

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

FRANCESCO RICCHI,

Petitioner,

vs.

Case No. 16-0854

DEPARTMENT OF BUSINESS AND  
PROFESSIONAL REGULATION,  
DIVISION OF CONDOMINIUMS,  
TIMESHARES AND MOBILE HOMES,

Respondent.

\_\_\_\_\_ /

RECOMMENDED ORDER

A hearing was conducted in this case pursuant to sections 120.569 and 120.57(1), Florida Statutes (2016),<sup>1/</sup> before Cathy M. Sellers, an Administrative Law Judge ("ALJ") of the Division of Administrative Hearings ("DOAH"), on April 27, 2016, by video teleconference at sites in Lauderdale Lakes and Tallahassee, Florida.

APPEARANCES

For Petitioner: Richard F. Della Fera, Esquire  
Entin and Della Fera, P.A.  
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For Respondent: Ryan N. Lumbreras, Esquire  
Robin E. Smith, Esquire  
Department of Business and  
Professional Regulation  
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STATEMENT OF THE ISSUE

Whether Petitioner is of "good moral character" as required by section 326.004(6)(a), Florida Statutes, and Florida Administrative Code Rule 61B-60.003, such that he is entitled to issuance of a yacht salesperson license.

PRELIMINARY STATEMENT

On January 6, 2016, Respondent issued a Notice of Intent to Deny Petitioner's application for a yacht salesperson license. Petitioner timely requested a hearing pursuant to sections 120.569 and 120.57(1) to contest Respondent's proposed denial of his license.

The final hearing was held on April 27, 2016. Petitioner testified on his own behalf and presented the testimony of Helen Brazier and Giancarlo Ricchi. Petitioner's Exhibits A and B were admitted into evidence without objection. Respondent presented the testimony of Chelisa Kirkland and Respondent's Exhibits 1 and 2 were admitted into evidence without objection.

The one-volume Transcript was filed on May 31, 2016. A jointly-requested extension for filing the parties' proposed recommended orders was granted. Petitioner's Proposed Recommended Order was timely filed on June 15, 2016, and Respondent's Proposed Recommended Order was timely filed on June 16, 2016. Both proposed recommended orders were duly considered in preparing this Recommended Order.

## FINDINGS OF FACT

### I. The Parties

1. Petitioner is an applicant for a yacht salesperson license, pursuant to the Yacht and Ship Brokers Act, chapter 326, Florida Statutes, and Florida Administrative Code Chapter 61B-60. He is 22 years old.

2. Respondent is the state agency charged under chapter 326 with licensing yacht salespersons.

### II. The Evidence Adduced at Hearing

3. On October 6, 2015, Petitioner submitted to Respondent a complete application for a yacht salesperson license.

4. On January 6, 2016, Respondent sent Petitioner a Notice of Intent to Deny License Application ("Notice of Intent"). The Notice of Intent stated that Respondent was denying Petitioner's application on the basis that he did "not [provide] satisfactory proof that he is of good moral character."

5. Respondent based this decision on Petitioner's disclosure, in his criminal history report required as part of the application, that he previously had pled nolo contendere to a felony charge of aggravated assault with a deadly weapon without intent to kill, a third degree felony under section 784.021, Florida Statutes.

6. This charge resulted from Petitioner having waved a firearm outside of his vehicle after being involved in a traffic

incident with another driver. Petitioner committed the offense on November 10, 2012, when he was 18 years old.

7. The court withheld adjudication of guilt on the charged offense. On January 9, 2014, Petitioner was sentenced, as a youthful offender, to 120 days in jail and three years' probation without the possibility of early termination.

8. Petitioner completed his jail sentence in April 2014, and is in the process of completing his probation sentence, which will terminate in or about January 2017.

9. Upon sentencing, Petitioner was not allowed to leave the tri-county area without obtaining a permit and was required to report once a month to his probation officer.

