

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS and)
PROFESSIONAL REGULATION,)
DIVISION OF FLORIDA LAND SALES,)
CONDOMINIUMS AND MOBILE HOMES,)
)
Petitioner,)
)
vs.) Case No. 99-5314
)
ROBERT E. POINDEXTER,)
)
Respondent.)
_____)

RECOMMENDED ORDER

An administrative hearing was conducted in this proceeding on April 12, 2000, in Viera, Florida, before Daniel Manry, Administrative Law Judge ("ALJ"), Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner: Scott K. Edmonds
Assistant General Counsel
Department of Business and
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1940 North Monroe Street, Suite 60
Tallahassee, Florida 32399-2202

For Respondent: Thomas C. Houck, Esquire
312 South Harbor City Boulevard
Melbourne, Florida 32901

STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner should deny Respondent's application for a yacht salesperson's license on the ground that Respondent failed to furnish proof of his good moral

character in violation of Section 326.004(6)(a), Florida Statutes (1999). (All chapter and section references are to Florida Statutes (1999) unless otherwise stated.)

PRELIMINARY STATEMENT

Petitioner served Respondent with a Notice of Intent to Deny License Renewal Application on or about November 18, 1999. On December 7, 1999, Respondent requested an administrative hearing. On December 17, 1999, Petitioner referred the matter to DOAH for assignment of an ALJ to conduct the hearing.

At the hearing, Petitioner presented the testimony of two witnesses and submitted seven exhibits for admission in evidence. Respondent testified in his own behalf, called two witnesses, and submitted 13 exhibits for admission in evidence.

The identity of the witnesses and exhibits, and the rulings regarding each, are set forth in the Transcript of the hearing filed on May 12, 2000. The parties timely filed their respective proposed recommended orders ("PRO") on June 16, 2000.

FINDINGS OF FACT

1. Petitioner is the state agency responsible for regulating yacht and ship salespeople and brokers and for administering and enforcing Chapter 326. Respondent is a licensee applying for renewal of a yacht salesperson's license.

2. Respondent applied for and the Division approved Respondent's initial yacht salesperson's license in 1995. Pursuant to Section 326.004(1), yacht salesperson's licenses are

valid for a two-year period. In addition, Respondent formerly held a state contractor's license and a real estate broker's license from Petitioner's agency.

3. The Construction Industry Licensing Board ("CILB") is a division of Petitioner. The CILB served Respondent with an administrative complaint regarding his contractor's license in March 1997. In 1998, the Florida Real Estate Commission ("FREC") revoked Petitioner's real estate license. The Division did not become aware of the administrative proceedings against Respondent's construction and real estate licenses until August 1998.

4. By final order issued March 19, 1998, the CILB fined Respondent and suspended his state contractor's license for five years. The CILB found that Respondent violated Section 489.129(1)(h)(2), (k) and (m). Respondent committed mismanagement that caused financial harm to a customer by accepting deposit money but failing to perform on the contract; abandoned the construction project under contract by failing to begin construction for a period of five months; and engaged in deceitful conduct in the practice of contracting. The CILB also found that Respondent violated Section 489.129(1)(n) by committing incompetence and misconduct in the practice of contracting.

5. The victims in Respondent's CILB case received \$22,845.00 from the Construction Industries Recovery Fund as

compensation for the harm they suffered due to Respondent's violation of Section 489.129(1)(h)(2). Respondent's obligation to pay restitution to the victims was discharged in bankruptcy. Respondent is still paying the fines and interest ordered in the CILB license suspension case involving his construction license.

6. After the CILB suspended Respondent's contractor's license, FREC, another division of Petitioner, issued an administrative complaint seeking to revoke Respondent's real estate broker's license on the ground that the CILB had suspended Respondent's construction license. Respondent voluntarily surrendered his real estate broker's license for revocation. By final order dated August 19, 1998, FREC revoked Respondent's real estate broker's license.

7. Respondent timely applied for, and the Division approved, the renewal of Respondent's yacht salesperson's license in August 1997. On this renewal application, Respondent answered "N" to question number four which asked whether there were any cases pending against the applicant.

8. In August 1999, Respondent timely applied for renewal of his yacht salesperson's license. Petitioner denied the application on the sole ground that Respondent failed to show that he is of good moral character in violation of Section 326.004(6)(a). Petitioner determined that Respondent failed to show good moral character based on the CILB suspension of Respondent's contractor's license, FREC's revocation of

Respondent's real estate license, and Petitioner's conclusion that Respondent had answered question four on his 1997 renewal application untruthfully in violation of Section 326.006(2)(f)1. Petitioner relied solely on a review of the documents in its file and did not conduct an independent investigation or interview Respondent.

