

WISCONSIN DEPARTMENT OF REGULATION & LICENSING



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FILE COPY

STATE OF WISCONSIN
BEFORE THE DEPARTMENT OF REGULATION AND LICENSING

IN THE MATTER OF DISCIPLINARY	:	
PROCEEDINGS AGAINST	:	FINAL DECISION
	:	AND ORDER
DAVID M. HOFFMAN,	:	LS9309161REB
APPLICANT.	:	

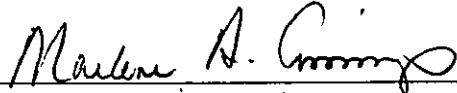
The State of Wisconsin, Department of Regulation and Licensing, having considered the above-captioned matter and having reviewed the record and the Proposed Decision of the Administrative Law Judge, makes the following:

ORDER

NOW, THEREFORE, it is hereby ordered that the Proposed Decision annexed hereto, filed by the Administrative Law Judge, shall be and hereby is made and ordered the Final Decision of the State of Wisconsin, Department of Regulation and Licensing.

The rights of a party aggrieved by this Decision to petition the department for rehearing and the petition for judicial review are set forth on the attached "Notice of Appeal Information."

Dated this 27th day of December, ¹⁹⁹³~~1994~~.



Marlene A. Cummings, Secretary
Department of Regulation and Licensing

STATE OF WISCONSIN
BEFORE THE DEPARTMENT OF REGULATION & LICENSING

IN THE MATTER OF
DISCIPLINARY PROCEEDINGS AGAINST

DAVID M. HOFFMAN,

LS9309161REB

Applicant

PROPOSED DECISION

The parties to this matter for the purposes of Wis. Stats. sec. 227.53 are:

David M. Hoffman
1122 East Center Street
Milwaukee, WI 53212-3005

State of Wisconsin
Department of Regulation & Licensing
1400 East Washington Avenue
P.O. Box 8935
Madison, WI 53708

State of Wisconsin
Department of Regulation & Licensing
Division of Enforcement
1400 East Washington Avenue
P.O. Box 8935
Madison, WI 53708

A Class 1 hearing was conducted in this matter on November 3, 1993, at 1400 East Washington Avenue, Madison, Wisconsin. The Division of Enforcement appeared by Attorney Roger R. Hall. David M. Hoffman appeared in person and by Attorney Daniel C. Conway. The transcript of the proceedings was received on November 14, 1993.

Based upon the entire record in this matter, the administrative law judge recommends that the Department of Regulation & Licensing adopt as its final decision in the matter the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. David M. Hoffman, applicant herein, 1122 East Center Street, Milwaukee, Wisconsin 53212-3005, filed his application for a license to practice as a real estate broker by application dated June 29, 1993.

2. Applicant indicated on his application that he had been convicted of a felony within the previous five years, and he enclosed a copy of a judgment of conviction dated August 19, 1988, filed in Case # 82-CR-157, before the United States District Court for the Eastern District of Wisconsin.

3. Based upon his plea of guilty, applicant was convicted of two counts of conspiracy to manufacture with intent to distribute amphetamine and methamphetamine, a Schedule II controlled substance, in violation of Title 21 U.S.C., §§ 846 & 841(a)(1), and Title 18 U.S.C. § 2; and one count of possession with intent to distribute tetrahydrocannabinol, a Schedule I controlled substance, in violation of Title 21 U.S.C. § 841(a)(1). Applicant was sentenced to concurrent prison terms of five years and nine years.

4. Applicant was paroled from prison on January 12, 1990, and will remain on regular parole until May 12, 1996. Upon completion of his regular parole, he is subject to an additional two years of special parole which will expire on May 11, 1998.

5. Applicant participated in and successfully completed an outpatient drug treatment program at Wisconsin Correctional Service, Milwaukee, from March 1, 1991, to May 5, 1992.

6. Applicant passed the national portion of the real estate licensure examination on March 20, 1993, passed the state portion of the salesperson examination on April 17, 1993, and passed the broker examination on May 15, 1993.

7. On August 6, 1993, the Department of Regulation & Licensing issued its *Final Decision and Order Granting Limited Real Estate Salesperson's License* in the matter of Mr. Hoffman's application. By the terms of the department's order, Mr. Hoffman's application for a broker's license was denied, and a limited salesperson's license was granted. Limitations included a requirement that Mr. Hoffman practice only under a licensed broker-employer, that he file quarterly reports verified by his employer containing a statement from the employer on applicant's dealings with the public as a salesperson, and that he get permission from the department prior to changing broker-employers. Mr. Hoffman appealed the department's denial of a broker's license.

8. The circumstances of applicant's conviction for conspiracy to manufacture with intent to distribute amphetamine and methamphetamine, and for possession with intent to distribute tetrahydrocannabinol, are substantially related to the circumstances of the practice of a real estate broker.

CONCLUSIONS OF LAW

1. The department has jurisdiction in this matter pursuant to secs. 452.05 and 452.09, Stats.

2. The circumstances of applicant's conviction for conspiracy to manufacture with intent to distribute amphetamine and methamphetamine, and for possession with intent to distribute tetrahydrocannabinol, are substantially related to the circumstances of the practice of a real estate broker, within the meaning of sec. 111.335, Stats., and sec. RL 24.17(2), Code.