10. However, because Petitioner had served his jail sentence and had fully complied with the conditions of his probation over a period of more than two years, in March 2016, the circuit court judge who presided over his criminal case converted his probation to not-reporting administrative probation. This has enabled Petitioner to engage in cross-country flight sessions necessary to complete his commercial and instrument flight training, discussed in greater detail below.

11. Subsequent to his commission of the offense but before sentencing, Petitioner accepted the help of Dr. Anthony M. Castro, a practicing clinical psychologist and assistant professor of clinical psychiatry at the University of Miami's

Miller School of Medicine. Petitioner has been consistently involved in treatment sessions with Dr. Castro since he began seeing him over two years ago. Petitioner continued to correspond with Dr. Castro via mail while he was serving his jail sentence, and continued his in-person counseling sessions immediately following his release from jail. Over the course of his treatment, Petitioner has attended sessions with Dr. Castro on a bi-weekly to monthly basis, has continued to respond well to the counseling, and has remained compliant with all of Dr. Castro's recommendations. The evidence shows that Petitioner has experienced significant personal growth as a result of the counseling, and that he exhibits more effective problem-solving skills and better manages his behavior and emotional responses than he did before the counseling.

12. Since April 2015, Petitioner has taken helicopter flight lessons.<sup>2/</sup> He is instructed by Helen Brazier, an instructor and assistant chief for helicopters at Pelican Flight Training in Pembroke Pines. Petitioner has obtained his private pilot's license and currently is training to receive his commercial and instrument licenses.

13. At the hearing, Brazier credibly testified that possessing maturity, good judgment skills, sound ethical values, self-discipline, motivation, and dependability are essential to obtaining a private pilot's license. This is because being a

pilot entails substantial responsibility, in that the pilot has others' lives in his or her hands. Brazier testified, persuasively, that Petitioner is "a very good student . . . and completed everything in minimum time, and with very good results." Brazier testified that she will recommend Petitioner for his commercial pilot license upon Petitioner's completion of the requisite coursework, based, among other things, on her positive evaluation of his moral character.

14. In order to obtain a pilot's license, applicants must be determined by the Federal Aviation Administration ("FAA") to have good moral character, in addition to providing all required documentation and successfully completing flying examinations. Evaluation of an applicant's character begins with a recommendation from the flight instructor, but the FAA has the ultimate authority to accept or deny the applicant based on a review of the applicant's criminal history. The FAA found Petitioner to have good moral character, as evidenced by their approval of his private pilot license.

15. Petitioner's progress in flight school and his display of personal growth over the past two years led the circuit court judge presiding over his criminal case to modify Petitioner's probation, thus enabling Petitioner to fly out of the tri-county area without obtaining a permit and not requiring him to continue to report monthly to his probation officer.

16. At the hearing, Petitioner credibly explained the circumstances under which he committed the offense. Petitioner had been frustrated by several unfortunate events in his life that culminated in the road rage incident that resulted in his felony charge. Petitioner testified that a motorcycle incident<sup>3/</sup> and the decline of his profits at work increased his overall frustration prior to his poor decision to wave a firearm outside of his vehicle. He explained, persuasively, that it was more an "ignorant" act than one of malice, and that it was more of an act of "not knowing any better" than one of bad moral character. He characterized the consequences of his actions as a "wake-up call." He expressed regret and remorse for his behavior in committing the offense.

17. Petitioner testified, credibly and persuasively, that through his counseling sessions with Dr. Castro, he has learned to be patient, to "wait for the dust to settle" before acting, and not to overreact to circumstances and situations.

18. Petitioner currently is employed full-time as a production manager at Pro Marine, a boat-building company. His responsibilities entail supervising the construction process for each vessel and consigning completed vessels to clients.

19. The evidence establishes that apart from the matter discussed above, Petitioner does not have any other criminal history. There is no evidence in the record indicating that

Petitioner has ever engaged in any fraudulent conduct or that he is in any manner dishonest.<sup>4/</sup>

20. Chelisa Kirkland, supervisor of Respondent's Yacht and Ship Broker's Section, testified regarding Respondent's proposed denial of Petitioner's yacht salesperson license.

