STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL SERVICES,	)	
Petitioner,	)	
vs.	)	Case No. 03-4850PL
HOWARD IRVIN VOGEL,	)	
Respondent.	)	

RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in West Palm Beach, Florida, on March 31 and April 1, 2004.

APPEARANCES

For Petitioner: Gregg S. Marr
David J. Busch
Division of Legal Services
Department of Financial Services
612 Larson Building
200 East Gaines Street
Tallahassee, Florida 32399-0333

For Respondent: Orrin R. Beilly
Law Office of Orrin R. Beilly
Citizens Building, Suite 705
105 South Narcissus Avenue
West Palm Beach, Florida 33401

STATEMENT OF THE ISSUES

The issue is whether Respondent is guilty of transacting insurance business in violation of Sections 626.611 and 626.621, Florida Statutes, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

By Administrative Complaint dated December 15, 2003, Petitioner alleged that, at all material times, Respondent was a licensed general lines insurance agent, holding license number A274461, and served as a corporate officer of L.N.V., Inc., d/b/a Federal Insurance.

Count I of the Administrative Complaint alleges that, on October 12, 1999, a Federal Insurance employee, Michael Smith, who is a licensed insurance agent, sold a workers' compensation policy to Nicholas Polyviou, d/b/a Polyviou Corporation. Count I alleges that, on January 27, 2000, Mr. Polyviou paid Mr. Smith $300 for processing four Notices of Election to be Exempt, which Mr. Polyviou had already completed. However, the four forms allegedly were never submitted to the Division of Workers' Compensation.

Count II alleges that, on August 21, 2000, Michael Smith sold a workers' compensation policy and general liability policy to David Wagner. Count II alleges that Mr. Wagner paid Mr. Smith $1498 for these policies, but only $1004.99 was submitted to the insurers as premium payment. Count II alleges that Mr. Wagner provided a Notice of Election to be Exempt, which he had already completed, but the form was never submitted to the Division of Workers' Compensation.

Count III alleges that, on October 24, 2000, Michael Smith sold a workers' compensation policy to Christopher York. Count III alleges that Mr. York paid Mr. Smith $446 for the policy, but only $281 was submitted to the insurer as premium payment. Count III alleges that Mr. York provided a Notice of Election to be Exempt, which he had already completed, but the form was never submitted to the Division of Workers' Compensation.

Count IV alleges that, on August 28, 2000, Michael Smith sold a tenant dweller's policy to Evelyn Grenyer, who provided Mr. Smith with specific instructions about her mailing address. Count IV alleges that Ms. Grenyer paid Mr. Smith $242.17 for the policy, but only $202.64 was submitted to the insurer as premium payment. Count IV alleges that, on May 20, 2001, Ms. Grenyer suffered a loss at the insured property, and she later discovered that her policy had been canceled on October 18, 2000. Count IV alleges that the insurer had issued Federal Insurance a refund on November 14, 2000, and Federal Insurance issued a refund check to Ms. Grenyer on May 10, 2001, but only after she had inquired about her policy.

Each of the above-described counts alleges that Petitioner is authorized to suspend or revoke Respondent's license for the violation of Section 624.11(1), Florida Statutes, which prohibits the transaction of insurance without complying with the Insurance Code; Section 626.611(4), Florida Statutes, which prohibits the willful use of a license or appointment to circumvent any of the requirements of the Insurance Code; Section 626.611(5), Florida Statutes, which prohibits the willful misrepresentation of any insurance policy or willful deception regarding such policy, either in person or by way of advertising or other dissemination of information; Section 626.611(7), Florida Statutes, which prohibits the demonstrated lack of fitness or trustworthiness to engage in the business of insurance; Section 626.611(8), Florida Statutes, which prohibits the demonstrated lack of reasonably adequate knowledge and technical competence to engage in the transactions authorized by the license or appointment; Section 626.611(9), Florida Statutes, which prohibits fraudulent or dishonest practices in the conduct of business under the license or appointment; Section 626.611(10), Florida Statutes, which prohibits the misappropriation, conversion, or unlawful withholding of money belonging to insurers, insureds, beneficiaries, or others received in the conduct of business under the license or appointment; Section 626.611(13), Florida Statutes, which prohibits the willful failure to comply with, or willful violation of, any proper order or rule of Petitioner or willful violation of any provision of the Insurance Code; Section 626.621(2), Florida Statutes, which prohibits the violation of any provision of the Insurance Code or other insurance law in the course of dealing under the license or appointment; and Section 626.621(3), Florida Statutes, which prohibits the violation of any lawful order or rule of Petitioner.