3. Conviction of a crime the circumstances of which are substantially related to the circumstances of the practice of a real estate broker constitutes incompetence within the meaning and for the purposes of sec. 452.03, Stats., and constitutes a basis for denial of an application for a broker's license.

ORDER

NOW, THEREFORE, IT IS ORDERED that the *Final Decision and Order Granting Limited Real Estate Salesperson's License* to David M. Hoffman is affirmed, and the application of David M. Hoffman for a real estate broker license is therefore denied.

OPINION

The Findings of Fact set forth above are uncontested with one exception. Applicant contends that his conviction on August 19, 1988, of two counts of conspiracy to manufacture with intent to distribute amphetamine and methamphetamine, and one count of possession with intent to distribute tetrahydrocannabinol, is not substantially related to the circumstances of the practice of a real estate broker.

In his testimony relating to the department's determination that the conviction is substantially related to the practice of a broker, Bureau Director Cletus Hansen testified in part as follows:

Well, to a limited degree, real estate brokers are authorized to practice law and so they are dealing with many legal documents. They are permitted to fill out offers

to purchase. Brokers are permitted to fill out other state bar forms, such as deeds and satisfaction of mortgage and mortgage notes and things of that nature. So, they themselves have that limited practice of law completing contractual forms.

They also deal a lot with legal documents, you know, as they put offers together and prepare for closing. Real estate brokers enter into listing contracts with sellers and they enter into listing contracts with sellers and they enter into buyer/agency contracts with buyers wherein they, you know, agree to provide their services to their clients and they agree to represent their clients and to maintain certain confidentiality pertaining to confidential information and so -- you know, they deal with consumers and are required to make certain kinds of representations which are accurate and correct. They are required to disclose material facts and adverse factors to parties involved in real estate transactions. And so, they act in a fiduciary capacity and have to be fair to other parties who are not their principals in real estate transactions, and so, in the case of brokers, they are also authorized to supervise other personnel that might be working on their behalf.

Analyzing the indictment of the grand jury, you know, one sees significant evidence in there relating to the seriousness of the crime. It's not just possession of controlled substances. It's distribution, manufacturing, all of those factors, which, you know, are much more serious in nature. There are -- if you look at some of the terminologies used in the indictment, one sees terms such as co-conspiring with others to violate laws. One sees verbs such as misrepresenting, and there's a certain amount of subterfuge involved in the activities that Mr. Hoffman was convicted of. And, as I said earlier, you know, that kind of thing is not appropriate for a real estate broker who has to make correct and truthful representations and deal with legal documents properly and objectively, and the two don't mix very well. (tr. pp. 8-10)

In his closing argument, Mr. Conway reasoned in part as follows:

In this case, there is no relationship between manufacturing and possessing drugs or conspiring to do that, and the practice of real estate. The logic of the department is, "Well, he's dishonest." Well, any crime shows that a person has a degree of dishonesty. . . The character traits that the department puts forth would be true and they could make those arguments with respect to every crime, and that's specifically not how the law is intended to be interpreted..

The County of Milwaukee [v. LARC, 139 Wis. 2d 805] case makes clear that the concern is with other similar crimes. The department's concern . . . should be, [and] the law confines it, to whether or not Mr. Hoffman would go and

deal drugs because he's a real estate broker or conspire to manufacture drugs because he's a real estate broker. And the language from the County of Milwaukee case is as follows: "The law should be liberally construed to effect its purpose of providing jobs for those who have been convicted of crime and at the same time not forcing employers to assume risks of repeat conduct by those whose conviction records show them to have the propensity to commit similar crimes long recognized by courts, legislatures and social experience." That's on page 823 of the decision.

Another reference to similar crimes being the appropriate issue is found on page 821: "On the one hand, society has an interest in rehabilitating one who has been convicted of a crime and protecting him or her from being discriminated against in the area of employment. Employment is an integral part of the rehabilitation process. On the other hand, society has an interest in protecting its citizens. There is a concern that individuals and the community at large not bear an unreasonable risk that a convicted person being placed in an employment situation offering temptations and opportunities for criminal activity similar to those present in the crimes for which he had been previously convicted will commit another similar crime."

I don't think that there is sufficient risk or reason to conclude that the public is at risk, that Mr. Hoffman would be more inclined to commit similar crimes involving possession and manufacture of drugs because he has a real estate broker's license. That is an incredible leap of logic or lack of logic.

