

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
REGULATORY COUNCIL OF COMMUNITY)
ASSOCIATION MANAGERS,)
)
Petitioner,)
)
vs.) Case No. 09-0977PL
)
RAUL AGUILERA,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case before Larry J. Sartin, an Administrative Law Judge of the Division of Administrative Hearings, on April 24, 2009, by video teleconference at sites in Miami and Tallahassee, Florida.

APPEARANCES

For Petitioner: Philip Francis Monte, III
Assistant General Counsel
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-2202

For Respondent: Raul Aguilera, pro se
2200 Northwest 102nd Avenue
Apartment 5
Miami, Florida 33172

STATEMENT OF THE ISSUES

The issues in this case are whether the Respondent, Raul Aguilera, committed the violation alleged in an Administrative Complaint, DPBR Case Number 2007-065018, issued by Petitioner Department of Business and Professional Regulation on January 12, 2009, and, if so, the penalty that should be imposed.

PRELIMINARY STATEMENT

On January 12, 2009, an Administrative Complaint was issued by the Department of Business and Professional Regulation in DPBR Case No. 2007-065018 against Respondent, alleging that Respondent had violated Section 468.436(1)(a), Florida Statutes, by having violated Section 455.227(1)(m), Florida Statutes.

On or about February 13, 2009, Respondent filed an Election of Rights form with Petitioner requesting a formal hearing to contest the allegations of fact contained in the Administrative Complaint.

The Administrative Complaint and Respondent's request for hearing was filed with the Division of Administrative Hearings on February 19, 2009, with a request that it be assigned to an administrative law judge. The request was designated DOAH Case No. 09-0977PL and was assigned to the undersigned.

The final hearing of this matter was scheduled for April 24, 2009, by Notice of Hearing by Video Teleconferencing entered March 4, 2009.

On April 10, 2009, Petitioner filed a Motion to Amend Complaint to Correct Scrivener's Error. That Motion was granted and an Order was entered on April 20, 2009. The error corrected was to add the word "he" in paragraph 9, of the Administrative Complaint, so that the paragraph reads as follows: "In a letter dated December 10, 2007, Respondent admitted that he had misrepresented facts regarding the election to Carroll."

At the final hearing, Petitioner presented the testimony of Danielle Carroll. Petitioner's Exhibits numbered 1 through 12 were admitted without objection. Respondent testified in his own behalf and presented the testimony of Ron Sedano. Respondent's Exhibit number 1 was admitted. That Exhibit was filed by Respondent on April 30, 2009.

A one-volume Transcript of the final hearing was filed with the Division of Administrative Hearings on May 14, 2009. By agreement of the parties, proposed recommended orders were to be filed on or before May 26, 2008. Petitioner filed "Respondent's [sic] Proposed Recommended Order" on May 20, 2009. Respondent filed a letter on May 26, 2009. Because a copy of the letter had not been provided to Petitioner, a Notice of Ex Parte Communication was entered on June 1, 2009, giving Petitioner

until June 17, 2009, to respond to the letter. On June 9, 2009, counsel for Petitioner indicated to the undersigned's administrative assistant that no response would be filed. Therefore, this Recommended Order, after having considered the Proposed Recommended Order of Petitioner and Respondent's May 26, 2009, letter, is being entered prior to June 17, 2009. Both pleadings have been fully considered in entering this Recommended Order.

All references to Florida Statutes and the Florida Administrative Code in this Recommended Order are to the 2007 versions unless otherwise indicated.

FINDINGS OF FACT

A. The Parties.

1. Petitioner, the Department of Business and Professional Regulation (hereinafter referred to as the "Department"), is the state agency charged with regulating the practice of community association management pursuant to Chapters 455 and 468, Florida Statutes.

2. Raul Aguilera is and was at the times material to this proceeding a licensed Florida Community Association Manager (hereinafter referred to as a "CAM"), having been issued license number CAM 6844.

3. At the times material to this proceeding, Mr. Aguilera's address of record was 2200 Northwest 102nd Avenue, Apartment 5, Miami, Florida.

B. Courts of Birdwood Condominium Association.

4. At the times material to this proceeding, Mr. Aguilera served as the Manager of SPM Group, Inc., and as the CAM for the Courts of Birdwood Condominium Association (hereinafter referred to as the "Association").

C. The Association's 2007 Election.

5. On or about October 16, 2007, the Department received a petition package from residents of the Association requesting the appointment of an election monitor (hereinafter referred to as the "Petition"), an Association election that had been scheduled for November 7, 2007. The Petition was reviewed and determined to be complete.

