

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARTA COMAS,)
)
 Petitioner,)
)
 vs.) Case No. 08-4944
)
 OFFICE OF FINANCIAL REGULATION,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on December 17, 2008, by video teleconference, with the parties appearing in Miami, Florida, before Patricia M. Hart, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, who presided in Tallahassee, Florida.

APPEARANCES

For Petitioner: O. Frank Valladares, Esquire
Law Offices of Frank Valladares
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For Respondent: Robert H. Schott, Esquire
Office of Financial Regulation
Post Office Box 8050
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STATEMENT OF THE ISSUE

Whether the Petitioner's application for licensure as a mortgage broker should be granted or denied.

PRELIMINARY STATEMENT

In a Notice of Denial of Application dated August 6, 2008, the Office of Financial Services ("Office") notified Marta Comas of its intent to deny her application for licensure as a mortgage broker. The Office identified the following bases for its intended denial: Section 494.0041(2)(b), (f), (h), (i), (j), (k), (p), (q), and (u)2., Florida Statutes (2008),¹ and Florida Administrative Code Rule 69V-40.031(2). The factual allegations set forth in the Notice of Denial are as follows:

a. On or about June 25, 2001, the Final Order entered in case number 7074-F-12/99 revoked your previous mortgage broker license. The revocation was affirmed on appeal in Comas v. Department of Banking and Finance, 820 So.2d 1088 (Fla. 3d DCA 2002), which found:

Appellant's conduct in altering a customer check, depositing it in her personal account, and later writing a letter to the customer on company letterhead falsely stating that the funds were in the hands of the title company jeopardized not only the customer, but also her employer and the title company. This conduct violates the numerous statutory provisions referenced in the Final Order, casts considerable doubt on either Appellant's competence, integrity, or both, and clearly warrants license revocation.

The Final Order entered in case number 7074-F-12/99 established grounds for denial pursuant to subsections 494.0041(2)(b)(f)(h)(p)(q), 494.0025(4)(a-c), and 494.0025(5), Florida Statutes. Further, the revocation is a ground for

denial within the meaning of subsection 494.0041(2)(i) and (u)2.

b. On or about March 17, 2003, the Office of Financial Regulation addressed your new mortgage broker license application by mailing you a Notice of Denial of Application. The denial was based on the fact that you had been the subject to [sic] the above mentioned Final Order which revoked your license and because each violation as stated in the Final Order provided grounds for denial of your application. On or about September 30, 2003, the Division of Administrative Hearings, in [DOAH] case number 03-1738, made an independent recommendation that the Office deny your license application based on your failure to demonstrate rehabilitation. Consequently, on or about October 27, 2003, a Final Order was entered denying your Mortgage Broker License application. The license denial is a ground for denial within the meaning of subsection 494.0041(2)(i) and (u)2.

c. On or about July 23-24, 2003, in DOAH case number 03-1738, Marta Mantelon Comas v. Office of Financial Regulation, you gave untruthful testimony in support of your petition seeking licensure as a Mortgage Broke The untruthful testimony violated section 494.0025(5) and is a ground for denial pursuant to 494.0041(2)(p).

d. You violated Final Order number 0044-F-3/03 by violating the terms as set forth in clauses 6.1.1 and 6.1.2 of the Stipulation and Consent Agreement incorporated by reference in the Final Order. This is a ground for denial within the meaning of subsection 494.0041(2)(j).

e. Based on the facts discussed at a. through d., immediately above, on December 18, 2006, the Office of Financial Regulation entered a Final Order, in case number 1575-

F-7/06, denying your then pending mortgage broker license application. The license denial is a ground for denial within the meaning of subsection 494.0041(2)(i) and (u)2.

f. As recent [sic] as April 17, 2008, you continued to violate clause 6.1.1 of the Stipulation and Consent Agreement that you signed on December 14, 2003 and that was incorporated by reference in the Final Order entered in case number 0044-F-3/03. This is a ground for denial within the meaning of subsection 494.0041(2)(j).

Mrs. Comas timely requested a formal administrative hearing, and the case was transmitted to the Division of Administrative Hearings for assignment of an administrative law judge.

