STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANICAL SERVICES, Petitioner, vs. WILLIAM DURBAHN KENNEDY, Respondent.	)	Case No. 04-2518PL

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case on October 15, 2004, by video teleconference at sites in West Palm Beach and Tallahassee, Florida, before Stuart M. Lerner, a duly-designated Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Elizabeth Penny, Qualified Representative
Dana M. Wiehle, Esquire
Department of Financial Services
Division of Legal Services
200 East Gaines Street
612 Larson Building
Tallahassee, Florida 32399-0333

For Respondent: William Durbahn Kennedy, pro se
6276 Southeast Charleston Place, No. 205
Hobe Sound, Florida 33455

STATEMENT OF THE ISSUE

Whether Respondent committed the violations alleged in the Amended Administrative Complaint issued against him and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On July 7, 2004, Petitioner issued a one-count Administrative Complaint alleging Respondent had violated Sections 626.611(8) and 626.621(8), Florida Statutes, and indicating that it intended to "enter an Order suspending or revoking [Respondent's] licenses and appointments as an insurance agent or to impose such penalties as may be provided [by law]" as disciplinary action against Respondent for having committed these violations. On July 14, 2004, Respondent "request[ed] a hearing [on the matter] pursuant to Section 120.57(1), Florida Statutes, to be held before the Division of Administrative Hearings." On July 16, 2004, the matter was referred to DOAH.

On August 5, 2004, Petitioner filed a Motion to Amend Administrative Complaint. The motion, which was unopposed, was granted by Order issued August 9, 2004. The Amended Administrative Complaint charged Respondent, in a single count, with violating Sections 626.611(7) and (14) and 626.621(8), Florida Statutes, based on his having pled guilty to, been convicted of, and been sentenced for committing "one (1) count

of Conspiracy to Obstruct or Impede the Internal Revenue Service, in violation of 18 USC 371."

As noted above, the final hearing in this case was held on October 15, 2004.[1] Respondent was the only witness to testify at the hearing. In addition to Respondent's testimony, four exhibits (Petitioner's Exhibits 1 through 3 and 5) were offered and received into evidence.

At the close of the taking of evidence, the undersigned established a deadline (10 days from the date of the filing of the hearing transcript with DOAH) for the filing of proposed recommended orders.

The hearing transcript (consisting of one volume) was filed with DOAH on November 4, 2004.

Petitioner timely filed its Proposed Recommended Order on Monday, November 15, 2004. To date, Respondent has not filed any post-hearing submittal.

FINDINGS OF FACT

Based on the evidence adduced at hearing, and the record as a whole, the following findings of fact are made:

1. Respondent is now, and has been since 1992, licensed as an insurance representative in the State of Florida holding 02-15, 02-16, 02-18, and 02-40 licenses.

2. In October of 1999, an indictment was filed against Respondent and others in United States District Court for the

Southern District of Florida Case No. 99-8145 (Indictment). In Count One of the Indictment, the following was alleged:

> 1. From at least as early as November, 1993, through on or about September, 1999, the exact dates being unknown, at West Palm Beach, Palm Beach County, in the Southern District of Florida and elsewhere, the defendants
>
> JOHN PHILIP ELLIS, SR.,
> ROBERT KOCH,
> SHARON ALFONSO,
> MARK KENNEDY,
> JEFFREY POLLARD,
> HOWARD RICCARDI,
>
> did knowingly, willfully and unlawfully combine, conspire, confederate and agree with each other, and with persons known and unknown to the Grand Jury, to defraud the United States by attempting to impede, impair, obstruct and defeat the lawful government functions of the Internal Revenue Service (IRS) of the Treasury Department in the ascertainment, computation, assessment and collection of revenue: to wit, income taxes.
>
> * * *
>
> In violation of Title 18, United States Code Section 371.

3. Respondent pled guilty to the crime alleged in Count One of the Indictment.

4. Based on Respondent's guilty plea, he was adjudicated guilty of said crime and, on January 23, 2002, given the following sentence: 21 months in prison, three years' probation following his release from prison, and a $100.00 fine.

CONCLUSIONS OF LAW

5. DOAH has jurisdiction over the subject matter of this proceeding and of the parties hereto pursuant to Chapter 120, Florida Statutes.

6. "Chapters 624-632, 634, 635, 636, 641, 642, 648, and 651 constitute the 'Florida Insurance Code.'" § 624.01, Fla. Stat.

7. It is Petitioner's responsibility to "enforce the provisions of this code." § 624.307, Fla. Stat.

8. Among Petitioner's duties under the Code is to license and discipline insurance agents.

9. Petitioner may take disciplinary action against a licensee only after the licensee has been given reasonable written notice of the charges and an adequate opportunity to request a proceeding pursuant to Sections 120.569 and 120.57, Florida Statutes.

