

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JEFFREY BARNES,)
)
 Petitioner,)
)
 vs.) Case No. 07-4522
)
 FLORIDA REAL ESTATE COMMISSION,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Administrative Law Judge Don W. Davis of the Division of Administrative Hearings conducted a final hearing in this case on December 11, 2007, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Jeffrey C. Barnes, pro se
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For Respondent: Garnett Chisenhall
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STATEMENT OF THE ISSUE

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

PRELIMINARY STATEMENT

On August 8, 2007, the Florida Real Estate Commission (the Commission) rendered a "Notice of Intent to Deny" informing the Petitioner of the Commission's preliminary decision to deny his application for licensure as a real estate broker. Via the Notice of Intent to Deny, the Commission also advised the Petitioner of his right to challenge the Commission's proposed action through an administrative hearing. On September 4, 2007, the Petitioner filed a hearing request with the Commission, and the matter was referred to the Division of Administrative Hearings (DOAH) for a formal administrative hearing.

During the final hearing in this matter, the Petitioner testified on his own behalf and called the following witnesses: Ms. Janet Victoria, Pastor Christopher Barnes, and Reverend J.D. Millar. The Petitioner also offered into evidence an audio recording from the Commission's July 18, 2007, meeting in Orlando, Florida, and it was accepted into evidence without objection.^{1/} The Commission did not call any witnesses, but it offered a composite exhibit which was accepted into evidence without objection. That composite exhibit consisted of Chapter 475, Part I, Florida Statutes (2007), and a copy of the Respondent's application file maintained by the Division of Real Estate.

A transcript of the proceeding was filed with DOAH on December 19, 2007. The parties requested and were granted leave to file proposed recommended orders more than 10 days following the filing of the transcript. Proposed recommended orders were submitted by the parties and both proposals have been considered and utilized in preparing this Recommended Order.

FINDINGS OF FACT

1. The Petitioner, Jeffrey C. Barnes, is a 60-year-old male who maintains a residence in Illinois and is currently a licensed realtor in Illinois and Wisconsin.

2. On April 9, 2007, the Department of Business and Professional Regulation received the Petitioner's application to become a licensed real estate broker in Florida.

3. The Petitioner responded affirmatively to a question on the application form which asked, "Have you ever been convicted of a crime, found guilty, or entered a plea of guilty or nolo contendere (no contest) . . . , even if you received a withhold of adjudication?"

4. The Petitioner's reported criminal history began with an incident on November 19, 1985, when the Illinois police stopped him for driving 53 M.P.H. in a 40 M.P.H. zone. Upon discovering that the Petitioner was driving with a suspended license, the police arrested him and found a small glass bottle containing cocaine on his person. The police also found 23

individually-wrapped packets of cocaine in the Petitioner's vehicle. Because of this incident, the Illinois authorities charged the Petitioner with unlawfully possessing a controlled substance with the intent to deliver more than 30 grams.

5. On February 18, 1986, an Illinois police officer witnessed the Petitioner driving erratically and pulled his car over. While asking for the Petitioner's license, the officer detected a strong odor of alcohol coming from the car. Upon looking into the car, the officer saw a bottle containing cocaine hanging from one of the Petitioner's pockets. During a subsequent search of the Petitioner and his car, the police discovered drug paraphernalia and more cocaine. The police also administered a sobriety test which the Petitioner failed.

6. The Petitioner was 38 years old during the incidents described above.

7. Ultimately, the Petitioner was convicted on two counts of manufacturing and delivering a controlled substance, one count of possessing cannabis, and one count of possessing a controlled substance (i.e., cocaine). The Petitioner was released in 1990 after serving four years in prison.

8. The Commission considered the Petitioner's licensure application on July 18, 2007 during a regularly-scheduled meeting in Orlando, Florida. The Petitioner was present, but he was not represented by an attorney.

