

WISCONSIN DEPARTMENT OF REGULATION & LICENSING



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STATE OF WISCONSIN
BEFORE THE REAL ESTATE BOARD

IN THE MATTER OF THE APPLICATION
FOR A LICENSE TO PRACTICE AS A
REAL ESTATE SALESPERSON OF

:

:

:

FINAL DECISION
AND ORDER

:

LS0506161REB

DEREK M. SMITH,
APPLICANT.

:

:

Division of Enforcement Case No. 05REB113

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 16th day of December, 2005.

Jackson
Licensing

Secretary Celia M.
Department of Regulation and

STATE OF WISCONSIN
BEFORE THE REAL ESTATE BOARD

IN THE MATTER OF THE APPLICATION :

FOR A LICENSE TO PRACTICE AS A : PROPOSED FINAL
REAL ESTATE SALESPERSON OF : DECISION AND ORDER

DEREK M. SMITH, :
APPLICANT. : LS0506161REB

Division of Enforcement Case # 05 REB 113

TO: Derek M. Smith
5842 W. Helena Street
Milwaukee, WI 53223

John N. Schweitzer
Department of Regulation and Licensing
Division of Enforcement
1400 East Washington Avenue
P.O. Box 8935
Madison, WI 53708-8935

PROCEDURAL HISTORY

A hearing in the above-captioned matter was conducted on August 24, 2005 before Administrative Law Judge (ALJ) Colleen M. Baird. The applicant, Derek M. Smith, appeared in person, representing himself. The Division of Enforcement appeared by Attorney John N. Schweitzer. Based upon the entire record in this case, the undersigned ALJ recommends that the Department of Regulation and Licensing adopt as its final decision in the matter the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. Derek M. Smith was born on January 6, 1977.
2. Mr. Smith's latest address on file with the Department of Regulation is 5842 W. Helena Street, Milwaukee, WI 53223.
3. On or about April 28, 2005, Mr. Smith submitted an application for a real estate salesperson's license.
4. The application for a real estate salesperson's license requires that an applicant answer question "A" under "STATEMENT OF ARREST OR CONVICTION," which states:

A. Have you ever been convicted of a misdemeanor or a felony, or driving while intoxicated (DWI), in this or any other state, OR are criminal charges or DWI charges currently pending against you? If YES, complete and attach Form#2252.
5. Mr. Smith's response to question "A" was to check the box marked "YES".
6. The Department obtained records indicating that Mr. Smith was convicted on June 17, 1997, of the following crimes in Wisconsin:

Felony conviction- Burglary (3 counts); and

Misdemeanor conviction- Petty Theft (3 counts).

7. Mr. Smith was incarcerated for four months with work release privileges and placed on probation for four years on each felony count and three years on each misdemeanor count concurrently.
8. On October 24, 1997, Mr. Smith's work release privileges were amended to including attending his Army National Guard duty on the first Saturday and Sunday of each month as long as his attendance did not violate the jail work release rules.
9. On May 10, 2000, Mr. Smith was charged, but not convicted, with Battery Domestic Abuse Related.
10. On May 23, 2005, the Department denied Mr. Smith's application for a real estate sales licensure on the basis that the documentation on file establishes that Mr. Smith had been convicted of crimes, the circumstances of which substantially relate to the practice of a real estate salesperson.
11. Mr. Smith made a timely request for a hearing on the denial of his application for a permit.
12. Mr. Smith appeared at the hearing and presented evidence as to circumstances surrounding his convictions. He had just graduated from high school and was red-shirted to play football at the University of Wisconsin-Whitewater.
13. While on campus, Mr. Smith entered six dorm rooms that were unlocked and stole various items, including small amounts of cash (\$17.00) and an ATM card which he used to make two withdrawals of \$25.00 and \$100.00.
14. Mr. Smith told the investigators that he took the money to pay bills and tuition.
15. Mr. Smith pled guilty to the theft charges, served his jail sentence and was placed on probation for four years. He has had no further criminal convictions.
16. Mr. Smith did not finish college and is employed as a truck driver delivering appliances. He has a Class A Commercial Driver's license and receives and handles checks in his current job.
17. Mr. Smith has three children, two from his first marriage. He is current on his child support obligations.

