

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL)
SERVICES,)
)
Petitioner,)
)
vs.) Case No. 06-0051PL
)
BRADFORD SCOTT BATEMAN,)
)
Respondent.)
_____)

RECOMMENDED ORDER

A duly-noticed final hearing was held in this case by Administrative Law Judge T. Kent Wetherell, II, on March 27, 2006, in Tallahassee, Florida.

APPEARANCES

For Petitioner: David J. Busch, Esquire
Department of Financial Services
Division of Legal Services
612 Larson Building
200 East Gaines Street
Tallahassee, Florida 32399-0333

For Respondent: Bruce A. Minnick, Esquire
Post Office Box 15588
Tallahassee, Florida 32317-5588

STATEMENT OF THE ISSUE

The issue is whether Respondent's license as a public adjuster, all lines, should be revoked.

PRELIMINARY STATEMENT

Through a Notice of Revocation dated October 10, 2005, the Department of Financial Services (Department) informed Respondent that his public adjuster's license was revoked. Respondent timely requested an administrative hearing, and on January 4, 2006, the Department referred this case to the Division of Administrative Hearings (DOAH) for the assignment of an Administrative Law Judge to conduct the hearing requested by Respondent.

The Department presented the testimony of Nelson Herold at the final hearing. The Department's Exhibits 1 and 3 through 5 were received into evidence. The Department's Exhibit 2 was offered, but not received.

Respondent did not present any witnesses at the final hearing. Respondent's Exhibits R1 and R5 were received into evidence. Exhibits R2 through R4, R6 through R13, and R15 were offered, but not received. Ruling on the admission of Exhibit R14 was reserved at the hearing. That exhibit is now received.

Official recognition was taken of Sections 120.569, 120.57, 120.60, 120.68, 120.69, 120.695, 626.207, 626.611, 626.621, 626.631, 626.8437, 626.844, 626.854, 626.865, 626.869, 626.8697, 626.8698, Florida Statutes, and Florida Administrative Code Rules 69B-211.040 through 69B-211.042 and Rule Chapter 69B-231.

The Transcript of the final hearing was filed on April 14, 2006. The parties were given 10 days from that date to file proposed recommended orders (PROs). The Department's PRO was timely filed on April 24, 2006. Respondent's PRO was filed on April 27, 2006.¹ The PROs have been given due consideration.

FINDINGS OF FACT

1. Respondent is licensed by the Department as a public adjuster, all lines. His license number is A015739.

2. On September 1, 2004, Respondent pled nolo contendere to three counts of "lewd or lascivious molestation" in the Circuit Court of the Twentieth Judicial Circuit in and for Collier County, Florida. Each count was a second degree felony pursuant to Section 800.04(5)(c)2., Florida Statutes (2004).²

3. On that same date, Respondent was adjudicated guilty of all three counts and was sentenced to 15 years in prison to be "mitigated" to 364 days in jail upon his timely surrender into custody on November 1, 2004.

4. The transcript of the court hearing at which Respondent's plea was accepted, Exhibit R14, includes an extensive colloquy between Respondent and the judge, the prosecutor, and his defense attorney. The colloquy reflects that Respondent was fully apprised of the plea negotiations between his attorney and the prosecutor; that he was advised of the consequences of the court's accepting his plea and

adjudicating him guilty, including the likelihood that he would lose his professional license as a result of his convictions; and that he was advised of his right to reject the plea offered by the prosecutor and go to trial.

5. The circumstances underlying Respondent's criminal offenses are described in an Affidavit for Criminal Offense dated December 19, 2003, and in a Prosecution Report prepared sometime thereafter. Those documents, which were offered into evidence by Respondent at the final hearing in this case, reflect that Respondent admitted to going into his then 14-year-old step-daughter's bedroom a number of times over a period of two years to view her genitalia by lifting her pajamas and moving aside her panties while she slept.

6. In August 2005, the Department commenced an investigation of Respondent after it learned of his criminal convictions. The investigation was conducted by Nelson Herold.

7. Mr. Herold compiled records related to Respondent's public adjuster business as well as documents from the Collier County Clerk's office related to Respondent's criminal convictions.

8. Mr. Herold met with Respondent while he was in jail and advised him of the Department's investigation and its intent to revoke his public adjuster's license based upon his felony convictions. Respondent was given an opportunity to provide a

response as part of Mr. Herold's investigation, but there is no evidence that he did so.

