

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JON D. TREMPER,)
)
 Petitioner,)
)
 vs.) Case No. 09-1771
)
 FLORIDA REAL ESTATE COMMISSION,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

On May 21, 2009, an administrative hearing in this case was held in Melbourne, Florida, before Lawrence P. Stevenson, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Jon D. Tremper, pro se
The Home Inspection Academy
6396 Highway US 1
Rockledge, Florida 32955

For Respondent: Thomas Barnhart, Esquire
Office of the Attorney General
The Capitol, Plaza Level 01
Tallahassee, Florida 32399-1050

STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner's two applications for continuing education course approval should be denied for the reasons set forth in the Florida Real Estate Commission's Notices of Intent to Deny, which were issued on February 19, 2009.

PRELIMINARY STATEMENT

By issuance of Notices of Intent to Deny dated February 19, 2009, the Florida Real Estate Commission (FREC) advised Petitioner that it intended to deny his applications for continuing education course approval for courses titled "Homeowner's Guide to Hurricane Protection & Insurance Discounts" and "Protecting Homes from Termites, Water Damage and Mold." Petitioner timely requested a formal administrative hearing. The case was forwarded to the Division of Administrative Hearings (DOAH) on April 6, 2009, and the matter was scheduled for a hearing on May 21, 2009.

At the hearing, Petitioner testified on his own behalf. Petitioner's Exhibits 1 through 3 were admitted into evidence. The FREC presented the testimony of its chairman, Ralph McCoig. The FREC's Exhibits 1 and 2 were admitted into evidence.

No transcript of the hearing was filed. The FREC timely submitted a Proposed Recommended Order on June 1, 2009. Petitioner did not file a proposed recommended order.

FINDINGS OF FACT

1. Petitioner Jon D. Tremper is a licensed real estate sales associate. In 1988, Petitioner established a home inspection company and has since performed several thousand inspections of properties in Florida.

2. In 1999, Petitioner established The Home Inspection Academy, which he describes as a "private school providing training to the home inspection industry." Petitioner has developed and taught home inspection and construction-related courses to individuals and to groups including the Florida Association of Building Inspectors.

3. Petitioner applied to the Department of Business and Professional Regulation, Division of Real Estate (Division) for continuing education credit for two courses that he developed and wished to present for credit to licensed real estate professionals: "Homeowner's Guide to Hurricane Protection & Insurance Discounts," and "Protecting Homes from Termites, Water Damage and Mold."

3. The courses were placed on the FREC agenda for consideration at its January 20, 2009, meeting. The FREC denied both courses by way of Notices of Intent to Deny issued on February 19, 2009. The FREC's intent to deny was based on Subsection 475.182(1)(a), Florida Statutes (2008),¹ the relevant portion of which provides:

Approval or denial of a specialty course must be based on the extent to which the course content focuses on real estate issues relevant to the modern practice of real estate by a real estate licensee, including technology used in the real estate industry.

4. Each Notice contained the following finding of fact:

The Director of the Division of Real Estate suggested that the course could be denied due to the subject matter of the course not being related to the profession of real estate and not related to the nuts and bolts of real estate.

5. "Homeowner's Guide to Hurricane Protection & Insurance Discounts" is a three-hour course. The learning objectives of the first hour are to understand the impact of recent hurricanes in Florida, which structures survived the storms and why they survived, and the wind resistance upgrades that are available to homeowners. The learning objectives of the second hour are to understand what insurance companies are looking for and how a homeowner can lower his premium, where to get help in determining cost-effective wind resistance upgrades, and the necessity of taking the initiative in dealing with insurance companies. The learning objectives of the third hour are to understand the "My Safe Florida Home" program offered by the State of Florida, the importance of and procedures for documentation of home improvements, and the best resources available for protecting a home from hurricanes.

6. "Protecting Homes from Termites, Water Damage and Mold" is a three-hour course. The learning objectives of the first hour are to know the threats of termites, water damage and mold to Florida homes, where to get help when a problem is found, and

the seven ways to ensure that a home stays termite free. The learning objectives of the second hour are to know and understand the unique elements of Florida climate, the importance of keeping water out of Florida homes, and the seven ways to prevent water damage. The learning objectives of the third hour are to know and understand the conditions for mold growth in Florida homes, why mold remediation is necessary, and the seven ways to keep mold out of Florida homes.

7. Ralph McCoig, the chairman of the FREC, has been a real estate agent and broker for nearly 30 years. Since 1994, Mr. McCoig has been the owner and broker of Edita Realty in Rockledge. Mr. McCoig testified that Petitioner's courses were of great interest to homeowners, but were not really relevant to a real estate licensee's practice.

8. Mr. McCoig stated that a licensee's duties to a seller are to establish a price for the house based on the current market, to market the house, and to negotiate the contract of sale. A licensee's duties to a buyer are to find houses, show the properties, and assist the buyer in obtaining financing. Licensees do not give opinions on hurricane insurance requirements or on termite, water or mold damage.

9. Mr. McCoig stated that home inspection companies, insurance agents, and licensed pest control companies are the professionals qualified to deal with the matters discussed in

Petitioner's courses. A real estate licensee would be better served to retain these professionals on his client's behalf, because they are the best sources of relevant information and because the real estate professional does not want to incur liability for practicing beyond his area of expertise.

10. Mr. McCoig testified that the FREC determined that Petitioner's courses were not applicable to a real estate professional's job and not appropriate for continuing education credit.