21. In evaluating Petitioner's application for licensure, Respondent applied rule 61B-60.003. Kirkland testified that Respondent's decision to deny Petitioner's license was based on his criminal history as disclosed in his application. She noted that Petitioner did not submit any information in his application regarding his rehabilitation, and that had such information been submitted, Respondent would have considered it in determining whether he possessed good moral character for purposes of granting or denying his application for a yacht salesperson license.

22. Respondent did not present any evidence at the final hearing countering or rebutting Petitioner's evidence of his rehabilitation that was presented at the final hearing.

### III. Findings of Ultimate Fact

23. Upon full consideration of the competent substantial evidence in the record, it is determined that Petitioner has demonstrated, by a preponderance of the evidence, that he is rehabilitated from his prior criminal offense such that he possesses good moral character for purposes of being entitled to



issuance of a yacht salesperson license under chapter 326 and rule 61B-60.003.

24. Petitioner has been honest and forthcoming regarding his criminal offense. As noted above, he fully disclosed his criminal history in his application and, at the hearing, acknowledged that his conduct was inexcusable and expressed remorse at having committed the offense.

25. Petitioner showed, by credible and compelling evidence presented at the final hearing, that he recognized his anger management issues, and he took the initiative to turn his life around by voluntarily obtaining the assistance of Dr. Castro for mental health counseling. The evidence establishes that Petitioner has learned effective strategies and appropriate behaviors for dealing with stressful situations. The evidence further shows that he likely will continue to improve as he works toward and meets his personal and professional goals. Petitioner has shown that he understands that the behavior he exhibited when he was 18 years old that led to his criminal record is unacceptable.

26. Petitioner has further shown good moral character through his actions involved in obtaining his private pilot license and by receiving positive evaluations regarding his moral character from the FAA. Petitioner's and Brazier's credible and persuasive testimony establish that Petitioner possesses the

sound judgment, strong ethical values, maturity, focus, mental and behavioral stability, and self-discipline that are essential to demonstrating rehabilitation and establishing that he possesses good moral character.

27. For these reasons, it is determined that Petitioner has shown, by a preponderance of the competent substantial evidence in the record, that he is rehabilitated such that he possesses good moral character and, thus, is entitled to issuance of a yacht salesperson license under chapter 326 and rule 61B-60.003.

#### CONCLUSIONS OF LAW

28. DOAH has jurisdiction over the parties to, and subject matter of, this proceeding pursuant to sections 120.569 and 120.57(1).

29. This is a de novo proceeding, the purpose of which is to "formulate agency action, not to review action taken earlier and preliminarily." Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778, 785 (Fla. 1st DCA 1981); Capeletti Bros. Inc. v. Dep't of Transp., 362 So. 2d 346, 348 (Fla. 1st DCA 1978); McDonald v. Dep't of Banking and Fin., 346 So. 2d 569, 584 (Fla. 1st DCA 1977). Accordingly, the undersigned is charged with determining anew, based on the evidence presented,<sup>5/</sup> whether Petitioner has met the statutory and rule requirements such that he is entitled to issuance of a yacht salesperson license.

30. As the applicant for a yacht salesperson license, Petitioner bears the burden to demonstrate, by a preponderance of the evidence,<sup>6/</sup> that he meets all applicable licensure requirements such that he is entitled to issuance of the license. J.W.C. Co., 396 So. 2d at 787.

31. Section 326.004(6)(a), which sets forth the requirements for licensure of yacht salespersons, provides in pertinent part: "[t]he division may deny a license to any applicant who does not [f]urnish proof satisfactory to the division that he or she is of good moral character."

32. Rule 61B-60.003, governing applications for yacht salespersons' licenses, requires, among other things, a determination of the applicant's moral character. This rule provides in pertinent part:

(3) Review for Good Moral Character.