9. On October 10, 2005, the Department issued a Notice of Revocation, which informed Respondent that his public adjuster's license was revoked based upon his felony convictions. The Notice advised Respondent of his right to request an administrative hearing, and Respondent timely did so.

10. Respondent was not present at the final hearing.

11. Respondent's counsel waived Respondent's presence at the final hearing and elected to proceed without him.

CONCLUSIONS OF LAW

12. DOAH has jurisdiction over the parties to and subject matter of this proceeding pursuant to Sections 120.569, 120.57(1), 120.60(5), and 626.631(1), Florida Statutes (2005).

13. The parties disagree as to the legal effect of the Notice of Revocation. The Department contends that in accordance with the plain language of Section 626.631(1), Florida Statutes, the revocation of Respondent's license was effective immediately upon the issuance of the Notice of Revocation subject only to this post-deprivation administrative hearing; Respondent contends that the Notice was preliminary agency action, and that consistent with well-settled principles of Florida administrative law, the revocation of Respondent's license cannot become effective until the Department issues a

final order in this case. It is not necessary to resolve the issue in this proceeding because, whatever the legal effect of the Notice of Revocation, the heightened burden of proof that the Department must meet would be the same.

14. In that regard, the Department has the burden to prove the factual basis for the revocation Respondent's license by clear and convincing evidence. See Dept. of Banking & Finance v. Osborne, Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); Goodwin v. Dept. of Insurance, Case No. 00-3503, 2000 Fla. Div. Adm. Hear. LEXIS 5475, at **4-5 (DOAH Nov. 14, 2000); Dept. of Insurance v. St. Pierre, Case No. 00-0396, 2000 Fla. Div. Adm. Hear. LEXIS 5256, at *4 (DOAH June 5, 2000).

15. Section 626.631(1), Florida Statutes, requires the Department to "immediately revoke[]" the license of a public adjuster who is convicted of a felony. More specifically, the statute provides:

If any licensee is convicted by a court of . . . a felony, the licenses and appointments of such person shall be immediately revoked by the department. The licensee may subsequently request a hearing pursuant to ss. 120.569 and 120.57, and the department shall expedite any such requested hearing. The sole issue at such hearing shall be whether the revocation should be rescinded because such person was not in fact

convicted of a violation of this code or a felony.

§ 626.631(1), Fla. Stat.

16. Section 626.611, Florida Statutes, also requires the Department to suspend or revoke a public adjuster's license under certain circumstances. As it relates to this case, the statute requires suspension or revocation where the licensee has:

pleaded . . . nolo contendere to a felony or a crime . . . which involves moral turpitude, without regard to whether a judgment of conviction has been entered by the court having jurisdiction of such cases.

§ 626.611(14), Fla. Stat.

17. A "felony" is a criminal offense punishable by imprisonment in the state prison for more than one year.

§ 775.08(1), Fla. Stat. See also Art. X, § 10, Fla. Const.

18. The offenses that Respondent pled to and was adjudicated guilty of are felonies; each count was punishable by up to 15 years in prison. See § 800.04(5)(c)2., Fla. Stat. ("lewd and lascivious molestation" of a victim between 12 and 16 years of age by an adult is a "felony of the second degree"); § 775.082(3)(c), Fla. Stat. (punishment for a felony of the second degree is "a term of imprisonment not exceeding 15 years"). The fact that Respondent's sentence was "mitigated" to

364 days in jail is immaterial to the classification of the offenses as felonies.

19. The offenses that Respondent pled to and was adjudicated guilty of -- i.e., pulling aside his 14-year-old step-daughter's panties while she slept in order to view her genitalia -- are socially and morally reprehensible. The offenses are unquestionably crimes of moral turpitude, as defined by the Department's rules³ and case law.⁴ Indeed, Respondent appears to concede that his offenses involve moral turpitude because he argues in his PRO that the penalty guideline applicable to his conduct is Florida Administrative Code Rule 69B-231.150(1)(c)3., which applies to crimes involving moral turpitude, rather than the guidelines in paragraph (1)(d) of that rule, which apply to crimes not involving moral turpitude.

20. The fact that the court adjudicated Respondent guilty based upon his plea means that Respondent was "convicted" of the offenses that he pled to. See Fla. Admin. Code R. 69B-231.030(3) ("'Convicted' means adjudicated guilty by a court."); Fla. Admin. Code R. 69B-211.042(18)(a)1. (same).

21. Those Department rules are not undermined by State v. Gazda, 257 So. 2d 242 (Fla. 1971), which was cited by Respondent in his PRO for the proposition that there is a distinction

between a conviction and an adjudication of guilt. The case is distinguishable.

