

BEFORE THE
DEPARTMENT OF CORPORATIONS
STATE OF CALIFORNIA

In the Matter of the)
Accusation of the:) OAH No. N-1997120014
)
THE COMMISSIONER OF CORPORATIONS)
OF THE STATE OF CALIFORNIA)
)
Complainant,)
)
)
vs.)
)
FIRST FINANCIAL)
)
Respondents.)
_____)

DECISION

The attached Proposed Decision of the Administrative Law
Judge is hereby adopted by the Commissioner of the Department of
Corporations as its Decision in the above-entitled matter.

This Decision shall become effective on 7/27/98. -

IT IS SO ORDERED 7/27/98.

Commissioner of Corporations

By Dale E. Bonner

BEFORE THE
DEPARTMENT OF CORPORATIONS
STATE OF CALIFORNIA

In the Matter of the Accusation of:	)	
	)	OAH No. N-1997120014
	)	
THE COMMISSIONER OF CORPORATIONS	)	
OF THE STATE OF CALIFORNIA,	)	
	)	
Complainant,	)	
	)	
v.	)	
	)	
FIRST FINANCIAL	)	
	)	
Respondent.	)	

PROPOSED DECISION

On January 28, 1998, in Sacramento, California, William O. Hoover, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter.

R. Michael Llewellyn, Counsel, represented the complainant.

Eric R. Garner, Attorney at Law, of Wagner, Kirkman and Blaine, Attorneys at Law, represented respondent. Alden Jonathon Appleton also appeared on behalf of respondent in his capacity as president of the corporation.

Evidence was received, the record was closed and the matter was submitted.

FINDINGS OF FACT

I

Brian A. Thompson ("complainant"), Acting Commissioner of Corporations of the State of California, made and filed this Accusation in his official capacity.

II

Since June 17, 1997, and at all times relevant to this proceeding, First Financial, Inc. ("respondent") was licensed by

the Commissioner as a corporate broker under the California Finance Lenders Law (License no. 607 1163). The license was issued under the name of "First Financial" to engage in business at 2201 21st Street, Sacramento, California 95818.

III

As part of the application process for a corporate broker's license under the California Finance Lenders' Law, respondent was required to submit a Statement of Identity and Questionnaire ("SIQ"). The SIQ, dated July 2, 1996, was completed by A. Jonathan Appleton ("Appleton"), as an officer and on behalf of respondent. Item 3 of the SIQ asked the following question:

"Have you ever been named in any order, ... of ...any governmental agency or administrator, temporarily or permanently restraining or enjoining you from engaging in or continuing any conduct, practice or employment?"

Appleton answered "No" to this question, although he was named in a Cease and Desist Order (H-3011 SAC) issued by the Commissioner of Real Estate on May 19, 1994 and filed with the Department of Real Estate (DRE) on June 2, 1994. Appleton signed an Acknowledgement of Receipt of this Order on June 6, 1994.

The basis for issuance of the Order was the fact that Appleton had engaged in the business of a real estate broker in the state without being licensed as a real estate broker or salesperson.

IV

On page 4 of the SIQ, Appleton signed the following VERIFICATION:

"I, the undersigned, state that I am the person named in the foregoing Statement of Identity and Questionnaire; that I have read and signed said Statement of Identity and Questionnaire and know the contents thereof, including all exhibits attached thereto, and that the statements made therein, including any exhibits attached thereto, are true."

"I certify/declare under penalty of perjury that the foregoing is true and correct."

V

Appleton was familiar with Cease and Desist Orders as he previously signed an Acknowledgement of Receipt for such an Order (H-2261 SAC) issued by the DRE on August 31, 1987. While not named in that Order, Appleton was the president of the cited business and signed the receipt in that capacity. That Order was against Property Owners Management Association, Inc.(POMA), for engaging in activities as real estate brokers while its corporate license was suspended. POMA was directed to cease operations until it demonstrated to the Commissioner of Real Estate that it was no longer subject to suspension. As president and signator to the Acknowledgement of Receipt, Appleton was aware of these facts.

