

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF INSURANCE,)
)
Petitioner,)
)
vs.) Case No. 00-3778PL
)
GEORGE JESUS GONZALEZ,)
)
Respondent.)
_____)

RECOMMENDED ORDER

The parties having been provided proper notice, Administrative Law Judge John G. Van Laningham of the Division of Administrative Hearings convened a formal hearing of this matter by video teleconference on March 28, 2001. The parties, counsel, and witnesses appeared in Miami, Florida, and the Administrative Law Judge presided in Tallahassee.

APPEARANCES

For Petitioner: Anoush A. Arakalian, Esquire
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Division of Legal Services
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For Respondent: Ignacio Siberio, Esquire
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STATEMENT OF THE ISSUE

Whether one or more grounds exist for suspending, or imposing other discipline against, Respondent's license, where

Petitioner charges that Respondent engaged in fraudulent or dishonest practices in the conduct of business as a licensed health insurance agent.

PRELIMINARY STATEMENT

On August 16, 2000, Petitioner Department of Insurance (the "Department") issued a two-count Administrative Complaint against Respondent George J. Gonzalez ("Gonzalez"), a licensed health insurance agent. The Department accused Gonzalez of having engaged in deceptive, dishonest, or fraudulent practices in connection with the preparation and submission of an insurance application for the late Doris Simpson (Count I) and further charged him with failing to timely notify the Department of a new business address (Count II).

Gonzalez disputed the Department's factual allegations and timely filed an Election of Rights with the Department in which he requested a formal administrative hearing. On September 8, 2000, the Department referred the matter to the Division of Administrative Hearings for further proceedings.

The final hearing was held on March 28, 2001, by video teleconference, as scheduled, and both parties appeared, each represented by counsel. At the outset of the hearing, the Department announced that it had decided not to pursue the charges brought against Gonzalez under Count II of the Administrative Complaint.

The Department called two witnesses: Patrick O'Connell and Sergio Rumie, both of whom were, at the time of the hearing, employees of Foundation Health, a Florida Health Plan, Inc., where Gonzalez, too, had worked when the alleged misconduct at issue occurred. In addition, the Department offered nine exhibits, numbered 1, 2, and 4 through 10, each of which was received in evidence.

Gonzalez testified on his own behalf and called no other witnesses. He introduced six exhibits, numbered 1 through 6, half of which were admitted (Respondent's Exhibits 1, 2, and 6), and half rejected (Respondent's Exhibits 3 through 5).

A transcript of the final hearing was filed with the division on May 9, 2001. Thereafter, the parties submitted proposed recommended orders, and the Administrative Law Judge carefully considered these papers in the preparation of this Recommended Order.

FINDINGS OF FACT

The evidence presented at final hearing established the facts that follow.

The Big Picture

1. Gonzalez is, and at all times material was, a Florida-licensed health insurance agent whose conduct qua licensee is subject to the regulatory jurisdiction of the Department.

2. From April 1997 until January 25, 1999, Gonzalez worked as a sales representative for Foundation Health, a Florida Health Plan, Inc. ("Foundation") at its offices in Dade County, Florida. Foundation paid Gonzalez a base salary and car allowance plus commissions and bonuses tied to production.

3. As an agent of Foundation, Gonzalez's job was to solicit applications from Medicare recipients for membership in Foundation's Senior Value Medicare Plan, a health maintenance organization ("HMO") that, through managed care, provided a broader spectrum of benefits than otherwise was available under traditional Medicare coverage. For each Medicare recipient enrolled in the Senior Value Medicare Plan, Foundation received a monthly payment from the federal Health Care Financing Administration ("HCFA").

4. On January 14, 1999, Gonzalez, as Foundation's representative, signed an application for enrollment in the Senior Value Medicare Plan that had been filled out for an applicant named "Doris Simpson." Included in the application were numerous identifying data such as Ms. Simpson's address, phone number, date of birth, social security number, and Medicare number. Gonzalez submitted Ms. Simpson's January 14, 1999, application to Foundation, initiating the enrollment process.

