

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LAWRENCE BERTON KUTUN,)
)
 Petitioner,)
)
 vs.) CASE NO. 94-6033
)
 DEPARTMENT OF BUSINESS AND)
 PROFESSIONAL REGULATION,)
 DIVISION OF FLORIDA LAND SALES,)
 CONDOMINIUMS AND MOBILE HOMES,)
 SECTION OF GENERAL REGULATION,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Upon due notice, this cause 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.

This cause was consolidated with DOAH Case No. 94-5768RU, initiated by a Section 120.535 F.S. petition challenging a perceived non-rule policy of Respondent agency. A final order in DOAH Case No. 94-5768RU 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

Whether Petitioner is eligible for a yacht and ship broker's license.

PRELIMINARY STATEMENT

Respondent agency issued a Notice of Intent to Reject Petitioner's License Application on September 19, 1994 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.

Petitioner also filed a Section 120.535 F.S. challenge to a perceived non-rule policy of Respondent agency whereby the agency presumes that a salesman's license automatically cancels at the time his employing broker's license expires or lapses. That challenge is taken up in the final order of instant date entered 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. 94-5768RU.

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 recommended order pursuant to Section 120.59(2) F.S.

FINDINGS OF FACT

1. Applicants for yacht and ship salesman licenses and for broker's licenses are furnished with copies of Chapter 326 F.S. and applicable agency rules with the application forms.

2. 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.

3. 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.

4. 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.

5. At formal hearing, Petitioner admitted he had left Mr. Stanzel's firm on October 19, 1992 to pursue a construction job due to the vigorous insurgence of the construction industry following Hurricane Andrew. He took the original of his salesman's license with him and left only copies with Mr. Stanzel in Stanzel's Miami office. Petitioner asserted, however, that since "all it takes to sell yachts is a computer and a telephone," he continuously attempted to sell yachts from his own home after October 19, 1992.

6. After October 19, 1992, Petitioner worked at least 40 hours a week in construction, did not sell any yachts or ships, and had no contact with Mr. Stanzel as his employing broker. Mr. Stanzel did not supervise Petitioner's sales activities after October 19, 1992. Petitioner never returned to Mr. Stanzel's Miami office after that date. Petitioner has never been in Mr. Stanzel's new office in Ft. Lauderdale. Mr. Stanzel paid Petitioner a commission in December 1992 for prior sales work on a yacht sale to Petitioner's father, which sale ultimately closed in December 1992, but since October 19, 1992, Mr. Stanzel has not considered Petitioner his employee. Petitioner received no IRS 1099 form (commission salesman's equivalent of employee's W-2 form) from Mr. Stanzel after 1992.

7. After October 19, 1992, Mr. Stanzel did not display Petitioner's license, as required by agency rules for salesmen in a broker's employ.

8. Nothing precludes a licensed salesman from selling yachts and ships out of his home if he is overseen by an employing broker. Petitioner had done so while employed by Mr. Stanzel prior to October 19, 1992. However, by law, all yacht and ship sale closings must be done through the employing broker's trust account. Petitioner has closed no sales on his own through Mr. Stanzel's trust account since October 19, 1992. The two have never discussed a return to work by Petitioner. They did not communicate on any subject between October 19, 1992 and April 15, 1994.

9. Even if Mr. Stanzel had not written his March 1, 1993 letter, Petitioner still would not have been able to show that he has attained the type and duration of training in the sale of yachts and ships which is associated with two uninterrupted years of broker-supervised salesman's status.

10. 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.

11. 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.

12. 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.

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

14. 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.

15. 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.

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

17. 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 became the focus of the concurrent Section 120.535 F.S. proceeding.

18. 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.

19. 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.

20. The deficiency notice also specified that if Petitioner paid another dollar for a fingerprinting fee and provided an explanation of his 1992 yacht sales, the agency would issue a new salesman's license.

21. There was no way Petitioner could alter the past lapse of the broker's license.

22. Petitioner did not pursue relicensure as a salesman.

23. 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.

24. 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.

25. Even if Mr. Stanzel's broker's license had been reinstated without lapse, thereby by implication reinstating Petitioner's salesman's license without lapse, it would not retroactively change the fact that Petitioner has not attained the type and duration of training in the sale of yachts and ships which is associated with two uninterrupted years of broker-supervised salesman's status.

26. Petitioner claimed that he was "cancelled by ambush," because the agency did not timely notify him of Mr. Stanzel's lapsed broker's license, and further asserted that the agency's failure to timely notify him constituted a violation of Rule 61B-60.002(6) F.A.C.

27. At the present time, the agency writes a letter to salesmen advising them when their employing broker's license is cancelled. However, such a letter would not have been written to Petitioner, even if it were being used by the agency on March 22, 1993 when Mr. Stanzel's original broker's license expired, because Petitioner's license had already been effectively cancelled by his own removal of his license from Mr. Stanzel's office, by his assuming other full time employment in construction, and by his removing his yacht-selling activities, if any, from Mr. Stanzel's immediate oversight.

