

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LUIS ANTONIO VICTORIA,)
)
 Petitioner,)
)
 vs.) Case No. 03-3499
)
 DEPARTMENT OF BUSINESS AND)
 PROFESSIONAL REGULATION,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on November 4, 2003, in Kissimmee, Florida, before T. Kent Wetherell, II, the designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Luis Antonio Victoria, pro se
3280 Fairfield Drive
Kissimmee, Florida 34743

For Respondent: Juana Carstarphen Watkins, Esquire
Department of Business and
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Hurstons Building, North Tower
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STATEMENT OF THE ISSUE

The issue is whether Petitioner's application for a real estate salesperson license should be granted.

PRELIMINARY STATEMENT

By Order dated April 16, 2003, the Florida Real Estate Commission (Commission) denied Petitioner's application for a real estate salesperson license. The Order, which was mailed to Petitioner on April 28, 2003, informed Petitioner of his right to an administrative hearing on the Commission's decision and the procedure for requesting such a hearing.

On May 21, 2003, the Department of Business and Professional Regulation, Division of Real Estate (Department), received Petitioner's request for an administrative hearing on the denial of his license application. On September 25, 2003, the Department referred the matter to the Division of Administrative Hearings (Division) for the assignment of an Administrative Law Judge to conduct the hearing requested by Petitioner.

The hearing was scheduled for and held on November 4, 2003. At the hearing, Petitioner testified in his own behalf and also presented the testimony of Sheila Almodovar. Petitioner did not offer any exhibits into evidence. The Department did not present any witnesses. The Department's Exhibits 1 through 7 were received into evidence.

At the hearing, the Department requested that the undersigned take official recognition of Chapters 120, 455, and 475, Florida Statutes (2001), and Florida Administrative

Code Rule Chapter 61J2, in their entirety. That request was granted, but only as to the specific statutory and rule provisions implicated in this case. The Department was directed to file copies of those statutes and rules after the hearing, which the Department did on November 7, 2003.¹

The one-volume Transcript of the hearing was filed with the Division on December 2, 2003. The parties were given 10 days from the date that the Transcript was filed to file their proposed recommended orders (PROs). Respondent timely filed a letter summarizing his position in this case on December 12, 2003, and the Department filed its PRO on December 15, 2003. Those filings were given due consideration by the undersigned in preparing this Recommended Order.

FINDINGS OF FACT

Based upon the testimony and evidence received at the hearing, the following findings are made:

1. Petitioner is 29 years old. He is currently selling timeshare units at the Westgate Resort in the Orlando area. He also works part-time as a pizza delivery person.

2. Petitioner is being paid on an hourly basis by Westgate, since he does not hold a real estate salesperson license. If he had a license, he could be paid on commission and would have the potential to earn more money.

3. In April 2002, Petitioner completed a three-week long "real estate school" and passed the related examination.

4. In June 2002, Petitioner filed with the Department an application for a real estate salesperson license.

5. The Department and the Commission are the state agencies responsible for licensing and regulating real estate professionals in Florida.

6. On the application, Petitioner answered "yes" to the question as to whether he had been convicted of, found guilty of, or entered a plea of guilty or nolo contendere to any crime. He listed the following offenses: petty theft; trespassing; false information; obstructing justice; and domestic battery.

7. Each of the offenses except for the domestic battery occurred in Sarpy County, Nebraska, where Petitioner lived prior to coming to Florida. The domestic battery occurred in Osceola County, Florida.

8. The petty theft offense occurred in 1994, when Petitioner and a friend stole a street sign that bore one of their names. Petitioner was 19 years old at the time. He paid restitution of \$150 for the street sign to resolve the charge.

9. The trespassing offense occurred in 1995 when Petitioner and a friend were caught swimming in a public pool after hours. Petitioner was 20 years old at the time. He paid a \$75 fine to resolve the charge.

10. The false information offense occurred in 1996 when Petitioner knowingly and intentionally lied to a police officer regarding the identity of the friend who was riding in Petitioner's car. The friend had a warrant and he asked Petitioner to give the police officer a false name for him, which Petitioner did. Petitioner was 21 years old at the time, and he paid a \$75 fine to resolve the charge.

11. The obstructing justice offense occurred in 1997 when Petitioner was at a party and refused to open the door for the police, who had been called to the party to investigate a sexual assault. The party was not at Petitioner's home, and he was not charged in connection with the sexual assault. Petitioner was 22 years old at the time, and he paid a \$75 fine to resolve the charge.

12. The record does not include the arrest reports or judgments related to the Nebraska offenses, which would detail whether the offenses were felonies or misdemeanors and would establish the precise legal dispositions of those cases. However, Petitioner's un rebutted testimony that he simply paid a fine to resolve the charges against him suggests that the offenses were misdemeanors and that Petitioner either pled guilty or "no contest" (i.e., nolo contendere).

13. The domestic battery offense occurred in March 2001 and involved Petitioner's then-fiancée, Sheila Almodovar.

Ms. Almodovar is the mother of Petitioner's daughter, who was born in October 1999.

