

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)	
PROFESSIONAL REGULATION, FLORIDA)	
REAL ESTATE APPRAISAL BOARD,)	
)	
Petitioner,)	
)	
vs.)	Case No. 99-2292
)	
IRIS ADAMES,)	
)	
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 September 10, 1999, by video teleconference with sites in Tallahassee and Fort Lauderdale, Florida.

APPEARANCES

For Petitioner: Sunia Y. Marsh, Esquire
Department of Business and
Professional Regulation
Division of Real Estate
Post Office Box 1900
Orlando, Florida 32802-1900

For Respondent: Iris Adames, pro se
6503 North Military Trail
Apartment 2308
Boca Raton, Florida 33496

STATEMENT OF THE ISSUE

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 April 20, 1999, Petitioner issued a two-count Administrative Complaint which charged that Respondent, a registered real estate appraiser, violated certain provisions of Section 475.624, Florida Statutes. Count I alleged that Respondent violated the provisions of Subsection 475.624(12), Florida Statutes, by having "obtained a license by means of knowingly submitting false information, or engaging in misrepresentation." The gravamen of such charge was Petitioner's contention that in applying for registration as a real estate appraiser Respondent falsely represented that she had never pled nolo contendere to a crime. Count II alleged that Respondent violated the provisions of Subsection 475.624(6), Florida Statutes, by "having had a professional license revoked or otherwise acted against in any jurisdiction." The gravamen of such charge was Petitioner's contention that "the Florida Real Estate Commission revoked Respondent's real estate salesperson's license after finding her guilty of obtaining her salesperson's license by means of fraud, misrepresentation or concealment, and failure to timely advise [the Florida Real Estate Commission] of a change in her mailing address.

Respondent filed an election-of-rights wherein she disputed the allegations of fact contained in the Administrative Complaint. Consequently, 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 1-3 were received into evidence. Respondent testified on her own behalf, and Respondent's Exhibits 1-4 were received into evidence.

The transcript of hearing was filed October 4, 1999, and the parties were accorded 10 days from that date to file proposed recommended orders. Petitioner elected to file such a proposal and it has been duly-considered.

FINDINGS OF FACT

1. Petitioner, Department of Business and Professional Regulation, Florida Real Estate Appraisal Board (Department), is a state government licensing and regulatory agency charged with the duty and responsibility to prosecute administrative complaints pursuant to the laws of the State of Florida, in particular Section 20.165, Florida Statutes, Chapters 120, 455, and 475, Florida Statutes, and the rules promulgated pursuant thereto.

2. Respondent, Iris Adames, is now and was at all times material hereto, a registered real estate appraiser in the State of Florida, having been issued license number RI0003454.

3. On or about March 21, 1996, Respondent filed an application (dated March 8, 1996) with the Department for licensure as a registered real estate appraiser. Pertinent to

this case, item 11 on the application required that Respondent answer yes or no to the following question:

Have you ever 1) been convicted of a crime, 2) pled nolo contendere to any crime? (This question applies to any violation of any municipality, county, state, or nation, including traffic offenses --but not parking, speeding, inspection, or traffic signal violations-- regardless of whether you were placed on probation, had adjudication withheld, were paroled or were pardoned.)

Respondent responded to the question by checking the box marked "N[o]."

4. The application concluded with the applicant's signature immediately below the following affirmation:

. . . I have read the questions in this application and have answered them completely and truthfully to the best of my knowledge. . . .

5. Contrary to Respondent's response to item 11 on the application, the proof demonstrates that on October 23, 1995, Respondent pled nolo contendere to the crime of uttering a worthless check, a first degree misdemeanor, in the Circuit Court, Eighteenth Judicial Circuit, Brevard County, Florida, Case No. 94-23154-CF-A. The court entered an order withholding adjudication of guilt, placed Respondent on probation for a period of six months, and imposed a fine and costs totaling \$105.65.

6. On September 18, 1997, the Florida Department of Business and Professional Regulation, Division of Real Estate (Florida Real Estate Commission or FREC) issued an Administrative Complaint against Respondent, as a licensed real estate

salesperson. That complaint alleged, in pertinent part, as follows:

4. At the time Respondent made application for a real estate license, Respondent was asked to indicate whether or not [s]he had "ever been convicted of a crime, found guilty, or entered a plea 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 . . . without regard to whether you were placed on probation, had adjudication withheld, paroled or pardoned." Respondent checked the "No" box. (Licensure Application, at Question 9).

5. Respondent swore and attested that all answers and information contained in h[er] application were true and correct. Respondent's signature was duly notarized.

6. On or about October 23, 1995, Respondent entered a plea of nolo contendere to one count of writing a worthless check, a first degree misdemeanor (§ 832.05, Fla. Stat.) A true and correct copy of the Order of Judgment is attached hereto, incorporated herein and made a part hereof by reference as Administrative Complaint Exhibit 2.

7. Further, in connection with this investigation, mail addressed from Petitioner to Respondent was returned by the U.S. Postal Service noting that Respondent has moved without any forwarding address.

