REPRESENTING
ALEX SINK
CHIEF FINANCIAL OFFICER
STATE OF FLORIDA

IN THE MATTER OF:

Docketed by:

VINCENT ROBERT FUGETT, SR.
_____/

Case No. 83756-05-AG

DOAH Case #05-4037

FINAL ORDER

THIS CAUSE came on for consideration of and final agency action. On September 22, 2005, a Notice of Denial was issued by the Department of Financial Services denying the license application of the Petitioner, Vincent Robert Fugett, Sr., for licensure as a resident life, including variable annuity and health agent because of his criminal history.

The Petitioner timely filed a request for a formal hearing in accordance with Section 120.57(1), Florida Statutes. Pursuant to notice, the matter was heard before Daniel Manry, Administrative Law Judge (ALJ), Division of Administrative Hearing, on April 25, 2006. A Recommended Order was issued on June 8, 2006. Subsequently an Amended Recommended Order (ARO) was issued on June 22, 2006. Respondent, on or about July 10, 2006, filed a Petition for Writ of Certiorari to Review Non-Final Action by an Administrative Law Judge with the First District Court of Appeal dated July 10, 2006, which stayed the issuance of the Final Order.

On December 27, 2006, the Court quashed the Recommended Order and apparently also quashed the Amended Recommended Order, and remanded the case to the ALJ for further proceedings consistent with the Court's Order. The Order of the First District Court of Appeal is

attached as Exhibit A. The Order limited the remand proceeding to evidence concerning the default licensing provision in Section 120.60(1), Florida Statutes. The hearing on remand was held on April 25, 2007, in St. Petersburg, Florida. The Respondent timely filed a Proposed Recommended Order in both hearings.

After consideration of the record and argument presented at both hearings, the Administrative Law Judge issued a Recommended Order on Remand (ROR) in which the ALJ incorporated all of the Findings of Fact and Conclusions of Law in the Amended Recommended Order except for those that pertained to the interpretation of the default license provision in Section 120.60(1), Florida Statutes. Those findings and conclusions relative to the default license provision were modified as set forth in the Recommended Order on Remand. Both the Recommended Order on Remand and the Amended Recommended Order are attached as Composite Exhibit B.

On July 13, 2007, the Respondent filed a motion to extend the time for filing exceptions. After consideration of the motion, an Order was issued granting the motion and extending the time for filing exceptions by ten days; thus permitting the Exceptions to be filed on or before July 26, 2007. Additionally, the Order waived the time period for issuing the Final Order by ten days. The Respondent's exceptions to the Recommended Order were filed on July 26, 2007. These exceptions have been considered and are herein addressed.

Although the First District Court of Appeal quashed the Recommended Order and arguably the Amended Recommended Order, the Court apparently did not quash the Recommended Order in its entirety, as it appears that the Court only directed the ALJ to allow evidence to be presented relative to whether the Petitioner has a default license pursuant to Section 120.60(1), Florida Statutes, based upon the ALJ's *sua sponte* recommendation that the

Petitioner receive a default license. The basis of the First District Court's Order was that the ALJ had not permitted the parties due process of law regarding this issue. Thus, the hearing on remand and the Recommended Order on Remand only addresses the issue of whether the Petitioner is entitled to a default license by operation of law pursuant to Section 120.60(1), Florida Statutes. The ROR does not address the issue for which these proceedings were initiated, which is whether the Respondent properly denied the Petitioner's application for licensure. Further, the Court's Order does not speak to this issue. Accordingly, the central issue of this matter remains for resolution in this Final Order, and, further, since the ALJ incorporates Findings of Fact and Conclusions of Law relative to this central issue in his ROR, those findings and conclusions must also be addressed and resolved.

RULING ON RESPONDENT'S EXCEPTIONS

1. Respondent excepts to the ALJ's Finding of Fact #7 in the ARO maintaining that the applicable duly-adopted waiting period is irrelevant to the denial of licensure. Further, the Respondent contends that Rule 69B-211.042(9)(a), Florida Administrative Code, is only applicable to an applicant whose law enforcement record contains multiple felonies, and the waiting period is a result of the applicant's law enforcement record that operates subsequent to the denial of the application for licensure.