5. The Doris Simpson who fit the application's description had died on or around July 1, 1998. The fact of her death was discovered in short order by HCFA during the ordinary course of the enrollment process. HCFA naturally rejected the bogus application and notified Foundation of the problem on or around January 20, 1999.

6. On January 22, 1999, Foundation suspended Gonzalez for three days, effective immediately, pending the outcome of its investigation into the Doris Simpson matter.

7. Gonzalez resigned his employment with Foundation on January 25, 1999. Thereafter, on February 1, 1999, Gonzalez began working for Physicians Healthcare Plans, Inc. as a sales representative, a job he has held ever since.

Mistake or Misconduct?

8. The foregoing facts are largely undisputed; those that follow mostly are, hotly. Getting to the bottom of whether Gonzalez made an honest mistake, as he maintains, or submitted a fraudulent application, as the Department has charged, is facilitated by a careful scrutiny of Gonzalez's conflicting explanations of what happened.

9. Gonzalez's most contemporaneous account of the Simpson affair appears to be contained in an undated handwritten document, entitled simply "Statement," that Gonzalez himself

indisputably prepared and signed. The full text of this paper follows:

STATEMENT

Prospect: Doris Simpson
SS# 075-22-6675
Agent: George J. Gonzalez
SS# 263-92-7916

To whom it may concern:

To the best of my recollection I arrived at 20879 N.W. 9th Ct #107 (Walden Ponds Community) during the morning of (on or about) 11 a.m. 14th Jan.—through the gate system. Ms. Simpson agreed to my visit & let me in. Ms. Simpson opened [the] door and throughout my presentation produced a Medicare card and then proceeded to verification. Verification person was "DAWN." Throughout the whole process everything proceeded to a normal sit down "application-to-verification" prospect call. P.S. She is blind, African-American.

[Signed]
George J. Gonzalez

10. Gonzalez's manager at Foundation, Sergio Rumie, testified that sometime between January 20 and January 22, 1999, Gonzalez personally had handed him this Statement, which, according to Mr. Rumie, constituted Gonzalez's written explanation of what had occurred with the Simpson application. Mr. Rumie recalled that in a discussion between the two of them, Gonzalez had told him that he (Gonzalez) had met with someone (obviously not Doris Simpson) in the Simpson household on

January 14, 1999, who had held herself out as Ms. Simpson and signed the application. Mr. Rumie believed Gonzalez.

11. Although the Statement is not dated, two details in Gonzalez's handwritten memorandum strongly suggest that the events of January 14, 1999, were its intended subject. The first of these telltale details is the date itself. The controversial Simpson application is dated January 14, 1999. The Statement refers to a meeting between Gonzalez and Doris Simpson on January 14. No imagination is required to connect one to the other.

12. The second common denominator linking the Statement to the phony Simpson application is the verifier's name, Dawn. Before going on, however, some additional background must be provided, so that the significance of this datum may be understood.

13. At all times material, an independent contractor located in Utah performed application verification services for Foundation. The name of this contractor is not in evidence. For convenience's sake, following the witnesses' lead, the contractor will be referred to simply as "Utah."

14. As part of the approved sales process, Foundation required its agents to place a telephone call to Utah, in the presence of the prospective enrollee, whenever an application had been completed. Once connected, the agent was supposed to

introduce the applicant to the verifier, and then turn the phone over to the applicant. Using a script, the verifier would ask the applicant a series of questions, to confirm that he or she understood the transaction at hand. If the interview went well, the verifier would give the agent a verification number along with his or her name, both of which the agent would record on the face of the application. Foundation would not accept an application unless it contained a verification number.

15. On the controversial Simpson application of January 14, 1999, Gonzalez wrote, by hand, a verification number and the verifier's name, which happens to have been Dawn—the very name, recall, of the verifier who was so prominently identified (as "DAWN") in the Statement.