Pursuant to Notice, the final hearing was held on December 17, 2008.

Prior to the hearing, the Office and Mrs. Comas submitted motions in limine seeking to exclude certain evidence. Both motions were denied without prejudice to renew the objections if and when the evidence identified in the motions was offered at the formal hearing. Also, as a preliminary matter at the final hearing, the Office abandoned two of its factual allegations for license denial: that Mrs. Comas had acted as a mortgage broker in violation of a Stipulation and Consent Agreement with the Office; and that Mrs. Comas had failed to provide high school graduation information, as required by Florida Administrative Code Rule 69V-40.031(2). Accordingly, the charge that

Mrs. Comas violated Florida Administrative Code Rule 69V-40.031(2) was withdrawn by the Office and will not be addressed in this Recommended Order.

At the formal hearing, Mrs. Comas testified in her own behalf, and Petitioner's Exhibits 1, 2, 4, 8, 13, and 14 were offered and received into evidence. Petitioner's Exhibits 13 and 14 consist of the transcripts of the depositions of Patricia Caminero and Annette Torres, respectively, which were received in lieu of live testimony. The Office called no witnesses, and Respondent's Exhibits A, B, C, D, E, H, I, L, N, P, Q, and Y were offered and received into evidence. Respondent's Exhibit E was offered for the limited purpose of showing that Mrs. Comas responded to a consumer complaint posted on an Internet website and was received into evidence only for this limited purpose. Respondent's Exhibit R, consisting of the two-volume transcript of the proceedings in DOAH Case No. 03-1738 was offered into evidence but was rejected; the Office proffered the document.

The one-volume transcript of the proceedings was filed with the Division of Administrative Hearings on January 6, 2009, and the parties timely filed proposed findings of fact and conclusions of law, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing and on the entire record of this proceeding, the following findings of fact are made:

1. The Office is the state agency responsible for regulating mortgage brokerage and mortgage lending and for licensing mortgage brokers. §§ 494.0011(1); 494.0033(2), Fla. Stat.

License revocation and criminal prosecution

2. The Office's predecessor, the Department of Banking and Finance ("Department"), issued a mortgage broker's license to Mrs. Comas in 1997. Mrs. Comas worked as a mortgage broker with Miami Mortgage Lenders until 1999, when she left her employment with that company after she was involved in what will be referred to as "the Sipple transaction."

3. The Department initiated disciplinary action against Mrs. Comas's mortgage broker's license, and, because Mrs. Comas stipulated to the material facts of the Sipple transaction, an informal administrative hearing was held before a hearing officer appointed by the Department. The Department entered a final order revoking Mrs. Comas's mortgage broker's license on June 25, 2001, which was upheld on appeal by the Third District Court of Appeal in Comas v. Department of Banking and Finance, 820 So. 2d 1088 (Fla. 3d DCA 2002).

4. The material facts of the Sipple transaction and the basis for the revocation of Mrs. Comas's mortgage broker's license were set out by the district court in Comas, which quoted the Final Order with approval, as follows:

"Appellant's conduct in altering a customer check, depositing it in her personal account, and later writing a letter to the customer on company letterhead falsely stating that the funds were in the hands of the title company jeopardized not only the customer, but also her employer and the title company. This conduct violates the numerous statutory provisions referenced in the Final Order, casts considerable doubt on either Appellant's competence, integrity, or both, and clearly warrants license revocation."

5. Criminal charges were filed against Mrs. Comas as a result of her actions in the Sipple transaction. The information filed against Mrs. Comas, and all counts thereof, was dismissed by order of the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, in April 2002. Denials of applications for licensure as a mortgage broker subsequent to revocation

6. In October 2002, Mrs. Comas applied for licensure as a mortgage broker. The Office notified her that it intended to deny her application in a Notice of Denial dated March 17, 2003. Mrs. Comas requested an administrative hearing, and the case was transmitted to the Division of Administrative Hearings and assigned DOAH Case No. 03-1738. A recommended order was entered

on September 30, 2003, in which the administrative law judge found that Mrs. Comas failed to establish that she was rehabilitated and recommended that Mrs. Comas's application be denied. The Office entered a final order in which it adopted the findings of fact and conclusions of law in the recommended order, and denied Mrs. Comas's application for licensure as a mortgage broker.

