STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION,	)	
Petitioner,	)	
vs.	)	Case No. 05-0598PL
WILLIAM J. FLANAGAN, III,	)	
Respondent.	)	

RECOMMENDED ORDER

On May 6, 2005, an administrative hearing in this case was held by videoconference between Tallahassee and Orlando, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Alfonso Santana, Esquire
Department of Business and Professional Regulation
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Orlando, Florida 32801-1757

For Respondent: Robyn Severs Braun, Esquire
Taylor & Carls, P.A.
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STATEMENT OF THE ISSUES

The issues in the case are whether the allegations of the Administrative Complaint are correct, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

By Administrative Complaint dated July 23, 2004, the Department of Business and Professional Regulation, Division of Real Estate (Petitioner), alleged that William J. Flanagan, III (Respondent), was "guilty of having been convicted or found guilty of, or entered a plea of nolo contendere to, regardless of adjudication, a crime which directly relates to the activities of a licensed real estate associate or that involves moral turpitude or fraudulent or dishonest dealing in violation of Section 475.25(1)(f), Florida Statutes." Petitioner further alleged that Respondent had failed to notify Petitioner within 30 days of the criminal case disposition, a violation of Subsection 475.25(1)(p), Florida Statutes (2004).[1]

Respondent disputed the allegations and requested a formal administrative hearing. Petitioner forwarded the request for hearing to the Division of Administrative Hearings, which scheduled and conducted the proceeding.

At the hearing, Petitioner had Exhibits numbered 1 through 5 admitted into evidence. Respondent presented the testimony of two witnesses, testified on his own behalf, and had one exhibit admitted into evidence.

The one-volume Transcript of the hearing was filed on June 10, 2005. Page three of the Transcript incorrectly identifies the exhibits admitted into the hearing record.

Pages 28 and 29 of the Transcript contain typographical errors that render parts of Respondent's testimony unintelligible.

The parties filed Proposed Recommended Orders on June 20, 2005. In rendering this Recommended Order, the undersigned has relied on his recollection of Respondent's testimony to clarify the erroneous transcription of the hearing.

FINDINGS OF FACT

1. At all times material to this case, Respondent was a real estate sales associate, holding Florida license number 3055247. Respondent is currently employed in real estate sales.

2. On May 9, 2004, Respondent entered a plea of guilty to a violation of Subsection 800.04(4)(b), Florida Statutes, and to a violation of Subsection 847.0135(3), Florida Statutes, in Case No. 42-2003-CF-002535, Circuit Court, Fifth Judicial Circuit, Marion County, Florida.

3. Subsection 800.04(4)(b), Florida Statutes, classifies commission of sexual activity with a person under 16 years of age as a second-degree felony.

4. Subsection 847.0135(3), Florida Statutes, classifies knowingly using a computer service to solicit sexual activity with a child as a third-degree felony.

5. Respondent entered the guilty pleas upon advice of legal counsel and in order to avoid a public trial.

6. Respondent was ordered to pay a $500 fine and various court costs, and to serve 100 hours of community service.

7. Although a sentence of one day in jail is noted in the court documents, the same documents credit Respondent with one day of incarceration, and according to Respondent, he spent no time in jail.

8. Respondent was classified as a sex offender, subject to the requirements applicable to the classification, and was placed on probation for a period of seven years.

9. The court records note that Respondent's sentence was a downward departure from sentencing guidelines. The court withheld an adjudication of guilt.

10. At the administrative hearing, Respondent provided the only testimony directly related to the events that resulted in the criminal charges.

11. At some point prior to 2004, Respondent joined a computer dating service in order to meet people for social activities and possible relationships. The dating service charged a monthly fee of $20. Users could post personal information and engage in online chats with other users.

12. In joining the service, Respondent was required to attest to the fact that he was at least 18 years of age, and he presumed that other persons utilizing the service would be subject to the same requirement.

13. While using the online chat service, Respondent became acquainted with another individual, and the two decided to meet. Based on the online discussion, Respondent believed that the other individual was of college age.

14. Respondent drove to an unidentified location where he met and picked up the individual. Respondent testified that the person's appearance, including facial hair and the clothing worn, gave no indication that the individual was not of legal age. Respondent testified that he had "one date" with the individual.

15. Several days after the meeting, Respondent was contacted by an investigator from Marion County who advised him that the individual was under the legal age of consent.

16. There was no reliable evidence offered at the hearing as to the actual age of the other individual at the time the events occurred.

17. Pursuant to the investigator's request, Respondent met with the investigator in Marion County, and was subsequently charged with the cranial offenses referenced herein.

18. According to Respondent's probation officer, at the time of the hearing Respondent was in compliance with and was exceeding the terms of his probation.

19. Respondent participates in mental health counseling with a therapist who has 20 years of counseling experience,

including 18 years working with sex offenders. Respondent participates in weekly group therapy and in individual counseling and was described as a cooperative client.

CONCLUSIONS OF LAW

20. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. § 120.57(1), Fla. Stat.