10. An evidentiary hearing must be held if requested by the licensee when there are disputed issues of material fact. §§ 120.569(1) and 120.57(1), Fla. Stat.

11. At the hearing, Petitioner bears the burden of proving that the licensee engaged in the conduct, and thereby committed the violations, alleged in the charging instrument.

12. Proof greater than a mere preponderance of the evidence must be presented by Petitioner to meet its burden of

proof. Clear and convincing evidence of the licensee's guilt is required. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932, 935 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292, 294 (Fla. 1987); Pou v. Department of Insurance and Treasurer, 707 So. 2d 941 (Fla. 3d DCA 1998); and § 120.57(1)(j), Fla. Stat. ("Findings of fact shall be based upon a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute . . . .").

13. Clear and convincing evidence "requires more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" In re Graziano, 696 So. 2d 744, 753 (Fla. 1997). It is an "intermediate standard." Id. For proof to be considered "'clear and convincing' . . . the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony 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 a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established." In re Davey, 645 So. 2d 398, 404 (Fla. 1994), quoting, with approval, from Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA

1983). "Although this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous." Westinghouse Electric Corporation, Inc. v. Shuler Bros., Inc., 590 So. 2d 986, 989 (Fla. 1st DCA 1991).

14. In determining whether Petitioner has met its burden of proof, it is necessary to evaluate its evidentiary presentation in light of the specific allegations of wrongdoing made in the charging instrument. Due process prohibits Petitioner from taking disciplinary action against a licensee based on matters not specifically alleged in the charging instrument, unless those matters have been tried by consent. See Shore Village Property Owners' Association, Inc. v. Department of Environmental Protection, 824 So. 2d 208, 210 (Fla. 4th DCA 2002); Cottrill v. Department of Insurance, 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996); and Delk v. Department of Professional Regulation, 595 So. 2d 966, 967 (Fla. 5th DCA 1992).

15. The charging instrument in the instant case, the Amended Administrative Complaint, alleges in its one count that Respondent violated Sections 626.611(7), 626.611(14), and 626.621(8), Florida Statutes, as a consequence of his having pled guilty to, been convicted of, and been sentenced for participating in a "Conspiracy to Obstruct or Impede the Internal Revenue Service, in violation of 18 USC 371."

16. Section 626.611(7) and (14), Florida Statutes, provide 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, 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.
>
> * * *
>
> (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(8), Florida Statutes, provides as follows:

> 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, 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:
>
> 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. It is undisputed, and the record evidence clearly and convincingly establishes, that, as alleged in the Amended Administrative Compliant, in or around January 2002, in United States District Court for the Southern District of Florida Case No. 99-8145, Respondent pled guilty to, was adjudicated guilty of, and was sentenced for participating in a "Conspiracy to Obstruct or Impede the Internal Revenue Service, in violation of 18 USC 371," which provides, in pertinent part, as follows:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

"As the language of the [18 U.S.C. § 371] indicates, there are two different conspiracies with which a defendant can be charged

under § 371--a conspiracy 'to commit any offense against the United States,' *or* a conspiracy 'to defraud the United States.'" U.S. v. Jackson, 33 F.3d 866, 870 (7th Cir. 1994).

19. It was this latter type of conspiracy, a "conspiracy 'to defraud the United States,'" that Respondent pled guilty to and was convicted of and sentenced for participating in.[2] This crime was one "punishable by imprisonment of 1 year or more under the law of the United States of America . . . which involve[d] moral turpitude." See Jordan v. De George, 341 U.S. 223, 229, 71 S. Ct. 703, 706 (1951)("[I]t can be concluded that fraud has consistently been regarded as such a contaminating component in any crime that American courts have, without exception, included such crimes within the scope of moral turpitude. It is therefore clear, under an unbroken course of judicial decisions, that the crime of conspiring to defraud the United States is a 'crime involving moral turpitude.'"); In re Quinn, 849 A.2d 1009, 1010 (D.C. 2004)("[I]t is well settled that conspiracy to defraud the United States . . . [is] inherently [a] crime[] of moral turpitude."); In re Birdwell, 20 S.W.3d 685, 686 (Tex. 2000)("We hold that a conviction for conspiracy to defraud the United States in violation of [18 U.S.C.] section 371 is a crime of moral turpitude."); In re Crooks, 800 P.2d 898, 906 (Cal. 1990)(crime of conspiring to defraud the United States, in violation of 18 U. S. C. § 371, by