7. Among the findings of fact made in the Recommended Order in DOAH Case No. 03-1738 and adopted in the Office's Final Order was a finding that Mrs. Comas had failed to make restitution to the owner of Miami Mortgage Lenders, who had paid Ms. Sipple the monies that Mrs. Comas had improperly deposited in her personal account.

8. On March 10, 2006, Mrs. Comas again applied to the Office for licensure as a mortgage broker. In a Notice of Denial of Application dated November 9, 2006, the Office notified Mrs. Comas that it intended to deny her application. Mrs. Comas did not request an administrative hearing, and the Office entered a final order denying the application on December 18, 2006. The Office incorporated into the final order the factual bases set forth in the November 9, 2006, Notice of Denial of Application, which were virtually identical to the factual bases set forth in paragraphs a. through d. of the Notice of Denial at issue herein.

RPM Lenders, Inc. and related companies

9. In 1997, Mrs. Comas and her husband, Rolando Comas, founded RPM Lenders, Inc. ("RPM Lenders"). Mrs. Comas worked as a mortgage broker with RPM Lenders from the time she left her employment at Miami Mortgage Lenders in 1999 until her mortgage broker's license was revoked in 2001. Mrs. Comas continued working for RPM Lenders after her mortgage broker's license was revoked in 2001.² RPM Lenders shared office space with RPM Systems, a computer company which set up computer networks and distributed computers, and it also shared office space with RPM Loans and Realty, which was created in 1999 or 2000 to handle real estate transactions.

10. On or about December 29, 2003, Mr. Comas and Mrs. Comas, on behalf of RPM Lenders, signed a Stipulation and Consent that was incorporated into a final order entered by the Office on December 30, 2003. In the Stipulation and Consent, it was recited that Mrs. Comas was the sole owner and president of RPM Lenders until May 14, 2003. In paragraph 6.1.1 of the Stipulation and Consent, Mrs. Comas agreed that she would "not become a mortgage broker, principal broker, principal representative, owner, officer or director of R.P.M. Lenders, Inc."

11. From 2004 through April 17, 2008, Mrs. Comas was the corporate secretary for RPM Lenders until it ceased business in

2007, when its name was changed to ROC Lenders, Inc. ROC Lenders, Inc., never did any business, but Mrs. Comas nonetheless continued to serve as that company's corporate secretary until her name was deleted as the corporate secretary pursuant to a filing with the Florida Secretary of State dated April 17, 2008.³

12. At the times material to this proceeding, Mrs. Comas managed RPM Lenders, RPM Loans and Realty, and RPM Systems. Her title with RPM Lenders and RPM Loans and Realty was "Finance Manager," and her duties included the general daily management responsibilities of an office manager, such as ensuring that office equipment was repaired and maintained and ordering office supplies, as well as duties that included customer support, marketing and advertising, developing and implementing quality control procedures, preparing financial statements, handling accounts receivable and accounts payable, reconciling all bank accounts, reviewing all funded files, and attending all of the closings. Mrs. Comas was paid a management fee for her services as Financial Manager and Office Manager for RPM Lenders and RPM Loans and Realty.

13. In providing customer support for RPM Lenders and RPM Loans and Realty, Mrs. Comas responded to customer complaints on behalf of the brokers employed by those companies, reviewing

files and attempting to resolve problems and disagreements between customers and brokers.

14. RPM Loans and Realty was created in 1999 or 2000 "for realty purposes," and Mrs. Comas began working with RPM Loans and Realty as a real estate associate beginning in March 1999. Mrs. Comas continued to work with RPM Loans and Realty both as manager and as a real estate associate up to the time of the final hearing.⁴

Rehabilitation

15. As part of her practice as a real estate associate, Mrs. Comas accepts deposits from buyers and transmits them to title companies.⁵ Mrs. Comas's license as a real estate associate was current at the time of the final hearing, and it has never been the subject of disciplinary action.

