

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF INSURANCE,                    )  
  )  
      Petitioner,                                )  
  )  
vs.    )     Case No. 01-4438PL  
  )  
GUS JONES, JR.,                                )  
  )  
      Respondent.                              )  
\_\_\_\_\_  
  )

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted on January 17, 2002, by video teleconference between Fort Lauderdale and Tallahassee, Florida, before Claude B. Arrington, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Mathew A. Nowels, Esquire  
                  Dickson Kesler, Esquire  
                  Department of Insurance  
                  200 East Gaines Street  
                  Tallahassee, Florida 32399-0333

For Respondent: James O. Walker, III, Esquire  
                  1339 Northeast 4th Street  
                  Fort Lauderdale, Florida 33304

STATEMENT OF THE ISSUES

Whether Respondent, a licensed insurance agent, committed the offenses alleged in the Administrative Complaint and the penalties, if any, that should be imposed.

PRELIMINARY STATEMENT

On October 15, 2001, Petitioner filed an Administrative Complaint against Respondent containing two counts. Count I alleged that Respondent had entered a plea of nolo contendere to certain criminal charges. Based on the factual allegations, Petitioner charged Respondent with violating the provisions of Sections 626.611(7), (13), and (14) and Section 626.621(1) and (8), Florida Statutes. Section 626.611, Florida Statutes, provides grounds that mandate the suspension or revocation of an insurance license. Section 626.621, Florida Statutes, provides grounds for the discretionary suspension or revocation of an insurance license.

Count II alleged that Respondent failed to timely notify Petitioner of his plea in the criminal proceeding and charged that the failure violated the provisions of Section 626.621(11), Florida Statutes.

Respondent timely requested an administrative hearing to challenge the allegations of the Administrative Complaint, the matter was referred to the Division of Administrative Hearings, and this proceeding followed.

Respondent did not dispute the factual allegations of the Administrative Complaint, but argues that the statute mandating the suspension or revocation of his licensure creates an irrebuttable presumption that violates his due process rights.

At the final hearing, Petitioner presented two composite exhibits, which were admitted into evidence as Petitioner's Exhibits 1<sup>1</sup> and 2. Respondent testified on his own behalf and presented the additional testimony of Simon Blank, an investigator for the Department of Insurance, Division of Insurance Fraud. Respondent presented no exhibits. Petitioner thereafter re-called Mr. Blank as a rebuttal witness.

A transcript of the proceedings was filed on January 22, 2002. Each party filed a Proposed Recommended Order, which has been duly-considered by the undersigned in the preparation of this Recommended Order.

#### FINDINGS OF FACT

1. At all times material to this proceeding, Respondent has been licensed as a general lines insurance agent (2-20), a life and health insurance agent (2-18), and a health insurance agent (2-40).

2. In June 2000, the statewide prosecutor filed an information against Respondent in the Circuit Court in and for Orange County, Florida, where it was assigned Case No. CR-0-00-9771/A. The information charged that Respondent was guilty of organized insurance fraud involving \$50,000 or more in violation of Section 817.034(4)(a), Florida Statutes, which is a first degree felony and a crime involving moral turpitude.

3. Simon Blank, an investigator employed by Petitioner's Division of Insurance Fraud, participated in the investigation that culminated in the charges being filed against Respondent. Respondent cooperated with Mr. Blank's investigation and candidly answered questions that were put to him.

4. On July 31, 2001, Respondent entered a plea of nolo contendere to the charges against him. At Respondent's plea hearing the prosecutor summarized the facts he expected to be able to prove, including the fact that Respondent engaged in fraudulent activity involving workers' compensation insurance.<sup>2</sup> Thereafter, Respondent stipulated that there was a factual basis for his plea. The Court accepted Respondent's plea, but withheld adjudication of guilt. The Court sentenced Respondent to two days in jail with credit for time served and placed him on probation under the supervision of the Florida Department of Corrections for a period of ten years. Respondent was ordered to perform 100 hours of community service and to pay restitution in the total amount of \$16,179.00, which included the costs of investigation. As a condition of his probation, Respondent was ordered not to write or renew any policy of workers' compensation for a period of five years.

5. Prior to the filing of the Administrative Complaint against him, Respondent had not notified Petitioner in writing

that he had entered a plea of nolo contendere to the criminal charges that had been filed against him.

6. Respondent has been the owner of A Maples Insurance Agency in Pompano Beach, Florida, since 1987.

7. Consistent with his probation, Respondent no longer writes or renews workers' compensation insurance.

8. At the time of the final hearing, Respondent was current with his continuing education classes.

9. Respondent has not been convicted of a felony or a misdemeanor.

10. Respondent testified that his plea in the criminal proceeding was a plea of convenience and that he could not afford to contest the charges. Respondent did not believe the plea would lead to the suspension of his license because the suspension of his license was not a condition of his probation. He mistakenly believed that the entry of his plea in the criminal proceeding would resolve all issues with the Petitioner since Petitioner participated in the investigation of the case.

11. Respondent testified that his attorney said he had received something from the Department of Insurance that gave reason to believe that they already knew about the plea. That correspondence was not admitted into evidence and Respondent's self-serving testimony was not corroborated.

12. Respondent's license was previously disciplined in Case No. 93-L-222JDM, which involved allegations of misappropriation of funds. Petitioner's records reflect that Respondent was placed on probation for one year as a result of that proceeding.

CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this case pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

14. Petitioner has the burden of proving by clear and convincing evidence the allegations against Respondent. See Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); Evans Packing Co. v. Department of Agriculture and Consumer Services, 550 So. 2d 112 (Fla. 1st DCA 1989); and Inquiry Concerning a Judge, 645 So. 2d 398 (Fla. 1994). The following statement has been repeatedly cited in discussions of the clear and convincing evidence standard:

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 evidence must be precise and explicit and the witnesses must be lacking in 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 the firm belief of [sic] conviction, without hesitancy, as to the truth of the allegations sought to be

established. Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

15. Count I of the Administrative Complaint alleges that Respondent violated the following provisions of the Florida Insurance Code: Section 626.611(7), (13), and (14) and Section 626.621(1) and (8), Florida Statutes.

16. Section 626.611, Florida Statutes, provides grounds for the mandatory suspension or revocation of an insurance license. Section 626.611(7), (13), and (14), Florida Statutes, provides, in pertinent part, as follows:

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:

\* \* \*

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

\* \* \*

(13) 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.

(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.

17. Section 626.621(1) and (8), Florida Statutes, provides the following grounds for the discretionary suspension or revocation of an insurance license.

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.

18. Petitioner proved by clear and convincing evidence that Respondent plead nolo contendere to violating Section 817.034(4)(a), Florida Statutes, which is a first degree felony and a crime involving moral turpitude. Pursuant to Section 626.611(14), Florida Statutes, the entry of that plea constitutes grounds for the mandatory suspension or revocation of Respondent's license. Although the entry of the plea may arguably constitute violations of Section 626.611(7) and (13), and of Section 626.621(1) and (8), Florida Statutes, those arguable statutory violations are more appropriately treated as being subsumed in the violation of Section 626.611(14), Florida Statutes.

19. The undersigned does not have the authority to declare a statute unconstitutional. See Florida Public Employees Council 79, AFSCME v. Department of Children and Families, 745 So. 2d 487 (Fla. 1st DCA 1999). Respondent's constitutional attack on the statutes at issue in this proceeding will have to be addressed by a court of competent jurisdiction.

20. Count II of the Administrative Complaint charges Respondent with failing to timely notify Petitioner in writing of his plea in the criminal proceeding. Section 626.621(11), Florida Statutes, provides the following discretionary grounds for the suspension or revocation of an insurance license:

(11) Failure to inform the department in writing within 30 days after pleading guilty or nolo contendere to, or being convicted or found guilty of, any felony or a crime punishable by imprisonment of 1 year or more under the law of the United States 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 the case.

21. Petitioner proved the violation alleged in Count II of the Administrative Complaint by clear and convincing evidence. Respondent was not relieved of his responsibility to notify Petitioner in writing of his plea by his belief that Petitioner had actual knowledge of the plea.

22. Rule 4-231.150(2)(a), Florida Administrative Code, contains the following penalty guidelines pertinent to this proceeding:

If it is found that a licensee has violated either section 626.611(14) or 626.621(8), the following stated penalty shall apply:

\* \* \*

(2) If the licensee is not convicted of, but has been found guilty of or has pleaded guilty or nolo contendere to, a felony or a crime punishable by imprisonment of one (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, the penalties are as follows:

(a) If the conduct directly relates to activities involving an insurance license, the penalty shall be a twenty-four (24) month suspension.

23. Rule 4-231.090(11), Florida Administrative Code, provides that the penalty guideline for a violation of Section 621(11), Florida Statutes, is suspension of licensure for a period of three months.

24. Petitioner established that Respondent's license has been previously disciplined, which is an aggravating factor. That aggravating factor is offset by Respondent's long history as a licensee and by his full cooperation during the course of the investigation that culminated in the criminal charges.

#### RECOMMENDATION

Based on the foregoing findings of fact and conclusions of Law, it is RECOMMENDED that Petitioner enter a final order that finds Respondent guilty of violating Section 626.611(14), Florida Statutes, as alleged in Count I of the Administrative Complaint, and guilty of violating Section 626.621(11), Florida Statutes, as alleged in Count II. It is further RECOMMENDED that the final order suspend Respondent's licensure for a period of 24 months for the Count I violation, and for a period of three months for the Count II violation. It is further RECOMMENDED that the final order provide that the periods of suspension shall run concurrently.

DONE AND ENTERED this 20th day of February, 2002, in  
Tallahassee, Leon County, Florida.

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CLAUDE B. ARRINGTON  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 20th day of February, 2002.

ENDNOTES

<sup>1/</sup> Petitioner was permitted to submit, as a late-filed exhibit, a certification under seal that its Exhibit 1 was a true and correct copy of Petitioner's records. Counsel for Petitioner represented at the final hearing that such a certification under seal was part of the exhibit package when it was delivered to DOAH.

<sup>2/</sup> The gravamen of the charges was that between December 13, 1992 and November 5, 1998, while acting as an insurance agent, Respondent participated in a scheme to defraud certain named insurance companies by submitting applications for workers' compensation insurance that contained false or misleading information. Because of those false or misleading applications, the insurance companies issued policies for workers' compensation insurance they would not have issued had they had accurate information or they issued policies for a lower premium. In addition, Respondent was charged with issuing false certificates of insurance pertaining to workers' compensation coverage.

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.

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