STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MILAIN DAVID FAYULU,

Petitioner,

vs. Case No. 19-0509

FLORIDA REAL ESTATE COMMISSION,

Respondent.
_____/

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing by video teleconference on March 21, 2019, at sites in Tallahassee and Miami, Florida.

APPEARANCES

For Petitioner: Milain D. Fayulu, pro se
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For Respondent: Marlene K. Stern, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether the crime of which Petitioner was convicted in the District of Columbia, namely simple assault under that jurisdiction's law, directly relates to the activities of a real estate sales associate, thereby

warranting Respondent's intended decision to deny Petitioner's application for licensure as a sales associate.

PRELIMINARY STATEMENT

By a Notice of Intent to Deny dated November 29, 2018, Respondent Florida Real Estate Commission informed Petitioner Milain David Fayulu that it planned to deny his application for licensure as a real estate sales associate. Attached to the notice was a Key for License Denials, in which Respondent identified the following findings of fact and conclusions of law as the grounds for its intended decision:

Findings of Fact

> [1.] Applicant's criminal record is as revealed in application.
>
> [2.] Applicant's testimony or evidence in explanation/mitigation was unpersuasive.
>
> [3.] Applicant's criminal history is recent in time.
>
> [4.] Applicant is a convicted felon.

Conclusions of Law

> [5.] [Applicant] engaged in conduct or practices which would have been grounds for revoking or suspending a real estate license. [§§] 475.17(1)(a), 475.181, F.S.
>
> [6.] [Applicant was] convicted or found guilty or entered a plea of nolo contendere to, regardless of adjudication, a crime which directly relates to the activities of a licensed broker or sales associate or involves moral turpitude or fraudulent or

> dishonest dealing. [§§] 475.25(1)(f), 475.181, F.S.
>
> [7.] Applicant has not had sufficient lapse of time, without government supervision, to establish rehabilitation by being crime free.
>
> [8.] The Commission concludes that it would be a breach of its duty to protect the health, safety and welfare of the public to license this applicant and thereby provide him/her easy access to the homes, families or personal belongings of the citizens of Florida. [§] 455.201, F.S.

At bottom, these grounds were predicated on Mr. Fayulu's having been convicted of simple assault in the Superior Court of the District of Columbia in January 2016, which is a misdemeanor crime under D.C. Code section 22-404(a)(1). Mr. Fayulu is not, in fact, a convicted felon, contrary to Respondent's finding, as Respondent admitted at hearing.

The hearing took place as scheduled on March 21, 2019, with both parties present. Mr. Fayulu testified on his own behalf and called Mr. Steeven Ottou as a witness. Petitioner's Exhibits 5, 6, 8 through 10, and 12 through 21 were received in evidence.

Respondent called no witnesses, but offered Respondent's Exhibits 1A, 1B, 2, 3, 4A, 4B, 5, and 6, which were admitted. After the hearing, on April 9, 2019, Respondent filed an affidavit whose purpose is to authenticate Respondent's Exhibits 4A and 4B as the business records of an out-of-state

physician. Respondent's motion to accept this late-filed authentication is hereby granted.

The final hearing transcript was filed on April 9, 2019. The deadline established at hearing for filing proposed recommended orders was April 24, 2019. Respondent timely filed its Proposed Recommended Order on April 24, 2019.

Unless otherwise indicated, citations to the official statute law of the State of Florida refer to Florida Statutes 2018.

FINDINGS OF FACT

1. Respondent Florida Real Estate Commission ("FREC") is authorized to certify for licensure persons who are qualified to practice as real estate brokers and sales associates in the state of Florida.

2. On September 11, 2018, Petitioner Milain David Fayulu ("Fayulu") applied for licensure as a real estate sales associate.

3. In his application, Fayulu truthfully answered the question asking whether he had ever been convicted of a crime. Fayulu disclosed that he had been convicted of simple assault in the District of Columbia as the result of "[a]n altercation with a fellow student at American University in Washington DC," which had occurred on April 7, 2014. He further reported that he had completed all terms of sentence, which included one year of

probation and 100 hours of community service. Fayulu did not mention that he also had been sentenced to 180 days of incarceration, the execution of which had been suspended, but FREC has not faulted him for this.

