

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND )  
PROFESSIONAL REGULATION, )  
DIVISION OF REAL ESTATE, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 99-3698  
 )  
DONALD MATTHEW GREEN, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on October 26, 1999, at Miami, Florida, before Errol H. Powell, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

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

For Respondent: Donald Matthew Green  
700 95th Street  
Surfside, Florida 33154

STATEMENT OF THE ISSUE

The issue for determination is whether Respondent committed the offenses set forth in the Administrative Complaint and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On May 21, 1999, the Department of Business and Professional Regulation, Division of Real Estate (Petitioner) filed a two-count Administrative Complaint against Donald Matthew Green (Respondent). Petitioner charged Respondent with the following: Count I--violating Subsection 475.25(1)(m), Florida Statutes, by obtaining a license by means of fraud, misrepresentation, or concealment; and Count II--violating Subsection 475.25(1)(e), Florida Statutes, by failing to comply with the continuing education requirements of Rule 61J2-3.009, Florida Administrative Code. Respondent disputed the allegations of fact of the Administrative Complaint and requested a hearing. On August 30, 1999, this matter was referred to the Division of Administrative Hearings.

At hearing, Petitioner presented the testimony of one witness and entered seven exhibits (Petitioner's Exhibits numbered 1-7) into evidence. Respondent testified on his own behalf and entered four exhibits (Respondent's Exhibits numbered 1-4) into evidence.

A transcript of the hearing was ordered. At the request of the parties, the time for filing post-hearing submissions was set for more than ten days following the filing of the transcript.

The transcript, consisting of one volume, was filed on December 16, 1999. Respondent filed his post-hearing submission on November 3, 1999. Petitioner timely filed its post-hearing submission on January 14, 2000. The parties' timely filed post-hearing submissions have been considered in the preparation of this Recommended Order.

#### FINDINGS OF FACT

1. At all times material hereto, Donald Matthew Green (Respondent) was licensed by the State of Florida as a real estate salesperson, having been issued license number 0371748. Respondent's licensure record indicates that his last association was with Island Properties of Miami Beach, Inc. (Island Properties), a broker corporation, located at 1999 East 150th Street, Suite 103, North Miami Beach, Florida.

2. Respondent renewed his real estate salesperson license, which was to expire on March 31, 1997. The renewal notice stated, among other things, the following:

IMPORTANT: BY SUBMITTING THE APPORPRIATE RENEWAL FEES TO THE DEPARTMENT OR THE AGENCY, A LICENSEE ACKNOWLEDGES COMPLIANCE WITH ALL REQUIREMENTS FOR RENEWAL.

Respondent submitted the renewal fee, and by submitting the renewal fee, Respondent was stating that he had complied with all renewal requirements.

3. Petitioner renewed Respondent's real estate salesperson license.

4. Respondent knew that one of the requirements for renewal of his license was successful completion of continuing education coursework. In past renewal periods of his license, Respondent completed his continuing education coursework at Gold Coast School of Real Estate.

5. Both parties believe that continuing education for licensees began in or around 1992.

6. On May 29, 1999, an inspector for Petitioner visited Island Properties. One of the purposes for the inspector's visit was to review the continuing education requirements for salespersons employed by Island Properties. The inspector requested Respondent to produce proof that he successfully completed the 14-hour continuing education requirement for the period from April 1, 1995, through March 31, 1997. Respondent was unable to produce any information showing that he had completed the continuing education.

7. The investigator provided Respondent with additional time to produce proof of completing the continuing education requirement. Respondent was again unable to produce the

requested information. Respondent contacted each school in the southern region of Florida, which offered continuing education in real estate. However, none of the schools retained records on individuals taking continuing education coursework beyond a three-year period; therefore, no school had records covering the renewal period in question.

8. Respondent filed a complaint against himself for being unable to produce proof of successful completion of continuing education coursework for the renewal period from 1995 through 1997.

9. Respondent did produce proof of successfully completing the 14-hour continuing education requirement for the 1993 through 1995 renewal period, having begun the continuing education in December 1992 and completed it in February 1993. Respondent also produced proof of successfully completing the 14-hour continuing education requirement for the current renewal period, which is the 1996 through 1998 renewal period, having begun and completed the continuing education in March 1998.

10. Having failed to locate proof evidencing that he successfully completed the continuing education requirement for the renewal period from 1995 through 1997, Respondent was desirous of complying with the requirement. Respondent began and successfully completed a 14-hour continuing education course in September 1999.

