

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARCUS DOUGLAS HESTER,)
)
 Petitioner,)
)
 vs.) Case No. 05-2107
)
 DEPARTMENT OF FINANCIAL)
 SERVICES, OFFICE OF FINANCIAL)
 REGULATION,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was held in this case before Diane Cleavinger, Administrative Law Judge of the Division of Administrative Hearings, on August 3, 2005, in Tallahassee, Florida.

APPEARANCES

For Petitioner: C. Scott Hester, Esquire
13843 Longs Landing Road, East
Jacksonville, Florida 32225

For Respondent: Robert H. Schott, Esquire
Gregg Morton, Esquire
Department of Financial Services
Office of Financial Regulation
200 East Gaines Street, Suite 526
Tallahassee, Florida 32399

STATEMENT OF THE ISSUE

The issue in this case is whether the Petitioner's application for licensure as a mortgage broker should be approved.

PRELIMINARY STATEMENT

On or about April 18, 2005, Respondent, the Office of Financial Regulation (Office), issued a denial letter denying Petitioner, Dr. Marcus Douglas Hester's application for licensure as a mortgage broker in the State of Florida, based on Sections 494.0041(1)(f) and 494.0041(2)(c) (material misstatement on an application), (g), (i), and (q), Florida Statutes.

Petitioner disputed the Office's denial and filed a timely request for a formal administrative hearing. Respondent referred the matter to the Division of Administrative Hearings.

Prior to the hearing, Respondent moved to amend the Denial Letter to include additional grounds for denial under Section 494.0041(2)(d), Florida Statutes, which deals with the disbursement of funds from the Real Estate Recovery Fund, and for further misstatements made by Petitioner. The motion was granted.

At the hearing, Petitioner testified on his own behalf and presented the testimony of one witness. Additionally, Petitioner offered 22 exhibits into evidence. Respondent

presented the testimony of one witness and offered 25 exhibits in evidence, including Respondent's Exhibits numbered 21, 22 and 24, consisting of the depositions of Leonard Schoenfeld, Johannes Fruhwirt, and Petitioner.

After the hearing, Petitioner filed a Proposed Recommended Order on September 12, 2005. Respondent filed a Proposed Recommended Order on September 9, 2005.

FINDINGS OF FACT

1. Petitioner resides in Riverwoods, Illinois. He has four children, and is married to Sharon Wheat-Hester.

2. Petitioner received his undergraduate degree from Wake Forest University in North Carolina. Petitioner also received a master's degree and doctorate degree in theology from Share-A-Prayer and Word Theological School in Whitewater, Wisconsin.

3. Petitioner is currently employed as the director of a ministry called Marketplace Movement Network. The ministry provides advice to businesses on Christian business ethics. In that regard, Petitioner has published one book on the subject of Christian ethics in business.

4. Petitioner is also the President and shareholder of Hester International, Inc., a Florida Corporation that since 1995, provides mortgage brokerage services in the State of Illinois and several other states. The corporation's principal office is located in Illinois. The business has an established

client list and referral list. Additionally, Petitioner is currently licensed as a mortgage broker in the Illinois, California, North Carolina and Hawaii. He has not had any disciplinary action taken against him in those states.

5. On January 25, 1996, prior to the present license application at issue here, Petitioner sought licensure as a mortgage broker in Florida with the Florida Department of Banking and Finance, Respondent's predecessor agency.

6. On the 1996 application Petitioner answered "no" to a question that asked whether he had ever had a license revoked.

7. Petitioner's 1996 application was denied for a material misrepresentation or omission. Petitioner did not challenge the 1996 denial.

8. On February 16, 2004, also prior to the present application, Petitioner again applied for a mortgage broker license. On this application, question number six asked:

Have you had a license, or the equivalent, to practice any profession or occupation denied, revoked, suspended, or otherwise acted against which involved fraud, dishonest dealing, or any other act of moral turpitude? Yes__ No__

A "Yes" answer to question six required the applicant to attach details, provide a copy of allegations, and also supply documentation of the final disposition of the case.

9. In response to question number six, Petitioner appeared to have marked both the answers "yes" and "no", but then circled "yes." On the second page of the application, Petitioner explained his answer to question number six, stating that he had had a real estate license ten years ago and that he had been involved with a dispute for \$2,500 and lost the case. The explanation further stated that Petitioner was moving to Illinois at the time, so he voluntarily surrendered his license.

