

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF REAL ESTATE,)
)
Petitioner,)
)
vs.) Case No. 10-3197PL
)
MARSHA EVANS FRIELS,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on August 9, 2010, by video teleconference at sites in Tallahassee and St. Petersburg, Florida, before Elizabeth W. McArthur, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Joseph A. Solla, Esquire
Department of Business and
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Orlando, Florida 32801-1757

For Respondent: Marsha Evans Friels, pro se
6395 21st Way, South
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STATEMENT OF THE ISSUES

The issues in this case are whether the Respondent violated Subsections 475.42(1)(a) and 475.25(1)(e), Florida Statutes (2009),¹ and, if so, what discipline should be imposed.

PRELIMINARY STATEMENT

By a one-count Administrative Complaint filed on April 22, 2010, the Petitioner, the Department of Business and Professional Regulation, Division of Real Estate (the Division of Real Estate or the Petitioner), charged the Respondent, Marsha Evans Friels (Ms. Friels or the Respondent), with operating as a real estate sales associate without a valid and current license in violation of Subsection 475.42(1)(a), Florida Statutes. This same statutory violation was also the predicate for charging a violation of Subsection 475.25(1)(e), Florida Statutes, which is a more general umbrella provision authorizing discipline for violations of any statute in Chapter 475, Florida Statutes.

Ms. Friels timely requested an administrative hearing involving disputed issues of material fact, and a hearing was noticed and held, accordingly, pursuant to Sections 120.569 and 120.57, Florida Statutes. As noticed, the hearing was conducted by video teleconference with the Administrative Law Judge (ALJ) in Tallahassee and the parties, witnesses, and court reporter in St. Petersburg.

The Petitioner presented the testimony of two fact witnesses: the complainant, Robert Brissenden; and the investigator, Lisa L. Dubord. The Petitioner's Exhibits 1, 2,² and 3 were received into evidence. The Respondent testified on her own behalf and also presented the testimony of one fact witness, the licensed broker with whom Ms. Friels was associated, Merrill Williams. The Respondent's Exhibits 1 through 4 were received into evidence.

The one-volume Transcript of the final hearing was filed on August 27, 2010. The parties agreed to file their proposed recommended orders within ten days after the Transcript was filed. Both parties timely filed Proposed Recommended Orders, which were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Division of Real Estate is the state agency responsible for the regulation of the real estate sales profession in Florida, including licensure of real estate sales associates and enforcement of the statutory provisions within its charge.

2. Ms. Friels is a real estate sales associate who first obtained her license in 2005. Ms. Friels has never had any prior disciplinary action taken against her.

3. Ms. Friels received a renewal notice from the Department of Business and Professional Regulation (the Department), notifying her that her sales associate license was due to expire on March 31, 2009. The notice touted in bold print that the "Department Provides Instant Online Renewal," while also offering a Renewal Notice card to detach and mail in to the Department. The Renewal card option required nothing to be filled in by the licensee unless an address update were necessary (in which case a box could be checked and the address updated on the back of the card), or unless the licensee wanted to opt for inactive status, which could be done by checking a different box. Otherwise, the card could simply be sent in with payment of the \$85.00 renewal fee. The card included the following statement in small print: **IMPORTANT: SUBMITTING YOUR RENEWAL REQUEST TO THE DEPARTMENT AFFIRMS COMPLIANCE WITH ALL REQUIREMENTS FOR RENEWAL.**

4. Ms. Friels had been undergoing a period of great personal challenges and stress in the two-year period leading up to the licensure expiration date and nearly missed the renewal deadline. On the day before her license was to expire, she utilized the "Instant Online Renewal" option after contacting a Department customer representative to make sure that her online renewal payment would be credited immediately so that it would be timely before the March 31, 2009, expiration date. As

alleged in the Administrative Complaint, "[o]n . . . March 30, 2009 Respondent paid the renewal fee of \$85.00 to renew her real estate license." The Department receipt showed the online payment of the \$85.00 fee on March 30, 2009, for the renewal of real estate sales associate License No. SL3141119 held by Marsha Evans Friels.

5. At the time Ms. Friels processed her online license renewal, she had not completed the 14 hours of continuing education she was required to complete during the two-year licensure period ending on March 30, 2009, but Ms. Friels did not realize at that time that she had not complied with the continuing education requirements.

