STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF REAL ESTATE,	)	
Petitioner,	)	
vs.	)	Case No. 01-1599PL
MARK FRANCIS THRENHAUSSER,	)	
Respondent.	)	

RECOMMENDED ORDER

Pursuant to notice, a hearing was held in this case in accordance with Section 120.57(1), Florida Statutes, on July 10, 2001, by video teleconference at sites in Fort Lauderdale and Tallahassee, Florida, before Stuart M. Lerner, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Donna K. Ryan, Esquire
Department of Business and Professional Regulation
Post Office Box 1900
Orlando, Florida 32802-1900

For Respondent: Steven W. Johnson, Esquire
1801 East Colonial Drive
Suite 101
Orlando, Florida 32803

STATEMENT OF THE ISSUE

Whether Respondent committed the violations alleged in the Administrative Complaint, and, if so, what disciplinary action should be taken against him.

PRELIMINARY STATEMENT

On December 14, 2000, Petitioner filed an Administrative Complaint against Respondent, a Florida-licensed real estate salesperson, alleging that Respondent had failed to make certain disclosures regarding his criminal history on the application for licensure he had submitted on or about April 27, 1998, and, as a consequence, was guilty of: having "obtained [his] license by means of fraud, misrepresentation, or concealment in violation of Section 475.25(1)(m)," Florida Statutes (Count I); and having "failed to comply with the requirements of R[ule] 61J2-2.027(2), Fla. Admin. Code," in violation of Section 475.25(1)(e), Florida Statutes (Count II). Through the submission of a completed Amended Election of Rights form, Respondent denied the allegations of wrongdoing made in the Administrative Complaint and requested "a formal hearing pursuant to Section 120.57(1), Florida Statutes, before [an Administrative Law Judge] to be appointed by the Division of Administrative Hearings." On April 27, 2001, the matter was referred to the Division of Administrative Hearings (Division)

for the assignment of a Division Administrative Law Judge to conduct the hearing Respondent had requested.

As noted above, the final hearing was held on July 10, 2001. Five witnesses testified at the hearing: Catherine Rivera, an investigator with Petitioner; Respondent; Christopher Cloney, Esquire; Samantha Molloy, Esquire; and Gene Whiddon. In addition to the testimony of these five witnesses, 11 exhibits (Petitioner's Exhibits 1 through 7, 9, and 10, and Respondent's Exhibits 1 and 4) were offered and received into evidence.

At the close of the evidentiary portion of the hearing, the undersigned established a deadline (ten days from the date of the filing of the hearing transcript with the Division) for the filing of proposed recommended orders.

A Transcript of final hearing (consisting of one volume) was filed with the Division on July 30, 2001. Petitioner and Respondent filed their Proposed Recommended Orders on August 8, 2001, and August 9, 2001, respectively. These post-hearing submittals have been carefully considered by the undersigned.

FINDINGS OF FACT

Based upon the evidence adduced at the final hearing and the record as a whole, the following findings of fact are made:

1. Respondent is now, and has been since June 8, 1998, a Florida-licensed real estate salesperson. He holds license number SL-0665186.

2. Since February of 1999, he has worked at Prudential Florida Realty in Fort Lauderdale, Florida.

3. In the late 1970s and early 1980s, prior to obtaining his real estate salesperson license, Respondent was a defendant in several criminal proceedings. His legal problems stemmed from his use of alcohol.

4. On or about May 31, 1977, in Broward County Court Case No. 77006724MM19A, Respondent was adjudicated guilty of one count of possessing drugs without a prescription and fined $110.00.

5. On or about March 29, 1978, in Broward County Court Case No. 78000832MM10A, after entering a plea of no contest, Respondent was adjudicated guilty of one count of driving with a suspended or revoked driver's license and fined $500.00.

6. On or about October 10, 1980, in Broward County Court Case No. 80011944MMA02, Respondent pled guilty to one count of resisting arrest without violence. (It is unclear whether or not adjudication of guilt was withheld.)

7. On or about February 2, 1981, in Palm Beach County Court Case No. 800011068MMA02, Respondent was sentenced for prowling. Adjudication of guilt was withheld.

