

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DAVID L. FLEMING, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 08-3080  
 )  
 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 September 9 and 10, 2008, in Gainesville, Florida.

APPEARANCES

For Petitioner: David L. Fleming, pro se  
1653 Bass Avenue  
Seville, Florida 32191

For Respondent: Robert H. Schott, Esquire  
Office of Financial Regulation  
Post Office Box 8050  
Tallahassee, Florida 32314

STATEMENT OF THE ISSUE

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

PRELIMINARY STATEMENT

On April 28, 2008, Respondent, the Office of Financial Regulation (Respondent or OFR) issued a Denial Letter denying Petitioner, David L. Fleming's (Petitioner) application for licensure as a mortgage broker based on Sections 494.0041(1)(f) and 494.0041(2)(a),(c), (i) and (q), Florida Statutes. Specifically, OFR denied Petitioner's application based on alleged material misrepresentations on his application when he answered "No" to questions about his criminal history, past licensure discipline and past application denials.

Petitioner disputed the OFR's denial and timely filed a Petition for Administrative Hearing. Initially, OFR determined that Petitioner did not raise any disputed issues of material fact and set the case for an informal hearing. However, based on some of Petitioner's discovery responses, OFR determined that disputed issues of material fact existed and referred the matter to the Division of Administrative Hearings for purposes of hearing.

Prior to the hearing, OFR twice moved to amend its reasons for denial. In the first motion, it sought to amend the Denial Letter to assert additional grounds under Section 494.0041(2)(c), Florida Statutes (material misstatements on license applications.) The motion was granted. The Second Motion to Amend sought to deny Petitioner's application based on

Emergency Rule 69VER08-1, adopted on August 12, 2008, and involving application denials based on past criminal convictions. The motion was granted. At the hearing, Respondent clarified that OFR raised Rule 69VER08-1 only as evidence of past OFR policy regarding license denial and not as an additional "Rule" basis for such denial.

At the formal hearing, Petitioner testified on his own behalf and called OFR's attorney as a witness. Additionally, Petitioner introduced 12 numbered exhibits into evidence and proffered an additional exhibit. Respondent did not present the testimony of any witnesses, but offered 19 lettered exhibits into evidence, including 3 deposition transcripts.

After the hearing, Petitioner filed a Motion to Supplement Record to introduce four additional exhibits. The motion was granted. Additionally, Petitioner and Respondent filed Proposed Recommended Orders on October 10, 2008.

#### FINDING OF FACTS

1. Petitioner resides in Seville, Florida. He is a single parent with an 18-year-old daughter.

2. Petitioner graduated from law school in 1978 and holds an LLM degree in international tax planning. Petitioner currently is a law clerk and consultant working primarily as an independent contractor for Wealthcare International Title Services, LLC.

3. On April 3, 1998, in the United States District Court, Northern District, Pensacola Division, Petitioner, then a practicing attorney, was convicted of conspiracy to commit bankruptcy fraud for failing to disclose to the bankruptcy court and trustee, \$12,000 in legal fees paid to Petitioner and \$50,000 derived from the sale of inflated assets involved in a bankruptcy estate. The court, commenting on the conviction, wrote:

The evidence, viewed most favorable to the government as it must now be, shows that Fleming was responsible for structuring the sale of 112 Matamoros, arranged for \$50,000 to go to Yost personally, and did not disclose the \$50,000 payment to the bankruptcy court. While the \$50,000 was supposedly given for personal property inside the residence, and the amount was inflated in excess of what even Yost felt was the true value, Fleming asked Yost to prepare a list of items inside the residence to provide support for the price, and later asked Yost to revise the list to add more items. The \$50,000 was placed in Fleming's escrow account, and approximately \$12,000 of the funds were paid to Fleming personally. Fleming and Yost both believed that the residence was part of the bankruptcy estate. On the basis of this evidence, a reasonable fact-finder could find that the evidence established beyond a reasonable doubt that Fleming conspired to knowingly, willfully, and fraudulently conceal the \$50,000 from creditors of Mariner Realty Associates, Inc., and conceal all evidence of the payment of legal fees to Fleming from the bankruptcy trustee and bankruptcy court. (emphasis supplied)

After the conviction, the Florida Supreme Court suspended Petitioner from the practice of law based on the conviction. Later, on September 13, 2001, based on the same facts as the conviction, the Florida Supreme Court disbarred and fined Petitioner for commission of an unlawful act that is contrary to honesty and justice. The disbarment was effective back to 1998 with the ability to apply for readmission after five years.