VI

Further, POMA was charged by the Department of Real Estate in an Accusation (H-3009 SAC) filed May 19, 1994. The Accusation alleged negligence or incompetence by POMA in permitting and compensating unlicensed real estate activities by named individuals, including Appleton. That matter was settled by stipulated agreement whereby POMA admitted the foregoing and to revocation of its license. Appleton signed the stipulation as president and on behalf of POMA on November 23, 1994.

VII

Appleton has been involved in various aspects of the real estate business for approximately 29 years. He has experience in starting up and managing related businesses and has generally been in positions of authority and responsibility.

He is currently directly involved in three real estate related businesses operating under the name of First Financial. These businesses are all co-located at the 21st Street address. They are First Financial, Inc. the corporation referred to in this Accusation; First Financial Services, a general partnership; and First Financial management company, a property management company, apparently doing business as POMA, Inc..

VIII

In the course of business Appleton has been exposed to "lots of paperwork" and "lots of forms" and has worked with numerous federal, state and local governmental agencies. His testimony that he has had no direct contact with the DRE, despite being named in and served with a cease and desist

order by DRE, strains credulity. Appleton further asserted that he often just

signs forms prepared by others. He stated that if he was uncertain of the meaning of a form he would ask others with expertise in that area. These statements were self-serving and not supported by the evidence.

IX

When questioned about his negative response to Item 3 on the SIQ, Appleton claimed that he did not understand the meaning of the terms "governmental agency" or "enjoin". He further asserted a lack of recollection whether he sought help filling out the application.

Given Appleton's years and levels of experience in the field of real estate, his involvement in the disciplinary process and litigation with the DRE, his explanations are disingenuous and simply not credible.

X

On September 11, 1997, acting on a consumer complaint, two examiners from the Department of Corporations went to the place of business of "First Financial" at 2201 21st Street in Sacramento, California. The purpose of the visit was to examine the books and records of "First Financial", including the complaining consumer's file. The nature of the complaint was never explained and the only inference that may reasonably be drawn is that it was related in some manner to a real estate transaction and/or loan.

The examiners identified themselves to Appleton and stated the purpose of their visit. The only other person present was an Estell Schleicher. Appleton refused access to the books and records of First Financial explaining to the examiners that they were not entitled to access. After spending approximately four (4) hours at the place of business, the examiners left without having obtained access to the particular file sought or the books and records of First Financial. Neither examiner in his testimony (by affidavit) indicated that Appleton offered any explanation for his failure to grant access beyond the assertion that they were not entitled to access. The respective contents of the affidavits were consistent with other evidence received.

XI

During his testimony, Appleton claimed that the examiners were told that First Financial (the Corporation) was not functional or operational and that Appleton did not have anything that he could show them, despite being licensed for a period of three months. He also claimed to have told the

examiners that the specific file sought was incomplete and was being held by the general partnership (First Financial Services, a real estate brokerage). The license status of First Financial Services was never established.

Appleton further testified that the corporation was not functional at that time for tax reasons and that the business was being conducted by the general partnership (also known as First Financial). Appleton could not recall whether he informed the examiners of this latter information. Appleton asserted at hearing that the file sought by the examiners was the property of the general partnership and that he had no authority to permit access to it. He also claimed that the general partnership was not under the jurisdiction of the Department of Corporations. Appleton's testimony was not persuasive.

XII

When queried about the general partnership, Appleton stated that Estell Schleicher (a witness for respondent), who was present during the examiner's visit, was the general partner and Metro Trust was the only other partner. Only upon further inquiry did Appleton admit that he was the sole trustee of Metro Trust and the only other officer of the general partnership (In other words he was Metro Trust). Ms. Schleicher is also an officer in First Financial Corporation and Appleton is its president.

Appleton's testimony in this area was evasive and lacking in candor. It is unclear what was the motive for his lack of cooperation with the examiners, but it is clear that he could have cooperated if he so chose. Further, Appleton concealed his true relationship to the general partnership and permitted the examiners to believe erroneously that he had no authority to grant access to the file in question.

XIII

The determination that the file was not subject to the jurisdiction of the Department of Corporations was made unilaterally by Appleton. At the hearing he did not produce any evidence that First Financial Services was a broker licensed by the Department of Real Estate or that the file in question pertained to a loan secured by a lien on real property. Nor was evidence presented of any other circumstance that would exempt First Financial Services or the file from examination or investigation.

