

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL)
SERVICES,)
)
Petitioner,)
)
vs.) Case No. 04-3012PL
)
ROBERT WESLEY TRUEBLOOD,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case on November 2, 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: Philip M. Payne, Esquire
Department of Financial Services
Division of Legal Services
200 East Gaines Street
612 Larson Building
Tallahassee, Florida 32399-0333

For Respondent: Robert Wesley Trueblood, pro se
Post Office Box 2023
Hobe Sound, Florida 33475

STATEMENT OF THE ISSUE

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

PRELIMINARY STATEMENT

On July 21, 2004, Petitioner issued a four-count Amended Administrative Complaint against Respondent notifying him that it "intend[ed] to enter an Order suspending or revoking [his] licenses and appointments as an insurance agent or impose such penalties as may be provided under [the law]." Count I of the Amended Administrative Complaint alleged that Respondent had violated Sections 626.611(7) and 626.621(8), Florida Statutes, based on his having pled guilty on February 20, 2002, in Orange County Circuit Court to having violated Section 517.07, Florida Statutes. Count II of the Amended Administrative Complaint alleged that Respondent had further violated Sections 626.611(7) and 626.621(8), Florida Statutes, based on his having pled guilty on February 20, 2002, in Orange County Circuit Court to having violated Section 517.12(1), Florida Statutes. Count III of the Amended Administrative Complaint alleged that Respondent had violated Section 626.621(11), Florida Statutes, by not timely informing Petitioner of the guilty pleas referenced in the first two counts of the Amended Administrative Complaint. Count IV of the Amended Administrative Complaint alleged that

Respondent had violated "Section 626.621(2), Florida Statutes, by way of Section 626.551, Florida Statutes, [as a result of having] fail[ed] to timely notify [Petitioner] of a change in [his] residency address." On August 19, 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 August 25, 2004, the matter was referred to DOAH.

As noted above, the final hearing in this case was held on November 2, 2004. Three witnesses testified at the hearing: Barry Lanier and Hazel Muhammad (for Petitioner), and Respondent (on his own behalf). In addition to these three witnesses' testimony, six exhibits (Petitioner's Exhibits 1, 2, 3A, 3B, 4, and 5) were offered and received into evidence.

Following the close of the evidence, but before the conclusion of the hearing, the undersigned established a deadline (December 3, 2004) for the filing of proposed recommended orders. Thereafter, counsel for Petitioner announced on the record that Petitioner was voluntarily dismissing Count IV of the Amended Administrative Complaint.

The hearing Transcript (consisting of one volume) was filed with DOAH on November 18, 2004.

Petitioner filed its Proposed Recommended Order on December 2, 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, including the parties' prehearing stipulation filed October 21, 2004, the following findings of fact are made:

1. Respondent is now, and has been since October 17, 1988, licensed as an insurance representative in the State of Florida holding 02-16, 02-18, and 02-40 licenses. His licensure identification number is A268617.

2. In 2001, criminal charges were filed against Respondent in Orange County Circuit Court Case No. CR-01-2309/B.

3. On or about February 20, 2002, Respondent submitted, in Orange County Circuit Court Case No. CR-01-2309/B, a verified Petition to Enter Plea of Guilty, which read as follows:

1. My name is Robert Trueblood and I acknowledge that I am the Defendant charged in the above-styled criminal case[].

2. I am represented by a lawyer, Arthur L. Wallace, III.

3. I wish to withdraw my plea of not guilty and plead guilty to: Count 2 - Sale of Unregistered Security and Count 3 - Sale of Security by Unregistered Agent.

4. I understand that each of these counts is a third degree felony and each is punishable by up to five (5) years in the

Department of Corrections and a \$5,000.00 fine.

5. I have told my lawyer all the facts and circumstances about the charges against me. I believe that my lawyer is fully informed on all such matters. My lawyer has counseled and advised me on the nature of each charge; on any and all lesser included charges; on all possible defenses that I might have in this cause; and all the penalties that might be imposed if convicted.[¹]

6. I understand that I may plead not guilty to any offense charged against me. If I choose to plead not guilty, the Constitution guarantees me the right to maintain that plea and (a) the right to a speedy and public trial by jury; (b) the right to see, hear and face in open Court all witnesses called to testify against me and to cross-examine said witnesses; (c) the right to use the power and process of the Court to compel the production of any evidence, including the attendance of any witnesses in my favor; (d) the right to have the assistance of a lawyer at all stages of the proceedings and to have one appointed for me if necessary; and (e) also the right to take the witness stand at my sole option; and if I do not take the witness stand I understand the jury, at my request, will be told that this may not be held against me.