participating in a "tax-shelter investment scheme" involved "moral turpitude"); Matter of Meisnere, 471 A.2d 269, 270-71 (D.C. 1984)("A violation of 18 U.S.C. 371, the conspiracy statute[,] does not necessarily constitute moral turpitude *per se* since the statute prohibits both conspiracy to commit an offense against the United States and conspiracy to defraud the United States. In this case, however, the information to which Respondent pleaded guilty, specifically charged conspiracy knowingly to defraud the United States by obstructing the Treasury Department in its attempt to ascertain the assets of and the taxes due from one Leon Durwood Harvey. Thus the information to which Respondent pleaded guilty necessarily required proof of intent to defraud. Intent to defraud inherently involves moral turpitude."); Levine v. Department of Insurance and Treasurer, Case No. 90-3898, 1991 WL 832870 *1 (Fla. DOAH April 2, 1991)(Recommended Order)("Based upon this plea, the Petitioner was found guilty of conspiracy to defraud an insurance company and filing a false insurance claim, each count being a felony involving moral turpitude."); and Fla. Admin Code R. 69B-211.042(21) (The Department finds that each felony crime listed in this subsection is a crime of moral turpitude: . . . (w) Fraud. . . . (y) Tax evasion. . . . (bb) Failure to pay tax. . . .(ss) Defrauding the government. . . (vv) Conspiracy. . . .").

20. Having pled guilty to and been adjudicated guilty of such a crime, Respondent is subject to mandatory suspension or revocation of his license pursuant to Section 626.611(14), Florida Statutes, as Petitioner has alleged in the Amended Administrative Complaint (not discretionary suspension or revocation pursuant to Section 626.621(8), Florida Statutes.)

21. That Respondent pled guilty to this crime is sufficient proof, for purposes of this disciplinary proceeding, to establish that he actually participated in the conspiracy. See Kelly v. Department of Health and Rehabilitative Services, 610 So.2d 1375, 1377 (Fla. 2d DCA 1992)("[W]here a judgment of conviction is based upon a guilty plea . . . , a defendant is estopped from denying his guilt of the subject offense in a subsequent civil action."); Paterno v. Fernandez, 569 So.2d 1349, 1351 (Fla. 3d DCA 1990)("In pleading guilty to an information charging her with the crime of grand theft in the first degree, the defendant admitted all facts contained in the information, that she committed the crime of grand theft in the first degree when she took $20,000.00 or more from the plaintiffs with the intent to deprive them of the right to their property and appropriated the property for her use or for the use of others. Thus, we find that the facts underlying the criminal offense were stipulated through a guilty plea."); and Brown v. City of Hialeah, 30 F.3d 1433, 1437 (11th Cir.

1994)("In this case, Brown sought to introduce evidence that he did not attempt to shoot Officer Pugliese. The introduction of this evidence would have been contrary to Brown's guilty plea, which included attempted murder of Officer Pugliese. The facts surrounding the issue of whether Brown attempted to shoot Officer Pugliese were necessarily decided when Brown pleaded guilty to the attempted murder charge.") His having done so demonstrates his "lack of fitness [and] untrustworthiness to engage in the business of insurance." See Paisley v. Department of Insurance, 526 So. 2d 167, 169 (Fla. 1st DCA 1988); and Natelson v. Department of Insurance, 454 So. 2d 31, 32 (Fla. 1st DCA 1984). Respondent therefore is also subject to mandatory suspension or revocation of his license pursuant to Section 626.611(7), Florida Statutes, as Petitioner has alleged in the Amended Administrative Complaint.

22. To determine whether Respondent's license should be revoked or just suspended (and, if so, for how long) pursuant to Section 626.611(7) and (14), Florida Statutes, it is necessary to consult Petitioner's "penalty guidelines" set forth in Florida Administrative Code Rule Chapter 69B-231, which impose restrictions and limitations on the exercise of Board's disciplinary authority. See Parrot Heads, Inc. v. Department of Business and Professional Regulation, 741 So. 2d 1231, 1233 (Fla. 5th DCA 1999)("An administrative agency is bound by its

own rules . . . creat[ing] guidelines for disciplinary penalties."); cf. State v. Jenkins, 469 So. 2d 733, 734 (Fla. 1985)("[A]gency rules and regulations, duly promulgated under the authority of law, have the effect of law."); Buffa v. Singletary, 652 So. 2d 885, 886 (Fla. 1st DCA 1995)("An agency must comply with its own rules."); Decarion v. Martinez, 537 So. 2d 1083, 1084 (Fla. 1st 1989)("Until amended or abrogated, an agency must honor its rules."); and Williams v. Department of Transportation, 531 So. 2d 994, 996 (Fla. 1st DCA 1988)(agency is required to comply with its disciplinary guidelines in taking disciplinary action against its employees).

23. Florida Administrative Code Rule 69B-231.040 explains how Petitioner goes about "[c]alculating [a] penalty." It provides as follows:

> (1) Penalty Per Count.
>
> (a) 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".
>
> (b) The requirement for a single highest stated penalty for each count in an administrative complaint shall be applicable

> regardless of the number or nature of the violations established in a single count of an administrative complaint.
>
> (2) Total Penalty. Each penalty per count shall be added together and the sum shall be referred to as the "total penalty".
>
> (3) Final Penalty. The final penalty which will be imposed against a licensee under these rules shall be the total penalty, as adjusted to take into consideration any aggravating or mitigating factors, provided however the Department shall convert the total penalty to an administrative fine and probation in the absence of a violation of Section 626.611, F.S., if warranted upon the Department's consideration of the factors set forth in rule subsection 69B-231.160(1), F.A.C.

