FLORIDA
DEPARTMENT OF
FINANCIAL SERVICES

TOM GALLAGHER
CHIEF FINANCIAL OFFICER
STATE OF FLORIDA

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DIVISION OF ADMINISTRATIVE HEARINGS

05-4158PL

IN THE MATTER OF:

Case No. 60585-03-AG

MICHAEL CARROLL GAINER
_____/

FINAL ORDER

This cause came on for consideration of Recommended Order and final agency action. On October 20, 2005, an Amended Administrative Complaint was issued by the Department of Financial Services ("Department"), against Respondent alleging that he willfully utilized his insurance license to convince a consumer to invest in an unregistered security in which the consumer later suffered a substantial monetary loss. Respondent timely filed a request for a proceeding pursuant to Section 120.57(1), Florida Statutes. Pursuant to notice, the matter was heard before Charles C. Adams, Administrative Law Judge, Division of Administrative Hearings on March 13, 2006.

After consideration of the record and argument presented at hearing, the Administrative Law Judge issued a Recommended Order on June 2, 2006. (Attached as Exhibit A). The Administrative Law Judge recommended that the Department enter a Final Order suspending the Respondent's licenses for a period of six months.

On June 15, 2006, the Petitioner and the Respondent filed exceptions to the Recommended Order. The exceptions have been considered and are addressed below.

RULING ON PETITIONER'S EXCEPTIONS

1. Petitioner excepts to the Administrative Law Judge's (ALJ) Preliminary Statement wherein the Judge stated that he officially recognized Exhibits 3 and 4, while, nonetheless, denying admission of those exhibits.

Pursuant to Rule 28-106.217, Florida Administrative Code, "Parties may file exceptions to findings of fact and conclusions of law contained in recommended orders. . . ." Although the Petitioner has not excepted to a specific findings of fact or conclusions of law, the exception presented does relate to a conclusion of law, the admissibility of certain exhibits as evidence, and the Petitioner has appropriately identified the portion of recommended order in dispute and has set forth the legal basis for the exception. Thus, this exception will be addressed.

The Petitioner argues that the exhibits in question were directed to proving material allegations of the complaint, and that since the ALJ granted the request for compulsory judicial notice of these exhibits, they should have been admissible. The Department agrees with this contention. These exhibits are official documents; Exhibit 3 an official document under seal issued by a governmental agency and Exhibit 4 a court document, and there is abundant case law to support the taking of judicial notice of such documents.

However, the Florida Supreme Court and a learned treatise on evidence have found that the taking of judicial notice does not necessarily mean the document is admitted for the truth of the matter asserted. Stoll v. State of Florida, 762 So.2d 870, 877 (Fla. 2000)(finding documents contained in a court file that has been judicially noticed are still subject to the same rules of evidence to which all evidence must adhere); C. Ehrhardt, Florida Evidence §201.1 (2006

Edition). See also Allstate Ins. Co. v. Greyhound Rent-a Car, 586 So.2d 482, 483 (Fla. 4th DCA 1991)("The fact that the deposition may be judicially noticed does not render all that is in it admissible."). Curiously, the ALJ did not explain his reasons for not admitting the proposed exhibits into evidence, and, save for the fact that the propositions which they were proffered to support were proved by other evidence in the record, thus, perhaps, rendering them "unduly repetitious" (See Section 120.569 (2)(g), Florida Statutes), it seems to the Department that they should have been admitted as highly probative to material fact issues in this cause. (The Petitioner contends that these exhibits should have been admitted to establish the fact that the 21st century investment product -the sixty-month promissory note- was an unregistered security.)

Nonetheless, it appears that the admissibility of proposed exhibits into evidence may not be within this agency's "substantive jurisdiction" and therefore it is without the authority to reject or modify the ALJ's rulings in this regard. Section 120.57(1)(l), Florida Statutes. Accordingly, this exception is REJECTED.

RULING ON RESPONDENT'S EXCEPTIONS

2. Respondent first excepts to Conclusion of Law #50, in which the ALJ concluded that "the investment opportunity Respondent marked for 21st Century to S.R. . . . constituted a security as defined in section 517.021(19), Florida Statutes. . .[and] the marketing and sale to S.R. did not involve exempt securities or an exempt transaction." An administrative agency may not reject or modify an Administrative Law Judge's findings or conclusions unless it is first determined that the conclusions are not based on competent substantial evidence. Bush v. Brogan , 725 So.2d 1237 (Fla. 2nd DCA 1999). Further, the weighing of the evidence and judging of the credibility of the witnesses are solely the prerogative of the Administrative Law

Judge as the finder of fact. See Strickland v. Florida A&M University, 799 So.2d 276, 278 (Fla. 1st DCA 2001).

There was competent substantial evidence presented at the hearing to support this conclusion. Particularly, Exhibit 5 established the fact that the investment product was an unregistered security. Additionally, Exhibit 5 established the fact that no applicable exemption from registration applied to this investment product. Furthermore, the definition of a security set forth in section 517.021(19), Florida Statutes is clear and unambiguous as it specifically lists a note as a type of security. Accordingly, this conclusion will not be disturbed; hence, Respondent's exception is REJECTED.