7. I also understand that by pleading guilty and admitting the truth of the charges against me, I am waiving all of the rights referred to in the above paragraph and the Court may impose the same punishment as if I had ple[]d not guilty, stood trial and been convicted. I know that if I plead guilty there will be no further trial of any kind, which means that by pleading guilty I waive my right to trial.

8. I understand that some of the charges filed against me in this case may have occurred in whole or in part in Florida Counties other than Orange. However, I wish to resolve, in Orange County, all the charges filed in case number CR 01-2309 and do affirmatively waive my right to venue in other counties where the crimes may have occurred.

9. I am 55 years of age. I have gone to school up to and including 5 y[ea]rs [of] college. I am not under the influence of any alcoholic beverage, drug or medicine at the time I sign this plea agreement. My physical and mental health is presently satisfactory.

10. No one has made any promise, assurance or guarantee to me that I would receive any consideration in exchange for pleading guilty other than as set out in this plea agreement.

11. I declare that no one has subjected me to any force, duress, threats, intimidation or pressure to compel or induce me to enter a plea of guilty.

12. I am entering this plea with the understanding that I may serve every day of the sentence I am agreeing to in this plea agreement. Although I may have received advice or opinions as to the potential for some type of early release, I hereby acknowledge under oath that I have not relied upon those opinions or that advice as an inducement to enter this plea.

13. I believe that my lawyer has done all that a competent attorney could to counsel and assist me. He has answered all my questions about this case to my satisfaction and I AM SATISFIED WITH THE ADVICE AND HELP HE HAS GIVEN ME.

14. I understand that if I am not a United States citizen, this criminal proceeding could cause me to be deported to the country of my origin.

15. I understand that if I fail to pay any fines or costs as ordered by the Court, there will be a lien placed against me.

16. I understand that I waive my right to appeal any rulings of the Court previously made in this case except as specifically stated herein.

17. I understand that I have the right to appeal the judgment and sentence of the Court within thirty (30) days from the date of sentence. I understand that any appeal must be in writing. I understand that if I wish to take an appeal and cannot afford an attorney to help in my appeal, the Court will appoint an attorney to represent me for that purpose.

18. I request the Court to accept my plea, knowing that upon it being accepted by the Court that nothing will remain to be done except for the Court to enter its judgment and sentence.

19. I offer my plea freely and voluntarily and of my own accord and with full understanding of all matters set forth in the Information and in this Petition, the Certificate of my lawyer and Plea Agreement which are contained herein.

20. Though I may have been assisted by my lawyer, I certify that the statement and representations herein above made are my own and have not been suggested directly or indirectly by him or anyone else, and that the decision to plead guilty was made by me. I further represent that my attorney has advised me of considerations bearing on the choice of which plea to enter and the pros and cons of such plea, the likely results

thereof as well as any possible alternative which may be open to me. I represent to the Court that the plea bargain attached hereto was negotiated by my attorney with my full and complete consent thereto and that the decision to plead guilty was made by me. I fully concur in the efforts of my attorney and agree to the terms of the bargained plea.

4. The Plea Agreement between Respondent and the prosecutor (which was referenced in Respondent's Petition to Enter Plea of Guilty) read as follows:

The Defendant, and the State, pursuant to the provisions of Fla. R. Crim. P. 3.171, agree and stipulate to recommend to the Court the following resolution of the above-styled case:

1. Defendant agrees to plead guilty as charged to Count 2 - Sale of Unregistered Security and Count 3 - Sale of Security by Unregistered Agent.
2. The State will stand silent as to the issue of adjudication.
3. The Defendant shall be sentenced to five (5) years of supervised probation with all standard conditions, as well as the following special conditions:
 - a) The Defendant shall testify truthfully when requested by the State, without the necessity of subpoena, in reference to any and all matters related to the facts and circumstances surrounding the Defendant's charges in this case.
 - b) The Defendant shall pay restitution in an amount to be determined. The Defendant agrees the amount of restitution owed is not limited to the transactions to which he is entering this plea.

c) Defendant shall pay court costs as directed by the Court.

d) Defendant shall be required to pay \$3,5000.00 for costs of prosecution to the Office of Statewide Prosecution, Department of Legal Affairs for the State of Florida.

e) The Defendant shall pay \$500.00 to the Florida Department of Law Enforcement and \$500.00 to the Office of Comptroller, Department of Banking and Finance for costs of investigation involved in this case.

f) The Defendant shall have no contact, directly or indirectly, with any of the witnesses in this case.