4. The Judgment of conviction entered on January 15, 2016, by the Superior Court of the District of Columbia in United States v. Fayulu, Case No. 2014-CF2-006367, confirms that Fayulu pleaded guilty to one count of simple assault and received the sentence just described.

5. As evidence of what happened on April 7, 2014, FREC relies almost entirely on the Affidavit in Support of an Arrest Warrant (the "Arrest Report"), which was subscribed and sworn to on April 10, 2014, by a District of Columbia law enforcement officer whose name is illegible (the "detective"). According to the Arrest Report, the detective interviewed three people in preparing his description of the incident: the arresting officer, the complainant, and a witness to the offense. To the extent relevant,[1/] however, the entire narrative of the Arrest Report (the "Probable Cause Allegations"), with one possible, but largely immaterial exception,[2/] is hearsay that is neither admissible pursuant to a recognized exception to the hearsay rule, nor corroborative of any competent, persuasive, *nonhearsay* evidence in the record that needs to be supplemented or explained.[3/] Thus, the Arrest Report is not competent

substantial evidence of the truth of the matters concerning the offense asserted therein.[4/]

6. The Arrest Report is *not* hearsay evidence of one fact, however; namely, that the prosecutor, and the judicial officer who approved the issuance of an arrest warrant, concluded (along with the detective) that the Probable Cause Allegations justified a charge of aggravated assault while armed ("AAWA") under D.C. Code section 22-404.01——a far more serious offense[5/] than the simple assault of which Fayulu ultimately would be convicted.[6/] This means that the government did not need to prove all of the Probable Cause Allegations——and, for all we know based on the instant record, could not have proved them beyond a reasonable doubt——to obtain Fayulu's conviction.

7. The actual charging document containing the government's formal allegations against Fayulu is not in evidence. Nor is the transcript of the plea colloquy. As a result, the undersigned cannot make any findings regarding the specific factual admissions Fayulu made when he pleaded guilty to the simple assault charge. To be clear, Fayulu's guilty plea is not an admission to the truth of the Probable Cause Allegations in their entirety, for, as just explained, the government did not have the burden of proving those allegations in toto to support a simple assault conviction.

8. If this sounds like hair-splitting, it is only because the undersigned has not recited (and will not repeat) the unproved Probable Cause Allegations. To be sure, it is extremely tempting to evaluate Fayulu's testimony against the backdrop of the alarming Probable Cause Allegations and to conclude that he is being cagey or unforthcoming about what really happened during the incident that led to his arrest and conviction. This is because the Arrest Report enjoys unearned credibility, probably owing to a general respect for law enforcement, whereas Fayulu's testimony, which depicts the incident in a much less malevolent light (as perpetrators do, we imagine), is readily, albeit unfairly, presumed to be self-serving. FREC's intended decision to deny Fayulu's application is, in fact, based on the premise that, as a matter of historical fact, Fayulu behaved as described in the Arrest Report, even though there is no competent substantial evidence in the record proving the Probable Cause Allegations.

9. Fayulu tried to make this legal point in the proceedings before FREC, but——not being a lawyer and representing himself——he did so somewhat clumsily and managed mostly to come off sounding like he had something to hide. At hearing, after some prodding, Fayulu testified that on the evening of April 7, 2014, he and his two roommates were in a car heading home from the library, where they had been studying,

when the alleged victim (the complainant) approached their vehicle, which was stopped at the exit from the library's parking lot as the driver waited for a break in traffic to pull out onto the street. The complainant spit on the driver through an open window. The driver parked the car and the three men got out. They began yelling at the complainant.

10. According to Fayulu, the complainant threw the first punch, so to speak, which triggered a brawl that lasted for two or three minutes. Fayulu was directly involved in the fight, which was violent and caused the combatants to fall to the ground. Fayulu and his friends then decided to stop the altercation. The complainant, who afterwards remained standing on the side of the street, "seemed perfectly fine" and was "in a physically decent condition" in Fayulu's opinion, having been neither bloodied nor knocked unconscious during the affray. Fayulu and his two companions walked back to their car and left.

