

STATE OF FLORIDA  
OFFICE OF FINANCIAL REGULATION

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DIVISION OF  
ADMINISTRATIVE  
HEARINGS

DAVID L. FLEMING,  
Petitioner,

vs.

OFFICE OF FINANCIAL  
REGULATION,

Respondent.

Agency Administrative Proceeding  
No.: 0183-FR-4/08

DOAH Case No.: 08-3080

**FINAL ORDER AND NOTICE OF RIGHTS**

On or about December 10, 2007, Petitioner, David L. Fleming, ("Petitioner") applied to the Office of Financial Regulation ("Office") for licensure as a mortgage broker in the State of Florida. On April 28, 2008, the Office denied this application. Petitioner challenged the denial and the case was referred to the Division of Administrative Hearings ("DOAH"). A hearing was held on September 9, 2008 before Judge Diane Cleavinger, an Administrative Law Judge ("ALJ") with DOAH. On January 6, 2009, the ALJ submitted her Recommended Order to the Petitioner and the Office recommending that Petitioner's license application be denied.

By way of this Final Order, the Office is adopting the Findings of Fact, Conclusions of Law, and Recommendation contained in the ALJ's Recommended Order. A copy of the Recommended Order is attached hereto as Exhibit A.

Petitioner timely filed exceptions to the Recommended Order on January 19, 2009. In this filing, Petitioner argued that he did not receive a copy of the Recommended Order until January 17, 2009 and did not have adequate time to prepare his exceptions.

On January 21, 2009, the Office entered an order granting Petitioner additional time to supplement his exceptions and Petitioner subsequently filed a supplement to his exceptions. The supplement did not raise any new exceptions, but provided record citations for some of the exceptions filed on January 19, 2009. On February 10, 2009, the Office filed a Response to Petitioner's exceptions. This matter is now before the Commissioner as head of the Office for final agency action.

After carefully reviewing Petitioner's exceptions, the Office being authorized and directed to administer Chapter 494, Florida Statutes, hereby enters the following Final Order ruling on all exceptions and adopting the ALJ's Recommended Order. Individual exceptions are discussed in as much detail as warranted. Throughout this order paragraph numbers in parentheses (e.g., ¶ 3) refer to the paragraph number in the Petitioner's January 19th filing where the exception appears. References to the "Finding of Fact No." or "Conclusion of Law No." refers to the paragraph number of the ALJ's Recommended Order.

As set forth below, the ALJ's Recommended Order is adopted and incorporated herein by reference as the Final Order of the Office.

## STATEMENT OF THE ISSUE

The issue is whether the Petitioner's application for licensure as a mortgage broker should be granted.

### LEGAL STANDARD FOR RULING ON EXCEPTIONS

At the outset, Petitioner's exceptions can largely be characterized as a reiteration of his arguments before the Division of Administrative Hearings. Given the nature and content of Petitioner's exceptions, it is useful to address the legal standard that the Office is required to use in reviewing the ALJ's Recommended Order. See § 120.57(k)&(l), Fla. Stat. (2008).

First, all proceedings conducted under the subsection governing ruling on exceptions shall be de novo. § 120.57(k), Fla. Stat. However, the Office may not reject or modify any of the ALJ's findings of fact unless the Office "first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law." § 120.57(1)(l), Fla. Stat. (2008). Competent substantial evidence is "'such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred' or such evidence as is 'sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached.'" Heifetz v. Dep't of Bus. Regulation, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985) (quoting De Groot v. Sheffield, 95 So.2d 912, 916 (Fla.1957)). The Office has no authorization "to re-

weigh the evidence presented, judge the credibility of the witnesses, or otherwise interpret the evidence to fit a desired ultimate conclusion.” Bill Salter Advertising, Inc. v. Dep’t of Transp., 974 So.2d 548, 551 (Fla. 1st DCA 2008); Rogers v. Dep’t of Health, 920 So.2d 27, 30 (Fla. 1st DCA 2005). “In summary, if there is competent substantial evidence to support the findings of fact in the record . . . the agency may not reject them, substitute its findings, or make new findings.” Packer v. Orange County School Bd. 881 So.2d 1204, 1207 (Fla. 5th DCA 2004) (quoting Gross v. Dep’t of Health, 819 So.2d 997, 1001 (Fla. 5th DCA 2002).

