

STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
DIVISION OF FLORIDA LAND SALES, CONDOMINIUMS, AND MOBILE HOMES

DEPARTMENT OF BUSINESS AND
PROFESSIONAL REGULATION,
DIVISION OF FLORIDA LAND SALES,
CONDOMINIUMS, AND MOBILE HOMES,

Petitioner,

vs.

DOAH Case No.: 99-5314
DOCKET NO. YS1999193

ROBERT E. POINDEXTER,

Respondent.

FINAL ORDER

The Director of the Division of Florida Land Sales, Condominiums, and Mobile Homes (Division) enters this Final Order in the above referenced matter.

PRELIMINARY STATEMENT

1. On November 18, 1999, the Division issued a Notice of Intent to Deny License Renewal Application (Notice), which alleged that the Respondent, Robert Poindexter had failed to furnish proof of good moral character as required by section 326.004(6), Florida Statutes, and that he had answered falsely a question on his renewal application as to whether any actions were pending against him in violation of section 326.006(2)(1), Florida Statutes. The Notice advised the Respondent of his right to request a formal hearing or an informal proceeding pursuant to chapter 120, Florida Statutes.

2. On December 7, 1999, the Respondent requested a Formal Proceeding.

3. On April 12, 2000, the Division of Administrative Hearings (DOAH) conducted a hearing in Viera, Florida with Judge Manry presiding. Division was represented by Scott K. Edmonds, Esquire. Respondent was represented by Thomas C. Houck, Esquire. The hearing was conducted in accordance with sections 120:569 and 120.57(1), Florida Statutes. Upon conclusion of the hearing, the Administrative Law Judge (ALJ) allowed each party to submit proposed orders, which each party timely filed.

4. Petitioner presented the testimony of 2 witnesses and submitted 7 exhibits for admission at the hearing. Respondent testified in his own behalf, called 2 witnesses, and submitted 13 exhibits for admission at the hearing. The rulings on the evidence are in the transcript of the hearing, which was filed on May 12, 2000.

5. On June 28, 2000, the ALJ entered a Recommended Order finding that that Respondent was of good moral character and that the Division should renew his license. Recommended Order at 12.

6. On July 13, 2000, Petitioner filed its exceptions to the Recommended Order.

7. Respondent did not file exceptions or a response to the Division's exceptions.

RULING ON EXCEPTIONS FILED BY DIVISION

8. Division enumerates one exception to the Findings of Fact in the Recommended Order and two exceptions to the Conclusions of Law.

9. Florida case law holds that an agency reviewing a recommended order is not authorized to reevaluate the quantity and quality of the evidence presented at an administrative hearing beyond determining whether the evidence is competent and substantial. Brogan v. Carter, 671 So. 2d 822, 823 (Fla. 1st DCA 1996). On reviewing a recommended order, an agency may not reweigh the evidence, resolve the conflicts, or judge the credibility of witnesses, as those are evidentiary matters within the province of the ALJ as the fact-finder. See Martucci v. Dep't of Prof. Reg., 622 So. 2d 607 (Fla. 1st DCA 1993); Heffetz v. Dep't of Bus. Reg., 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). The Division is bound by the ALJ's factual findings where the record of the hearing discloses any competent substantial evidence supporting the findings of fact. Florida Dep't of Corrections v. Bradley, 510 So. 2d 1122, 1123 (Fla. 1st DCA 1987). The agency may reject a finding of fact if it finds, after a review of the entire record, that the finding of fact is not based upon competent substantial evidence. See § 120.57(1)(1), Fla. Stat. The agency may reject or modify the conclusions of law over which it has substantive jurisdiction if it states its reasons with particularity and finds that its interpretation of law is as or more reasonable than the ALJ's. Id.; See also L.B. Bryan & Co. v. The School Bd. Of Broward County, Fla., 746 So. 2d 1194 (Fla. 1999) (noting the legislature intended to apply this provision to both the statutes and rules with the amendment in 1999). The agency may accept the recommended penalty without further review. Id.

A. EXCEPTIONS TO FINDINGS OF FACT

10. Petitioner asserts that the ALJ's finding that the Division's "sole ground" for rejecting Respondent's renewal application was his failure to demonstrate good moral character is not supported by substantial competent evidence. Petitioner points to the Notice, which was admitted as Petitioner's Exhibit 8, as evidence that it asserted two separate grounds for the license denial. A review of the transcript indicates that the ALJ acknowledged two bases for the Notice and denial. Transcript at 114. The ALJ commented: "the state agency in this case made the determination to deny the license renewal application on two grounds: One, the alleged erroneous response to the question in the '97 application for renewal, and, two, a determination that the Applicant lacked good moral character." Id. Respondent's attorney acknowledged that the Notice framed two issues for the case: (1) whether Respondent had good moral character; and (2) whether Respondent attempted to obtain his 1997 license renewal by deceit or misrepresentation. Id. at 83. Finding of Fact 8 as to the "sole ground" for license denial is not based on competent substantial evidence because there were clearly two grounds asserted by the Division, tried by consent of the parties, and ruled upon by the ALJ.

11. Petitioner's exception to the Administrative Law Judge's Finding of Fact 8 that the Division's "Sole ground" for denying Respondent's license renewal application was his asserted failure to establish good moral character is not supported by competent, substantial evidence and is revised to acknowledge the additional ground included in the Notice of Respondent's asserted false answer on his renewal application.

B. EXCEPTIONS TO CONCLUSIONS OF LAW

12. Petitioner bled exceptions to the ALJ's Conclusions of Law 28 and 29. Both 28 and 29 conclude that the Division's procedures were flawed.