6. At the time of receipt of the Petition, Danielle Carroll was the Department's "Condominium Ombudsmen." See § 718.5011, Fla. Stat. Among other powers, Section 718.5012(5), Florida Statutes, grants the following power to the Condominium Ombudsmen:

(5) To monitor and review procedures and disputes concerning condominium elections or meetings, including, but not limited to, recommending that the division pursue enforcement action in any manner where there is reasonable cause to believe that election misconduct has occurred.

7. Section 718.5012(9), Florida Statutes, establishes the Condominium Ombudsmen's authority with regard to elections disputes:

(9) Fifteen percent of the total voting interests in a condominium association, or six unit owners, whichever is greater, may petition the ombudsman to appoint an election monitor to attend the annual meeting of the unit owners and conduct the election of directors. The ombudsman shall appoint a division employee, a person or persons specializing in condominium election monitoring, or an attorney licensed to practice in this state as the election monitor. All costs associated with the election monitoring process shall be paid by the association. The division shall adopt a rule establishing procedures for the appointment of election monitors and the scope and extent of the monitor's role in the election process.

8. Pursuant to the foregoing quoted charge, Ms. Carroll first verified that 15 percent of the Association's residents had signed the Petition requesting the appointment of a monitor.

9. Once Ms. Carroll had verified that she was authorized and, indeed, required to appoint an election monitor for the Association, she sent a letter dated October 7, 2007, addressed to the "Board of Directors" of the Association notifying them that the Petition had been received, that it had been determined to be complete and sufficient, and that she had, pursuant to the authority of Section 718.5012(9), Florida Statutes, and Florida Administrative Code Rule 61B-00215, "appointed an election

monitor to attend and conduct the election of directors at your association's annual meeting." Ms. Carroll also informed the Association that "all costs associated with the election monitoring process shall be paid by the association."

10. Once a request for an election monitor has been received and verified, the Condominium Ombudsmen will not cancel the monitor unless the scheduled election is cancelled.

11. In response to Ms. Carroll's October 7, 2007, letter, Mr. Aguilera spoke with Ms. Carroll by telephone on or about October 25, 2007. During this conversation, Mr. Aguilera told Ms. Carroll that "the Board members aren't running for re-election and so there wasn't going to be an election." In fact, while the dispute that had led to the filing of the Petition had been resolved, the November 7, 2007, election had not been cancelled, which Mr. Aguilera was fully aware of.

12. In a letter dated October 29, 2007, from Mr. Aguilera to Ms. Carroll, Mr. Aguilera confirmed that there would be no election:

IN RESPONSE TO YOUR LETTER DATED OCTOBER 25, 2007 [NOT OFFERED AT HEARING], I MUST ADVISE THAT THERE WAS NO ELECTION BEING HELD DUE TO THE FACT THAT THE PRERSON THAT FILLED [SIC] PETITION FOR RLECTION MONITOR WILL BE ON THE BOARD OF DIRECTORS AUTOMATICALLY.

NO MEMBERS OF THE PRIOR BOARD OF DIRECTORS SIGNEDUP FOR THE ELECTIONS [SIC].

. . . .

13. Mr. Aguilera's representation to Ms. Carroll in the October 29, 2007, letter was only partially correct, as Mr. Aguilera was fully aware. What had actually happened was that the Petition had been signed and filed because the residents who signed it were upset with the current Board of Directors. The persons on the Association's Board of Directors who the residents signing the Petition were upset with decided not to run for re-election. This decision eliminated the concern which had generated the Petition. Additionally, Mr. Aguilera was concerned about the costs associated with having a monitor at the election. In an effort to avoid the costs of the monitor, Mr. Aguilera simply told Ms. Carroll that the election had been cancelled.

14. Despite Mr. Aguilera's representations to the contrary, the election of the Association's Board of Directors was held as scheduled on November 7, 2007. Seven candidates were listed on the election ballot and five of those individuals were elected. Because the number of candidates exceeded the number of positions, the election was necessary. See § 719.112(2)(d)1., Fla. Stat.

15. In a letter dated December 10, 2007, from Mr. Aguilera to the Department's Bureau Chief-Investigations, Mr. Aguilera

admitted that he "made a wrong decision and wrote a letter to give some answers to the (DPBR) request."

CONCLUSIONS OF LAW

A. Jurisdiction.

16. 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 (2008).