Each of the above-described counts also alleges that, pursuant to Section 626.734, Florida Statutes, a general lines agent who is an officer, director, or shareholder of an incorporated general lines insurance agency is personally liable for any wrongful acts, misconduct, or violations of the Insurance Code by such licensee or any person under his direct supervision and control while acting on behalf of the corporation, provided that the officer, director, or shareholder personally committed or knew or should have known of the act and facts constituting a violation of the Insurance Code.

Count V alleges that the business address on record for Respondent is JEMS Services, 4207 Lake Avenue, West Palm Beach, even though the actual business address has been, for a period in excess of 60 days, 3564 South Military Trail, Lake Worth. Count V alleges that Respondent's failure to notify Petitioner in writing, within 60 days after a change in business address, violates Sections 624.11(1), 626.611(13), 626.621(2), and 626.621(3), Florida Statutes, which are mentioned above.

By Motion to Amended Administrative Complaint filed January 30, 2004, Petitioner requested leave to add Count VI. The Administrative Law Judge granted leave to amend the Administrative Complaint. Count VI alleges that, on September 16, 2002, Respondent notified Petitioner of a change of his business address to JEMS Services, 4207 Lake Avenue, West Palm Beach. Count VI alleges that Respondent never used this address as a place of business, and he filed this address without the knowledge or consent of the individual whose business is located at the address. Count VI alleges that Respondent thus violated Sections 624.11(1), 626.611(7), 626.611(8), 626.611(13), 626.621(2), and 626.621(3), Florida Statutes, which are mentioned above.

By Motion to Amend Amended Administrative Complaint filed February 13, 2004, Petitioner requested leave to add Count VII and add the allegation, common to all counts, that Respondent was a corporate director, as well as a corporate officer. The Administrative Law Judge granted leave to amend the Amended Administrative Complaint. Count VII alleges that, based on the notices filed with Petitioner by Federal Insurance, Juan C. Montoya served as the designated primary agent from January 27, 1998, until September 27, 2002. However, Count VII alleges that Juan C. Montoya's employment with Federal Insurance terminated in early 1998. Count VII alleges that Respondent thus violated

Sections 624.11(1), 626.611(7), 626.611(8), 626.611(13), 626.621(2), and 626.621(3), Florida Statutes, which are mentioned above.

At the hearing, Petitioner presented no evidence as to Count III, so it is stricken.

At the hearing, Petitioner called ten witnesses and offered into evidence 17 exhibits: Petitioner Exhibits 1-14 and 16-18. Respondent called two witnesses and offered into evidence four exhibits: Respondent Exhibits 1-4. All exhibits were admitted.

The court reporter filed the transcript on May 3, 2004. The parties filed their proposed recommended orders on June 14, 2004.

FINDINGS OF FACT

1. Respondent is licensed as a general lines insurance agent, holding license number A274461. He has been so licensed for over 20 years. The record discloses no previous discipline.

2. Respondent bought L.N.V., Inc., d/b/a Federal Insurance (Federal Insurance), when he first became licensed in Florida. Respondent has retained ownership control of Federal Insurance since its purchase, except for a one-year period starting in June 2002, when Federal Insurance sold its assets to an unrelated party. However, after the party defaulted on its purchase obligations, Federal Insurance recovered the assets.

3. Prior to June 2002, Respondent was, at all material times, the sole shareholder, the president, and a director of Federal Insurance. The acts and omissions alleged in Counts I, II, IV, and VII took place during this time period.