11. Fayulu's account of the incident provides a sufficient basis in fact to support a conviction for simple assault under D.C. law, which is analogous to misdemeanor battery under section 784.04, Florida Statutes. Fayulu's testimony about what happened is not inherently unbelievable, moreover, and there is no competent substantial evidence in the record refuting his version of the event. While it is likely that Fayulu has tried to put himself in the best possible light consistent with the

truth, and despite some obvious testimonial ducking and weaving, the undersigned cannot find that he intentionally lied. At any rate, if it weren't for Fayulu's evidence about the facts and circumstances comprising the underlying offense (as opposed to the fact of his conviction, which is undisputed), there would be none at all.

CONCLUSIONS OF LAW

12. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes.

13. As an applicant for licensure, Fayulu bore the burden at hearing of going forward initially with proof of his qualifications; he also must shoulder the ultimate burden of persuasion. See Dep't of Banking & Fin., Div. of Secs. & Investor Prot. v. Osborne Stern & Co., 670 So. 2d 932, 934 (Fla. 1996).

14. FREC has burdens, too. Section 120.60(3) provides as follows:

> (3) Each applicant shall be given written notice, personally or by mail, that the agency intends to grant or deny, or has granted or denied, the application for license. The notice must state with particularity the grounds or basis for the issuance or denial of the license, except when issuance is a ministerial act. Unless waived, a copy of the notice shall be delivered or mailed to each party's attorney of record and to each person who has made a

> written request for notice of agency action. Each notice must inform the recipient of the basis for the agency decision . . . .

(Emphasis added). Thus, it is "the [agency's] burden to provide specific reasons for the denial and to produce competent, substantial evidence to support those reasons." N.W. v. Dep't of Child. & Fam. Servs., 981 So. 2d 599, 601 (Fla. 3d DCA 2008).

15. Before the Department of Business and Professional Regulation can issue a real estate license to an applicant, FREC must certify that the applicant is qualified to practice as a broker or sales associate. § 475.181(1), Fla. Stat. In addition to determining whether an applicant meets the qualifications for licensure, FREC has authority to "refuse to certify any applicant who has violated any of the provisions of s. 475.42 or who is subject to discipline under s. 475.25." § 475.181(2), Fla. Stat.

16. Section 475.17(1)(a), Florida Statutes, prescribes the qualifications for licensure to practice as a real estate broker or salesperson, as follows:

> An applicant for licensure who is a natural person must be at least 18 years of age; hold a high school diploma or its equivalent; be honest, truthful, trustworthy, and of good character; and have a good reputation for fair dealing. An applicant for an active broker's license or a sales associate's license must be competent and qualified to make real estate transactions and conduct negotiations therefore with safety to investors and to

> those with whom the applicant may undertake a relationship of trust and confidence. If the applicant has been denied registration or a license or has been disbarred, or the applicant's registration or license to practice or conduct any regulated profession, business, or vocation has been revoked or suspended, by this or any other state, any nation, or any possession or district of the United States, or any court or lawful agency thereof, because of any conduct or practices which would have warranted a like result under this chapter, or if the applicant has been guilty of conduct or practices in this state or elsewhere which would have been grounds for revoking or suspending her or his license under this chapter had the applicant then been registered, the applicant shall be deemed not 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.

(Emphasis added).

17. FREC contends that Fayulu's criminal conviction disqualifies him from eligibility for licensure, in that he was found guilty of conduct or practices which would have warranted the revocation of his real estate license had he held one at the time. FREC urges that denial of Fayulu's application is authorized under section 475.25, Florida Statutes, which provides, in pertinent part, as follows:

> (1) The commission may deny an application for licensure . . . if it finds that the . . . applicant:

* * *

> (f) Has been convicted or found guilty of, or entered 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 a 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.

(Emphasis added).[7/]

18. The question of whether Fayulu is qualified for licensure boils down to whether the crime of which he was convicted, simple assault, "directly relates to the activities of a licensed broker or sales associate." (FREC does not contend that the crime involved moral turpitude or fraudulent or dishonest dealing.) Because the facts are undisputed (once the hearsay Arrest Report is properly set aside), this is a question of law.

19. FREC presented the testimony of Jeffrey M. Fagan, a licensed real estate broker who has engaged in the practice of real estate sales for more than 17 years, on the "direct relationship" issue, urging that he be accepted as an expert on the subject. The undersigned has not relied upon Mr. Fagan's testimony for two reasons, neither of which involves his credibility or expertise in real estate.