Section 626.207(1), Florida Statutes provides that the Department shall adopt rules establishing specific waiting periods for applicants to become eligible for licensure following denial of license of licensure in accordance with Sections 626.611 or 626.621, Florida Statutes. See Section 626.207, Florida Statutes. As prescribed by Section 626.207, Florida Statutes, the Department established Part IV of Rule Chapter 69B-211, Florida Administrative Code, which sets forth provisions applicable to waiting periods. Thus, the waiting period is not a basis for

denial. As provided by statute, the waiting period is applied subsequent to denial. However, it is apparent that the Respondent's notice of denial was merely intended to inform the applicant of the specific rule and the applicable waiting period based on the crimes committed by the applicant which formed the factual basis for the denial. Accordingly, the Respondent's exception is ACCEPTED and the Finding of Fact is modified as specified herein.

2. The Respondent next excepts to Conclusion of Law #23 of the ARO, which states that the Petitioner satisfied his burden of proof (concerning the second part of the grounds for denial), as the Petitioner showed by a preponderance of the evidence that he does not lack one of more of the qualifications for licensure and that he had not failed to demonstrate the necessary fitness and trustworthiness to engage in the business of insurance. The Respondent asserts that the ALJ failed to state with particularity the evidentiary basis for the aforementioned conclusion of law, and given the Petitioner's felony record, and the fact that the Respondent has broad discretion in interpreting statutes it is charged with enforcing in determining the fitness of applicants in licensing actions, the Respondent's determination that the Petitioner lacked fitness and trustworthiness is appropriate given the factual circumstances.

Section 626.611(7), Florida Statutes, provides that the Department shall deny an application for licensure if the applicant lacks fitness and trustworthiness. The courts have determined that a criminal plea is sufficient to demonstrate that an agent is unfit and untrustworthy. Cf. McNair v. Criminal Justice Standards and Training Commission, 518 So. 2d 390 (Fla. 1st DCA 1987) (where a plea of nolo contendere to an offense is itself a violation of the licensing statute, the agency is not required to give the licensee an opportunity to explain the circumstances surrounding the plea or demonstrate that he or she is not guilty of the offense). In Natelson v. Department of Insurance, 454 So. 2d 31, 32 (Fla. 1st DCA 1984), the Department

entered a Final Order determining that Natelson was unfit and trustworthy to hold an insurance license due to his guilty plea to Conspiracy to Distribute and Possess with Intent to Distribute Cannabis. The Court held that the Department could interpret a lack of fitness and trustworthiness to include a plea and conviction of criminal conspiracy. See Natelson, 454 So.2d at 32; see also Paisley v. Department of Insurance, 526 So. 2d 167, 169 (Fla 1st DCA 1988)(holding that a conviction of a crime, even if not a felony or a crime of moral turpitude, is within the meaning of "lack of fitness or trustworthiness" and can support a license revocation). Thus, these cited cases establish that a criminal plea can be the basis for a determination that an agent is unfit and untrustworthy to hold a license.

It is well settled that the Respondent has broad discretion in determining the fitness of applicants, particularly where the occupation is one potentially injurious to the public welfare. Agencies must use their discretion to make a determination of fitness. This discretion is particularly broad where the applicant seeks to engage in an occupation that is a privilege rather than a right. Once an agency has exercised its discretion to determine fitness, courts utilize a standard of reasonableness to review the agency's decision. See Astral Liquors, Inc. v. State of Fla. Dept. of Business and Regulation, 432 So. 2d 93 (Fla. 1st DCA 1985) and Dept of Business and Regulation v. Jones, 474 So. 2d 359 (Fla. 1st DCA 1985). Here, the situation involves a question of fitness of an applicant which necessitates the exercise of discretion by an agency. This discretion is justifiably broad as the granting of an insurance license is considered a privilege and the practice of insurance is undeniably potentially injurious to the public welfare. See Astral, 432 So. 2d at 95-96 and Jones, 474 So. 2d at 361-362. As a result, an applicant's felony record can be the basis for a determination that the applicant is unfit to engage in the business of insurance. The instant record is undisputed that the Petitioner pled guilty to two