4. After June 2003, Respondent's formal roles with Federal Insurance became less clear, although he continued to run the daily operations of the business and control the corporation. At minimum, though, Respondent was the Agency Owner from May 20, 2003, through November 7, 2003, and November 25, 2003, through December 29, 2003, according to the Agency Location Report, which is part of Petitioner Exhibit 2. The acts and omissions alleged in Counts V and VI took place, at least in part, during these time periods. Without doubt, regardless of his formal roles after June 2003, Respondent personally committed the acts and omissions that are the subject of Counts V and VI.

5. Michael Smith is a licensed property and casualty insurance agent. He is also licensed to sell life and health insurance. He has held insurance licenses since 1983. Mr. Smith has been employed by Federal Insurance twice: from the late 1980s to the mid-1990s and 1999-2001.

6. At all material times, Nicholas Polyviou, d/b/a Polyviou Corporation, was a self-employed manufacturer of office furniture. Mr. Polyviou did his insurance business at Federal Insurance where he dealt with Michael Smith.

7. On October 13, 1999, Mr. Polyviou visited Michael Smith at Federal Insurance to purchase workers' compensation and liability insurance. Mr. Polyviou completed an application for workers' compensation insurance and delivered four Notices of Election to be Exempt, which had already been filled out and signed by Mr. Polyviou and the other three employees who were the subjects of the notices. The notices represented elections by qualified persons not to be covered by workers' compensation.

8. To process the Notices of Election to Be Exempt and file them with the Division of Workers' Compensation, Federal Insurance charged Mr. Polyviou $75 per form, for a total of $300. The $75 fee per form consisted of a $50 fee charged by the Division of Workers' Compensation to file the notices and a $25 fee charged by Federal Insurance to process the notices and send them to the Division of Workers' Compensation.

9. However, Federal Insurance never sent these notices to the Division of Workers' Compensation. Eventually, following an audit, Mr. Polyviou was assessed about $20,000 in unpaid workers' compensation premiums for these four individuals. Mr. Polyviou's injury was considerably less than $20,000 because the other three employees were ineligible to elect out of coverage in the first place.

10. At all material times, David Wagner was self-employed in landscape maintenance. On August 21, 2000, Mr. Wagner

visited Mr. Smith at Federal Insurance to purchase workers' compensation insurance. Mr. Wagner completed an application for workers' compensation insurance and delivered a Notice of Election to be Exempt, which had already been filled out and signed by Mr. Wagner. Respondent notarized the Notice of Election to be Exempt.

11. To process the Notice of Election to Be Exempt and file them with the Division of Workers' Compensation, Federal Insurance charged Mr. Wagner $75. The $75 fee consisted of a $50 fee charged by the Division of Workers' Compensation to file the notice and a $25 fee charged by Federal Insurance to file the notice.

12. However, Federal Insurance never filed the notice with the Division of Workers' Compensation. Eventually, an audit uncovered the absence of a filed notice, but the workers' compensation insurer and Petitioner were able to give effect to the notice, as of the date that it should have been filed, so that Mr. Wagner was not subject to any fines, fees, or penalties.

13. Mr. Smith and other Federal Insurance employees described the office procedures at the time of the Polyviou and Wagner transactions. After completing the applications and notices and collecting the customers' checks, Mr. Smith typically placed the documents and checks in a basket where

employees not performing other tasks would process the notices and payments, prepare checks for deposit, prepare money orders, and mail completed packages to the Division of Workers' Compensation. Because the Division of Workers' Compensation required the payment of filing fees by money order, not corporate check, Federal Insurance would not know if the Division of Workers' Compensation had received a package.

14. On August 28, 2000--one week after the Wagner transaction--Evelyn Grenyer visited Mr. Smith at Federal Insurance to purchase renter's insurance. She informed Mr. Smith that all correspondence had to be mailed to a post office box, not her street address. Mr. Smith agreed to do so.