22. First, Gazda did not involve a proceeding under the Insurance Code. The fact that the case involved a different statute is significant because, as noted by the court in Raulerson v. State, 763 So. 2d 285, 291 (Fla. 2000), "the term 'conviction' as used in Florida law has been a 'chameleon-like' term that has drawn its meaning from the particular statutory context in which the term is used."⁵

23. Second, the court in Gazda did not adjudicate the defendant guilty, as was the case with Respondent. Thus, the holding in Gazda that an adjudication of guilt is not necessary (at least for purposes of the statute at issue in that case) for there to be a conviction where the defendant pled guilty in no way undermines the proposition codified in the Department's rules that an adjudication of guilt by the court necessarily results in a conviction.

24. The decision in Montgomery v. State, 897 So. 2d 1282 (Fla. 2005), supports the proposition codified in the Department's rules. In that case, the court held that, a prior nolo contendere plea is a "conviction" for purposes of the sentencing guidelines even if adjudication was withheld by the court. Id. at 1286. The dissent in Montgomery noted that "[a] nolo plea means 'no contest,' not 'I confess'" and, therefore,

would have held that "to establish a 'prior conviction' there must have been either an adjudication of guilt, or a plea or a trial that results in a determination of guilt." Id. at 1287 (Bell, J., dissenting, joined by Pariente, C.J., and Anstead, J.) (emphasis supplied). Thus, there does not appear to be any dispute at the Florida Supreme Court that an adjudication of guilt (even if based upon a nolo contendere plea) is a conviction.

25. Respondent's de facto collateral attack on the validity of his convictions and/or the voluntariness of plea is beyond the scope of this proceeding, see Section 626.631(1), Florida Statutes,⁶ as well as the jurisdiction of DOAH and the Department. Only a circuit court has the authority to consider those claims. See Fla. R. Crim. P. 3.850.

26. Even if it was somehow appropriate to consider Respondent's collateral attack on his convictions in this proceeding, the evidence does not support Respondent's argument that the plea which led to his convictions was involuntary. Indeed, the Florida Rules of Criminal Procedure expressly contemplate the "interrogations" (as Respondent refers to the colloquy contained in Exhibit R14) that occurred during the hearing at which Respondent's plea was accepted and his sentence was imposed. See, e.g., Fla. R. Crim. P. 3.170(k), 3.171(d), 3.172.

27. Respondent's felony convictions are sufficient in and of themselves to justify the revocation of his license under Section 626.631(1), Florida Statutes.

28. Respondent's pleas of nolo contendere to crimes involving moral turpitude are also sufficient in and of themselves to justify the revocation of his license under Section 626.611(14), Florida Statutes. And cf. McNair v. Criminal Justice Standards & Training Comm'n, 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).

29. Respondent argues in his PRO that the appropriate penalty for his conduct is the suspension of his license for no more than six months. In support of that argument, Respondent cites the penalty guideline in Florida Administrative Code Rule 69B-231.150(1)(c)3. That rule, which applies "[i]f the licensee is not convicted" (emphasis supplied), does not apply to Respondent because he was convicted of three felonies.

30. The penalty guideline applicable to Respondent is Florida Administrative Code Rule 69B-231.150(1)(a), which states: "If the licensee is convicted by a court of . . . a

felony (regardless of whether or not such felony is related to an insurance license), the penalty shall be revocation."

31. Based upon that rule and the plain language of Sections 626.611 and 626.631(1), Florida Statutes, revocation of Respondent's license is mandatory under the circumstances of this case.

32. In light of these conclusions, it is not necessary to consider whether revocation of Respondent's license is also justified under Section 626.621(8), Florida Statutes, which authorizes (but does not require) the Department to suspend or revoke a public adjuster's license where the licensee "[has] been found guilty of or [has] pleaded nolo contendere to a felony . . . , without regard to whether a judgment of conviction has been entered by the court" It is noted, however, that even if the Department proceeded under Section 626.621(8), Florida Statutes, the same penalty guideline would apply and, therefore, revocation of Respondent's license would be appropriate. See Fla. Admin. Code R. 69B-231.150(1)(a).

RECOMMENDATION

Based upon the foregoing findings of fact and conclusions of law, it is

RECOMMENDED that the Department of Financial Services issue a final order affirming the Notice of Revocation and revoking Respondent's license as a public adjuster, all lines.

