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FILED

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THE TREASURER OF THE STATE OF FLORIDA
DEPARTMENT OF INSURANCE

Treasurer and
Insurance Commissioner
Docketed by: EL

TOM GALLAGHER

01-2438

SBK-CLOS

IN THE MATTER OF:

MATILDA M. VATH

CASE NO: 39967-01-AG

FINAL ORDER

THIS CAUSE came on for consideration and final agency action. On April 10, 2001, an Administrative Complaint was issued by the Department of Insurance alleging that Respondent Matilda M. Vath failed to timely remit cash collateral and misappropriated, converted or wrongfully withheld fiduciary funds. Respondent timely filed a request for a proceeding pursuant to section 120.57(1), Florida Statutes. For purposes of the Section 120.57, Florida Statutes, hearing this matter was consolidated with the related case in the matter of John L. Vath in case no. 40065-01-AG. Pursuant to notice, the consolidated matter was heard before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings, on November 30, 2001.

After consideration of the record and argument presented at the hearing, the Administrative Law Judge issued his consolidated Recommended Order on February 22, 2002. (Attached as Exhibit A). The Administrative Law Judge recommended that a Final Order be entered suspending for three (3) months the licenses and eligibility for

licensure of Matilda M. Vath as a limited surety agent, and requiring the refunding of \$318.00 to Augustavo Porro.

On March 8, 2001, the Respondent timely filed exceptions to the Recommended Order. The Respondent's exceptions are addressed below.

RULINGS ON RESPONDENT'S EXCEPTIONS

Respondent's factual exceptions, which were filed in consolidation with the matter of John L. Vath in case no. 40065-01-AG, were made in an eight paragraph Exceptions to Findings of Fact. Respondent's exceptions do not specifically identify a single specific paragraph or finding of fact in the Recommended Order. For the purpose of this ruling on Respondent's exceptions each paragraph of Respondents' Exceptions to Findings of Fact is treated as a separate exception.

1. Respondent's first exception is that the record does not support a finding that any willful act was done in violation of the laws of the State of Florida. This exception is not made to any specific finding of fact in the Recommended Order. Respondent's exception is made without support of the record. It is legally insufficient to merely state that the findings of fact are not supported by the record or were not supported by competent substantial evidence. Hoover v. Agency for Health Care Administration, 676 So.2d 1380 (Fla. 3rd DCA 1996).

For the purpose of ruling on Respondent's exception it is presumed that the Respondent's exception relates to paragraph 28 of the Recommended Order, which finds as follows:

28. In this case, either the Respondents acted in an untrustworthy and dishonest manner in willful violation of the statutes and rules relevant to this incident or the facts establish a lack of reasonable adequate knowledge and technical competence on their part.

There is competent substantial evidence in the record to support this finding of fact. Although the two forfeited bonds totaled only \$2,000, the Petitioners took from Mr. Porro money far in excess of that amount. The Petitioners took from Mr. Porro \$500 for the two \$250 bonds even though those bonds had not been forfeited. The Petitioners' also took from Mr. Porro an additional \$304 for costs and expenses that had not been incurred and which the Petitioners have subsequently not been able to substantiate.

Moreover, Petitioners' defense that the violations were attributable to errors by the Petitioners' office staff not timely remitting the money owed to Mr. Porro, would, if believed, not excuse the Respondent's from the conclusion that they willfully acted in an untrustworthy and dishonest manner or that the facts establish a lack of reasonable adequate knowledge and technical competence on their part. As evidence of their willful disregard for the responsibilities imposed upon them by the insurance code to faithfully handle monies entrusted to them, the Respondent's admitted that neither corporate officer of the agency exercised direct supervisory control over the office staff they had charged with the responsibility of remitting the money due to their customers, including Mr. Porro. (See Hearing Transcript, page 85, line 25, through page 86, line 17; and page 102, lines 10 through 24).

The agency's authority to reject or modify findings of fact is limited by the provisions in section 120.57(1)(l), Florida Statutes, which provides that "the agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact

were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.”

Because there is competent substantial evidence in the record to support the ALJ's finding of fact, the Department would have to improperly reject the Administrative Law Judge's findings of fact to permit the adoption of Respondent's exception.

Adoption of Respondent's exception would also require that the Department reweigh the evidence. The Department cannot reweigh the evidence. The weight given to the evidence is the province of the Administrative Law Judge and cannot be disturbed by the agency unless the finding is not supported by competent substantial evidence.

Brogan v. Carter, (Fla. 1st DCA 1996).

Accordingly, Respondent's exception is rejected.

2. Respondent's second exception is that “the record does not support a finding that the customers owed \$318.00.” Paragraph 2, Respondent's Exceptions to Findings of Fact. The Recommended order does not make a finding that any customers owed \$318.00. For the purpose of this ruling on Respondent's second exception, it is presumed that the Respondent's exception relates to the Administrative Law Judge's conclusion that the Respondents Mildred M. Vath and John L Vath owe Mr. Porro \$318.00.

There is competent substantial evidence in the record to support this finding of fact. Respondents John and Matilda Vath initially took \$2,804 from Mr. Porro. (Hearing Transcript, page 22, lines 2 through 11). Respondents made a partial return of the money to Mr. Porro in two payments in the amount of \$1,994 and \$492. (Hearing Transcript, page 24, line 13 through page 27, line 12). Consistent with the

Administrative Law Judge's finding of fact that money retained by the Respondents for improperly documented expenses are due to Mr. Porro, which finding cannot be reweighed here, the outstanding amount owed by the Respondent's to Mr. Porro is \$318. To grant the Respondent's exception, the Department would have to improperly reject findings of fact that are based on competent substantial evidence and reweigh the evidence.

Accordingly, Respondent's second exception is rejected.