16. If the story ended here, it would be difficult to find that Gonzalez had willfully submitted a false application. Rather, to this point, Gonzalez seems to have been the victim of a strange hoax, fooled by an imposter pretending (for reasons that admittedly are not readily apparent) to be the late Doris Simpson. Mr. Rumie, after all, who knew Gonzalez and was in a position to assess his character and credibility at the time of the incident, had believed this to be the case.

17. But there is more to the story. The exculpatory scenario just mentioned holds water only if Gonzalez were unacquainted with the real Doris Simpson, for if Gonzalez had

known the decedent personally, then common sense would counsel that he could not have fallen for a poseur's deceit.

18. Gonzalez testified that he had been to Ms. Simpson's home on three occasions before January 1999, and that he knew her well. Twice, he said, he had taken an application from Ms. Simpson in person, had submitted the application, which was accepted, and thereby had succeeded in enrolling her in Foundation's HMO. Each time, however, Ms. Simpson had dis-enrolled before long. Corroborating Gonzalez's account are two completed applications, dated March 31, 1997, and June 4, 1998, and the fact that Ms. Simpson had been a member of the Senior Value Medical Plan for brief periods following these dates.

19. Gonzalez claimed also to have taken an application from Ms. Simpson in January 1998 that was rejected. In contrast to the other two, however, no application from January 1998 was produced at hearing—indeed, no persuasive corroborating evidence of any kind was adduced in support of this supposed January 1998 application.

20. The reliability of Gonzalez's testimony that he knew Ms. Simpson personally from dealings between them that had occurred before January 1999 is high because the fact is against his interests; this much of Gonzalez's testimony, therefore, is accepted as true and adopted as a fact finding.

21. On the other hand, Gonzalez's testimony that he met with Ms. Simpson in January 1998 and took an application from her at that time is suspiciously self-serving (as will be seen) and, ultimately, not believable. Initially, Gonzalez's failure to produce the purported application raises a skeptical eyebrow. But what sinks Gonzalez's story about meeting Ms. Simpson in January 1998 is that the tale was told in an incredible attempt to explain away the Statement (which, if intended to refer to events of January 14, 1999, cannot be squared with Gonzalez's admission that he had by then known Ms. Simpson personally from prior dealings) as a memorandum regarding this purported January 1998 visit. Gonzalez maintained that, by coincidence, he had happened to meet with Ms. Simpson on January 14, 1998, and again on January 14, 1999, and that both times the verifier, as chance would have it, was Dawn. This contention is contrived and forced.

22. Taken as a whole, the evidence is convincing that Gonzalez wrote the Statement in January 1999 for his former employer and delivered it to Mr. Rumie between January 20 and January 22, 1999, with the intent that the Statement be understood as a description of the circumstances surrounding Gonzalez's solicitation of the January 14, 1999, application from the putative Ms. Simpson. The contents of the Statement,

however, are false and misleading, as was Gonzalez's testimony at hearing about the Statement.

23. Gonzalez gave a different account of the Simpson application to the Department of Insurance in response to the Administrative Complaint in this matter. In an undated letter to the Department which the Department received on September 6, 2000, Gonzalez wrote:

By recollection I believe this case involves a mail-in situation. I recall that I sent maybe two/three such invitation packages in the Spring of 1998 and one could have been for Mrs. Simpson. That practice is no longer tolerated after a new Vice-president of marketing (Medicare) was installed in the Sawgrass Headquarters late May of that same year.

As 1998 was ending in December (late) I believe I received an application signed and (I believe) it was the Simpson one. I completed the data in those days that followed early in January 1999, before starting my new job did a phone verification (3 way) or gave this information to a verifying person (Utah) and the person was thus verified (I cannot be clear on this). Hearing no problems from Utah I recorded the authorization # on a call back from Utah or after the verification; if done by 3-way.