8. On or about October 19, 1981, in Broward County Court Case No. 81017282MM10A, Respondent was adjudicated guilty of

resisting arrest/obstructing justice without violence and placed on probation for four months and fined $78.50.

9. In or about 1984, Respondent was found guilty of driving under the influence and was ordered, as part of his sentence, to attend Alcoholics Anonymous (AA) meetings.

10. Since that time, Respondent has attended AA meetings on a regular basis.

11. Respondent was successful in his efforts to end his reliance upon alcohol. He has been sober since approximately 1992.

12. On December 17, 1997, Respondent was arrested in Broward County for prostitution/lewdness/assignation in violation of a City of Fort Lauderdale municipal ordinance. The case was docketed as Broward County Court Case No. 97033300MO10A. Respondent initially entered a plea of not guilty to the charge. On March 18, 1998, Respondent executed an Affidavit to Enter Plea, Waiver of Rights and Stipulation (Affidavit). In the Affidavit, Respondent "agree[d] to enter a plea of NO CONTEST to the [reduced] charge of DISORDERLY CONDUCT . . . upon the following terms: receive a withholding of adjudication, pay $4.00 to lift any capias, and pay Court Costs of $300.00," and he requested the court to accept his "plea in abstentia pursuant to rule 3.180(c), and sentence [him] in abstentia." Respondent left the executed Affidavit with his

attorney, Christopher Cloney, Esquire, with the understanding that Mr. Cloney would take the necessary measures to present it to the court. The executed Affidavit was filed with the court the next day, March 19, 1998. That same day, March 19, 1998, the court accepted Respondent's plea, withheld adjudication of guilt, and fined Respondent $300.00. Neither Respondent nor Mr. Cloney was present when the court took such action. Mr. Cloney, on or about April 1, 1998, paid the fine on behalf of Respondent. Sometime after April 1, 1998, Mr. Cloney sent Respondent a bill and advised Respondent of the outcome of the case. Respondent had not made any inquiry regarding the status of his Affidavit and the disposition of his case prior to hearing from Mr. Cloney.

13. On April 1, 1998, Respondent completed an Application for Licensure as a Real Estate Salesperson form (Application).

14. The Application was subsequently filed with Petitioner.

15. The Application contained the following signed and notarized "Affidavit of Applicant":

> 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 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 or its representatives, by him/her in response to inquiries concerning his/her qualifications.

16. Item 9 on the Application form that Respondent used to apply for licensure read as follows:

> Have you ever been convicted of a crime, found guilty, or entered a plea of guilty or nolo contendre (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.

17. In response to the question asked in Item 9, Respondent checked the box marked "Yes." Contrary to the instructions set forth in Item 9, however, Respondent did not "attach the details including dates and outcome, including any sentence and conditions imposed, in full on a separate sheet of paper." Instead, Respondent wrote on the Application itself, in the margin next to Item 9, the following: "Had DUI in 1984."

18. Respondent filled out the Application at the Gold Coast School of Real Estate, where he was taking a course.

19. He filled out the application hurriedly because he "was trying to get it in for the next [licensure] exam" before the deadline.

20. At the time he filled out the Application, Respondent knew that there had been other instances in the late 1970s and early 1980s, in addition to the one he had disclosed on the Application, where he had "been convicted of a crime, found guilty, or entered a plea of guilty or nolo contendre (no contest)"; however, he did not remember all of the particulars of these previous encounters with the law.

21. At the time he filled out the Application, Respondent did not know whether the Affidavit he had signed on March 18, 1998, had been filed and accepted by the court in Broward County Court Case No. 97033300MO10A.

22. In a hurry to complete the Application and not wanting to take the time to do the research necessary for him to obtain the "details" asked for in Item 9, Respondent decided to disclose what he considered to be his most serious offense, the 1984 "DUI," and not bother to mention any other offense. In so doing, Respondent did not intend to mislead or deceive Petitioner about his past. He simply did not think that it was critical that he disclose any more information than he did. He assumed (reasonably so, in light of the third paragraph of Item 9) that, since he answered Item 9 in the affirmative, Petitioner would "do [its] own records check" and find out the "details" of his criminal record, which he "knew" did not include "any crime of fraud or anything that was dishonest."