21. Petitioner has the burden of establishing the allegations of the Administrative Complaint by clear and convincing evidence. Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). Department of Banking and Finance v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996). Clear and convincing evidence is that which is credible, precise, explicit, and lacking 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. Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

22. The evidence establishes that Respondent entered a guilty plea to a violation of Subsection 800.04(4)(b), Florida Statutes, which provides in relevant part as follows:

> Lewd or lascivious offenses committed upon or in the presence of persons less than 16 years of age.--
>
> * * *

> (4) LEWD OR LASCIVIOUS BATTERY.--A person who:
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> * * *
>
> (b) Encourages, forces, or entices any person less than 16 years of age to engage in sadomasochistic abuse, sexual bestiality, prostitution, or any other act involving sexual activity commits lewd or lascivious battery, a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

23. The evidence further establishes that Respondent entered a guilty plea to a violation of Subsection 847.0135(3), Florida Statutes, which provides as follows:

> CERTAIN USES OF COMPUTER SERVICES PROHIBITED.--Any person who knowingly utilizes a computer on-line service, Internet service, or local bulletin board service to seduce, solicit, lure, or entice, or attempt to seduce, solicit, lure, or entice, a child or another person believed by the person to be a child, to commit any illegal act described in chapter 794, relating to sexual battery; chapter 800, relating to lewdness and indecent exposure; or chapter 827, relating to child abuse, commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. (emphasis supplied)

24. Respondent's entry of guilty pleas to the charges constitutes conviction. State v. Gazda, 257 So. 2d 242 (Fla. 1971). Also see Florida Rules of Criminal Procedure Rule 3.701(d)(2), which defines "conviction" as "a determination of guilt resulting from plea or trial, regardless of whether adjudication was withheld or whether imposition of sentence was suspended."

25. Section 475.25, Florida Statutes, in material part provides as follows:

> 475.25 Discipline.--
> (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:
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> * * *
>
> (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 directly relates to the activities of a licensed broker or sales associate, or involves moral turpitude or fraudulent or dishonest dealing. The record of a conviction certified or authenticated in such form as to be admissible in evidence under the laws of the state shall be admissible as prima facie evidence of such guilt.
>
> * * *
>
> (p) Has failed to inform the commission in writing within 30 days after pleading guilty or nolo contendere to, or being convicted or found guilty of, any felony. (emphasis supplied)

26. As to whether the convictions constitute a violation of Subsection 475.25(1)(f), Florida Statutes, depends on whether Respondent's actions demonstrate moral turpitude. 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. 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 of judgment when wrong was not contemplated. State ex rel. Tullidge v. Hollingsworth, 146 So. 660 (1933).

27. At the hearing, Respondent testified that he had no reason to know or believe that the individual with whom he chatted and subsequently met was not of legal age. Respondent joined an online dating service that required payment of a fee and attestation that he was at least 18 years old. It was reasonable for him to presume that others using the service would be required to do the same. There is no evidence that any aspect of the interaction between Respondent and the other person should have caused Respondent to suspect or to know that the other individual was not of legal age.

28. It should be noted that Respondent's ignorance or mistake regarding the age of the other person was not available as a defense in a criminal prosecution for lewd or lascivious battery. See § 800.04(4)(b), Fla. Stat.

29. As a general rule, a judgment of conviction, in and of itself, is not conclusive proof of the facts upon which it is based; however, an exception to that rule exists where a judgment of conviction is based upon a guilty plea. In that

instance, a defendant in a criminal prosecution is estopped from denying his guilt in a subsequent civil proceeding. The exception operates even in the absence of an adjudication of guilt. Kelly v. Department of Health and Rehabilitative Services, 610 So. 2d 1375 (Fla. 2d DCA 1992).

30. Conviction of a crime does not automatically require disciplinary action against a licensee. In Pearl v. Fla. Board of Real Estate, 394 So. 2d 189 (Fla. 3rd DCA 1981), the Third District Court of Appeal set forth principles to be considered in an administrative proceeding where a licensee is charged with committing a crime involving moral turpitude. The court held that the facts and circumstances surrounding the illicit conduct must be taken into account and that the primary purpose of Chapter 475 (protecting the public from unscrupulous and dishonest real estate brokers) must be kept in mind. Disciplinary statutes are penal in nature and must be strictly interpreted against the authorization of discipline and in favor of the person sought to be penalized. Munch v. Department of Professional Regulation, 592 So. 2d 1136 (Fla. 1st DCA 1992). Statutes imposing a penalty must always be construed strictly in favor of the one against whom the penalty is imposed and are never to be extended by construction. Hotel and Restaurant Commission v. Sunny Seas No. One, Inc., 104 So. 2d 570 (Fla. 1958).

31. The only explanation of the events that resulted in the criminal charges against Respondent was that which was provided through Respondent's testimony. There were no charging documents offered into the record of the Administrative Hearing and the factual allegations of the criminal charges were not disclosed.

32. As to the violation of Subsection 847.0135(3), Florida Statutes, Respondent entered a guilty plea to the charge of "knowingly" using a computer service to solicit a child to commit lewdness and indecent exposure. While Respondent's testimony at the hearing was credible, Respondent is estopped as a matter of law from asserting facts contrary to the guilty plea. Conviction of a violation of Subsection 847.0135(3), Florida Statutes, is an act of moral turpitude, and therefore, the evidence establishes that Respondent is guilty of violating Subsection 475.25(1)(f), Florida Statutes.

