

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

ANTHONY DENICOLA, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 03-3498  
 )  
 DEPARTMENT OF BUSINESS AND )  
 PROFESSIONAL REGULATION, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

On December 11, 2003, Administrative Law Judge, Ella Jane P. Davis, conducted a disputed-fact hearing via telephonic conference among the cities of Tallahassee (the Administrative Law Judge), Orlando (Respondent's counsel), and Fruitland Park (Petitioner), on behalf of the Division of Administrative Hearings. The appearances were as follows:

APPEARANCES

For Petitioner: Anthony DeNicola, pro se  
36730 Daisy Lane  
Fruitland Park, Florida 34731

For Respondent: Juana Carstarphen Watkins, Esquire  
Department of Business and  
Professional Regulation  
400 West Robinson Street  
Orlando, Florida 32801

STATEMENT OF THE ISSUE

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

PRELIMINARY STATEMENT

Respondent Florida Real Estate Commission (FREC) is the state agency responsible for regulating the practice of real estate, pursuant to Chapter 475, Florida Statutes. On April 5, 2002, Petitioner submitted an application for licensure as a real estate sales associate. Due to his answers which related to criminal activity, FREC conducted an informal hearing on July 17, 2002, and denied his application.

Petitioner reapplied, and on January 15, 2003, FREC conducted a second informal hearing regarding Petitioner's application for registration for the real estate examination. Petitioner appeared at this hearing and answered questions regarding the circumstances surrounding his criminal history. Once again, after the second hearing, FREC denied Petitioner's application.

Petitioner timely requested a formal disputed-fact hearing before the Division of Administrative Hearings (DOAH), and the case was referred to DOAH on or about September 25, 2003.

On December 11, 2003, the disputed-fact hearing was conducted by telephonic conference call. Petitioner testified on his own behalf. He offered no exhibits. Respondent

presented no oral testimony. Respondent had eight exhibits admitted in evidence. By arrangement for post-hearing filings, official recognition was taken of relevant portions of Chapters 20, 120, 144, and 475, Florida Statutes, and of Florida Administrative Code Chapter 61J-2.

A transcript was filed December 19, 2003.

The parties' respective Proposed Recommended Orders have been considered in preparation of this Recommended Order.

#### FINDINGS OF FACT

1. Petitioner is an applicant for licensure as a real estate sales associate. He was born November 23, 1970.

2. Respondent is the State agency in Florida responsible for regulating the practice of real estate, pursuant to Chapter 475, Florida Statutes.

3. On April 5, 2002, Petitioner submitted an application for licensure as a real estate sales associate.

4. In his application, Petitioner answered "yes" to question one of the application, which asks:

Have you ever been convicted of a crime, or entered a plea of guilty or nolo contendere (no contest), even if adjudication was withheld? . . . If you answered "Yes", attached the full details including dates and outcomes, including any sentence and conditions imposed, on a separate sheet of paper.

5. Petitioner further disclosed on his application that in 1990, he had entered a guilty plea in Virginia to fraud, false claim, stealing mail, larceny, signing a false statement, and dereliction of duty. He further disclosed that these charges had resulted in his incarceration.

6. Petitioner also disclosed that in 1994, he had entered a plea to criminal sexual contact and endangering the welfare of children and was again sentenced to incarceration.

7. On July 17, 2002, FREC conducted an informal hearing regarding Petitioner's application for licensure and his past crimes. Petitioner attended the hearing and submitted letters attesting to his good character. FREC discussed the circumstances surrounding Petitioner's application, including the ages of the victims and the penalty the courts had imposed and issued an order denying Petitioner's application.

8. Petitioner reapplied to FREC, and on or about January 15, 2003, FREC conducted a second informal hearing regarding Petitioner's application for registration and the charges. Petitioner again appeared and answered questions regarding the circumstances surrounding his criminal history, specifically the ages of the victims and the theft of another person's identity. Following the second hearing, FREC issued a second order denying Petitioner's application.

9. Petitioner was entirely forthcoming in his answers on each of his applications. He has made no attempt to hide his past criminal history. However, his past criminal history is formidable and reflects negatively on his reputation for truth, veracity, and fair and honest dealing.

10. Petitioner has three felony convictions. These are based on two incidents of "crimes" which he admits to having committed. He served time for both "crimes." He was released, finally, only six years ago.

11. Petitioner's first incident of criminal behavior occurred in 1990, when he was nineteen years old and serving in the United States Air Force. Those charges involved larceny, forgery, and impersonating a fellow member of the military. In laymen's terms, Petitioner was charged with fraud, false claim, and stealing mail. The result was that Petitioner was court-martialed and sentenced to a dishonorable discharge from the military. He also was sentenced to confinement for four years at a reduced pay grade of E-1. Because Petitioner had made restitution prior to the actual court-martial in 1990, he was not ordered to make restitution. He also was not dishonorably discharged in 1990. Rather, he began serving four years of incarceration in Ft. Leavenworth, Kansas.

12. Petitioner's offense in 1990, involved his breaking into a mailbox to steal the leave and earnings statement and the birth certificate of a fellow airman. With those documents, Petitioner assumed the other airman's identity so as to get a driver's license in his fellow airman's name. He then opened a checking account in that fellow airman's name and wrote some bad checks on the account which were not supported by any funds, because Petitioner had put no money into the checking account.

