

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF REAL ESTATE,)
)
Petitioner,)
)
vs.) Case No. 08-2096PL
)
ROMANDA JEANETTE MAXWELL,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings by its duly-designated Administrative Law Judge, Jeff B. Clark, held a formal hearing in the above-styled case on June 4, 2008, in Kissimmee, Florida.

APPEARANCES

For Petitioner: Jason W. Holtz, Esquire
Department of Business and
Professional Regulation
400 West Robinson Street, Suite N-801
Orlando, Florida 32801-1757

For Respondent: Daniel Villazon, Esquire
Daniel Villazon, P.A.
1420 Celebration Boulevard, Suite 200
Celebration, Florida 34747

STATEMENT OF THE ISSUE

At issue in this proceeding is whether Respondent committed the offenses set forth in the Administrative Complaint, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On March 27, 2008, Petitioner, Department of Business and Professional Regulation, Division of Real Estate, issued a two-count Administrative Complaint which charged that Respondent, Romanda Jeanette Maxwell, a licensed real estate sales associate, violated certain provisions of Section 475.25, Florida Statutes (2004).^{1/} Count I alleged that Respondent violated the provisions of Subsection 475.25(1)(m), Florida Statutes, by having "obtained a license by means of fraud, misrepresentation, or concealment"; and Count II alleged that Respondent violated Subsection 475.25(1)(e), Florida Statutes, by having "failed to comply with the requirements of Rule 61J2-2.027(2) of the Florida Administrative Code." The gravamen of the charges was Petitioner's contention that in applying for licensure as a real estate sales associate, Respondent failed to disclose her criminal history.

Respondent, through her attorney, filed a Petition for Formal Hearing wherein she disputed the allegations of fact contained in the Administrative Complaint.

On April 28, 2008, the Division of Administrative Hearings received Petitioner's referral and request for the assignment of an Administrative Law Judge to conduct a formal hearing pursuant to Sections 120.569 and 120.60 and Subsection 120.57(1), Florida Statutes (2007). On the same day, an Initial Order was sent to both parties requesting mutually convenient dates for a final hearing. Based on the response of the parties, the final hearing was scheduled for June 4, 2008, in Kissimmee, Florida.

The final hearing was held as scheduled. At the hearing, Respondent testified in her own behalf. Petitioner's Exhibits 1 through 5 were received into evidence without objection and marked accordingly. Official notice was taken of Chapter 425.225, Florida Statutes, and Florida Administrative Code Chapter Rule 61J2.

A Transcript of the hearing was filed June 10, 2008. Both parties timely filed Proposed Recommended Orders which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is a state government licensing and regulatory agency charged with the duty and responsibility to prosecute administrative complaints pursuant to the laws of the State of Florida, in particular Section 20.165, Florida Statutes (2007); Chapters 120, 455, and 475, Florida Statutes (2007); and the rules promulgated pursuant thereto.

2. Respondent is now, and was at all times material hereto, a licensed real estate associate in the State of Florida, having been issued License No. SL-3144440.

3. On or about May 5, 2005, Respondent filed an application with Petitioner for licensure as a real estate sales associate. Pertinent to this case, Item 1 on the Background Information section of the application required that Respondent answer "Yes" or "No" (by checking the appropriate box) to the following question:

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? This question applies to any violation of the laws of any municipality, county, state or nation, including felony, misdemeanor and traffic offenses (but not parking, speeding, inspection, or traffic signal violations), without regard to whether you were placed on probation, had adjudication withheld, were paroled, or pardoned. If you intend to answer "NO" because you believe those records have been expunged or sealed by court order pursuant to Section 943.058, Florida Statutes, or applicable law of another state, you are responsible for verifying the expungement or sealing prior to answering "NO." "YOUR ANSWER TO THIS QUESTION WILL BE CHECKED AGAINST LOCAL, STATE AND FEDERAL RECORDS. FAILURE TO ANSWER THIS QUESTION ACCURATELY MAY RESULT IN THE DENIAL OR REVOCATION OF YOUR LICENSE. IF YOU DO NOT FULLY UNDERSTAND THIS QUESTION, CONSULT WITH AN ATTORNEY OR CONTACT THE DEPARTMENT.

Respondent answered the question by checking the box marked "No."

4. The application concluded with Respondent's Attest Statement before a Notary Public of the State of Florida as follows:

I have read the questions in this application and have answered them completely and truthfully to the best of my knowledge.

* * *

I understand the types of misconduct for which disciplinary proceedings may be initiated.

