

Before the
Administrative Hearing Commission
State of Missouri



CARLOS SHAW,)	
)	
Petitioner,)	
)	
vs.)	No. 12-0052 RE
)	
MISSOURI REAL ESTATE COMMISSION,)	
)	
Respondent.)	

DECISION

We grant Carlos Shaw a real estate salesperson’s license.

Procedure

On August 11, 2011, Shaw filed an application for a real estate salesperson license. The Missouri Real Estate Commission (“MREC”) denied that application by letter on December 22, 2011. On December 30, 2011, Shaw filed a complaint alleging that he is entitled to a real estate salesperson license. On January 12, 2012, we served MREC with a copy of the complaint and our notice of complaint/notice of hearing. MREC filed an answer on February 2, 2012. We held a hearing on May 11, 2012. Shaw appeared *pro se*.¹ Assistant Attorney General Megan Fewell appeared for MREC. The matter became ready for our decision on August 13, 2012, the date the last written argument was filed.

¹ Although this Commission was created to be a forum where all citizens can present their issues in a contested case format, the *pro se* licensee must make the calculated choice of: can I afford to lose simply because I don’t know the rules or the law, or have the ability to present my case?

Findings of Fact

1. On January 4, 2011, Shaw pled guilty to one count of conspiracy to distribute, and possession with intent to distribute, over five kilograms of cocaine in the United States District Court for the Eastern District of Missouri.

2. Shaw was the middleman in the drug transaction.

3. The federal court placed Shaw on five years' probation. That probationary period was ongoing during all times relevant to this action.

4. On May 5, 2011, Shaw pled guilty in the Circuit Court of St. Louis County, Missouri, to one count of misdemeanor driving while intoxicated.

5. The court suspended the imposition of sentence and placed Shaw on probation for two years. That probationary period was ongoing during all times relevant to this action.

6. On June 5, 2006, Shaw pled guilty in the Circuit Court of St. Louis County, Missouri, to one count of misdemeanor passing bad checks.

7. The court suspended the imposition of sentence and placed Shaw on probation for two years. The court discharged Shaw from probation on June 18, 2008.

8. The passing bad checks charge occurred because Shaw closed a bank account before a check had been submitted for payment. Shaw did not intend to defraud anyone.

9. Shaw applied for a real estate salesperson license from MREC on August 11, 2011.

10. In that application, MREC asked the following question:

Have you been finally adjudicated and found guilty, or entered a plea of guilty or nolo contendere, in a criminal prosecution in this state, or any other state, or the United States, or any other jurisdiction whether or not sentence was imposed?
NOTE: This includes Suspended Imposition of Sentence, Suspended Execution of Sentence, and alcohol related offenses (i.e. DWI and BAC)? If yes, complete information below.

11. In answer to that question, Shaw stated:

Date of conviction and/or pleading: Jan. 4, 2011/May 5, 2011
Court location: Eastern MO/St. Louis County
Nature of Offense: Class A felony/Class B misdemeanor
Case number: 4:10CR268 RWS

12. Shaw thus advised MREC about his federal conviction and his St. Louis County guilty plea for driving while intoxicated. Shaw did not inform MREC about his St. Louis County guilty plea for passing bad checks.

13. MREC denied Shaw's application.

Conclusions of Law

Section 621.120² provides us jurisdiction to decide this appeal and requires that Shaw prove his qualifications to be licensed as a real estate salesperson. We decide the issue that was before the MREC, *Department of Soc. Services v. Mellas*, 220 S.W.3d 778 (Mo.App. W.D. 2007). We exercise the same authority that has been granted to MREC. *J.C. Nichols Co. v. Director of Revenue*, 796 S.W.2d 16, 20 (Mo. 1990). Therefore, we simply decide the application *de novo*. *State Bd. of Regis'n for the Healing Arts v. Trueblood*, 368 S.W.3d 259, 264-267 (Mo.App. W.D. 2012); *State Bd. of Regis'n for the Healing Arts v. Finch*, 514 S.W.2d 608, 614 (Mo. App. K.C.D. 1974). When an applicant for licensure files a complaint, the agency's answer provides notice of the grounds for denial of the application. *Ballew v. Ainsworth*, 670 S.W.2d 94, 103 (Mo. App., E.D. 1984).

"May" means an option, not a mandate. *S.J.V. ex rel. Blank v. Voshage*, 860 S.W.2d 802, 804 (Mo. App., E.D. 1993). The appeal vests in this Commission the same degree of discretion as MREC, and we need not exercise it in the same way. *Finch*, 514 S.W.2d at 614.

