

because he failed to disclose all of his misdemeanor convictions for Driving Under the Influence (DUI).²

The relevant facts are as follows. On May 23, 2007, Applicant submitted an application for initial licensure as a real estate salesperson to the Commission. On the application, Applicant answered “yes” to question 3F which asked: “Have you ever been convicted of or pled *nolo contendere* to a felony or misdemeanor in a local, state or federal court or in a foreign country?” (Certified Record (C.R.) at 1.) Applicant attached a cover letter to his application which explained that he was convicted of a DUI in 2004 and was sentenced to two years parole and two years probation. Applicant also stated in the cover letter that his probation was in good standing and all fines were paid in full. Because Applicant answered question 3F in the affirmative, Applicant was told that he would be scheduled for an informal conference with the Commission’s Enforcement Committee.

At the informal conference with Applicant, it was discovered that Applicant had two prior convictions for DUI that he failed to disclose on his application. By letter dated June 7, 2007, the Commission provisionally denied his application under 18 Pa. C.S. §9124(c) and Sections 501(a) and 604(a)(14) of the Real Estate Licensing and Registration Act, 63 P.S. §455.501(a) and

² Defendant was convicted of DUI under 75 Pa. C.S. § 3731, which was later supplanted by 75 Pa. C.S. §3802. Under both provisions, DUI was treated as a misdemeanor of varying degrees. See 75 Pa. C.S. §3731(e)(1) (repealed); 75 Pa. C.S. §3803(a).

§455.604(a)(14).³ Applicant appealed the Commission’s provisional denial and requested a formal hearing.

Before the Commission, Applicant testified that in 1999, while a student at Pennsylvania State University, he was arrested and charged with DUI and entered the Accelerated Rehabilitated Disposition (ARD) program. ARD was contingent upon no further convictions for two years of probation, a \$300 fine, home confinement for 32 days, surrender of his driver’s license, and completion of alcohol and driving courses. He testified that he was again arrested for DUI in January of 2000, and because it occurred within two years of his first offense, his ARD was revoked, he was sentenced to a two-year probation to be served concurrently with that from the first DUI, and he was admitted into the Intermediate Punishment Program.⁴ Finally, Applicant testified that in 2004, he was convicted of a third DUI with a sentence including two years parole, a work-release program with a confinement of approximately 50 days, completion of a drug and alcohol evaluation, a safe driving course, and payment of fines and related costs.

With respect to why he did not list the 1999 and 2000 DUIs on his application, Applicant testified that he thought he was only to list the convictions that

³ Section 604(a)(14) of the Act, 63 P.S. §455.604(a)(14), allows the Commission to deny a license if the applicant has been convicted of “forgery, embezzlement, obtaining money under false pretenses, bribery, larceny, extortion, conspiracy to defraud, or any similar offense or offenses, or any felony or pleading guilty or *nolo contendere* to any such offense or offenses.”

⁴ Eligibility for and nature of “Intermediate Punishment” is set forth in Section 9804 of the Sentencing Code, *as amended*, 42 Pa. C.S. §9804.

appeared on the background “check” prepared by the Pennsylvania State Police.⁵ Applicant admitted, though, that at the Enforcement Committee conference, he only disclosed the earlier DUIs when he was asked why he did not receive ARD for the 2004 DUI. On cross-examination, Applicant admitted that his DUI convictions in 1999 and 2000 should have been included within the definition of “conviction” on the application which provides: “A conviction includes a finding or verdict of guilt, an admission of guilt, a plea or *nolo contendere*, or receiving probation without verdict, disposition in lieu of trial or ARD in the disposition of felony charges.”⁶ (September 26, 2007 Notes of Testimony (N.T.) at 34.) Applicant further testified that he did not

⁵ 18 Pa. C.S. §9125 provides, in relevant part:

(a) General rule.--Whenever an employer is in receipt of information which is part of an employment applicant's criminal history record information file, it may use that information for the purpose of deciding whether or not to hire the applicant, only in accordance with this section.

