

8-27-03

FILED

OCT 10 2003



DEPARTMENT OF FINANCIAL SERVICES

Docketed by: [Signature]

TOM GALLAGHER
CHIEF FINANCIAL OFFICER

IN THE MATTER OF:

KAREN MARIE MALDONADO

REM-CWS
OCT 10 11:58 AM 2003

03-1834PL
CASE NO: 61793-02-AG

FINAL ORDER

THIS CAUSE came on for consideration and final agency action. On July 26, 2002, a two (2) count Administrative Complaint was issued by the Department of Insurance, now the Department of Financial Services, (hereinafter referred to as "the Department"), against the Respondent, Karen Marie Maldonado, (hereinafter referred to as "the Respondent"), alleging that she pleaded nolo contendere to several felonies while licensed as a customer representative, and failed to report these pleas to the Department. Respondent timely filed a request for a proceeding pursuant to Section 120.57(1), Florida Statutes. Pursuant to notice, the matter was heard before Robert E. Meale, Administrative Law Judge, Division of Administrative Hearings, on August 4, 2003.

After consideration of the record and argument presented at hearing, the Administrative Law Judge issued his Recommended Order on August 27, 2003. (Attached as Exhibit A). The Administrative Law Judge recommended that the Department enter a Final Order finding Respondent guilty of violating Sections 626.611(14) and 626.621(11), Florida Statutes, and suspending Respondent's license for five months.

On September 11, 2003, the Petitioner filed exceptions to the Recommended Order. The exceptions were to the Recommendation. The Respondent did not file any exceptions nor did she file a response to the Petitioner's exceptions. The exceptions have been considered and are addressed below.

RULING ON PETITIONER'S EXCEPTIONS

1. The Petitioner excepts to the Recommendation as to the penalty in the Recommended Order and argues that the Administrative Law Judge inappropriately used the mitigating factors of Rule 4-231.160, Florida Administrative Code to arrive at a penalty of a five month suspension.

Prior to addressing the Petitioner's exception to the Recommendation, two Conclusions of Law in the Recommended Order must be addressed. In Conclusion of Law #12, the Administrative Law Judge cites to and quotes from Rule 4-231.150(1)(c), Florida Administrative Code as authority for the penalties for a licensee who has pleaded no contest to a felony involving moral turpitude with adjudication withheld. The language of the Rule quoted by the Administrative Law Judge is from the Penalty Guideline Rule amended September 23, 2002. This amendment became effective after the Administrative Complaint was issued by the Department and after the dates of the criminal pleas by the Respondent. As the Court stated in Jordan v. Department of Professional Regulation, 522 So.2d 450 (Fla. 1st DCA 1988), "An administrative rule is operative from its effective date, and like a statute, is presumed to operate prospectively in the absence of express language to the contrary, for when an agency adopts rules and regulations, it functions as a quasi-legislative body". The version of Rule 4-231.150, Florida Administrative Code that was in effect during the relevant dates in this case, is one with the

history notation "New - 7-13-93." In order to correct Conclusion of Law #12 of the Recommended Order, said Conclusion is amended to read as follows:

12. Rule 4-231.150(2) provides the penalties for a licensee who has pleaded no contest to a felony involving moral turpitude, but the court has withheld adjudication. The penalties are as follows:

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

(2)(b) If the conduct indirectly involves insurance or has a bearing in an agent's fitness or trustworthiness to hold an insurance license, the penalty shall be a twelve (12) month suspension.

(2)(c) If the conduct is not related to insurance license, the penalty shall be a six (6) month suspension.

Although this amendment to Conclusion of Law #12 has no effect on the calculation of the total penalty in this case, this Conclusion of Law is as, or more reasonable than, the Conclusion of Law of the Administrative Law Judge.

In Conclusion of Law #15 of the Recommended Order, the Administrative Law Judge correctly cites to the Rule that lists aggravating and mitigating factors that may increase or decrease the final penalty. However, the Administrative Law Judge does not explain how he arrived at a penalty of a five month suspension of Respondent's license.