Section 339.040 sets forth the qualifications of a person to be licensed as a real estate salesperson. Shaw meets the qualifications of being at least 18 years old (subsection 3), having

² Statutory references are to the 2012 Cumulative Supplement to the Missouri Revised Statutes unless otherwise noted. The reference to § 621.120 is to the 2000 version of the Missouri Revised Statutes.

satisfactorily completed the salesperson examination (subsection 4), and having provided a certificate with his application showing the successful completion of a salesperson curriculum from an accredited school within six months before the date of application (subsection 6).

Section 339.040.1 provides:³

1. Licenses shall be granted only to persons who present . . . satisfactory proof to the commission that they:

- (1) Are persons of good moral character; and
- (2) Bear a good reputation for honesty, integrity, and fair dealing; and
- (3) Are competent to transact the business of a broker or salesperson in such a manner as to safeguard the interest of the public.

Section 339.080 provides:

1. The commission may refuse to examine or issue a license to any person known by it to be guilty of any of the acts or practices specified in subsection 2 of section 339.100[.]

Section 339.100.2 provides the following conduct as cause for discipline:

(16) Committing any act which would otherwise be grounds for the commission to refuse to issue a license under section 339.040;

(18) Been finally adjudicated and found guilty, or entered a plea of guilty or nolo contendere, in a criminal prosecution under the laws of this state or any other state or of the United States, for any offense reasonably related to the qualifications, functions or duties of any profession licensed or regulated under this chapter, for any offense an essential element of which is fraud, dishonesty or an act of violence, or for any offense involving moral turpitude, whether or not sentence is imposed;

(19) Any other conduct which constitutes untrustworthy, improper or fraudulent business dealings, demonstrates bad faith or incompetence, misconduct, or gross negligence;

(25) Making any material misstatement, misrepresentation, or omission with regard to any application for licensure or license renewal. As used in this section, “material” means important information about which the commission should be informed and which may influence a licensing decision[.]

³ MREC also relies on 20 CSR 2250-3.010. That regulation is substantially similar to §339.040.1. Our discussion of § 339.040.1 will also encompass 20 CSR 2250-3.010.

MREC contends that it properly denied Shaw a license under § 339.080 and § 339.100.2(16), (18), (19), and (25).

A. Shaw satisfies the requirements for licensure under § 339.040

Section 339.040.1 requires proof of good moral character, a good reputation, and competence to transact the business of a broker or salesperson. Good moral character is honesty, fairness, and respect for the law and the rights of others.⁴ “Reputation” means “the estimation in which one is generally held: the character commonly imputed to one as distinct from real or inherent character[.]”⁵ “The requirements of character reputation, and competence are closely related, and the same proof may satisfy all of them.”⁶

Shaw has the requisite good moral character. Shaw admits that he has pled guilty to three crimes: conspiracy to sell at least five kilograms of cocaine, passing bad checks, and driving while intoxicated. We cannot conclude that Shaw lacks good moral character based solely on these convictions. § 314.200.⁷ We may “consider the conviction as some evidence of an absence of good moral character” but we must also consider “the nature of the crime committed in relation to the license which the applicant seeks, the date of the conviction, the conduct of the applicant since the date of the conviction and other evidence as to the applicant's character.” *Id.*

Shaw’s convictions do not indicate a lack of good moral character. The 2007 bad check conviction is six years in the past, and we do not consider it of great weight because it is remote in time. Although the drug charges are serious, Shaw has since distanced himself from the people that were involved in illegal activities. Shaw appears to have played a minor part in the

⁴ *Hernandez v. State Bd. of Regis’n for the Healing Arts*, 936 S.W.2d 894, 899 n.1 (Mo.App. W.D. 1997).

⁵ Webster’s Third New International Dictionary 1929 (unabr. 1986).

⁶ *Ringo v. Mo. Real Estate Comm’n*, no. 01-1833 RE at 5 (Mo. Admin. Hrg Comm’n June 3, 2002).

⁷ RSMo 2000.

drug crime, and his sentence of probation reflects that fact.⁸ Shaw's DWI conviction occurred after a University of Missouri football game and we do not consider it to show a lack of moral character.

The MREC also relies on the convictions to show that Shaw lacks a good reputation for honesty, integrity, and fair dealing and that he is incompetent to transact the business of a broker or salesperson. We disagree. We believe that Shaw's convictions, for the reasons set out above, have minimal bearing on his reputation and his competence. Shaw has worked at Wells Fargo, AT&T, and First Horizon. At Wells Fargo, he had access to confidential personal information in his job in real estate and mortgage loans. At AT&T, Shaw took credit card numbers over the phone for Yellow Page advertisements. Shaw was not fired from any of these jobs; he left First Horizon to work for Wells Fargo, and he left Wells Fargo to work for AT&T. He left AT&T due to a car accident that restricted his ability to work.