Second, with regard to the ALJ’s conclusions of law or interpretation of administrative law, the Office:

may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact.

§ 120.57(1)(f), Fla. Stat. Third, the Office may accept the recommended penalty in the ALJ’s recommended order, but it may not reduce or increase it without a review of the complete record and without stating with particularity its reasons and by citing to the record in justifying the action. Id.

Finally, in ruling on Petitioner’s exceptions, the Office “need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the

exception, or that does not include appropriate and specific citations to the record.” § 120.57(1)(k), Fla. Stat.

### **RULINGS ON EXCEPTIONS**

#### **A. Petitioner’s Preliminary Exception Matters**

1. In his January 19, 2009 Exceptions to the Recommended Order, Petitioner initially argued that he was not afforded a reasonable and timely opportunity to prepare exceptions based on an alleged mailing error by the Clerk of DOAH (§ 1). The Office’s January 21, 2009 order granted Petitioner additional time to supplement his exceptions and Petitioner availed himself of the opportunity to use the additional time to file a supplement. To the extent that this argument can be read as an exception, it is REJECTED.

2. Petitioner takes exception to the ALJ’s preliminary statement that the Office’s “initial denial was based on past application denials” (§ 2). Petitioner is technically correct because the Department of Financial Services (“DFS”) denial of Petitioners’ title insurance agent application was not included in the Office’s initial April 28, 2008 denial letter. On June 27, 2008, the Office filed a motion to amend its denial to include DFS action and his facts surrounding his failure to disclose the action as additional grounds supporting the denial of Petitioner’s application. On July 2, 2008, the ALJ granted this motion. Therefore, Petitioner’s exception is GRANTED only to clarify that the grounds associated with the DFS application denial were added after the Office’s initial denial letter. This modification does not materially alter the ALJ’s Findings of Fact, Conclusions of Law, or the ultimate recommendation that the Office should

deny the Petitioner's application to be a mortgage broker. Moreover, Petitioner offers no argument as to how this clarification would offer him any relief. Aside from this minor clarification, in all other aspects this exception is REJECTED.

#### **B. Petitioner's Exceptions to Findings of Fact**

3. Petitioner challenges Findings of Fact Nos. 3 & 4 wherein the ALJ recited facts about Petitioner's conviction for conspiracy to commit bankruptcy fraud and the referee's report in his disbarment proceedings (§§ 3 & 4). For example, in challenging Finding of Fact No. 4, Petitioner alleges that it was "not true" that he was disciplined based on the "aggravating factors" recited in the referee's report. Petitioner misconstrues this Finding of Fact in making his exception. The ALJ found that in the disbarment proceedings the referee specifically stated that dishonest or selfish motive was a relevant aggravating factor and this is supported by the record. To claim otherwise, ignores the express language contained in the referee's report.

In fact, Petitioner's disjointed arguments against Findings of Fact Nos. 3 & 4 can essentially be distilled into Petitioner's belief that (1) the ALJ either did not consider or use the evidence that he submitted, (2) the evidence against him was not relevant, or (3) the ALJ misconstrued the evidence (§§ 3 & 4). These exceptions amount to a request that the Office improperly reweigh the evidence that the ALJ used in arriving at her findings of fact. As noted above, even if the Office were inclined to disagree with the ALJ's Findings of Fact Nos. 3 & 4, which it is not, the Office does not have the authority to reweigh the evidence. Moreover, the Office finds that Findings of Fact Nos. 3 & 4 are supported by

competent substantial evidence in the record. Therefore, Petitioner's exceptions are REJECTED.

4. Petitioner objects to the Findings of Fact Nos. 5 through 8 in a blanket exception arguing that the denial of his application to be a title insurance agent was irrelevant to the Office's licensing decision (§ 5). As noted above, the Office amended its denial to include the fact that the Petitioner had a license application denied by the Department of Financial Services. Moreover, Petitioner not only failed to report the denial to the Office, he attempted to conceal the denial during in the application process. As specified in the Conclusion of Law No. 26, this type of behavior is, of course, relevant to the decision about whether an individual can be trusted as a licensed mortgage broker. The ALJ's findings are supported by competent substantial evidence in the record. Therefore, this exception is REJECTED.