5. On October 7, 2005, Respondent passed the sales associate examination. From October 7, 2005, to November 14, 2005, her license was in inactive status. From November 14, 2005, through the date of hearing, Respondent has been licensed as an active sales associate with Perfect Gulf Properties, Inc., doing business as Century 21 Sunshine Realty.

6. Following approval of Respondent's application and her licensure as a real estate associate, Petitioner received the results of a state and federal records search which revealed a criminal history not disclosed on Respondent's application. That records search revealed a criminal conviction in the Circuit Court, Eighteenth Judicial Circuit, Brevard County, Florida. On January 24, 1991, Respondent was convicted of

robbery with a weapon, not deadly, a first-degree felony, and sentenced to three and a half years' incarceration.

7. Respondent maintains that based on a telephone conversation with someone at the Brevard County Courthouse and the fact that she is/was a notary, registered voter, served on a jury, and is a licensed minister, that the record of her criminal activity had been expunged. This is not credible.

8. Respondent did not initiate any action to cause her criminal record to have been expunged or sealed by court order pursuant to Section 943.058, Florida Statutes, nor did she make any reasonably, prudent inquiry regarding the status of her criminal record prior to answering questions regarding same and affirming to accuracy of her application for licensure.

CONCLUSIONS OF LAW

9. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of these proceedings. §§ 120.569, 120.57(1) and 120.60(5), Fla. Stat. (2007).

10. Where, as here, Respondent proposes to take punitive action against a licensee, it must establish grounds for disciplinary action by clear and convincing evidence.

Department of Banking and Finance v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

11. "'[C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in 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 a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.'" In re Davey, 645 So. 2d 398, 404 (Fla. 1994), quoting with approval from Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

12. In cases of this nature, the disciplinary action taken may be based only upon the offenses specifically alleged in the Administrative Complaint. Kinney v. Department of State, 501 So. 2d 129 (Fla. 5th DCA 1987); Sternberg v. Department of Professional Regulation, Board of Medical Examiners, 465 So. 2d 1324 (Fla. 1st DCA 1985); and Hunter v. Department of Professional Regulation, 458 So. 2d 842 (Fla. 2d DCA 1984). Finally, in determining whether Respondent violated the provisions of Subsection 475.25(1), Florida Statutes, as alleged in the Administrative Complaint, one "must bear in mind that it is, in effect, a penal statute. . . . This being true, the statute must be strictly construed and no conduct is to be regarded as included within it that is not reasonably proscribed

by it." Lester v. Department of Professional and Occupational Regulations, 348 So. 2d 923, 925 (Fla. 1st DCA 1977).

13. Subsection 475.25(1), Florida Statutes, provides that
Petitioner:

[M]ay 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:

* * *

(e) Has violated any of the provisions of this chapter or any lawful order or rule made or issued under the provisions of this chapter or chapter 455.

* * *

(m) Has obtained a license by means of fraud, misrepresentation, or concealment.

14. Pertinent to the alleged violation of Subsection 475.25(1)(e), Florida Statutes, Florida Administrative Code Rule 61J2-2.027(2) provides:

(2) The applicant must make it possible to immediately begin the inquiry as to whether the applicant is honest, truthful, trustworthy, of good character, and bears a good reputation for fair dealings, and will likely make transactions and conduct negotiations with safety to investors and to those with whom the applicant may undertake

a relation of trust and confidence. The applicant is required to disclose:

(a) If ever convicted of a crime, or if any judgment or decree has been rendered against the applicant for fraudulent or dishonest dealings, or

15. To establish that a licensee committed a violation of Subsection 475.25(1)(m), Florida Statutes, as alleged in Count I of the Administrative Complaint, Petitioner must show not only that the licensee provided false or misleading information on his application, but that she did so knowingly and intentionally. Munch v. Department of Professional Regulation, 592 So. 2d 1136, 1143-1144 (Fla. 1st DCA 1992) ("[A]pplying to the words used in [Section 475.25(1)(m)] their usual and natural meaning, it is apparent that it is contemplated that an intentional act be proved before a violation may be found.") Walker v. Department of Business and Professional Regulation, 705 So. 2d 652 (Fla. 5th DCA 1998).

16. Here, the evidence demonstrates with the requisite degree of certainty that Respondent failed to disclose her criminal history as required by the application. What remains to be resolved is whether Respondent's failure may be reasonably characterized as "willful," so as to constitute a violation of Subsection 475.25(1)(m), Florida Statutes, or is more appropriately characterized as careless or passive in character so as to constitute a violation of Florida Administrative Code

Rule 61J2-2.027(2) and, therefore, Subsection 475.25(1)(e), Florida Statutes. To reach a resolution of the issue, it is necessary to resolve whether Respondent's failure to disclose was "willful" or "intentional."