CONCLUSIONS OF LAW

1. The Department of Regulation and Licensing has jurisdiction in this matter under § 458.03, Stats.
2. The circumstances of the convictions detailed above substantially relate to the practice of a real estate salesperson within the meaning of § 111.335 (1)(c)(1), Stats.
3. License shall be granted only to persons who are competent to transact such business in a manner which safeguards the interests of the public, and only after satisfactory proof of the person's competence has been presented to the department. § 452.03, Stats.

ORDER

NOW, THEREFORE, IT IS ORDERED that Derek M. Smith be, and hereby is, granted a limited license to practice as a real estate salesperson, contingent upon his compliance with the following conditions:

A. Beginning on the effective date of this order, Mr. Smith shall be required to work under the supervision of licensed real estate broker who shall be pre-approved by the Department and agrees to the following:

1. The Supervising Broker shall prepare and submit written quarterly reports which describe Mr. Smith's activities and his compliance with the laws relating to the sale of real estate and with the terms of this order.
2. The work reports shall be submitted according to a schedule established by the Department Monitor who coordinates compliance with the terms of this order. All work reports and other materials shall be addressed and sent to the following:

Department Monitor
Department of Regulation and Licensing
P.O. Box 8935
Madison, Wisconsin 53708-8935
FAX (608) 266-2264
Tel. (608) 267-3817
E-mail: department.monitor@drl.state.wi.us

B. Mr. Smith shall provide a complete copy of the Department's Final Decision and Order, including all attached exhibits, to his supervising broker and arrange for his employer to immediately notify the Department Monitor if there is a known or suspected violation of the terms of the order or other unprofessional conduct by Mr. Smith.

C. Mr. Smith shall not work simultaneously for more than one broker employer. If Mr. Smith changes employers, he shall arrange for his new supervising broker to accept the responsibilities of this order.

D. Mr. Smith's permit may be subject to summary suspension if he is charged or convicted of a crime or if he violates the terms of this order.

E. The period of limitation described herein shall continue for a period of not less than two (2) years and shall be subject to on-going review and monitoring by the Department, until such time as the Department removes the limitations.

F. After two years without further arrests or convictions and with satisfactory quarterly employment reports, Mr. Smith may petition the Department for removal of the limitations on his real estate salesperson license.

OPINION

same time not forcing employers to assume risk of repeat conduct by those whose conviction records show them to have a "propensity" to commit similar crimes. The first issue in this case is whether Mr. Smith's criminal conviction record is substantially related to the practice of a real estate salesperson within the meaning of Wis. Stat. § 111.335(1)(c)(1). The second issue is whether the Department is justified in denying Mr. Smith's application for a license to practice as real estate salesperson on the basis of his criminal conviction record.

There can be little question but that the circumstances of Mr. Smith's convictions are substantially related to the practice of a real estate salesperson. Burglary and theft are criminal acts of dishonesty which are inconsistent with the character and traits of a real estate professional. A real estate salesperson is entrusted with the duty to represent the interests of the property owner and the public. They often have often have access to the homes and property of others and can enter such property when the owners are not present. Real estate sales involve significant financial and legal transactions. The ability to conduct oneself in manner where the property of others is not at risk of theft or misappropriation is critical to the real estate profession. Accordingly, the initial decision of the Department to deny the application on the basis that Mr. Smith's criminal convictions were substantially related to the practice of a real estate salesperson was justified based upon the limited information that was available to the Department before the hearing.