3. Respondent next excepts to Conclusion of Law #51, particularly the finding, "Recognizing that Respondent was an "associated person" as defined in Section 517.021(2), Florida Statutes (1997), when he marketed and sold the 21st Century investment opportunity to S.R., it is reasonable to assume that the Respondent did recognize or should have recognized that the product was a security, defined in Section 517.021(19), Florida Statutes (1997), although he denies knowledge of that fact." The Respondent's knowledge regarding the unregistered security he was selling is clearly a finding of fact. Although this statement is set forth in the Conclusions of Law section it is actually a factual determination and, thus, a finding of fact. See Pillsbury v. Department of Health, 744 So. 2d 1040, 1041 (Fla. 2nd DCA 1999) ("The mere fact that what is essentially a factual determination is labeled a conclusion of law, whether labeled by the hearing officer or the agency, does not make it so, and the obligation of the agency to honor the hearing officer's findings of fact cannot be avoided by categorizing a contrary finding as a conclusion of law."). Again, the ALJ based this finding on competent evidence presented, particularly the fact that, at the time of the sale, the Respondent was an "associated person" as

defined in Section 517.021(2), Florida Statutes. In support of this finding, the Department of Banking of Finance determined in Exhibit 5 that Respondent was an "associated person" as he was associated with the broker dealer, Tower Square Securities. Respondent also testified that he was associated with Tower Square Securities during the time of this transaction. (TR. 73) Furthermore, Respondent testified that he held a Series 6 license which he obtained by taking an examination, which had sections that covered securities and unregistered securities. (TR 95-96). Thus, the ALJ reasonably found that given the Respondent's training and expertise he knew or should have known that he was selling an unregistered security.

The Department can not reweigh the evidence, judge the credibility of witnesses or draw inferences from the evidence; that is the ALJ's function. See Strickland supra As a result, an agency may not reject an ALJ's findings unless it determines that there is no competent substantial evidence from which the findings could be reasonably inferred. See Bush v. Brogan 725 So.2d at 1239. The ALJ listened to and weighed the testimony and documentary evidence and concluded that the Respondent willfully sold an unregistered security to S.R. As discussed above, there is such evidence to support this finding. Accordingly, Respondent's exception is REJECTED.

4. Respondent excepts to Conclusion of Law #53, particularly the following statement by the ALJ pertaining to the recommended order and final order entered In the Matter of: Oscar Brown, Jr. Case No. 60582-03-AG before the Department of Financial Services (DOAH Case No. 05-0765PL): "the factual findings in the Recommended Order adopted in the Final Order in that case were seen by the Agency as not establishing untrustworthiness by the Respondent or as has been more specifically defined earlier in the summary of that Final Order entered in the prior case." This exception is without merit, as this conclusion of law is merely

summarizing the parties' contentions regarding the applicability of Oscar Brown, Jr. supra, the opinion set forth in that case, and the legal concept of *stare decisis*. It is apparent that the ALJ's synopsis of all matters referenced in this conclusion is consistent with the law and the parties' contentions as set forth at the hearing and in the parties' proposed recommended orders; therefore, this exception is REJECTED.

Additionally, Respondent argues in this same exception that under the doctrine of *stare decisis*, the Department is bound by its decision the Oscar Brown, Jr. Final Order, and is thus compelled to find that Respondent's conduct does not establish untrustworthiness. However, the ALJ found that there was a meaningful distinction between this case and the Oscar Brown, Jr. case that justifies his determination. Particularly, he found that Respondent was an associated person as Respondent was affiliated with a securities brokerage firm at the time of the transaction. Thus, Respondent should have known the nature of the product he sold. See Administrative Law Judge's Finding of Fact #4 and Conclusions of Law #51 and 53. Moreover, there was evidence presented (as discussed in paragraph 3 above) establishing Respondent's licensure and attendant knowledge, which further distinguishes this case from Oscar Brown, Jr. As such, there is competent substantial evidence to support this finding, and this exception is likewise REJECTED. See Bush v. Brogan, 725 So.2d at 1239-1240 (finding for the proposition that whether the facts presented demonstrate a violation of rule or statute is a question of ultimate fact).

5. Respondent further excepts to the statement in Conclusion of Law #54, "The only meaningful distinction between Oscar Brown, Jr. and his activities in association with 21st Century and that of this Respondent, is the license held by the present Respondent as an associated person pursuant to Chapter 517, Florida Statutes (1997)." The Respondent contends

that there are other meaningful distinctions that should be considered, and as such reasserts his *stare decisis* contention. The weight given to the evidence, including the consideration given to the specific and unique evidentiary distinctions presented in this case is the province of the ALJ, and it is obvious from a reading of the Recommended Order that the ALJ engaged in a deliberated weighing process, which is exactly what an ALJ is supposed to do. Strickland v. Florida A&M University, 799 So.2d 276, 278 (Fla. 1st DCA 2001).

