

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

LAWRENCE BERTON KUTUN, )  
 )  
 Petitioner, )  
 )  
 vs. ) CASE NO. 94-5768RU  
 )  
 DEPARTMENT OF BUSINESS AND )  
 PROFESSIONAL REGULATION, )  
 DIVISION OF FLORIDA LAND SALES, )  
 CONDOMINIUMS AND MOBILE HOMES, )  
 SECTION OF GENERAL REGULATION, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

FINAL ORDER

Upon due notice, this cause, brought pursuant to Section 120.535 F.S., came on for formal hearing on December 28, 1994 in Tallahassee, Florida, before Ella Jane P. Davis, a duly assigned hearing officer of the Division of Administrative Hearings. It was consolidated with DOAH Case No. 94-6033, whereby Petitioner challenged denial of his application for a yacht and ship broker's license, pursuant to Section 120.57(1) F.S. A recommended order in DOAH Case No. 94-6033 has been entered this same date.

APPEARANCES

For Petitioner: Eric B. Tilton, Esquire  
Gustafson & Tilton, P.A.  
204 South Monroe Street, Suite 200  
Tallahassee, Florida 32301

For Respondent: E. Harper Field, Esquire  
Department of Business  
and Professional Regulation  
1940 North Monroe Street  
Tallahassee, Florida 32399-1007

STATEMENT OF THE ISSUE

At issue in this proceeding is whether Respondent Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums and Mobile Homes, Section of General Regulation has violated Section 120.535 F.S. by adoption of a policy which meets the definition of a "rule" under Section 120.52(16) F.S., without complying with the rulemaking procedures established by Section 120.54 F.S.

#### PRELIMINARY STATEMENT

This is a proceeding arising from a petition under Section 120.535 F.S. seeking an administrative determination that the following declaration, contained in an August 2, 1994 deficiency letter, is an improper non-rule policy:

"any salesman licenses held by [the employing broker] were considered cancelled (sic) for that period of time [the period while the employing broker's license was expired/lapsed] because they did not have an actively licensed broker holding their license." [Bracketed material added to provide clarity]

Respondent agency subsequently issued a Notice of Intent to Reject Petitioner's License Application on September 19, 1994 solely upon grounds he had failed to demonstrate his eligibility for a yacht and ship broker's license by completion of two consecutive years as a licensed yacht and ship salesman. Petitioner timely petitioned for a Section 120.57(1) F.S. formal hearing. That issue is taken up in the recommended order of instant date in Kutun v. Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums and Mobile Homes, Section of General Regulation, DOAH Case No. 94-6033.

The cases were consolidated for formal hearing and share a common transcript and exhibits.

Petitioner presented the oral testimony of Kathy Forrester, Robert Badger, and Peter Butler and testified on his own behalf. He had eleven exhibits admitted in evidence.

Respondent's Exhibit 1 was admitted in evidence. By agreement, Frank Stanzel testified by deposition, admitted as Respondent's Exhibit 2.

The parties' prehearing stipulation was admitted as HO Exhibit A. Official recognition was taken of Chapter 326 F.S. and Chapter 61B-60 F.A.C.

A transcript was filed. All timely-filed proposed findings of fact have been ruled upon in the appendix to this final order pursuant to Section 120.59(2) F.S.

#### FINDINGS OF FACT

1. Petitioner originally applied and was licensed as a yacht and ship salesman in June, 1992. To be a salesman, one must be associated with a licensed broker who prominently displays the salesman's license.

2. On April 15, 1994, Petitioner contacted Respondent agency by telephone to discuss renewal of his salesman's license issued June 3, 1992 and due to expire under its own terms on June 3, 1994. At that time, Kathy Forrester told Petitioner that his file reflected that his license had been "cancelled" effective March 10, 1993 due to a letter received on or about March 1, 1993 from Petitioner's employing broker, Frank Stanzel.