17. Where, as here, the Legislature has not defined the words used in a phrase, the language should usually be given its plain and ordinary meaning. Southeastern Fisheries Association, Inc. v. Department of Natural Resources, 453 So. 2d 1351 (Fla. 1984). The American Heritage Dictionary of the English Language, New College Edition (1979), defines "willful" as "said or done in accordance with one's will; deliberate." Perhaps more informative to the instant case, Black's Law Dictionary, Fifth Edition (1979), defines "willful" as follows:

Proceeding from a conscious motion of the will; voluntary. Intending the result which actually comes to pass; designed; intentional; not accidental or involuntary.

An act or omission is "willfully" done, if done voluntarily and intentionally and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law.

Willful is a word of many meanings, its construction often influenced by its context. Screws v. United States, 325 U.S. 91, 101, 65 S.Ct. 1031, 1035, 89 L.Ed. 1495.

The word [willfully] often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental.

But when used in a criminal context it generally means an act done with a bad purpose; without justifiable excuse; stubbornly, obstinately, perversely. The word is also employed to characterize a thing done without ground for believing it is lawful or conduct marked by a careless disregard whether or not one has the right so to act. United States v. Murdock, 290 U.S. 389, 394, 395, 54 S.Ct. 223, 225, 78 L.Ed. 381.

Whatever the grade of the offense the presence of the word "willful" in the definition will carry with it the implication that for guilt the act must have been done willingly rather than under compulsion and, if something is required to be done by statute, the implication that a punishable omission must be by one having the ability and means to perform. In re Trombley, 31 Cal.2d 801, 807, 193 P2d 734, 739.

A willful act may be described as one done intentionally, knowingly, and purposely, without justifiable excuse, as distinguished from an act done carelessly, thoughtlessly, heedlessly, or inadvertently. A willful act differs essentially from a negligent act. The one is positive and the other negative.

Premeditated; malicious; done with evil intent, or with a bad motive or purpose, or with indifference to the natural consequences; unlawful; without legal justification.

18. Applying to the words used in Subsection 475.25(1)(m), Florida Statutes, their usual and customary meaning, it is apparent that to establish a violation of that subsection in this case, Petitioner must show not only that Respondent failed to fully disclose her criminal history, but that she did so

"intentionally, knowingly, and purposely, without justifiable excuse, as distinguished from . . . carelessly, thoughtlessly, heedlessly, or inadvertently." Black's Law Dictionary, Fifth Edition (1979), supra. Here, Respondent's failure to disclose her criminal history reflects a reckless disregard for the specific admonition requiring Petitioner "to verify the expungement or sealing prior to answering "No." As such, her patently incorrect answer is intentional and purposeful. Consequently, Petitioner has demonstrated clearly and convincingly that Respondent violated Subsection 475.25(1)(m), Florida Statutes, as well as the provisions of Florida Administrative Code Rule 61J2-2.027(2) and, therefore, Subsection 475.25(1)(e), Florida Statutes.

19. Florida Administrative Code Rule 61J2-24.001(3)(f) provides that for a violation of Subsection 475.25(1)(e), Florida Statutes, "[t]he usual action of the Commission shall be to impose a penalty from an 8 year suspension to revocation and an administrative fine not to exceed \$5,000."

RECOMMENDATION

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

RECOMMENDED that a final order be entered adopting the foregoing Findings of Fact and Conclusions of Law, and which, for the violations found, Respondent's license be revoked and

that she be charged fees in accordance with Subsection 455.227(3), Florida Statutes.

DONE AND ENTERED this 15th day of July, 2008, in Tallahassee, Leon County, Florida.



JEFF B. CLARK
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 15th day of July, 2008.

ENDNOTE

^{1/} All references herein are to Florida Statutes (2004), unless otherwise noted.

COPIES FURNISHED:

Daniel Villazon, Esquire
Daniel Villazon, P.A.
1420 Celebration Boulevard, Suite 200
Celebration, Florida 34747

Jason W. Holtz, Esquire
Department of Business and
Professional Regulation
400 West Robinson Street, Suite N-801
Orlando, Florida 32801-1757

Thomas W. O'Bryant, Jr., Director
Division of Real Estate
Department of Business and
Professional Regulation
400 West Robinson Street, Suite 802 North
Orlando, Florida 32801

Ned Luczynski, General Counsel
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-0792

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.