

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

EARRON SHIELDS,

Petitioner,

vs.

Case No. 19-0132

DEPARTMENT OF BUSINESS AND
PROFESSIONAL REGULATION, FLORIDA
REAL ESTATE COMMISSION,

Respondent.

_____ /

RECOMMENDED ORDER

Administrative Law Judge D. R. Alexander conducted a final hearing by video teleconference in this matter on April 16, 2019, at sites in Altamonte Springs and Tallahassee, Florida.

APPEARANCES

For Petitioner: Alejandro L. Marriaga, Esquire
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For Respondent: Robert Antonie Milne, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Petitioner's application for a real estate license should be denied for the reasons stated in Respondent's Notice of Intent to Deny, dated November 2, 2018.

PRELIMINARY STATEMENT

On November 2, 2018, Respondent, Department of Business and Professional Regulation, Florida Real Estate Commission (Commission), informed Petitioner that his application for a real estate license was denied based on his criminal record; unpersuasive testimony in explanation/mitigation; recent criminal history; pattern of crime; insufficient time, free of government supervision, to establish rehabilitation; other license discipline; and being a convicted felon. The Notice of Intent to Deny states that the foregoing reasons constitute sufficient grounds under chapter 475, Florida Statutes, to deny the application.^{1/} Petitioner timely requested a hearing to contest this determination, and the matter was referred to the Division of Administrative Hearings to resolve the dispute.

At the hearing, Petitioner, who currently resides in Minnesota, testified by telephone on his own behalf and presented the post-hearing deposition testimony of two character witnesses. The Commission did not present any witnesses. Commission Exhibits 1 through 11 were accepted in evidence.

A one-volume Transcript of the hearing was prepared. The Transcripts of the depositions were filed on June 20, 2019. Proposed findings of fact and conclusions of law (PROs) were timely filed by the parties, and they have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Commission is the state agency charged with licensing real estate brokers and sales associates in Florida. See § 475.161, Fla. Stat.

2. On August 17, 2018, Petitioner filed with the Commission an application for a Real Estate Broker License - Out of State Experience. According to his PRO, however, he is applying for a "real estate associate license." In conjunction with the application, a lengthy and somewhat confusing record of Petitioner's administrative and criminal history in New York and Minnesota between 1995 and 2018 has been compiled and is found in Commission Exhibit 11, consisting of approximately 300 pages. Besides holding an active Colorado real estate license, he also has a mortgage originator's license issued by the State of Minnesota in 2018.

3. The application required Petitioner to provide answers to four background questions. In response to question 1, which asks the applicant if he has ever been convicted or found guilty of, or entered a plea of nolo contendere or guilty to, regardless of adjudication, a crime in any jurisdiction, or is currently under criminal investigation, Petitioner answered yes. In his explanation to the question, Petitioner listed four arrests, discussed below, all occurring in the State of Minnesota. Although the Notice of Intent to Deny alleges that he was

convicted of a felony, the Commission now concedes that all convictions are for misdemeanors.

4. First, on July 1, 1997, Petitioner, then 22 years old, was arrested for one felony count of criminal sexual conduct in the first degree and two felony counts of criminal sexual conduct in the third degree. In May 1998, he pled guilty to fifth degree sexual conduct, a gross misdemeanor, and was fined \$900.00, sentenced to nine days in jail, placed on two years' probation, ordered to undergo sex offender treatment, and required to register as a sex offender for ten years in New York (where he had relocated temporarily) and Minnesota. Petitioner completed all conditions required by the court.

5. In his application, Petitioner explained that the arrest and conviction were the result of "interactions with an underaged woman [a 15-year-old babysitter for his fiancée's child] that lied about her age." At hearing, he testified that he pled guilty to the misdemeanor charge because he did not have sufficient funds to continue to fight the original felony charges, and he "did not want to take the chances with the jury," even though the prosecutor admitted to the court the defendant's attorney "can kill our guys on cross-examination." He decided to "take the misdemeanor and get on with [his] life." Petitioner acknowledges that he pled guilty to a sexual offense, but it is

fair to find that he wants the Commission to accept his version of events - that the girl fabricated the entire incident.

6. Second, on July 10, 1997, Petitioner was arrested for disorderly conduct, a misdemeanor, after an "[a]rgument with girlfriend and her brother." He was found guilty of the charge and paid a \$150.00 fine.

