

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ELNOR D. ROBERTS,)
)
 Petitioner,)
)
 vs.) Case No. 01-0125
)
 DEPARTMENT OF BUSINESS AND)
 PROFESSIONAL REGULATION,)
 DIVISION OF REAL ESTATE,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

A formal hearing was conducted on July 20, 2001, before Daniel M. Kilbride, Administrative Law Judge of the Division of Administrative Hearings, in Viera, Florida.

APPEARANCES

For Petitioner: Frederic Stanley, Jr., Esquire
Stanley, Dehlinger & Rascher
260 Maitland Avenue, Suite 1500
Altamonte Springs, Florida 32701

For Respondent: Sunia Y. Marsh, Esquire
Department of Business and
Professional Regulation
400 West Robinson Street
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STATEMENT OF THE ISSUE

Whether Petitioner is qualified to take the examination for licensure as a real estate salesperson.

PRELIMINARY STATEMENT

On or about March 1, 2000, Elnor D. Roberts (Petitioner) submitted an application for licensure as a salesperson to the Department of Business and Professional Regulation, Division of Real Estate (Respondent), on behalf of the Florida Real Estate Commission (FREC). Based upon her responses on the application, Respondent set a hearing before the FREC for its consideration. The FREC denied her application on two occasions, and Petitioner timely requested a formal hearing pursuant to Section 120.57(1), Florida Statutes. This matter was referred to the Division of Administrative Hearings on January 9, 2001.

Following three continuances granted at the request of Petitioner, a formal hearing was held on July 20, 2001. Official recognition was taken of Chapters 20, 120, 475, 455, Florida Statutes, and the rules promulgated thereto. Petitioner's Exhibit one and Respondent's Exhibits one through nine were admitted in evidence. Petitioner testified in her own behalf. Neither Petitioner nor Respondent called any additional witnesses at the hearing. Respondent's request that the proposed recommended orders were due fifteen (15) days after the filing of the transcript was granted. The court reporter forwarded the transcript of the hearing to Respondent. Respondent's counsel filed a Motion for Extension of Time to File Proposed Recommended Orders. Respondent's motion was

granted and the time for filing was extended to September 7, 2001. The Transcript was filed on September 10, 2001. Petitioner has not filed post hearing submittal as of the date of this Recommended Order. Respondent filed its Proposed Recommended Order on September 7, 2001.

FINDINGS OF FACTS

1. Respondent, the Department of Business and Professional Regulation, Division of Real Estate, is an agency of the State of Florida, charged with the duty inter alia of representing the Florida Real Estate Commission in matters before the Division of Administrative Hearings.

2. Petitioner is an applicant for licensure as a real estate salesperson.

3. On or about March 1, 2000, Petitioner submitted an application for licensure as a salesperson with Respondent. Petitioner answered "YES" to questions numbered, nine, ten, twelve, and thirteen. Respondent attached a two-page letter of explanation, and attached additional documentation regarding her disclosures and in support of her application.

4. Question No. 9 states in pertinent part: "Have you ever been convicted of a crime, found guilty, or enter a plea of guilty or nolo contendere (no contest), even if adjudication was withheld?" Petitioner answered "YES" to Question No. 9. Petitioner disclosed a prior criminal conviction, where on or

about March 10, 1993, in the Circuit Court of Palm Beach County in Case No. 92-12798CFA02, Petitioner pled guilty to the offense of "Felony Exploitation of the Elderly." The Judge withheld adjudication of guilt, placed Petitioner on probation for a period of five years, and ordered restitution to the victim.

5. The Court granted Petitioner's request for early termination of probation upon payment of the restitution.

6. Question No. 10 states in pertinent part: "Has any judgment or decree of a court been entered against you in this or any other state, . . . in which you were charged in the petition complaint, . . . with any fraudulent or dishonest dealing?" Petitioner answered affirmatively, it appears, based upon her disclosure regarding a federal Internal Revenue Service matter. Petitioner stated in her letter of explanation that the case involved her failure to pay income tax and that she was ordered to pay restitution.

7. Question No. 12 stated in pertinent part: "Have you ever been denied, or is there now pending a proceeding to deny your application for licensure, registration, or permit to practice any regulated profession" Petitioner answered affirmatively but the record does not clearly indicate what type of application Petitioner was referencing as to this question.

8. Question No. 13 stated in pertinent part: "(a) Has any license, registration or permit to practice any regulated

profession, occupation, or vocation been revoked, annulled or suspended in this or any other state, province, district, territory, possession or nation, upon grounds of fraudulent or dishonest dealing or violations of law, or is any proceeding now pending?" Petitioner disclosed a prior disciplinary action against her former life and health insurance license in the State of Florida.

9. Respondent's application process revealed the following:

(a) In 1984 Petitioner entered into a Settlement Stipulation with the Department of Insurance for failing to fill out a replacement form on a policy. She was sentenced to two years of probation and a \$500 fine.

