

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF INSURANCE,)
)
 Petitioner,)
)
vs.) Case No. 01-4271PL
)
GARY L. KONIZ,)
)
 Respondent.)

)

RECOMMENDED ORDER

Pursuant to notice, this cause came on for hearing before Stephen F. Dean, Administrative Law Judge, on February 27, 2002, in Jacksonville, Florida.

APPEARANCES

For Petitioner: Matthew A. Nowels, Esquire
Department of Insurance
612 Larson Building
200 East Gaines Street
Tallahassee, Florida 32399-0333

For Respondent: Gary L. Koniz, pro se
9480 Princeton Square Boulevard, South
Apartment No. 815
Jacksonville, Florida 32256

STATEMENT OF THE ISSUES

Whether Respondent's licenses as a health insurance agent, a life and health insurance agent, and a life including variable annuity agent should be suspended or revoked based on the

allegations set forth in the Department's Administrative Complaint.

PRELIMINARY STATEMENT

On September 11, 2001, Petitioner Department of Insurance filed an Administrative Complaint against Respondent Gary L. Koniz. The complaint alleged that Respondent failed to divulge on his application for licensure dated September 30, 2000, that he plead guilty in 1988 in County Court in and for Ulster County, New York, to operating a vehicle while under the influence of alcohol, a felony. Respondent timely filed a request for a formal proceeding conducted pursuant to Sections 120.569 and 120.57(1), Florida Statutes. The matter was referred to the Division of Administrative Hearings and a formal hearing was scheduled for January 31, 2002. Pursuant to Respondent's request for a continuance, the hearing was re-scheduled and held on February 27, 2002.

Petitioner's Exhibits 1-3 were admitted into evidence. Respondent submitted various documents into evidence, all of which Petitioner had seen previously.

Respondent testified on his own behalf and was subject to cross-examination. Petitioner did not call any witnesses. Petitioner submitted a Proposed Recommended Order that was read and considered; Respondent did not file any documents post-hearing.

FINDINGS OF FACT

1. Respondent Gary L. Koniz (Respondent) is currently licensed by the Department as a health insurance (2-40) agent, a life and health insurance (2-18) agent, and a life including variable annuity (2-14) agent.

2. On August 17, 1988, Respondent plead guilty to operating a vehicle while under the influence of alcohol (DUI), a felony, in the County Court in and for Ulster County, New York, Case No. 88-57. Respondent was sentenced to five years' probation, license revocation, and payment of a fine.

3. On or about September 30, 2000, Respondent submitted an application to the Department for licensure as health agent, a life and health agent, and a life including variable annuity agent, on which he was asked the following two questions:

a) Have you ever been convicted, found guilty, or pleaded guilty or nolo contendere to a felony under the laws of any municipality, county, state, territory, or country, whether or not adjudication was withheld or a judgment of conviction was entered?

b) Have you ever been convicted, found guilty, or pleaded guilty or nolo contendere to a crime punishable by imprisonment of one year or more under the laws of any municipality, county, state, territory, or country, whether or not adjudication was withheld or a judgment of conviction was entered?

Respondent answered each of the aforementioned questions, "no."

4. On the application dated September 30, 2000, Respondent signed and swore to the statement that read:

Under penalty of perjury, I declare that I have read the foregoing application for licensure, related information and related attachments, and that the facts as stated in it are true. I understand that misrepresentation of any fact required to be disclosed through this application is a violation of the Florida Insurance and Administrative Code and may result in the denial of my application and/or the revocation of my insurance license.

5. Respondent testified at hearing. Respondent made a court appearance at which he entered a plea as part of a plea bargain to a misdemeanor. He did not comply with one of the conditions and the matter was called back up before the court. At this second hearing, the court asked how he plead. Respondent indicated he had already plead. The court took this response as a plea to the DUI felony and imposed the aforementioned penalties. Respondent did not knowingly answer the questions on the application for licensure incorrectly.

CONCLUSIONS OF LAW

6. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject mater of, these proceedings.

7. The standard of evidence to discipline an insurance licensee is that of clear and convincing evidence. See Farris v. Turlington, 510 So. 2d 292 (Fla. 1987).

8. Section 626.611, Florida Statutes, states in pertinent part:

The department shall deny an application for, suspend, revoke, or refuse to renew or continue the license or appointment of any applicant, agent, title agency, solicitor, adjuster, customer representative, service representative, or managing general agent, and it shall suspend or revoke the eligibility to hold a license or appointment of any such person, if it finds that as to the applicant, licensee, or appointee any one or more of the following applicable grounds exist:

- (1) Lack of one or more of the qualifications for the license or appointment as specified in this code.
- (2) Material misstatement, misrepresentation, or fraud in obtaining the license or appointment or in attempting to obtain the license or appointment.