(b) Use of information.--Felony and misdemeanor convictions may be considered by the employer only to the extent to which they relate to the applicant's suitability for employment in the position for which he has applied.

(c) Notice.--The employer shall notify in writing the applicant if the decision not to hire the applicant is based in whole or in part on criminal history record information.

Under the “DOCUMENTATION” portion of the application, applicants are directed to submit a completed State Police criminal background check in the state that he or she is currently living, dated within 90 days of the application’s submission to the Commission. (Certified Record (C.R.) at 1.)

⁶ Question 3F states: “Have you ever been convicted of any felony or misdemeanor in a local, state or federal court or in a foreign country?” The following page of the application contains an asterisk at the top and provides the definition for “conviction.” (Salesperson License Application, C.R. at 1.)

mention in the cover letter that he served a time of confinement as a result of his DUI conviction in 2004.

Applicant was also questioned on cross-examination as to his interaction with Commonwealth employees regarding the processing of his application. Applicant testified that he dropped off his application, and an employee told him that he was denied because she saw the letter from his probation officer. He testified that another employee, Deborah Misheck (Division Chief Misheck), the Division Chief of Real Estate and Vehicle Licensing, appeared and told him that he had to go before the Enforcement Committee, to which he responded by asking several times how he would do that. After she did not answer his repeated questions, Applicant admitted that he raised his voice and at that point, Division Chief Misheck then told him that she would contact another employee.

Counsel for Applicant then offered a letter from Terese Brittingham (Brittingham), the broker who intended to hire Applicant. The Brittingham letter stated she was fully aware of all of the convictions dating back to 1999, and it was her intention to have him join her real estate firm if he was granted the license. Counsel for Applicant stated at the hearing before the Commission that the letter was not identical to the one submitted with the license application. Counsel explained that it was not clear from the face of the original letter whether or not Brittingham was aware of all of Applicant's DUIs. According to Counsel, he asked Applicant to confirm with Brittingham that she was in fact aware of everything in full disclosure, and she then submitted an updated letter. The Commission admitted this letter into evidence over the hearsay objection of Counsel for the Commonwealth, citing to the

fact that a broker's letter was required as part of the application for licensure. (September 26, 2007 N.T. at 24-25.)

The Commonwealth presented Division Chief Misheck as its sole witness. She testified that on May 23, 2007, she had a conversation with Applicant concerning whether or not he would receive his license right away and explained to him that if an applicant had a conviction, he or she would go before the Commission in the future. She testified that he responded by demanding to be on the Commission's agenda, and that after she explained that they would be in contact with him, he screamed obscenities. She explained that after attempts to review his paperwork, Applicant eventually left the office again screaming obscenities. Division Chief Misheck described the conversation with Applicant as one that made her very uneasy and scared. She also testified as to several later phone conversations with Applicant concerning the license application process, during one in which she testified that he again screamed at her. Counsel for Applicant declined to cross-examine Division Chief Misheck and instead recalled Applicant for rebuttal. During rebuttal, Applicant denied that he ever threatened to kill anyone or used the obscenities Misheck accused him of saying at her office. Applicant did, however, admit that his discussion with Misheck became heated, that he probably lost his temper, and raised his voice.

The Commission denied the license application finding that Applicant did not exhibit the "honesty, trustworthiness, integrity and competence" to be licensed. It arrived at that conclusion because it found the Applicant intentionally attempted to deceive the Commission about his criminal history by omitting criminal

convictions and not accurately reflecting their respective criminal penalties.⁷ The Commission rejected Applicant's explanation that he did not disclose those crimes because they were not listed on the Pennsylvania State Police background check finding that specific instructions on the application did not limit an applicant to report crimes only listed on the background check, but rather it directed an applicant to supply criminal documents, police reports, probation updates, and a narrative explaining any and all convictions. In addition, the Commission found that Applicant failed to disclose to Brittingham portions of his prior criminal record and offered no explanation at the hearing for why he withheld this information. (Commission's