15. Ms. Grenyer paid Federal Insurance a premium of $242.17. Over the next several days, Mr. Smith called Ms. Grenyer with questions about her residence, but he consistently assured her that she had insurance.

16. In May 2001, Ms. Grenyer's home was robbed of property worth $2000. When she called Federal Insurance, she learned that she had not been insured because they had been unable to find her residence. Someone at Federal Insurance explained that they had sent mail to her residence, rather than, as instructed, her post office box, and the mail had been returned.

17. Mr. Smith testified that Federal Insurance submitted the premium of $202.64 to the renter's insurance company. He

thought that the difference may have been a charge to inspect the house. When the insurer required additional information, Federal Insurance attempted to contact Ms. Grenyer through her street address, rather than, as instructed, by her post office box. When she did not respond, the insurer canceled coverage, as of October 18, 2000, and refunded $149.53 of the premium to Federal Insurance, by check dated November 14, 2000.

18. Federal Insurance deposited the check to its account. Only after Ms. Grenyer contacted Federal Insurance about the loss did it issue a check, in the same amount and dated May 10, 2001, to Ms. Grenyer. Obviously, no one at Federal Insurance visited the residence or tried calling Ms. Grenyer, whose phone number had not changed for five years and was in the records of Federal Insurance.

19. Ms. Grenyer never recovered any insurance proceeds for the $2000 loss that she suffered.

20. From 1995-1998, Federal Insurance employed Juan C. Montoya as an insurance agent. On January 22, 1998, Federal Insurance designated Mr. Montoya as the primary agent of Federal Insurance. In May 1998, Mr. Montoya's employment with Federal Insurance terminated.

21. Federal Insurance failed to designate a new primary agent until July 9, 2001. For nearly three years, Federal Insurance operated without a designated primary agent.

22. A few months after selling the insurance business, Respondent filed a notice with Petitioner, on September 25, 2002, identifying JEMS Services, 4207 Lake Avenue, West Palm Beach, as his new principal business address. When filing the notice, Respondent knew that he did not intend to transact insurance business at the JEMS Services address.

23. In fact, Respondent used the JEMS Services address without the consent of the insurance agent conducting insurance business at that address. JEMS Services is an insurance agency owned by Janet Travieso-Otero, a friend of Respondent and his wife. Ms. Travieso-Otero never gave Respondent permission to use her address as his principal business address. Respondent has never been employed by JEMS Services, nor has he ever transacted business from this address, which has never been the principal business address of Respondent or any insurance business that he has owned or operated.

24. Respondent accused Ms. Travieso-Otero of lying when she testified that she had never told Respondent that he could use her business as his principal place of business. To the contrary, Respondent is lying, and, even if he were not lying, Respondent intentionally provided Petitioner an incorrect business address.

25. With Mr. Montoya and Ms. Travieso-Otero, Respondent has used friends and business associates, without their

knowledge, to satisfy regulatory requirements. At all times during which Mr. Montoya was designated as the primary agent, including while he was employed by Federal Insurance, Respondent was the primary agent because Respondent, not Mr. Montoya, was responsible for the supervision of the insurance agents and their hiring and firing. The common thread in both situations is that Respondent, not someone on his behalf, has intentionally filed false information with Petitioner.

26. Petitioner's expert witness, Wilford Ghioto, testified about Respondent's obligations. Mr. Ghioto, who has considerable relevant experience in the retail property-and-casualty insurance business, described the procedures that his office followed when processing and filing Notices of Election to be Exempt from workers' compensation insurance coverage. In particular, the insurance agent, but not the supervising agent, was responsible to ensure that the completed package was mailed to the proper location, and the supervising agent, if aware of any problems with an insurance agent, opened all of the insurance agent's mail to discover any problems. The supervising agent also ensured that the office routinely ran account receivable reports to find any money due an insured.

CONCLUSIONS OF LAW

27. The Division of Administrative Hearings has jurisdiction over the subject matter. §§ 120.569 and 120.57(1), Fla. Stats. (2004).