20. First, whether a crime is directly related to the practice of real estate sales is an ultimate issue that does not require any particular real estate expertise. The term "directly relates" is composed of ordinary, frequently used, and nontechnical words whose straightforward meaning is one that persons of common experience and general understanding can figure out without help. Clearly, the term "directly relates" denotes a "close logical, causal, or consequential relationship." See "Definition of *direct* (Entry 2 of 3)," Merriam-Webster.com, http://www.merriam-webster.com (last visited June 4, 2019). Thus, a crime directly relates to the activities of a sales associate if there is a close logical connection between the two.

21. The crime is defined by its elements. The elements of simple assault under District of Columbia law are not codified but have been fashioned by the courts. See Hernandez v. U.S., 2019 D.C. App. LEXIS 181, *8 (D.C. May 9, 2019). There are three types of simple assault in that jurisdiction. The one that fits the facts of Fayulu's case is called "attempted-battery assault (in fact completed)."[8/] This type of assault

> has long been defined . . . as "an attempt with force or violence to do corporeal injury to another," consisting of "any act tending to such corporal injury, accompanied with such circumstances as denote at the time an intention, coupled with the present

> ability, of using actual violence against the person."

Id. at *9 (citations omitted)(emphasis removed).

22. The "activities" of a real estate sales associate are established by law as well. Section 475.01(1)(j) defines the term "sales associate" as meaning "a person who performs any act specified in the definition of 'broker,' but who performs such act under the direction, control, or management of another person." Thus, the activities of a sales associate are those of a broker. A broker's activities, in turn, are described in section 475.01(1)(a), which defines the term "broker" as follows:

> [A real estate "broker" is] a person who, for another, and for a compensation or valuable consideration directly or indirectly paid or promised, expressly or impliedly, or with an intent to collect or receive a compensation or valuable consideration therefor, appraises, auctions, sells, exchanges, buys, rents, or offers, attempts or agrees to appraise, auction, or negotiate the sale, exchange, purchase, or rental of business enterprises or business opportunities or any real property or any interest in or concerning the same, including mineral rights or leases, or who advertises or holds out to the public by any oral or printed solicitation or representation that she or he is engaged in the business of appraising, auctioning, buying, selling, exchanging, leasing, or renting business enterprises or business opportunities or real property of others or interests therein, including mineral rights, or who takes any part in the procuring of sellers, purchasers, lessors, or lessees of

> business enterprises or business opportunities or the real property of another, or leases, or interest therein, including mineral rights, or who directs or assists in the procuring of prospects or in the negotiation or closing of any transaction which does, or is calculated to, result in a sale, exchange, or leasing thereof, and who receives, expects, or is promised any compensation or valuable consideration, directly or indirectly therefor; and all persons who advertise rental property information or lists.

There is nothing in the foregoing statutory language that is beyond the ken of an ordinary layperson.

23. The second reason for rejecting Mr. Fagan's testimony is that he clearly relied upon the factual narrative in the Arrest Report as a true record of the historical facts. Thus, the predicate for his opinions, even if expert testimony were appropriate to the question at hand, is comprised, literally, of facts not in evidence. Such opinions are legally irrelevant.

24. Returning to the merits, FREC's theory of "direct relationship" is essentially this: Fayulu was convicted of assault against a human being. Real estate sales associates come into contact with human beings. Therefore, the crime of assault is directly related to the practice of real estate. One does not need to be a logician to spot the problem with this syllogism, namely, that its conclusion is a non sequitur.

25. There is no close logical, causal, or consequential connection between using force or violence to injure another

person (assault) and the practice of real estate sales, where the only nexus is that both involve transactions between human beings. Such a nexus is a universal common denominator as far as the activities of human beings are concerned. If this were a sufficient connection to establish that a crime directly relates to the activities of a sales associate, then practically every crime, if not all crimes, would fit the bill.

