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FLORIDA
DEPARTMENT OF
FINANCIAL SERVICES

FILED

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DIVISION OF ADMINISTRATIVE HEARINGS
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TOM GALLAGHER
CHIEF FINANCIAL OFFICER
STATE OF FLORIDA

IN THE MATTER OF:

HOWARD IRVIN VOGEL

CASE NO: 63667-03-AG

/

FINAL ORDER

03-4850PL
REM-Clos

THIS CAUSE came on for consideration and final agency action. On December 5, 2003, an Administrative Complaint was filed by the Florida Department of Financial Services (hereinafter referred to as the "Department"), charging Respondent with committing various violations of the Insurance Code by willfully misrepresenting insurance policies, failing to comply with the rules of the Department, and misappropriating funds. The Respondent timely filed a request for a proceeding pursuant to Section 120.57(1), Florida Statutes. Subsequently, the Department filed a Motion to Amend Administrative Complaint. That motion was granted on February 9, 2004, and the Administrative Complaint was amended to add Count VI, which charged the Respondent with failing to notify the Department of a change in business address. On February 13, 2004, The Department filed a Motion to Amend Amended Administrative Complaint. That motion was granted on March 2, 2004, and the Amended Administrative Complaint was amended to add Count VII, which charged the Respondent with failing to properly designate a primary agent. Pursuant to notice, the matter was heard before Robert E. Meale, Administrative Law Judge, Division of Administrative Hearings, on March 31 and April 1, 2004.

After consideration of the evidence, argument and testimony presented at hearing, the Administrative Law Judge issued his Recommended Order on July 20, 2004. (Attached as Exhibit A). The Administrative Law Judge recommended that the Department enter a final order suspending Respondent's license(s) and eligibility for licensure in the State of Florida for a period of six (6) months, and imposing an administrative fine in the amount of one thousand two hundred fifty dollars ($1250).

On August 3, 2004, the Respondent timely filed exceptions to the Recommended Order. The Respondent excepted to Findings of Fact, Conclusions of Law, and the Recommendation. On August 16, 2004, the Petitioner filed a Response to Respondent's exceptions. The Exceptions and Response will be addressed below.

RULINGS ON RESPONDENT'S EXCEPTIONS

1. The Respondent excepts to the portion of Finding of Fact #24 of the Recommended Order that states "...and, even if he were not lying, Respondent intentionally provided Petitioner an incorrect business address," and argues that Respondent's testimony was that Respondent placed his license at the incorrect address to keep it active and that he wasn't writing any insurance.

This exception is to the credibility of one witness' testimony over another's. The weighing of the evidence and judging the credibility of witnesses by the Administrative Law Judge are solely the prerogative of the Administrative Law Judge as the finder of fact. See, Strickland v. Florida A&M University, 799 So.2d 276 (Fla. 1st DCA 2001). Further, an administrative agency may not reject an Administrative Law Judge's findings unless it is first determined that the findings were not based on competent substantial evidence. See, Bush v. Brogan, 725 So.2d 1237 (Fla. 2d DCA 1999). From a complete review of the record in this case, Finding of Fact #24 was based on facts

supported by competent substantial evidence in the record. Accordingly, Respondent's exception is rejected.

2. The Respondent excepts to the portion of Finding of Fact #25 of the Recommended Order that states "The common thread in both situations is that Respondent, not someone on his behalf, has intentionally filed false information with Petitioner" and argues that the Petitioner failed to prove by clear and convincing evidence that Respondent *intentionally* filed false information. Respondent also argues that an "intentional" act is distinguishable from a "willful" act in that a "willful" act involves a degree of conscious wrong on the part of the actor, or at least culpable carelessness on his part and that the Petitioner failed to prove by clear and convincing evidence that Respondent *willfully* filed false information.