10. On April 1, 2004, without investigating the facts to refresh his memory, Petitioner provided the requested signed letter of explanation. Subsequently, he withdrew his February application because he did not have time to deal with the ongoing questions the agency had regarding his application.

11. Around July 13, 2004, after discussing the February 2004 application with Respondent, Petitioner submitted a revised Application for Licensure as a Mortgage Broker in the State of Florida. In response to question six, Petitioner marked "no" based on his memory that his real estate agent's license had been "voluntarily surrendered." Petitioner also submitted character reference letters. Additionally, Petitioner discussed with Respondent any proof of rehabilitation since the "voluntary surrender" of his real estate license.

12. On page two of the July application, Petitioner wrote that his "only blemish" was a voluntary surrender of a real

estate license in 1992. Petitioner stated, "[t]his was 'not' an act of moral turpitude or fraud."

13. In a deficiency letter dated July 28, 2004, the Office requested additional information from the Petitioner, including a signed statement explaining his side of the occurrence. On September 30, 2004, the Office received the same statement the Petitioner had previously forwarded to the Office for his February 2004 application. Petitioner again did not avail himself of the opportunity to discover the true facts surrounding the claimed surrender of his license.

14. In the second paragraph of this explanatory letter Petitioner stated that the disciplinary action that led to surrender of his real estate license arose out of a transaction involving one of his customers who rented property to a third-party renter. Petitioner stated that the rental transaction between his customer and the third-party renter occurred in the lobby of Petitioner's office without his knowledge or help.

15. According to Petitioner's, somewhat confusing, explanatory letter, the customer did not have the right to rent the house, but collected \$2,500 from the renter and then left the state. Later, Petitioner discovered that the customer had closed in escrow and gained temporary occupancy of the home, thereby enabling the customer to ostensibly rent the home.

16. Petitioner further explained that the renter sued him for the \$2,500 and prevailed because the transaction took place in Petitioner's lobby. Petitioner stated he lost the case because his attorney, Scott Hester (also his brother), was unavailable to make the closing argument and Petitioner had to do his own summation. In fact, Petitioner's brother never represented Petitioner in the renter's case because he did not have time to undertake the case. Petitioner did not supply the names of the people referenced in the letter because he did not remember them. As will be seen, at the time of the explanatory letter, Petitioner's memory of the facts surrounding his license surrender is, at best, faulty.

17. On April 19, 2005, the Office issued its Denial Letter, denying Petitioner's application for licensure as a mortgage broker. As grounds for denial under Section 494.041(2)(c), (g), (i) and (q), Florida Statutes, the letter stated in relevant part:

The Office's background investigation and information you provided revealed the following:

(a) You answered Question #6 on your application as "no", when it asks if you have had a license, or the equivalent, to practice any profession or occupation denied, revoked, suspended, or otherwise acted against which involved fraud, dishonest dealing, or any other act of moral turpitude.

(b) On or about May 7, 1996, the Florida Department of Banking and Finance, Division of Finance, denied your application for a license as a mortgage broker for making a material misstatement of fact on their application.

(c) On or about December 8, 1992, after the State of Florida, Department of Professional Regulation, Division of Real Estate conducted an investigation, you surrendered your license with that agency and entered into a written agreement stating that you agreed to have your license revoked. Accordingly, the Real Estate Commission did revoke your license in their meeting of January 19, 1993 effective December 8, 1992.

(d) The Investigative Report attached to the Final Order to revoke reveals that you were sued for dishonest conduct and subsequently, on March 25, 1992, ordered to pay Johannes Fruhwirt \$7,800 plus post-judgment interest. This order was by the County Court of Broward County as a result of a Final Judgment, Case #9103333 CC53 and a Writ of Execution. The investigation revealed that Hester left the State of Florida without leaving word of his whereabouts. Apparently, that judgment was never satisfied.

(e) On May 14, 1991 you promised to pay \$3000 to Leonard Schoenfeld when closing occurred on a home Mr. Schoenfeld was purchasing. Closing occurred shortly afterward, and you have never made that payment.