⁷ Despite only mentioning the two years probation and two years parole as the sentence for his 2004 DUI conviction, the Commission made the following finding of fact with respect to Applicant's actual sentence for the 2004 DUI conviction:

17. Applicant was sentenced on October 6, 2004 to:

- a. Imprisonment for not less than 90 days, nor more than 23 months in the Montgomery County Prison with credit for time served at the Malvern Institute from October 19, 2003 through November 21, 2003,
- b. Immediate work release,
- c. Two years of probation under the supervision of the Montgomery County Adult Probation/Parole Department,
- e. Consecutive parole,
- f. Pay a \$300.00 fine
- g. Undergo and participate in any evaluation and/or treatment as arranged and approved by the Montgomery County Probation Department
- h. Complete an alcohol safe driving course,
- i. Pay the costs of prosecution, supervision fees, and program fees.

(N.T. 17-18; Exhibit A-4.)

(Commission's Adjudication, January 24, 2008, at 8.)

Final Adjudication and Order (Commission's Adjudication) January 24, 2008, at 17.) The Commission went on to determine that statements made in Brittingham's letter failed to shed light on Applicant's true character of ethical standards because during his first five purported contacts with her, Applicant did not disclose his three convictions. The Commission also determined the following:

[T]he Commission believes that Applicant's intentional and repeated deception and omissions to the Commission and his future broker as well as his misstatements and contradictory testimony at the formal hearing speak directly, albeit, negatively, to his reputation for honesty, trustworthiness, integrity and competence to transact the business of a salesperson.

(Commission's Adjudication, January 24, 2008, at 17.)

The Commission concluded that instead of providing truthful responses regarding his conviction and criminal penalties, Applicant repeatedly provided responses to the Commission that he believed would result in the issuance of a license, "all the while knowing that his responses were misleading and contained significant omissions." (Commission's Adjudication, January 24, 2008, at 18.) This appeal followed.⁸

⁸ Our scope of review of the Commission's determination is limited to determining whether necessary findings of fact are supported by substantial evidence, whether constitutional rights were violated, or whether an error of law was committed. *Bhala v. State Real Estate Commission*, 617 A.2d 841 (Pa. Cmwlth. 1992).

On appeal, Applicant asserts, *inter alia*,⁹ that the Commission has no authority to demand or consider criminal information from applicants other than those convictions contained in the Pennsylvania State Police background check and, by doing so, the Commission assumed statutory authority given to another instrumentality of the Commonwealth. What this argument seems to suggest is that if the State Police background check is not complete, then an applicant is allowed to take advantage of the incompleteness and free to not disclose that crime. Ignoring

⁹ Applicant in his brief also raises the following issues:

- Whether the Commission violated Applicant's constitutional rights by failing to afford him notice that failure to disclose two prior DUI convictions to the Commission and his future broker would be used against him; that Misheck would testify at the hearing about his interaction with its employees;
- Whether his right to a fair and impartial hearing was violated at both the conference and hearing due to commingling of the prosecutorial and adjudicatory functions of the Commission because the various members of the Enforcement Committee were also members of the Commission present and voting at the hearing, which created a condition of dual membership in direct contravention of *Lyness v. State Board of Medicine*, 529 Pa. 535, 605 A.2d 1204 (1992);
- Whether the Enforcement Committee exhibited bias because its members allegedly made up their minds as to how they would vote with respect to applicant prior to the hearing based on the conference;
- Whether the testimony of Misheck was biased against Applicant due to his filing of a complaint against her with the Department of Human Resources and Office of Professional Compliance, which caused her to retaliate against him.