We find that Shaw has a good reputation for honesty, integrity, and fair dealing and that he is competent to conduct the business of a real estate salesperson.

B. We may deny Shaw a license under § 339.080

1. § 339.100.2(18)

Section 339.100.2(18) allows us to deny a license if Shaw has pled guilty to a state or federal criminal offense when that offense: (1) is "reasonably related to the qualifications, functions or duties" of a real estate salesperson; (2) has an essential element of "fraud, dishonesty or an act of violence;" or (3) involves moral turpitude.⁹

⁸ We have no doubt that that Shaw would not have received a sentence of probation if Shaw was actually selling five kilograms of cocaine or if he had a major role in the conspiracy.

⁹ The moral turpitude subsection explicitly states that sentence need not be imposed. § 339.100.2(18). Thus, the fact that the state courts suspended the imposition of sentence and that the federal court placed Shaw on probation does not bar us from considering this subsection.

a. Qualifications, functions, or functions

MREC argues that Shaw's passing bad checks conviction is reasonably related to the functions or duties of a real estate salesperson. We agree. A real estate salesperson is involved in the sale, purchase, or rent of real estate. Section 339.010, subsections 1 and 2. A real estate salesperson also handles client fees, negotiates real estate transactions, and buys and sells real estate. *Id.* Thus, a real estate salesperson has responsibility for ensuring that real estate and cash transactions are done in a correct manner and that correct records of those transactions are kept. We are troubled by the fact that Shaw's conviction for passing bad checks occurred when he was repairing a house in order to resell it and that he closed his bank account in order to stop a mortgage company from withdrawing mortgage payments after Shaw sold the property. We are further troubled that Shaw did not disclose this conviction and attempted to minimize the conviction by blaming his attorney. Therefore, we may deny Shaw's application because his conviction for passing bad checks is reasonably related to the functions or duties of a real estate salesperson.

b. Fraud as an essential element

MREC also argues that dishonesty or fraud is an essential element of Shaw's conviction for passing bad checks. The statute defining that offense, § 570.120,¹⁰ states that "a person commits the crime of passing a bad check when ... [w]ith purpose to defraud, the person makes, issues or passes a check ... knowing that it will not be paid by the drawee[.]" The information filed in Shaw's case specifically states that fraud is an element of his offense.¹¹ Shaw pled guilty to that indictment, and his guilty plea constitutes an admission of the charged crime. *State v. Hagan*, 836 S.W.2d 459, 464 (Mo. 1992), *overruled on other grounds by State v. Heslop*, 842 S.W.2d 72, 75 (Mo. 1992). Fraud was an essential element of Shaw's offense.

¹⁰RSMo 2000.

¹¹ Resp. Ex. 3, page 5.

c. Moral turpitude

The statute does not define “moral turpitude,” but the concept exists in other disciplinary contexts and has been examined by Missouri courts. For example, in attorney disciplinary cases, the Supreme Court has “long defined moral turpitude as ‘baseness, vileness, or depravity’ or acts ‘contrary to justice, honesty, modesty or good morals.’” *In re Duncan*, 844 S.W.3d 443, 444 (Mo. 1993)(internal citations and quotations omitted). *See also Brehe v. Mo. Dep’t of Elem. and Secondary Educ.*, 213 S.W.3d 720, 725 (Mo. App. W.D. 2007)(same definition used in discipline of teaching certificate).

Not all criminal acts are acts of moral turpitude. *Brehe*, 213 S.W.3d at 725. Missouri courts have examined several types of criminal acts in license discipline cases and held that certain ones always constitute acts of moral turpitude, others may, and some never do. In *Brehe*, the court explained there are three categories of crimes:

1. crimes that necessarily involve moral turpitude, such as fraud (so-called “Category 1” crimes);
2. crimes “so obviously petty that conviction carries no suggestion of moral turpitude,” such as illegal parking (“Category 2” crimes); and
3. crimes that “may be saturated with moral turpitude,” yet do not necessarily involve it, such as willful failure to pay income tax or refusal to answer questions before a congressional committee (“Category 3” crimes).