4. In disbaring Petitioner, the Florida Supreme Court adopted the referee's report. The referee specifically found dishonest or selfish motive to be a relevant aggravating factor and recommended disbarment based on the following ethical rules:

5.11 Disbarment is appropriate when:

a. a lawyer is convicted of a felony under applicable law; or

b. a lawyer engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or

\* \* \*

e. a lawyer attempts or conspires or solicits another to commit any of the offenses listed in sections (a)-(d); or

f. a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

5. On March 14, 2007, prior to the present license application at issue here, Petitioner sought licensure as a resident title insurance agent with the Department of Financial Services.

6. On the March 14th application, Petitioner disclosed his criminal conviction. However, he answered "No" to the question that asked:

Have you ever had a professional license subjected to any of the following actions by any state agency or public authority or any other regulation authority in any jurisdiction:

Revocation in Florida less than two years ago.

Revocation in another state at any time or in Florida more than two years ago

Suspension

Placed on probation

Administrative fine or penalty levied

Cease and desist order entered.

The question is clear and capable of being understood by a reasonable person. As indicated, the Florida Supreme Court had suspended, disbarred and assessed a fine against Petitioner. Clearly, Petitioner should have responded "Yes" to the question. However, Petitioner responded "No"; and therefore, Petitioner failed to disclose this very material information to the Department in his application.

7. On May 22, 2007, unaware of the bar's disciplinary actions and citing the criminal conviction, the Department denied the title insurance agent license application. Petitioner requested an informal hearing on the Department's denial. An informal hearing was begun on August 31, 2007, but the hearing officer determined that material issues of fact existed and ended the hearing so that the case could be forwarded to the Division of Administrative Hearings.

8. On September 1, 2007, Petitioner withdrew his request for a hearing acknowledging that the Department's denial of his title insurance agent license application would become final.

9. On December 10, 2007, Petitioner filed an online application for licensure as a mortgage broker with OFR. Question 5A of that application asked:

Have you pleaded nolo contendere, been convicted, or found guilty, regardless of adjudication, of a crime involving fraud, dishonest dealing, or any other act of moral turpitude? YES\_\_\_ NO\_\_\_

Petitioner checked "NO." Additionally, Question 5B of the application 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 \_\_\_

Similarly, Petitioner checked "NO" to Question 5B.

10. On July 27, 2008, the Respondent filed an Amended Denial Letter, denying Petitioner's application for licensure as a mortgage broker. As grounds for denial under Section 494.0041(2)(a), (c), (i) and (q), the letter stated in relevant part:

(a) On or about April 3, 1998, you were convicted on conspiracy to commit bankruptcy fraud. This conviction resulted from your structuring the sale of property located at 112 Matamoros Drive, Pensacola Beach, Florida, so that \$50,000, including your \$12,000 fee, would be concealed from creditors and the bankruptcy court. This was a crime involving dishonesty and/or moral turpitude within the meaning of section 494.0041(2)(a) and an act of fraud, misrepresentation, concealment, and dishonest dealing in a business transaction within the meaning of section 494.0041(2)(q). Although your civil rights have been restored, this criminal act was a felony and directly related to the business license being sought, within the meaning of section 112.011(1)(b), Florida Statutes.

(b) On July 23, 1998, The Florida Supreme Court, on being advised of the conviction discussed at (a) above, suspended you from the practice of law.

(c) On September 13, 2001, The Florida Supreme Court disbarred you for commission of an act that is unlawful or contrary to honesty and justice. This constituted having a professional license, or the equivalent revoked for dishonest dealing within the meaning of section 494.0041(2)(i). Further, you were fined \$933.90.

(d) On or about March 17, 2007, you applied to the Florida Department of Financial Services Bureau of Licensing ("Bureau") for a resident title insurance agent license. On that application, you answered "No" to



the question that asked, *inter alia*, if any regulatory authority had revoked and/or suspended any professional license or had fined you. In answering "No," you made a material misrepresentation on an initial application within the meaning of Section 494.0041(2)(c), Florida Statutes.

