STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL SERVICES, Petitioner, vs. BC & ABC FIRE ENTINGUISHER MAINTENANCE AND RICARDO CABRERA, QUALIFIER, Respondents.	)	Case No. 04-2662

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing by video teleconference on October 1, 2004, at sites in Tallahassee and Miami, Florida.

APPEARANCES

For Petitioner: Casia R. Sinco, Esquire
Department of Financial Services
200 East Gaines Street, Room 612
Tallahassee, Florida 32399-0333

For Respondent: Ricardo Cabrera, pro se
3340 South Lake Drive
Miami, Florida 33155

STATEMENT OF THE ISSUE

The issue in this case is whether discipline should be imposed upon Respondents' license to do business as a Fire Equipment Dealer, based on allegations that Respondents failed to maintain continuously in force a policy of comprehensive

general liability insurance, failed to provide proof of insurance to Petitioner, and failed to maintain a qualification for licensure.

PRELIMINARY STATEMENT

On June 29, 2004, Petitioner Department of Financial Services issued an Administrative Complaint against Respondents Ricardo Cabrera and BC & ABC Fire Extinguisher Maintenance. Petitioner charged Respondents with offenses relating to Respondents' alleged failures to timely renew required liability insurance coverage and to provide proof of such coverage to Petitioner in the proper manner. Respondents timely requested a formal hearing, and on July 28, 2004, Petitioner filed the pleadings with the Division of Administrative Hearings, where the undersigned Administrative Law Judge was assigned to preside in the matter.

The final hearing took place as scheduled on October 1, 2004, with all parties present. Petitioner called two witnesses: Milagros Novoa, an insurance agent with Power Insurance Agency; and Terry Hawkins, who works for Petitioner as a Safety Program Manager in the Division of State Fire Marshal. As well, Petitioner's Exhibits 1 through 11 were offered and received in evidence.

Mr. Cabrera testified on behalf of Respondents, who offered no exhibits or other evidence.

At Petitioner's request, the undersigned took official recognition of Sections 633.061 and 633.162, Florida Statutes, and Florida Administrative Code Rules 69A-21.102 and 69A-21.114.

The final hearing transcript was filed on November 8, 2004. Each party timely filed a Proposed Recommended Order on or before the established deadline, which was November 18, 2004.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2004 Florida Statutes.

FINDINGS OF FACT

1. Respondent Ricardo Cabrera, as the qualifier for Respondent BC & ABC Fire Extinguisher Maintenance ("BC"), is licensed by the State of Florida to do business under BC's name as a Class C Fire Equipment Dealer. For the purposes of this case, the actions of BC and the actions of Mr. Cabrera are indistinguishable. Thus, Respondents will be referred to collectively as "Cabrera."

2. As a licensed Fire Equipment Dealer, Cabrera is subject to the regulatory jurisdiction of Petitioner Department of Financial Services (the "Department").

3. Class C licensees are required by law to maintain comprehensive general liability ("CGL") insurance in an amount not less than $100,000 and to provide the Department with proof of such coverage.

4. In compliance with Florida law, Cabrera maintained CGL coverage in the amount of $300,000 for the policy period from January 29, 2003 to January 29, 2004, and he submitted proof of such coverage to the Department.

5. By letter dated December 1, 2003, the Department notified Cabrera that, because his existing CGL policy was due to expire on January 29, 2004, he would need to submit evidence of continuing coverage beyond that date. Enclosed with this letter was a blank Certificate of Insurance in the form required by the Department as proof of insurance, for Cabrera to complete and return.

6. Cabrera failed to timely renew his CGL policy and the coverage lapsed following January 29, 2004, which was the last day of the policy period.

7. A few weeks later, Cabrera obtained another CGL policy for his business, in the amount of $300,000. This policy provides coverage for the period from February 23, 2004 to February 23, 2005.

8. Cabrera was without the required CGL coverage for 24 days, from January 30, 2004 through February 22, 2004.

9. On February 24, 2004, the Department received, by facsimile transmission, a Certificate of Insurance, in the proper form, showing that Cabrera was insured for the period from February 23, 2004 to February 23, 2005, in the amount

$300,000.[1] Cabrera was erroneously identified on the form as a "Class A Fire Equipment Dealer." This misidentification, the undersigned reasonably infers from the evidence presented, was the result of a scrivener's mistake; it had no effect whatsoever on Cabrera's coverage, which was, in fact, for an amount well in excess of the statutory minimum for Class C licensees.

