

**STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION**

FILED	
Department of Business and Professional Regulation Deputy Agency Clerk	
CLERK	Brandon Nichols
Date	1/11/2012
File #	2012-00176

**DEPARTMENT OF BUSINESS AND
PROFESSIONAL REGULATION,**

Petitioner

v.

**DOAH Case No.: 11-1340PL
DBPR Case No.: 2009-042101
LICENSE No.: CAM 33242**

FERNANDO A. LARACUENTE,

Respondent.

FINAL ORDER

THIS CAUSE came before the State of Florida, Department of Business and Professional Regulation (“the Department”) for the purpose of considering Administrative Law Judge Stuart M. Lerner’s (“ALJ Lerner”) Recommended Order, a copy of which is attached hereto as Exhibit A. The Petitioner filed Exceptions to the aforementioned Recommended Order, and those Exceptions are hereby incorporated into the instant Final Order and attached hereto as Exhibit B.

The Petitioner filed a three-count Administrative Complaint alleging the Respondent violated particular statutes and rules governing Florida-licensed community association managers. The Respondent disputed the facts alleged in the Administrative Complaint and requested an evidentiary hearing before the Division of Administrative Hearings (“DOAH”). After this matter was referred to DOAH, ALJ Lerner convened a formal administrative hearing on August 3, 2011.

The Petitioner moved to amend the Administrative Complaint on August 8, 2011. On August 10, 2011 and over the Respondent's objection, ALJ Lerner granted the Petitioner's Motion, and the Amended Administrative Complaint is attached hereto as Exhibit C.

On September 26, 2011, ALJ Lerner issued a Recommended Order calling for the Department to dismiss the Amended Administrative Complaint.

The Petitioner filed Exceptions to ALJ Lerner's Recommended Order. After a complete review of the Record in this matter, the Department rules as follows:

RULINGS ON PETITIONER'S EXCEPTIONS

1. The Petitioner's first Exception took issue with Paragraph #31 of the Recommended Order in which ALJ Lerner concluded that "[w]hile Respondent was involved in the 2010 Board elections, it was not as a community association manager. Rather, [Respondent] was acting in his capacity as secretary of the Board."

2. The Petitioner's first Exception also took issue with Paragraph #33 of the Recommended Order in which ALJ Lerner concluded that "[t]he record evidence fails to clearly and convincingly establish that . . . Respondent participated in the Association's response to [Adrianna Caraballo]'s attorney's letter in any role other than as secretary of the Board."

3. However, the Petitioner correctly acknowledged in its Exceptions that "principles of administrative law preclude the Department from rejecting Paragraphs 31 and 33." Accordingly, to whatever extent the Petitioner is requesting that Paragraph #'s 31 and 33 be rejected, the Petitioner's first Exception is denied. See Gross v. Dep't of Health, 819 So. 2d 997, 1003 (Fla. 5th DCA 2002)(noting "Florida Courts have

consistently held that the issue of whether an individual violated a statute or deviated from a standard of conduct is generally an issue of fact to be determined by the administrative law judge based on the evidence and testimony.”).

4. The Petitioner also took exception to Paragraph #32 of the Recommended Order in which ALJ Lerner concluded that “[t]he record evidence does clearly and convincingly establish that Respondent made this false statement; however, the statement was made during a telephone conversation Respondent had with one of Petitioner’s investigators and not ‘[d]uring the performance of management services.’ The making of this statement therefore did not constitute a violation of Florida Administrative Code Rule 61E-2.001(2). Accordingly, Count II of the Amended Administrative Complaint must be dismissed.”

5. In this second Exception, the Petitioner notes that Count II could have been charged under section 455.227(1)(m), Florida Statutes (2007-2010), which subjects licensees to discipline for “[m]aking 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.”

6. According to the Petitioner, “it is quite clear the [Petitioner] would have been able to prove Respondent committed a violation if the [Petitioner] had charged the Respondent under the above-referenced statute, rather than Rule 61E14-2.001(2), Florida Administrative Code.” As a result, the Petitioner submits that should be taken into account as an aggravating circumstance in the event the Respondent commits additional violations in the future.

7. To the extent the Petitioner's second Exception asks the Department to reject Paragraph # 32 of the Recommended Order, that Exception is denied.

8. However and as noted above, the Petitioner's Exceptions have been incorporated into the instant Final Order and attached hereto as Exhibit B. A determination as to whether the circumstance in the second Exception will be considered in future cases will be addressed if the Respondent commits additional violations.

FINDINGS OF FACT

9. ALJ Lerner's Findings of Fact as set forth in Exhibit A are approved, adopted, and incorporated herein by reference. Those findings are supported by competent, substantial evidence.

CONCLUSIONS OF LAW

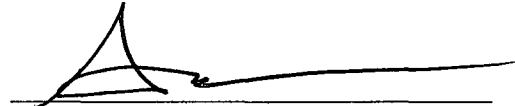
10. ALJ Lerner's Conclusions of Law as set forth in Exhibit A are approved, adopted, and incorporated herein by reference.

WHEREFORE, IT IS ORDERED AND ADJUDGED THAT:

1. The Amended Administrative Complaint pertaining to DPBR case # 2009-042101 is hereby dismissed.

2. This order shall become effective on the date of the filing with the Department's Agency Clerk.

DONE AND ORDERED this 11 day of January, 2012



G.W. HARRELL
Director of Professions
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, FL 32399

NOTICE OF RIGHT TO APPEAL UNLESS WAIVED

Unless expressly waived, any party substantially affected by this final order may seek judicial review by filing an original Notice of Appeal with the Clerk of the Department of Business and Professional Regulation, and a copy of the notice, accompanied by the filing fees prescribed by law, with the clerk of the appropriate District Court of Appeal within thirty (30) days of rendition of this order, in accordance with Rule 9.110, Fla. R. App. P., and section 120.68, Florida Statutes.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Final Order has been provided by U.S. Mail to: (1) Christopher L. Hixon, Esquire; Lynch & Robbins, P.A.; 2639 Dr. Martin Luther King, Jr. Boulevard North; St. Petersburg, Florida 32804; and (2) C. Erica White, Esquire; Department of Business and Professional Regulation; 1940 North Monroe Street, Suite 42; Tallahassee, Florida 32399-2202 on this the 11th day of January, 2012.

AGENCY CLERK'S OFFICE



Brandon Nichols, Deputy Agency Clerk

Copy furnished to:

The Honorable Stuart M. Lerner, Administrative Law Judge; Division of Administrative Hearings; 1230 Apalachee Parkway; Tallahassee, Florida 32399-3060