As the Petitioner correctly argues in its exceptions, the three mitigating factors stated by the Administrative Law Judge in Conclusion of Law #12, are also aggravating factors. The amount of money involved was \$1,892.87, not considered by the Department to be a "modest" sum and it took the Respondent two years to make full restitution (See, Finding of Fact #5). Also, the Respondent only recently completed her criminal probation, in March 2003 (See, Finding of Fact #5), and was on probation at the time the Department filed its Administrative

COPIES FURNISHED TO:

Karen Marie Maldonado
701 Southwest Ravenswood West
Port St. Lucie, Florida 34983
Respondent

Honorable Robert E. Meale
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060

R. Terry Butler, Esquire
Division of Legal Services
Department of Financial Services
200 E. Gaines Street
Tallahassee, FL 32399-0333

Complaint. As argued by the Department, in its exceptions, completion of probation is not an appropriate mitigating factor in this case.

The Administrative Law Judge also failed to consider the recentness of the crime, as an aggravating factor, pursuant to Rule 4-231.160(2)(a), Florida Administrative Code. The incidents resulting in Respondent's nolo contendere pleas occurred only four years ago. The felony pleas involved obtaining money by the Respondent signing her employer's name to checks belonging the employer. This would be another aggravating factor to increase the penalty pursuant to Rule 4-231.160(2)(f), Florida Administrative Code.

As a result of the above discussion, Conclusion of Law #15 of the Recommended Order is amended to read as follows:

15. Rule 4-231.160 lists various aggravating and mitigating factors that may influence the penalty. The total penalty for the two-count Administrative Complaint is the sum of each penalty per count. In this case the penalty for count one of the Administrative Complaint is 12 months suspension and for count two, a 3 months suspension, for a total penalty of 15 months suspension. The mitigating factor of the completion of restitution is offset by the aggravating factors of the recentness of criminal proceedings, and that the crime involved obtaining money by the Respondent signing her employer's name to checks belonging to the employer. Under the circumstances, the appropriate final penalty would be a 15 month suspension of Respondent's license.

This Conclusion of Law is as, or more reasonable than, the Conclusion of Law of the Administrative Law Judge.

It is well established that an agency may increase or decrease a penalty recommended by a Hearing Officer. Criminal Justice Standards v. Bradley, 596 So.2d 661 (Fla. 1992); Department of Law Enforcement v. Hood, 601 So.2d 1194 (Fla. 1992). So long as there are standards for the imposition of a penalty, and adherence to those standards, an agency is free to increase or decrease a penalty recommended by a Hearing Officer. In the present case, the

standards for the imposition of the penalty are enumerated in Section 626.611, Florida Statutes and Rule Chapter 4-231, F.A.C. The increased penalty is in accordance with those standards. Further, a complete review of the record has been made, as evidenced by the above discussions, justifying this action. Finally, the Petitioner's exceptions to the Recommendation of the Administrative Law Judge are accepted.

Therefore, upon careful consideration of the entire 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 are adopted in full as the Department's Conclusions of Law, with the exception of the two Conclusions of Law amended above.
3. The Administrative Law Judge's recommendation that the Department enter a Final Order suspending Respondent's license for five (5) months is rejected and not accepted as being the appropriate disposition of this case. Rather, pursuant to the above discussions, the appropriate penalty in this case is a fifteen (15) month suspension of Respondent's license.

ACCORDINGLY, it is ORDERED that Respondent's, KAREN MARIE MALDONADO's, license(s) and eligibility for licensure are hereby SUSPENDED for fifteen (15) months, beginning ten (10) calendar days from the date of the filing of this Final Order. Pursuant to Section 626.651, Florida Statutes, the suspension of Respondent's license(s) and eligibility for licensure is applicable to all licenses and eligibility held by Respondent under the Florida Insurance Code.

Pursuant to Section 626.641(4), Florida Statutes, during the period of suspension, 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 any insurance agent or agency or adjuster or adjusting firm. Pursuant to Section 626.641(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 her license is reinstated. The Department shall not grant such reinstatement if it finds that the circumstance or circumstances for which the license(s) was 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 10th day of October, 2003.



A handwritten signature in black ink that reads "Karen Chandler". The signature is written in a cursive, flowing style.

KAREN CHANDLER
Deputy Chief Financial Officer