6. Ms. Friels explained that although she was generally aware of the continuing education requirement for licensure renewal, the reason she did not realize that she had not taken the required coursework during this particular two-year period was because she was coping with a series of tragic, personal challenges. The circumstances were compelling, as she explained: In May 2007, Ms. Friels' older sister died of breast cancer; then, in October 2007, Ms. Friels' father died, and Ms. Friels assumed the responsibilities for arranging for his funeral and then probating his estate; and finally, Ms. Friels' youngest sister, who was diagnosed with paranoid schizophrenia and had lived with her father, was left without care, and the

responsibilities for caring for her sister and making decisions about her placement fell on Ms. Friels' shoulders.

7. While these circumstances do not excuse a failure to comply with the continuing education requirements during the two-year period, the totality of the circumstances make the oversight understandable and mitigate against Ms. Friels' culpability.

8. Ms. Friels was under the impression that having accessed the Department's "Instant Online Renewal" and successfully remitted payment of the renewal fee in time, she had done all that was needed to renew her license. She received no notice to the contrary.

9. Apparently, however, at some point after Ms. Friels thought she had successfully renewed her license via the Department's Instant Online Renewal service, the Department's records re-characterized the status of Ms. Friels' license as involuntarily inactive, effective on March 31, 2009, "due to non[-]renewal of her real estate sales associate license."

10. Neither Ms. Friels, nor the licensed broker with whom Ms. Friels was associated, received notice that her real estate sales associate license had been changed to inactive status, that Ms. Friels had not satisfied the continuing education requirements at license renewal, or that her "Instant Online Renewal" and payment were ineffective to renew her license.

11. Ms. Friels presented evidence of the Department's practice to issue a Notice of Deficiency or a Continuing Education Deficiency letter, when a real estate sales associate renews a license without having completed the required continuing education hours. No evidence was offered to explain why this practice would not have applied in this case or why no such notice was given to Ms. Friels.

12. Operating under the impression that she had successfully renewed her license and receiving no notice to the contrary, on one occasion, on approximately June 1, 2009, Ms. Friels participated as a real estate sales associate working on a real estate sales contract under the supervision of Ms. Williams, the licensed broker with whom Ms. Friels was associated, who remained actively involved in the transaction.

13. Mr. Brissenden is a real estate appraiser who was asked to perform an appraisal on the property that was the subject of the same contract, which is how he came to learn that Ms. Friels was operating as a sales associate. Mr. Brissenden testified that he happened to be online on the Department's licensing portal checking on some other things when he looked up Ms. Friels' license out of curiosity. He saw that her license was shown to be inactive, and, so, he filed a complaint.

14. Ms. Friels first learned that she had not completed the required continuing education hours in the two-year period

before renewal when she received a letter advising her that she was being investigated for operating as a sales associate without an active license.

15. Immediately upon learning that she had a continuing education deficiency, Ms. Friels took the 14-hour continuing education course and successfully completed the required hours. This course included the "Real Estate Core Law" component required by Florida Administrative Code Rule 61J2-3.009(2)(a). The course material, which according to rule, must be submitted to the Florida Real Estate Commission for review and approval, included the following:

In the event a license is renewed without the required continuing education course having been completed, the licensee will be sent a deficiency letter. This letter will inform the licensee that the required continuing education was not completed prior to renewal.

16. Ms. Friels' license was reinstated to "active" status on October 16, 2009, following her completion of the 14-hour course credited to her prior renewal cycle.

17. Ms. Friels cooperated with the investigation and submitted a letter with supporting documentation explaining that she did not realize she had not completed the continuing education course during the prior two years and detailing her personal circumstances that led to her oversight.

18. At the completion of the investigation, the investigator contacted Ms. Friels to deliver a Uniform Disciplinary Citation, on December 11, 2009. By this document, the investigator sets forth her determination that there was probable cause to believe Ms. Friels had violated Subsection 475.42(1)(b), Florida Statutes, and that the Department had set the penalty at a \$500.00 fine (plus no additional amount for costs). Ms. Friels had the choice of accepting the citation, in which case it would become a final order, or disputing the citation, in which case the charges would be prosecuted as a disciplinary action pursuant to Section 455.225, Florida Statutes.

19. Ms. Friels testified that while she accepted responsibility for not completing the required continuing education and was willing to resolve this matter by paying the \$500 fine in December 2009, she was unwilling to accept the citation's charge of violating Subsection 475.42(1)(b), Florida Statutes. That subsection establishes the following as a violation:

A person licensed as a sales associate may not operate as a broker or operate as a sales associate for any person not registered as her or his employer.

Ms. Friels perceived this charge as more serious, in effect, charging her with operating outside the scope of her sales

associate license by operating in a broker capacity.