(f) On or about July 17, 1995, the State of Illinois received an Application Form to Operate as a Residential Mortgage Licensee in the name of Hester International, Inc. on which you were listed as 50% owner. You signed the "Verification" portion of that form and your signature was notarized on June 20, 1995 indicating that you verified

as being true all data entered onto that form. However, you responded "N/A" to Part III, Question #10 which asks that you list all licenses which you or your firm have applied for and been denied and/or any and all licenses issued to you or your firm which were subsequently suspended or revoked. You therefore failed to disclose the revocation of your license with the Florida Division of Real Estate that occurred in 1992.

(g) On the same application filed with the State of Illinois, in response to Part III, question 19(m), you did not disclose that a judgment had been entered against you on grounds of fraud, misrepresentation, or deceit.

(h) The renewal for Hester International Inc., with the State of Illinois, states under the section labeled, "Averment of License" in item "s" that the licensee will advise the Commissioner in writing of any changes to the information submitted on the most recent application for license within 30 days of said change. The State of Illinois reports that you never disclosed the denial of a mortgage broker license in 1996 with the State of Florida

(i) On November 18, 2004 in an electronic filing for corporation reinstatement for Hester International, Inc., you certified that as Registered Agent you maintained an office at 6278 N. Federal Highway, Suite #305 in Ft. Lauderdale, Florida. In fact, that address is a mail drop leased to one Carl Thames, CPA. The signage required by Section 48.091(2), Florida Statutes, does not appear, and you and Hester International, Inc. are unknown at this location.

18. In pre-hearing interrogatories, the Office asked Petitioner to provide more information about the transaction involving the transaction that had led to the revocation of his real estate license, including the identity of those individuals. Even though the importance of accuracy was apparent since Petitioner was now in litigation, Petitioner, again, without investigating the facts and relying solely on his improving memory answered the interrogatories posed to him.

19. In his answers, Petitioner identified the "customer" who had collected the money as Leonard Schoenfeld and the "renter" as Johannes Fruhwirt.

20. Petitioner went on, in his answers, to describe the transaction with Mr. Schoenfeld and Mr. Fruhwirt. This description is similar to the explanation offered in the explanatory letters supplied for his earlier applications.

21. In his response to Requests for Admissions, Petitioner denied that in May of 1991 he acted as a real estate broker in the auction of a home located at 14884 Equestrian Way in Wellington, Palm Beach County, Florida, and that he had been unable to deliver a mortgage at an agreed interest rate. Petitioner also denied that he had agreed to pay \$3,000 for closing costs as deferred interest payments.

22. Despite these denials, Petitioner admitted that he had signed an agreement to pay \$3,000 to Mr. Schoenfeld. Petitioner

explained these denials by claiming that these funds were never due because the agreement to pay \$3,000 was contingent on closing. Since the real estate deal never closed, the \$3,000 was never due.

23. At his July 15, 2005, deposition, Petitioner essentially reaffirmed the inaccurate account of events in his interrogatory answers. At the deposition, Petitioner was asked to review documents related to the Schoenfeld transaction. Those documents included: (1) a copy of the May 14, 1991, agreement wherein he agreed to pay Mr. Schoenfeld \$3,000, (2) a handwritten letter wherein he agreed to pay Mr. Schoenfeld the money that he owed him, and (3) a warranty deed on property purchased by Mr. Schoenfeld. When he was shown the May 14, 1991, agreement, Respondent testified that he did not know why he would have agreed to pay Mr. Schoenfeld \$3,000. Even when he was shown the deed on the property and even though he had notarized the signatures on that deed, Petitioner maintained that the deal never closed and he never owed the \$3000. At hearing, Petitioner's various and growing explanations during discovery significantly differ from his testimony. Petitioner testified that throughout his various explanations he had confused and combined several individuals into one transaction. Even though he knew that the true facts of these transactions were important to consideration of his application and in

answering discovery in this case, Petitioner did not make any real attempt to refresh his memory of these transactions until shortly before the hearing. In fact, the Schoenfeld and Fruhwirt transactions involved different real estate deals and had nothing to do with each other.

24. The Schoenfeld transaction occurred in 1991 and involved the sale of real property located at 14884 Equestrian Way in Wellington, Florida. Mr. Schoenfeld was Petitioner's customer. As part of the transaction, Petitioner guaranteed he could get a mortgage at a certain rate. After failing to get Mr. Schoenfeld a mortgage at a certain rate, Petitioner agreed to pay Mr. Schoenfeld \$3,000 upon closing.