I did not know of her death and in fact only found out when receiving your package of counts and allegations on August 21, 2000. I would only add that Mrs. Simpson had a family member there, perhaps her sister. During my first application for the plan with Mrs. Simpson in late 1997 I believe she helped in the signing and subsequent verification of her sister. Mrs. Simpson

could not sign any proper way the petitions.
I believe she was blind in my recollections.

24. Ironically, one of the few unqualified representations in this letter of Gonzalez's to the Department—that he “in fact” had first learned of Ms. Simpson's death upon receipt of the Administrative Complaint—was clearly untrue. In fact, Gonzalez undeniably had known of Ms. Simpson's death at the time of his resignation from Foundation on January 25, 1999, if not sooner, and certainly long before August 21, 2000, in any event.

25. As for the rest of this explanation, Gonzalez essentially stuck with it at hearing, although his memory apparently had improved by then, for he seemed far more confident of the details than he had as author of the above-quoted letter.

26. In a nutshell, Gonzalez claimed that, on his own initiative, he had mailed a partially filled-out application to Ms. Simpson in June or July 1998 with note asking her to sign and return the document if she wanted to re-enroll in Foundation's Medicare HMO. He claimed to have had no further contact with Ms. Simpson until, in late December 1998 or early January 1999, he received through the mail Ms. Simpson's signed-but-undated application. According to Gonzalez, despite the delay of some five months, Gonzalez failed to call Ms. Simpson to confirm her continued interest and instead signed the

application on January 14, 1999, inscribing the same date next to the purported signature of Ms. Simpson. He claimed to have contacted Utah, provided the necessary information to the verifier, and in due course to have received a verification number from Dawn, which signified to him that all was in order.

27. This story is facially unbelievable and is rejected as a fabrication. Moreover, there is an out-of-place detail on the January 14, 1999, application that exposes the chicanery; namely, the designated primary care physician, a Dr. Nidal Radwan, who is specifically identified therein as Ms. Simpson's current physician. When Gonzalez was asked at hearing to point out the parts of the application that he had filled out, Gonzalez replied, making reference to the top quarter of the first page where the primary care physician information appears, that

[t]he part that's my handwriting is the name, the address, the phone number, and the date of birth, and doctor selected, which was her last doctor. I put it there, I said does she [sic] want this doctor again.

Transcript of Final Hearing at 193 (emphasis added).

28. At the time Gonzalez supposedly prepared this application, in June or July 1998, he had not spoken with Ms. Simpson specifically about doing so; indeed, she may well already have passed away. He certainly did not speak with her about doctors after July 1, 1998. Yet on the previous

application that Gonzalez had taken from Ms. Simpson just a few weeks before her death, dated June 4, 1998 (Respondent's Exhibit 4), Ms. Simpson had chosen a Dr. [Illegible]-Nunez as her primary care physician—not Dr. Radwan.

29. It is commonly known that for a genuine insurance application, the sales representative or agent will endeavor to elicit truthful, complete, and current information from the applicant and rely upon the applicant's representations in preparing the paperwork. The fact that Gonzalez's selection of Dr. Radwan as Ms. Simpson's "current" primary care physician was not based on information obtained from Ms. Simpson—indeed, his election deviated from her last (known) written expression of intent in this regard—exposes the act as an arbitrary choice of Gonzalez's, which in turn underscores the counterfeit nature of the January 14, 1999, application.

The Charges

30. In Count I of its Administrative Complaint, based on allegations that Gonzalez had signed and presented an application for insurance in the name Doris Simpson, who was at the time deceased, the Department accused Gonzalez of having submitted an enrollment form that he "knew or should have known" contained false or fraudulent information, in violation of Sections 626.611 and 626.621, Florida Statutes. Specifically, the Department alleged the following grounds for discipline:

(a) Willful misrepresentation of any insurance policy or annuity contract or willful deception with regard to any such policy or contract, done either in person or by any form of dissemination of information or advertising. [Section 626.611(5), Florida Statutes];

(b) Demonstrated lack of fitness or trustworthiness to engage in the business of insurance. [Section 626.611(7), Florida Statutes];