(a) When the application has been determined to be in acceptable form, the division shall evaluate the application and make appropriate inquiry to determine the applicant's moral character. For the purposes of this rule, the following factors bear upon good moral character:

1. The completion of a criminal history check by the Florida Department of Law Enforcement that reveals no convictions of a felony, no convictions of a misdemeanor involving moral turpitude, and no pleas of nolo contendere, pleas of guilty, or verdicts of guilty to a felony charge or of any non-felonious offense involving moral turpitude, fraud, theft,

dishonesty, assault and battery, or false statement[.]

\* \* \*

6. Failure of the applicant to provide full and complete disclosure, or to provide accurate information, on the application for licensure.

7. The foregoing factors shall be considered in determining whether an applicant is of good moral character for purposes of licensure under Chapter 326, F.S., if they comply with the following guidelines:

a. The disposition of criminal charges shall be considered if such constitutes a felony, or if such constitutes a misdemeanor involving moral turpitude, fraud, theft, dishonesty, assault and battery, or false statement.

\* \* \*

c. Except as provided in sub-sub-paragraph 7.d. of this rule, no information relating to criminal, administrative or civil actions shall be considered if more than 5 years has elapsed from the satisfaction of the terms of any order, judgment, restitution agreement, or termination of any administrative or judicially-imposed confinement or supervision of the applicant, whichever is more recent.

\* \* \*

e. Other considerations such as termination of probation, compliance with and satisfaction of any judgment or restitution agreement may be considered as evidence of rehabilitation of the applicant's good moral character.

33. As discussed above, Petitioner fully disclosed in his application that he had pled nolo contendere to assault with a deadly weapon without intent to kill.

34. Rule 61B-60.003(3)(a)7. lists factors that "shall" be considered in determining whether the applicant is of good moral character.

35. Pursuant to sub-sub-paragraph a., disposition of felony criminal charges must be considered. As noted above, the evidence establishes that adjudication of Petitioner's guilt for that offense was withheld.

36. Pursuant to sub-sub-paragraph c. of the rule, Petitioner's criminal history must be considered because it involved a felony and five years has not elapsed since Petitioner's satisfaction of the terms of the judgment against him.

37. However, the plain language of rule 61B-60.003 (3)(a)7.e. makes clear that even when an applicant has a criminal history and five years have not elapsed since satisfaction of the terms of judgment, he or she still may be determined to be rehabilitated and, thus, of good moral character, based on other considerations.

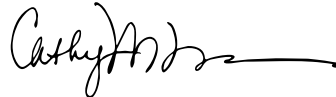
38. As discussed in detail above, Petitioner presented competent, credible, and persuasive evidence at the final hearing showing that he is rehabilitated from his criminal offense and that he is of "good moral character" pursuant to rule 61B-60.003 and as required by section 326.004(6)(a).<sup>7/</sup>

39. Based on the foregoing, it is concluded that Petitioner is entitled to issuance of a yacht salesperson license under chapter 326 and rule 61B-60.003.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Business and Professional Regulation issue a final order approving Petitioner's application for a yacht salesperson license.

DONE AND ENTERED this 18th day of July, 2016, in Tallahassee, Leon County, Florida.



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CATHY M. SELLERS  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 18th day of July, 2016.

ENDNOTES

<sup>1/</sup> All references are to the 2016 version of Florida Statutes unless otherwise stated.

<sup>2/</sup> Because being a yacht salesperson is a part-time occupation, Petitioner also is working toward being licensed as a commercial pilot.

<sup>3/</sup> Petitioner previously had been severely injured in a motorcycle accident.

<sup>4/</sup> To that point, as noted above, Petitioner fully disclosed his criminal history on his application for a yacht salesperson license.