7. Third, in October 2008, while in a divorce proceeding with his then wife, Petitioner was charged with violation of an Order for Protection for "exchanging messages with my wife on childcare/exchange matters which were allowed according to the original order. She called in and filed a complaint." The application states that the charge was later dismissed. The Commission does not dispute this representation.

8. Finally, in November 2008, Petitioner was arrested for gross misdemeanor domestic assault against his then wife. Petitioner explained that this incident occurred after an "argument with wife (she was heavily intoxicated) that escalated." He later pled guilty to disorderly conduct, paid a \$300.00 fine, and was given one year of unsupervised probation. He successfully completed all conditions imposed by the court.

9. Question 1 requires that an applicant also report traffic offenses other than parking, speeding, inspection, or traffic signals. The Commission's PRO points out that Petitioner failed to disclose that in 1995, while a resident of the State of

New York, he pled guilty to operating a motor vehicle (motorcycle) while impaired by drugs (marijuana). At hearing, Petitioner testified that he forgot about the traffic violation, as it occurred 24 years ago when he was only 20 years old. Even though the Notice of Intent to Deny does not allege that Petitioner failed to disclose his complete criminal record, the issue was tried by consent at hearing. However, Petitioner's omission of this minor item should have no bearing on whether to approve or deny the application.

10. Question 4 asks the applicant to disclose whether he ever has had a license to practice any regulated profession revoked, annulled, suspended, relinquished, or otherwise disciplined in any jurisdiction. Petitioner answered yes.

11. In explaining his answer to question 4, Petitioner stated that his Minnesota real estate broker license was revoked by the Department of Commerce in May 2018 for (a) failure to self-report a 2008 bankruptcy; (b) the denial in 2009 of his application for a residential general contractor's license; and (c) a 2012 felony charge (domestic assault by strangulation of his ex-wife), which was dismissed later. The application added that due to the revocation of the Minnesota license, his Colorado realtor license "is currently in review." At hearing, however, Petitioner testified that Colorado is not taking any action on that license.

12. The revocation order provided in part that Petitioner obtained his license by fraud and misrepresentation, he had a complete disregard for the law, and he could not be trusted to make material disclosures and otherwise comply with licensing requirements. See Comm. Ex. 11, p. 208. Obtaining a license by fraud and/or misrepresentation, and not being trusted to make material disclosures and comply with licensing requirements, are grounds for revoking or suspending a license in the state of Florida had Petitioner then been registered. At hearing, Petitioner testified that he actually had disclosed the bankruptcy and administrative action to the state when he submitted an application to transfer a brokerage license in 2009. Evidently, this contention was not accepted by the Department of Commerce. Petitioner says he "attempted" to appeal the revocation order, but the appeal was denied.

13. In its PRO, the Commission alleges that Petitioner failed to disclose an enforcement action instituted by the Minnesota Department of Labor and Industry (MDLI) in 2009, which resulted in him voluntarily consenting to the revocation of a residential building contractor license held by Vanquish Custom Homes, LLC, a company he controlled. Although this omission is not cited in the Notice of Intent to Deny, the issue was raised at hearing without objection by Petitioner.

14. Petitioner's response to background question 3 acknowledges that his application for a "residential general contractor's license" was denied in 2009. Also, in a letter attached to the application, Petitioner made reference to that action, although in a somewhat confusing and incomplete manner. See Comm. Ex. 11, p. 187. The letter fails to disclose that the proceeding arose in the context of an enforcement action by MDLI, which alleged, among other things, that Petitioner was untrustworthy, incompetent, and unqualified to act as a licensee's qualifying owner. The letter and application also fail to disclose that MDLI issued a consent order revoking the license, imposing a \$5,000.00 suspended civil fine, and ordering him to cease and desist from acting as a residential building contractor. Had Petitioner been registered in the state of Florida, these actions would have been grounds to suspend or revoke the license.

15. At hearing, Petitioner explained that the license lapsed around 2007, he reapplied for licensure in 2008, but he withdrew the application after MDLI issued an intent to deny. He says he took this action because he "didn't need the contractor license, and it just wasn't worth spending the money to fight it."