9. Respondent did not falsely answer "no" to question four on his 1997 renewal application. Question four asked, in relevant part:

Has any judgment or decree of court been entered against you or is there now pending any case, in this or any other state, in which you were charged with any fraudulent or dishonest dealing.

10. Question four limited its scope to judgments, decrees, and cases pending in any court in this or another state and did not ask for disclosure of administrative proceedings. Administrative agencies, including DOAH, are not courts. The administrative complaint filed against Respondent in March 1997 was not a case pending in a court in this or another state. As Petitioner noted on its Investigative Report, ". . . a final order of an agency is not a judgment or decree of court."

11. Respondent construed question four on his 1997 renewal application to be limited to courts. Respondent's interpretation was reasonable and valid. It was not intended to deceive Petitioner.

12. In August 1998, an attorney for FREC informed Respondent that he should disclose administrative proceedings in addition to court cases. Respondent immediately informed Petitioner by telephone and letter of the pending administrative proceedings.

13. In the renewal application filed in 1999, Respondent disclosed the suspension of his construction license, the revocation of his real estate license, and answered "yes" to question four on the application. In an effort toward full disclosure, Respondent answered "yes" to question three when Respondent should have answered "no." Question three asked Respondent if he had been convicted of a crime.

14. The only finding from the suspension of Respondent's construction license by the CILB and the revocation of Respondent's real estate license by FREC that is at issue in this case is a finding by ALJ Daniel M. Kilbride that Respondent committed fraud and deceit by adding a provision for a commission at the end of a construction contract entered into on December 23, 1994. By final order entered on March 16, 1998, the CILB adopted the Recommended Order of Judge Kilbride.

15. The judicial doctrine of equitable estoppel, or estoppel by judgment, bars the re-litigation of factual and legal issues common to both the CILB case and this case. Therefore, the finding that Respondent committed fraud and deceit in 1994 cannot be litigated in this case.

16. The good moral character of Respondent was not at issue in the license suspension case decided by Judge Kilbride. Therefore, Respondent is entitled to present evidence of his good moral character in this case including evidence that explains and mitigates the circumstances of the 1994 transaction in an effort to show that Respondent does not now lack good moral character.

17. The sales commission at issue in the 1994 transaction was to be paid out of Respondent's proceeds from the construction contract. It was not an additional expense to be paid by the buyers. It did not increase the construction price of the house. The commission was to be paid by Respondent for services provided by Castle Real Estate on behalf of Respondent.

18. The buyers did not object to the insertion of the commission provision at the end of the contract. The buyers did not object to the commission being paid at closing.

19. The construction lender released the funds for the commission as part of the construction draw Respondent received. The funds were not separately identified, and Respondent had no knowledge that the lender had released the funds as part of the construction draw.

20. Respondent was an active builder in the local real estate market. He had constructed several "spec" homes. When the real estate market declined, Respondent incurred financial problems attributable to subcontractors and was unable to service the debt he owed on the "spec" homes.

21. Respondent declared bankruptcy in 1996. The buyers in the 1994 transaction did not make any request for refund until after Respondent had declared bankruptcy. Respondent could not make preferential payments to creditors after he declared bankruptcy.

22. More than five years have passed since the 1994 transaction. Even if Respondent lacked good moral character in 1994, he now possesses good moral character.

23. Respondent is now in stable financial condition. Respondent has made all payments due under the license suspension order in a timely manner.

24. Respondent is a licensed captain in the Coast Guard Auxiliary. He has served as a commodore of the local boating club and as a former public affairs officer in charge of public education for the local flotilla.

25. Respondent has conducted himself with integrity in all of his yacht sales. Respondent enjoys an excellent reputation in the boating community for honesty and integrity. Respondent's knowledge about yachts is above average.

26. Over a span of 15 years, Respondent has held licenses with the state as a mortgage broker, real estate salesman, and real estate broker. During that time, no complaints have ever been filed against Respondent for his activities under those licenses. The revocation of Respondent's real estate license was based on the suspension of Respondent's construction license by

the CILB. The complaint filed against Respondent's construction license involved a single isolated transaction that occurred more than five years ago for which there were significant mitigating circumstances.

CONCLUSIONS OF LAW

27. DOAH has jurisdiction over the subject matter and parties. The parties were duly noticed for the administrative hearing.