The Respondent's characterization of the Administrative Law Judge's Finding of Fact in this exception is somewhat misguided. The section excepted to by Respondent of the Administrative Law Judge's Finding of Fact must be taken in context with the remaining portion of the Finding of Fact #25. The Administrative Law Judge's discussion in Finding of Fact #25 is directed at laying culpability for Respondent's actions at Respondent's doorstep and not at one of his employee's. Moreover, this Finding of Fact is based on competent substantial evidence within the record and cannot be disturbed by the agency. See Brogan v. Carter, 671 So.2d 822 (Fla. 1st DCA 1996). Accordingly, Respondent's exception is rejected.

3. The Respondent excepts to the portion of Conclusion of Law #44 in the Recommended Order that states "Respondent personally and intentionally filed an incorrect address with Petitioner." The Respondent argues that the Petitioner failed to prove by clear and convincing evidence that Respondent willfully filed an incorrect address with Petitioner.

This exception to Conclusion of Law #44 contains a similar argument as Respondent's exception to Conclusion of Law #48 and thus will be examined in conjunction with Respondent's exception to Conclusion of Law #48 in the Recommended Order.

4. The Respondent also excepts to the portion of Conclusion of Law #48 of the Recommended Order that states "Petitioner has proved that Respondent has personally violated Section 626.592(1), Florida Statutes, by failing to designate a primary agent. Petitioner has proved that the violations were willful, not accidental, so Petitioner has proved violations of Section 626.611(13), Florida Statutes." It should be noted, that the initial portion of Conclusion of Law #48 of the Recommended Order deals with Respondent's alleged violations of Section 626.551, Florida Statutes and, by combining all three violations into the same paragraph, the Administrative Law Judge finds willful violations of Section 626.611(13), Florida Statutes, for all three violations. As such, this exception will be addressed as to all three violations found in Conclusion of Law #48 of the Recommended Order. Respondent argues, once again, that Petitioner failed to prove by clear and convincing evidence that Respondent willfully violated Section 626.551, Florida Statutes and/or Section 626.592(1), Florida Statutes. Respondent also argues that Petitioner's actions do not meet the definition of "willful" found in In County Canvassing Board of Primary Elections of Hillsborough County v. Lester, 118 So. 201 (Fla. 1928), which defined a willful act as involving "some degree of conscious wrong on the part of the actor, or at least culpable carelessness on his part, something more than a mere omission to perform a previously imposed duty."

The issue in this case, as to whether the Respondent's acts or failures to act were willful, was a question of fact to be determined by the Administrative Law Judge. See McGann v. Florida Elections Commission, 803 So.2d 763 (Fla. 1st DCA 2001). The weighing of the evidence and judging the credibility of the witnesses are solely the prerogative of the Administrative Law Judge as

the finder of fact. See Strickland v. Florida A & M University, 799 So.2d 276 (Fla. 1st DCA 2001). Further, an administrative agency may not reject an Administrative Law Judge's findings unless it is first determined that the findings were not based on competent substantial evidence. See Bush v. Brogan, 725 So.2d 1237 (Fla. 2nd DCA 1999). Conclusions of Law # 44 and 48 were based on facts supported by competent substantial evidence in the record and accordingly, Respondent's exceptions number 3 and 4 are rejected.

5. The Respondent asserts that his failure to change his business address back to Federal Insurance was an oversight and that no evidence was presented that Respondent's failure to change his business address back to Federal Insurance was willful.

It is unclear what specific finding(s) this assertion is directed to. In any event, there is competent substantial evidence in the record to support the Administrative Law Judge's findings in this regard.

6. The Respondent excepts that no evidence was presented at the hearing that his failure to designate a primary agent was willful. Respondent contends he was never asked why he or any one else at Federal Insurance failed to designate a primary agent between the time Mr. Montoya left his employment with Federal Insurance and Lee Scott Vogel was designated as the primary agent.

For the same reasons set forth in paragraph 4 above, this exception is rejected.

