

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)	
PROFESSIONAL REGULATION,)	
DIVISION OF REAL ESTATE,)	
)	
Petitioner,)	
)	
vs.)	Case No. 00-0440
)	
EMILIO DANIEL LISTA,)	
)	
Respondent.)	
_____)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on April 5, 2000, in Miami, Florida, before Patricia Hart Malono, the duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner:	Daniel Villazon, Esquire Department of Business and Professional Regulation Division of Real Estate 400 West Robinson Street Post Office Box 1900 Orlando, Florida 32801
For Respondent:	Emilio Daniel Lista, <u>pro se</u> 28205 Southwest 125th Avenue Homestead, Florida 33033

STATEMENT OF THE ISSUE

Whether the Respondent committed the violation alleged in the Administrative Complaint dated September 17, 1998, and if so, the penalty that should be imposed.

PRELIMINARY STATEMENT

In an Administrative Complaint dated September 17, 1998, the Department of Business and Professional Regulation ("Department") charged that Emilio Daniel Lista obtained a real estate license by fraud, misrepresentation, or concealment, in violation of Section 475.25(1)(m), Florida Statutes (1997). In support of its charge, the Department alleged that Mr. Lista failed to disclose on his application for licensure that he had been found guilty in 1985 of disorderly intoxication and resisting arrest without violence. Mr. Lista timely requested an administrative hearing, and the Department transmitted the matter to the Division of Administrative Hearings for assignment of an administrative law judge. Pursuant to notice, the final hearing was held on April 5, 2000.

At the hearing, the Department presented the testimony of Keith Chapman, and Petitioner's Exhibits 1 through 3 were offered and received into evidence. Mr. Lista testified in his own behalf, but offered no exhibits into evidence. Chapters 20, 120, 455, and 475, Florida Statutes, and Chapter 61J2, Florida Administrative Code, were officially recognized.

A one-volume transcript of the hearing was filed with the Division of Administrative Hearings on June 1, 2000, and the parties timely submitted proposed findings of fact and conclusions of law, which have been considered.

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 is the state agency charged with the responsibility for investigating and prosecuting complaints pursuant to Chapters 455 and 475, Florida Statutes (1997). The Florida Real Estate Commission operates within the Department and is the entity directly responsible for licensing and disciplining persons licensed under Chapter 475, Florida Statutes (1997). Section 475.02, Florida Statutes (1997). The Division of Real Estate operates within the Department and assists the Commission in carrying out its statutory duties. Section 475.021, Florida Statutes (1997).

2. Mr. Lista is, and was at all times material to this proceeding, a licensed real estate salesperson, having been issued Florida license number SL-0647732. Mr. Lista's license is currently on inactive status.

3. Mr. Lista submitted to the Department an Application for Licensure as a Real Estate Salesperson dated January 14, 1997, and received by the Department on January 27, 1997.

4. Question number 9 on the application requests that the applicant answer "Yes" or "No" to the following:

Have you ever been convicted of a crime, found guilty, or entered a plea of guilty 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, 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. If you intend to answer "NO" because you believe those records have been expunged or sealed by court order pursuant to Section 943.058, Florida Statutes, or applicable law of another state, you are responsible for verifying the expungement or sealing prior to answering "NO."

If you answered "Yes," attach the details including dates and outcome, including any sentence and conditions imposed, in full on a separate sheet of paper.

Your answer to this question will be checked against local, state and federal records. Failure to answer this question accurately could cause denial of licensure. If you do not fully understand this question, consult with an attorney or the Division of Real Estate.

5. Mr. Lista answered "No" to question number 9 on the application for licensure. He signed his name below the Affidavit of Applicant, which provides as follows:

The above named, and undersigned, applicant for licensure as a real estate salesperson under the provisions of Chapter 475, Florida Statutes, as amended, upon being duly sworn, deposes and says that (s)(he) is the person so applying, that (s)(he) has carefully read the application, answers, and the attached statements, if any, and that all such answers and statements are true and correct, and are as complete as his/her knowledge, information and records permit, without any evasions or mental reservations whatsoever; that (s)(he) knows of no reason why this application should be denied; and (s)(he) further extends this affidavit to cover all amendments to this application or further statements to the Division of Administrative Hearings or its representatives, by him/her in response to inquiries concerning his/her qualifications.

Mr. Lista's signature was notarized, and he submitted the application to the Department in January 1997.