XIV

The evidence indicates that confusion existed on the part of the examiners regarding the identity of Appleton's various business entities and their relationship to one another. That all three businesses used the name First Financial, were co-located and the fact that the Department of Corporations license was issued to "First Financial", were certainly contributing factors. For his part, Appleton made no attempt to clarify the situation for the examiners.

XV

Appleton's testimony, taken in its entirety, was self-serving, lacked candor and disingenuous. Appleton's conduct with the examiners and while testifying tended to obfuscate matters and mislead rather than clarify or inform. Absent corroborative evidence it was not persuasive and must be viewed with skepticism.

DETERMINATION OF ISSUES

I

Cause for discipline of respondent's license pursuant to Financial Code section 22714(a)(3), has been established by a preponderance of the evidence by reason of Findings II-IX and XV.

II

Financial Code section 22109(a)(1) provides that a false statement of a material fact is a basis for denial of a license. This section provides the basis for discipline under section 22714(a)(3) in that it is a fact or condition that would have warranted denial of a license.

The facts amply demonstrate that respondent through Appleton, wilfully and intentionally failed to disclose on the SIQ, and concealed the fact, that Appleton had been the subject of a cease and desist order issued by the DRE. Appleton's explanation that he did not understand what the term "governmental agency" or "enjoined" meant were not believable in light of all the other evidence, and adversely impacted his credibility.

III

Cause for discipline of respondent's license pursuant to Financial Code section 22714(a)(1)&(2) has been established by a preponderance of the evidence by reason of

Findings II and X-XV.

IV

Financial Code section 22701 provides the authority for the Commissioner of Corporations or his representative(s), at any time, to investigate the business and any and all records of anyone engaged in the business of a finance lender or broker whether or not the person so engaged acts or claims to act under the authority of the Finance Lender Law. The section also provides that the Commissioner or his representative(s) "shall have free access" to the place of business, its storage areas and any and all and any and records used in the business. Failure to comply with this section provide a basis for discipline pursuant to section 22714(a)(1)&(2).

Financial Code section 22057 provides that section 22701 does not apply to "...any loan that is made or arranged by any person licensed as a real estate broker by the state and secured by a lien on real property, or to any licensed real estate broker when making such a loan."

Financial Code section 22053 provides that "[i]n any proceeding under this law, the burden of proving an exemption is upon the person claiming it."

V

As the preceding sections indicate, the burden of establishing that the file sought to be inspected by the examiners was exempt was on respondent. The only evidence of exemption was Appleton's and Mrs Schleicher's testimony that is belonged to the general partnership. However, no evidence was provided that the general partnership was licensed by the DRE or that the file related to a loan secured by a lien on real property. Given that the complaint was generated with the Department of Corporations, Appleton's general lack of credibility and the fact the file was never produced, respondent has not met its burden.

Further, the examiners were entitled by law to examine any and all records of First Financial, Inc.. It strains credulity to accept Appleton's assertion that a company in existence for three (3) months would not have a single document that could be shown to the examiners. The fact that all three First Financial businesses were co-located clearly required a modicum of cooperation from Appleton, which was not forthcoming.

VI

For purposes of determining the appropriateness of a probationary license, the presence or absence of mitigating or aggravating circumstances were considered. There does not appear from the record any factors that could be considered as mitigating of the conduct described.

Aggravating circumstances are found in the fact that Appleton was previously involved in a disciplinary proceeding with the DRE due to his engaging in the business of real estate while unlicensed. It is also noted that while respondent was not named in other disciplinary matters, he occupied positions of authority in those instances. Further, the fact that Appleton's misrepresentation was intentional rather than negligent or inadvertent is considered an aggravating circumstance.

The profession of real estate requires persons of the highest integrity who will comply with regulatory and statutory guidelines. Respondent (Appleton) has demonstrated an inability or unwillingness to follow the law. Equally important, his conduct with the examiners and his demeanor and testimony at hearing raise serious questions about his integrity, such that granting of a probationary license is not warranted.

ORDER

Respondent's broker's license No. 607 1163, issued under the California Finance Lenders Law and any and all rights and privileges associated with said license are revoked.

Dated: _____

WILLIAM O. HOOVER
Administrative Law Judge
Office of Administrative

Hearings