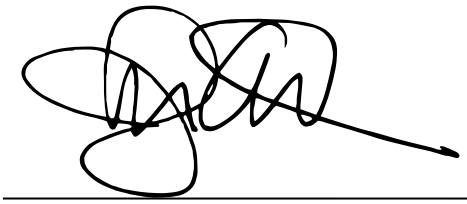
26. The legislature, however, plainly intended that the "directly relates" proviso would operate as a filter, not an open valve. If the legislature wants, in the future, to make all crimes disqualifying, then it can amend the statute to make such an intention clear.

27. It is concluded that the crime of simple assault under the law of the District of Columbia is not directly related to the activities of a licensed real estate sales associate.

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 approving Fayulu's application for licensure as a real estate sales associate.

DONE AND ENTERED this 5th day of June, 2019, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of June, 2019.

ENDNOTES

[1/] The detective's statements about the scope of his investigation might fall under the business or public records and reports exception, but these are not relevant facts.

[2/] A statement about the complainant's injuries might possibly fall under the business records exception if the source is the arresting officer.

[3/] The Arrest Report does confirm a few facts that are undisputed (such as the date of the offense) and supply additional detail about undisputed or superfluous facts (such as the location and time of the offense), but in these particulars the out-of-court statements are cumulative or irrelevant; consequently, while it might be allowable to do so, there is no need to resort to the hearsay to make any findings of fact.

[4/] Hearsay is admissible in administrative proceedings. Unless a predicate is laid for the admission of the hearsay under a recognized exception to the hearsay rule, however, such "evidence" (which would be rejected as unreliable in a court of law) can be used only to supplement or explain other nonhearsay

evidence (or hearsay received pursuant to an exception); even in this forum, with its relatively relaxed rules of evidence, uncorroborated hearsay is not sufficient in itself to support a finding of fact. See § 120.57(1)(c), Fla. Stat.

The undersigned has not overlooked the possibility that the Arrest Report might qualify for admission as primary substantive evidence pursuant to the public records and reports exception, see § 90.803(8), Fla. Stat., or the business records exception set forth in section 90.803(6), Florida Statutes, even though FREC made little, if any, attempt to provide the proper predicate. Neither exception, however, is applicable. The public reports exception does not apply because the Arrest Report sets forth factual findings resulting from an investigation and also relies upon information supplied by outside sources, making it inadmissible under section 90.803(8). See Lee v. Dep't of HRS, 698 So. 2d 1194, 1200-01 (Fla. 1997). The business records exception does not apply because the sources of information contained in the Arrest Report—— especially the complainant and witness——were not employees or agents of the police department and were not acting within the regular course of the police department's business; that is, the relevant sources with personal knowledge of the material facts were not, as far as the evidence shows, under a "business duty" to report the information accurately to the police department. See Quinn v. State, 662 So. 2d 947, 953-54 (Fla. 5th DCA 1995); Harris v. Game & Fresh Water Fish Comm'n, 495 So. 2d 806, 808-09 (Fla. 1st DCA 1986); see also Franzen v. State, 746 So. 2d 473, 474 (Fla. 2d DCA 1998)(Casanueva, J., explaining, in a concurring opinion, that the predicate for admitting a business record includes the requirement "that the source of the information be an employee or agent of the business possessing the requisite knowledge of the data or information").

[5/] Under District of Columbia law, a conviction for simple assault carries a maximum sentence of 180 days, whereas the crime of AAWA is punishable by up to *30 years* in prison. White v. U.S., 2019 D.C. App. LEXIS 180, *11-12 (D.C. May 9, 2019).

[6/] As proof of the charge brought against Fayulu, the Arrest Report is not hearsay because the relevance of that fact is not its "truth" (i.e., not that Fayulu was in fact guilty), but that Fayulu was charged with a very serious and violent crime. In other words, to the extent the contents of the Arrest Report are relevant simply because they were made, the information——by

definition——is not hearsay, which is an out-of-court statement offered to prove its truth. § 90.801(1)(c), Fla. Stat.

[7/] FREC relies upon the fact of Fayulu's conviction in asserting his ineligibility for licensure; it did not attempt, in other words, to prove that he was, in fact, guilty of, e.g., a more serious offence than simple assault. Thus, although FREC cites section 475.17(1)(a), its theory of the case is not really dependent on this particular statute; the intended agency action requires only section 475.25(1)(f) for legal support.

[8/] The other simple assaults are intent-to-frighten and nonviolent sexual touching. Id.

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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.