25. When Petitioner failed to pay Mr. Schoenfeld the \$3,000 on closing, he asked Mr. Schoenfeld if he could make payments of \$200 a month. In a letter to Mr. Schoenfeld, Petitioner confirmed that he would pay Mr. Schoenfeld the amount that was owed. Petitioner made two payments and then stopped making payments.

26. In a letter dated July 1, 1991, Mr. Schoenfeld complained about his dealings with Petitioner to the Division of Real Estate. A few days before Mr. Schoenfeld's deposition on July 25, 2005, Petitioner paid Mr. Schoenfeld \$2,600. Mr. Schoenfeld accepted the payment since the money was still owed to him. However, the payment had been delayed for 14 years

and did not include interest for those years. Petitioner testified that he made the payment because, once he remembered the details of the transaction, he felt morally obligated to pay Mr. Schoenfeld what he had promised. However, fulfillment of this obligation also occurred with this litigation pending and after denials that any money was due Mr. Schoenfeld. In short, Petitioner did not pay Mr. Schoenfeld the money that was due him for 14 years until Petitioner was forced to acknowledge the true facts of the Schoenfeld transaction in this litigation.

27. The Fruhwirt transaction involved a man named Mark Ritter who was a client of Petitioner. Mr. Fruhwirt met with Mark Ritter at a house he wanted to rent. Eventually, Mr. Ritter sent him to Petitioner to complete a lease agreement. Mr. Ritter did not know about leases and said Petitioner was a friend whose real estate office could set up the lease contract.

28. Mr. Fruhwirt met Petitioner at his real estate office. Since it was lunchtime, they went to a nearby Burger King to finalize the lease. While at Burger King, Mr. Fruhwirt paid Petitioner \$2,850 on the lease.

29. Petitioner's testified that he did not receive any money from Mr. Fruhwirt and did not accompany Mr. Fruhwirt to Burger King. Petitioner testified that Mr. Ritter and Mr. Fruhwirt met in his lobby and both went to Burger King to

finalize the lease arrangement. However, given Petitioner's past faulty memory, Petitioner's testimony is not credible.

30. At some point, Mr. Fruhwirt moved into the house. Subsequently, Mr. Fruhwirt received a letter from an attorney representing the real owner demanding that he vacate the premises. Mr. Fruhwirt then discovered that Mr. Ritter was not the owner and had to hire an attorney to sort out his continued occupancy of the property. Eventually Mr. Fruhwirt bought this property.

31. Mr. Fruhwirt sued Petitioner and the real estate office for the recovery of the \$2,850 he had paid to rent the house. Petitioner was found liable, but the real estate office was found not liable because the transaction happened off its premises at Burger King.

32. On March 25, 1992, the Broward County Court entered a judgment of \$7,800 against Petitioner, finding that Petitioner had "breached his duty to disclose that Mark Ritter was not the owner of the involved property." After Mr. Fruhwirt obtained the judgment, Petitioner declared bankruptcy.

33. Mr. Fruhwirt pursued an adversary action in Petitioner's bankruptcy proceedings. Subsequently, the Bankruptcy Court cited "11 U.S.C. 523 A(2) and 11 U.S.C. 523 A(4)" and refused to discharge the judgment debt.

34. The Bankruptcy Court's Order refusing to discharge the debt clearly conflicts with Dr. Hester's repeated implications and statements that this debt was discharged in bankruptcy.

35. Unable to collect from Petitioner, Mr. Fruhwirt filed with the Florida Real Estate Recovery Fund. The fund paid \$2,850 to Mr. Fruhwirt and suspended Petitioner's license. Mr. Fruhwirt used the money to defray some of his legal expenses. To date, Petitioner has not paid Mr. Fruhwirt any money on the judgment.

36. The Fruhwirt transaction led to the revocation of Petitioner's real estate license and, on January 19, 1993, the Florida Real Estate Commission entered a final order revoking Petitioner's real estate license.

37. Despite Petitioner's testimony that he never received a copy of the documents, the certificate of service for the final order indicates it was sent to Petitioner at 1101 Hidden Cove, Salem, SC 29676, which was the address where Petitioner was living at that time. Again, Petitioner's testimony is not credible.