28. Section 624.11(1) provides:

> No person shall transact insurance in this state, or relative to a subject of insurance resident, located, or to be performed in this state, without complying with the applicable provisions of this code.

29. Section 626.611, Florida Statutes, provides in relevant part:

> The department or office shall deny an application for, suspend, revoke, or refuse to renew or continue the license or appointment of any applicant, agent, title agency, 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:
>
> (4) If the license or appointment is willfully used, or to be used, to circumvent any of the requirements or prohibitions of this code.
>
> (5) Willful misrepresentation of any insurance policy or annuity contract or willful deception with regard to any such policy or contract, done either in person or by any form of dissemination of information or advertising.

> (7) Demonstrated lack of fitness or trustworthiness to engage in the business of insurance.
>
> (8) Demonstrated lack of reasonably adequate knowledge and technical competence to engage in the transactions authorized by the license or appointment.
>
> (9) Fraudulent or dishonest practices in the conduct of business under the license or appointment.
>
> (10) Misappropriation, conversion, or unlawful withholding of moneys belonging to insurers or insureds or beneficiaries or to others and received in conduct of business under the license or appointment.
>
> (13) Willful failure to comply with, or willful violation of, any proper order or rule of the department, commission, or office or willful violation of any provision of this code.

30. Section 626.621, Florida Statutes, provides in relevant part:

> The department or office may, in its discretion, deny an application for, suspend, revoke, or refuse to renew or continue the license or appointment of any applicant, agent, 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:
>
> (2) Violation of any provision of this code or of any other law applicable to the

> business of insurance in the course of dealing under the license or appointment.
>
> (3) Violation of any lawful order or rule of the department, commission, or office.

31. Section 626.551, Florida Statutes, provides:

> Every licensee shall notify the department or office in writing within 60 days after a change of name, residence address, principal business street address, or mailing address. Any licensed agent who has moved his or her residence from this state shall have his or her license and all appointments immediately terminated by the department or office. Failure to notify the department or office within the required time period shall result in a fine not to exceed $250 for the first offense and, for subsequent offenses, a fine of not less than $500 or suspension or revocation of the license pursuant to s. 626.611 or s. 626.621.

32. Section 626.592, Florida Statutes, provides in relevant part:

> (1) Each person operating an insurance agency and each location of a multiple location agency shall designate a primary agent for each insurance agency location and shall file the name of the person so designated, and the address of the insurance agency location where he or she is primary agent, with the department, on a form approved by the department. The designation of the primary agent may be changed at the option of the agency, and any change shall be effective upon notification to the department. Notice of change must be sent to the department within 30 days after such change.
>
> (2) For the purpose of this section, a "primary agent" is the licensed agent who is responsible for the hiring and supervision of

> all individuals within an insurance agency location whether such individuals deal with the public in the solicitation or negotiation of insurance contracts or in the collection or accounting of moneys from the general public. An agent may be designated as primary agent for only one insurance agency location.

33. Section 626.734 provides:

> Any general lines insurance agent who is an officer, director, or stockholder of an incorporated general lines insurance agency shall remain personally and fully liable and accountable for any wrongful acts, misconduct, or violations of any provisions of this code committed by such licensee or by any person under his or her direct supervision and control while acting on behalf of the corporation. Nothing in this section shall be construed to render any person criminally liable or subject to any disciplinary proceedings for any act unless such person personally committed or knew or should have known of such act and of the facts constituting a violation of this chapter.

34. Petitioner must prove the material allegations by clear and convincing evidence. Department of Banking and Finance v. Osborne Stern and Company, Inc., 670 So. 2d 932 (Fla. 1996) and Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

35. In Ganter v. Department of Insurance, 620 So. 2d 202 (Fla. 1st DCA 1993), the court affirmed a final order of the Florida Department of Insurance suspending for six months the license of an insurance agent. As is true in the present case, the court determined that the applicable statute required proof

that the agent knew or reasonably should have known of the misconduct of his employee, an unlicensed salesperson.