10. By letter dated February 25, 2004, the Department notified Cabrera of three alleged deficiencies relating to his recently filed proof of insurance, namely: (1) the misidentification of Cabrera as a Class A licensee; (2) the 24-day coverage gap; and (3) the fact that a copy of the Certificate of Insurance, rather than the original, had been submitted. The Department requested a response.

11. Cabrera failed to respond to the Department's deficiency letter. Consequently, by letter dated April 21, 2004, the Department gave Cabrera a "final notice" of his alleged noncompliance with the statutory requirements concerning proof of insurance. Cabrera still did not respond.

12. On June 29, 2004, the Department issued an Administrative Complaint against Cabrera, charging him with failing to provide proof of insurance or failing to maintain coverage in force, an offense described in Section 633.162(4)(e), Florida Statutes; and failing to maintain one or

more qualifications for licensure, an offense pursuant to Section 633.162(4)(f).

13. Thereafter, around July 21, 2004, the Department received a corrected copy of Cabrera's Certificate of Insurance, one which identified him accurately as a Class C licensee.

Ultimate Factual Determinations

14. Cabrera is guilty of failing to maintain continuously in force the statutorily required insurance coverage, which is a specific offense disciplinable pursuant to Section 633.162(4)(e), Florida Statutes.

15. Although Cabrera's failure to maintain continuously in force the statutorily required insurance coverage also necessarily constituted a failure to maintain a qualification for licensure——which latter is a general offense disciplinable pursuant to Section 633.162(4)(f), Florida Statutes——his misconduct in allowing a gap in insurance coverage is, as a matter of ultimate fact, a single wrong and hence should be treated as a single violation. Since the particular wrong that Cabrera committed is specifically punishable under Section 633.162(4)(e) as a failure to maintain insurance coverage continuously in force, that is the offense for which he should be disciplined, not the general offense described in Section 633.162(4)(f).

16. Cabrera is not guilty of failing to provide proof of insurance to the Department.

CONCLUSIONS OF LAW

17. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to Sections 120.569, and 120.57(1), Florida Statutes.

18. Among the conditions for licensure as a Fire Equipment Dealer is that the applicant or licensee must submit

> to the State Fire Marshal proof of insurance providing coverage for comprehensive general liability for bodily injury and property damage, products liability, completed operations, and contractual liability. The State Fire Marshal shall adopt rules providing for the amounts of such coverage, but such amounts shall not be less than $300,000 for Class A or Class D licenses, $200,000 for Class B licenses, and $100,000 for Class C licenses; and the total coverage for any class of license held in conjunction with a Class D license shall not be less than $300,000. The State Fire Marshal may, at any time after the issuance of a license or its renewal, require upon demand, and in no event more than 30 days after notice of such demand, the licensee to provide proof of insurance, on a form provided by the State Fire Marshal, containing confirmation of insurance coverage as required by this chapter. Failure, for any length of time, to provide proof of insurance coverage as required shall result in the immediate suspension of the license until proof of proper insurance is provided to the State Fire Marshal. An insurer which provides such coverage shall notify the State Fire Marshal of any change in coverage or of any

> termination, cancellation, or nonrenewal of any coverage.

§ 633.061(3)(c)3., Fla. Stat.

19. Section 633.162, Florida Statutes, under which Cabrera has been charged, sets forth the acts for which punishment, including the suspension or revocation of a license, can be imposed upon proof of guilt. This statute provides, in pertinent part, as follows:

> (4) [I]t is cause for denial, nonrenewal, revocation, or suspension of a license or permit by the State Fire Marshal if she or he determines that the licensee or permittee has:
>
> * * *
>
> (e) Failed to provide proof of insurance to the State Fire Marshal or failed to maintain in force the insurance coverage required by s. 633.061.
>
> (f) Failed to obtain, retain, or maintain one or more of the qualifications for a license or permit as specified in this chapter.