28. 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 salesmen'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 statute 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.

29. 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.

30. 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.

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

32. Petitioner asserted that he had been treated differently than others similarly situated because other salesmen were notified by the agency when their employing broker's license lapsed and because the agency cancelled their salesman's licenses for other reasons but did not cancel their salesman's licenses because of their broker's license's lapse. The facts adduced did not closely parallel his own situation so as to demonstrate disparate treatment.

33. Petitioner did not demonstrate that the agency affirmatively set out to notify any other salesman that his salesman's license was cancelled due to a lapse of his employing broker's license. Rather, the agency was tipped off by a complaint that Bryan Long's salesman's license had expired February 27, 1993. The agency investigated and determined that the license of Mr. Long's broker had expired on February 14, 1993, before Long's own salesman's license had expired. The broker's name was Herbert Postma. Upon discovering that Long and Postma were selling yachts without licenses, the agency investigated the broker's transactions and commissions paid. As a result of its investigation, the agency discovered that two more salesmen, Villalon and Grzeszczak, held salesman's licenses which, like Long's license, had expired during the time Postma's license was lapsed.

34. As with Petitioner, the agency did not attempt to notify any of the salesmen when their broker's license lapsed. The disciplinary investigation of Long's sales and of Postma's transactions and commissions peripherally notified the other salesmen of their lapsed salesman's licenses and of the broker's lapsed license.

35. Petitioner is correct that none of the four licensees were listed as "cancelled" in the agency's records, and Brian Long entered into a Consent Order with the agency which did not mention he was "cancelled" because of the broker's license's lapse. However, the duration dates of each type of license were shown in the agency records. Like the current situation, the new licenses were not issued retroactive to the date of each salesman's prior license's expiration or retroactive to the date of the broker's prior license expiration. Also like Petitioner's reinstatement, none of these licenses showed a reinstatement without a lapse.

36. The agency printout for yet another salesman, Preston, showed that like Petitioner, he was "cancelled" when he had no broker and was reinstated 21 days later. The printout also shows that like Petitioner, Preston was not reinstated retroactively.

37. None of the named salesmen were shown to have been granted a broker's license as having been employed by a broker for two consecutive years.

CONCLUSIONS OF LAW

38. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this cause, pursuant to Section 120.57(1), F.S.

39. 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.

40. The concurrent Section 120.535 F.S. challenge resulted in the following language being determined not to be an unpromulgated rule:

Any salesman license held by [the employing broker] were considered cancelled (sic) for that period of time because they did not have an actively licensed broker holding their license. [Bracketed material supplied for clarity]

41. The agency has done nothing more than make a reasonable interpretation of the existing statutes and rules and apply them to the facts.

42. 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.

43. By accepting the broker's notification in 1993 that Petitioner was no longer in his employ, the agency in effect "cancelled" Petitioner's salesman's license. In 1994, by imputing the broker's lapsed license to the Petitioner's salesman's license, the agency in effect "cancelled" Petitioner's salesman's license. Each time, the agency made a fully permissible interpretation of existing statutes and rules.

44. In making such "cancellations", the agency also was required by its own Rule 61B-60.002(6) F.A.C. to advise Petitioner of a window to challenge each proposed final agency action. See also, Board of Trustees of the Internal Improvement Trust Fund v. Barnett, 533 So. 2d 1202 (Fla. 3d DCA 1988) to the effect that once having granted permission or licensure, an agency cannot revoke without complying with the Florida Administrative Procedure Act. In Petitioner's case, the agency did not give the timely notice required in March 1993, but this failure was the equivalent of harmless error.

45. In March 1993, the agency deemed Petitioner's salesman's license cancelled because of his own removal of himself from the supervision of his employing broker. This was a permissible and reasonable interpretation of the existing statutes and rules. See, all statutes and rules previously cited, particularly Rule 61B-60.008(1)(b) and (c) F.A.C. Although the agency had failed to timely notify Petitioner of the 1993 "cancellation," he was permitted to challenge the agency action and present Stanzel's affidavit when he found out about the agency's position on April 15, 1994. Petitioner's license was reinstated when he requested reinstatement, but the reinstatement was not

retroactive. He accepted that reinstatement as of April 29, 1994 and did not timely challenge it for not being retroactive. He cannot reopen that issue now.

46. Even without notification by the agency, Petitioner would have known of the broker's license's lapse in 1993 if he had only remained under the broker's supervision in the broker's office, but the agency did not notify him of that proposed final agency action in 1993 because agency personnel already considered him previously cancelled on other grounds. Because he was already cancelled, personnel were not applying the agency's interpretation of the existing statute and rules concerning the broker's license expiration at that point.