To an extent, both the applicant and the department have missed an obvious point. Applicant was convicted of manufacturing Schedule II amphetamines with intent to distribute, and possession of THC with intent to deliver. What that means is that applicant intentionally engaged in the commission of felonies for the purpose of monetary gain. Moreover, this felonious activity had grave ramifications in terms of the public health, safety and welfare. Schedule I substances are defined at sec. 161.13, Stats., as substances which have a high potential for abuse, and which either have no accepted medical use or lack safety for use in medical treatment. Schedule II drugs are defined at sec. 161.15, Stats., as substances which have high potential for abuse leading to severe psychic or physical dependence, and which have accepted medical use only with severe restrictions. In short, these are dangerous drugs. And applicant was therefore not only willing to commit felonies in the pursuit of personal gain, but was willing as well to commit felonies which are destructive of human health and safety. The circumstances of applicant's conviction are therefore antithetical to qualities of trust, honesty and concern for the interests of clients and others inherent to and necessary in the practice of a real estate broker.

Concluding its discussion on balancing the competing societal interests of promoting rehabilitation of persons convicted of crimes through employment, on the one hand, and protecting society against further criminal activity on the other, the Supreme Court in *County of Milwaukee v. LIRC, supra*, described the balancing test as follows (at 823):

We reject an interpretation of this test which would require, in all cases, a detailed inquiry into the facts of the offense and the job. Assessing whether the tendencies and inclinations to behave a certain way in a particular context are likely to reappear in a related context, based on the traits revealed, is the purpose of the test. What is important in this assessment is not the factual details related to such things as the hour of the day the offense was committed, the clothes worn during the crime, whether a knife or a gun was used, whether there was one victim or a dozen or whether the robber wanted money to buy drugs or raise bail for a friend. All of these could fit a broad interpretation of "circumstances." However they are entirely irrelevant to the proper "circumstances" inquiry required under the statute. *It is the circumstances which foster criminal activity that are important, e.g., the opportunity for criminal behavior, the reaction to responsibility, or character traits of the person* (emphasis supplied).

Applicant's argument that granting applicant a broker's license will not facilitate or promote illegal drug activities is therefore somewhat disingenuous. Applicant's conduct evinced an utter disregard for the law and for the welfare of the public. Brokers routinely handle real estate trust funds and are expected to carry out that responsibility with scrupulous honesty. They must represent the interests of their client and must treat all parties to a transaction fairly. They have an affirmative obligation to protect the public against fraud, misrepresentation and unethical practices. Brokers are prohibited from self-dealing and are required to disclose to interested parties their interests in any property sold. They are prohibited from misrepresenting or concealing material facts and are required to disclose any adverse factors to interested parties. Implicit in these various duties and responsibilities is the opportunity for an unscrupulous broker to misuse client funds with which he or she is entrusted, to fail to serve the interests of client in favor of the broker's interests, and to engage in fraud, misrepresentation and unethical practices for the broker's own gain rather than to protect against them. Applicant's criminal activity demonstrates a reaction to responsibility and constitutes evidence of character traits which militate against offering him -- at this time -- an opportunity to engage in such unethical or illegal conduct.

The department has decided that the existing evidence of applicant's rehabilitation is sufficient to permit him to practice as a salesperson under supervision, but insufficient

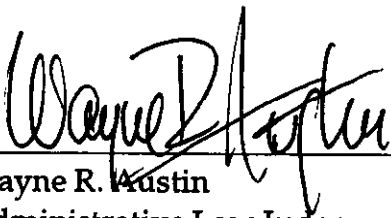
David M. Hoffman

Page 7

to permit him to practice independently. Having found that Mr. Hoffman's conviction is substantially related to the practice of a broker, and given that he is now but half-way through the period of active monitoring of his activities by the federal authorities, the undersigned unhesitatingly concurs that any practice of real estate by Mr. Hoffman must also be monitored for a period of time sufficient to provide some assurance that his reformation is complete.

Dated this 6th day of December, 1993.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Wayne R. Austin", is written over a horizontal line.

Wayne R. Austin
Administrative Law Judge

WRA:BDLS2:3965

NOTICE OF APPEAL INFORMATION

(Notice of Rights for Rehearing or Judicial Review,
the times allowed for each, and the identification
of the party to be named as respondent)

The following notice is served on you as part of the final decision:

1. Rehearing.

Any person aggrieved by this order may petition for a rehearing within 20 days of the service of this decision, as provided in section 227.49 of the Wisconsin Statutes, a copy of which is attached. The 20 day period commences the day after personal service or mailing of this decision. (The date of mailing of this decision is shown below.) The petition for rehearing should be filed with the State of Wisconsin Department of Regulation and Licensing.

A petition for rehearing is not a prerequisite for appeal directly to circuit court through a petition for judicial review.

2. Judicial Review.

Any person aggrieved by this decision has a right to petition for judicial review of this decision as provided in section 227.53 of the Wisconsin Statutes, a copy of which is attached. The petition should be filed in circuit court and served upon the State of Wisconsin Department of Regulation and Licensing

within 30 days of service of this decision if there has been no petition for rehearing, or within 30 days of service of the order finally disposing of the petition for rehearing, or within 30 days after the final disposition by operation of law of any petition for rehearing.

The 30 day period commences the day after personal service or mailing of the decision or order, or the day after the final disposition by operation of the law of any petition for rehearing. (The date of mailing of this decision is shown below.) A petition for judicial review should be served upon, and name as the respondent, the following: the State of Wisconsin Department of Regulation and Licensing.

The date of mailing of this decision is December 27, 1993.