13. Apparently, because the United States Air Force needed Petitioner to play in a marching band, he was released on parole after serving only two years for his 1990 offenses. While he was on parole, Petitioner was arrested for a second crime.

14. In 1994, while on parole from conviction for the first set of offenses, Petitioner was involved in a criminal case based on sexual assault charges. The sexual assault charges were dropped, but he was charged and convicted of endangering the welfare of a minor and criminal sexual contact. He admitted that sexual contact had, in fact, occurred when he got drunk and went home from a bar with his girlfriend and her sister. He was 23 years old; his girlfriend was 17 years old; and the girlfriend's sister was only 15 years old. Petitioner was convicted and sentenced to three years of incarceration.

15. It appears from the evidence as a whole that, due to his conviction of the second crime in New Jersey, Petitioner's parole for the first crime in Virginia was revoked and he served the remainder of his sentence for the first crime and part of his sentence for the second crime concurrently.

16. Petitioner was released from incarceration in 1998, upon completion of both his sentences. Thereafter, he had no further parole or probation to serve.

17. In the hearings before FREC, Petitioner apparently attributed some of his past problems with criminal activity to his misuse of alcohol.

18. Since Petitioner's release six years ago, he has started his own part-time computer web design company. Many of his customers submitted letters of recommendation on his behalf. These recommendations include stating what a fine webmaster and computer specialist he is and stating that his clients have trust and confidence in his computer skills and his business decisions and advice. His wife also has expressed confidence in him through her letter. They are starting a family. Unfortunately, only one letter mentioned moral or ethical considerations. None of the letters related specific personal experiences with Petitioner's honesty, morality, or ethical behavior over the entire course of time that the author had known Petitioner. Likewise, not one of the letters of business

associates indicated that the author's opinion of Petitioner's current good character was given with full knowledge of Petitioner's prior criminal history.

CONCLUSIONS OF LAW

19. The Division of Administrative Hearings has jurisdiction of the parties and subject matter of this cause, pursuant to Section 120.57(1), Florida Statutes.

20. Petitioner has the burden of proving by a preponderance of the evidence that he meets the requirements for registration as a real estate sales associate, despite FREC's denial of his application. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996).

21. Pursuant to Section 475.25(1), Florida Statutes, FREC has the discretion to refuse to certify any applicant whose conduct would have been grounds for discipline under Section 475.25(1)(f), Florida Statutes.

22. Additionally, Section 475.17(1)(a), Florida Statutes, specifies that if an applicant has been guilty of conduct that would have been grounds for discipline by FREC had the person been a licensee at the time of the conduct, that person is deemed not to be qualified unless, because of the lapse of time and subsequent good conduct and reputation, the public is not likely to be endangered by the granting of the registration.



23. Section 475.17(1)(f), Florida Statutes, allows FREC to discipline an applicant if he or she has been found guilty of, or entered a plea of guilty or nolo contendere, to a crime of fraud or dishonest conduct or crimes of moral turpitude.

24. Based on the facts of this case and Petitioner's admissions, he has a serious record of fraudulent or dishonest dealing, compounded by an act which resulted in a criminal charge involving moral turpitude. If, at the time the charges were brought, Petitioner had been the holder of a Florida real estate sales associate's license, his conduct would have been grounds for discipline, and probably revocation.

25. Both Petitioner's crimes occurred while he was quite young. He should be commended for admitting honestly to his prior dishonest and immoral acts. However, those elements of the case do not change the fact that he must be held accountable for his past criminal behavior.

26. Petitioner also should be commended for starting his own profitable business. Likewise, marriage and a family are clearly sobering and steadying life experiences. However, these elements are not necessarily predictors of future honesty and fair-dealing in the business of real estate.

27. The facts that Petitioner's last offense occurred in 1994 and that he was only released from incarceration or other obligations to the governing authority as of 1998, are not

persuasive that his offenses occurred so long ago as to be of negligible importance. Assuming the identity of another person in order to commit fraud upon that person, one's creditors, and one's bank is about as dishonest an act as can be imagined. Likewise, natural sympathy for Petitioner's youth at the time of the second crime does not mitigate what he did. Sexual contact of a 23-year-old male with female minors clearly constituted a crime of moral turpitude. In addition to being very serious offenses which reflect directly and negatively on Petitioner's character, these two types of past criminal activity do not give the undersigned any confidence in Petitioner's common sense or good judgment, each of which should be an element of the practice of real estate.

28. Most of the testimonial letters submitted do not contain the combination of their authors' knowledge of the Petitioner's prior bad acts, personal experience with his current moral and ethical rehabilitation, and personal knowledge of his current reputation for truth, veracity, and good moral character in his community, the combination of which are necessary to persuade the undersigned of Petitioner's current eligibility to sit for the licensing examination.

29. Petitioner has failed to meet his burden of proving by a preponderance of the evidence that he meets the requirements for licensure as a real estate sales associate, because he has

failed to demonstrate sufficient evidence of good conduct and reputation or other reason over a sufficient lapse of time after his crimes, to persuade that the interest of the public and investors will not likely be endangered by the granting of the registration.

RECOMMENDATION

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

RECOMMENDED that the Florida Real Estate Commission enter a Final Order denying Petitioner's application for licensure as a real estate sales associate.

DONE AND ENTERED this 5th day of March, 2004, in Tallahassee, Leon County, Florida.



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ELLA JANE P. DAVIS  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 5th day of March 2004.

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.