(e) On or about May 22, 2007, the Bureau issued a Notice of Denial to you. That May 22 Notice advised you that you were being denied licensure because of having been found guilty of a felony. You responded by Petitioning for a Hearing. On August 31, 2007, at the informal hearing, the Bureau further asserted, as grounds for denial, the bar disciplinary actions discussed at (b) and (c) above. On September 1, 2007, you withdrew your Petition for Hearing.

(f) You answered "No" to Question #5A, Florida mortgage broker license application, that asked if you have pleaded nolo contendere to or have been convicted or found guilty of a crime involving fraud, dishonest dealing, or any act of moral turpitude.

(g) You answered "No" to Question #5B, on your Florida mortgage broker license application, that asked if you have had a professional license denied, suspended or revoked in a matter involving fraud, dishonest dealing, or any act of moral turpitude. In fact, during the Office's processing of the application, you concealed that you had been denied a resident title insurance agent license as described at (d) and (e) above.

(h) In so answering Questions #5A and 5B, you made material misrepresentations on your initial mortgage broker license application within the meaning of Section 494.0041(2)(c), Florida Statutes.

11. Petitioner attributes his "NO" responses to questions 5A and 5B to the Respondent's requirement that applications be submitted on-line. He asserts that the on-line procedure

required a "yes" or "no" answer that did not allow explanation or a qualified answer. Specifically, Petitioner thought he should be permitted to qualify his answer based on the fact that he was convicted of conspiracy to commit bankruptcy fraud and not the related substantive charge of bankruptcy fraud.

However, the facts found by both the federal court and the Florida Supreme Court clearly established that both courts considered the conspiracy conviction as one involving fraud, dishonesty and misrepresentation. Clearly, Petitioner was aware of both courts' findings and, based on such findings, should have answered "Yes" to questions 5A and 5B. In answering "No", Petitioner was neither honest with himself or with OFR and materially misrepresented both his prior conviction and his bar license discipline to OFR.

12. On December 14, 2007, OFR wrote a letter to Petitioner asking for additional information and documentation about his application, including a set of fingerprints.

13. Petitioner responded by letter dated January 28, 2008. Petitioner's January 28th letter disclosed his criminal conviction and subsequent disbarment. In addition to his fingerprints, Petitioner attached a copy of the 1998 criminal judgment and the Supreme Court order disbarring Petitioner. Petitioner contends that his January 28th correspondence cured his untruthful responses to questions 5A and 5B.

14. However, the letter did not cure Petitioner's misrepresentation of either his conviction and subsequent suspension and disbarment. Nowhere in the letter does it reference the Department of Financial Services' denial of Petitioner's title insurance agent application. The title insurance license was, clearly, a license denial within the meaning of question 5B of Petitioner's mortgage broker license application. Petitioner should have disclosed the denial of that license to OFR when he completed the online mortgage broker application and should have disclosed the denial when he had a second opportunity to disclose in his January 28th letter.

15. In fact, Petitioner took measures to conceal the Department's title agent license denial. In applying for the title insurance agent license, Petitioner submitted five letters of recommendation. Two of these letters, from Christopher Cathcart and Karen Powell Ward, made a passing reference to Petitioner's fitness to act as a title agent. Another, from Steven Andrews made two prominent references to the pending title agent application.

16. Petitioner submitted the same Cathcart and Ward letters to the OFR in support of the mortgage broker license application. However, the references to Petitioner acting as a title agent were redacted in both letters. Petitioner did not

submit the Andrews letter with the prominent references to title agency in support of his mortgage broker license application.

17. Petitioner testified that he did not believe that question 5B applied to the title insurance agent license denial. However, the question asks specifically whether the applicant has had a license denied within the past two years. The evidence demonstrated that Petitioner was denied a title agent's license within the relevant timeframe and that that information should have been disclosed by Petitioner.

18. In fact, Petitioner admitted that he intentionally chose not to disclose the title agent's license denial.

Petitioner stated that:

I chose not to voluntarily disclose anything having to do with that license application because I wanted my mortgage broker license application to be considered on its own merits and not fall into the trap of monkey-see/monkey-do type of approach from the Office of Financial Regulation when they saw that the Department of Financial Services had taken that action on the application.

Petitioner's deliberate concealment of the Department's license denial reveals an attitude that he doesn't need to disclose material information when he doesn't want to. At best, Petitioner's appreciation of honesty, truthfulness and integrity is suspect. It is Petitioner's consistent and continued failure to recognize when he should reveal facts about his past that leads to the conclusion that Petitioner has failed to establish

that he has the character and honesty necessary to be trusted to hold a mortgage broker's license. Lacking such evidence, Petitioner's application should be denied.