16. By consent of the parties, Petitioner acknowledged that he failed to disclose a consent order issued by MDLI in 2013,

which determined that Vanquish Services Group, LLC, another company controlled by Mr. Shields, had violated the 2009 consent order. Petitioner was ordered to cease and desist from any further residential building contractor violations and to pay a \$5,000.00 civil penalty, of which \$4,500.00 was stayed. At hearing, Petitioner testified that in an effort to procure clients, his company incorrectly advertised four trades on Angie's List, when the company was allowed no more than three trades to be advertised. He admits this was a "mistake."

17. Two character witnesses, Mr. Hartos and Ms. Anderson, both currently licensed as realtors in Minnesota, testified on behalf of Petitioner. Both testified that they are aware of his prior administrative and criminal history. Mr. Hartos is a long-time licensed broker, who has served on the Minnesota Association of Realtors Board of Professional Standards for more than 25 years, and was Petitioner's broker and "boss" for the last five years. The other is a former employee. Based on their work experience with Petitioner, they found him to be ethical, truthful, honest, and trustworthy, and not a danger to the public. Forty-three letters of recommendation, including those submitted by the two character witnesses, all hearsay in nature, corroborate this conclusion.

CONCLUSIONS OF LAW

18. Petitioner challenges the Commission's denial of his application for a broker/sales associate license. He carries the ultimate burden of persuasion in this proceeding. Dep't of Child. & Fams. v. Davis Fam. Day Care Home, 160 So. 3d 854, 857 (Fla. 2015).

19. In an application denial case, however, the agency has the burden to prove the specific acts or violations which it alleges are grounds for denial. See, e.g., M.H. v. Dep't of Child. & Fams., 977 So. 2d 755, 761 (Fla. 2d DCA 2008).

20. Although the Notice of Intent to Deny cites multiple grounds for denying Petitioner's application, in its PRO, the Commission relies on only three: the 1997 conviction for a sexual offense, which it contends constitutes a crime involving moral turpitude or a crime directly related to the activities of a broker or sales associate; the revocation of Petitioner's real estate broker license in 2018; and an insufficient lapse of time and subsequent good conduct and reputation since these two incidents occurred. The PRO cites sections 475.17(1)(a) and 475.25(1)(f), (g), and (s), Florida Statutes, as the statutory bases to support those charges.

21. Section 475.17(1)(a) provides, in relevant part, as follows:

(a) An applicant for licensure . . . must be honest, truthful, trustworthy and of good character; and have a good reputation for fair dealing. An applicant for an active broker's license must be competent and qualified to make real estate transactions and conduct negotiations therefor with safety to investors and to those with whom the applicant may undertake a relationship of trust and confidence. . . . [I]f the applicant has been guilty of conduct or practices in this state or elsewhere which would have been grounds for revoking or suspending his or her license under this chapter had the applicant then been registered, the applicant shall not be deemed to be qualified unless, because of lapse of time and subsequent good conduct and reputation, or other reason deemed sufficient, it appears to the commission that the interest of the public and investors will not likely be endangered by the granting of registration.

22. Section 475.25(1) authorizes the Commission to deny an application for licensure if it finds the applicant:

(f) Has been convicted or found guilty of, or entered into a plea of nolo contendere to, regardless of adjudication, a crime in any jurisdiction which directly relates to the activities of a licensed broker or sales associate, or involves moral turpitude or fraudulent or dishonest dealing. The record of conviction certified or authenticated in such form as to be admissible in evidence under the laws of the state shall be admissible as prima facie evidence of such guilt.

(g) Has had a broker's or sales associate's license revoked, suspended, or otherwise acted against, or has had an application for such licensure denied, by the real estate licensing agency of another state, territory, or country.

* * *

(s) Has had a registration suspended, revoked, or otherwise acted against in any jurisdiction. The record of the disciplinary action certified or authenticated in such form as to be admissible in evidence under the laws of the state shall be admissible as prima facie evidence of such disciplinary action.

23. The Commission carried its burden of proving that Petitioner pled guilty to a criminal sexual offense in 1998, and that Petitioner's real estate broker license was revoked by the state of Minnesota in May 2018.

