STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

VINCENT ROBERT FUGETT, SR.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 05-4037
	)	
DEPARTMENT OF FINANCIAL SERVICES,	)	
	)	
Respondent.	)	
_______________________________	)	

RECOMMENDED ORDER ON REMAND

Administrative Law Judge (ALJ) Daniel Manry conducted the hearing on remand of this proceeding on behalf of the Division of Administrative Hearings (DOAH), on April 25, 2007, in St. Petersburg, Florida.

APPEARANCES

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For Respondent: Angelique Knox, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Petitioner is licensed as a life insurance agent pursuant to a default license approved by operation of Subsection 120.60(1), Florida Statutes (2005).[1]

PRELIMINARY STATEMENT

The procedural history of this case is discussed in greater detail in the Findings of Fact. In summary, the First District Court of Appeal quashed the Amended Recommended Order entered in the original proceeding on June 22, 2006, and remanded the case to the ALJ for the purpose of giving the parties "an opportunity to present evidence and/or argument" concerning the "default license provision of Subsection 120.60(1)."

At the hearing on remand, Petitioner did not testify and did not submit any exhibits for admission into evidence. Respondent called one witness and submitted nine exhibits.

The identity of the witnesses and exhibits and related rulings are reported in the one-volume Transcript of the hearing filed on May 3, 2007. Respondent filed its Proposed Recommended Order (PRO) on May 15, 2007. Petitioner did not file a PRO.

FINDINGS OF FACT

1. The original proceeding began on May 2, 2005, when Petitioner filed an application with Respondent to be licensed as a "resident life including variable annuity personal lines insurance agent." Respondent issued a Notice of Denial on September 22, 2005, and Petitioner requested an administrative hearing pursuant to Subsection 120.57(1).

2. Respondent referred the matter to DOAH to conduct the hearing. The ALJ conducted the hearing on April 25, 2006, and

issued an Amended Recommended Order on June 22, 2006 (the Amended Recommended Order).

3. The Amended Recommended Order, in relevant part, concluded that the license application "is considered approved" pursuant to Subsection 120.60(1) because Respondent did not deny the application within 90 days of receiving it and did not establish a record predicate for agency inaction within the statutory time limit. The Amended Recommended Order concluded that a default license was approved by operation of the statute on August 1, 2005, approximately 91 days after the agency received the application.

4. Respondent filed a Petition for Writ of Certiorari to Review Non-Final Action By an Administrative Law Judge (Petition for Cert) with the First District Court of Appeal. The Petition for Cert is dated July 10, 2006.

5. On December 27, 2006, the court quashed the Amended Recommended Order and remanded the case to the ALJ for further proceedings consistent with the court's order. The order limits the remand proceeding to "evidence and/or argument" concerning the "default licensing provision of Subsection 120.60(1)." State of Florida, Department of Financial Services v. Vincent Robert Fugett, Sr., 946 So. 2d 80 (Fla. 1st DCA 2006).

6. The findings in this Recommended Order On Remand are limited to those pertaining to the default licensing provision

of Subsection 120.60(1). Except as modified herein, the Findings of Fact in the Amended Recommended Order are incorporated by reference.

7. Respondent received the initial license application on May 2, 2005, but the application was not complete until August 23, 2005. Respondent issued a written Notice of Denial of the application on September 22, 2005, within 90 days of receiving a complete application.

8. Respondent issued a written notice of deficiency when Respondent received the initial application on May 2, 2005. That notice of deficiency is identified in the record as an "automatic deficiency statement."

9. Petitioner submitted three separate supplements to the initial application. Respondent issued a timely, written deficiency notice concerning each supplement on May 18, July 25, and August 11, 2005.

10. A final supplement completed the application on August 23, 2005. Respondent denied the application by written Notice of Denial dated September 22, 2005, less than 90 days after receiving the completed application.