(c) Fraudulent or dishonest practices in the conduct of business under the license or appointment. [Section 626.611(9), Florida Statutes];

(d) Willful failure to comply with, or willful violation of, any proper order or rule of the department or willful violation of any provision of this code. [Section 626.611(13), Florida Statutes];

(e) Violation of any provision of this code or of any other law applicable to the business of insurance in the course of dealing under the license or appointment. [Section 626.621(2), Florida Statutes];

(f) In the conduct of business under the license or appointment, engaging in unfair methods of competition or in unfair or deceptive acts or practices, as prohibited under part X of this chapter, or having otherwise shown himself or herself to be a source of injury or loss to the public or detrimental to the public interest. [Section 626.621(6), Florida Statutes];
[and]

(g) UNFAIR METHODS OF COMPETITION AND UNFAIR OR DECEPTIVE ACTS.- The following are defined as unfair methods of competition and unfair or deceptive acts or practices:
Misrepresentation in insurance applications.- Knowingly making a false or

fraudulent written or oral statement or representation on, or relative to, an application or negotiation for an insurance policy for the purpose of obtaining a fee, commission, money, or other benefit from any insurer, agent, broker, or individual.
[Section 626.9541(1)(k), Florida Statutes] [.]

Ultimate Factual Determinations

31. Because the evidence does not illuminate all the particulars of Gonzalez's scheme, it is impossible to reconstruct completely the precise course of his misconduct. The evidence is sufficient, however, to establish, clearly and convincingly, that on or around January 14, 1999, Gonzalez: (a) signed an insurance application for Ms. Doris Simpson knowing that she had neither requested the sought-after coverage, nor supplied information for that application, nor executed the application herself; (b) placed a date next to the purported signature of Ms. Simpson (which he knew was not hers) intentionally to represent, falsely, that "she" and he had signed the instrument contemporaneously (and hence, implicitly, in one another's presence); and (c) with intent to deceive, submitted this bogus application to his employer, Foundation, for the purpose of obtaining a commission or other benefit.

CONCLUSIONS OF LAW

32. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

33. Section 626.611, Florida Statutes, under which Gonzalez has been charged, sets forth the acts for which punishment, including the suspension or revocation of an agent's license, is mandatory upon proof of guilt. Section 626.621, Florida Statutes, under which Gonzalez also has been charged, sets forth the acts for which the Department upon sufficient proof may, in its discretion, discipline a violator, the available sanctions again including suspension or revocation of a license.

34. A proceeding, such as this one, to suspend, revoke, or impose other discipline upon a professional license is penal in nature. State ex rel. Vining v. Florida Real Estate Commission, 281 So. 2d 487, 491 (Fla. 1973). Accordingly, to impose discipline, the Department must prove the charges against Gonzalez by clear and convincing evidence. Department of Banking and Finance, Div. of Securities and Investor Protection v. Osborne Stern & Co., 670 So. 2d 932, 935-36 (Fla. 1996) (citing Ferris v. Turlington, 510 So. 2d 292, 294-95 (Fla. 1987)); Nair v. Department of Business & Professional Regulation, 654 So. 2d 205, 207 (Fla. 1st DCA 1995).

35. In Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983), the Court of Appeal, Fourth District, canvassed the cases to develop a "workable definition of clear and convincing evidence" and found that of necessity such a definition would need to contain "both qualitative and quantitative standards." The court held that

clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Id. The Florida Supreme Court later adopted the fourth district's description of the clear and convincing evidence standard of proof. Inquiry Concerning a Judge No. 93-62, 645 So. 2d 398, 404 (Fla. 1994). The First District Court of Appeal also has followed the Slomowitz test, adding the interpretive comment that "[a]lthough this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous." Westinghouse Electric Corp., Inc. v. Shuler Brothers, Inc., 590 So. 2d 986, 988 (Fla. 1st DCA 1991), rev. denied, 599 So. 2d 1279 (1992) (citation omitted).