36. In Ganter, the agent was the president and director of the company and the immediate supervisor of the salesperson, who had misrepresented the coverage of policies to four customers, so that they had unknowingly purchased auto service contracts. However, the agent worked at a distant office four days a week, during which time the agent left the salesperson in charge of the office. The hearing officer noted that, as argued by Petitioner, "a simple review of business written and a follow-up of client files by [the agent] would have disclosed [the salesperson's] improprieties . . .. There is no indication that at any time during the period in issue, did [the agent] make even the slightest effort to properly oversee his employees." 620 So. 2d at 204.

37. Focusing on the lack of supervision and the practice of allowing an unlicensed employee to use the agent's general lines insurance license, the majority and concurring opinions concluded that the agent knew or reasonably should have known of the wrongful acts of the unlicensed salesperson. The majority and dissenting opinions pointed out the lack of evidence of the appropriate minimum standards of conduct, which are typically necessary, in the form of testimony from an expert witness or a rule, to establish the basis of what the agent should reasonably

have known. The absence of such evidence in Ganter was excusable because the agent had left an unlicensed employee to operate an insurance office four days a week.

38. The dissenting opinion raised another important point. The majority and concurring opinions had agreed that the Department of Insurance was required to prove that the agent knew or reasonably should have known of the violations, thus rejecting the Department's theory of strict liability. Agreeing with the rejection of strict liability, the dissenting opinion noted that the majority and concurring opinions actually embraced the Department's strict liability theory by failing to require allegations as to how the agent, not the salesperson, had violated the Insurance Code or how the agent reasonably should have known of the salesperson's wrongful acts.

39. Under all of the opinions in Ganter, Petitioner has adequately pleaded Counts I, II, and IV of the Second Amended Administrative Complaint by predicating Respondent's liability on two grounds. First, the Second Amended Administrative Complaint alleges that the acts or omissions of Mr. Smith or Federal Insurance violated various provisions of the Insurance Code, and Respondent knew or reasonably should have known of these violations. Second, the Second Amended Administrative Complaint alleges that Respondent has demonstrated a lack of reasonably adequate knowledge and technical competence to engage

in the transactions authorized by the license or appointment, in violation of Section 626.611(8), Florida Statutes. These allegations describe Respondent's personal acts or omissions, not the acts or omissions of Mr. Smith or other Federal Insurance employees.

40. On the other hand, the expert evidence offered by Petitioner failed to prove that Respondent reasonably should have known of the violations or was himself unknowledgeable or incompetent. In effect, the expert witness testified that Respondent was not required to check all of Mr. Smith's work before it went out, or that Respondent, absent any indication of trouble with Mr. Smith's work, had to open all of Mr. Smith's business mail. The record does not establish that Mr. Smith was incompetent, or, if he were, that Respondent was aware that Mr. Smith was incompetent. The expert witness's testimony about checking accounts receivable does not identify the problem in the Grenyer transaction where Federal Insurance thought itself unable to contact Ms. Grenyer, even if it knew that it owed her money.

41. In sum, the expert testimony did not establish by clear and convincing evidence exactly what Respondent reasonably should have done to prevent the mistakes that occurred in the Polyviou, Wagner, and Grenyer transactions. Although the proximity of the mishandling of the Wagner and Grenyer

transactions is suspicious, the record fails to demonstrate that Respondent has negligently discharged his responsibilities as to these three transactions or that he has engaged in any practices as obviously negligent or even as reckless as those of the Ganter agent who left his office, and license, in the hands of an unlicensed salesperson four days a week. Thus, Petitioner has failed to prove Counts I, II, and IV.

42. Counts V, VI, and VII of the Second Amended Administrative Complaint raise different issues as to Respondent's personal liability. Rather than isolating on several mistakes that require careful analysis in the context of a busy retail insurance agency, the allegations of Counts V, VI, and VII address simple acts required of a licensee to assure adequate administration of his license by Petitioner.