23. As noted above, Petitioner, on June 8, 1998, issued Respondent a real estate salesperson license.

CONCLUSIONS OF LAW

24. The Florida Real Estate Commission (Commission) is statutorily empowered to take disciplinary action against Florida-licensed real estate salespersons based upon any of the grounds enumerated in Section 475.25(1), Florida Statutes. Such disciplinary action may include one or more of the following penalties: license revocation; license suspension (for a period not exceeding ten years); imposition of an administrative fine not to exceed $1,000 for each count or separate offense;

issuance of a reprimand; and placement of the licensee on probation. Section 475.25(1), Florida Statutes.

25. "No revocation [or] suspension . . . of any [real estate salesperson's] license is lawful unless, prior to the entry of a final order, [Petitioner] has served, by personal service or certified mail, an administrative complaint which affords reasonable notice to the licensee of facts or conduct which warrant the intended action and unless the licensee has been given an adequate opportunity to request a proceeding pursuant to ss. 120.569 and 120.57." Section 120.60(5), Florida Statutes.

26. The licensee must be afforded an evidentiary hearing if, upon receiving such written notice, the licensee disputes the alleged facts set forth in the administrative complaint. Sections 120.569(1) and 120.57, Florida Statutes.

27. At the hearing, Petitioner bears the burden of proving that the licensee engaged in the conduct, and thereby committed the violations, alleged in the administrative complaint. Proof greater than a mere preponderance of the evidence must be presented. Clear and convincing evidence of the licensee's guilt is required. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932, 935 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); Pou v. Department of

Insurance and Treasurer, 707 So. 2d 941 (Fla. 3d DCA 1998); and Section 120.57(1)(j), Florida Statutes ("Findings of fact shall be based upon a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute . . . .").

28. Clear and convincing evidence "requires more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" In re Graziano, 696 So. 2d 744, 753 (Fla. 1997). It is an "intermediate standard." Id. For proof to be considered "'clear and convincing' . . . the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony 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 a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established." In re Davey, 645 So. 2d 398, 404 (Fla. 1994), quoting, with approval, from Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

29. In determining whether Petitioner has met its burden of proof, it is necessary to evaluate its evidentiary presentation in light of the specific factual allegations made in the administrative complaint. Due process prohibits an

agency from taking disciplinary action against a licensee based upon conduct not specifically alleged in the agency's administrative complaint or other charging instrument. See Hamilton v. Department of Business and Professional Regulation, 764 So. 2d 778 (Fla. 1st DCA 2000); Lusskin v. Agency for Health Care Administration, 731 So. 2d 67, 69 (Fla. 4th DCA 1999); and Cottrill v. Department of Insurance, 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996).

30. Furthermore, "the conduct proved must legally fall within the statute or rule claimed [in the administrative complaint] to have been violated." Delk v. Department of Professional Regulation, 595 So. 2d 966, 967 (Fla. 5th DCA 1992). In deciding whether "the statute or rule claimed to have been violated" was in fact violated, as alleged by Petitioner, if there is any reasonable doubt, that doubt must be resolved in favor of the licensee. See Whitaker v. Department of Insurance and Treasurer, 680 So. 2d 528, 531 (Fla. 1st DCA 1996); Elmariah v. Department of Professional Regulation, Board of Medicine, 574 So. 2d 164, 165 (Fla. 1st DCA 1990); and Lester v. Department of Professional and Occupational Regulations, 348 So. 2d 923, 925 (Fla. 1st DCA 1977).

31. In those cases where the proof is sufficient to establish that the licensee committed the violations alleged in the administrative complaint and therefore disciplinary action

is warranted, it is necessary, in determining what disciplinary action should be taken against the licensee, to consult Petitioner's "disciplinary guidelines," which impose restrictions and limitations on the exercise of Petitioner's disciplinary authority. See Parrot Heads, Inc. v. Department of Business and Professional Regulation, 741 So. 2d 1231, 1233 (Fla. 5th DCA 1999)("An administrative agency is bound by its own rules . . . creat[ing] guidelines for disciplinary penalties."); cf. State v. Jenkins, 469 So. 2d 733, 734 (Fla. 1985)("[A]gency rules and regulations, duly promulgated under the authority of law, have the effect of law."); Buffa v. Singletary, 652 So. 2d 885, 886 (Fla. 1st DCA 1995)("An agency must comply with its own rules."); Decarion v. Martinez, 537 So. 2d 1083, 1084 (Fla. 1st 1989)("Until amended or abrogated, an agency must honor its rules."); and Williams v. Department of Transportation, 531 So. 2d 994, 996 (Fla. 1st DCA 1988)(agency is required to comply with its disciplinary guidelines in taking disciplinary action against its employees).