CONCLUSIONS OF LAW

11. The Conclusions of Law in the Amended Recommended Order are incorporated by this reference except as modified herein. Modifications are limited to those required to examine

the agency's argument concerning the proper interpretation of the default license provision in Subsection 120.60(1).

12. The examination of the agency's interpretation of Subsection 120.60(1) is not limited to a determination of the good faith of agency policy choices. The ALJ is charged with the additional duty of critiquing agency policy.[2]

13. The additional duty of an ALJ was recognized by the First District Court of Appeal more than 30 years ago in McDonald v. Department of Banking and Finance, 346 So. 2d 569, 581-583 (Fla. 1st DCA 1977). As the court explained:

> While the Florida APA . . . requires rulemaking for policy statements of general applicability (emphasis not supplied), it also recognizes the . . . desirability of refining incipient agency policy through adjudication of individual cases. . . .
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> * * *
>
> [The APA] recognizes there may be "officially stated agency policy" otherwise than in "an agency rule"; and, since all agency action tends under the APA to become either a rule or an order, such other "officially stated agency policy" is necessarily recorded in agency orders. . . .
>
> The APA's provision for agency policymaking by adjudication has significant effect on Section 120.57(1) proceedings, such as those before us now, in which a party's substantial interests are determined and there are disputed issues of material fact. Because the agency's final order in such proceedings must explicate nonrule policy, the . . . recommended order must do the same. . . .

It follows that both the agency's final order and the . . . recommended order must in all respects - in dealing with emerging agency policy as well as in finding the facts - have a predicate in the record . . . . (emphasis supplied)

* * *

"The exposure of an official's decisional referents to the critical scrutiny of others may disclose the inadequacy of those referents and create pressures to bring about their change. This type of constraint upon agency action will not tend to be limited - as is judicial review - to overseeing the good faith of agency policy choices. Rather, exposure of the agency's decisional referents to the critical scrutiny of others possesses a potential . . . for improving the degree of objective rationality of agency decisions." (citation omitted) (emphasis supplied)

* * *

Thus the APA infuses Section 120.57(1) proceedings with concern for agency policy as well as for facts and law. The [ALJ] . . . is . . . charged to record, recommend and critique agency policy as it is revealed in the record. . . . The [ALJ's] duty to respond to the evidence in that way cannot fail to promote responsible agency policymaking. . . . (emphasis supplied) The [ALJ's] function . . . encourages an agency to fully and skillfully expound its nonrule policies by conventional proof methods (emphasis supplied); and, in appropriate cases, subjects agency policymakers to the sobering realization their policies lack convincing wisdom, and requires them to cope with the [ALJ's] adverse commentary. Thus in Section 120.57(1) proceedings the [ALJ] does not merely find the facts and supply the law, as would a court. The [ALJ] "independently serves the public interest by

> providing a forum to expose, inform and challenge agency policy and discretion." [citations omitted] (emphasis supplied)

McDonald, 346 So. 2d at 581-583, n. 12 at 583.

14. In the original proceeding, the ALJ critiqued agency policy that the agency revealed in the record by conventional proof methods. That critique persuaded the agency that the ALJ favored the opposing party. The agency argued to the appellate court in the Petition for Cert that the ALJ became "Petitioner's advocate." However, an ALJ that critiques agency policy favors the performance of his or her duty rather than the party who benefits from the critique.

15. The duty to critique agency policy exists in any proceeding conducted pursuant to Subsection 120.57(1), including this proceeding. In this proceeding, the ALJ must examine the agency's construction of the default license provision in Subsection 120.60(1).

16. Subsection 120.60(1) does not define the term "license." A license can mean the "revocable permission" to engage in a trade or business. Black's Law Dictionary at 931 (West Pub. Co. 7th ed. 1999) (hereinafter, Black's). A license can also mean the "document evidencing" such permission. Black's at 931.

17. Under the first definition, an applicant is licensed when the applicant receives permission to engage in a trade or

business. Under the second definition, an applicant is not licensed until the appropriate legal authority issues a document evidencing such permission.