* * *

(7) Demonstrated lack of fitness or trustworthiness to engage in the business of insurance.

* * *

(14) Having been found guilty of or having pleaded guilty or nolo contendere to a felony or a crime punishable by imprisonment of 1 year or more under the law of the United States of America or of any state thereof or under the law of any other country which involves moral turpitude, without regard to whether a judgment of conviction has been entered by the court having jurisdiction of such cases.

9. Section 626.621, Florida Statutes, provides in pertinent part:

The department may, in its discretion, deny an application for, suspend, revoke, or refuse to renew or continue the license or appointment of any applicant, agent, solicitor, adjuster, customer representative, service representative, or managing general agent, and it may suspend or revoke the eligibility to hold a license or appointment of any such person, if it finds that as to the applicant, licensee, or appointee any one or more of the following applicable grounds exist under circumstances for which such denial, suspension, revocation, or refusal is not mandatory under s. 626.611:

(1) Any cause for which issuance of the license or appointment could have been refused had it then existed and been known to the department.

* * *

(8) Having been found guilty of or having pleaded guilty or nolo contendere to a felony or a crime punishable by imprisonment of 1 year or more under the law of the United States of America or of any state thereof or under the law of any other country, without regard to whether a judgment of conviction has been entered by the court having jurisdiction of such cases.

10. As to Section 626.621, Florida Statutes, Respondent's plea of guilty to DUI is a felony. An applicant's prior criminal history is material to the Department's decision to license the applicant. Thus, Respondent's failure to disclose his prior felony plea was a material misstatement of fact contrary to Section 626.621(1), Florida Statutes. His felony plea was also a violation of Section 626.621(8), Florida Statutes.

11. Respondent asserts that he did not knowingly answer the questions on the application for licensure incorrectly. He states that he believed he had entered a plea of guilty to a misdemeanor, rather than a felony, and, therefore, answered the questions on his application for licensure correctly to the best of his knowledge.

12. Sections 626.611(2) and 626.621(1) and (8), Florida Statutes, do not require Respondent to have knowingly answered the questions on his application for licensure incorrectly. The statutes state that any "material misstatement or misrepresentation" are grounds for suspension or revocation of Respondent's licenses. This is stated in the disjunctive; intent is not an element. Indeed, the knowing failure to disclose is addressed separately in the statute by the phrase, "fraud in obtaining the license," which follows the terms "misstatements" or "misrepresentation". Further, entering a plea to a felony is a separate, distinct basis for discipline which also may be revocation or suspension.

13. It is impossible for the Department to know what each applicant knows or believes at the time of application for licensure. The inclusion of the phrase "material misstatement" allows the Department to avoid having to make impossible determinations of what was and was not known to the applicant.

If the applicant misstates his or her criminal background, even unknowingly, he or she is held liable for that misstatement.

14. The Department has presented clear and convincing evidence showing that Respondent entered a guilty plea in 1988 to a felony charge and failed to disclose said plea on his application for licensure. While Respondent's answers on the application may have been truthful to the best of his knowledge, his answers still represent material misstatements and he entered a plea to a felony.

15. Pursuant to Rule 4-231.080, Florida Administrative Code, the penalty for violation of Section 626.611(2), Florida Statutes, is a three-month suspension. Pursuant to Rule 4-231.090, the penalty for violations of Section 626.621(1), Florida Statutes, is three months and for violation of Section 626.621(18) 12 months. See Rule 4-231.150, Florida Administrative Code.

16. Pursuant to Rule 4-231.040, Florida Administrative Code, the total penalty could be an 18-month suspension.

17. Pursuant to Rule 4-231.160, Florida Administrative Code, the Department shall apply aggravating and mitigating factors to the Total Penalty in reaching the Final Penalty. No aggravating or mitigating factors apply.

RECOMMENDATION

Based on the foregoing Findings of Facts and Conclusions of Law, it is

RECOMMENDED that the Department of Insurance enter a final order finding Respondent Gary L. Koniz guilty of violating Sections 626.611 and 626.621, Florida Statutes, and suspending his licensure as a health insurance agent, a life and health insurance agent, and a life including variable annuity agent for a period of up to 18 months.

DONE AND ENTERED this 23rd day of April, 2002, in Tallahassee, Leon County, Florida.

STEPHEN F. DEAN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 23rd day of April, 2002.

COPIES FURNISHED:

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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.