9. During the aforementioned meeting, the Commission made the following findings of fact: (a) "[a]pplicant's criminal record is as revealed in [his] application; (b) "[a]pplicant's testimony or evidence in explanation/mitigation was unpersuasive;" and (c) "[a]pplicant's criminal history is recent in time."^{2/}

10. Based on the findings of fact described above, the Commission concluded the Petitioner had "engaged in conduct or practices which would have been grounds for revoking or suspending a real estate license." The Commission also concluded the Petitioner had been "[c]onvicted or found guilty or entered a plea of nolo contendere to, . . . a crime which directly relates to activities of a licensed broker or sales associate or involves moral turpitude or fraudulent or dishonest dealing."

11. Ultimately, the Commission elected to deny the Petitioner's application by concluding "it would be a breach of its duty to protect the health, safety and welfare of the public to license this applicant and thereby provide him easy access to the homes, families or personal belongings of the citizens of Florida."

12. The Commission's decision was memorialized in a "Notice of Intent to Deny" rendered on August 8, 2007.

13. The Petitioner responded by filing a petition disputing the facts on which the Commission's decision was based. Specifically, due to the lapse of time since his convictions and subsequent good conduct, the Petitioner asserted he satisfied the criteria for licensure set forth in Section 475.17(1)(a), Florida Statutes.

14. During the December 11, 2007 formal hearing, the Petitioner testified on his own behalf and described how he has worked in the information technology field for over 35 years. In addition, the Petitioner described his charitable and civic activities in considerable detail.

15. The Petitioner attributed his convictions to a serious cocaine addiction. While incarcerated, he participated in substance abuse programs and describes his time in prison as a blessing. The Petitioner testified that he has had no further involvement with illegal drugs since his release from prison.

16. During his testimony at hearing, the Petitioner revealed that he had sold 3.5 grams of cocaine to a friend in the presence of an undercover police officer, a crime not disclosed to the Commission in his licensure application. The Petitioner was not specific about when this crime occurred, but he believed that he was 25 or 30 years old at the time. While it is uncertain whether the Petitioner's sale of cocaine actually resulted in a conviction which had to be expressly

disclosed to the Commission in his licensure application, his claim that this crime was fully disclosed casts doubt on his credibility.

17. In addition to his own testimony, the Petitioner offered the testimony of his brother, Pastor Christopher Barnes. When asked about the Petitioner's character, Pastor Barnes expressed his opinion that the Petitioner's arrest and convictions were responsible for the turn-around in the Petitioner's life and present day exemplary good character.

18. The Petitioner also offered the testimony of his wife, Ms. Janet Victoria. They met in late 1991 or early 1992 and have been married since 1997. Ms. Victoria works as a real estate broker in Illinois, and the Petitioner began working for her in 2004.

19. Reverend James Dean Millar also testified on the Petitioner's behalf that he and the Petitioner met in 2003, that the Petitioner has been involved in charitable endeavors and that the Petitioner regularly attends church services.

20. All of the Petitioner's witnesses responded affirmatively when asked if they knew the Petitioner to be honest, truthful, trustworthy, and a person of good character. They also responded affirmatively when asked if they knew whether the Petitioner had a good reputation for fair dealing. However, their statements were more in the nature of

conclusions, lacking any specific detail to support their opinions. No specific instances were related where the Petitioner demonstrated honesty, morality, or ethical behavior. Also, none of the witnesses can be considered "disinterested."

21. The testimony and evidence indicated the Petitioner is accomplished in the fields of information technology and real estate sales.

CONCLUSIONS OF LAW

22. DOAH has jurisdiction over the subject matter of this proceeding and over the parties hereto pursuant to Chapter 120, Florida Statutes.

23. The Commission consists of seven members who act in a quasi-judicial capacity. Those seven members are responsible for regulating real estate brokers, salespersons, and real estate schools. See §§ 475.001, 475.02, Fla. Stat. (2007).

24. The Department of Business and Professional Regulation licenses any applicant whom the Commission certifies as being "qualified to practice as a broker or sales associate." § 475.181(1), Fla. Stat. (2007).

25. A professional license is not a right, but a privilege granted by the State. Borrego v. AHCA, 675 So. 2d 666, 668 (Fla. 1st DCA 1996).