11. Respondent has persuaded the undersigned that, even though he was unable to produce written proof, he did successfully complete the 14-hour continuing education requirement for the renewal period from 1995 through 1997, prior to submitting his renewal form for licensure renewal.

CONCLUSIONS OF LAW

12. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the parties thereto pursuant to Section 120.569 and Subsection 120.57(1), Florida Statutes.

13. License revocation proceedings are penal in nature. The burden of proof is on Petitioner to establish by clear and convincing evidence the truthfulness of the allegations in the Administrative Complaint. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

14. There is no dispute that Respondent, as a real estate salesperson, is required to successfully complete continuing education coursework of a minimum of 14 hours, during the license renewal period, for the renewal of his license. Rule 61J2-3.009, Florida Administrative Code.

15. Section 475.25, Florida Statutes, provides in pertinent part:

(1) The commission may deny an application for licensure, . . . or renewal thereof; may place a licensee . . . on probation; may suspend a license . . . for a period not exceeding 10 years; may revoke a license . . .; 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 . . .:

\* \* \*

(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.

16. No dispute exists that Respondent failed to produce written proof that he successfully completed the 14-hour continuing education requirement for the renewal period from 1995 through 1997. However, the undersigned is persuaded that, prior to submitting his renewal form for licensure renewal, Respondent did successfully complete the continuing education requirement. Regardless, Petitioner, being charged with the duty of ensuring licensees maintain their education, must rely upon written proof of compliance, and it is not unreasonable for Petitioner to require such proof. Respondent was unable to produce such written proof. Consequently, Petitioner

demonstrated that Respondent violated Subsection 475.25(1)(e), Florida Statutes.

17. A licensee is charged with knowing the practice act that governs his/her license. Wallen v. Florida Department of Professional Regulation, Division of Real Estate, 568 So. 2d 975 (Fla. 3d DCA 1990). Respondent does not dispute that he knew that, prior to submitting his renewal form for licensure renewal, he was required to successfully complete a minimum of 14 hours of continuing education during the license renewal period.

18. Subsection 475.25(1)(m), Florida Statutes, contemplates "that an intentional act be proved before a violation may be found." Walker v. Department of Business and Professional Regulation, Division of Real Estate, 705 So. 2d 652, 654 (Fla. 5th DCA 1998), citing Munch v. Department of Professional Regulation, Division of Real Estate, 592 So. 2d 1136, 1144 (Fla. 1st DCA 1992). Therefore, a violation of Subsection 475.25(1)(m), Florida Statutes, is demonstrated by showing intent on the part of Respondent.

19. Intent may be proven by circumstantial evidence, as well as direct evidence. Walker, supra, citing Ellis v. State, 425 So. 2d 201 (Fla. 5th DCA 1983). Wrongful intent can be established by showing that Respondent was reckless or careless



as to the truth of the matter asserted. Ocean Bank of Miami v. Inv.-Uni Inv. Corp., 599 So. 2d 694, 697 (Fla. 3d DCA 1992).

20. Petitioner failed to demonstrate that Respondent intended to obtain the renewal of his license through fraud, misrepresentation, or concealment. No direct evidence of intent was presented. Moreover, the undersigned is not persuaded that Respondent's conduct was contrary to the truth or that Respondent was reckless or careless as to the truth of his assertion that he had successfully completed the renewal requirement.

21. Consequently, Petitioner failed to demonstrate that Respondent violated Subsection 475.25(1)(m), Florida Statutes.

22. Regarding penalty, Subsection 475.25(1), Florida Statutes, provides for any or all of the following: an administrative fine not to exceed \$1,000; suspension not to exceed 10 years; revocation of license; a reprimand; and probation. Furthermore, Rule 61J2-24.001(3)(f), Florida Administrative Code, provides the following range of penalty for a violation of Subsection 475.25(1)(e), Florida Statutes: from a licensure suspension of 8 years to revocation and an administrative fine of up to \$1,000. Additionally, Rule 61J2-24.001(2), Florida Administrative Code, provides that the licensee may be placed on probation for a period of time and

under such conditions as determined by the Florida Real Estate Commission.

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 Real Estate enter a final order against Donald Matthew Green and therein:

1. Dismissing Count I.
2. Finding Donald Matthew Green guilty of Count II.
3. Imposing an administrative fine of \$1,000, payable within six months of the date of the final order.
4. Placing Donald Matthew Green on probation for one year under the terms and conditions deemed appropriate.

DONE AND ENTERED this 24th day of March, 2000, in Tallahassee, Leon County, Florida.

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ERROL H. POWELL  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 24th day of March, 2000.

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.