24. The Commission argues that the sexual offense directly relates to the activities of a broker or sales associate, and the crime involves moral turpitude. See § 475.25(1)(f), Fla. Stat. To support this allegation, the Commission relies on the rationale in Raines v. Construction Industry Licensing Board, Case No. 08-2718 (Fla. DOAH Dec. 15, 2008; FCILB July 23, 2009). In Raines, an applicant for a certified residential contractor license had been found guilty in 1991 of attempted capital sexual battery on a person under the age of 12 years (his step-daughter), and guilty in 1999 of possession of child pornography on his computer. Administrative Law Judge E.J. Davis found that the crime related to the practice of contracting "because a residential contractor has greater access to private homes than laymen or many other professionals; because a licensed

residential contractor is automatically extended a higher level of trust by consumers' families than is a typical unlicensed construction worker; and because there is a substantial potential that homeowners will entrust a licensed residential contractor in their home and near their children, while expecting the licensee to oversee his on-premises staff." Therefore, she concluded that, by virtue of the convictions, the applicant was not of "good moral character," and there was a substantial connection between the lack of good moral character of the applicant and the professional responsibilities of a certified contractor.

25. There is no evidence describing the activities that a broker or sales associate typically engage in, and whether the acts described in the 1998 conviction directly relate to those activities. Given this evidentiary shortcoming, and having reviewed the Raines case, the cited authority is deemed to be unpersuasive on this issue.

26. The Commission also contends the sexual offense involves moral turpitude. § 475.25(1)(f), Fla. Stat. Moral turpitude has been defined by the Supreme Court, in part, as "anything done contrary to justice, honesty, principle, or good morals." State ex rel Tullidge v. Hollingsworth, 146 So. 660, 661 (Fla. 1933). In other words, if the crime "reflects on the honesty, integrity, and good morals of the offender," it is a

crime of moral turpitude. Cambas v. Dep't of Bus. & Prof'l Reg., 6 So. 3d 668, 671 (Fla. 5th DCA 2009).

27. The difficulty in delineating in a general way which crimes are, or are not, ones involving moral turpitude is spelled out in Nelson v. Department of Business and Professional Regulation, 707 So. 2d 378 (Fla. 5th DCA 1998). In cases where crimes involving moral turpitude have been used in disciplining real estate licensees, the courts have held that drug trafficking, manslaughter, bookmaking, and leaving the scene of an accident with injuries involve moral turpitude, while criminal mischief, possession of a controlled substance, and unlawful possession of lottery tickets do not. See Cambas, 6 So. 3d at 670 n. 2.

28. Illicit sexual activity with a 15-year-old female clearly reflects on the honesty, integrity, and good morals of the offender. This is especially true here as the court required Petitioner to register as a sex offender for ten years, undergo sex offender treatment, and to have no contact with the victim. While Petitioner contends that the victim fabricated the entire incident, this proceeding is not a forum in which the underlying facts of that crime may be relitigated. It is concluded that the crime involves moral turpitude.

29. The crime occurred 22 years ago, which in most cases would constitute a sufficient lapse of time since the offense.

However, given the string of arrests/convictions and administrative actions since that time, the undersigned cannot conclude that Petitioner has demonstrated subsequent good conduct and reputation since the plea of guilty. § 475.17(1)(a), Fla. Stat.

30. The 2018 revocation of the broker license is also a statutory ground for denying licensure. §§ 475.17(1)(a) and 475.25(1)(g) and (s), Fla. Stat. Unless there is a "lapse of time and subsequent good conduct and reputation, or other good reason deemed sufficient" since the revocation, an applicant shall not be deemed to be qualified for licensure. Only 14 months have passed since revocation occurred. Under any reasonable interpretation of the term "lapse of time," Petitioner cannot, at this time, satisfy the statutory requirement. Given this conclusion, it is unnecessary to consider the 2009 consent order, which was issued after the State of Minnesota initiated an enforcement action against Petitioner's residential building contractor license. § 475.25(1)(s), Fla. Stat.

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 application for a license as a real estate broker or sales associate.

DONE AND ENTERED this 15th day of July, 2019, in
Tallahassee, Leon County, Florida.



D. R. ALEXANDER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of July, 2019.

ENDNOTE

^{1/} Although the Commission's practice, when denying an application, is to enter a brief order advising an applicant that an application has been denied, the nuts and bolts of the denial are found in a "Key for License Denials" form, which is attached to the order. There the Commission places a check mark beside those facts (of which there are nine) and conclusions of law (of which there are 13) which apply to a particular applicant. In this case, the Commission checked seven fact boxes and four conclusions of law boxes.

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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.