Throughout this proceeding, Ms. Friels remained sensitive to the suggestion that she had operated as more than a real estate sales associate and went to great pains to establish that she did not exceed the bounds of a licensed real estate sales associate and that she was acting under the supervision of the licensed broker with whom she was associated.

20. The subsequently-issued Administrative Complaint charged Ms. Friels with a violation of Subsection 475.42(1)(a), Florida Statutes, not Subsection 475.42(1)(b), Florida Statutes, as charged in the Uniform Disciplinary Citation. By this time, however, when Ms. Friels attempted to resolve the dispute, the Division of Real Estate would not agree to the penalty originally proposed in the Citation (with the incorrect statutory charge), but instead proposed additional terms, including payment of \$521.40 in investigation costs on top of the \$500 fine, plus attendance at two meetings of the Florida Real Estate Commission. Ms. Friels objected to the increased financial consequences since in her view, the reason why the dispute was not resolved by the citation was because the wrong statutory violation was charged.

21. Before the evidentiary hearing, counsel for the Division of Real Estate acknowledged that this case involves, at most, a "minor violation of licensing law." After the

evidentiary portion of the hearing, counsel reiterated the Division's position that "this is a minor licensing violation and we're looking for a very minor penalty."

22. Inexplicably, the Proposed Recommended Order submitted by the Petitioner proposed a significantly elevated recommended penalty. The Petitioner proposed an increased fine of \$1,000, plus a 30-day suspension, plus costs of investigation, plus "fees pursuant to Section 455.227(3), Florida Statutes,"³ despite assurances at the close of the hearing that the Petitioner was only looking for a "very minor penalty" consistent with what had been previously offered.

23. The appropriate penalty for a violation of licensing law cannot be determined without first reviewing the record evidence on mitigating and aggravating circumstances in accordance with Florida Administrative Code Rule 61J2-24.001(4). Here, no aggravating circumstances were established or even argued while there are multiple mitigating circumstances.

24. There was no evidence of any harm to the consumers or public as a result of Ms. Friels' oversight in not completing her continuing education by her license renewal date or as a result of her participating as a real estate sales associate in a transaction in June 2009.

25. The fact that there was only one count in the Administrative Complaint is a mitigating circumstance to be considered.

26. Likewise, the fact that Ms. Friels has no disciplinary history is another mitigating circumstance weighing in favor of leniency below the normal penalty ranges established in rule.

27. Consideration of the financial hardship to the Respondent as a result of imposition of a fine or suspension of a license, adds to the weight of mitigating circumstances. Ms. Friels testified to the hardship she has endured as a result of personal circumstances beyond her control. Ms. Friels was forthright and sincere in accepting responsibility for her oversight and acted immediately to rectify the continuing education deficiency as soon as she received notice of it. Under the circumstances, imposition of a fine or suspension of her license would result in unnecessary financial hardship.

28. Finally, under the catch-all language in Florida Administrative Code Rule 61J2-24.001(4)(b) ("mitigating circumstances may include, but are not limited to . . ."), consideration must be given to the Respondent's compelling personal circumstances that make her oversight understandable and mitigate further against imposing a penalty in the normal range. The circumstances here were far from normal, and imposing a penalty as if they were normal would be unduly harsh.

CONCLUSIONS OF LAW

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

30. The Petitioner is the state licensing and regulatory agency charged with the responsibility to prosecute Administrative Complaints pursuant to Section 20.165, Florida Statutes, and Chapters 120, 455, and 475, Florida Statutes.

31. The Petitioner has the burden to prove the allegations in the Administrative Complaint by clear and convincing evidence. Department of Banking and Finance v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996).

32. The single count of the Administrative Complaint alleges as follows:

Respondent is guilty of having operated as a sales associate without being the holder of a valid and current license as a sales associate in violation of Section 475.42(1)(a), Florida Statutes and, therefore, in violation of Section 475.25(1)(e), Florida Statutes.

33. Subsection 475.42(1)(a), Florida Statutes, provides in pertinent part that the following is a violation:

A person may not operate as a broker or sales associate without being the holder of a valid and current active license therefor.

Subsection 475.25(1)(e), Florida Statutes, authorizes discipline against a licensee who has "violated any of the provisions of

this chapter," including Subsection 475.42(1)(a), Florida Statutes.

34. The Division of Real Estate met its burden of proving that Ms. Friels did not satisfy the continuing education hours required by Section 475.182, Florida Statutes, and Florida Administrative Code Rule 61J2-3.009, when she used the Department's online licensure renewal service to pay for renewal of her license before the end of the renewal period.