felonies, possession of cocaine and criminal mischief. Moreover, the ALJ did not explain in his findings of fact the basis for his determination that the Petitioner does not lack fitness and trustworthiness and upon what evidence he relied. Nonetheless, the record is clear that the Petitioner pled guilty to felony crimes. Thus, in accordance with Section 626.621(8), Florida Statutes, the Department has the discretion to deny an application of licensure based on those pleas. Furthermore, the Department is afforded the discretion in determining that a criminal plea demonstrates a lack of fitness and trustworthiness. Accordingly, the Department has made that determination and has promulgated rules that address an applicant's felony record, and impose timeframes which must be met before which an applicant may reapply for licensure. This classification is determined by the class or classes of the crime (if there are multiple crimes) that were committed as specified in Rule 69B-211.041, Florida Administrative Code.

The Department has properly concluded that the Petitioner's criminal history demonstrates his lack of fitness and trustworthiness which is violative of Section 626.611(7), Florida Statutes. The ALJ's conclusion that the Petitioner's lack of fitness and trustworthiness had not been demonstrated is not supported by competent substantial evidence. Since the Department has broad discretion in interpreting its statutes and the legal conclusion that the Petitioner lacks fitness and trustworthiness based on his criminal history is as or more reasonable then the ALJ's conclusion, the application for licensure must be denied. Thus, Respondent's Exception is ACCEPTED and the ALJ's Conclusion of Law is REJECTED.

3. The Respondent next excepts to Conclusion of Law #29 of the ARO as the ALJ states that Section 626.621(8), Florida Statutes, authorizes Respondent to deny Petitioner's license application if Petitioner pled guilty to a felony involving moral turpitude.

The ALJ incorrectly referenced in that Conclusion of Law that Section 626.621(8), Florida Statutes, pertains to a felony involving moral turpitude. However, the ALJ does rectify this error in his endnote as he correctly states that this provision relates to a felony that does not involve moral turpitude. Nonetheless, the statement in the Conclusion of Law #29 is erroneous. Accordingly, Respondent's Exception is ACCEPTED and the ALJ's Conclusion of Law is appropriately modified as set forth herein.

4. The Respondent further excepts to Conclusions of Law #31, 35, 36, 37 and 40 of the ALJ's ARO which address the issue as to whether the criminal offenses committed by Petitioner are felonies. The Respondent asserts that the Petitioner's felony record is undisputed and that any discussion or analysis of whether Petitioner's felonies were, in fact, felonies is not germane or dispositive to the outcome of this case.

The ALJ did erroneously state in his ARO that there is an issue as to whether either of the criminal offenses constitutes a felony. That position is without merit as the Department has promulgated Rule 69B-211.041(5), F.A.C. which fully delineates the term "felony" and specifically provides that it means, among other definitions, a crime designated as a "felony" by statute in the state of prosecution. The evidence irrefutably establishes that the Petitioner pled guilty to a felony, criminal mischief, under Section 806.13(1)(b)(3), Florida Statutes, and that the Petitioner pled guilty to a felony, possession of cocaine, under Sections 893.03(2)(a)4 and 893.13(1)(e), Florida Statutes (1986). As a result, any further discussion regarding: whether the Petitioner's crime is a felony under Chapter 775, Florida Statutes, the statutory sentencing guidelines that relate to such crimes, and the meaning of the terms "felony," "punishable," and "punishable under the laws of this state" are not relevant. Furthermore, the ALJ's analysis is contrary to the provision of Rule Chapter 69B-211, F.A.C. which specifically defines the term

"felony" and explains how an applicant's criminal history relates to his application for licensure. As the Department's interpretation of Rule 69B-211.041(5), F.A.C. is as or more reasonable then the ALJ's analysis set forth in Conclusions of Law #31-41; all of the conclusions, for the reasons and to the extent delineated above are hereby REJECTED and accordingly, the Respondent's Fourth, Fifth, Sixth, Seventh and Eighth Exceptions are ACCEPTED to the extent as modified herein.

5. The Respondent next excepts to Conclusions of Law #19-24 in the ROR, which pertain to subsection 120.60(1), Florida Statutes. The Respondent excepts to the proposition that the Legislature is the legal authority that approves a default license.

