STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

NICHOLAS AUTRY,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 07-0587
	)	
FLORIDA REAL ESTATE COMMISSION,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

A duly-noticed final hearing was held in this case by Administrative Law Judge T. Kent Wetherell, II, on April 16, 2007, in Tampa, Florida.

APPEARANCES

For Petitioner: Daniel Villazon, Esquire
Daniel Villazon, P.A.
1020 Vernoa Street
Kissimmee, Florida 34741

For Respondent: Thomas Barnhart, Esquire
Office of the Attorney General
The Capitol, Plaza Level 01
Tallahassee, Florida 32399

STATEMENT OF THE ISSUE

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

PRELIMINARY STATEMENT

On January 3, 2007, the Florida Real Estate Commission (Commission) advised Petitioner that his application for a real

estate sales associate license was denied. Petitioner timely requested a formal hearing on the denial of his application, and on February 2, 2007, the Commission referred the matter to the Division of Administrative Hearings (DOAH) for the assignment of an Administrative Law Judge (ALJ) to conduct the hearing requested by Petitioner.

The final hearing was scheduled for and held on April 16, 2007. Petitioner testified at the hearing in his own behalf and also presented the testimony of Karen Putney. The Commission did not present any witnesses. The following exhibits were received into evidence: Joint Exhibit 1 and Petitioner's Exhibits 1 through 4. Official recognition was taken of Section 475.17, Florida Statutes (2006).[1]

No Transcript of the final hearing was filed with DOAH. The parties were given 10 days from the date of the hearing to file proposed recommended orders (PROs). The Commission timely filed a PRO on April 26, 2007, and Petitioner filed a PRO on April 27, 2007. The PROs have been given due consideration.

FINDINGS OF FACT

1. Petitioner is 36 years old. He has a bachelor's degree and a master's degree in environmental science. He also has a Juris Doctorate degree.

2. Petitioner was licensed to practice law in Illinois in May 2002. His license was suspended in August 2006 by the

Illinois Supreme Court as a result of the October 2005 criminal offenses discussed below. See Findings 12-14.

3. The suspension of Petitioner's license to practice law is for a period of 18 months and "until further order of the Court." Thus, the suspension runs through at least February 2008.

4. Petitioner is currently working part-time at a Barnes & Nobles bookstore in Tampa. Before that, he worked as an executive recruiter for several months.

5. Before coming to Florida, Petitioner worked as an inspection and enforcement officer for the United States Environmental Protection Agency (EPA) in Illinois, and as an attorney and manager for title insurance companies in Illinois and Colorado.

6. Petitioner has been offered a sales associate job by the Keller Williams real estate firm in the Tampa area. The offer is contingent upon the approval of Petitioner's license application.

7. Petitioner has a long history of alcohol and substance abuse, which he freely acknowledged in his testimony at the final hearing. He has been using illegal substances since his high-school years.[2]

8. Petitioner has four criminal offenses in his background, each of which involved alcohol.

9. In June 1991, Petitioner was arrested in Indiana for driving under the influence (DUI). He pled guilty to the offense and spent four days in jail. Petitioner was 20 years old and in college at the time.

10. In February 2004, Petitioner was arrested in Colorado for DUI with a blood-alcohol level of 0.17 percent, which was more than twice the legal limit. He pled guilty to the lesser offense of "driving while ability impaired" and was sentenced to probation and community service.

11. In July 2004, Petitioner was arrested again in Colorado for DUI. He pled guilty and was sentenced to probation and community service.

12. In October 2005, Petitioner was arrested at a concert in Boca Raton for possession of cocaine, criminal mischief (two counts), resisting arrest with violence, and battery of a law enforcement officer (three counts). The offenses were felonies.

13. Petitioner testified that he does not recall any of the circumstances surrounding the incident because he was "extremely intoxicated" at the time. The police report of the incident, which Petitioner does not dispute,[3] states that Petitioner punched a patron at the concert, punched a police officer, kicked another police officer, spit on a paramedic, damaged handcuffs and a police car, and was in possession of 0.5 grams of cocaine. The report also indicates that Petitioner was

yelling, cursing, and acting belligerently throughout the incident.

14. In January 2006, Petitioner pled no contest to the charges, and adjudication was withheld by the court. He was sentenced to 24 months of probation and 50 hours of community service; he was required to undergo an anger management class; and he was required to successfully complete a substance abuse treatment program and undergo random drug testing.