35. Subsection 455.2177, Florida Statutes, requires the Department to monitor licensee compliance with continuing education requirements and to determine whether a licensee is in full compliance with applicable continuing education requirements at the time of license renewal. Subsection(2) of that statute authorizes the Department to refuse renewal until the licensee has satisfied continuing education requirements.

36. Subsection 475.182(3), Florida Statutes, provides that "[a]ny license that is not renewed at the end of the license period prescribed by the department shall automatically revert to involuntarily inactive status." The Department's monitoring system apparently identified Ms. Friels' non-compliance with the continuing education requirements, causing the Department to refuse to renew her license, so that the license automatically reverted to involuntarily inactive status.

37. The evidence established that the Department's practice has been to issue a Continuing Education Deficiency Notice to a licensee who has not complied with continuing education requirements at the time of license renewal. Had the Department issued such a notice in this case when it refused to renew Ms. Friels' license, Ms. Friels would have corrected the continuing education oversight well before the June 1, 2009, transaction relied on to establish a violation, because Ms. Friels did, in fact, immediately correct the continuing education deficiency when she learned of it in October 2009.

38. An agency is required to adhere to its prior practice, absent explanation in the record for deviating from that practice. § 120.68(7)(e)3., Fla. Stat. Here, no explanation was offered for the failure to send the Respondent a Notice of Continuing Education Deficiency.

39. Not only is it clear that this violation could have been avoided completely had the Department adhered to its prior practice, but it is also clear that the only reason this case proceeded to prosecution was because the Uniform Disciplinary Citation offered to the Respondent prior to prosecution charged her with a violation of the wrong statute. The Department bears some responsibility for this matter having progressed to this point because of its own missteps.

40. The clear, convincing evidence of multiple mitigating circumstances, with no aggravating circumstances, plainly calls for the exercise of great leniency here, departing from the low end of the penalty guidelines that would apply in the normal case without mitigating circumstances.

41. Under these circumstances, including the financial hardship that would result from imposition of a fine or suspension of license and the fact that the violation itself (participation in the June 2009 transaction) would have been avoided had the Department acted in accordance with its prior practice to give notice of the continuing education deficiency, the appropriate penalty for Ms. Friels' minor violation of the licensing law is a reprimand.

42. In addition, under these circumstances, where the Department did not follow its practice of issuing a Notice of Continuing Education Deficiency, there should be no assessment of costs. It is noted that there also was no assessment of costs in the Uniform Disciplinary Citation issued in December 2009, which was not accepted by the Respondent only because it charged a violation of the wrong statute.

RECOMMENDATION

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

RECOMMENDED that a final order be entered by the Petitioner, Department of Business and Professional Regulation, Division of Real Estate, finding that the Respondent, Marsha Evans Friels, violated Subsection 475.42(1)(a), Florida Statutes (and, thereby, Subsection 475.25(1)(e), Florida Statutes); issuing a reprimand as the sole penalty; and waiving the permissive assessment of costs allowed by Subsection 455.227(3)(a), Florida Statutes.

DONE AND ENTERED this 24th day of September, 2010, in Tallahassee, Leon County, Florida.



ELIZABETH W. MCARTHUR
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of September, 2010.

ENDNOTES

^{1/} Unless otherwise indicated, all references to the Florida Statutes are to the 2009 version.

^{2/} In accordance with the pre-hearing order, the parties pre-filed their proposed exhibits so that at the video conference hearing, the ALJ would be able to review the described documents as they were offered into evidence. The

court reporter marked the exhibits tendered by the parties and attached the original exhibits to the original Transcript. As pointed out by the Petitioner in its Proposed Recommended Order, a mistake was made in what was marked as the Petitioner's Exhibit 2. The Petitioner's Exhibit 2 should be the two-page Certification of Ms. Friels' licensure history that was attached as Exhibit 2 to the Administrative Complaint, as described on the record. What the court reporter erroneously marked as the Petitioner's Exhibit 2 is actually the fourth and fifth pages of Petitioner's Exhibit 3, part of the supporting material submitted by the Respondent as attachments to her letter responding to the investigator's inquiry as described on the record by the investigator. These mistakes have been corrected by the undersigned ALJ by marking the correct the Petitioner's Exhibit 2, and re-marking the two pages that are part of the Petitioner's Exhibit 3, and initialing each corrected page.

^{3/} There is no statutory authority for assessment of "fees." Subsection 455.227(3)(a), Florida Statutes, permits, but does not require, assessment of costs related to the investigation and prosecution of a disciplinary case, "excluding costs associated with an attorney's time."

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.