However, it appears that the ALJ is primarily restating the statutory provision relative to default licensure as provided in Section 120.60(1), Florida Statutes and analyzing the Legislature's and the agency's roles as contemplated in this particular subsection and in substantive case law. Moreover, the argument as to who is the legal authority that approves a default license is irrelevant, as the license, subject to satisfactory completion of an examination, is approved as an operation of law, subject to satisfactory completion of a examination if required as a prerequisite to licensure. Accordingly, the Respondent's Exceptions #9-14 are REJECTED and the ALJ's Conclusions of Law are ACCEPTED as modified to the extent discussed herein.

6. The Respondent also excepts to Conclusion of Law #26 in the ROR in which the ALJ concludes that the administrative hearing did not provide the agency with an adequate opportunity to reveal in the record through conventional proof methods the evidential "predicate" and "decisional referents" for agency inaction during the statutory time limit. The Respondent asserts that the original administrative proceeding did in fact provide the Department with an

opportunity to reveal in the record the evidential predicate, as Exhibit 1 admitted in the original administrative hearing enumerates ten deficiencies in the Petitioner's license application. Thus, the Respondent further asserts that pursuant to Rule 69B-211.0035, F.A.C, if an application is deficient then it is not considered an application as contemplated by Section 120.60(1) and is thereby considered an incomplete application. As a result, the ninety day period for approval or disapproval of the application for licensure is tolled, until all deficient information is received, thereby rendering the application complete.

Although it is true that the Respondent provided evidence at the hearing that would have established that the application was initially deficient and therefore, not a complete application, the Respondent was not given the opportunity to explain the actual effect of the deficiencies relative to the application for licensure. Further, the Respondent was not afforded the opportunity to assert its argument regarding the issue of whether the application was properly denied within the 90 day period for approving or disapproving an application for licensure, and whether the Petitioner was entitled to a default license in accordance with Section 120.60(1), Florida Statutes. Accordingly, the Respondent's Exception is REJECTED and the ALJ's Conclusion of Law is ACCEPTED as clarified herein.

7. The Respondent lastly excepts to Conclusion of Law #31 of the ROR asserting that the facts in the Krakow v. Department of Professional Regulation, Board of Chiropractic, 586 So. 2d 1271, 1272 (Fla. 1st DCA 1991) are distinguishable from the instant case. The Respondent is correct that the facts in that case are materially different from the facts in this case. However, in his conclusion of law, the ALJ is merely quoting certain sections of the Krakow case as it relates to the default licensure provision as provided in Section 120.60(1), Florida Statutes. Thus, this exception is REJECTED.

8. Although the Respondent does not specifically except to Conclusion of Law #28 of the ARO, it must be REJECTED for the following reasons. In this Conclusion of Law, the ALJ asserts that even if the statutory waiting periods were to operate as grounds to deny the application, the waiting periods would not apply to the first offense, as it occurred approximately twenty (20) years before the date of application and preceded the effective date of the statute authorizing rules prescribing waiting periods. This assertion is erroneous, as the date of the notice of the denial, not the date of the criminal offense, determines the applicability of the relevant statutory and rule provisions. See Bruner v. Bd. of Real Estate, Dept of Professional Regulation, 399 So. 2d 4 (Fla. 5th DCA 1981) (holding that a denial of licensure must be based on the statute in effect at the time of the agency's decision). See also Jason v. Miami, 278 So. 2d 311 (Fla. 3rd DCA 1973) (holding that the law as it stands at the time of a decree, rather than at the time of application for licensure controls the decision). Since Section 626.207, Florida Statutes (the statutory provision authorizing waiting periods) and Rule 69-211.040, et. seq., Florida Administrative Code (the applicable rule) were in effect at the time Respondent issued the Notice of Denial, this law and rule are applicable to the present case.

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

The Findings of Fact of the Administrative Law Judge's ARO and ROR are adopted as the Department's Findings of Facts with the following exceptions: Finding of Fact #7 of the ARO is rejected for the reasons set forth in the Rulings on Respondent's Exceptions.

The Conclusions of Law of the Administrative Law Judge's ARO and ROR are adopted as the Department's Conclusions of Law with the following exceptions: Conclusions of Law #23, 24, 29, 31-34 of the ARO are rejected for the reasons set forth in the Rulings on

Respondent's Exceptions; Conclusions of Law #19-24, and 26 of the ROR are accepted as modified herein.