38. The Final Order referenced a December 8, 1992, agreement in which Petitioner agreed that his license would be revoked. In the December 8, 1992 agreement, entitled "Affidavit for the Voluntary Surrender of License, Registration, Certificate/Permit for Revocation," signed by Petitioner, he

agreed to the revocation of his license and to not apply for a new real estate license for ten years from the effective date of revocation. In particular, the December 8, 1992 agreement stated, "[t]he effective date of the revocation shall be upon signing this document."

39. Notwithstanding the clear language revoking the license, at the hearing, Petitioner maintained that because he had voluntarily surrendered his license, he did not believe his license had been revoked. In referring to the agreement he had signed, he testified that the agreement said, "that my license will be inactive, not revoked" and denied ever seeing the other documents revoking his license. This testimony is simply not credible and demonstrates Petitioner's propensity to see or remember things in a way that is more flattering to him, irrespective of reality. The affidavit signed by Petitioner clearly stated that Petitioner's license would be and was revoked upon signing.

40. In 1995, Hester International applied to operate as a residential mortgage licensee in Illinois.

41. The application identified Petitioner as the vice president and Sharon Hester as the president.

42. Page one of the application indicated the application had to be executed "by two officers or all directors if the applicant/licensee is a corporation." The application was

signed by Petitioner and his wife. Petitioner did not disclose to Illinois that a judgment had been entered against him in Florida or that his real estate license had been revoked or suspended.

43. Question 10 in Part III of the Application asked: "LIST ALL LICENSES WHICH YOU OR YOUR FIRM HAVE APPLIED FOR AND BEEN DENIED AND/OR ANY AND ALL LICENSES ISSUED TO YOU OR YOUR FIRM WHICH WERE SUBSEQUENTLY SUSPENDED OR REVOKED." Petitioner responded "N/A." (Id.).

44. Question 19(m) in Part III of the Application asked:

UNDER PENALTY OF PERJURY, I(WE) STATE THAT ALL OF THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY (OUR) KNOWLEDGE AND FURTHER STATE THAT AS THE APPLICANT/LICENSEE:

. . .

(m) Has not committed a crime against the law of this State, any other state or the United States, involving moral turpitude, fraudulent or dishonest dealing, and that no final judgment has been entered against it in a civil action upon grounds of fraud, misrepresentation or deceit which has not previously been reported to the Commissioner.

45. The evidence did not demonstrate that the emphasized clauses in question 10 or the "I(WE)" in 19(m) direct such questions to individuals signing the application. One reasonable interpretation of the language is that the questions are directed to the business entity applying for the license. In short, the I(WE) language is simply language in a form meant

to cover multiple types of business entities ranging from sole proprietorships to corporations. Therefore, Petitioner was not required by Illinois to disclose matters which involved him personally. To date, Illinois has not filed any disciplinary action against Petitioner or Hester International. Thus, the failure to disclose personal judgments or license actions to Illinois in a corporate application for licensure does not support a finding of dishonesty or denial of Respondent's application at issue here.

46. At some point, Hester International's corporate status had to be reinstated in Florida. Petitioner reinstated the company's corporate status in November of 2004. Petitioner filed as registered agent at 6278 North Federal Highway #305, Fort Lauderdale, Florida. Petitioner had not lived at this address for some 15 years, but had lived there for seven years with his girlfriend. The evidence showed that Petitioner simply forgot to change the registered agent's address and was not acting dishonestly. Once he discovered his mistake, Petitioner amended his filing to reflect the appropriate address. Again, these facts do not form a basis to deny Petitioner's license application.

47. Finally, Petitioner testified that until Spring 2005, he and his wife were 50/50 owners of Hester International, Inc., as reflected on the application and license renewals in

Illinois. In September 2004, Ms. Hester submitted Hester International, Inc.'s application for Florida licensure as a mortgage broker business. The Hester International business application was submitted after the Office had denied Petitioner's license application in 1996 and was scrutinizing his July 2004 application.