15. Petitioner successfully completed his probation without incident and without any positive drug tests.

16. An Order formally terminating Petitioner's probation was entered on March 15, 2007.

17. Petitioner's criminal offenses were not acts of youthful indiscretion or the result of momentary lapses of judgment. All of the offenses, except for the first DUI, were committed when Petitioner was in his 30's and working in a professional capacity.

18. Petitioner credibly testified that he has taken steps to turn his life around. He is active in a church group in the Tampa area, and he testified that he has not had a drink of alcohol or used illegal drugs since December 31, 2005.

19. Petitioner does not currently attend Alcoholics Anonymous (AA) meetings, although he has done so in the past. He testified that he continues to live by AA's principles and

that he has a support system in place to help him remain completely abstinent from alcohol and drugs.

20. There is no evidence that Petitioner committed any acts of fraud or dishonest dealing in connection with his work with the EPA or the title insurance companies.

21. In October 2006, Petitioner applied for a real estate sales associate license. He was still on probation at that time.

22. Petitioner fully disclosed his criminal history and the suspension of his license to practice law in Illinois in his license application.

23. Petitioner's license application was considered by the Commission at its meeting on December 13, 2006. Petitioner appeared at the Commission meeting with his attorney and responded to questions from members of the Commission.

24. The Commission voted at the meeting to deny Petitioner's license application. The denial was memorialized in a Notice of Intent to Deny dated January 3, 2007.

25. The grounds for denial listed in the Notice of Intent to Deny included Petitioner's criminal record, as revealed in the license application; the recent nature of Petitioner's criminal offenses; the fact that Petitioner's criminal history "shows a pattern and practice of criminal behavior over an extended period of time"; the fact that Petitioner "has not had

sufficient time free of government supervision to establish rehabilitation"; and the suspension of Petitioner's license to practice law in Illinois.

CONCLUSIONS OF LAW

26. DOAH has jurisdiction over the parties to and subject matter of this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

27. Licensing agencies such as 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).

28. Petitioner has the burden to prove by a preponderance of the evidence that he satisfies the requirements for licensure as a real estate sales associate. 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).

29. Section 475.181, Florida Statutes, 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 . . . sales associate.

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

30. Section 475.17(1)(a), Florida Statutes, requires an applicant for licensure as a real estate sales associate to be "at least 18 years of age; hold a high school diploma or its equivalent; be honest, truthful, trustworthy, and of good character; and have a good reputation for fair dealing." The statute further provides that an applicant is "deemed not to be qualified" for licensure if:

> the applicant's . . . license to practice or conduct any regulated profession, business, or vocation has been revoked or suspended, by this or any other state . . . because of any conduct or practices which would have warranted a like result under this chapter, or if 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 . . . . (Emphasis supplied).

31. Section 475.25(1)(f), Florida Statutes, authorizes the Commission to deny an application for licensure if it finds that the applicant 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 . . . ." An existing licensee can be disciplined for that reason as well.

32. The Florida Supreme Court defined "moral turpitude" as follows:

> 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, 661 (Fla. 1933) (citations omitted).

33. Not all crimes involve moral turpitude, and courts have had difficulty in delineating which crimes involve moral turpitude and which ones do not. See, e.g., Milliken v. Dept. of Business & Professional Reg., 709 So. 2d 595, 597 (Fla. 5th DCA 1998); Nelson v. Dept. of Business & Professional Reg., 707 So. 2d 378, 379-80 (Fla. 5th DCA 1998) (Sharp, J., concurring specially).

34. The "mere possession of a controlled substance" is not a crime involving moral turpitude. See Pearl v. Florida Board of Real Estate, 394 So. 2d 189, 192 (Fla. 3d DCA 1981). Thus, Petitioner's possession of cocaine offense is not a crime involving moral turpitude.

35. In Department of Business and Professional Regulation v. Starr, 1998 Fla. Div. Admin Hear. LEXIS 5645, at ¶ 25 (DOAH

Mar. 30, 1998), the ALJ concluded that DUI is not a crime involving moral turpitude.[4] That conclusion is consistent with appellate decisions in other states where the issue has been specifically decided. See, e.g., State v. Hall, 411 S.E. 2d 441, 442 (S.C. Ct. App. 1991) (citing cases). Thus, Petitioner's DUIs are not crimes involving moral turpitude.

36. In Nelson, supra, the court held that misdemeanor battery and criminal mischief are not crimes involving moral turpitude. The offenses in that case did not involve resisting arrest with violence or battery of a law enforcement officer, but rather involved setting off a "smoke bomb" in a government office building as part of a "political protest." Id. at 378.