213 S.W.3d at 725 (quoting *Twentieth Century Fox Film Corp. v. Lardner*, 216 F.2d 844, 852 (9th Cir. 1954)).

While Category 3 crimes require inquiry into the circumstances, crimes such as murder, rape, and fraud fall into Category 1 because they are invariably regarded as crimes of moral turpitude. *Brehe*, 213 S.W.3d at 725. “Courts invariably find moral turpitude in the violation of narcotic laws.” *In re Frick*, 694 S.W.2d 473, 479 (Mo. 1985). *Compare In re Shunk*, 874 S.W.2d 789, 791-792 (Mo. 1993) (possession of narcotics is crime of moral turpitude justifying attorney disbarment or other discipline).

Shaw's drug conviction is a crime of moral turpitude under Category 1. We would find that Shaw's drug conviction was a crime of moral turpitude even if we considered the conviction under Category 3. Shaw was the middleman in a drug transaction that involved at least five kilograms of cocaine and additional cocaine base. Selling or arranging the sale of cocaine in those quantities is inherently immoral. The potential sentence for Shaw under federal law was a minimum of ten years and a maximum of life imprisonment.¹² Shaw has not yet completed probation for this offense. Under these circumstances, Shaw's drug crime involved moral turpitude.

Convictions involving fraud necessarily involve moral turpitude. 213 S.W.3d at 725. As discussed above, fraud was an essential element of Shaw's conviction for passing bad checks.

We find that the DWI conviction does not involve moral turpitude. Instead, it was simply the result of a victory for the University of Missouri football team. Shaw has not shown that he has any other problems with alcohol or that he is a frequent DWI offender.

We therefore find that the passing bad checks conviction and the federal drug conviction involve moral turpitude.

2. § 339.100.2(16) and (19)

Subsection (16) looks to “committing any act which would otherwise be grounds for MREC to refuse to issue a license under section 339.040.” MREC primarily argues that Shaw's prior convictions render him unfit for a license under § 339.040. We have already analyzed those convictions under § 339.040. We find that this statute applies only to the discipline of a real estate salesperson license—not the grant of a real estate salesperson license. To conclude otherwise would essentially render either § 339.040 or § 339.100.2(16) superfluous when

¹² 21 U.S.C. §841(b).

granting a license. We therefore find that § 339.100.2(16) does not provide a basis to deny Shaw a license.¹³

Section 339.100.2(19) authorizes denial of a real estate salesperson license based on “any other conduct which constitutes untrustworthy, improper or fraudulent business dealings, demonstrates bad faith or incompetence, misconduct, or gross negligence.” In arguing this point, MREC merely repeats its arguments based on Shaw’s prior convictions. As we have already found that MREC had cause to deny Shaw a real estate salesperson license under § 339.100.2(18) based on Shaw’s prior convictions, those convictions (and the events surrounding and underlying them) cannot be “other conduct.” We find that §339.100.2(19) does not provide a basis to deny Shaw a license.

3. § 339.100.2(25)

This subsection prohibits an applicant from “making any material misstatement, misrepresentation, or omission with regard to any application for licensure[.]” “Material” means “important information about which MREC should be informed and which may influence a licensing decision[.] Section 339.100.2(25).

We find that Shaw failed to disclose his conviction for passing bad checks. We also find that that disclosure was material. The passing bad checks conviction involved moral turpitude and was a basis to deny the application under § 339.100.2(18).

Conclusion

Shaw is qualified to receive a license under § 339.040. We may choose to deny him a license because he would be subject to discipline under § 339.100.2(18) and (25).

¹³ Alternatively, even assuming that § 339.100.2(16) applies to the grant of a license, its standards are equivalent to those in § 339.040. As we have already decided that Shaw is entitled to a license under § 339.040, we would also find that § 339.100.2(16) does not establish cause to deny him a license.

Under § 324.038.1, when there is cause to deny a license, a licensing board such as the MREC may, at its discretion, issue a probated license. It may also deny a license, or issue it without restrictions. Shaw's appeal vests in this Commission the same degree of discretion as the Board, and we need not exercise it in the same way.¹⁴

In this case, we choose to exercise our discretion and grant Shaw a license. As discussed above, the major negatives against Shaw are his prior convictions. We believe that those convictions should not have much weight. We also believe that one year of probation will be sufficient to protect the public and ensure that Shaw begins his career in real estate in a proper manner.

We therefore grant Shaw a license and place him on probation for one year. The MREC shall establish reasonable terms of probation for Shaw.

SO ORDERED on September 12, 2013.

\s\ Nimrod T. Chapel, Jr.
NIMROD T. CHAPEL, JR.
Commissioner

¹⁴ *Finch*, 514 S.W.2d at 614; *Trueblood v. Board of Regis'n for the Healing Arts*, 368 S.W.3d 259, 264-67 (Mo. App. W.D., 2012).