Since the Administrative Law Judge's Conclusions of Law do not adequately address the specific statutory basis for the denial that is relevant to the Petitioner's application for licensure, and likewise fails to address the specific duly-adopted rule provisions which prescribe the waiting periods applicable in the instant case, the following Conclusions of Law must be substituted in the place of the Conclusions of Law rejected by the Department. These additional Conclusions of Law are as or more reasonable than the Conclusions of Law rejected by the Department. See Section 120.57(1)(l), Florida Statutes. The following substituted Conclusions of Law will be added after the last numbered Conclusion of Law of the ROR, which is numbered 33.

34. Section 626.621(8), Florida Statutes, states, in pertinent part, that " The department may, in its discretion, deny an application for, ... the license or appointment of any applicant ... if it finds that as to the applicant, . . . any one or more of the following applicable grounds exist under circumstances for which such denial, . . . 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 . . .

35. The Department has promulgated a rule providing guidelines and waiting periods for individuals with criminal histories, and for determining fitness and trustworthiness for licensure. Rule 69B-211.040, et seq., Florida Administrative Code (F.A.C.) became effective October 17, 2002, which was prior to the Notice of Denial issued by the Department and prior to

the final decision on the Petitioner's application. Therefore, this rule is applicable to the present case.

36. Rule 69B-211.042(3)(a), Florida Administrative Code, states:

> (3) Policy Specifically Concerning Effect of Criminal Records.
> (a) The Department interprets Sections 626.611(14) and 626.621(8), Florida Statutes, which subsections relate to criminal records, as applying to license application proceedings. The Department interprets those statutes as not limiting consideration of criminal records to those crimes of a business-related nature or committed in a business context. More specifically, it is the Department's interpretation that these statutes include crimes committed in a non-business setting, and that such crimes are not necessarily regarded as less serious in the license application context than are crimes related to business or committed in a business context.

37. Rule 69B-211.042(8), Florida Administrative Code, states:

> (8) The Department finds it necessary for an applicant whose law enforcement record includes a single felony crime to wait the time period specified below (subject to mitigating factors set forth elsewhere in the rule) before licensure. All waiting periods from the trigger date.
> (a) Class A Crime. The applicant will not be granted licensure until 15 years have passed since the trigger date.
> (b) Class B Crime. The applicant will not be granted licensure until 7 seven years have passed since the trigger date.
> (c) Class C Crime. The applicant will not be granted licensure until 5 years have passed since the trigger date.

38. Rule 69B-211.041(11), Florida Administrative Code, states:

> (11) "Trigger Date" is the date on which an applicant was found guilty, or pled guilty, or pled nolo contendere to a crime; or, where that date is not ascertainable, the date of the charges or indictment.

39. Rule 69B-211.042(9)(a), Florida Administrative Code, states:

> (9) Applicants With Multiple Crimes
> (a) The Department construes Sections 626.611 and 626.621, Florida Statutes, to require that an applicant whose law enforcement record includes multiple felony crimes wait longer than those whose law enforcement record includes only a single

> felony crime before becoming eligible for licensure in order to assure that such applicant's greater inability or unwillingness to abide by the law has been overcome. Therefore, the Department finds it necessary that a longer waiting period be utilized in such instances, before licensure can safely be granted. Accordingly, where the applicant has been found guilty or pled guilty or pled nolo contendere to more than one felony...the Department shall add 5 years to the waiting period for each additional felony. . . (b) The additional periods are added to the basic waiting period for the one most serious crime, and the combined total waiting period then runs from the trigger date of the most recent . . . felony crime.

40. The Petitioner pled guilty to two felonies. The most serious crime as provided in the rule is Criminal Mischief, which is classified as a Class B Crime. See Rule 69B-211.042(23), F.A.C. It requires a seven year waiting period. However, given the multiple felonies committed by the Petitioner, Rule 69B-211.042(9)(a), Florida Administrative Code directs the Department to add an additional five (5) years to the waiting period for the felony of Possession of Cocaine; resulting in a twelve (12) year waiting period to commence from the trigger date of January 13, 2005.