(b) On February 22, 1991, the Department of Insurance issued a Final Order revoking Petitioner's license for a period of two years.

10. Petitioner's application also included four letters of recommendation.

11. On May 17, 2000, the FREC held a hearing regarding Petitioner's application. Petitioner requested a reconsideration hearing before the FREC, and a second hearing was held on September 20, 2000. The FREC denied her application on both occasions.

12. Approximately ten years have lapsed from the DOI case and eight years from the criminal plea.

13. At the formal hearing, Petitioner testified on her own behalf that while licensed as an insurance agent, she developed a clientele selling health insurance to senior citizens. In years prior to the case filed by the Department of Insurance (DOI), she earned approximately \$140,000 per year in income.

14. On or about September 21, 1989, the DOI filed an Administrative Complaint against Petitioner. Essentially the complaint charged that Petitioner allegedly sold policies to a Mrs. Hajek while she suffered from chronic mental disability and dementia, and that Petitioner knew or should have known this. Additionally, it charged that she sold policies to individuals including a Mrs. Holden, while she knew that they were replacing existing policies with similar provisions already in force, and that she failed to properly respond to these clients' phone calls and requests. Lastly, she was charged with selling replacement policies through misrepresentation.

15. Petitioner stated that several agents in her insurance office also were charged by the DOI with multiple counts in the administrative complaint. It was alleged that their clients were primarily senior citizens who were sold the same type of insurance policies sold by Petitioner. She testified that to her knowledge, these individuals accepted plea agreements to resolve their cases.

16. A formal hearing was held on April 19, 1990. On November 5, 1990, Hearing Officer Michael M. Parrish issued a Recommended Order calling for the dismissal of all charges. The DOI filed exceptions to the recommended order, and the Insurance Commissioner issued a Final Order on February 22, 1991. The Commissioner rejected the Department's exceptions one through eight as to the findings of fact. The Commissioner accepted Petitioner's exception number three regarding a probation violation, submitted additional conclusions of law, and found Petitioner guilty of the charges relating to Mrs. Hajek and Mrs. Holden. The Commissioner, therefore, adopted the Hearing Officer's findings of fact and conclusions of law, and added conclusions of law to support its findings. The Commissioner ordered that Petitioner's license be revoked for a period of two years.

17. Petitioner appealed the Final Order, and the Fourth District Court of Appeals upheld the Final Order of the DOI. Johnson v. Department of Insurance, 595 So. 2d 56 (Fla. 4th DCA 1992).

18. Petitioner did not reapply for her insurance license after the two-year revocation period ended.

19. Petitioner also admitted that she was involved in a case where she owed the Internal Revenue Service \$125,000 for failing to file joint tax returns with her former husband.

Petitioner claimed that the problem stemmed from her husband's failure to disclose to her what was being done with the parties' joint assets. Petitioner testified that she settled the matter with the IRS and does not currently owe any penalty.

20. Petitioner testified at the formal hearing that she was charged with felony exploitation of the elderly concerning a loan she received from Thelma Smith. She admitted that she pled guilty to the charge and was sentenced for the crime. Petitioner testified that she accepted the plea agreement based upon her financial situation at the time and that Ms. Smith was unable to testify at that time. Petitioner failed to provide any witness or documentary evidence to support her explanation of the charge at the formal hearing.

21. Petitioner acknowledged that it took greater care and time to work with her senior clientele than the average individual while selling insurance. In selling real estate, some of her clientele might be senior citizens, and she understands that she may need to explain contracts and information carefully to such individuals during a transaction.

22. Petitioner has failed to present convincing evidence to indicate that she is honest, trustworthy, of good character and has a good reputation for fair dealing to meet the requirements of Section 475.17, Florida Statutes.

CONCLUSIONS OF LAW

23. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to Sections 129.569 and 120.57(1), Florida Statutes.

24. The FREC consists of seven members acting in its quasi-judicial capacity, charged with the duty to regulate real estate brokers, salespersons and real estate schools in the interest of the public welfare. Sections 475.001 and 475.02, Florida Statutes. The FREC is bound by 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.

25. Respondent's authority is derived from Chapters 475 and 455, Florida Statutes, and the rules promulgated thereto, specifically, Chapter 61J2, Florida Administrative Code. Respondent is authorized to represent the FREC in this matter pursuant to Section 475.021, Florida Statutes.

26. The burden of proof is on Petitioner, as the party asserting the affirmative of the issue. Florida Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981); Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932, 934 (Fla. 1996).

27. A professional license is not a right, but a privilege granted by the State. Borrego v. Agency for Health Care Admin., 675 So. 2d 666, 668 (Fla. 1st DCA 1996). The administrative agency (in this case FREC) has "particularly broad discretion in determining the fitness of applicants who seek to engage in an occupation the conduct of which is a privilege rather than a right." 670 So. 2d at 934 citing Osborne Stern & Co. v. Department of Banking and Fin., 647 So. 2d 245 (Fla. 1st DCA 1994) (Booth, J., concurring and dissenting).