32. Petitioner's "disciplinary guidelines" are found in Rule 61J2-24.001, Florida Administrative Code, which provides, in pertinent part, as follows:

> (1) Pursuant to s.455.2273, Florida Statutes, the Commission sets forth below a range of disciplinary guidelines from which disciplinary penalties will be imposed upon licensees guilty of violating Chapters 455

or 475, Florida Statutes. The purpose of the disciplinary guidelines is to give notice to licensees of the range of penalties which normally will be imposed for each count during a formal or an informal hearing. For purposes of this rule, the order of penalties, ranging from lowest to highest, is: reprimand, fine, probation, suspension, and revocation or denial. Pursuant to s. 475.25(1), Florida Statutes, combinations of these penalties are permissible by law. . . .

(2) As provided in s. 475.25(1), Florida Statutes, the Commission may, in addition to other disciplinary penalties, place a licensee on probation. The placement of the licensee on probation shall be for such a period of time and subject to such conditions as the Commission may specify. Standard probationary conditions may include, but are not limited to, requiring the licensee: to attend pre-licensure courses; to satisfactorily complete a pre-licensure course; to attend post-licensure courses; to satisfactorily complete a post-licensure course; to attend continuing education courses; to submit to and successfully complete the state-administered examination; to be subject to periodic inspections and interviews by a DPR investigator; if a broker, to place the license on a broker-salesperson status; or, if a broker, to file escrow account status reports with the Commission or with a DPR investigator at such intervals as may be prescribed.

(3) The penalties are as listed unless aggravating or mitigating circumstances apply pursuant to paragraph (4). The verbal identification of offenses is descriptive only; the full language of each statutory provision cited must be consulted in order to determine the conduct included. . . .

(f) VIOLATION: 475.25(1)(e)
Violated any rule or order or provision under Chapters 475 and 455, F.S.

RECOMMENDED RANGE OF PENALTY: The usual action of the Commission shall be to impose a penalty from an 8 year suspension to revocation and an administrative fine of $1,000 . . . .

(n) VIOLATION: 475.25(1)(m)
Obtained a license by fraud, misrepresentation or concealment

RECOMMENDED RANGE OF PENALTY: In the case of a licensee who renews the license without having complied with Rule 61J2-3.009 and the act is discovered by the BPR, the usual action of the Commission shall be to impose a penalty of revocation. In the case of a licensee who renews the license without having complied with Rule 61J2-3.009 and the licensee brings the matter to the attention of the BPR, the usual action of the Commission shall be to impose a penalty of a $1,000 administrative fine. In all other cases, the usual action of the Commission shall be to impose a penalty of revocation and an administrative fine of $1,000. . . .

(4)(a) When either the Petitioner or Respondent is able to demonstrate aggravating or mitigating circumstances to the Commission in a s. 120.57(2), Florida Statutes, hearing or to a Division of Administrative Hearings hearing officer in a s. 120.57(1), Florida Statutes, hearing by clear and convincing evidence, the Commission or hearing officer shall be entitled to deviate from the above guidelines in imposing or recommending discipline, respectively, upon a licensee. Whenever the Petitioner or Respondent intends to introduce such evidence to the Commission in a s. 120.57(2), Florida Statutes, hearing, advance notice of no less than seven (7) days shall be given to the

other party or else the evidence can be properly excluded by the Commission.