COUNT I

Based upon the foregoing, Respondent is guilty of obtaining a license by means of fraud, misrepresentation, or concealment in violation of § 475.25(1)(m), Fla. Stat.

COUNT II

Based upon the foregoing, Respondent is guilty of failing to timely advise Petitioner of a change of mailing address in violation of Rule 61J2-10.037, Fla. Admin. Code and, therefore, in violation of § 475.25(1)(e), Fla. Stat.

WHEREFORE, Petitioner respectfully requests the Florida Real Estate Commission to issue a Final Order as final agency action finding the Respondent(s) guilty as charged. 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 of or all of the above penalties as provided by § 455.227 and § 475.25(1), Fla. Stat. and Fla. Admin. Code R. 61J2-24.001. In addition to the foregoing, Petitioner requests an award of costs as provided by § 455.227(3), Fla. Stat.

Respondent did not formally respond to the Administrative Complaint and on February 18, 1998, the Florida Real Estate Commission held a hearing on Petitioner's Request for an Informal Hearing and Motion for Final Order. Respondent was served with a copy of the notice of hearing and failed to appear.

7. By final order dated February 18, 1998, and filed March 9, 1998, the Florida Real Estate Commission resolved the case, as follows:

Upon a complete review of the evidence presented by the Department of Business and Professional Regulation, Division of Real Estate, the Florida Real Estate Commission finds:

1. That the Respondent was properly served with the Administrative Complaint and failed to request a hearing or otherwise respond to the service of Administrative Complaint. See s. 120.60(5), Florida Statutes, and Rules 28-5.111 and 28-6.009, Florida Administrative Code.

2. That there are no disputed issues of material fact and, therefore, the Petitioner's Motion for an Informal Hearing, pursuant to s. 120.57(2), Florida Statutes, is granted.

3. That the Petitioner has established a prima facie case.

4. That the facts and legal conclusions contained in the Administrative Complaint are adopted as true and that violations of Chapter 475, Florida Statutes, have occurred, as stated in the Administrative Complaint, a copy of which is attached hereto as Exhibit A and made a part hereof.

Therefore, the Commission ORDERS that the license of Iris Amor Adames be revoked.

This Order shall be effective on date of filing with the Clerk of the Department of Business and Professional Regulation. However, any party affected by this Order has the right to seek judicial review, pursuant to s. 120.68, Florida Statutes, and Rule 9.110, Florida Rules of Appellate Procedure.

Within 30 days of the filing date of this Order, review proceedings may be instituted by filing a Notice of Appeal with the Clerk of the Department of Business and Professional Regulation, at Suite 309 North Tower, 400 West Robinson Street, Orlando, Florida 32801. At the same time, a copy of the Notice of Appeal, with applicable filing fees, must be filed with the appropriate District Court of Appeal.

8. In her response to Count I of the Administrative Complaint, and again at hearing, Respondent explained she entered the plea of nolo contendere to the worthless check charge based upon advice of her court-appointed counsel even though (in her opinion) she was innocent of the charge. As for her negative response to the question posed on the application, Respondent averred she understood the judge to have directed her attorney to have her records sealed, she assumed he had done as directed, and consequently gave what she understood was an appropriate response to the question on the application. See Section 943.059(4), Florida Statutes.

9. Here, Respondent's explanation for her failure to disclose her plea on her application is credited, and it is resolved that, at the time she submitted her application, Respondent did not intend to mislead or deceive those who would be reviewing the application. In so concluding, it is observed that Respondent's testimony was candid and her understanding of the disposition of the matter (and the propriety of her response to the question on the application) was, given her unfamiliarity with such matters, reasonable. 1/

10. Count II of the Administrative Complaint sought to take disciplinary action against Respondent based on the Final order of the Florida Real Estate Commission (FREC) which had disciplined (revoked) Respondent's licensure as a real estate sales person. As heretofore noted, that final order was premised on Respondent's failure to respond to a two-count Administrative Complaint. Count I was predicated on the same issue raised by the Department in the instant case, and Count II was premised on Respondent's "fail[ure] to timely advise [FREC] of a change in her mailing address."

11. Here, Respondent explained her failure to respond to the FREC complaint as follows:

. . . when I called Tallahassee, they told me that you have 48 hours to respond, or get a lawyer. I say excuse me, I cannot just go and get a lawyer.

Because, why? Because, now in 1998, since December 1997, I've been into a domestic violence case, and I almost -- Me and my daughter almost got killed.

And, in the meantime, the father of my child took my car, took every means for me to

make my living. I was almost fighting all the time.

December, January, February, I was fighting eviction. I was fighting the court. And, all the problems. And, I have all the paperwork here.

And, I cannot take more stress. Now, you ask me my life -- My life, and the life of my child is priority. I cannot just go, and hire a lawyer.

I don't have the money. I don't have the means. You have to give me more time. And to say that I am sorry it's only 48 hours, you should had [sic] been in response to this before, and that's it.