24. Florida Administrative Code Rule 69B-231.080 is entitled, "Penalties for Violation of Section 626.611." It provides, in pertinent part, as follows:

> If it is found that the licensee has violated any of the following subsections of Section 626.611, F.S., for which compulsory suspension or revocation is required, the following stated penalty shall apply:
>
> * * *
>
> (7) Section 626.611(7) -- suspension 6 months.
>
> * * *
>
> (14) Section 626.611(14), F.S. -- see Rule 69B-231.150, F.A.C.

25. Florida Administrative Code Rule 69B-231.150 provides, in pertinent part, as follows:

> (1) If it is found that a licensee has violated . . . Section 626.611(14) . . ., the following stated penalty shall apply:
>
> (a) If the licensee is convicted by a court of . . . a felony (regardless of whether or not such felony is related to an insurance license), the penalty shall be revocation.
>
> * * *

26. Respondent was convicted of a felony. See The Florida Bar v. Meldon, 459 So. 2d 314, 315 (Fla. 1984); and Matter of Vagionis, 672 N.Y.S.2d 343, 344 (N.Y. App. Div. 1998)("On July 16, 1997, respondent pleaded guilty in the United States District Court of the District of New Jersey to an information charging him with conspiracy to defraud the United States and the Internal Revenue Service (one count), in violation of 18 U.S.C. § 371, and income tax evasion (one count), in violation of 26 U.S.C. § 7201, both felonies.").

27. Therefore, the "stated penalty" for his violation of Section 626.611(14), Florida Statutes, is revocation, which is "high[er]" than the stated penalty for a violation of Section 626.611(7), Florida Statutes.

28. Revocation is also the "total penalty" in the instant case since the Amended Administrative Complaint contains but a single count.

29. The "aggravating/mitigating factors" that must be considered to determine whether any "adjust[ment]" should be

made to the "total penalty" are set forth in Florida Administrative Code Rule 69B-231.160, which provides, in pertinent part, as follows:

> The Department shall consider the following aggravating and mitigating factors and apply them to the total penalty in reaching the final penalty assessed against a licensee under this rule chapter. After consideration and application of these factors, the Department shall, if warranted by the Department's consideration of the factors, either decrease or increase the penalty to any penalty authorized by law.
>
> * * *
>
> (2) For penalties assessed under Rule 69B-231.150, F.A.C., for violations of Section[] 626.611(14) . . . , F.S.:
>
> (a) Number of years that have passed since criminal proceeding;
>
> (b) Age of licensee at time the crime was committed;
>
> (c) Whether licensee served time in jail;
>
> (d) Whether or not licensee violated criminal probation;
>
> (e) Whether or not licensee is still on criminal probation;
>
> (f) Whether or not licensee's actions or behavior resulted in substantial injury to victim;
>
> (g) Whether or not restitution was, or is being timely, paid;

(h) Whether or not licensee's civil rights have been restored; and

(i) other relevant factors.

30. Examining the evidentiary record in the instant case in light of these "aggravating/mitigating factors," it does not appear that a decrease of the "total penalty" is warranted.

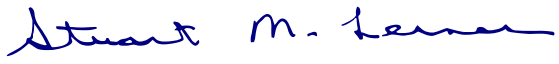
31. Accordingly, the "final penalty" that Petitioner should impose in the instant case is the revocation of Respondent's licenses.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby

RECOMMENDED that Petitioner issue a Final Order revoking Respondent's licenses pursuant to Section 626.611, Florida Statutes.

DONE AND ENTERED this 18th day of November, 2004, in Tallahassee, Leon County, Florida.



STUART M. LERNER
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 18th day of November, 2004.

ENDNOTES

[1] The hearing was originally scheduled for September 10, 2004, but was continued at Petitioner's request.

[2] Count One of the Indictment (the count to which Respondent pled guilty) specifically alleged that the conspiracy of which Respondent was a part was formed "to defraud the United States."

COPIES FURNISHED:

Elizabeth Penny, CLI
Dana M. Wiehle, Esquire
Department of Financial Services
Division of Legal Services
200 East Gaines Street
612 Larson Building
Tallahassee, Florida 32399-0333

William Durbahn Kennedy
6276 Southeast Charleston Place, No. 205
Hobe Sound, Florida 33455

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

Pete Dunbar, General Counsel
Department of Financial Services
The Capitol, 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 should be filed with the agency that will issue the Final Order in this case.