36. As set forth in the preceding Findings of Fact, the trier has determined as matter of ultimate fact that the Department established, by the requisite level of proof, that Gonzalez committed fraudulent, dishonest, and deceptive acts in the conduct of business as a licensed insurance agent.

37. Specifically, the evidence clearly and convincingly shows that Gonzalez violated Sections 626.611(5), (7), and (9), for which violations he must be punished; and also Sections 626.621(2) and (6)—the latter subsection in consequence of engaging in deceptive practices as prohibited by Section 626.9541(1)(k), Florida Statutes—for which misconduct the Department may, in its discretion, impose discipline against Gonzalez's license.

38. The evidence is not sufficient, however, to establish that Gonzalez violated Section 626.611(13), Florida Statutes, because the trier is unable to conclude, with the required degree of certainty, that Gonzalez specifically intended to disobey an administrative order, rule, or statutory provision.¹

39. In Chapter 4-231, Florida Administrative Code, the Department has promulgated penalty guidelines for insurance representatives. The purpose of this rule chapter is to provide "notice of the penalties which will normally be imposed against specified licensees for violation of particular provisions of

the Insurance Code" See Rule 4-231.010, Florida Administrative Code.

40. According to the guidelines, when, as here, a licensee is found, based upon a single count in an administrative complaint, to have committed several violations for which punishment must or may be imposed, and the multiple grounds for discipline relate to a single transaction or occurrence, the penalty for that count (before any adjustment is made in consideration of aggravating or mitigating factors) cannot exceed the maximum penalty for the particular violation, among the several, which would carry the highest penalty were it standing alone. In other words, the penalty per count is not to be the aggregate of penalties applicable to each ground established thereunder, but rather the maximum penalty for the single most serious violation proven under that count. See Rule 4-231.040(1), Florida Administrative Code; see also Rule 4-231.030(2), (6), Florida Administrative Code.

41. Of the multiple grounds charged and established under Count I of the Administrative Complaint against Gonzalez, the transgression that carries the highest stated penalty is the commission of fraudulent or dishonest insurance practices, which is proscribed by Section 626.611(9), Florida Statutes. The prescribed penalty for a violation of Section 626.611(9) is a

nine-month's suspension of the agent's license. Rule 4-231.080(9), Florida Administrative Code.

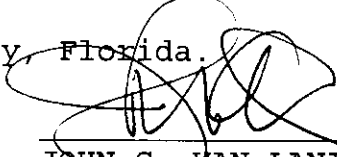
42. Rule 4-231.160, Florida Administrative Code, requires the Department to consider a number of enumerated factors as the basis for either increasing or decreasing the stated penalty. In this instance, none of the factors provides a ground for mitigating the penalty prescribed for a violation of Section 626.611(9), Florida Statutes. Several, however, operate as aggravating factors.

43. Specifically, the following considerations favor an increase in the recommended penalty: Gonzalez's conduct was willful; his motives were selfish and unjustifiable; he failed to cooperate, and was not candid, with the Department; he is personally, not vicariously, responsible for the misconduct in question; and the Department proved several secondary violations in Count I. See Rule 4-231.160(1)(a), (f), (h), (i), and (k), Florida Administrative Code. For these reasons, three additional months should be added to the suspension period.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department enter a final order suspending Gonzalez's health insurance agent license for a period of one year.

DONE AND ENTERED this 10th day of July, 2001, in
Tallahassee, Leon County, Florida.



JOHN G. VAN LANINGHAM
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of July, 2001.

ENDNOTE

^{1/} By its plain terms, Section 626.611(13), Florida Statutes, establishes a "specific intent" violation because the misconduct prohibited is an act (that which is proscribed by the underlying order, rule, or statute) accompanied by an intent (to disobey the underlying order, rule, or statute) other than to do the act itself. Cf. Linehan v. State, 442 So. 2d 244, 247 (Fla. 2d DCA 1983), result approved, 476 So. 2d 1262 (1985).

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.