5. Petitioner challenges Finding of Fact No. 9 alleging that the ALJ did not address his argument that disclosure question 5B on the application is "unintelligible" (§ 6). Petitioner is incorrect. In Finding of Fact No. 11, the ALJ found that the Petitioner should have answered "yes" to the question, which implicitly includes the finding that the question was proper and intelligible. The ALJ also found that the "Petitioner was neither honest with himself or with OFR" and that he materially misrepresented his bar license discipline to OFR.

In footnote 5 in § 6, Petitioner also claims that the application form he filled out had not been adopted as a rule. Petitioner is mistaken. Rule 69V-40.031, Florida Administrative Code, which adopted form OFR-MB-101, was in effect at

the time Petitioner filed his application. This was the form on which he failed to disclose his prior criminal history and administrative actions. Accordingly, this exception is REJECTED.

6. Petitioner challenges Findings of Fact Nos. 11 & 12 complaining that the ALJ did not accept his argument that his later attempts to provide information cured the material misrepresentations on his application (§ 7). It is clear from the Recommended Order that the ALJ considered and rejected Petitioner's rationalizations as having no rational basis. Competent substantial evidence supports the ALJ's Findings of Fact Nos. 11 & 12. This exception is REJECTED.

7. In addition to reiterating prior arguments, Petitioner also takes issue with Finding of Fact No. 12 because he believes it "implies" that Petitioner's subsequent decision to disclose his criminal history and the adverse administrative actions against him were triggered by the Office's request for his fingerprints (§ 8). Notably, the implication referenced by the Petitioner does not appear in this Finding of Fact, which simply states that the Office wrote to the Petitioner on December 14, 2007, to request additional information including a set of fingerprints. Even if such an implication were present in the Finding of Fact, the Office will not entertain what amounts to a request to reweigh the evidence and arrive at an interpretation that is not supported by the record. Competent substantial evidence support the ALJ's finding and this exception is REJECTED.



8. Petitioner challenges Finding of Fact Nos. 13 through 17 arguing that the ALJ failed to make a finding of materiality as to each of his application answers and objecting to the finding that he took measures to conceal the denial of his title agent license application (§§ 9, 10, 11). The objection to the failure to make a finding of materiality as to each of his application answers (§ 9) and the reiteration of his belief that he was under no obligation to report the denial of his title insurance license (§ 11) are without merit.<sup>1</sup> In the Recommended Order, the ALJ discussed the Petitioner's failure to disclose his criminal conviction, his disbarment, and the denial of his application for licensure as a title agent in detail and related those failures to Petitioner's continued and ongoing lack of honesty. The ALJ's findings comply with the essential requirements of the law. Moreover, in support of Finding of Fact Nos. 15 and 16, there was an abundance of evidence that Petitioner intentionally sought to conceal the denial of his application. The evidence included recommendation letters provided to the Office, wherein references to the Petitioner acting as a title agent were redacted. In fact, the Petitioner admitted at the hearing that he intentionally chose not to disclose the title agent's license denial. Competent substantial evidence supported the ALJ's discussion in Findings of Fact Nos. 13 through 17. Hence, each of these exceptions are REJECTED.

9. In his next exception, Petitioner again objects to the ALJ's finding that he admitted that he intentionally chose not to disclose his title agent's license

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<sup>1</sup> As Respondent noted in responding to Petitioner's exceptions, Factual Finding No. 17 may confuse the Office's question 5B with the similar question on the Department of Financial Services title application disclosure. However, any confusion or error has no bearing on the contents of the Factual Finding and does not need to be addressed.

denial calling the ALJ's Finding of Fact No. 18 "subjective opinion" (§ 12). The ALJ's Finding of Fact is not subjective opinion and is supported by competent substantial evidence. Within this exception, Petitioner also alleges that the (1) the ALJ's finding of concealment is "not intellectually honest," (2) that the ALJ and Office's expectation of honesty and trustworthiness "smacks of a society based on autocratic decision making," (3) that everything "proffered by the [Office] is nothing more than an attempt to justify this arbitrary and capricious approach," and (4) that the ALJ's Recommended Order is "no different."