33. Although Respondent also entered a guilty plea to a violation of Subsection 800.04(4)(b), Florida Statutes, the defense being raised in the administrative proceeding (that of a mistaken belief regarding the individual's age) was unavailable in the criminal prosecution. As stated previously, Respondent's testimony regarding the events leading to the criminal charges is credited. The evidence fails to establish that Respondent intended to violate Subsection 800.04(4)(b), Florida Statutes.

34. Petitioner offered no evidence indicating that Respondent has violated Subsection 475.25(1)(p), Florida Statutes.

35. Florida Administrative Code Rule 61J2-24.001(3)(g) sets forth a guideline for the imposition of disciplinary penalties for being "[c]onvicted or found guilty of a crime related to real estate or involves moral turpitude, or fraudulent or dishonest dealing." The Rule provides as follows:

> The usual action of the Commission shall be to impose a penalty from a 7 year suspension to revocation and an administrative fine of $1,000.

36. Florida Administrative Code Rule 61J2-24.001(4)(b) sets forth circumstances which may be considered by the Commission in varying from the penalty guidelines, and provides as follows:

> Aggravating or mitigating circumstances may include, but are not limited to, the following:
> 1. The degree of harm to the consumer or public.
> 2. The number of counts in the Administrative Complaint.
> 3. The disciplinary history of the licensee.
> 4. The status of the licensee at the time the offense was committed.
> 5. The degree of financial hardship incurred by a licensee as a result of the imposition of a fine or suspension of the license.

37. There is no evidence of harm to the consumers or to the public. The allegations do not involve fraudulent or dishonest activity, or a crime related to real estate. There is no evidence that Respondent has any previous disciplinary or criminal history. Lengthy revocation or suspension of Respondent's license would prevent him from continuing in his current employment. The law proscribing sexual activity between an adult and an underage person certainly reflects recognition of the harm that can be visited upon a victim; however, there was no evidence presented by either party regarding the victim in this case.

38. The fact that the sentence imposed by the criminal court was greatly reduced from the statutorily available penalty is of great significance. Section 775.082, Florida Statutes, provides for a term of imprisonment of up to 15 years for conviction of a second degree felony and up to 5 years for conviction of a third degree felony. Section 775.083, Florida Statutes, provides for imposition of a fine up to $10,000 for conviction of a second-degree felony and up to $5,000 for conviction of a third-degree felony. Based on the charges to which he pled, Respondent could have been sentenced to a 20-year incarceration and a $15,000 fine. It is presumed that the Judge who presided over the criminal case was fully advised as to the charges and the evidence prior to the sentencing, and

essentially determined that a $500 fine and one day of incarceration were appropriate.

39. Finally, during the testimony of Respondent's therapist, she twice mentioned the results of a polygraph test administered to Respondent. There is no evidence that the therapist administered the polygraph test, and her testimony on this point was hearsay. No other polygraph evidence was offered at the hearing. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it is not sufficient in itself to support a finding unless it would be admissible over objection in civil actions. § 120.57(1)(c), Fla. Stat.

40. Aside from the hearsay issue, polygraph evidence is not admissible in a court of law, absent a stipulation by the parties. DeLap v. State, 440 So. 2d 1242 (Fla. 1983); Sullivan v. State, 303 So. 2d 632 (Fla. 1974). In this case, there was no affirmative stipulation by the parties as to the admissibility of the information, although there was also no objection by either party to the testimony.

41. The admissibility of polygraph evidence in an administrative proceeding was at issue in Lieberman v. Dept. of Prof. Reg., 573 So. 2d 349 (Fla. 5th DCA 1990). In Lieberman, a hearing officer admitted polygraph evidence over an objection from counsel, and then denied a motion to strike it from the

record. The court held that the evidence was inadmissible, and that under those circumstances it was reversible error for the hearing officer to admit the results of a polygraph examination.

42. In this case, neither party solicited testimony directly about a polygraph examination; the witness volunteered the information. Neither party objected to the testimony. Neither party questioned the witness about her reference to polygraph testing. Neither party asked the undersigned to make any determination regarding the admissibility of the testimony during the hearing.

43. In preparing this Recommended Order the therapist's testimony has been disregarded in its entirety, other than to confirm that Respondent participates in counseling, and it was not considered in rendering the Findings of Fact set forth herein. The determination of Respondent's credibility in this case was based solely on the uncontroverted testimony he provided during the hearing. Respondent's explanation of the requirements to join the dating service, and his belief that others using the service would meet the same requirements, was consistent and logical.

RECOMMENDATION

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

RECOMMENDED that Petitioner enter a final order reprimanding Respondent William J. Flanagan, III.

DONE AND ENTERED this 6th day of July, 2005, in Tallahassee, Leon County, Florida.

William F. Quattlebaum

WILLIAM F. QUATTLEBAUM
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 6th day of July, 2005.

ENDNOTE

1/ All references to the Florida Statutes are to the 2004 version unless otherwise indicated.

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.