26. The Commission's judgment regarding who is qualified to hold a real estate broker's license in Florida is entitled

to a considerable degree of deference. See Autry v. Fla. Real Estate Comm'n, DOAH Case No. 07-0587 (Recommended Order issued July 8, 2007, adopted by Final Order issued July 10, 2007) where the Administrative Law Judge concluded that licensing agencies such as the Commission have broad latitude in determining the fitness of applicants for licensure; Dep't of Bus. & Prof'l Regulation v. Martin County Liquors Inc., 574 So. 2d 170, 175 (Fla. 1st DCA 1991)(holding "[a]gencies have broad discretionary authority to issue licenses especially when the operation of that license is deemed a privilege rather than a right, as in liquor licenses"); Astral Liquors, Inc. v. Dep't of Bus. & Prof'l Regulation, 463 So. 2d 1130, 1132 (Fla. 1985)(noting that "[d]iscretionary authority is necessary for agencies involved in the issuance of licenses and the determination of fitness of applicants for licenses" and that "[t]his discretionary authority is particularly necessary where an agency regulates 'occupations which are practiced by privilege rather than by right and which are potentially injurious to the public welfare.' Solimena, 402 So. 2d at 1246.").

27. Deference to the Commission's judgment is particularly important in the instant case because the Petitioner is seeking a broker's license rather than a sales associate's license. Accordingly, if the Petitioner were to be licensed, he would

not be subject to supervision. See § 475.01(1)(j), Fla. Stat. (2007) (defining the term "sales associate" to mean "a person who performs any act specified in the definition of 'broker,' but who performs such act under the direction, control, or management of another person.").

28. With regard to determining who is qualified to practice as a broker or sales associate, Section 475.25(1)(f), Florida Statutes (2007), provides in pertinent part that the Commission may deny an application for licensure if it finds that the applicant "[h]as 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." (emphasis added)

29. In addition, Section 475.17(1)(a), Florida Statutes (2007), provides in pertinent part that:

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, 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.

(emphasis added)

30. The Petitioner was convicted on two counts of manufacturing and delivering cocaine, and such an offense is a crime of moral turpitude.^{3/}

31. Such crimes would have been grounds for revoking or suspending a license if the Petitioner had been licensed at the time he committed the offenses. See § 475.25(1)(f), Fla. Stat. (2007).

32. Therefore, in order to avoid a determination that he does not satisfy the criteria for licensure as a real estate broker set forth in Section 475.17(1)(a), Florida Statutes (2007), and that his application for licensure should not be denied pursuant to Section 475.25(1)(f), Florida Statutes (2007), it was the Petitioner's burden to establish by a preponderance of the evidence that, "because of lapse of time and subsequent good conduct and reputation, or other reason deemed sufficient, . . . the interest of the public and investors will not likely be endangered" by granting his application. See Osborne Stern & Co., 670 So. 2d at 934 (noting "[t]he general rule is that a party asserting the affirmative of an issue has the burden of presenting evidence as to that issue.>").

33. The convictions disclosed on the Petitioner's licensure application resulted from arrests which occurred on

November 19, 1985 and February 18, 1986. Given the amount of time that has passed since those arrests, however, one could conclude there has been a sufficient "lapse of time." Notably, Section 475.17(1)(a), Florida Statutes (2007), requires that the Petitioner also demonstrate through "subsequent good conduct and reputation, or other reason deemed sufficient, . . . [that] the interest of the public and investors will not likely be endangered" by granting his application. See Strockbine v. Dep't of Bus. & Prof'l Regulation, DOAH Case No. 05-1138 (Recommended Order issued June 29, 2005; adopted by Final Order issued April 27, 2006, noting that passage of time notwithstanding, "[s]ection 475.17(1)(a), Florida Statutes, however, requires both the passage of time and subsequent good conduct and reputation. Viewing both prongs of the test leads one to conclude that Petitioner has satisfied neither.")

34. There is no need to assess whether there has been a sufficient "lapse of time" since the Petitioner committed his offenses. As explained below, the Findings of Fact set forth above lead the undersigned to conclude that the Petitioner has failed to carry his burden of proof on the second prong of Section 475.17(1)(a), Florida Statutes (2007). See generally Lillquist v. Dep't of Bus. & Prof'l Regulation, Fla. Real Estate Comm'n, DOAH Case no. 86-2902, (Recommended Order issued January 14, 1987, adopted by Final Order issued February 20,

1987, explaining “[i]t is not found or concluded that Petitioner is not honest, truthful, trustworthy, of good character and of good reputation for fair dealing, or that it is likely that the interest of the public and investors will be endangered if Petitioner’s application is granted. It is simply concluded that Petitioner has not presented sufficient proof to establish that the contrary is true at this time.”).