11. Petitioner testified that his courses were not designed to make a realtor an expert in hurricane protection or termite, water and mold damage, but to give the realtor the ability to offer common sense advice to his clients. Petitioner pointed out that the standard contract for sale and purchase of real property in Florida contains provisions regarding disclosure of wood-destroying organisms and mold, and that Section 627.711, Florida Statutes, requires insurers to take certain actions regarding discounts for hurricane reinforcements. Petitioner opined that realtors should be familiar with these matters in order to properly serve their clients.

12. Petitioner also testified that the Department of Business and Professional Regulation, Bureau of Education and Testing's web site discloses "thousands" of approved courses,

including some whose titles appear equivalent to Petitioner's proposed courses and some of which appear frivolous, such as "Feng Shui for Realtors."

13. In rebuttal, Mr. McCoig testified that the FREC has recently denied applications for courses related to Feng Shui concepts. Mr. McCoig stated more generally that the current FREC board has taken a more hands-on and restrictive approach to the approval of continuing education courses than had been the practice in previous years, when the Division had apparently been delegated authority to approve courses at the staff level. The FREC board intends to whittle the list of approved courses down to a manageable number directly related to the "nuts and bolts" of real estate practice in Florida.

CONCLUSIONS OF LAW

14. The DOAH has jurisdiction over the parties to and subject matter of this proceeding. § 120.57(1), Fla. Stat.

15. Subsection 475.02(1), Florida Statutes, establishes the FREC within the Department of Business and Professional Regulation. Section 475.04, Florida Statutes, provides, in relevant part:

- (1) The commission shall foster the education of brokers, broker associates, sales associates, and instructors concerning the ethical, legal, and business principles which should govern their conduct.
- (2) For the purpose of performing its duty under subsection (1) to educate persons

holding a license or permit, the commission may conduct, offer, sponsor, prescribe, or approve real estate educational courses for all persons licensed or permitted by the department as brokers, broker associates, sales associates, or instructors; and the cost and expense of such courses shall be paid as provided in s. 475.125. . . .

16. Subsection 475.182(1)(a), Florida Statutes, provides:

The department shall renew a license upon receipt of the renewal application and fee. The renewal application for an active license as broker, broker associate, or sales associate shall include proof satisfactory to the commission that the licensee has, since the issuance or renewal of her or his current license, satisfactorily completed at least 14 classroom hours of 50 minutes each of a continuing education course during each biennium of a license period, as prescribed by the commission. Approval or denial of a specialty course must be based on the extent to which the course content focuses on real estate issues relevant to the modern practice of real estate by a real estate licensee, including technology used in the real estate industry. The commission may accept as a substitute for such continuing education course, on a classroom-hour-for-classroom-hour basis, any satisfactorily completed education course that the commission finds is adequate to educate licensees within the intent of this section, including an approved distance learning course. However, the commission may not require, for the purpose of satisfactorily completing an approved correspondence or distance learning course, a written examination that is to be taken at a centralized location and is to be monitored. (Emphasis added.)

17. The FREC's rules do not expand upon the underscored statutory language. Florida Administrative Code Rule 61J2-3.009(1)(b) simply provides that approval or denial of a "specialty" course "will be based on its compliance with the criteria established in Section 475.182(1), F.S."²

18. An agency's interpretation of the statute it is charged with enforcing is entitled to great deference. A court will not depart from the contemporaneous construction of a statute by a state agency charged with its enforcement unless the construction is "clearly erroneous." Verizon Florida, Inc. v. Jacobs, 810 So. 2d 906, 908 (Fla. 2002).

19. A reviewing court will consider an agency's finding to be "clearly erroneous" when review of the entire record leaves the tribunal with "the definite and firm conviction that a mistake has been committed," even though there is some evidence to support the agency's finding. United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).

20. In the instant case, the FREC initial decision to deny continuing education credit to Petitioner's courses was not clearly erroneous. It is reasonable for the FREC to interpret Subsection 475.182(1)(a), Florida Statutes, as requiring continuing education courses to bear a direct relationship to the practice of real estate by licensees. It was reasonable for

the FREC to find that Petitioner's courses did not bear the required direct relationship to the practice of real estate.

21. Petitioner's evidence regarding the Division's past practices in approving continuing education courses does not render the FREC's action in this case erroneous. Mr. McCoig implicitly agreed with Petitioner that some of the approved courses should not be on the list, and indicated that the FREC is committed to eliminating approved courses such as "Feng Shui." It is Petitioner's misfortune that his courses were brought before the FREC at a time when the agency is tightening the approval standards to bring them more into line with the language of Subsection 475.182(1)(a), Florida Statutes.

RECOMMENDATION

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

RECOMMENDED that the Florida Real Estate Commission enter a final order denying Petitioner's applications for continuing education course credit for courses titled "Homeowner's Guide to Hurricane Protection & Insurance Discounts" and "Protecting Homes from Termites, Water Damage and Mold."

DONE AND ENTERED this 19th day of June, 2009, in
Tallahassee, Leon County, Florida.

Lawrence P. Stevenson

LAWRENCE P. STEVENSON
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of June, 2009.

ENDNOTES

^{1/} Unless otherwise noted, all references to the Florida Statutes are to the 2008 edition.

^{2/} Neither the statutes nor the rules appear to define "specialty course" except by inference as any course other than a "Core Law" course, i.e., the FREC-prescribed course on Florida real estate license law, FREC rules, and agency law that each licensee must take at least once during each license renewal period. See Fla. Admin. Code R. 61J2-3.009(2).

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.