When she told me that, what else can I do? So, I said well, fine. One day I will go back, and try to reopen the case. There is nothing that I can do at this moment.

(Transcript, pages 28-30.) With regard to her failure to keep FREC informed regarding her current address, Respondent explained:

The reason I didn't keep changing my addresses is because my realtor appraiser license, the person who supervised my work, Gary Eilen, he's the father of my child, he's the person who I get the injunction for.

That's why sometimes I just tried to disappear from his life. And, when -- That's one of the complaints that I don't keep moving with my addresses, but he [could] get it from the state [if she informed the state of her new address. Therefore, for safety reasons, she chose not to notify FREC of her new address].

(Transcript, page 39.)

12. Respondent's testimony was candid and credible, and her domestic problems (at the time of the FREC proceeding) well-documented. See Respondent's Exhibit 4. Had Respondent the means and opportunity to contest the FREC complaint, the conclusion of that proceeding would, most likely, have mirrored

the conclusions reached in this case. In sum, given the conclusion reached here that (by her response to the application at issue in this case) Respondent did not intend to mislead or deceive the Department, a de minimus penalty should be imposed as a consequence of the FREC Final Order, which was essentially entered by default and premised on the same issue (of non-disclosure) raised in this case (and resolved favorably to the Respondent).

CONCLUSIONS OF LAW

13. 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).

14. Where, as here, the Department proposes the 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 475.624, 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).

15. Pertinent to this case, Section 475.624, Florida Statutes, provides that the Florida Real Estate Appraisal Board:

. . . may reprimand or impose an administrative fine not to exceed \$5,000 for each count or separate offense against any such appraiser; and may revoke or suspend, for a period not to exceed 10 years, the registration, license, or certification of any such appraiser, or place any such appraiser on probation, if it finds that the registered assistant, licensee, or certificateholder:

* * *

(6) Has had a registration, license, or certification as an appraiser revoked, suspended, or otherwise acted against, or has been disbarred, or has had her or his registration, license, or certificate to practice or conduct any regulated profession, business, or vocation revoked or suspended by this or any other state, any nation, or any possession or district of the United States, or has had an application for such registration, licensure, or certification to practice or conduct any regulated profession, business, or vocation denied by this or any

other state, any nation, or any possession or district of the United States.

* * *

(12) Has obtained or attempted to obtain a registration, license, or certification by means of knowingly making a false statement, submitting false information, refusing to provide complete information in response to an application question, or engaging in fraud, misrepresentation, or concealment.

16. To establish that a licensee committed a violation of Subsection 475.624(12), Florida Statutes, the Department must show not only that the licensee provided false or misleading information on her 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 475.624(12)] 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.")

17. Here, it is undisputed that Respondent's answer to the inquiry made in item 11 of the application was inaccurate; however, 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 she did, Respondent did not intend to deceive or defraud anyone about her past, but rather responded in a manner she believed, in good faith, was appropriate.

Consequently, the charge (as stated in Count I of the Administrative Complaint) that Respondent "obtained a license by means of knowingly submitting false information, or engaging in misrepresentation," in violation of Subsection 475.624(12), Florida Statutes, must be dismissed.

18. While the Department failed to sustain Count I of the Administrative Complaint, it did demonstrate with the requisite degree of certainty that (as alleged in Count II of the Administrative Complaint) Respondent violated the provisions of Subsection 475.624(6), Florida Statutes, by "having had a professional license revoked or otherwise acted against in any jurisdiction." Having so concluded, it remains to resolve the appropriate penalty that should be imposed.

19. Here, the Department's Proposed Recommended Order suggests, as a penalty for the violation of Subsection 475.624(6), that Respondent be issued a reprimand. That proposal is consistent with Section 475.624, Florida Statutes, as well as the penalty guidelines, and the aggravating and mitigating factors established by Rule 61J1-8.002, Florida Administrative Code. Gadsden State Bank v. Lewis, 348 So. 2d 343 (Fla. 1st DCA 1977)(Agencies must honor their own substantive rules until they are amended or abrogated). 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 not guilty of violating of Subsection 475.624(12),
Florida Statutes, as alleged in Count I of the Administrative
Complaint.

It is further RECOMMENDED that the final order find the
Respondent guilty of violating Subsection 475.624(6), Florida
Statutes, as alleged in Count II of the Administrative Complaint,
and that for such violation Respondent receive a reprimand.

DONE AND ENTERED this 25th day of October, 1999, in
Tallahassee, Leon County, Florida.

WILLIAM J. KENDRICK
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of October, 1999.

ENDNOTE

1/ Respondent also offered proof that her attorney had criminal charges filed against him (in or about June and September 1998) and had been granted leave to withdraw from the Florida Bar (by order of the Florida Supreme Court, dated December 29, 1998). (Respondent's Exhibit 1.) The relevance of these matters, given their remoteness in time to the 1995 criminal matter in which Respondent was involved, is not apparent from the record.

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.