13. In Conclusion of Law 28, the ALJ determined that the Division's procedures were flawed. The ALJ concluded that the Division could not substitute a proceeding to deny a renewal of a license for a proceeding to revoke a license for failure to demonstrate anew his good moral character. The ALJ cited to Dubin v. Department of Business Regulation, 262 So. 2d 273 (Fla. 1st DCA 1972) as authority for this conclusion and the conclusion that a license renewal is merely a ministerial duty.

14. In Conclusion of Law 29, the ALJ concluded that the Division incorrectly used the license renewal process as a substitute for a license disciplinary proceeding. The ALJ found

that the Division had the information that it used to act on the denial in its file as early as August 1998, but waited until Respondent applied to renew his license in 1999 to deny his application for license renewal.

15. The Division finds that the ALJ's Conclusions of Law are not correct and accepts the Division's interpretation of section 326.004, Florida Statute, and rule 61 B-60.003(3), (7), Florida Administrative Code, as being consistent with the legislature's intent to protect the public and ensure that license holders, who are fiduciaries to consumers, are of good moral character. Dubin is distinguishable on its procedural facts. In Dubin, the agency's board entered an order denying a horse trainer's renewal of his license on the grounds that the trainer had failed to demonstrate his fitness for licensure. See Dubin, 262 So. 2d at 274. The agency did not give the trainer access to a chapter 120 proceeding before entry of the final order from the board's proceedings. See id. The district court held that a licensee did not have to re-establish his initial fitness for licensure with each renewal as the renewal of a license, absent specific statutory authority, was a ministerial duty. See id. The district court found that a denial of a renewal, like a disciplinary proceeding, required the agency to give the licensee notice of the charges against him and afford him chapter 120 hearing rights. See id. at 275.

16. This case is distinguishable from Dubin on its facts and on the procedure followed. As Petitioner points out, the Notice gave Respondent notice of the two charges against him, Respondent exercised his full administrative hearing rights, and the burden of proof was placed on the agency. Therefore, the procedure followed in this case is consistent with the procedure outlined in Dubin. Section 326.004, Florida Statutes, and the Division's rule 61B-60.003, Florida Administrative Code, require all applicants--first time applicants and renewal applicants--to demonstrate that they have maintained good moral character. If they do not, the Division must notify the applicant of the intended agency action and the applicant's right to chapter 120 proceedings. Fla. Admin. Code R. 61B-60.003. This is the very procedure followed in this case. The requirement of good moral character is mandatory. The decision to initiate disciplinary proceedings is discretionary. Therefore, the agency was not required to initiate disciplinary proceedings against Respondent as soon as it found out that other divisions were taking disciplinary action against his other licenses.

17. The Division is the agency charged with enforcing chapter 326, Florida Statutes, and the administrative rules enacted in accordance with that chapter. Therefore, the Division's interpretation of these statutes and rules is within

its substantive jurisdiction. See § 120.57(1)(1), Fla. Stat. The Division's interpretation of the governing statutes and rules to this case is reasonable, or at least as reasonable as the ALJ's, because it takes into account the procedures set out in the Division's rules, which afford the due process concerns of notice and a hearing expressed by the ALJ that were the reason for the reversal in Dubin.

FINDINGS OF FACT

18. The Division hereby adopts and incorporates by reference the Findings of Fact numbered 1 through 7 and 9 through 26 as set forth in the Recommended Order.

19. The Division adopts Finding of Fact 8 with the one correction of "sole ground" to two grounds with the additional ground being that Respondent answered question four on his 1997 renewal application untruthfully in violation of section 326.006(2)(f)(1), Florida Statutes.

CONCLUSIONS OF LAW

20. The Division hereby adopts and incorporates by reference the Conclusions of Law numbered 27, 30 through 36 as set forth in the Recommended Order.

21. The Division rejects Conclusions of Law 28 and 29 and substitutes its own conclusion that its procedures, which were followed in the case, were authorized by section 326.004, Florida Statutes, and rule 61B-60.003, Florida Administrative Code.

22. The Division accepts the Recommendation of the ALJ as to a finding that Respondent has good moral character and Respondent's license should be renewed.

ORDER

Based on the foregoing findings of fact and conclusions of law, it is hereby ordered that Respondent's application for renewal of his Yacht and Ship Broker's Salesperson's license is GRANTED.

DONE AND ORDERED in Tallahassee, Leon County, Florida, this 9th day of August, 2000.

NOTICE OF RIGHT OF APPEAL

THIS FINAL ORDER CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED BY ANY PARTY SUBSTANTIALLY AFFECTED BY THIS FINAL ORDER PURSUANT TO SECTION 120.68, FLORIDA STATUTES AND RULE 9.110, FLORIDA RULES OF APPELLATE PROCEDURE. BY FILING A .NOTICE OF APPEAL CONFORMING TO THE REQUIREMENTS OF RULE 9.110(d), FLORIDA RULES OF APPELLATE PROCEDURE. BOTH WITH THE APPROPRIATE DISTRICT COURT OF APPEAL. ACCOMPANIED BY THE APPROPRIATE FILING FEE, AND WITH THE AGENCY CLERK DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, AT 1940 NORTH MONROE STREET, TALLAHASSEE, FLORIDA 32399-1007 WITHIN THIRTY (30) DAYS OF THE RENDITION OF THIS ORDER.

ROSS FLEETWOOD, Director
Division of Florida Land Sales,
Condominiums, and Mobile Homes
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-0792

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Certified Mail to Thomas C. Houck, Esq., 312 South Harbour City Blvd., Melbourne, Florida 32901, this 14th day of August.

KRISTIE HARRIS, Docket Clerk

Copies furnished to:

Division of Administrative Hearings
Scott K Edmonds, Office of the General Counsel
Peter Butler, Section Head, General Regulation