16. In a letter dated November 12, 2008, to Sherry Sipple, the person whose check Ms. Comas altered and deposited in her personal bank account, Mrs. Comas denied having altered the check, stating that her name was placed on the check by someone else. Mrs. Comas did not mention in the letter her depositing Ms. Sipple's check in her personal bank account, and Mrs. Comas blamed Ms. Sipple and Ms. Sipple's brother for what she called a "misunderstanding," stating that, because Ms. Sipple and Ms. Sipple's brother went to the closing on the subject property without Mrs. Comas, she was unable to deliver to the title

company the money Ms. Sipple had entrusted to her. Mrs. Comas apologized to Ms. Sipple "for what happened," but then asked that she give Mrs. Comas's attorney a "statement of acceptance of this BIG MISUNDERSTANDING."⁶

17. Mrs. Comas telephoned Mark Mazis, her employer at Miami Mortgage Company, and apologized to him for "what happened."⁷

18. Mrs. Comas acknowledged in her testimony at the final hearing that she did something wrong, although she insisted that she did not intend to steal Ms. Sipple's money by placing it in her personal bank account but intended only to expedite Ms. Sipple's closing.

19. Since her license was revoked in 2001, Mrs. Comas has contributed to charities and attends church approximately twice a month.

Summary

A. The Sipple transaction

20. The evidence presented by the Office in the form of the opinion of the Third District Court of Appeal in Comas v. Department of Banking and Finance establishes conclusively that, in 1999, Mrs. Comas committed fraud, misrepresentation, deceit, or incompetence in a mortgage financing transaction; that Mrs. Comas failed to deliver funds to her customer that Mrs. Comas was not entitled to retain; and that Mrs. Comas

misappropriated the customer's check by depositing it in her personal account.

B. Untruthful testimony in DOAH Case No. 03-1738

21. The evidence presented by the Office is not sufficient to support a finding of fact that Mrs. Comas gave untruthful testimony in a previous administrative proceeding. In the Notice of Denial dated August 6, 2008, the Office stated as one of the factual grounds for its denial of Mrs. Comas's application for a mortgage broker's license that Mrs. Comas had testified untruthfully at the final hearing in DOAH Case No. 03-1738. This allegation was apparently based on several findings of fact in the Recommended Order which were referenced in the Office's Proposed Recommended Order in the instant case, as follows:

5. At the July 23, 24[, 2003] formal hearing three issues were litigated – Mrs. Comas's claims about the circumstances of the Sipple transaction, Mrs. Comas's claim that she had paid restitution, and her claim that she had apologized to the victims, Sherry Sipple (now Sherry Mercugliano) and Marc Mazis. (Exhibit Q) On these three claims, Mrs. Comas's testimony conflicted with that of the victims. (Id.)

6. The Administratively [sic] Law Judge weighed the conflicting testimony and determined:

18. Through the time of the hearing, **Comas falsely claimed** the transaction failed because Sipple

was dissatisfied with the interest rate Comas was able to obtain. This testimony is rejected in favor of Sipple's much more convincing explanation that she rejected the balloon payment Comas proposed, insisting upon the fixed rate which she had required from the beginning.

* * *

20. For all of the trouble Comas caused Sipple and Mazis, she has never apologized to them. *Although Comas testified to the contrary on that point, her self-serving testimony is not credible.*

* * *

22. Taking into account the entire record, and having had the opportunity to view the demeanor, credibility, ability to perceive facts, knowledge of the facts and circumstances of the events to which they testified, and motive to testify, of each of the witnesses in close and stressful quarters, the conclusion is inescapable that *the victims' version of events is entirely consistent with the truth. To the extent that victims' recollections or characterizations of material events differ from those of Comas and her witnesses, the testimony of the victims is credited.*

(Emphasis added.) (Id.) Consequently, Petitioner made false claims and testified untruthfully at the July 23-24, 2003 formal hearing.

22. The discussions in the quoted paragraphs are not findings of fact regarding the truth or falsity of Mrs. Comas's testimony. Rather, the Administrative Law Judge was assessing the quality and quantity of the evidence presented by the parties as a predicate to making findings of fact regarding the issue of whether Mrs. Comas had established rehabilitation. The Administrative Law Judge's assessment that Mrs. Comas's testimony was not as credible or as persuasive as the conflicting testimony of other witnesses was an assessment of the weight of the evidence and the credibility of the witnesses made by the Administrative Law Judge in order to determine which conflicting testimony and evidence is the more persuasive.