14. The domestic battery offense stemmed from an argument that Petitioner and Ms. Almodovar were having in their shared apartment. Petitioner was arrested after the police were called to the apartment by Ms. Almodovar, and they observed a bruise on Ms. Almodovar's face. Ms. Almodovar told the police that the bruise was caused by Petitioner.

15. At the hearing, Ms. Almodovar testified that she had lied to the police regarding the source of the bruise. She testified that Petitioner did not strike her, but instead only "moved her out of the way" as he was leaving the apartment. She further testified that she caused the bruise to her own face by hitting it against the wall in the bathroom after Petitioner left the apartment and that Petitioner did not see her bang her head.

16. Petitioner's testimony at the hearing regarding the incident was virtually identical to Ms. Almodovar's testimony, but it is inconsistent in some respects with the sworn testimony that he gave to the Commission in April 2003. At that time, Petitioner testified that he actually saw Ms. Almodovar bang her head against the wall in the bedroom.

17. After the domestic battery incident, Petitioner spent the weekend in jail. He testified that he pled "no contest" to

the charge; that adjudication was withheld; and that he was sentenced to probation, community service, and required to take domestic violence and anger management classes, all of which he satisfactorily completed.

18. On July 19, 2002, Petitioner's license application was "administratively denied" because of his criminal record, and he was directed to appear before the Commission on August 21, 2002, to answer questions regarding his application.

19. In advance of his appearance before the Commission, Petitioner presented three letters of recommendation to the Commission. The letters were from his father, Ms. Almodovar, and Ms. Almodovar's sister. The letters praised Petitioner's actions in taking care of his daughter and referred to his "ambition" and "motivation" to succeed in the real estate profession.

20. Petitioner attended the August 21, 2002, Commission meeting as directed. The Commission gave Petitioner an opportunity to explain the circumstances surrounding each of the offenses listed on his application, which Petitioner attempted to do. At the end of the meeting, the Commission voted to deny Petitioner's license application. The denial was memorialized by the Commission in an Order dated August 29, 2002.

21. In September 2002, Petitioner was again arrested for domestic battery involving Ms. Almodovar. According to

Petitioner, the incident occurred when he and Ms. Almodovar got into an argument when Petitioner was picking up his daughter from Ms. Almodovar. The police report from the incident was not introduced into evidence, and the circumstances giving rise to Petitioner's arrest are not entirely clear from the testimony of Ms. Almodovar and Petitioner at the hearing.

22. Petitioner testified that he spent 60 days in jail after his arrest but that the charges against him were ultimately "dropped." Ms. Almodovar testified at the hearing that Petitioner "did not deserve" to be arrested for the September 2002 incident because she had lied to the police regarding what Petitioner had done. Petitioner testified that Ms. Almodovar's sister, who was a witness to the confrontation, was going to testify for him if the case went to trial.

23. Ms. Almodovar blamed her actions towards Petitioner and her lying to the police on her mental instability. She testified that she has been diagnosed as being "bi-polar" and that she is seeing a psychiatrist and is on medication for her mental instability.

24. On April 16, 2003, the Commission considered Petitioner's license application in response to his request for reconsideration of the August 2002 denial. Petitioner and his father both addressed the Commission and responded to questions from the Commission members. Again, Petitioner was given an

opportunity to explain the circumstances surrounding each of his prior incidents.

25. There were several passing references to the second incident of domestic battery at the April 2003 Commission meeting. However, it was clear from the transcript of that meeting that the members of the Commission were confused regarding the circumstances of each incident or were unaware that there were two separate incidents. Petitioner did nothing to clarify the Commission's confusion and, indeed, actually added to that confusion by discussing both incidents together without distinguishing between them.

26. At the conclusion of the meeting, the Commission again voted to deny Petitioner's license application. That decision was memorialized by the Commission in an Order dated April 16, 2003.

27. Thereafter, Petitioner timely filed his request for a formal administrative hearing, which led to this proceeding.

28. In August 2003, Petitioner was arrested for possession of marijuana. The arrest report is not part of the record, but Petitioner testified that he was charged only with a misdemeanor.

29. Petitioner admitted at the hearing that marijuana was found in his car, but he claimed that it did not belong to him. Instead, both Petitioner and Ms. Almodovar testified that the

marijuana belonged to Ms. Almodovar's sister, whom Petitioner was living with at the time. Petitioner further testified that Ms. Almodovar's sister "set him up" for the arrest as a means to get him to leave the apartment that they shared.

30. Petitioner has a lawyer and is "fighting" the possession of marijuana charge. The record does not reflect where that case is in the judicial process.

31. The testimony given by Petitioner and Ms. Almodovar at the hearing regarding the circumstances surrounding Petitioner's recent offenses was not patently unbelievable, but it was not overly persuasive either. For example, it is difficult to square Petitioner's claim that he was "set up" on the possession of marijuana charge by Ms. Almodovar's sister when she had previously written a letter of recommendation for Petitioner in which she characterized him as a "friend" and a "model citizen" and that she was allegedly prepared to testify for Petitioner in connection with the September 2002 domestic violence incident.