3. Mr. Stanzel's letter showed that he was relocating his business from Miami to Ft. Lauderdale and that he wanted his two salesmen's licenses

transferred to the new location. He enclosed with his letter the two salesmen's licenses for agency action, as required by agency rules. Mr. Stanzel further reported that Petitioner had left his employ on October 19, 1992, taking his license with him, so Mr. Stanzel could not return Petitioner's license to the agency.

4. On March 22, 1993, five months after Mr. Stanzel heard the last of Petitioner and approximately three weeks after he notified the agency of Petitioner's leaving his employ, Mr. Stanzel's broker's license expired. Under the terms of the agency rules, Mr. Stanzel was required to apply for a new license. He applied. His broker's license was not renewed retroactively, and his new license became effective August 30, 1993. For approximately five months, from March 22, 1993 to August 30, 1993, Mr. Stanzel was not a licensed Florida broker. Neither Mr. Stanzel nor the Respondent agency notified Petitioner of this fact nor did anyone notify Petitioner at that time that his salesman's license was deemed "cancelled" during the broker's lapse.

5. After finding out for the first time on April 15, 1994 that the agency presumed his salesman's license "cancelled" by Mr. Stanzel's notification that Petitioner had taken his salesman's license and left Mr. Stanzel's employ, Petitioner and his father prevailed upon Mr. Stanzel to execute an affidavit dated May 19, 1994 to the effect that Mr. Stanzel had misunderstood, now believed Petitioner had been diligently working at yacht sales after October 19, 1992, and wanted Petitioner's salesman's license reinstated. The affidavit was submitted to the agency.

6. Although Ms. Forrester had misgivings about the affidavit, the agency reinstated Petitioner's salesman's license effective April 29, 1994, after receiving the affidavit (TR 25-28). The reinstated license still had the original expiration date of June 3, 1994. The agency did not reinstate Petitioner's salesman's license retroactive to October 19, 1992 when Petitioner went into construction work fulltime, to the date of Mr. Stanzel's original broker's license expiration, or to the date of Mr. Stanzel's new broker's license. Petitioner accepted his salesman's license as reinstated.

7. Petitioner did not renew his salesman's license on June 3, 1994, so it expired by its own terms.

8. On July 21, 1994, Petitioner filed an application to be licensed as a yacht and ship broker, together with the required bond, fee, and fingerprints.

9. On August 2, 1994, Peter Butler, Head of the Section of Yacht and Ship Brokers, wrote Petitioner a deficiency notice, explaining that the agency regarded Petitioner's salesman's license "cancelled" during the lapse of his employing broker's license.

10. The agency has no rule which specifically states that when an employing broker's license expires, his salesmen's licenses are automatically cancelled.

11. The language employed in the deficiency notice was, "any salesman licenses held by [the employing broker] were considered cancelled (sic) for that period of time [the period while the employing broker's license was expired/lapsed] because they did not have an actively licensed broker holding their license." [Bracketed material added for clarity.] This language is the focus of this proceeding.

12. The deficiency notice did not refer to the prior "cancellation" of Petitioner's salesman's license based on Mr. Stanzel's March 1, 1993 notice that Petitioner had left his employ effective October 19, 1992.

13. The deficiency notice cited Section 326.004(8) F.S. [1993] which provides:

Licensing.-

(8) A person may not be licensed as a broker unless he has been a salesman for at least 2 consecutive years, and may not be licensed as a broker after October 1, 1990, unless he has been licensed as a salesman for at least 2 consecutive years.

14. Bob Badger, an agency investigator, submitted a report to Mr. Butler dated September 1, 1994 expressing his opinion that even with Mr. Stanzel's after-the-fact affidavit, Petitioner's salesman's license would have been interrupted by the fact that he had no licensed broker holding his salesman's license during Mr. Stanzel's broker's license lapse of five months. He further concluded that Petitioner's salesman's license was "suspended" for a short period for not renewing his salesman's license bond.

15. After review of the investigation report, on September 19, 1994, the agency issued its Intent to Reject Petitioner's broker's application pursuant to Rule 61B-60.002(6) F.A.C. alluding to the deficiency notice and citing Section 326.004(8) F.S., for Petitioner's failure to complete two consecutive years as a salesman.