20. The statutory insurance requirements are implemented and amplified in Florida Administrative Code Rule 69A-21.114, which provides as follows:

> (1) The Fire Equipment Dealer A, B, C and D licensed pursuant to Section 633.061, F.S., shall provide evidence of current and subsisting insurance coverage meeting the requirements of Section 633.061, F.S., to the Regulatory Licensing Section on a Form DI4-28, "Insurance Certificate Fire Equipment Dealer", revised and dated 10/99, as adopted and incorporated herein by

> reference. This form is available from the Regulatory Licensing Section, Bureau of Fire Prevention, 200 East Gaines Street, Tallahassee, Florida 32399-0342.
> (2) The licensed Fire Equipment Dealer A, B, C and D shall be responsible to ensure current and subsisting insurance coverage meeting the requirements of Section 633.061, F.S., is on file with the State Fire Marshal.
> (3) Failure to provide evidence of current and subsisting insurance coverage within 30 days of the expiration date of the policy or within 30 days of a notice to provide evidence of coverage shall result in administrative proceedings pursuant to Section 633.162, F.S.

21. A proceeding, such as this one, to suspend, revoke, or impose other discipline upon a professional license is penal in nature. State ex rel. Vining v. Florida Real Estate Commission, 281 So. 2d 487, 491 (Fla. 1973). Accordingly, to impose discipline, the Department must prove the charges against Cabrera by clear and convincing evidence. Department of Banking and Finance, Div. of Securities and Investor Protection v. Osborne Stern & Co., 670 So. 2d 932, 935-36 (Fla. 1996)(citing Ferris v. Turlington, 510 So. 2d 292, 294-95 (Fla. 1987)); Nair v. Department of Business & Professional Regulation, 654 So. 2d 205, 207 (Fla. 1st DCA 1995).

22. Regarding the standard of proof, in Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983), the Court of Appeal, Fourth District, canvassed the cases to develop a "workable definition of clear and convincing evidence" and found

that of necessity such a definition would need to contain "both qualitative and quantitative standards." The court held that

> 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 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.

Id. The Florida Supreme Court later adopted the fourth district's description of the clear and convincing evidence standard of proof. Inquiry Concerning a Judge No. 93-62, 645 So. 2d 398, 404 (Fla. 1994). The First District Court of Appeal also has followed the Slomowitz test, adding the interpretive comment that "[a]lthough this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous." Westinghouse Elec. Corp., Inc. v. Shuler Bros., Inc., 590 So. 2d 986, 988 (Fla. 1st DCA 1991), rev. denied, 599 So. 2d 1279 (1992)(citation omitted).

23. The evidence in this case is clear——indeed it is undisputed——that Cabrera allowed his CGL insurance coverage to lapse. Thus, the undersigned was compelled to find, as a matter of ultimate fact, that Cabrera had committed the offense of

failing to maintain in force the required insurance coverage. See § 633.162(4)(e), Fla. Stat.

24. While Cabrera's allowing a gap in coverage also constituted a failure to maintain a qualification for licensure (namely, current and subsisting CGL coverage), which is an offense pursuant to Section 633.162(4)(f), the undersigned concludes that Cabrera cannot be disciplined under both the specific provisions of Section 633.162(4)(e) and the general provisions of Section 633.162(4)(f) as if he had committed two violations. This conclusion is based, first, on the ultimate factual determination that Cabrera committed one substantial wrong, i.e., the failure to maintain his CGL coverage continuously in force; and, second, on the legal conclusion that Section 633.162(4)(e), being specific with respect to the offense of failing to maintain the required insurance coverage, controls over Section 633.162(4)(f), which describes the same offense (and others), but only in broad general terms. See Gretz v. Florida Unemployment Appeals Com'n, 572 So. 2d 1384, 1386 (Fla. 1991)(specific statute controls over general statue covering the same subject matter); accord, Cone v. State Dept. of Health, ___ So.2d ___, 29 Fla.L.Weekly D2413, 2004 WL 2402638, *4 (Fla. 1st DCA Oct. 20, 2004). Accordingly, it is concluded that discipline should be imposed under Section 633.162(4)(e) and not Section 633.162(4)(f).

25. The Department's charge that Cabrera failed to provide proof of insurance rests on the premise that an original Certificate of Insurance must be filed, not merely a copy thereof. It is undisputed that Cabrera submitted copies, but not the originals, of a Certificate of Insurance and a corrected Certificate of Insurance showing that he has the requisite coverage in place for the period from February 23, 2004 to February 23, 2005. Therefore, the Department argues, Cabrera is guilty of failing to provide proper proof of insurance.