43. Count V alleges that Respondent had the duty to inform Petitioner of changes in his principal business address and that Respondent failed to perform this duty. Respondent never conducted insurance business at the JEMS Services address. He conducted insurance business at the South Military Trail address from June to December, 2003, while his last filing with Petitioner showed the JEMS Services address. In his proposed recommended order, Respondent concedes, as he must, that he personally failed to perform this duty.

44. Count VI alleges that Respondent filed a change-of-address form to change his business address to the JEMS Services address, even though he never used this address and filed it without the knowledge of the person using this address. In his proposed recommended order and at the hearing, Respondent contended that he had the consent of Ms. Travieso-Otero, effectively conceding that he had not delegated the duty of arranging his use of this address and notifying Petitioner. The record amply demonstrates that Respondent personally undertook responsibility for notifying Petitioner of this purported change of address, Respondent personally and intentionally filed an incorrect address with Petitioner.

45. Count VII alleges that Federal Insurance designated Mr. Montoya as the primary agent and failed to file a new notice, designating a new primary agent, for three years after Mr. Montoya left the employment of Federal Insurance. Section 626.592(1), Florida Statutes, requires the "person operating an insurance agency" to designate a primary agent. Respondent personally failed to perform this duty from early 1998, when Mr. Montoya left Federal Insurance, through July 2001.

46. Florida Administrative Code Rule 69B-231.040(1)(a) provides:

> The Department is authorized to find that multiple grounds exist under Sections 626.611 and 626.621, F.S., for disciplinary

> action against the licensee based upon a single count in an administrative complaint based upon a single act of misconduct by a licensee. However, for the purpose of this rule chapter, only the violation specifying the highest stated penalty will be considered for that count. The highest stated penalty thus established for each count is referred to as the "penalty per count".

47. Florida Administrative Code Rule 69B-231.080(13) provides for a suspension of six months for a violation of Section 626.611(13), Florida Statutes.

48. Petitioner has proved that Respondent has personally twice violated Section 626.551, Florida Statutes. The first violation was when Respondent informed Petitioner of the JEMS Services address, even though he was not conducting business from that address. The second violation was when, several months later, Respondent began conducting business at South Military Trail and failed to update his address in the first 60 days. 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.

49. For the address violations, Section 626.551, Florida Statutes, provides for a fine of not more than $250 for the first offense and, for a second offense, a fine of at least

$500, suspension, or revocation. For the designated primary agent violation, Florida Administrative Code Rule 69B-231.080(13) provides for a suspension of six months.

50. In its proposed recommended order, Petitioner has proposed to fine Respondent $250 for the first address violation and $1000 for the second address violation. These are appropriate penalties. Petitioner also proposed a 24-month suspension, two years' probation, and continuing education, but these are for the designated primary agent violation, which Petitioner has proved, and the other counts, which Petitioner has not proved.

The designated primary agent violation should result in a six-month suspension, as suggested by the rule.

RECOMMENDATION

It is

RECOMMENDED that the Department of Financial Services enter a final order dismissing Counts I-IV, finding Respondent guilty of Counts V-VII, imposing an administrative fine of $1250, and suspending Respondent's license for six months.

DONE AND ENTERED this 20th day of July, 2004, in Tallahassee, Leon County, Florida.

ROBERT E. MEALE
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of July, 2004.

COPIES FURNISHED:

Gregg S. Marr
David J. Busch
Division of Legal Services
Department of Financial Services
612 Larson Building
200 East Gaines Street
Tallahassee, Florida 32399-0333

Orrin R. Beilly
Law Office of Orrin R. Beilly
Citizens Building, Suite 705
105 South Narcissus Avenue
West Palm Beach, Florida 33401

Honorable Tom Gallagher
Chief Financial Officer
Department of Financial Services
The Capital, Plaza Level 11
Tallahassee, Florida 32399-0300

Pete Dunbar, General Counsel
Department of Financial Services
The Capital, Plaza Level 11
Tallahassee, Florida 32399-0300

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 must be filed with the agency that will issue the final order in this case.