In relating these complaints, which contain little in the way substance, Petitioner demonstrates that he still believes that he has done nothing wrong and that he does not need to disclose material information in applying for licensure. Petitioner's exceptions provide a perfect window into why his appreciation of honesty, truthfulness and integrity should indeed be suspect. As the ALJ noted in Conclusion of Law No. 26:

The consistent and continued misrepresentations of such information by Petitioner is very troubling, especially since the basis for not revealing the required information was more for the convenience of Petitioner and were based on rationalizations that have no factual basis. Such misrepresentations do not demonstrate honesty and violation Section 494.0041(2)(c), Florida Statutes.

Competent substantial evidence supports the ALJ's Finding of Fact No. 18. This exception is REJECTED.

10. Finally, Petitioner argues that in Finding of Fact No. 19 the ALJ erred in distinguishing licensing files introduced by the Petitioner (§ 13). Petitioner does not challenge the factual findings in the paragraph. Rather, he

states that the cases relate to his "constitutional challenge" of the Office's denial based on a purported violation of his equal protection and substantive due process rights. This exception does not even challenge the factual findings made by the ALJ and therefore does not include any viable claim for resolution. This exception is REJECTED.

**C. Petitioner's Exceptions to Conclusions of Law**

11. Petitioner argues generally that the ALJ's Conclusions of Law were incorrect, but fails to identify the challenged conclusions with any specificity (¶¶ 14-20). The Office does not need to address these exceptions. § 120.57(1)(k), Flat. Stat. (stating that "an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record.") In any event, Petitioner's unspecified challenges to the ALJ's Conclusions of Law are cumulative in that they are simply a reiteration and repetition of his exceptions to the ALJ's Findings of Fact.<sup>2</sup>

In Conclusion of Law No. 26, the ALJ references the legal authorities that support the important proposition that honesty, truthfulness, and integrity are attributes that are required for individuals who deal with the public as mortgage brokers. Rather than provide any support in favor of licensure, Petitioner's exceptions clearly demonstrate a continued lack of honesty and these self-

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<sup>2</sup> The exceptions found in ¶¶ 15, 16, 17, 18, & 19, were addressed in rejecting the exceptions found in ¶¶ 5, 9, 13, 6, and 12 respectively.

serving responses verify that he should be disqualified him from being a mortgage broker in this state. Each of these exceptions is hereby REJECTED.

12. Finally, Petitioner references the Recommended Order he prepared and submitted to the ALJ (§ 21). This order was not adopted by the ALJ and for the reasons set forth above it is likewise not adopted by the Office. To the extent that this paragraph can be read as an exception, it is REJECTED.

#### **FINDINGS OF FACT**

13. Based on the foregoing discussion, and subject to the minor clarification in Paragraph 2 above, the Office adopts and incorporates by reference the ALJ's Findings and Fact into this Final Order.

#### **CONCLUSIONS OF LAW**

14. The Office hereby adopts and incorporates by reference the Conclusions of Law set forth in the Recommended Order into this Final Order.

#### **FINAL ORDER**

Having reviewed the record and ruled on each of the exceptions filed by Petitioner in this matter, the recommendation in the Recommended Order is hereby adopted and it is accordingly ORDERED that Petitioner's application to be a licensed mortgage broker in the State of Florida is DENIED.

DONE and ORDERED this 18<sup>th</sup> day of March, 2009, in Tallahassee, Leon County, Florida.


  
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ALEX HAGER, Acting Commissioner  
Office of Financial Regulation

NOTICE OF RIGHTS TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING THE ORIGINAL NOTICE OF APPEAL WITH THE AGENCY CLERK, OFFICE OF FINANCIAL REGULATION, LEGAL SERVICES OFFICE, SUITE 526, FLETCHER BUILDING, 200 E. GAINES STREET, TALLAHASSEE, FLORIDA 32399-0379, AND A COPY, ACCOMPANIED BY FILING FEES PRESCRIBED BY SECTION 35.22, FLORIDA STATUTES, WITH THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, 301 MARTIN LUTHER KING, JR., BOULEVARD, TALLAHASSEE, FLORIDA 32399-1850, OR WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent to Diane Cleavinger, Administrative Law Judge, Division of Administrative Hearings, DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida 32399-3060, and on David Fleming, 493 Cypress Street, Altamonte Springs, FL 32714 by U.S. Mail, on this 18<sup>th</sup> day of March, 2009.



Gregg Riley Morton  
Assistant General Counsel