28. "[L]icensing statutes deal with the question whether a person is qualified to receive the license in the first instance, while the disciplinary statutes are penal in nature and concern whether a license already granted should be suspended or revoked . . . a mere applicant for a . . . license has at best the hope of qualifying." Silver Show, Inc. v. Department of Business and Professional Regulation, 763 So. 2d 348, 349 (Fla. 4th DCA 1998). Administrative agencies possess discretion when determining whether an applicant should receive a license, especially when the agency is regulating an occupation which is deemed a privilege rather than a right. Astral Liquors, Inc. v. Department of Business and Professional Regulation, 463 So. 2d 1130, 1132 (Fla. 1985).

29. The questions on the real estate application are designed to aid FREC in deciding "whether or not [Petitioner]

possessed the necessary qualifications for registration, to-wit, honesty, truthfulness, trustworthiness, and good character as required by Section 475.17 . . ." Larson v. Florida Real Estate Comm., 227 So. 2d 886, 888 (Fla. 4th DCA 1969). See also Antel v. Department of Business and Professional Regulation, 522 So. 2d 1056 (Fla. 5th DCA 1988). The application process is regulatory and the issue is whether the applicant "should . . . be permitted to engage in the business of a real estate broker. In such a situation, past irregular conduct may be considered." Ahern v. Florida Real Estate Comm., 6 So. 2d 857, 858 (Fla. 1942).

30. Rule 61J2-2.027(2), Florida Administrative Code, describes the significance of the licensure application. It says that "[t]he applicant must make it possible to immediately begin the inquiry as to whether the applicant is honest, truthful, trustworthy, of good character, and bears a good reputation for fair dealings, and will likely make transactions and conduct negotiations with safety to investors and to those with whom the applicant may undertake a relation of trust and confidence."

31. Section 475.17, Florida Statutes, provides in pertinent part:

(1)(a) An applicant for licensure who is a natural person must . . . be honest, truthful, trustworthy, and of good

character; and have a reputation for fair dealing . . . must be competent and qualified to make real estate transactions and conduct negotiations therefor with safety to investors and to those with whom the applicant may undertake a relationship of trust and confidence. If the applicant has been denied registration or a license or has been disbarred, or the applicant's registration or license to practice or conduct any regulated profession, business, or vocation has been revoked or suspended, by this or any other state . . . because of any conduct or practices which would have warranted a like result under this chapter, or if the applicant has been guilty of conduct or practices in this state or elsewhere which would have been grounds for revoking or suspending her or his license under this chapter had the applicant then been registered, the applicant shall be deemed not to be qualified unless, because of lapse of time and subsequent good conduct and reputation, or other reason deemed sufficient, it appears to the commission that the interest of the public and investors will not likely be endangered by the granting of registration.

32. Section 475.25(1), Florida Statutes, authorizes the Florida Real Estate Commission to deny an application for licensure if it finds that the applicant:

* * *

(f) Has been convicted or found guilty of, or entered a plea of nolo contendere to, regardless of adjudication, a crime in any jurisdiction which . . . involves moral turpitude or fraudulent or dishonest dealing. . . .

* * *

(s) Has had a registration suspended, revoked or otherwise acted against in any jurisdiction. . . .

33. In this case, the allegations of the Department of Insurance Final Order issued against Petitioner involve conduct or practices that would have warranted discipline under Chapter 475, Florida Statutes, as referenced above. The charges with the Department of Insurance are deemed to involve fraudulent or dishonest dealing, breach of trust or culpable negligence in any business transaction.

34. The criminal charge would warrant discipline under Section 475.25(1)(f), Florida Statutes, as it is a crime involving moral turpitude or fraudulent or dishonest dealing. See Pearl v. Florida Board of Real Estate, 394 So. 2d 189 (Fla. 3rd DCA 1981).

35. The Florida Supreme Court discussed moral turpitude in the following terms:

Moral turpitude involves the idea of inherent baseness or depravity in the private social relations or duties owed by man to man or by man to society. (Citations omitted). It has also been defined as anything done contrary to justice, honesty, principle, or good morals, though it often involves the question of intent as when unintentionally committed through error or judgment when wrong was not contemplated.

State ex. rel. Tullidge v. Hollingsworth, 146 So. 660, 661 (Fla. 1933).

36. Petitioner has failed to prove that she is qualified to take the examination for licensure as a real estate salesperson, as required by Section 475.17, Florida Statutes. Petitioner has failed to introduce sufficient evidence at the formal hearing to establish evidence of good conduct or reputation in order to overcome the presumption that the interest of the public and investors will not likely be endangered by the granting of registration. Section 475.17(1)(a), Florida Statutes.

RECOMMENDATION

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

RECOMMENDED that the Florida Real Estate Commission issue a final order denying Petitioner's application for licensure as a real estate salesperson in the State of Florida.

DONE AND ENTERED this 18th day of September, 2001, in Tallahassee, Leon County, Florida.

DANIEL M. KILBRIDE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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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.