48. In the application, Ms. Hester identified herself as 100 percent owner of the Hester International. Petitioner did review this application, but he intentionally did not take part in its filing. The purported change in ownership was not adequately explained at hearing and appears to have been done in order to forestall any problems with licensure of the corporation due to Petitioner's participation in the corporation. While the change of ownership is troubling, given Petitioner's history, and also adds to the evidence that Petitioner is less than forthright in his memory and past business dealings, the change of ownership for the corporation's licensure application does not, by itself, support a denial of Petitioner's application.

49. On the other hand, too many inconsistencies exist between Petitioner's hearing testimony and his earlier accounts to conclude that Respondent can be trusted to hold a mortgage brokerage license. At worst, the evidence shows that Petitioner is not truthful or acts with integrity. At best, the evidence

shows that Respondent has the ability to convince himself of facts that do not quite fit the truth, but are more flattering to him. Under either scenario, Petitioner's appreciation of honesty, truthfulness and integrity are suspect. Neither Petitioner's letters supporting his good character, nor his success in his ministry demonstrates sufficient rehabilitation to overcome what appears to be long-time evasive behavior. Therefore, Petitioner's application for licensure as a mortgage broker should be denied.

CONCLUSIONS OF LAW

50. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2005).

51. The Office is the agency in the State of Florida responsible for administration and enforcement of Chapter 494, Florida Statutes, which includes determining the fitness of applicants who seek to engage in the occupation of mortgage brokering.

52. Section 494.0041(1)(f), Florida Statutes, authorizes the Office to deny an application for a mortgage broker license when an applicant has violated any provision of Section 494.0041(2), Florida Statutes.

53. Section 494.0041(2), Florida Statutes, states, in relevant part:

Each of the following acts constitutes a ground for which the disciplinary actions specified in subsection (1) may be taken:

* * *

(c) material misstatement of fact on an initial or renewal application.

(d) Disbursement, or an act which has caused or will cause disbursement, to any person in any amount from the Regulatory Trust Fund, the Securities Guaranty Fund, or the Florida Real Estate Recovery Fund, regardless of any repayment or restitution to the disbursed fund by the licensee or any person acting on behalf of the licensee or registrant.

* * *

(g) Failure to disburse funds in accordance with agreements.

* * *

(i) Having a license, or the equivalent, to practice any profession or occupation revoked, suspended, or otherwise acted against, including the denial of licensure by a licensing authority of this state or another state, territory, or country for fraud, dishonest dealing, or any other act of moral turpitude.

* * *

(q) Commission of fraud, misrepresentation, concealment, dishonest dealing by trick, scheme, or device, culpable negligence, or breach of trust in any business transaction in any state, nation, or territory; or aiding, assisting, or conspiring with any other person engaged in any such misconduct and in furtherance thereof.

54. Petitioner is an applicant for an individual mortgage broker's license. Accordingly, as the party asserting the affirmative of an issue before this administrative tribunal, Petitioner carries the burden of proof to establish by a preponderance of the evidence that the his application for licensure should be granted. Dep't of Transp. v. J.W.C. Company Inc., 396 So. 2d 778, 788 (Fla. 1st DCA 1981); Dep't of Banking and Fin. v. Osborne Stern Co., 670 So. 2d 932, 933-34 (Fla. 1996); Pershing Indus., Inc. v. Dep't of Banking and Fin., 591 So. 2d 991, 994 (Fla. 1st DCA 1991).

55. "Honesty, truthfulness and integrity are attributes which the legislature has determined are required for individuals who deal with the public as mortgage brokers." Dep't of Banking and Fin. v. Hughes, DOAH Case No. 94-5114, 1995 WL 1052790 at ¶ 36 (Fla. DOAH 1995)(Final Order); see also State v. Beeler, 530 So. 2d 932, 934 (Fla. 1988) (commenting on the legislative goal of protecting the public in enacting Chapter 494, Florida Statutes).

56. In that regard, Petitioner's answer to question number six on his July 2004 application was a material misstatement of fact as contemplated by Section 494.0041(2)(c), Florida Statutes.

57. Even if Petitioner believed that his real estate license had not been revoked or suspended, his answer to

question six was still a material misstatement because it asked if the applicant had ever had a license "otherwise acted against." Voluntarily surrendering a license in lieu of further proceedings constitutes having a license "otherwise acted against," and therefore, Petitioner should have answered affirmatively. See Emerald Coast Fin. v. Dep't of Banking and Fin., DOAH Case Nos. 92-3393 & 92-4957, 1993 WL 943461 at ¶17 (Fla. DOAH 1993).