28. Petitioner cannot employ the refusal to renew a license, to one who has previously demonstrated that he satisfies the statutory prerequisites including good moral character, as a substitute for a license revocation proceeding. Dubin v. Department of Business Regulation, 262 So. 2d 273 (Fla. 1st DCA 1972). The power to stop the renewal of a license once issued and needed in order to engage in a specific business should be exercised with no less careful circumspection than the original issuance of the license. Wilson v. Pest Control Commission of Florida, 199 So. 2d 777 (Fla. 4th DCA 1967). Once a license has been issued, the annual renewal of the license is a ministerial duty. If a violation occurs, Petitioner must resort to revocation rather than a denial of renewal. Dubin, 262 So. 2d at 275.

29. Petitioner has incorrectly used the license renewal process as a substitute for a license disciplinary proceeding. In August 1998, Petitioner had all of the information in its file

that it had when Respondent applied for renewal of his license. Rather than proceeding with a license discipline proceeding, Petitioner waited for Respondent to renew his license and then denied the renewal.

30. Petitioner incorrectly argues that evidence explaining the circumstances surrounding the 1994 transaction is barred by the judicial doctrine of collateral estoppel. The doctrine of collateral estoppel does not bar the ALJ from considering evidence presented by Respondent to explain the circumstances surrounding the 1994 transaction. The evidence is not considered for the purpose of re-litigating the finding in the license suspension case that Respondent committed fraud and deceit in 1994. The evidence is considered for the purpose of determining whether Respondent can show he now possesses good moral character. Respondent's good moral character was neither a factual nor legal issue in the license suspension case.

31. An applicant previously disciplined in administrative orders may explain and mitigate the circumstances of the earlier transactions in an effort to demonstrate that he is not now a person who lacks good moral character. Mitigation evidence regarding a guilty finding of a felony is admissible in a subsequent administrative hearing to show good moral character. McGraw v. Department of State, Division of Licensing, 491 So. 2d 1193 (Fla. 1st DCA 1986). Similarly, mitigation evidence of the circumstances surrounding previous discipline in administrative

proceedings is admissible to show current worthiness to transact business. Osborne Stern and Company, Inc. v. Department of Banking and Finance, Division of Securities and Investor Protection, 647 So. 2d 245, (Fla. 1st DCA 1994).

32. In Castleman v. Office of Comptroller, 538 So. 2d 1365 (Fla. 1st DCA 1989), the court held that the ALJ erred by excluding evidence explaining the facts underlying other disciplinary orders against an applicant for a securities license under Chapter 517. In relevant part, the court stated:

We do so on the rationale that the applicable provisions in Chapter 517 do not direct denial of the application merely upon proof that such disciplinary history adjudications have occurred. Rather, those provisions require the Department to make a discretionary determination that the applicant is not of good repute and has demonstrated his unworthiness to transact business of an associated person in order to deny the application. The applicable statutes and rules contemplate that an applicant previously disciplined pursuant to administrative orders may explain and mitigate the circumstances of those transactions in an effort to demonstrate that he is not now a person of bad business repute and unworthy to transact securities business.

33. Like the statutes and rules at issue in Castleman, Florida Administrative Code Rule 61B-60.003(3) does not direct denial of an application merely upon proof of prior disciplinary history. Rather, the rule requires Petitioner to make a discretionary determination of an applicant's good moral character based on factors that "bear upon good moral character." Those factors are not conclusive.

34. Petitioner has the burden of proof in this proceeding. Petitioner must show by clear and convincing evidence that Respondent lacks good moral character. Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). Petitioner failed to satisfy its burden of proof.

35. Petitioner did not conduct an independent investigation of Respondent's good moral character. Petitioner relied solely on a review of the documents in its agency file and a telephone conversation with Respondent. Section 326.004(6)(a) does not direct denial of Respondent's application merely upon proof that disciplinary history adjudications have occurred. Section 326.004(6)(a) requires Petitioner to exercise its agency discretion by considering all of the facts and circumstances that bear upon good moral character.

36. Respondent showed that he possesses good moral character within the meaning of Section 326.004(6)(a). The 1994 transaction was a single isolated incident in an otherwise unblemished career. The 1994 transaction involved substantial mitigating circumstances sufficient to refute the culpable intent inherent in bad moral character. In the five years since the 1994 transaction, Respondent has established a reputation for honesty and competency.

RECOMMENDATION

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

RECOMMENDED that Petitioner enter a final order finding that Respondent has good moral character, within the meaning of Section 326.004(6)(a), and renewing Respondent's yacht salesperson's license.

DONE AND ENTERED this 28th day of June, 2000, in Tallahassee, Leon County, Florida.

DANIEL MANRY
Administrative Law Judge
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Filed with the Clerk of the
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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.