the issues to be resolved in this case.

³ In his trial in Miami federal district court in 1981, Mr. Badolato was acquitted of the charge of possession of cocaine with intent to distribute.