37. Although there does not appear to be any Florida case directly on point, courts in other states have held that resisting arrest with violence and battery of a law enforcement officer are crimes involving moral turpitude. See, e.g., People v. Lindsay, 209 Cal. App. 3d 849, 857-58 (Cal. Ct. App. 5th Dist. 1989); Hall, 411 S.E. 2d at 443.

38. In Baurley v. Department of Professional Regulation, 1989 Fla. Div. Adm. Hear. LEXIS 6468, at ¶ 18 (DOAH Apr. 29, 1989), the hearing officer concluded that the applicant's crimes, which included battery of a law enforcement officer, were not crimes involving moral turpitude. The battery of a law enforcement officer offense in that case "had its genesis in a

shoving match involving Mr. Baurley and someone who turned out to be an off-duty police officer for a small municipality." Id. at ¶ 3.

39. The circumstances underlying Petitioner's resisting arrest with violence and battery of a law enforcement officer offenses are more egregious and reprehensible than the conduct at issue in Baurley. Petitioner's actions reflect a gross deviation from the standard of conduct expected of a law-abiding person and, as a result, it is concluded that Petitioner's resisting arrest with violence and battery of a law enforcement officer offenses involve moral turpitude.

40. Petitioner is "deemed not to be qualified" for licensure by virtue of the suspension of his license to practice law in Illinois. See § 475.17(1)(a), Fla. Stat. He is also "deemed not to be qualified" for licensure by virtue of his no contest plea to the felony offenses of resisting arrest with violence and battery of a law enforcement officer. Id.; § 475.25(1)(f), Fla. Stat.

41. To overcome the statutory presumption that he is not qualified for licensure, Petitioner must show that "the interest of the public and investors will not likely be endangered by the granting of registration" because of "lapse of time and subsequent good conduct and reputation, or other reason deemed sufficient." § 475.17(1)(a), Fla. Stat. See also State ex rel.

Corbett v. Churchwell, 215 So. 2d 302, 304 (Fla. 1968); Aquino v. Dept. of Professional Reg., 430 So. 2d 598, 599-600 (Fla. 4th DCA 1983); Fisher v. Dept. of Business & Professional Reg., DOAH Case No. 05-2773, Final Order No. BPR-2005-07077 (DOAH Nov. 22, 2005; FREC Dec. 21, 2005).

42. Petitioner failed to meet his burden of proof. There has not been a sufficient lapse of time since Petitioner's most recent criminal offenses in October 2005; it has been less than two years since those offenses, and only two months since Petitioner's probation for those offenses was terminated.

43. It is noteworthy that Petitioner has remained out of trouble with the law since the October 2005 offenses; that he has taken positive steps to turn his life around; and that he appears to be sincere in his commitment to continue those efforts. However, not enough time has passed since Petitioner's most recent criminal offenses to show that he has indeed overcome his substance abuse problem so that he will not endanger the interest public or investors if he is licensed as a real estate sales associate.

RECOMMENDATION

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

RECOMMENDED that the Commission enter a final order denying Petitioner's application for a real estate sales associate license.

DONE AND ENTERED this 8th day of May, 2007, in Tallahassee, Leon County, Florida.

S

T. KENT WETHERELL, II
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 8th day of May, 2007.

ENDNOTES

1/ All statutory references in this Recommended Order are to the 2006 version of the Florida Statutes.

2/ See Joint Exhibit 1, at 0060.

3/ See Joint Exhibit 1, at 0050 (Petitioner's testimony during the proceeding to suspend his license to practice law in Illinois that he was "very drunk and under the influence of other substances" at the concert and that he "read the police report and . . . accept[s] all consequences for that behavior").

4/ The ALJ in Starr recommended dismissal of the allegation that Ms. Starr violated Section 475.25(1)(f), Florida Statutes, as a result of her DUI. However, the ALJ recommended revocation of Ms. Starr's license based upon her failure to disclose a prior criminal offense on her license application in violation of Section 475.25(1)(m), Florida Statutes. The revocation of

Ms. Starr's license was affirmed on appeal. See Starr v. Dept. of Business & Professional Reg., 729 So. 2d 1006 (Fla. 4th DCA 1999).

COPIES FURNISHED:

Nancy B. Hogan, Chairman
Florida Commission Real Estate
Department of Business and
Professional Regulation
400 West Robinson Street, Suite 801N
Orlando, Florida 32801

Michael Martinez, Acting General Counsel
Department of Business and
Professional Regulation
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-0792

Thomas Barnhart, Esquire
Office of the Attorney General
The Capitol, Plaza Level 01
Tallahassee, Florida 32399

Daniel Villazon, Esquire
Daniel Villazon, P.A.
1020 Verona Street
Kissimmee, Florida 34741

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.