26. The problem with the Department's position is that the requirement of filing an original Certificate of Insurance is nowhere stated in Section 633.061, Florida Statutes, or Florida Administrative Code Rule 69A-21.114. Thus, if an original certificate must be filed, the obligation arises under an unpublished, and in that sense informal, mandate.

27. It is not clear from the record whether the Department's "best evidence" requirement is applicable to all licensees (in which case it is a rule by definition), is applicable only some of the time (i.e. is not generally applicable and hence not a "rule"), or is an emerging policy that has not yet crystallized to the point that rulemaking is feasible. In any event, to urge this informal policy as the basis for adjudicating Cabrera's substantial interests, the Department needed to explicate, defend, and support with

evidence the policy's grounds and rationale. See, e.g., Gulf Coast Home Health Services of Florida, Inc. v. Department of Health and Rehabilitative Services, 513 So. 2d 704, 707 (Fla. 1st DCA 1987).

28. The undersigned can find nothing in the record to justify the Department's disallowance of Cabrera's Certificates of Insurance. As a general rule, a duplicate certificate would be admissible as evidence in a court of law to the same extent as the original, unless a genuine question were raised about the either the copy's or the original's authenticity or some other particular unfairness would result. See § 90.953, Fla. Stat. Likewise, a copy would be admissible as evidence, in lieu of the original, in an administrative proceeding, provided such a copy would "commonly [be] relied upon by reasonably prudent persons in the conduct of their affairs." See § 120.569(2)(g), Fla. Stat. In this instance, there is no evidence suggesting that the certificates in question are anything but true copies of authentic originals, the kind of facsimile that reasonably prudent persons ordinarily rely upon in everyday transactions. These copies therefore constitute "evidence" or "proof" of insurance and should be accepted as such by the Department.

29. The Department concedes, and the undersigned agrees, that Cabrera's conduct does not warrant the penalty of suspension or revocation. The Department is authorized in such

circumstances to impose a fine not to exceed $1,000 per violation, see Section 633.163(1), and/or to place the offending licensee on probation for a period not to exceed two years, see Section 633.167(1).

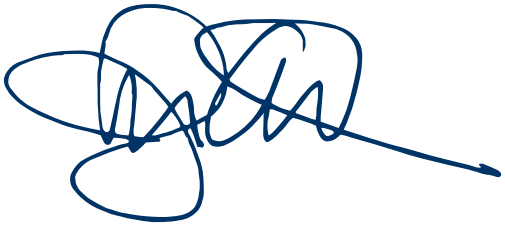
30. Unfortunately, it appears there are no penalty guidelines for determining what particular penalty or penalties would be appropriate here, within the ranges just mentioned. Absent specific guidance, the undersigned has little choice but to recommend such punishment as seems to him commensurate with the offense. In this regard, although the coverage gap was relatively short here, the undersigned is mindful that should Cabrera be found liable for an occurrence of professional negligence causing harm during the period from January 30, 2004 through February 22, 2004, the injured party or parties might not have, as a recourse, a source of financial security in the form of liability insurance that Florida law dictates be available for the protection of the public. This is a serious matter that cannot be excused simply because, in this instance, it appears there was no harm done.[2]

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department enter a final order finding Cabrera guilty of failing to maintain continuously in force the required CGL insurance coverage, an offense under

Section 633.162(4)(e), Florida Statutes. For this violation, it is further RECOMMENDED that Cabrera be ordered to pay an administrative fine of $1,000 and be placed on probation for a period of one year, on such reasonable terms and conditions as the Department may specify in its final order.

DONE AND ENTERED this 22nd day of December, 2004, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of December, 2004.

ENDNOTES

[1]/ By letter dated February 3, 2004, the Department had attempted to notify Cabrera of his failure to provide evidence of continuing insurance coverage and demanded that he submit an original Certificate of Insurance within 10 days after receiving the letter. Cabrera testified that he had not received this correspondence. It is not necessary to decide whether Cabrera actually received the Department's letter of February 3, 2004, because the outcome does not hinge on this fact.

[2]/ No evidence was presented concerning occurrences for which insurance coverage would be unavailable. As of this writing, however, the statute of limitation would not yet have run on such claims. Therefore, at this time, it cannot be said for certain that no one will be harmed by Cabrera's failure to maintain the required insurance coverage.

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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.