32. At the time Petitioner filed his license application, he was raising his daughter on his own because Ms. Almodovar was unable to do so as a result of her mental instability. Subsequently, Ms. Almodovar began receiving counseling and taking medication which has allowed her to share custody of the daughter with Petitioner. As a result, there is no inconsistency between the statements on Petitioner's application

and in the recommendation letters regarding his status as a single parent and Petitioner's testimony before the Commission in April 2003 that he had shared custody of his daughter.

CONCLUSIONS OF LAW

33. The Division has jurisdiction over the parties to and subject matter of this proceeding pursuant to Sections 120.569, 120.57(1), and 120.60, Florida Statutes (2003).

34. Petitioner has the burden to establish by a preponderance of the evidence that he satisfies the criteria for licensure as a real estate salesperson. See Dept. of Banking & Finance v. Osborne, Stern & Co., 670 So. 2d 932, 934 (Fla. 1996); Dept. of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778, 787 (Fla. 1st DCA 1981); § 120.57(1)(j), Fla. Stat. (2003).

35. Licensing agencies, such as the Department and the Commission, have broad latitude in determining the fitness of applicants for licensure. See, e.g., Astral Liquors, Inc. v. Dept. of Business Regulation, 463 So. 2d 1130, 1132 (Fla. 1985).

36. Section 475.181, Florida Statutes (2001), provides in pertinent part:

(1) The department shall license any applicant whom the commission certifies, pursuant to subsection (2), to be qualified to practice as a broker or salesperson.

(2) The commission shall certify for licensure any applicant who satisfies the requirements of ss. 475.17, 475.175, and 475.180. The commission may refuse to

certify any applicant who has violated any of the provisions of s. 475.42 or who is subject to discipline under s. 475.25. . . .

37. Section 475.17(1)(a), Florida Statutes (2001), requires an applicant for a real estate salesperson license to be "honest, truthful, trustworthy, and of good character; and have a good reputation for fair dealing." That statute further provides that:

[I]f 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. . . .

§ 475.17(1)(a), Fla. Stat. (2001). Accord Fla. Admin. Code R. 61J2-2.027(2) (requiring applicant to disclose prior criminal convictions as part of Commission's inquiry "as to whether the applicant is honest, truthful, trustworthy, of good character,").

38. The Commission may revoke or suspend a real estate license where the licensee:

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. . . .

§ 475.25(1)(f), Fla. Stat. (2001).

39. By virtue of his prior record, which includes crimes involving moral turpitude and fraud, Petitioner is "deemed not to be qualified" for licensure. See §§ 475.17(1)(a) and 475.25(1)(f), Fla. Stat. (2001). Although the "lapse of time" since the offenses committed by Petitioner in Nebraska is not insignificant, Petitioner has not demonstrated "subsequent good conduct" since those offenses. See § 475.17(1)(a), Fla. Stat. (2001). To the contrary, Petitioner has been arrested on three separate occasions since March 2001.

40. Moreover, Petitioner failed to establish that he is "honest, truthful, trustworthy, and of good character" as required by Section 475.17(1)(a), Florida Statutes (2001). In this regard, although the evidence establishes that Petitioner fully disclosed and explained his Nebraska criminal offenses on the license application, he was less than forthright with the Commission and the undersigned about the recent offenses, including the offenses which have occurred since the date of the license application.

41. For example, Petitioner did not fully disclose or explain the September 2002 domestic battery offense when he appeared before the Commission in April 2003. Nor did

Petitioner initially disclose that incident or the August 2003 possession of marijuana offense at the hearing in response to the undersigned's specific question as to whether he had "been in trouble with the law since [March 2001]." Indeed, it was not until cross-examination that the September 2002 offense came to light.

42. Petitioner's lack of forthrightness about the existence of and circumstances surrounding his prior (and current) offenses, whether intentional or not, goes to the essence of the duties of a real estate professional to deal honestly and fairly and to make full disclosures. See, e.g., §§ 475.17(1)(a); 475.25(1)(f); 475.278(2)(a), (3)(a), (4)(a), Fla. Stat. (2001).

43. Petitioner's pattern of behavior, particularly his multiple arrests for domestic battery since 2001 and his August 2003 arrest for possession of marijuana (which is still pending), raises serious questions regarding Petitioner's "good character" and the extent of his rehabilitation. See Antel v. Dept. of Professional Reg., 522 So. 2d 1056 (Fla. 5th DCA 1988) (affirming denial of real estate license to applicant who was still on parole).

RECOMMENDATION

Based upon the foregoing findings of fact and conclusions of law, it is

RECOMMENDED that the Florida Real Estate Commission issue a final order denying Petitioner's license application.

DONE AND ENTERED this 30th day of December, 2003, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of December, 2003.

ENDNOTE

1/ The Department filed copies of the following statutes and rules: Sections 120.569, 120.57, 120.60, 455.213, 475.02, 475.05, 475.17, 475.25, Florida Statutes (2001); and Florida Administrative Code Rule Chapter 61J2-2.

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.