23. Although the Administrative Law Judge included in paragraph 18 of the Recommended Order in DOAH Case No. 03-1738 a statement that Mrs. Comas made a "false" claim in her testimony, it is clear from a reading of the entire paragraph that the Administrative Law Judge found Ms. Sipple's version of the events more credible. Indeed, an Administrative Law Judge would be acting improperly if he or she were to make a finding of fact that a party's or witness's testimony was untruthful or false because the truth or falsity of evidence is not at issue in an administrative proceeding. Such a finding would amount to a finding that the party or witness had committed perjury, which

cannot be litigated in an administrative forum but is, rather, subject to criminal prosecution. See Ch. 837, Fla. Stat.

C. The Office's denials of Mrs. Comas's applications for licensure subsequent to the revocation of her license

24. The evidence presented by the Office establishes that it denied Mrs. Comas's applications for licensure as a mortgage broker in 2003 and 2006. The 2003 denial was based on a Final Order in which the Office, adopting the findings of fact and conclusions of law in the Recommended Order in DOAH Case No. 03-1738, found that Mrs. Comas had failed to establish that she had rehabilitated herself since the license revocation. The 2006 denial referenced, among other grounds, the denial of her application for licensure in 2003 for fraud and dishonest dealing. The Office's denials of Mrs. Comas's previous applications for licensure cannot, however, serve as an independent basis for denial of the application at issue herein. Were the previous denials sufficient of themselves to provide a basis for denying Mrs. Comas's future applications, the Office could perpetuate the denial of Ms. Comas's future applications indefinitely without regard to any efforts of Mrs. Comas to prove herself entitled to licensure.

D. Mrs. Comas's service as an officer of RPM Lenders

25. The evidence presented by the Office is sufficient to establish that Mrs. Comas violated a final order of the Office

by serving as an officer of RPM Lenders and its successor company, ROC Lenders, Inc., subsequent to signing a stipulation in December 2003 averring that she would not serve as a corporate officer of RPM Lenders. Mrs. Comas's role in responding customer complaints about the service provided by mortgage broker employed by RPM Lenders does not, however, rise to the level of acting as an officer of the corporation.⁸

E. Rehabilitation

26. The evidence presented by Mrs. Comas is not sufficient to establish that she has rehabilitated herself in the 10 years that have elapsed since the Sipple transaction. Although she attends church and contributes to charities, she presented no evidence of any other community service.

27. The lack of any disciplinary action against her real estate associate's license since it was issued is a factor in Mrs. Comas's favor, but she failed to present any evidence regarding the number of real estate transactions she handles, and it was, therefore, not possible to assess the frequency with which she handled the funds of others in the context of real estate transactions.

28. Other than her testimony about the November 2008 conversation with Mr. Mazis, Mrs. Comas presented no evidence with respect to her apology to him or to any acknowledgment she

made to him that she had acted improperly in the Sipple transaction.

29. Mrs. Comas's letter of apology to Ms. Sipple consisted primarily of her attempts to cast her actions in the Sipple transaction in a light favorable to herself, to excuse her actions as efforts to assist Ms. Sipple, and to blame others, including Ms. Sipple, for the incident. Although Mrs. Comas expresses remorse for what happened, she does not accept responsibility for her actions.

CONCLUSIONS OF LAW

30. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

31. Mrs. Comas has applied for licensure as a mortgage broker, and she, therefore, has the burden of proving by a preponderance of the evidence that she meets all the requirements for issuance of the license. See Department of Banking & Fin. v. Osborne Stern, 670 So. 2d 932, 934 (Fla. 1996)("[W]hile the burden of producing evidence may shift between the parties in an application dispute proceeding, the burden of persuasion remains upon the applicant to prove her entitlement to the license."); § 120.57(1)(j), Fla. Stat. ("Findings of fact shall be based upon a preponderance of the

evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute").