47. The agency deemed Petitioner's salesman's license cancelled when, by its August 2, 1994 deficiency letter, and ultimately its September 19, 1994 notice of intent to reject, it imputed Stanzel's broker's license's lapse to Petitioner's salesman's license. This also was a permissible and reasonable interpretation of the statute and rules.

48. When the 1994 deficiency letter and intent to reject applied the agency interpretation that the lapse in the broker's license constituted a lapse for Petitioner too, the agency timely provided Petitioner with notice, a window of opportunity, and the instant formal administrative hearing pursuant to Section 120.57(1) F.S.

49. 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 agency's interpretation in *pari materia* of the statutes and its duly promulgated rules to the effect that a lapsed broker's license precludes Petitioner from establishing he has worked as a salesman for two consecutive years is an entirely permissible and reasonable construction of the statutes and rules.

50. The agency is charged with protecting the public from untrained and unscrupulous sellers of yachts and ships. The legislature has determined that two consecutive years' worth of broker oversight is necessary to fit a salesman to become a broker. The agency has only implemented that goal by its action here.

51. When an agency committed with authority to implement a statute construes a statute in a permissible way, that interpretation must be sustained even though another interpretation may be possible or even, in the view of some, a preferable interpretation. See, *State Department of Health and Rehabilitative Services v. Freamet Realty, Inc.*, 407 So.2d 238, 241-242, (Fla. 1st DCA 1981). One challenging the facial validity of a statute must show that the agency's interpretation of the statute is clearly erroneous or unauthorized. See, *North American Publications, Inc. v. Department of Revenue*, 436 So.2d 954, 955 (Fla. 1st DCA 1983). The administrative construction of a statute by an agency or body charged with its administration is entitled to great weight and will not be overturned unless clearly erroneous. See, *State ex rel Biscayne Kennel Club v. Board of Business Regulation*, 276 So.2d 823 (Fla. 1973). A reviewing court must defer to an agency's interpretation of an operable statute as long as that

interpretation is consistent with legislative intent and is supported by substantial, competent evidence. See, Public Employees Relations Commission v. Dade County Police Benevolent Association, 467 So.2d 987 (Fla. 1985).

52. The agency's decision to deny the broker's license should stand for the foregoing reasons alone but also because the evidence herein affirmatively shows that even if Mr. Stanzel's broker's license had never lapsed, neither Mr. Stanzel nor any licensed broker oversaw and assumed responsibility for Petitioner's activities as a salesman for two consecutive years. That professional oversight, and not the mere physical possession of a salesman's license and bond, is clearly the intent of Section 326.004(8) F.S.

RECOMMENDATION

Upon the foregoing findings of fact and conclusions of law, it is RECOMMENDED that the Department of Business and Professional Regulation enter a final order denying Petitioner's application for licensure as a yacht and ship broker.

RECOMMENDED this 24th day of April, 1995, at Tallahassee, Florida.

ELLA JANE P. DAVIS
Hearing Officer
Division of Administrative Hearings
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(904) 488-9675

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

APPENDIX TO RECOMMENDED ORDER 94-6033

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

Petitioner's PFOF:

- 1-5 Accepted except that legal argumentation pejorative words, and unnecessary, subordinate, and/or cumulative material has not been utilized.
- 6 Rejected as not credible. Covered in substance in FOF 5, 6, and 8.
- 7 Accepted that this is what the letter stated. However, not dispositive due to the facts as presented. See FOF 11.
- 8 Rejected as mere legal argument.
- 9-10 Accepted except that legal argumentation pejorative words, and unnecessary, subordinate, and/or cumulative material has not been utilized.
- 11 Rejected as mere legal argument.
- 12-19 Accepted except that legal argumentation pejorative words, and unnecessary, subordinate, and/or cumulative material has not been utilized.
- 20 Rejected as mere legal argument.
- 21-25 Rejected in FOF 32-37 upon the greater weight of the evidence as a whole and in part as mere legal argument.

26-42 These proposals are mixed legal argument and some fact proposals, largely without any citation to the record. The legal argumentation has been rejected as not proposed facts. The facts not accepted are either rejected as covered specifically within the recommended order or are rejected as not dispositive. Ms. Forrester's testimony is mischaracterized in proposed fact 24, and it is rejected for that reason. The legal arguments are addressed in the conclusions of law.

Respondent's PFOF:

1-19 The proposed facts have been accepted except that unnecessary, subordinate, and/or cumulative material has not been utilized. The interspersed legal argumentation has been rejected as not proposed facts, but has been addressed in the conclusions of law.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to this Recommended Order. All agencies allow each party at least 10 days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should contact the agency that will issue the final order in this case concerning agency rules on the deadline for filing exceptions to this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.