18. The term "permission" does not appear in Subsection 120.60(1), but the statutory term "license" is a synonym for permission. The American Heritage Dictionary of the English Language at 1309 (4th ed. Houghton Mifflin Company 2000) (hereinafter, American Heritage). Permission denotes "approval" for a course of action that is granted by a legal authority. American Heritage at 1309. The statutory term "approved" denotes official consent. American Heritage at 88. The "license that is considered approved" in Subsection 120.60(1) denotes consent, or permission, to act.

19. Subsection 120.60(1) appears to equate approval of an application with approval of the license. The statute provides in relevant part:

> Any application for a license that is not approved or denied within the 90-day . . . period is considered approved. . . . [A]ny license that is considered approved shall be issued. (emphasis supplied)

20. The passive voice of the sentence referring to the "license that is considered approved" does not disclose the identity of the legal authority that considers the license approved. Presumably, the legal authority that considers the

license approved is the author of the sentence, i.e., the Legislature.

21. If the Legislature is the legal authority that approves the default license by operation of the statute, the applicant is licensed to engage in a trade or business at the point in time when the Legislature approves the license. The agency is not the legal authority that must approve the license before the applicant can act in his or her trade or business. Rather, the agency is the legal authority that is statutorily required to issue a document evidencing legislative approval.

22. Before an applicant acts to engage in a trade or business based on a default license that the Legislature approves by operation of Subsection 120.60(1), the applicant must provide the agency with written notice of the applicant's impending action. In relevant part, Subsection 120.60(1) provides:

> Any applicant for licensure seeking to claim licensure by default under this subsection shall notify the agency clerk of the licensing agency, in writing, of the intent to rely upon the default license provision of this subsection and shall not take any action based upon the default license until after receipt of such notice by the agency clerk.

23. The statutory prohibition is not permanent. The prohibition lasts only until the agency clerk receives the requisite notice. Thereafter, no express statutory provision

prevents a default licensee from undertaking action to conduct his or her trade or business.

24. The statutorily required notice serves at least two functions. The notice informs an unaware agency of the need to comply with the statutory mandate to issue a document evidencing legislative approval for the applicant to engage in a trade or business. The notice also provides the agency with a point of entry to initiate a license revocation proceeding based on deficiencies disclosed in the application. In such a proceeding, however, the agency would bear the burden of proving the grounds for revocation by clear and convincing evidence. Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

25. The conclusions in the Amended Recommended Order that are modified herein were based on an erroneous interpretation. The error was not necessarily the statutory interpretation that an applicant has legislative approval to engage in a trade or business at the point in time when a default license "is considered approved" by the Legislature pursuant to the operation of Subsection 120.60(1). The decision in Fugett did not reach that issue.

26. The error in the original proceeding was based on two faulty premises. The first premise was that the statute provided adequate notice to the agency and the applicant of the operation of the statute. The second premise was that the

administrative hearing in the original proceeding provided 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. See McDonald, 346 So. 2d at 581-583 (requiring agency policy choices to have a factual predicate in the record to expose the agency's decisional referents).[3]

27. The evidential predicate revealed in the record of the original proceeding did not include "decisional referents" to explicate a policy of denying the application more than 90 days after receiving it. The undisputed evidence showed the agency issued the Notice of Denial approximately 143 days after the date of application, and approximately 53 days after the expiration of the 90-day time limit. Neither the Notice of Denial nor the remaining evidence disclosed that the initial application was incomplete. The record did not explicate any additional factual "predicate" or "decisional referent" for agency inaction during the statutory time limit.

28. Subsection 120.60(1) does not expressly require any notice to the agency in addition to that the Legislature provides by statute before the "license . . . is considered approved." However, it was error for the ALJ to consider the license approved after the formal hearing without first giving

the parties an opportunity to present relevant evidence and argument. Fugett, 946 So. 2d at 80.