16. Section 326.004(14)(a) and (b) F.S. and rules enacted thereunder clearly place on the broker the responsibility of maintaining and displaying the broker's and salesman's licenses as well as providing for a suspension of a salesman's license when a broker is no longer associated with the selling entity. Typically, salesmen turn in their licenses through the original broker for cancellation by the agency and receive new ones when they move from one broker's oversight to another's. Salesmen who are employed by one broker also switch their salesman's licenses to another active broker whenever the first broker disassociates from a yacht sales company and moves to another company, quits, retires, or lets his broker's license lapse. Due to the common dynamics of the employment situation whereby salesmen are under the active supervision of their employing broker in the company office, they usually know immediately when a broker's license is in jeopardy or the broker is not on the scene and supervising them. This knowledge is facilitated by the statutes and rules requiring that all licenses be prominently displayed in the business location. Anybody can look at anybody else's license on the office wall and tell when it is due to expire. If licensees are in compliance with the statutes and rules, no active salesman has to rely on notification from the agency with regard to the status of his own or his broker's license. In the present case, Petitioner removed himself from all contact with Mr. Stanzel as of October 19, 1992. Therefore, he did not know what was occurring in the office or with any licenses.

17. All agency witnesses testified substantially to the effect that since they have been employed with the agency and so far as they could determine since its inception, agency personnel have relied on Sections 326.002(3), 326.004(8), 326.004(14)(a) and (b) F.S. and Rules 61B-60.005 and 61B-60.008(1)(b) and (c) F.A.C. to preclude licensing someone who has not been actively supervised by a

Florida licensed employing broker for two consecutive years. More specifically, agency personnel have always applied Sections 326.004(14)(a) and (b) to place on the broker the responsibility of maintaining and displaying the broker's and salesman's licenses as well as providing for a suspension of the salesman's license when his broker is no longer associated with the sales entity.

18. The agency has always interpreted the word "broker" as used in Chapter 326 F.S. and Chapter 61B-60 F.A.C. to mean "Florida licensed broker." See also, Section 326.002(1) and 326.004(1) F.S. and Rule 61B-60.001(1)(g) F.A.C.

19. These interpretations are in accord with the clear language of the applicable statutes and rules.

20. Petitioner unsuccessfully attempted to show that he had received treatment different than others similarly situated.

#### CONCLUSIONS OF LAW

21. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this cause, pursuant to Section 120.535, F.S.

22. Having been denied the broker's license for which he applied, Petitioner has standing to bring the Section 120.57(1) and 120.535 F.S. petitions.

23. Section 120.535, F.S. provides:

(1) Rulemaking is not a matter of agency discretion. Each agency statement defined as a rule under s. 120.52(16) shall be adopted by the rulemaking procedure provided by s. 12054 as soon as feasible and practicable. . .

(2)(a) Any person substantially affected by an agency statement may seek an administrative determination that the statement violates subsection (1). A petition for an administrative determination of an agency statement shall be in writing and shall state with particularity facts sufficient to show:

\* \* \*

2. That the statement constitutes a rule under s. 120.52(16), in which case the petition shall include the text of the statement or a description of the statement.

24. Section 120.52(16) F.S. defines "rule" to mean:

. . . each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedure, or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not required by statute or by an existing rule. The term also includes the amendment or repeal of a rule . . .

25. Here, the Petitioner is seeking an administrative determination that the following language is an "agency statement" that violates Section 120.535(1) F.S.:

"any salesman licenses held by [the employing broker] were considered cancelled (sic) for that period of time [the period while the employing broker's license was expired/lapsed] because they did not have an actively licensed broker holding their license." [Bracketed material added for clarity]

26. As the challenger, the burden is upon Petitioner to demonstrate, by a preponderance of the evidence, that such policy exists and that such policy constitutes a "rule" as defined by Section 120.52(16). See, Section 120.535 F.S., and Humana, Inc. v. Department of Health and Rehabilitative Services, 365 So.2d 759 (Fla. 1st DCA 1978).