35. The Petitioner was 38 years old at the time of his arrests. Therefore, his crimes cannot be attributed to youthful indiscretion. See Autry, supra (finding the “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.”).

36. Additionally, the Petitioner’s admissions at the final hearing established his commission of another crime that was not disclosed to the Commission in his licensure application. Specifically, the Petitioner revealed that he had sold 3.5 grams of cocaine to a friend in the presence of an undercover police officer.

37. While it is uncertain whether that crime actually resulted in a conviction which had to be explicitly disclosed to the Commission in the licensure application, the

Petitioner's lack of candor regarding the non-disclosure casts doubt on his credibility. See generally Nutting v. Fla. Real Estate Comm'n, DOAH Case No. 05-4510 (Recommended Order issued April 18 2006, adopted by Final Order issued July 27, 2006, finding the "Petitioner's evasiveness and lack of candor demonstrate his failure to acknowledge and take responsibility for his past actions. Petitioner's rehabilitation will not be complete before that happens.").

38. In order to bolster his own testimony regarding the second prong of Section 475.17(1)(a), Florida Statutes (2007), the Petitioner offered the testimony of his brother (Pastor Christopher Barnes), his wife (Ms. Janet Victoria), and a friend (Reverend James Dean Millar). However, they were not disinterested witnesses, and their testimony is insufficient to support a finding of the Petitioner's "subsequent good conduct and reputation." See generally Bettis v. Dep't of Bus. & Prof'l Regulation, Fla. Real Estate Comm'n, DOAH Case No. 82-453 (Recommended Order issued September 20, 1982, and adopted by Final Order issued October 20, 1982, concluding "[t]he evidence petitioner adduced consisted solely of his own testimony and that of his wife. There was no testimony as to his reputation either for fair dealing or otherwise. Notwithstanding the apparently exemplary life petitioner has led since prison, this testimony, uncorroborated by a single

disinterested witness, is legally insufficient to meet Petitioner's burden of proof."); Taylor v. Dep't of Bus. & Prof'l Regulation, Fla. Real Estate Comm'n, DOAH Case No. 06-3036 (Recommended Order issued January 9, 2007, adopted by Final Order issued March 22, 2007, concluding that in order to satisfy the two-prong test of Section 475.17(1)(a), "Petitioner must offer more than her own statements and those of her personal friend attesting to her good conduct over the past nine years. Such statements are insufficient to meet the required burden of proof.") (emphasis added).

39. Moreover, the conclusory nature of the witnesses' testimony did not assist the Petitioner in satisfying his burden of proof. See Baumgartner v. Dep't of Bus. & Prof'l Regulation, Fla. Real Estate Comm'n, DOAH Case no. 83-0802 (Recommended Order issued August 27, 1984, recommending denial of the petitioner's licensure application and concluding "[n]o direct evidence was introduced to show that Petitioner is honest, truthful, trustworthy or of good character, not even the testimony of the Petitioner himself."); Wozniak v. Fla. Real Estate Comm'n, DOAH Case No. 88-0188, (Recommended Order issued May 10, 1988, recommending denial of the petitioner's licensure application and concluding "[t]here is little evidence of good conduct and honest reputation beyond the

conclusory and uncorroborated assertions of good character by Petitioner.”) (emphasis added).

40. While the Petitioner and his witnesses testified at about his participation in church and charitable activities, such testimony does not satisfy the criteria of Section 475.17(1)(a), Florida Statutes (2007). See Doltie v. Dep’t of Bus. & Prof’l Regulation, Div. of Real Estate, DOAH Case no. 02-0112 (Recommended Order issued May 23, 2002, finding that “Petitioner’s testimony that he participates in church and civic activities does not establish that Petitioner has completed his rehabilitation. Nor are such activities, alone, sufficient to establish his honesty, trustworthiness, good character, or reputation for fair dealing.”).