6. The Department approved Mr. Lista's application and issued a Florida real estate salesperson license. The Department subsequently learned that, on December 10, 1985, Mr. Lista pleaded guilty to one misdemeanor charge of Disorderly Intoxication, one misdemeanor charge of Resisting an Officer Without Violence to His Person, and one misdemeanor charge of Assault. Adjudication was withheld by the court, and Mr. Lista was sentenced to probation for a period of six months. Mr. Lista was represented by an attorney in the criminal proceedings, who appeared in court and handled the matter for Mr. Lista.

7. At the time of the final hearing, Mr. Lista recalled being arrested, going to the police station, and being released after about 30 to 45 minutes without having to post bond, and he recalled the details of the 1985 incident leading to his arrest. Mr. Lista also recalled receiving copies of the dispositions of the criminal charges against him.

8. Mr. Lista testified that, at the time he was filling out the application for licensure, he did not recall the guilty pleas and the sentence of probation because the incident had happened 12 years previously.

9. The evidence presented by the Department is sufficient to establish with the requisite degree of certainty that Mr. Lista misrepresented his criminal history by answering question number 9 in the negative. At the very least, the evidence supports a finding that Mr. Lista acted carelessly in answering question number 9 in the negative; certainly, had he reflected for a few moments, he would have recalled the 1985 incident, as well as the guilty pleas and sentence of probation.

CONCLUSIONS OF LAW

10. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes (1999).

11. In its Administrative Complaint, the Department seeks to impose penalties against Mr. Lista that include suspension or revocation of his license and/or the imposition of an administrative fine. Therefore, it has the burden of proving by clear and convincing evidence that Mr. Lista committed the violations alleged in the Administrative Complaint. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); and Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

12. In Evans Packing Co. v. Department of Agriculture and Consumer Services, 550 So. 2d 112, 116, n. 5 (Fla. 1st DCA 1989), the court explained:

[C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the evidence must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact the firm belief of 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).

13. Section 475.25, Florida Statutes (1997), provides in pertinent part:

(1) The commission may deny an application for licensure, registration, or permit, or renewal thereof; may place a licensee, registrant, or permittee on probation; may suspend a license,

registration, or permit for a period not exceeding 10 years; may revoke a license, registration, or permit; 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 registrant, permittee, or applicant:

* * *

(m) Has obtained a license by means of fraud, misrepresentation, or concealment.

14. In order to prove a violation of Section 475.25(1)(m), Florida Statutes (1997), the Department must prove that the applicant had the intent to commit the act allegedly constituting fraud, misrepresentation, or concealment. Walker v. Florida Department of Business and Professional Regulation, 705 So. 2d 652, 654 (Fla. 5th DCA 1998). It is not necessary to prove that a misrepresentation of fact was deliberate in order to prove that the misrepresentation was intentional. "Misrepresentation may also be shown by carelessness or recklessness as to the truth of the matter asserted." Hernandez v. AMISUB (American Hospital), Inc., 714 So. 2d 539, 541 (Fla. 3d DCA 1998).

15. Based on the findings of fact herein, the Department has proven by clear and convincing evidence that Mr. Lista obtained his real estate salesperson license by misrepresentation, in violation of Section 475.25(1)(m), Florida Statutes. 1/

16. Rule 61J2-24.001(3)(n), Florida Administrative Code, identifies the penalty guidelines for a violation of Section 475.25(1)(m), Florida Statutes (1997). The recommendation of the Department falls within the guidelines set forth in the rule and is reasonable under the circumstances.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Real Estate Commission enter a final order finding that Emilio Daniel Lista is guilty of violating Section 475.25(1)(m), Florida Statutes (1997); suspending his real estate salesperson license for a period of one year; and imposing an administrative fine in the amount of \$1,000.00.

DONE AND ENTERED this 14th day of July, 2000, 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 14th day of July, 2000.

ENDNOTE

¹ In its Amended Proposed Recommended Order, the Department alludes to a "Count II" in the Administrative Complaint and recommends that Mr. Lista be found guilty of having violated Rule 61J2-2.027(2), Florida Administrative Code. The Administrative Complaint filed with the Division of Administrative Hearings, dated September 17, 1998, contains only one count, which asserts that Mr. Lista violated Section 475.25(1)(m), Florida Statutes. Because the Department did not include a violation of Rule 61J2-2.027(2), Florida Administrative Code, in its Administrative Complaint, Mr. Lista cannot be found guilty of a violation of that rule. See Sternberg v. Department of Professional Regulation, Board of Medical Examiners, 465 So. 2d 1324, 1325 (Fla. 1st DCA 1985); cf. Maddox v. Department of Professional Regulation, 592 So. 2d 717, 720 (Fla. 1st DCA 1991).

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.