[4]. If the Defendant violates any law while awaiting sentencing or if he fails to appear for sentencing as ordered by the Court, the State shall not be bound by this agreement and may recommend any lawful sentence and the Court may impose any sentence permissible under the law. The Defendant shall not be entitled to withdraw his plea of guilty in this case.

[5]. The State agrees to nolle prosequi Count 4 - Sale of Unregistered Security, Count 5 - Sale of Security by Unregistered Agent, Count 6 - Sale of Unregistered Security, and Count 7 - Sale of Security by Unregistered Agent.

[6]. If the sentence agreed upon in this plea agreement is a departure from the sentencing guidelines, both the State of Florida and the Defendant agree not to appeal this sentence.

[7]. Should the Defendant violate his community control or probation, he affirmatively agrees that he shall be sentenced pursuant to the sentencing guidelines.

[8]. The Defendant affirmatively agrees not to request that the Court impose a sentence lower than the sentence outlined above.

[9]. Both the State and the Defendant understand that the trial judge has the ultimate responsibility for the sentence the defendant actually receives and that the recommendations made above are not binding on the trial judge unless adopted thereby. The Defendant shall not be entitled to withdraw his pleas of guilty in the event that the trial judge imposes a sentence different from that recommended above.

5. On February 20, 2002, after Respondent entered his guilty pleas in Orange County Circuit Court Case No. CR-01-2309/B to Count 2 (alleging the "Sale of Unregistered Security," in violation of Section 517.07, Florida Statutes) and Count 3 (alleging the "Sale of Security by Unregistered Agent," in violation of Section 517.12(1), Florida Statutes), the court accepted the pleas, withheld adjudication, and placed Respondent on two concurrent five-year terms of probation, with the special condition that he "serve 1 Day[] in the Orange County Jail, with 1 Day[]'s credit for time served." Other special conditions, including those described in the Plea Agreement set out above, were also imposed.²

6. Respondent failed to notify Petitioner in writing within 30 days after entering his guilty pleas in Orange County Circuit Court Case No. CR-01-2309/B that he had entered the pleas.

7. Respondent has previously been disciplined by Petitioner's predecessor, the Department of Insurance (DOI).

8. By Consent Order issued November 1, 2000, in DOI Case No. 31036-00-AG, Respondent was suspended for a period of three months. The Consent Order approved the parties' Settlement Stipulation for Consent Order, which provided, in pertinent part, as follows:

* * *

3. The Department has caused to be made an investigation of the Respondent and other individuals involved in the marketing and promotion of Legends Sports, Inc. As a result of that investigation, the Department alleges that the Respondent induced individuals to invest in Legends Sports, Inc. and represented that the investment was guaranteed by a surety insurer. However, the investment was not a good investment, the purported surety insurer did not exist or was not authorized to conduct business in this state, and the investment resulted in substantial losses to individual investors.

4. The investigation resulted in a multi-count criminal information (hereinafter referred to as the "criminal actions") being filed against Respondent and other Legends Sports agents in the Seminole County Circuit Court in Sanford, Florida, Case No. 98-4569CFW. Specifically, Respondent was charged with the following felonies: sale of unregistered securities, sale of securities by an unregistered dealer and unlawful transaction of insurance. Respondent has entered or will enter a plea of guilty to lesser included charges which are first degree misdemeanors.

5. As a result of the plea, the Court in the criminal action, among other things, placed the Respondent on probation. As a condition of probation, the Court ordered the Respondent to pay restitution to the individuals who invested in Legends Sports through the Respondent and suffered financial losses as a direct consequence of such investments. The restitution amount represents the commissions received by the Respondent (hereinafter referred to as the "restitution order in the criminal action"). The Court in the criminal action also ordered that a criminal restitution judgment, that is not dischargeable in bankruptcy, be entered for the full amount of the promissory notes sold by the Respondent, unless a judgment has already been entered in that amount in favor of the Receiver for Legends Sports.