However, the question is now whether the applicant has submitted sufficient information from which the Department can determine that he can practice in a manner which safeguards the interests of the public. The answer to this question is largely determined by considering the circumstances which fostered the criminal activity in this case; that is whether the conduct represents an isolated incident or exhibits a tendency to re-occur. The Wisconsin Supreme Court in County of Milwaukee v. LIRC, 139 Wis. 2d. 805 (1987), 407 N.W. 2d 908, set forth a definitive explanation of this concept:

Assessing whether the tendencies and inclinations to behave in a certain way in a particular context are likely to reappear later in a related context, based on the traits revealed, is the purpose for the test. What is important in this assessment is not the factual details related to such things as the hour or the day the offense was committed, the clothes worn during the crime, whether a knife or gun was used, whether there was one victim or a dozen or whether

the robber wanted money to buy drugs or to raise bail money for a friend. All of these could fit the broad interpretation of “circumstances” inquiry required under the statute. However, they are entirely irrelevant to the proper “circumstances” inquiry 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 the character of the person.

The circumstances surrounding the conduct in this case support the conclusion that Mr. Smith’s criminal conduct is not likely to happen again. At the of his convictions, Mr. Smith was 19 years old. His unlawful conduct, although clearly opportunistic, reflects youthful immaturity and poor judgment. However, even at the time of the occurrence, the police report indicates that Mr. Smith was cooperative and admitted his acts. He subsequently plead guilty and fulfilled the court’s judgment.

Today, Mr. Smith is an adult and a father of three children. He has laudable goals to improve his life and his ability to provide for his family. He has taken the real estate course and passed the licensing examination while working a full-time job. Mr. Smith applied for a real estate salesperson license and disclosed his criminal record. He did not attempt to deceive or mislead the Department. Given his accomplishments and his lengthy conviction-free track record, Mr. Smith has successfully demonstrated that he is a rehabilitated person.

Whether Mr. Smith, who has a criminal record, should receive an occupational license involves a balancing of the interests of the applicant and the public. The decision in County of Milwaukee v. LIRC, is useful in describing the competing interests involved:

It is highly desirable to reintegrate convicted criminals into the work force, not only so that they will remain or become public charges but to turn them away from criminal activity and hopefully to rehabilitate them... This is a worthy goal and one that society has shown a willingness to assume, as evidence by the large sums of money expended in various rehabilitative programs. However, the legislature has clearly chosen not to force such attempts at rehabilitation in employment settings where experience has demonstrated the likelihood of repetitive criminal behavior. This law should be liberally construed to effect its purpose of providing jobs for those who have been convicted of crimes and at the long recognized by the courts, legislature and social experience. 139 Wis. 2d 805 at 820.

The strongest factor in determining the level of risk to the public if Mr. Smith is granted a real estate license, is the substantial passage of time that he has been conviction-free. Nearly ten years has passed since his convictions in 1996 and Mr. Smith has not had any new convictions. This length of time suggests that the risk of harm that Mr. Smith will re-offend is extremely low. If Mr. Smith had a genuine propensity to steal or commit acts of dishonesty, such conduct would have surely manifested during the years following his last convictions.

Additionally, by placing limitations upon Mr. Smith’s practice, there will be added assurance of public protection. Under current law, a real estate salesperson is not allowed to practice independently; all licensed salespersons must work for a licensed real estate broker who has supervisory responsibility for the salesperson’s practice. By the terms of this proposed decision, Mr. Smith’s license will be further limited and subject to increased scrutiny by his broker who will be required to submit quarterly work reports to the Department. Mr. Smith’s supervising broker will also receive a copy of this decision and be fully informed as to these requirements and to Mr. Smith’s criminal background.

In the final analysis there is adequate evidence in the record to establish that Mr. Smith should receive conditional licensure. If Mr. Smith is able to successfully comply with the terms and conditions of his limited license, he should then be entitled to petition the Department for termination of the limitations on his license.

Dated this 28th day of November, 2005.

Colleen M. Baird
Administrative Law Judge