32. The preponderance of the evidence standard requires proof by "the greater weight of the evidence," Black's Law Dictionary 1201 (7th ed. 1999), or evidence that "more likely than not" tends to prove a certain proposition. See Gross v. Lyons, 763 So. 2d 276, 289, n.1 (Fla. 2000)(relying on American Tobacco Co. v. State, 697 So. 2d 1249, 1254 (Fla. 4th DCA 1997), quoting Bourjaily v. United States, 483 U.S. 171, 175 (1987)).

33. Section 494.0033, Florida Statutes, sets forth the criteria for licensure as a mortgage broker in Florida, in pertinent part as follows:

(2) Each initial application for a mortgage broker's license must be in the form prescribed by rule of the commission. The commission may require each applicant to provide any information reasonably necessary to make a determination of the applicant's eligibility for licensure. The office shall issue an initial license to any natural person who:

(a) Is at least 18 years of age and has a high school diploma or its equivalent.

(b) Has passed a written test adopted and administered by the office, or has passed an electronic test adopted and administered by the office or a third party approved by the office, which is designed to determine competency in primary and subordinate mortgage financing transactions as well as to test knowledge of ss. 494.001-

494.0077 and the rules adopted pursuant thereto. . . .

(c) Has submitted a completed application and a nonrefundable application fee of \$195. An application is considered received for purposes of s. 120.60 upon receipt of a completed application form as prescribed by commission rule, a nonrefundable application fee of \$195, and any other fee prescribed by law.

(d) Has filed a complete set of fingerprints for submission by the office to the Department of Law Enforcement or the Federal Bureau of Investigation for processing. . . .

(3) Any person applying after July 1, 1992, must have completed 24 hours of classroom education on primary and subordinate financing transactions and the laws and rules of ss. 494.001-494.0077 to be eligible for licensure. The commission may adopt rules regarding qualifying hours.

(4) Notwithstanding the provisions of subsection (1), it is a ground for denial of licensure if the applicant has committed any violation specified in ss. 494.001-494.0077 or has pending against her or him any criminal prosecution or administrative enforcement action, in any jurisdiction, which involves fraud, dishonest dealing, or any other act of moral turpitude.

34. In its Notice of Denial, the Office did not contend that Mrs. Comas failed to meet the criteria set out in Section 494.0033(2), Florida Statutes, and it will be presumed that Mrs. Comas meets the requirements qualifications for licensure set forth in Section 494.0033(2), Florida Statutes.

35. Although the Office did not specifically cite the statute, it is clear from the Notice of Denial that the Office based its preliminary decision to deny Mrs. Comas's application on Section 494.0033(4), Florida Statutes, and the Office identified the following statutory grounds for its preliminary decision: Section 494.0041(2)(b), (f), (h), (i), (j), (k), (p), (q), and (u)2., Florida Statutes, and Florida Administrative Code Rule 69V-40.031(2). The Office has withdrawn as grounds Section 494.0041(2)(k), Florida Statutes, and Florida Administrative Code Rule 69V-40.031(2), and those grounds will not be addressed herein.

36. Section 494.0041, Florida Statutes, provides in pertinent part:

(1) Whenever the office finds a person in violation of an act specified in subsection (2), it may enter an order imposing one or more of the following penalties against the person:

* * *

(f) Denial of a license or registration.

(2) Each of the following acts constitutes a ground for which the disciplinary actions specified in subsection (1) may be taken:

* * *

(b) Fraud, misrepresentation, deceit, negligence, or incompetence, in any mortgage financing transaction.

* * *

(f) Failure to account or deliver to any person any property that has come into her or his hands and that is not her or his property or that she or he is not in law or equity entitled to retain, under the circumstances and at the time which has been agreed upon or is required by law or, in the absence of a fixed time, upon demand of the person entitled to such accounting and delivery.

* * *

(h) Any misuse, misapplication, or misappropriation of personal property entrusted to her or his care to which she or he had no current property right at the time of entrustment.

(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.

(j) Failure to comply with any order or rule made or issued under ss. 494.001-494.0077.

* * *

(p) Failure to comply with, or violation of, any other provision of ss. 494.001-494.0077.

