

Opinion No. 82-02

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OPINION OF: Jeff Bingaman, Attorney General

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LICENSES AND LICENSING

Synopsis: In each case in which the Real Estate Commission contemplates the denial, suspension or revocation of a license because of a criminal conviction, the provision of the Criminal Offender Employment Act must be considered.

QUESTIONS

If the Real Estate Commission is contemplating denial, suspension or revocation of a license because of a conviction of a felony or offense involving moral turpitude by the licensee, must the Criminal Offender Employment Act be followed?

CONCLUSIONS

Yes.

ANALYSIS

Under Section 28-2-6 NMSA 1978, the Criminal Offender Employment Act [Section 28-2-1 **et seq.** NMSA 1978] ("COEA") applies to any board or agency which has jurisdiction over the practice of any trade, business or profession if the board or agency is made subject to its coverage by law or regulation. Section 61-29-3 NMSA 1978 specifically provides that the COEA governs any consideration of criminal records required or permitted by Sections 61-29-1 through 61-29-18 NMSA 1978 of the Real Estate Licensing Act.

OPINION

Under Section 61-29-12 (F) NMSA 1978, the Real Estate Commission has the power to suspend or revoke a license where a licensee is deemed guilty of

"Conviction in any court of competent jurisdiction of a felony or any offense involving moral turpitude[.]"

Therefore, the provisions of the COEA must be followed by the Real Estate Commission in any action by the Commission to suspend or revoke a broker's or salesperson's license because of a conviction of a felony or misdemeanor involving moral turpitude.

Under Section 28-2-4 of the COEA the action of the Real Estate Commission depends upon whether the criminal conviction directly relates or does not directly relate to the licensee's employment, trade, business or profession.

If the licensee's criminal conviction directly relates to his or her profession, the Commission may refuse to grant, renew, suspend or revoke the license, provided that the reasons for its decision are explicitly stated in writing. It is not sufficient for the Commission to merely recite the language of the COEA. **Bertrand v. New Mexico State Board of Education**, 88 N.M. 611, 544 P.2d 1176 (1976).

"The statute requires that the reasons for the conclusion that there is a direct relation must be given. It is especially important for a reviewing body to know the reasons for the administrative body's conclusion because the statute here states that an entirely different criterion is relevant when the crime is not related. If the conviction of a crime is to operate as other than an "automatic bar" to {*271} employment, the administrative agencies must explain what they perceive the detrimental effect of her employment to be." **Id.** at 615.

If the conviction does not directly relate to the licensee's profession, the Commission is required to investigate whether the licensee has been sufficiently rehabilitated to warrant the public trust. Testimony or other evidence would have to be presented at the disciplinary hearing showing that the licensee was not sufficiently rehabilitated in order to uphold the Commission's decision. Even when the licensee has not completed a probationary or parole term the **Bertrand, supra**, decision apparently requires evidence that the licensee is "not sufficiently rehabilitated" in order to uphold a decision to suspend or revoke a licensee.

Pursuant to Section 28-2-4 (B) NMSA 1978, if a licensee convicted of a not directly related crime has completed probation or parole or has been discharged or released from an imprisonment term without a subsequent conviction, it is presumed that he has been sufficiently rehabilitated. In such a case, the Commission must produce evidence to overcome that presumption in order to uphold a decision to revoke or suspend the license.

In **McCoy v. Real Estate Commission**, 94 N.M. 602, 614 P.2d 14 (1980), the Court reversed the revocation of McCoy's broker's license because the Real Estate Commission failed to give notice to McCoy that the Commission might suspend or revoke her broker's license under the authority of COEA. The Court found that the Commission failed to follow the requirements of the Act to "investigate and determine that the person [had] not been sufficiently rehabilitated to warrant the public trust," and failed to explicitly state in writing the reasons for its decision. **Id.** at 603-604.

Therefore, in each instance in which the Commission contemplates the denial, suspension or revocation of a license because of a criminal conviction, certain steps should be followed. Whether the conviction directly relates or does not directly relate to real estate, notice should be given to the licensee that the basis for the action is warranted by the COEA. Evidence should be introduced on behalf of the Commission supporting whether the conviction is directly related or not directly related to the business of a real estate broker or salesperson, and whether sufficient rehabilitation has been made, if required by the COEA. Findings should be made after the hearing to uphold the decision of the Commission under the COEA as well as under the Licensing Act.

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