41. Finally, the testimony and evidence indicates the Petitioner is accomplished in the fields of information technology and real estate sales. However, information on the Petitioner’s success in his chosen fields of endeavor is also insufficient to establish the Petitioner’s “subsequent good conduct and reputation.” See generally Denicola v. Dep’t of Bus. & Prof’l Regulation, Div. of Real Estate, DOAH Case No. 03-3498 (Recommended Order issued on March 5, 2004, adopted by Final Order dated June 10, 2004, finding that “[s]ince Petitioner’s release six years ago, he has started his own part-time computer web design company. Many of his

customers submitted letters of recommendation on his behalf. These recommendations include stating what a fine webmaster and computer specialist he is and stating that his clients have trust and confidence in his computer skills and his business decisions and advice. His wife also has expressed confidence in him through her letter. They are starting a family. Unfortunately, only one letter mentioned moral or ethical considerations. None of the letters related specific personal experiences with Petitioner's honesty, morality, or ethical behavior over the entire course of time that the author had known Petitioner.").

42. In sum, the evidence and testimony offered by the Petitioner fails to establish by a preponderance of the evidence that "because of lapse of time and subsequent good conduct and reputation, or other reason deemed sufficient, . . . the interest of the public and investors will not likely be endangered" by granting his application.

RECOMMENDATION

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

RECOMMENDED:

That a final order be entered denying the Petitioner's application for licensure as a real estate broker.

DONE AND ENTERED this 30th day of January, 2008, in
Tallahassee, Leon County, Florida.

S

DON W. DAVIS
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of January, 2008.

ENDNOTES

1/ While the Commission considered and denied the Petitioner's licensure application during its July 18, 2007 meeting, the audio recording from that meeting has little or no relevance to the instant proceeding which is de novo in nature. See Snodgrass v. Dep't of Bus. & Prof'l Regulation, Div. of Real Estate, DOAH Case no. 05-1111 (Recommended Order issued September 30, 2005; Final Order issued February 21, 2006, noting "[t]he hearing to prove entitlement is de novo in nature and is not a review of the hearings previously conducted by the Florida Real Estate Commission."); Silverstein v. Fla. Real Estate Comm'n, DOAH Case no. 06-1144 (Recommended Order issued June 26, 2006; Final Order issued August 21, 2006, noting the de novo nature of the proceeding and that "the undersigned has a duty, as a participant in the decision-making process, to make an independent recommendation, based on the evidentiary record and applicable law, regarding the form and substance of final agency action in the cause.").

2/ A document entitled "Key for Licensure Denials" is attached to the Commission's Notice of Intent to Deny. The "Key for Licensure Denials" is intended to facilitate licensure proceedings by setting forth findings of fact and conclusions of law that could apply to any licensure applicant. At the conclusion of a licensure proceeding, a Commission staff member can simply "check-off" the findings of fact and conclusions of law that were made by the Commission. The "Key for Licensure Denials" associated with the instant case indicates the Commission also found that the Petitioner: (a) "has operated as though licensed while unlicensed;" and (b) has had other licenses revoked or suspended. However, the Commission's attorney stated during the formal hearing in this matter that he had listened to the audio recording from the Commission's July 18, 2007, meeting and ascertained there was nothing to support those findings of fact. He surmised that a scrivener's error was responsible for the discrepancy between the "Key for Licensure Denials" associated with the instant case and the findings actually made by the Commission during its July 18, 2007 meeting.

The "Key for Licensure Denials" associated with the instant case also cited Chapter 112 of the Florida Statutes and "failure to establish restoration of civil rights" as additional justification for denying the Petitioner's licensure application. However, in Scherer v. Dep't of Bus. & Prof'l Regulation, 919 So. 2d 662, 664 (Fla. 5th DCA 2006), the Fifth District Court of Appeal held that Section 112.011(1)(b) of the Florida Statutes "does not deny licensure to a felon whose civil rights have not been restored."

3/ In State ex rel. Tullidge v. Hollingsworth, 146 So. 660, 661 (Fla. 1933), the Florida Supreme Court described "moral turpitude" as "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."

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.