27. Petitioner contended that he had received different treatment than other salesmen in a similar situation. He concurrently contended that the "cancellation" of salesmen's licenses when their employing broker's license lapses or is suspended is an unpromulgated rule of general application in contravention of Section 120.535 F.S. The two arguments are contrary and mutually exclusive, but since Petitioner did not prove disparate treatment, further discussion of that issue is unnecessary.

28. The relevant existing statutes and rules, with emphasis supplied, are:

326.002 Definitions.-As used in ss.

326.001-326.006, the term:

(1) "Broker" means a person who, for or in expectation of compensation; sells, offers, or negotiates to sell; buys, offers, or negotiates to buy; solicits or obtains listings of; or negotiates the purchase, sale, or exchange of, yachts for other persons.

\* \* \*

(3) "Salesman" means a person who, for or in expectation of compensation, is employed by a broker to perform any acts of a broker.

326.004 Licensing.-

(1) A person may not act as a broker or salesman unless licensed under the Yacht and Ship Brokers' Act. The division shall adopt rules establishing a procedure for the biennial renewal of licenses.

\* \* \*

(6) The division may deny a license to any applicant who does not:

(d) Demonstrate that he is a resident of this state or that he conducts business in this state.

\* \* \*

(8) A person may not be licensed as a broker unless he has been a salesman for at least 2 consecutive years, and may not be licensed as a broker after October 1, 1990, unless he has been licensed as a salesman for at least 2 consecutive years.

\* \* \*

(13) Each broker must maintain a principal place of business in this state and may establish branch offices in the state. A separate license must be maintained for each branch office. ...

(14)(a) Each license must be prominently displayed in the office of the broker.

(b) Each salesman's license must remain in the possession of the employing broker until cancelled or until the salesman leaves such employment. Immediately upon a salesman's withdrawal from the employment of a broker, the broker must return the salesman's license to the division for cancellation.

#### 61B-60.001 Definitions and Scope.

(1) For purposes of these rules, the following definitions apply:

\* \* \*

(d) "Principal place of business" shall mean the primary location of the business of a yacht and ship broker.

(e) "Prominently displayed" as it refers to a license of a broker or salesman in accordance with section 326.004, Florida Statutes, shall mean that the license is placed in a conspicuous location on the premises and is readily visible from the entrance of the principal place of business or branch office.

\* \* \*

(g) "Foreign brokers or salesmen" shall mean those brokers or salesmen who primarily conduct business in states other than Florida or in countries other than the United States and do not maintain a valid license from the division.

#### 61B-60.005 Principal Place of Business; Broker's Branch Office License Application.

(3) A broker shall be responsible for maintaining and prominently displaying in each branch office, a broker's branch office license for the broker, and the licenses of all salesmen conducting business in that branch office. A broker shall prominently display at the principal place of business, the broker's license and the licenses of all salesmen conducting business in the principal place of business.

#### 61B-60.007 Renewal of Salesmen and Brokers' License; Branch Office License Renewal.

(1) Notification of License Expiration. The division shall notify all licensees of impending license expiration, not less than 60 days prior to expiration, on a DBR Form 31-007, APPLICATION FOR YACHT AND SHIP LICENSE RENEWAL/BRANCH OFFICE RENEWAL, effective 11-25-90, incorporated by reference.

(2) Submission of Application for License Renewal. Licensees shall apply for renewal of their license on a DBR Form 31-007, APPLICATION FOR YACHT AND SHIP LICENSE RENEWAL/BRANCH OFFICE RENEWAL, accompanied

both by a \$500 renewal fee and by the bond or letter of credit or proper continuation certificate, as provided by rule Be Florida Administrative Code. Completed applications shall be postmarked not less than 30 days prior to the expiration of the current license.

\* \* \*

(6) The holder of an expired license who fails to timely renew his license within 30 days after such expiration and who desires to perform yacht and ship broker services shall be required to make an initial application to the division and proceed as provided in rule 61B-60.004, Florida Administrative Code.