DONE AND ENTERED this 10th day of May, 2006, in
Tallahassee, Leon County, Florida.



T. KENT WETHERELL, II
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of May, 2006.

ENDNOTES

^{1/} On April 24, 2006, Respondent filed a Notice of Filing a Late Proposed Recommended Order, which stated that counsel for Respondent "needs additional time in order to finish Respondent's PRO" and that "counsel believes he can file Respondent's PRO by the end of business April 26." The Notice, which represented that Petitioner "does not object to this additional time," is treated as an unopposed motion for extension of time, and is granted nunc pro tunc April 24, 2006. Respondent's late-filed PRO is accepted even though it was filed after the date identified in the Notice.

^{2/} Except as otherwise noted, all statutory references in this Recommended Order are to the 2004 version of the statutes in effect at the time of Respondent's convictions.

^{3/} See Fla. Admin. Code R. 69B-211.042(21), which states that "each felony crime listed in this subsection is a crime of moral turpitude." Paragraph (bbb) of that rule refers to the crime of "sexually molesting any minor," which encompasses Respondent's offenses as detailed in the Affidavit for Criminal Offense and the Prosecution Report. See also Fla. Admin. Code R. 69B-211.042(7)(c) (explaining that the "names or descriptions of crimes, as set out in the classification of crimes, are intended to serve only as generic names or descriptions of crimes and

shall not be read as legal titles of crimes, or as limiting the included crimes to crimes bearing the exact name or description stated"). But cf. Fla. Admin. Code R. 69B-231.030(4) (defining "crimes involving moral turpitude" for purposes of the Department's penalty guidelines as those felony crimes identified in subsection (23) of Rule 69B-211.042, not subsection (21)).

^{4/} See, e.g., State ex rel. Tullidge v. Hollingsworth, 146 So. 660, 661 (Fla. 1933) ("Moral turpitude involves the idea of inherent baseness or depravity in the private social relations or duties owed by man to man or by man to society. It has also been defined as anything done contrary to justice, honesty, principle or good morals, though it often involves the question of intent as when unintentionally committed through error of judgment when wrong was not contemplated." (citations omitted)). Accord Aplin v. Fla. Real Estate Comm'n, Case No. 90-1844, 1990 Fla. Div. Adm. Hear. LEXIS 6971, at *6 (DOAH Oct. 2, 1990) (concluding that "the commission of lewd and lascivious sexual offenses against children clearly and unequivocally involves moral turpitude"); Winton v. Office of Financial Reg., Case No. 05-4070, 2006 Fla. Div. Adm. Hear. LEXIS 108, at **14-15 (DOAH Mar. 16, 2006; OFR Apr. 10, 2006) (concluding that the applicant's molestation of his 11-year-old step-daughter provides a basis for the denial of his application for a mortgage broker's license because the offense involves moral turpitude).

^{5/} The significance of statutory context is highlighted by Montgomery v. State, 897 So. 2d 1282 (Fla. 2005), and State v. McFadden, 772 So. 2d 1209 (Fla. 2000). In Mongomery, the court held that a nolo contendere plea is considered a prior conviction for purposes of the sentencing guidelines even if adjudication was withheld, whereas the court held in McFadden that a nolo contendere plea is insufficient to establish a prior conviction for impeachment purposes if adjudication was withheld.

^{6/} See also Fla. Admin. Code R. 69B-211.042(11)(b), which governs the Department's review of license applications and states:

The Department will not allow or give any weight to an attempt to re-litigate, impeach, or collaterally attack judicial criminal proceedings or their results wherein the applicant was found guilty or

pled guilty or nolo contendere. Thus, the Department will not hear or consider arguments such as: the criminal proceedings were unfair; the judge was biased; the witnesses or prosecutor lied or acted improperly; the defendant only pled guilty due to financial or mental stress; the defendant was temporarily insane at the time of the crime; or the defendant had ineffective counsel.

COPIES FURNISHED:

Honorable Tom Gallagher
Chief Financial Officer
Department of Financial Services
The Capitol, Plaza Level II
Tallahassee, Florida 32399-0300

Carlos G. Muniz, General Counsel
Department of Financial Services
The Capitol, Plaza Level II
Tallahassee, Florida 32399-0300

David J. Busch, Esquire
Department of Financial Services
Division of Legal Services
612 Larson Building
200 East Gaines Street
Tallahassee, Florida 32399-0333

Bruce A. Minnick, Esquire
Minnick Law Firm
Post Office Box 15588
Tallahassee, Florida 32317-5588

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.