6. Respondent denies knowingly misrepresenting the Legends Sports investment.

* * *

13. This Settlement Stipulation for Consent Order is subject to the approval of the Insurance Commissioner. Upon his approval, and without further notice, the Insurance Commissioner may issue a Consent Order providing for the following:

(a) Incorporation by reference of the terms and conditions of this Settlement Stipulation For Consent Order.

(b) Respondent's licensure and eligibility for licensure as an insurance agent within the state are SUSPENDED for a period of three (3) months pursuant to section 626.641(1), Florida Statutes. The suspension shall take effect on 11/1/2000.

* * *

9. Approximately a year earlier, by Consent Order issued July 12, 1999, in DOI Case No. 99-CE58350, Respondent was fined \$250.00 for failure to comply with continuing education requirements.

10. Respondent's health has deteriorated in recent years. He has "been in the hospital several times with . . . heart [problems]."

CONCLUSIONS OF LAW

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

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

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

14. Among its duties is to license and discipline insurance agents.

15. Petitioner is authorized to suspend or revoke agents' licenses, pursuant to Section 626.611 and Section 626.621, Florida Statutes; to impose fines of up to \$500.00 or, in cases where there are "willful violation[s] or willful misconduct," up to \$3,500, pursuant to Section 626.681, Florida Statutes; to place licensees on probation for up to two years, pursuant to

Section 626.691, Florida Statutes³; and to order licensees to pay restitution, pursuant to Section 626.692, Florida Statutes.

16. 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.

17. 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.

18. 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.

19. 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").

20. 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).

21. 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 an

agency from taking penal 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); Hamilton v. Department of Business and Professional Regulation, 764 So. 2d 778 (Fla. 1st DCA 2000); Luskin v. Agency for Health Care Administration, 731 So. 2d 67, 69 (Fla. 4th DCA 1999); 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).

22. The charging instrument in the instant case, the Amended Administrative Complaint, as modified at hearing, alleges two violations each of Sections 626.611(7) and 626.621(8), Florida Statutes, one based on Respondent's having pled guilty in Orange County Circuit Court Case No. CR-01-2309/B to having violated Section 517.07, Florida Statutes (Count I of the Amended Administrative Complaint) and the other based on his having pled guilty in that same criminal case to having violated Section 517.12(1), Florida Statutes (Count II of the Amended Administrative Complaint). The Amended Administrative Complaint, as modified at hearing, further alleges that Respondent violated Section 626.621(11), Florida Statutes, by

not having timely informed Petitioner of the entry of these pleas (Count III of the Amended Administrative Complaint).

23. Section 626.611(7), Florida Statutes, provides 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.

* * *

24. Section 626.621(8) and (11), 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:

* * *

(8) 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.

* * *

(11) Failure to inform the department in writing within 30 days after pleading guilty or nolo contendere to, or being convicted or found guilty of, any felony or a crime punishable by imprisonment of 1 year or more under the law of the United States 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 the case.

25. It is undisputed, and the record evidence clearly and convincingly establishes, that, as alleged in the Amended Administrative Complaint, on February 20, 2002, in Orange County Circuit Court Case No. CR 01-2309, Respondent pled guilty to one count of having violated Section 517.07, Florida Statutes, and one count of having violated Section 517.12(1), Florida Statutes.

26. Section 517.07, Florida Statutes, provides as follows:

(1) It is unlawful and a violation of this chapter for any person to sell or offer to sell a security within this state unless the security is exempt under s. 517.051, is sold in a transaction exempt under s. 517.061, is

a federal covered security, or is registered pursuant to this chapter.

(2) No securities that are required to be registered under this chapter shall be sold or offered for sale within this state unless such securities have been registered pursuant to this chapter and unless prior to each sale the purchaser is furnished with a prospectus meeting the requirements of rules adopted by the commission.

(3) The office shall issue a permit when registration has been granted by the office. A permit to sell securities is effective for 1 year from the date it was granted. Registration of securities shall be deemed to include the registration of rights to subscribe to such securities if the application under s. 517.081 or s. 17.082 for registration of such securities includes a statement that such rights are to be issued.

(4) A record of the registration of securities shall be kept by the office, in which register of securities shall also be recorded any orders entered by the office with respect to such securities. Such register, and all information with respect to the securities registered therein, shall be open to public inspection.

(5) Notwithstanding any other provision of this section, offers of securities required to be registered by this section may be made in this state before the registration of such securities if the offers are made in conformity with rules adopted by the commission.