3. Respondent's third exception is that the only evidence recording the expenses was the testimony of the Respondents. This exception is not made to any specific finding of fact in the Recommended Order. For the purpose of ruling on this exception it is presumed that Respondent's exception pertains to the finding of fact in paragraph 33 of the Recommended Order that the "improperly documented" expenses are due to Mr. Porro. This exception is an attempt to reargue the facts of the case and requires that the Department improperly reweigh the evidence and reject findings of fact made by the Administrative Law Judge. To reach his conclusion in paragraph 33, the Administrative Law Judge necessarily rejected the testimony of the Respondents on this issue. Because the Respondent's arguments would require that the Department improperly reweigh the evidence, this exception is rejected.

4. Respondent's fourth exception is that there is no evidence showing which of the Respondents was in direct control of the office staff. Respondents then proceed to argue it was the office staff that was responsible for the violations. There is no finding of fact in the Recommended Order that one of the Respondents was in direct control of the office staff. Moreover, as discussed above in the ruling on Respondent's

first exception, the lack of control by the Respondents over their office staff, if believed, would not exculpate the Respondents but would aggravate the violations found herein. Accordingly, Respondent's fourth exception is rejected.

5. Respondent's fifth exception is that there is no evidence of willfulness for any of the alleged violations. This is a repeat of the Respondent's first exception. Having already rejected that exception, Respondent's fifth exception is also rejected.

6. Respondent's sixth exception contends that there is insufficient evidence to show a willful deprivation of money. This is another repeat of the Respondent's first and fifth exceptions. Having already rejected those exceptions, Respondent's fifth exception is also rejected.

7. Respondent's seventh exception is that the record does not support a finding that the indemnitor paid the entire bail bond. Respondent's then proceed to argue that the indemnitor failed to pay \$89.00 of the premium. Respondent's exception is not directed to any particular finding of fact in the recommended order. It is also not clear to which specific finding of fact this exception could be attributed. There is no specific finding of fact made in the Recommended Order that the indemnitor "paid the entire premium." Nor do the Respondents argue or explain the relevance of this factual argument to any factual finding in the Recommended Order. Accordingly, Respondent's seventh exception is rejected.

8. Respondent's eighth exception reads as follows: "The evidence fails to show a substantial woeful [*sic*] violation of the Insurance Code, or the laws of the State of Florida, or the Law Administrative Code [*sic*]." For the purpose of ruling on this exception it is presumed that it was Respondent's intent to refer to the finding of willful

violations of the Insurance Code in paragraph 28 of the Recommended Order. This is a restatement of the Respondent's first, fifth, and sixth, exceptions. Having already rejected those exceptions, Respondent's eighth exception is also rejected for improperly requiring that the Department reweigh the evidence.

Upon careful consideration of the record, the submissions of the parties, and being otherwise fully advised in the premises, it is ORDERED:

1. The Findings of Fact of the Administrative Law Judge are adopted in full as the Department's Findings of Fact.

2. The Conclusions of Law of the Administrative Law Judge adopted in full as the Department's Conclusions of Law.

3. That the Administrative Law Judge 's recommendation that a Final Order be entered suspending for three (3) months the licenses and eligibility for licensure of Matilda M. Vath as an insurance agent, and requiring the refunding of \$318.00 to Augustavo Porro, is approved and accepted as being the appropriate disposition.

ACCORDINGLY, Matilda M. Vath's limited surety agent license is suspended for a period of three (3) months. The suspension shall be effective from the date of entry of this Final Order.

Matilda M. Vath is hereby also ordered to remit \$318.00 to Augustavo Porro, which sum constitutes the outstanding amount of cash collateral that Matilda M. Vath and John L. Vath, who is the respondent in the related case no. 40065-01-AG, owe to Mr. Porro.

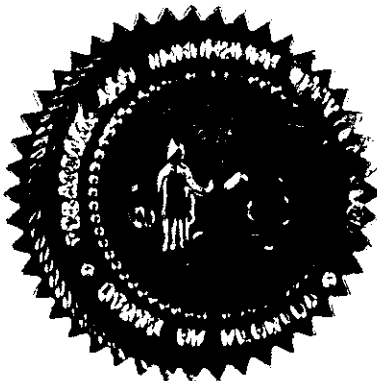
Pursuant to Section 648.50, Florida Statutes, the suspension of Respondent's licenses and eligibility for licensure is applicable to all licenses and eligibility held by

Respondent under the Florida Insurance Code. Pursuant to Sections 648.49(3) and 648.50(3), Florida Statutes, the Respondent shall not engage in or attempt or profess to engage in any transaction or business for which a license or appointment is required under the Insurance Code or directly or indirectly own, control or be employed in any manner by a bail bond agent or agency during the period of suspension. Pursuant to Section 648.49(1), Florida Statutes, Respondent's licensure shall not be reinstated except upon request for such reinstatement, and the Respondent shall not engage in the transaction of insurance until his licensure is reinstated. The Department shall not grant reinstatement if it finds that the circumstance or circumstances for which Respondent's licenses were suspended still exist or are likely to recur.

NOTICE OF RIGHTS

Any party to these proceedings adversely affected by this Order is entitled to seek review of the Order pursuant to Section 120.68, Florida Statutes, and Rule 9.110, Fla.R.App.P. Review proceedings must be instituted by filing a petition or Notice of Appeal with the General Counsel, acting as the agency clerk, at 200 East Gaines Street, Tallahassee, FL 32399-0333, and a copy of the same and the filing fee with the appropriate District Court of Appeal within thirty (30) days of the rendition of this Order.

DONE and ORDERED this 2nd day of April, 2002.





KENNEY SHIPLEY
Deputy Insurance Commissioner

COPIES FURNISHED TO:

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