Because those issues were not raised before the Commission, they are waived on appeal. *See* Pa. R.A.P. 1551.

that the applicant has the responsibility to disclose any convictions, Section 522(a) of the Act, 63 P.S. §455.522(a), states: “an application for a license as salesperson shall be made, in writing to the department, upon a form provided for the purpose by the department, and shall contain such information as to the applicant, as the commission shall require.” Moreover, under 18 Pa. C.S. §9124(c),¹⁰ state agencies are expressly authorized to refuse to grant a license where the applicant has been convicted of a misdemeanor or felony. While the misdemeanor convictions are limited to “the trade, occupation or profession for which the license, certificate, registration or permit is sought” whether it is relevant to the license being sought can only be determined after they are disclosed. Because the Commission was authorized to require applicants to disclose misdemeanor, or felony convictions, Applicant’s argument that the Commission has no right to make him disclose offenses not discovered by the State Police background check is beyond meritless.¹¹

¹⁰ 18 Pa. C.S. §9124(c) provides, in relevant part:

c) State action authorized. --Boards, commissions or departments of the Commonwealth authorized to license, certify, register or permit the practice of trades, occupations or professions may refuse to grant or renew, or may suspend or revoke any license, certificate, registration or permit for the following causes:

- (1) Where the applicant has been convicted of a felony.
- (2) Where the applicant has been convicted of a misdemeanor which relates to the trade, occupation or profession for which the license, certificate, registration or permit is sought.

¹¹ Applicant moved for the admission of two reference letters, one from his neighbor and another from a Catholic nun, but the Commonwealth’s hearsay objection was sustained. On appeal, Applicant contends that those two letters should have been admitted because evidentiary standards at administrative proceedings are lower than at the trial court level and under 2 Pa. C.S. §505, all relevant evidence of a reasonably probative value may be received. However, the general rule is that properly objected to hearsay evidence may not form the basis of a material fact. *Shapiro v. State Board of Accountancy*, 865 A.2d 864 (Pa. Cmwlt. 2004). Applicant’s credibility and **(Footnote continued on next page...)**

Applicant next contends the Commission erred in denying his application because DUI is not a crime related to his fitness to be a real estate agent under Section 604(a)(14) involving convictions of forgery, embezzlement, and the like and 18 Pa. C.S. §9124(c) involving conviction of a misdemeanor involving a trade or business. Though it initially based its provisional denial of his application for the license on Section 604(a)(14) of the Act and 18 Pa. C.S. §9124(c), the Commission ultimately denied the license solely because Applicant did not satisfy the requirement under Section 501(a) of the Act that he have a “reputation for honesty, trustworthiness, integrity and competence to transact the business of a salesperson.”¹² Because the Commission abandoned conviction of DUI alone as justification for denying Applicant’s application for a real estate license, that issue is not before us.

Finally, Applicant contends that the Commission did not have substantial evidence to support its findings. Contrary to Applicant’s assertion, his own testimony provides more than substantial evidence that he intentionally omitted criminal convictions on his application, only disclosed them when pressed, and inaccurately listed criminal penalties imposed for those convictions. Because there was substantial evidence to support the conclusion that Applicant intentionally failed

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trustworthiness were directly at issue before the Commission in this matter. Applicant sought to admit two letters demonstrating his character without providing the opportunity for cross-examination of the letters’ authors. Therefore, the Commission properly excluded the letters.

¹² Applicant also contends that the Commission has issued decisions in which it has granted licenses to applicants with criminal records. However, Applicant here was not denied a license because he had a criminal record, but rather because he did not disclose his criminal record. In none of the other cases did the applicant intentionally attempt to deceive the Commission as to his or her convictions or criminal penalties.

to disclose his prior convictions, the Commission properly found that Applicant failed to meet the requirement under Section 501(a) of the Act that real estate licenses shall only be granted for persons “who bear a good reputation for honest, trustworthiness, integrity, and competence....”

Accordingly, the order of the Commission to deny Applicant’s application for initial licensure is affirmed.