58. Moreover, the facts and circumstances surrounding the revocation and suspension of Petitioner's real estate license, coupled with the judgments of both the Bankruptcy and County courts, as well as Petitioner's experience with the 1996 denial of his application when he previously answered "no," and his mixed answer on the February 2004 application demonstrate that the revocation and suspension involved "fraud, dishonest dealing, or any other act of moral turpitude," such that Petitioner should have at a minimum ascertained the facts of his license revocation so that he could give an accurate answer and explanation to question number six. Petitioner's stubborn refusal to acknowledge his clearly faulty memory and reluctance to ascertain the facts until forced to do so by the Respondent's denial of his application are not defenses to Petitioner's repeated failure to answer and explain the details of the Fruhwirt and Schoenfeld transactions as well as his license

revocation. See generally Starr v. Dep't of Bus. and Prof. Reg., 729 So. 2d 1006, 1007 (Fla.4th DCA 1999) (noting that applicant should have answered question regarding criminal history affirmatively and noting that the ALJ rejected the applicant's explanation that she thought question only applied to felonies); Walker v. Dep't of Bus. and Prof'l Reg., 705 So. 2d 652, 654 (Fla. 5th DCA 1998) (concluding that circumstantial evidence supported the conclusion that the license applicant acted intentionally in obtaining license by means of fraud, misrepresentation, or concealment); Sellars v. Real Estate Comm'n, 380 So. 2d 1052, 1053-54 (Fla. 1st DCA 1979) (noting that competent substantial evidence supported revocation of real estate license for dishonest dealing where the real estate broker had actual and constructive knowledge that title to property being sold was not marketable). Therefore, Petitioner has violated Section 494.0041 (2)(c) by submitting his explanatory letters and Petitioner's application should be denied.

59. Additionally, Petitioner's transaction involving Mr. Schoenfeld demonstrates that Respondent failed "to disburse funds in accordance with agreements" in violation of Section 494.0041(2)(d), Florida Statutes. The violation is sufficient to deny Petitioner's application.

60. The facts surrounding the revocation of Petitioner's Real Estate License are a violation of Section 494.0041(2)(i), Florida Statutes. This violation is sufficient to deny Petitioner's application.

61. The facts surrounding Petitioner's transaction with Mr. Fruhwirt and the subsequent litigation demonstrate a violation of Section 494.0041(2)(q), Florida Statutes.

62. In Section 11 U.S.C. 523 discharge in bankruptcy for certain categories of debt is denied. In denying discharge of Petitioner's judgment debt to Johannes Fruhwirt, the Bankruptcy Court cited Section 11 U.S.C. 523(a)2. and (a)4. The latter, Subpart (a)4., denies discharge for a debt resulting from "fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." The former, 523(a)2., has three subparts, A, B and C. The third, C, concerns consumer debts for luxury goods and clearly does not apply to Mr. Fruhwirt's litigation with the Petitioner. Subpart B refers to a false written statement by a debtor describing his or her financial condition, and similarly does not apply. That leaves 523(a)2.(A), which denies discharge for a debt obtained by "false pretenses, a false representation, or actual fraud, . . .".

63. In prevailing in Bankruptcy Court, Mr. Fruhwirt had to prove that his judgment debt fell within exceptions to

discharge. See In re Belfry, 862 F.2d 661, 662 (8th Cir. 1988) (Exceptions to bankruptcy discharge of debt are to be narrowly construed and the burden is on the creditor opposing discharge); In re Black, 787 F.2d 503 (10th Cir. 1986) (same) abrogated on other grounds by Grogan v. Garner, 498 U.S. 279 (1991). See also Namvar v. Baker, 298 BR 815, 818-819 (Bankr. SD Fla. 2003).

64. In Veitch v. Dept. of Financial Services, Office of Financial Regulation, DOAH Case No. 04-1590, 2004 WL 2610402 at ¶ 115, 116 (Fla. DOAH 2005)(Final Order), the petitioner had stipulated to 523(a) violations in prior bankruptcy proceedings. In that case, the ALJ declined to interpret the resulting Judgment of Non-Dischargeability in a manner inconsistent with that of the Bankruptcy Court. The ALJ found that the Judgment of Non-Dischargeability constituted a civil judgment grounded on "fraud, embezzlement, misrepresentation, or deceit" within the meaning of Subsection 517.161(1)(k), Florida Statutes.