27. Section 517.12(1), Florida Statutes, provides as follows:

(1) No dealer, associated person, or issuer of securities shall sell or offer for sale

any securities in or from offices in this state, or sell securities to persons in this state from offices outside this state, by mail or otherwise, unless the person has been registered with the office pursuant to the provisions of this section. The office shall not register any person as an associated person of a dealer unless the dealer with which the applicant seeks registration is lawfully registered with the office pursuant to this chapter.

28. "Neither Section 517.07(1) nor Section 517.12(1), Florida Statutes, requires guilty knowledge or 'scienter' associated with securities fraud cases." Department of Banking and Finance v. Denton, Case No. 02-1284, 2002 WL 31668868 *6 (Fla. DOAH November 20, 2002)(Recommended Order); see also State v. Houghtaling, 181 So. 2d 636 (Fla. 1966); Huff v. State, 646 So. 2d 742, 743 (Fla. 2d DCA 1994); Santacroce v. Department of Banking and Finance, Division of Securities and Investor Protection, 608 So. 2d 134, 136 (Fla. 4th DCA 1992); and Jones v. Childers, 18 F.3d 899, 902 n.3 (11th Cir. 1994). They thus are not crimes involving moral turpitude. See In re Davis, 47 B.R. 599, 601-602 (Bankr. S.D. Fla. 1985).

29. Nonetheless, pursuant to Section 517.302, Florida Statutes, violations of Section 517.07 and Section 517.12(1), Florida Statutes, are third degree felonies.

30. Therefore, by pleading guilty to having committed these crimes, Respondent violated Section 626.621(8), Florida Statutes, as alleged in Counts I and II of the Amended

Administrative Complaint; however, his entry of these pleas does not clearly and convincingly establish a "lack of fitness or trustworthiness to engage in the business of insurance" on his part, in violation of Section 626.611(7), Florida Statutes, given that these crimes were securities violations not "requir[ing] guilty knowledge or 'scienter' associated with securities fraud cases."

31. The violation of Section 626.621(11), Florida Statutes, alleged in Count III of the Amended Administrative Complaint was established by the presentation of clear and convincing evidence of Respondent's failure to notify Petitioner in writing within 30 days that he had he had entered the aforementioned guilty pleas in Orange County Circuit Court Case No. CR-01-2309/B.

32. To determine what disciplinary action should be taken against Respondent for his two violations of Section 626.621(8), Florida Statutes, and his violation of Section 626.621(11), 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 Petitioner'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).

33. Florida Administrative Code Rule 69B-231.040 explains how Petitioner goes about "[c]alculating [a] penalty" in a disciplinary proceeding. 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.

34. Florida Administrative Code Rule 69B-231.090 is entitled, "Penalties for Violation of Section 626.621." It provides, in pertinent part, as follows:

If it is found that the licensee has violated any of the following subsections of Section 626.621, F.S., for which suspension or revocation is discretionary, the following stated penalty shall apply:

* * *

(8) Section 626.621(8), F.S. -- see Rule 69B-231.150, F.A.C.

* * *

(11) Section 626.621(11) -- suspension 3 months.

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

(1) If it is found that a licensee has violated . . . Section 626.621(8) . . . , the following stated penalty shall apply:

* * *

(d) If the licensee is not convicted of, but has been found guilty of or has pleaded guilty or nolo contendere to, a felony or a crime punishable by imprisonment of 1 year or more under the laws of the United States of America or of any state thereof or under the law of any other country, which does not involve moral turpitude and is not a crime involving breach of trust or dishonesty, the penalties are as follows:

* * *

3. If the conduct is not related to insurance license, the penalty shall be a 3 month suspension.

* * *

36. In view of the foregoing provisions of Florida Administrative Code Rules 69B-231.090 and 69B-231.150,⁴ the "penalty per count" for each of the three remaining counts of the Amended Administrative Complaint (Counts I through III) is a three-month suspension and the "total penalty" for all three counts is a nine-month suspension.

37. The "aggravating/mitigating factors" that must be considered to determine whether any "adjust[ment]" should be made to this "total penalty" are set forth in Florida Administrative Code Rule 69B-231.160, which provides 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.