(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.

* * *

(u)1. . . .

2. Having been the subject of any injunction or adverse administrative order by a state or federal agency regulating banking, insurance, finance or small loan companies, real estate, mortgage brokers or lenders, money transmitters, or other related or similar industries.

37. In the Notice of Denial, the Office specified Section 494.0025(4)(a) through (c) and (5), Florida Statutes, as the violations underlying the ground for denial in Section 494.0041(2)(p). Section 494.0025, Florida Statutes, provides in pertinent part:

It is unlawful for any person:

* * *

(4) In any practice or transaction or course of business relating to the sale, purchase, negotiation, promotion, advertisement, or hypothecation of mortgage transactions, directly or indirectly:

(a) To knowingly or willingly employ any device, scheme, or artifice to defraud;

(b) To engage in any transaction, practice, or course of business which operates as a fraud upon any person in connection with the purchase or sale of any mortgage loan; or

(c) To obtain property by fraud, willful misrepresentation of a future act, or false promise.

(5) In any matter within the jurisdiction of the office, to knowingly and willfully falsify, conceal, or cover up by a trick,

scheme, or device a material fact, make any false or fraudulent statement or representation, or make or use any false writing or document, knowing the same to contain any false or fraudulent statement or entry.

38. Although Mrs. Comas has the burden of proving that she meets the criteria for licensure as a mortgage broker, the Office has the burden of presenting evidence sufficient to establish that Mrs. Comas committed the violations on which it based its preliminary decision to deny Mrs. Comas's application. As the court stated in Osborne Stern & Co.,:

[W]e agree with the analysis of Judge Booth explaining that in license application proceedings:

The general rule is that a party asserting the affirmative of an issue has the burden of presenting evidence as to that issue. Florida Department of Transportation v. J.W.C. Company, 396 So. 2d 778 (Fla. 1st DCA 1981). Thus, the majority is correct in its observation that appellants had the burden of presenting evidence of their fitness for registration. The majority is also correct in its holding that the Department had the burden of presenting evidence that appellants had violated certain statutes and were thus unfit for registration. The majority's conclusion, however, that the Department had the burden of presenting its proof of appellants' unfitness by clear and convincing evidence is wholly unsupported by Florida law and

inconsistent with the fundamental principle that an applicant for licensure bears the burden of ultimate persuasion at each and every step of the licensure proceedings, regardless of which party bears the burden of presenting certain evidence. . . .

Osborne, 647 So. 2d at 250 (Booth, J., concurring and dissenting)(citations omitted). We emphasize the correctness of Judge Booth's conclusion that, while the burden of producing evidence may shift between the parties in an application dispute proceeding, the burden of persuasion remains upon the applicant to prove her entitlement to the license. *Id.*

(Footnotes omitted.) 670 So. 2d at 934. Therefore, the Office has the burden of presenting evidence to establish that Mrs. Comas committed the violations alleged in the Notice of Denial.

39. Based on the findings of fact herein, the Office has presented evidence sufficient to establish that Mrs. Comas committed the acts prohibited in Section 494.0041(2)(b), (f), and (h), Florida Statutes, when acting in her capacity as a mortgage broker for Ms. Sipple.

40. Based on the findings of fact herein, the Office has also presented evidence sufficient to establish that Mrs. Comas's mortgage broker license was revoked for fraud or dishonest dealing as a result of the Sipple transaction, which

revocation is a ground for denying an application for licensure pursuant to Section 494.0041(i), Florida Statutes.

41. Based on the findings of fact herein, the Office has presented evidence sufficient to establish that Mrs. Comas violated the final order issued by the Office on December 30, 2003, by continuing to serve as corporate secretary of RPM Lenders and its successor corporation until April 17, 2008, a ground for denial of an application for licensure pursuant to Section 494.0041(2)(j).

42. Based on the findings of fact herein, the Office has presented evidence sufficient to establish that Mrs. Comas violated Section 494.0025(4)(a) through (c), Florida Statutes, by her actions in the Sipple transaction and, therefore, violated Section 494.0041(2)(p), Florida Statutes. However, based on the findings of fact herein, the Office has failed to present evidence sufficient to establish that Mrs. Comas violated Section 494.0025(5), Florida Statutes.