61B-60.008 Suspension, Cancellation, and Revocation Upon Cause Shown.

(1) The license of a broker or salesman, as applicable, shall be suspended or cancelled where:

\* \* \*

(b) A salesman withdraws from the employment of a broker. In such a case, the broker shall immediately return the salesman's license to the division by certified mail; or

(c) A broker severs his professional relationship with a business entity so that the remaining salesmen are no longer employed by a broker licensed as required pursuant to chapter 326, Florida Statutes. In such a case, the broker shall immediately notify the division and the salesman shall immediately return his or her license to the division by certified mail pending installation of a new broker at the respective business entity.

29. Reviewing all the statutes and rules previously cited, it is straightforward and uncomplicated reasoning that since the statute prohibited Mr. Stanzel from acting as a broker when not licensed, his salesmen were likewise prohibited and unlicensed during his license's lapse. Moreover, while Petitioner's salesman's license was not prominently displayed by a licensed employing broker, Petitioner could not legitimately sell yachts and ships. He certainly could not be legitimately transacting business through the trust account of an unlicensed broker, nor could an unlicensed broker properly oversee his sales. The proof fails to support a conclusion that the agency's basis for review of Petitioner's application is not based on requirements currently required by statute or an existing duly promulgated rule.

30. Under such circumstances, Petitioner has failed to demonstrate a violation of Section 120.535(1) F.S. See, *St. Francis Hospital, Inc. v. Department of Health and Rehabilitative Services*, 553 So.2d 1351, 1354 (Fla. 1st DCA 1989), holding, "We recognize that an agency interpretation of a statute which simply reiterates the legislature's statutory mandate and does not place upon the statute an interpretation that is not readily apparent from its literal reading, nor in and of itself purports to create rights, or require compliance, or to otherwise have the direct and consistent effect of law is not an unpromulgated rule, and actions based upon such an interpretation are permissible without requiring an agency to go through rulemaking." See also, *St. Francis Hospital Inc.'s case law progeny: Arbor Health Care Co. v. AHCA and Manor Care of Boynton Beach DOAH Case No. 94-0889RU* (FO entered May 3, 1994),



Bay Bank and Trust Co. et al v. Department of Banking and Finance DOAH Case No. 94-0633RU (FO entered October 18, 1993) aff. \_\_\_\_ So.2d \_\_\_\_ (Fla. 1st DCA 1995), and East Beach Water Control District et al v. Department of Environmental Regulation DOAH Case No. 93-1479RU (FO entered June 29, 1993).

CONCLUSION

Upon the foregoing findings of fact and conclusions of law, it is,

ORDERED that Petitioner has failed to demonstrate a violation of Section 120.535(1) F.S., and the Petition is DENIED.

DONE AND ORDERED AND ENTERED this 24th day of April, 1995, in Tallahassee, Florida.

---

ELLA JANE P. DAVIS  
Hearing Officer  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-1550  
(904) 488-9675

Filed with the Clerk of the  
Division of Administrative Hearings  
this 24th day of April, 1995.

APPENDIX TO FINAL ORDER 94-5768RU

The following constitute specific rulings, pursuant to S120.59(2), F.S., upon the parties' respective proposed findings of fact (PFOF).

Petitioner's PFOF:

1-6 Accepted except that legal argumentation pejorative words, and unnecessary, subordinate, and/or cumulative material has not been utilized.

Respondent's PFOF:

1-3 Accepted except that unnecessary, subordinate, and/or cumulative material has not been utilized.

COPIES FURNISHED:

Eric B. Tilton, Esquire  
GUSTAFSON & TILTON, P.A.  
204 South Monroe Street, Suite 200  
Tallahassee, Florida 32301

E. Harper Field  
Senior Attorney  
Department of Business and  
Professional Regulation  
Division of Florida Land Sales,  
Condominiums and Mobile Homes  
1940 North Monroe Street  
Tallahassee, Florida 32399-0750

Henry M. Solares, Director  
General Counsel  
Department of Business and  
Professional Regulation