(1) For penalties other than those assessed under Rule 69B-231.150, F.A.C.:

- (a) Willfulness of licensee's conduct;
- (b) Degree of actual injury to victim;
- (c) Degree of potential injury to victim;
- (d) Age or capacity of victim;
- (e) Timely restitution;
- (f) Motivation of agent;
- (g) Financial gain or loss to agent;
- (h) Cooperation with the Department;
- (i) Vicarious or personal responsibility;
- (j) Related criminal charge; disposition;
- (k) Existence of secondary violations in counts;
- (l) Previous disciplinary orders or prior warning by the Department; and
- (m) Other relevant factors.

(2) For penalties assessed under Rule 69B-231.150, F.A.C., for violations of Sections 626.611(14) and 626.621(8), 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.

38. Examining the evidentiary record in the instant case in light of these "aggravating/mitigating factors," it does not appear, from the sparse evidence addressing these factors, that either aggravating or mitigating factors preponderate and that either an increase or a decrease of the "total penalty" is warranted.⁵

39. Accordingly, the "final penalty" that Petitioner should impose in the instant case is a nine-month suspension 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 finding Respondent guilty of twice violating Section 626.621(8), Florida Statutes, as alleged in Counts I and II of the Amended Administrative Complaint, and of violating Section 626.621(11), Florida Statutes, as alleged in Count III of the Amended Administrative Complaint, and suspending his licenses for nine months for having committed these violations.

DONE AND ENTERED this 7th day of December, 2004, in Tallahassee, Leon County, Florida.



STUART M. LERNER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of December, 2004.

ENDNOTES

¹ Neither Respondent's counsel, nor the trial court, was required to make Respondent aware of any of the possible collateral consequences of his plea, such as the suspension or revocation of his insurance licenses. See Major v. State, 814 So. 2d 424, 426 (Fla. 2002); and Kratt v. Garvey, 342 F.3d 475, 485 (6th Cir. 2003).

² One of these other special conditions of probation required Respondent to pay "victim restitution" in an amount to be determined at a subsequent time. The evidentiary record is silent as to how much "victim restitution," if any, Respondent was ultimately ordered to pay. (Nor, for that matter, does it reveal what restitution payments, if any, Respondent has made.).

³ Petitioner may impose a fine or place a licensee on probation "in lieu of" suspension or revocation of the licensee's license "except on a second offense or when . . . suspension [or] revocation . . . is mandatory."

⁴ In its Proposed Recommended Order, Petitioner contends that Florida Administrative Code Rule 69B-231.150(1)(c)3, which provides as follows, not Florida Administrative Code Rule 69B-231.150(1)(d)3, establishes the "stated penalty" for each of Respondent's violations of Section 626.621(8), Florida Statutes:

If the licensee is not convicted of, but has been found guilty of or has 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 or is a crime involving breach of trust or dishonesty, the penalties are as follows:

If the conduct is not related to insurance license, the penalty shall be a 6 month suspension.

The argument has been rejected because it is based on the erroneous premise that the crimes to which Respondent pled guilty "involve[] moral turpitude or are "crime[s] involving breach of trust or dishonesty."

⁵ In coming to this conclusion, the undersigned has not overlooked the argument Petitioner makes in its Proposed Recommended Order in support of its position that "the appropriate final penalty [in this case] is revocation of Respondent's licensure and eligibility for licensure." The undersigned recognizes, as Petitioner points out in its Proposed Recommended Order: that "only some two and half years have passed since Respondent's pleas of guilty to third degree

felonies" (although the undersigned would also note that it is unclear exactly how long it has been since the actual commission of these felonies); that it appears that these felonies were not the product of "youthful exuberance"; that "Respondent was ordered to serve jail time" (but the undersigned would further observe that it was for only one day, the same amount of time-served credit the court granted Respondent); that "Respondent was placed on five years probation beginning February 20, 2002, and therefore, would still be on probation" (assuming he has not been granted early termination, an issue to which the evidentiary record does not speak); that Respondent was "ordered to make victim restitution" (in an amount, the undersigned would add, not established by the evidentiary record); and that "Petitioner previously suspended Respondent's licensure and eligibility for licensure as a Florida insurance agent for a period of three months . . . based on Respondent's pleas of guilty to first-degree misdemeanors in Case No. 98-4569CFW in the Seminole County Circuit Court" (however, the undersigned would further point out that the evidentiary record does not establish that this suspension occurred prior to the commission of the felonies giving rise to the guilty pleas at issue in the instant case). These circumstances upon which Petitioner relies, in the undersigned's view, when considered in their proper context, do not tip the balance in favor of the imposition of a "final penalty" more severe than the "total penalty."

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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.