(b) Aggravating or mitigating circumstances may include, but are not limited to, the following:

1. The severity of the offense.
2. The degree of harm to the consumer or public.
3. The number of counts in the Administrative Complaint.
4. The number of times the offenses previously have been committed by the licensee.
5. The disciplinary history of the licensee.
6. The status of the licensee at the time the offense was committed.
7. The degree of financial hardship incurred by a licensee as a result of the imposition of a fine or suspension of the license.
8. Violation of the provision of Chapter 475, Florida Statutes, where in a letter of guidance as provided in s. 455.225(3), Florida Statutes, previously has been issued to the licensee.

33. The Administrative Complaint issued in the instant case alleges that Respondent violated Subsections (l)(e) and (m) of Section 475.25, Florida Statutes, by obtaining his real estate salesperson license by submitting to Petitioner an application for licensure in which he failed to disclose his complete criminal history.

34. Subsection (1)(e) of Section 475.25, Florida Statutes, authorizes the Commission to take disciplinary action against a Florida-licensed real estate salesperson who "[h]as 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."

35. Among the rules issued under Chapter 475, Florida Statutes, the violation of which subjects a licensee to disciplinary action pursuant to Subsection (1)(e) of Section 475.25, Florida Statutes, is Rule 61J2-2.027(2), Florida Administrative Code, which provides as follows:

> The 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. The applicant is required to disclose:
>
> (a) if ever convicted of a crime, or if any judgment or decree has been rendered against the applicant for fraud or dishonest dealings, or
>
> (b) if now a patient of a mental health facility or similar institution for the treatment of mental disabilities, or
>
> (c) if ever called by, or done business under any other name, or alias, than the name signed on the application, with sufficient information to enable the Commission to investigate the circumstances, or
>
> (d) if ever had a broker's or salesperson's license revoked, suspended, or otherwise acted against, or had an application for such licensure denied, by the real estate

licensing agency of another state, territory, or country.

36. Subsection (1)(m) of Section 475.25, Florida Statutes, authorizes the Commission to take disciplinary action against a Florida-licensed real estate salesperson who "[h]as obtained a license by means of fraud, misrepresentation, or concealment." To establish that a licensee committed such a violation, it must be shown not only that the licensee provided false or misleading information on his licensure application, but also that the licensee knowingly did so with the intent to deceive and that the license was issued based upon the false or misleading information provided by the licensee. 1/ 2/ See Walker v. Department of Business and Professional Regulation, 705 So. 2d 652, 654 (Fla. 5th DCA 1998)("[S]ection 475.25(1)(m), Florida Statutes, . . . contemplates that an intentional act be proved before a violation may be found."); see also Munch v. Department of Professional Regulation, Division of Real Estate, 592 So. 2d 1136 (Fla. 1st DCA 1992)("It is clear that Section 475.25(1)(b) [Florida Statutes, which, in its first clause, authorizes the Commission to discipline a licensee guilty of fraud, misrepresentation, concealment, false promises, false pretenses, dishonest dealing by trick, scheme or device, culpable negligence, or breach of trust in any business transaction] is

penal in nature. As such, it must be construed strictly, in favor of the one against whom the penalty would be imposed. . . . Reading the first clause of Section 475.25(1)(b) (the portion of the statute which appellant was charged with having violated in Count I of the complaint), and applying to the words used their usual and natural meaning, it is apparent that it is contemplated that an intentional act be proved before a violation may be found."); Charter Air Center, Inc. v. Miller, 348 So. 2d 614, 616 (Fla. 2d DCA 1977)("The elements of fraudulent representation are: a false statement pertaining to a material fact, knowledge that it is false, intent to induce another to act on it, and injury by acting on the statement"); Gentry v. Department of Professional and Occupational Regulations, 293 So. 2d 95, 97 (Fla. 1st DCA 1974)(statutory provision prohibiting licensed physicians from "[m]aking misleading, deceptive and untrue representations in the practice of medicine" held not to apply to "representations which are honestly made but happen to be untrue"; "[t]o constitute a violation, . . . the legislature intended that the misleading, deceptive and untrue representations must be made willfully (intentionally)"); and Naekel v. Department of Transportation, 782 F.2d 975, 978 (Fed. Cir. 1986)("[A] charge of falsification of a government document [in this case, an employment application] requires proof not only that an answer is wrong,