65. Similar to Veitch, the Bankruptcy Court's citation of 523(a) violations constitutes a finding that Petitioner committed a fraudulent or dishonest business act within the meaning of Subsection 494.0041(2)(q) (quoted in full above).

66. By arguing that he had nothing to do with the transaction between Mr. Fruhwirt and Mr. Ritter, Petitioner is essentially trying to challenge the validity of the decisions reached in Broward County Court, the Bankruptcy Court, and the

Florida Real Estate Commission and to relitigate these cases. Petitioner cannot use the administrative forum to relitigate his case with Mr. Fruhwirt or challenge the validity of Mr. Fruhwirt's judgment against the Petitioner. See Dep't of Bus. and Prof'l Reg. v. Jeffrey C. Johnson, DOAH Case No. 01-0603PL, 2001 WL 471715 at ¶ 28 (Fla. DOAH 2001) (concluding that license holder could not defend against a charge of failing to satisfy a pari-mutuel racing-related "obligation" arising from an unreversed civil judgment by challenging the correctness or the validity of the judgment); Dep't of Prof'l Reg. v. Burks, DOAH Case No. 97-1434, 1997 WL 1053280 at ¶ 61 (Fla. DOAH 1997) (Recommended Order) (concluding that "[a] contractor may not defend against a charge of failing to satisfy an unappealed civil judgment . . . by challenging the correctness or the validity of the judgment.").

67. The 1996 denial of Petitioner's Florida application to be a mortgage broker was for making a material misstatement, which falls under the language in Section 494.0041(2)(i), Florida Statutes, covering "the denial of licensure by a licensing authority of this state or another state, territory, or country for fraud, dishonest dealing, or any other act of moral turpitude." Cf. Watts v. Dep't of Banking and Fin., DOAH Case No. 97-2270, 1997 WL 1053357 at ¶ (CITE) (Fla. DOAH 1997)(Recommended Order) (concluding that the denial of

petitioner's application for admission to the Florida Bar was ground for denial of the mortgage broker license under the provisions of § 494.0041(2)(i)).

68. More importantly, it is the repeated unwillingness of the Petitioner to be forthcoming in the application process that demonstrates Petitioner's lack of appreciation for truthfulness, honesty and integrity. The continuation of such behavior also undermines any argument that he has been rehabilitated from the events providing grounds for denial in this case. See Fonseca v. Dep't of Juvenile Just., DOAH Case No. 99-3931, 2000 WL 564808 at ¶ 23 (Fla. DOAH 2000) (Recommended Order) (concluding that the applicant's dishonesty in the application process showed that he was not rehabilitated); Goings v. State, DOAH Case No. 80-2062S, 1981 WL 180305 at ¶ 7 (Fla. DOAH 1981) (observing that, "Petitioner has failed to demonstrate rehabilitation when he continues to rely upon dishonesty when he deems it appropriate"); see also Florida Bd. of Bar Examiners ex rel. John Doe, 770 So.2d 670 (Fla. 2000). Therefore, Petitioner's application for licensure as a mortgage broker should be denied.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law, it is RECOMMENDED:

A Final Order be entered denying Petitioner's application for licensure as a mortgage broker.

DONE AND ENTERED this 4th day of November, 2005, in
Tallahassee, Leon County, Florida.

Diane Cleavinger

DIANE CLEAVINGER
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 4th day of November, 2005.

COPIES FURNISHED:

C. Scott Hester, Esquire
13843 Longs Landing Road East
Jacksonville, Florida 32225

Robert H. Schott, Esquire
Gregg Morton, Esquire
Department of Financial Services
200 East Gaines Street
Fletcher Building, Suite 526
Tallahassee, Florida 32399-0376

Carlos G. Muniz, General Counsel
Department of Financial Services
The Capitol, Plaza Level 11
Tallahassee, Florida 32399-0307

Honorable Tom Gallagher
Chief Financial Officer
Department of Financial Services
The Capitol, Plaza Level 11
Tallahassee, Florida 32399-0300

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.