43. Based on the findings of fact herein, the Office has presented evidence sufficient to establish that Mrs. Comas committed misrepresentation and breach of trust in her dealings with Ms. Sipple, a ground for denial of an application for licensure pursuant to Section 494.0041(2)(q), Florida Statutes.

44. Based on the findings of fact herein, the Office has presented evidence sufficient to establish that Mrs. Comas has

been the subject of an adverse administrative order in Florida, a ground for denial of an application for licensure pursuant to Section 494.0041(2)(u)2., Florida Statutes.

45. The Department has discretion to approve a license application even though there are statutory bases upon which it may deny the application. See § 494.0041(1), Fla. Stat. (The Office may approve an application for licensure even if a person has committed one of the violations specified in Section 494.0041(2), Fla. Stat.) In determining whether to exercise its discretion in that regard, the Office may consider whether the applicant has demonstrated that he or she is rehabilitated based upon the passage of time, subsequent good conduct, and other similar factors. See Zaremba v. Dept. of Banking & Finance, DOAH Case No. 94-1229, 1994 Fla. Div. Adm. Hear. LEXIS 5741, 7-9 (DOAH Aug. 3, 1994; DBF Sept. 16, 1994) (approving application for mortgage broker license based upon applicant's proof of rehabilitation); Matala v. Dept. of Banking & Finance, DOAH Case No. 93-5603, 1994 Fla. Div. Adm. Hear. LEXIS 5448, at 6 (DOAH Jan. 27, 1994) (recommending denial of mortgage broker license based upon applicant's failure to demonstrate rehabilitation).

46. Based on the findings of fact herein, Mrs. Comas failed to establish that she is rehabilitated even though it has

been almost 10 years since the acts underlying the revocation of her mortgage broker's license were committed.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Office of Financial Regulation enter a final order denying the application of Marta Comas for licensure as a mortgage broker pursuant to Section 494.0033(4), Florida Statutes, for the acts specified in Section 494.0041(2)(b), (f), (h), (i), (j), (p), (q), and (u)2., Florida Statutes.

DONE AND ENTERED this 27th day of February, 2009, in Tallahassee, Leon County, Florida.



PATRICIA M. HART
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of February, 2009.

ENDNOTES

^{1/} All references herein to the Florida Statutes are to the 2008 edition except as otherwise noted.

^{2/} Respondent's Exhibit N, Office of Financial Regulations Interrogatories to Marta Comas and Response to the Office of Financial Regulation's Interrogatories, number 11.

^{3/} According to Mrs. Comas's answers to the Office's interrogatories, in settlement of two trademark infringement actions, RPM Lenders and a business named RPM Loans and Realty, Inc., agreed not to use the name "RPM." See Respondent's Exhibit N, Office of Financial Regulations Interrogatories to Marta Comas and Response to the Office of Financial Regulation's Interrogatories, number 3.

^{4/} Respondent's Exhibit N, Office of Financial Regulations Interrogatories to Marta Comas and Response to the Office of Financial Regulation's Interrogatories, number 11; Transcript at page 35. It is noted, however, that it is difficult to reconcile Mrs. Comas's testimony regarding the various companies operating under the name "RPM" and her answers to interrogatories regarding the dates of her employment with one or the other company.

^{5/} Mrs. Comas testified at the final hearing that money was entrusted to her in her capacity as a real estate associate. In a footnote to paragraph 24 of its Proposed Recommended Order, the Office observed that this was "unusual", and it cited to Section 475.42(1)(d), Florida Statutes, which provides: "A sales associate may not collect any money in connection with any real estate brokerage transaction, whether as a commission, deposit, payment, rental, or otherwise, except in the name of the employer and with the express consent of the employer." Mrs. Comas's testimony was, however, uncontroverted; the Office did not present any evidence to establish that Mrs. Comas acted in contravention of the prohibition in Section 475.42(1)(d), Florida Statutes.

^{6/} Respondent's Exhibit H.

^{7/} Transcript at pages 48.

^{8/} See Respondent's Exhibit E.

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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.