but also that the wrong answer was given with intent to deceive or mislead the agency. The fact of an incorrect response cannot control the question of intent. Were a bare inaccuracy controlling on the question of intent, the 'intent' element of the charge would be subsumed within the distinct inquiry of whether the employee's answer adheres to the true state of facts. A system of real people, pragmatic in their expectations, would not easily tolerate a rule under which the slightest deviation from truth, would sever one's tenuous link to employment. Indeed, an SF-171 does not require absolute accuracy. Instead, an employee must certify that the answers are 'true, complete and correct to the best of my knowledge and belief, and are made in good faith.' No more than that can reasonably be required. The oath does not ask for certainty and does not preclude a change in one's belief.").

37. In the instant case, it is undisputed that Respondent failed to disclose, as required by Item 9 on the Application form, the full extent of his criminal history; however, the evidence adduced at hearing (specifically, the unrebutted testimony of Respondent on the subject, which the undersigned has credited) establishes that, in responding to the question in the manner that he did, Respondent did not intend to deceive or defraud Petitioner about his criminal background. Furthermore, it does not appear that Respondent's failure to provide all of

the details required by Item 9 resulted in his receiving a license for which he was not qualified. There has been no showing that, at the time of his Application, Respondent was not honest, truthful, trustworthy and of good character, or was otherwise not qualified for licensure, and therefore there is no reason to believe that, had he disclosed his criminal history in its entirety, the outcome of the licensure application review process would have been different. 3/

38. The facts of the instant case are strikingly similar to those that were present in the case of Department of Business and Professional Regulation v. Solomon, 2000 WL 564801 (Fla. DOAH 2000)(Recommended Order), adopted in toto, (FREC July 19, 2000)(Final Order). Solomon, like Respondent, was a licensed real estate salesperson who was charged with having violated Subsections (1)(e) and (m) of Section 475.25, Florida Statutes. The "proof [presented at the final hearing] demonstrate[d] with the requisite degree of certainty that [Solomon had] failed to fully disclose his criminal history as required by [I]tem 9 on the application" form that he had filled out on or about June 16, 1997. Solomon had answered Item 9 in the affirmative and, on an attachment to the application, disclosed that he had pled guilty to "drug possession and carrying a concealed weapon . . . 10 to 15 years ago" and that he had a "conviction for driving under the influence in 1984," but failed to reveal

that: on September 17, 1979, upon entry of a plea of guilty, he had been found guilty of "Shooting into an Occupied Dwelling"; on August 19, 1981, he had been convicted of "misdemeanor Battery, Resisting an Officer Without Violence, and Disorderly Conduct"; and on June 17, 1985, upon entry of a plea of guilty, he had been adjudicated guilty of "Leaving the Scene of an Accident Involving Personal Injury." Crediting Solomon's testimony, the Administrative Law Judge (Judge William J. Kendrick) found that Solomon "did not intend to mislead or deceive the Department," explaining as follows:

> Respondent's testimony was candid, the nature of the incidents he disclosed were serious, as opposed to trivial, and his assumption that the complete details of his criminal history would be revealed when the Department (as it stated it would do on the application) checked his response against local, state, and federal records was well founded. Consequently, while his response to item 9 on the application was incomplete, Respondent's failure to more fully detail his criminal history is more appropriately characterized as a careless, thoughtless, or heedless act as opposed to a willful or intentional effort to mislead the Department as to the true character of his history.

Having determined that Solomon's "failure to completely disclose his criminal history part[ook] more of a careless, thoughtless, or heedless act than one done with bad motive or spite," Judge Kendrick concluded that Solomon's "failing" was therefore not a violation of Subsection (1)(m) of Section 475.25, Florida

Statutes, but did constitute a violation of Subsection (2) of Rule 61J2-2.027(2), Florida Administrative Code, and thus Subsection (1)(e) of Section 475.25, Florida Statutes. Judge Kendrick then engaged in the following discussion regarding the "appropriate penalty that should be imposed" for this violation of Subsection (1)(e) of Section 475.25, Florida Statutes:

> Having resolved that Respondent violated the provisions of Subsection 475.25(1)(e), Florida Statutes, by having failed to comply with the requirements of Rule 61J2-2.027(2), Florida Administrative Code, it remains to resolve the appropriate penalty that should be imposed. Pertinent to this issue, Rule 61J2-24.001(3)(f), Florida Administrative Code, provides that for a violation of Subsection 475.25(1)(e), Florida Statutes, "[t]he usual action of the Commission shall be to impose a penalty from an 8 year suspension to revocation and an administrative fine of $1,000." Here, giving due regard for the Commission's usual penalty, as well as the aggravating and mitigating circumstances set forth in Rule 61J2-24.001(4), Florida Administrative Code, including the time that has elapsed since the offenses occurred and the absence of any proof that the Department (given the nature of the offenses) would have altered its decision (to approve Respondent's application for licensure) had it known of Respondent's convictions, an appropriate penalty for the violation found is a suspension for 30 days and an administrative fine of $250.

Judge Kendrick's Recommended Order was adopted in its entirety by Petitioner in a Final Order issued on July 19, 2000.

39. There being no apparent reason why it should not do so, Petitioner should treat Respondent as it did the similarly situated Solomon and find Respondent guilty of having violated Rule 61J2-2.027(2), Florida Administrative Code, and therefore Subsection (1)(e) of Section 475.25, Florida Statutes, as alleged in Count II of the Administrative Complaint, suspend his real estate salesperson license for 30 days and fine him $250.00 for having committed such a violation, and dismiss the charge made in Count I of the Administrative Complaint that he "has obtained a license by means of fraud, misrepresentation, or concealment in violation of Section 475.25(1)(m)," Florida Statutes. See Nordheim v. Department of Environmental Protection, 719 So. 2d 1212 (Fla. 3d DCA 1998); Plante v. Department of Business and Professional Regulation, Division of Pari-Mutuel, 716 So. 2d 790 (Fla. 4th DCA 1998); and Gessler v. Department of Business and Professional Regulation, 627 So. 2d 501 (Fla. 4th DCA 1993.

RECOMMENDATION

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

RECOMMENDED that Petitioner issue a final order dismissing Count I of the Administrative Complaint, finding Respondent guilty of the violation alleged in Count II of the Administrative Complaint, and suspending his real estate

salesperson license for 30 days and fining him $250.00 for having committed this violation.

DONE AND ENTERED this 10th day of August, 2001, in Tallahassee, Leon County, Florida.

STUART M. LERNER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of August, 2001.

ENDNOTES

1/ As a general rule, a licensee may not be disciplined for conduct engaged in prior to licensure. An exception to this general rule exists, however, where the prelicensure conduct in question is the falsification of the licensee's licensure application. See Taylor v. Department of Professional Regulation, 534 So. 2d 782 (Fla. 1st DCA 1988); and Board of Medicine v. Mata, 561 So. 2d 364 (Fla. 1st DCA 1990).

2/ Subsection (2) of Section 475.25, Florida Statutes (a statutory provision not cited in the Administrative Complaint issued in the instant case) provides that a licensed real estate salesperson's "license may be revoked or canceled if it was issued through the mistake or inadvertence of the commission." This subsection, in contrast to subsection (1)(m)of Section 475.25 (one of the subsections upon which Petitioner is relying in seeking the revocation of Respondent's license), authorizes the Commission to revoke a license that was issued based upon erroneous information provided by the licensee concerning the licensee's qualifications, regardless of whether the licensee, in providing such information, had the intent to deceive.

3/ It therefore cannot be said that Respondent's license was issued as a result of "mistake or inadvertence," within the meaning of Subsection (2) of Section 475.25, Florida Statutes.

COPIES FURNISHED:

Donna K. Ryan, Esquire
Department of Business and Professional Regulation
Post Office Box 1900
Orlando, Florida 32802-1900

Steven W. Johnson, Esquire
1801 East Colonial Drive
Suite 101
Orlando, Florida 32803

Jack Hisey, Deputy Division Director
Department of Business and Professional Regulation
Division of Real Estate
400 West Robinson Street
Post Office Box 1900
Orlando, Florida 32802-1900

Hardy L. Roberts, III, General Counsel
Department of Business and Professional Regulation
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-2202

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.