B. The Burden and Standard of Proof.

17. In the Administrative Complaint, the Department seeks to impose penalties against Mr. Aguilera, including suspension or revocation of his license and/or the imposition of an administrative fine. The Department, therefore, has the burden of proving the allegations of the Amended Administrative Complaint by clear and convincing evidence. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); and Nair v. Department of Business & Professional Regulation, 654 So. 2d 205, 207 (Fla. 1st DCA 1995).

18. In Evans Packing Co. v. Department of Agriculture and Consumer Services, 550 So. 2d 112, 116, n. 5 (Fla. 1st DCA 1989), the court defined "clear and convincing evidence" as follows:

[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 evidence 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 the firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established. Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

C. The Charge Against Mr. Aguilera.

19. The Department has charged that Mr. Aguilera violated Section 468.436(1)(a), Florida Statutes, which provides that disciplinary action may be taken against the license of a CAM if it is found that the CAM has violated any provision of Section 455.227(1), Florida Statutes. The Department alleges in the Administrative Complaint that Mr. Aguilera violated Section 455.227(1)(m), Florida Statutes.

20. Section 455.227(1)(m), Florida Statutes, defines the following disciplinable offense: "Making deceptive, untrue, or fraudulent representations in or related to the practice of a profession or employing a trick or scheme in or related to the practice of a profession."

21. Although the evidence failed to prove that Mr. Aguilera was attempting to protect himself or obtain some benefit for himself, the Department proved clearly and convincingly that he made "deceptive, untrue, or fraudulent

representations in or related to the practice of a profession . . . " in violation of Section 455.227(1)(m), Florida Statutes, and, therefore, that he violated Section 468.436(1)(a), Florida Statutes, as alleged in the Administrative Complaint.

G. The Appropriate Penalty.

22. The only issue remaining for consideration is the appropriate disciplinary action which should be taken by the Department against Mr. Aguilera for the violation that has been proved. To resolve this issue it is necessary to consult the "disciplinary guidelines" of Florida Administrative Code Rule 61-20.010. Those guidelines effectively place restrictions and limitations on the exercise of the Department's disciplinary authority in this case. See Parrot Heads, Inc. v. Department of Business and Professional Regulation, 741 So. 2d 1231, 1233 (Fla. 5th DCA 1999)("An administrative agency is bound by its own rules . . . creat[ing] guidelines for disciplinary penalties."); and § 455.2273(5), Fla. Stat.

23. The Department has proved that Mr. Aguilera violated Section 468.436(1)(a), Florida Statutes, by violating Section 455.227(1)(m), Florida Statutes as alleged, in part, in the Administrative Complaint. The penalty guideline for this violation ranges from a "Reprimand; \$500 fine" to "Revocation; \$5000 fine; costs." Fla. Admin. Code R. 61-20.010(5)(ff).

24. In addition to considering the adopted penalty ranges, Florida Administrative Code Rule 61-20.010(2), provides for a consideration of certain aggravating and mitigating circumstances:

- (a) Danger to the public;
- (b) Physical or financial harm resulting from the violation;
- (c) Prior violations committed by the subject;
- (d) Length of time the registrant or licensee has practiced;
- (e) Deterrent effect of the penalty;
- (f) Correction or attempted correction of the violation;
- (g) Effect on the registrant's or licensee's livelihood;
- (h) Any efforts toward rehabilitation;
- (i) Any other aggravating or mitigating factor which is directly relevant under the circumstances.

25. In its Proposed Recommended Order, Petitioner has suggested that Mr. Aguilera's license be placed on probation for 18 months, that he attend 12 hours of continuing education in CAM practice within one year of the issuance of a final order in this matter, that he pay a fine of \$750.00, and that he pay costs in the amount of \$316.12. While generally reasonable, it will be recommended that the period of probation should only be 12 months in light of the fact that Mr. Aguilera was simply attempting to avoid the costs the Association would have had to pay for the election monitor when the problem that gave rise to the filing of the Petition had been resolved.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Business and Professional Regulation enter a final order finding that Mr. Aguilera committed the violation described in this Recommended Order and imposing the following penalties:

1. Probation for 12 months, beginning upon the entry of the final order in this case;
2. Payment of an administrative fine in the amount of \$750.00;
3. Attendance at 12 hours of continuing education in CAM practice to be completed within his probation period; and
4. Payment to the Department of costs of \$316.12.

DONE AND ENTERED this 10th day of June, 2009, in Tallahassee, Leon County, Florida.



LARRY J. SARTIN
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of June, 2009.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within
15 days from the date of this recommended order. Any exceptions
to this recommended order should be filed with the agency that
will issue the final order in this case.