7. Respondent excepts to the portion of the Recommendation of the Recommended Order which states "For the designated primary agent violation, Florida Administrative Code Rule 69B-231.080(13) provides for a suspension of six months" and requests that no disciplinary action be taken for that count because the Petitioner failed to prove by clear and convincing evidence that the failure to designate a primary agent was willful.

Based on the above discussions and upon a complete review of the record in this case, there are no arguments made by the Respondent that would justify dismissal of that portion of the Administrative Law Judge's recommendation in this case. Accordingly, Respondent's exception to the Recommendation is rejected.

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

1. So as to correct a typographical error in the Preliminary Statement section of the Recommended Order, the date of the Administrative Complaint is amended to "December 5, 2003."

2. Upon review of the record in this case, it has been determined that in Count V of the Second Amended Administrative Complaint, Petitioner did not charge Respondent with a violation of Section 626.551, Florida Statutes. The Second Amended Administrative Complaint is a notice pleading and it must be specific enough to inform the Respondent with reasonable certainty of the nature of the charges. See Hunter v. Department of Professional Regulation, 458 So.2d 842 (Fla. 1st DCA 1984). As Respondent was not charged with a violation of Section 626.551, Florida Statutes in Count V of the Second Amended Administrative Complaint and the remaining provisions of the Insurance Code in the charging paragraph do not amount to a violation or are vague as related to the facts alleged, Count V should be dismissed and Respondent cannot be penalized for this violation.

3. In recommending the final penalty in this case, the Administrative Law Judge took into account the Respondent's guilt on two separate violations of Section 626.551, Florida Statutes. Pursuant to the discussions in Paragraph 2 immediately above, Respondent should only be found guilty of one violation of Section 626.551, Florida Statutes.

It is well established that an agency may increase or decrease a penalty recommended by an Administrative Law Judge. See 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 the adherence to those standards, an agency is free to increase or decrease a penalty recommended by an Administrative Law Judge. See Section 120.57(1)(l), Florida Statutes. In the present case, the standards for the imposition of the administrative fine are enumerated in Section 626.551, Florida Statutes, and the standards for the imposition of the suspension are enumerated in Section 626.611, Florida Statutes and Rule Chapter 69B-231, Florida Administrative Code. The decreased 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.

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

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

6. The Administrative Law Judge's recommendation that the Department enter a Final Order dismissing Counts I-IV, finding Respondent guilty of Counts V-VII, imposing an administrative fine in the amount of one thousand, two hundred fifty dollars ($1250), and suspending Respondent's license for six months, is rejected in part and accepted in part as being the appropriate disposition of this case. Pursuant to the above discussions, the appropriate penalty in this case is the imposition of an administrative fine in the amount of two hundred fifty dollars ($250) and a six month suspension of Respondent's license.

ACCORDINGLY, it is ORDERED:

1. Respondent, HOWARD IRVIN VOGEL, shall pay an administrative penalty in the amount of two hundred fifty dollars ($250) as authorized by Section 626.551, Florida Statutes,

within thirty (30) days of the entry of this Final Order. Failure of Respondent to pay the administrative fine within the specified limit shall result in the immediate revocation of Respondent's licenses and eligibility for licensure in this state without further proceedings.

2. Respondent, HOWARD IRVIN VOGEL's license(s) and eligibility for licensure are hereby SUPENDED FOR A PERIOD OF SIX (6) MONTHS, beginning ten (10) 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, 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 an insurance agent or agency, or adjuster or adjusting firm, during the period of suspension. 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 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 this Order pursuant to Section 120.68, Florida Statutes, and Rule 9.110, Florida Rules of Appellate Procedure. Review proceedings must be instituted by filing a Notice of Appeal with the General Counsel, acting as the agency clerk, at 612 Larson Building, Tallahassee, Florida 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 9th day of September, 2004.

KAREN CHANDLER
Deputy Chief Financial Officer

COPIES FURNISHED TO:

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