As to Respondent's *stare decisis* argument, the ALJ found a major factual distinction between the instant Respondent and the Respondent in Oscar Brown, Jr. based upon the facts that Respondent was an "associated person" at the time of the transaction (See Exhibit 5), and that Respondent held a Series 6 license, which license is obtained by taking an examination that contains sections on securities, including unregistered securities. (TR 73, 95-96). The Respondent in Oscar Brown, Jr. was neither an associated person nor a Series 6 licensee. Thus, unlike in Oscar Brown, Jr., the instant Respondent was in possession of actual or constructive knowledge about unregistered securities sales that rendered his offering of the same to S.R. willful. See Dezell v. King 91 So.2d 624 (Fla. 1956); State Department of Highway Safety and Motor Vehicles v. Taylor, 456 So.2d 550 (Fla 3rd DCA 1984). Thus, the ALJ's challenged factual determinations are based upon competent substantial evidence, and cannot be disturbed by the agency. (Even though these findings were set forth in the Conclusion of Law Section, there are actually findings of fact. See Holmes v. Turlington, 480 So. 2d 150 (Fla 1st DCA 1985), where it was stated that a deviation from a standard of conduct is essentially an ultimate finding of fact clearly within the realm of the hearing officer's fact-finding discretion.).

The above findings support the conclusion of law that Respondent violated Section 626.611(7), Florida Statutes, by offering the sale of an unregistered security to S.R. The ALJ

weighed the evidence, the credibility of the witnesses, and made a factual determination that the Respondent's conduct, relative to Section 626.611(7), Florida Statutes, was willful based on the Respondent's status as an "associated person" and the possessor of a Series 6 license, both of which, in contradistinction to Oscar Brown, Jr. provide constructive or actual (and enhanced) knowledge of the unregistered nature of the investment product sold. Since there is competent substantial evidence to support the ALJ's factual determination, this exception is also REJECTED. See Gross v. Department of Health, 819 So. 2d 997, 1001 (Fla. 4th DCA 2002)("When determining whether to reject or modify findings of fact in a recommended order, the agency is not permitted to weigh the evidence, judge the credibility, or interpret the evidence to fit its ultimate conclusion.").

6. Finally, Respondent excepts to Conclusion of Law #58, which states that the Respondent violated Section 626.611(13), Florida Statutes, by willful violation of Section 626.611(7), Florida Statutes because of the arguments presented in the exception addressed above. In accordance with the discussion set forth above, this exception is also REJECTED.

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

1. The Findings of Fact of the Administrative Law Judge, as delineated and clarified, are adopted as the Department's Findings of Fact.

2. So as to correct typographical errors in the Conclusions of Law section of the Recommended Order, in Conclusion of Law #54, the citation to "Hartnett v. Department of Professional Regulation, 406 So. 2d 1480 (Fla. 1st DCA 1981) is changed to "Hartnett v. Department of Insurance, 406 So. 2d 1180 (Fla. 1st DCA 1981)" and to correct the spelling of the name "Dezel" in a citation in the same conclusion, the spelling is changed to "Dezell."

3. With the exception of the correction of the typographical errors, the Conclusions of Law, as delineated and clarified, of the Administrative Law Judge are adopted in full as the Department's Conclusions of Law.

ACCORDINGLY, it is ORDERED that Respondent's, MICHAEL CARROLL GAINER's license(s) and eligibility for licensure as an insurance agent are hereby SUSPENDED for a period of six (6) months, effective immediately upon issuance of this Final Order. Pursuant to Section 626.651, Florida Statutes, the suspension of Respondent's license(s) and eligibility is applicable to all licenses and eligibility held by Respondent under the Florida Insurance Code.

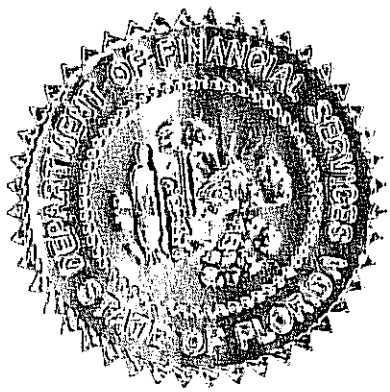
Pursuant to Section 626.641(4), Florida Statutes, the Respondent shall not engage in or attempt or profess to engage in any transaction or business for which a license or appointment is required under the Insurance Code or directly or indirectly own, control, or be employed in any manner by any insurance agent or agency or adjuster or adjusting firm, during the period of suspension. Pursuant to Section 626.641(1), Florida Statutes, Respondent's licensure shall not be reinstated except upon request for such reinstatement, and the Respondent shall not engage in the transaction of insurance until his licensure is reinstated. The Department shall not grant reinstatement if it finds that the circumstance or circumstances for which the Respondent's licenses were suspended still exist or are likely to recur.

NOTICE OF RIGHTS

Any party to these proceedings adversely affected by this Order is entitled to seek review of this Order pursuant to Section 120.68, Florida Statutes, and Fla. R. App.P. 9.110. Review proceedings must be instituted by filing a petition or notice of appeal with the General Counsel, acting as the agency clerk, at 612 Larson Building, Tallahassee, Florida 32399-0333, and a copy

of the same and the appropriate filing fee with the appropriate District Court of Appeal within thirty (30) days of rendition of this Order.

DONE AND ORDERED this 31st day of August, 2006.



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