19. Finally, Petitioner introduced five licensure files where the applicant's were granted licensure or probationary licensure after conviction for serious felony offenses. In four of the five licensing files relied on by Petitioner, the applicant answered "YES" to question 5A disclosing his or her criminal history. In the fifth case, the applicant answered "NO" to question 5A. However, OFR did not act on the applicant's file within the 90-day deadline imposed by Section 120.60(1), Florida Statutes, for such action. Based on the deemer provision in Chapter 120, Florida Statutes, the applicant received his license. All of these files are distinguishable from the facts in Petitioner's case. At least four of the files were, from the outset, honest in their answers to the questions on the application regarding the applicant's criminal history. Given these differences, none of these files form a precedential basis for a grant of licensure in this case.

#### CONCLUSIONS OF LAW

20. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2008).

21. OFR is the agency in the State of Florida responsible for administration and enforcement of Chapter 494, Florida Statutes. Dep't of Banking and Fin. v. Osborne Stern & Co., 670 So. 2d 934 (Fla.1996).

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

23. 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:

(a) Pleading nolo contendere to, or having been convicted or found guilty of, regardless of whether adjudication was withheld, a crime involving fraud, dishonest dealing, or any act of moral turpitude.

\* \* \*

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

\* \* \*

(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.

24. Petitioner is an applicant for a mortgage broker's license. Accordingly, as the party asserting the affirmative of an issue, Petitioner carries the burden of proof to establish by a preponderance of the evidence that his application for licensure should be granted. Department of Transportation v. J.W.C. Company Inc., 396 So. 2d, (Fla.1st DCA 1981); Osborne Stern Co., supra; and Pershing Industries, Inc. v. Department of Banking and Finance, 591 So. 2d (Fla.1st DCA 1991).

25. The facts surrounding Petitioner's conviction for conspiracy to commit bankruptcy fraud and the findings of the federal court and the Florida Supreme Court clearly demonstrate that Petitioner's conviction for the same constitutes a crime involving fraud, dishonest dealing, or moral turpitude within the meaning of Section 494.0041(2)(a) and (q), Florida Statutes. Unquestionably, the bar disciplinary actions and the Department of Financial Services' denial of Petitioner's title insurance agent license application were actions against a license. Failure to disclose those denials violate Section 494.0041(2) (a), (i) and (q), Florida Statutes. Watts v. Dep't of Banking

and Fin., DOAH Case No. 97-2270, 1997 WL 1053357 at ¶ 30 (Fla. DOAH 1997) (Recommended Order) (concluding that the denial of Petitioner's application for admission to the Florida Bar was grounds for denial of the mortgage broker license under the provisions of § 494.0041(2)(i)).

26. "Honesty, truthfulness and integrity are attributes 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) and Hester v. Office of Fin. Regulation, DOAH Case No. 05-2107, 2005 WL 3733863 at ¶ 55 (Fla. DOAH 2005.) In that regard, Petitioner's failure to disclose the bar disciplinary actions on his March 2007 title insurance agent license application and his answers to questions 5A and 5B on his December 2007 mortgage broker application were material misstatements of fact. 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 violate Section 494.0041(2)(c), Florida Statutes.



27. Petitioner's untruthful answers to disclosure questions reveal a lack of honesty, integrity and trustworthiness. Starr v. Department of Business and Professional Regulation, 729 So. 2d 1006, 1007 (Fla. 4th DCA 1999)(noting that applicant should have answered questions regarding criminal history affirmatively and noting that the ALJ rejected the applicant's explanation that she thought the question only applied to felonies); Walker v. Department of Business and Professional Regulation, 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). The repeated unwillingness of Petitioner to be forthcoming in applications 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. Fonseca v. Department of Juvenile Justice, 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(Fla. DOAH 1981) (observing that, "Petitioner has failed to demonstrate rehabilitation when

he continues to rely upon dishonesty when he deems it appropriate"); Florida Board 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 6th day of January, 2009, in Tallahassee, Leon County, Florida.

*Diane Cleavinger*

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DIANE CLEAVINGER  
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Filed with the Clerk of the  
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this 6th day of January, 2009.

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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.