29. The agency interprets the default license provision in Subsection 120.60(1) to mean that an applicant is not licensed to engage in a trade or business until the agency issues a document evidencing legislative approval. Under the agency's interpretation, the statutory prohibition against "action" without prior notice to the agency clerk takes on a legal, rather than common, meaning. The term "action" means a legal or administrative action initiated to prove entitlement to a license document.

30. Under the agency's interpretation, the notice to the agency clerk provides the agency with an opportunity to avoid a legal or administrative action by issuing the license document. If a legal or administrative action is necessary, the agency argues that an applicant has the burden of proving that the applicant is entitled to a default license on the ground that the agency did not deny the application within the statutory time limit.

31. In Krakow v. Department of Professional Regulation, Board of Chiropractic, 586 So. 2d 1271, 1272 (Fla. 1st DCA 1991), the court held that a license application was approved by operation of the statute following agency inaction within the

statutory time limit. As the First District Court of Appeal explained in Krakow:

> Legislative intent is quite clear in providing for deemed approval of an application when the statutory time limit is violated. Approval by default has the effect of placing the applicants in the same position they would have enjoyed had the Department granted approval on the merits within the [statutory time limit]. (emphasis supplied)
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> * * *
>
> More importantly, however, the . . . failure to timely act on these applications precludes [the agency] from exercising its discretion to determine the applicants' qualifications for licensure. . . .
>
> Once the [agency] failed to act in a timely manner, it was precluded from considering the merits of the . . . application. . . .

Krakow, 586 So. 2d at 1272-1273; accord Johnson v. Board of Architecture and Interior Design, 634 So. 2d 666 (Fla. 2d DCA 1994); Jennings v. Board of Clinical Social Work, 588 So. 2d 656 (Fla. 1st DCA 1991). See also Premier International Travel, Inc. v. Charles H. Bronson, 843 So. 2d 294 (Fla. 1st DCA 2003); Tuten v. Department of Environmental Protection, 819 So. 2d 187 (Fla. 4th DCA 2002); Florida Academy of Cosmetic Surgery, Inc. v. Department of Health, Board of Medicine, 771 So. 2d 602 (Fla. 1st DCA 2000).

32. When the court decided Krakow, an insurance "license" was not defined by statute.[4] Compare Krakow, 586 So. 2d 1271, with §§ 626.112(1) and 626.211, Fla. Stat. (1989). In 1995, the Legislature defined an insurance "license" to mean a document issued by the agency. The 1995 statute provided:

> A "license" is a document issued by the department authorizing a person to be appointed to transact insurance or adjust claims for the classes of insurance identified in the document.

§ 626.103, Fla. Stat. (1995).

33. The statutory definition of an insurance license is substantially unchanged today. § 626.015, Fla. Stat. (2006). The agency's interpretation of the default license provision in Subsection 120.60(1) is consistent with the statutory definition of an insurance license.

RECOMMENDATION

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

RECOMMENDED that Respondent enter a final order concluding that Petitioner is not licensed to engage in the business of insurance pursuant to Subsection 120.60(1).

DONE AND ENTERED this 29th day of June, 2007, in Tallahassee, Leon County, Florida.

DANIEL MANRY
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of June, 2007.

ENDNOTES

1/ All statutory references are to Florida Statutes (2005) unless stated otherwise.

2/ An agency statement that interprets law is a rule, within the meaning of Subsection 120.52(15), Florida Statutes (2006), if the statement satisfies the test of general applicability and does not fall within an express statutory exception. An agency statement that interprets law, is not generally applicable, and does not fall within a statutory exception to the definition of a rule is a statement of non-rule policy.

3/ Under this interpretation, Subsection 120.60(1) is not the functional equivalent of an affirmative defense that must be asserted and proved by the applicant before a license is considered approved by the Legislature. Rather, the agency must establish a predicate in the record for denying the application more than 90 days after the date of the initial application.

4/ None of the cited cases involved an application for an insurance license.

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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.