<sup>5/</sup> The undersigned recognizes that the evidence of rehabilitation provided at the final hearing that supports the determination that Petitioner is of good moral character was not available to Respondent at the time it reviewed Petitioner's application. However, this is a de novo proceeding. § 120.57(1)(k), Fla. Stat. Accordingly, it is necessary and appropriate for the undersigned to consider all competent substantial evidence in the record of this proceeding, including information not available to Respondent at the time it formulated its proposed agency action. See J.W.C. Co., 396 So. 2d at 784-85.

<sup>6/</sup> In its Proposed Recommended Order, Respondent cites Espinoza v. Department of Business and Professional Regulation, Florida Board of Engineers, 739 So. 2d 1250 (Fla. 3d DCA 1999), for the proposition that, in addition to showing entitlement to a license by a preponderance of the evidence, Petitioner also must show that the agency's decision to deny his license was arbitrary and capricious. Even a cursory reading of Espinoza reveals that it is completely distinguishable from, and therefore inapposite to, this case. Espinoza, and the case on which it is grounded, Harac v. Department of Professional Regulation, Board of Architecture, 484 So. 2d 1333 (Fla. 3d DCA 1986), involved circumstances where an applicant for a professional license had not satisfied the licensure examination requirements—a key and dispositive distinction between those cases and the instant case. In Harac, the court noted that generally, one who fails a licensure examination shoulders a heavy burden in proving that the evaluation was arbitrary. Id. at 1338. Likewise, in State ex rel. Topp v. Board of Electrical Examiners for Jacksonville Beach, 101 So. 2d 583, 586 (Fla. 1st DCA 1958), cited in Harac, the court noted that where city examining boards conduct their examinations fairly and uniformly in accordance with their own rules and regulations, their judgment as to proper grading of such examinations will not be disturbed by courts unless clearly shown to be devoid of logic and reason. Espinoza, Harac, and their antecessors and progeny are applicable to the specific circumstances where an applicant disputes denial of a license based on a determination that he or she failed to satisfy a licensure examination requirement. No such circumstances are present in this case, and Respondent failed to provide any legal authority whatsoever to support extension of the principle applied

in Espinoza, Harac, and their antecessors and progeny to circumstances, such as those present in this case, that do not involve denial of a license on the basis of failing to satisfy a licensure examination requirement.

<sup>7/</sup> In support of its position that Petitioner has not demonstrated good moral character, Respondent states that after Petitioner filed his request for hearing challenging its proposed denial, Respondent's Division director and counsel conferred and that the Division "ultimately determined, in its discretion, that such evidence was not satisfactory proof that Petitioner is of good moral character." That position is rejected for three reasons. First, Respondent did not present any evidence at the hearing regarding its subsequent consideration of Petitioner's rehabilitation, so the record is devoid of evidence to support Respondent's representation on that point. Second, even if Respondent had presented such evidence, it would not have been dispositive because, as discussed at length above, this is a de novo proceeding designed to formulate agency action, not review action taken earlier and preliminarily. As such, the purpose of this hearing is to determine anew, in an evidentiary proceeding, whether Petitioner is rehabilitated from his criminal offense such that he is of good moral character for purposes of entitlement to a yacht salesperson license. As discussed herein, the competent substantial evidence in the record establishes that Petitioner is rehabilitated and is of good moral character, so is entitled to issuance of a license. Third, under any circumstances, Respondent did not present evidence at the final hearing countering or rebutting Petitioner's credible, persuasive evidence that he is rehabilitated from his criminal offense for purposes of demonstrating good moral character. While rule 61B-60.003 invests Respondent with the power to exercise its judgment in determining whether an applicant is of good moral character, established case law makes abundantly clear that Respondent's exercise of discretion must be based on evidence in the record explaining and supporting the exercise of that discretion. Fla. Power & Light Co. v. Siting Bd., 693 So. 2d 1025, 1027 (Fla. 1st DCA 1997); McDonald v. Dep't of Banking and Fin., 346 So. 2d 569, 577 (Fla. 1st DCA 1977). As discussed above, Respondent failed to present evidence at hearing supporting its rejection of Petitioner's evidence of rehabilitation presented at hearing.



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.