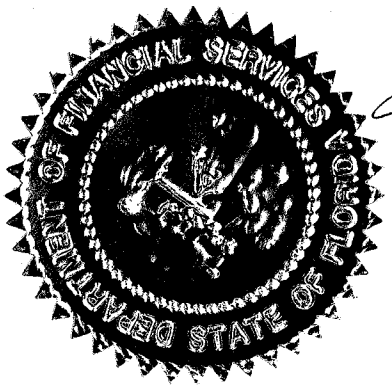
41. Although the Respondent, in the initial Proposed Recommended Order, recommends a deduction of only two (2) years to the waiting period based on mitigating factors, the Department has determined that, pursuant to Rule 69B-211.042(10)(a), F.A.C., the aggregate mitigation allowable and appropriate is four (4) years. At the initial hearing, Petitioner's character witness, Mr. Dillard, testified to Petitioner's credit worthiness and financial stability. Further, the restitution made by the Petitioner, and the character references admitted into evidence are additional evidence demonstrating mitigation. Based on the mitigating evidence presented at hearing, the Department concludes that the overall waiting period should be decreased by a total of (4) years based on the standards of Section 626.207, Florida Statutes, i.e.,

that the probability for the propensity to commit illegal conduct has been overcome. See Rule 69B-211.042(10)(a)(6), F.A.C.

The Administrative Law Judge's recommendation that the Respondent enter a final order concluding that Petitioner is not licensed to engage in the business of insurance pursuant to Subsection 120.60(1), Florida Statutes is an appropriate recommendation and is therefore ORDERED.

Furthermore, based on the Findings of Fact and the Conclusions of Law as adopted and modified herein, it is concluded that the Petitioner's application for licensure was properly denied in accordance with Sections 626.611(7), and 626.621(8), Florida Statutes. Therefore, it is ORDERED that the Petitioner's application for licensure be denied upon that separate statutory basis. Further, pursuant to Rule 69B-211.042, F.A.C. and considering the mitigation evidence presented, the Petitioner must wait eight (8) years before he may reapply for licensure, rendering the Petitioner ineligible for licensure until January 13, 2013.

DONE and ORDERED this 23rd day of August, 2007.



KAREN CHANDLER
Deputy Chief Financial Officer

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Attorney for Respondent

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D06-3486

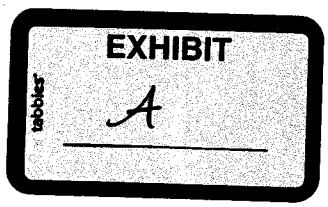
STATE OF FLORIDA,
DEPARTMENT OF FINANCIAL SERVICES,

Petitioner,

v.

VINCENT ROBERT FUGETT, SR.,

Respondent.
_____/



Opinion filed December 27, 2006.

Petition for Review -- Original Jurisdiction.

Angelique Knox, Counsel for the Department of Financial Services, Tallahassee.

Vincent Robert Fugett, Sr., pro se, Respondent.

PER CURIAM.

The Department of Financial Services (DFS) petitions this court for review of a non-final order entered by an administrative law judge (ALJ) of the Department of

Administrative Hearings, recommending that DFS enter a final order determining that Respondent's application to be licensed as an insurance agent "has been granted by operation of law" under the default provision of section 120.60(1), Florida Statutes. We have jurisdiction to review a non-final administrative order under section 120.68(1), Florida Statutes, and Florida Rule of Appellate Procedure 9.190(b)(2) when review of the final agency action would not provide an adequate remedy. We have stated that the scope of review in such a matter "is analogous to and no broader than the right of review by common law certiorari," see Charlotte County v. Gen. Dev. Utilities, Inc., 653 So. 2d 1081, 1084 (Fla. 1st DCA 1995).

We find that the ALJ, who *sua sponte* raised and decided the issue of default after the final hearing without giving the parties an opportunity to present evidence and/or argument, departed from the essential requirements of law by denying DFS due process, for which the remedy of appeal following the conclusion of the administrative proceedings will be inadequate. The challenged recommended order is therefore QUASHED, and the case is REMANDED to the ALJ for further proceedings consistent with this opinion.

ERVIN, BARFIELD, and POLSTON, JJ., CONCUR.