REPRESENTING
ALEX SINK
CHIEF FINANCIAL OFFICER
STATE OF FLORIDA

FILED

FILED
07 DEC 21 PM 4:41
DEPARTMENT OF
ADMINISTRATIVE
HEARINGS

FILED
DEC 21 2007
Docketed by:

IN THE MATTER OF:

Case No.: 83179-07-AG

FELTON EUGENE TURNER
_____/

FINAL ORDER

This cause came on for consideration and final agency action. On January 31, 2007, an Administrative Complaint was filed by the Florida Department of Financial Services (hereinafter also referred to as the "Department"), charging Respondent with committing various violations of the Insurance Code in connection with the sale of annuities issued by an unauthorized entity to at least three Florida consumers.[1] The Respondent timely filed a request for a proceeding pursuant to Section 120.57(1), Florida Statutes. An Amended Administrative Complaint was filed on June 6, 2007, adding a fourth count involving approximately 87 additional unnamed consumers. Pursuant to notice, the matter was heard before Charles C. Adams, Administrative Law Judge, Division of Administrative Hearings, on July 19, 2007.

After consideration of the evidence, argument, testimony presented at hearing, and the Petitioner's Proposed Recommended Order, the Administrative Law Judge issued his Recommended Order on September 26, 2007 (attached hereto as Exhibit "A"). [2] The Administrative Law Judge recommended that the Department enter an order suspending the Respondent's license for a period of six months. Neither the Respondent nor the Petitioner filed exceptions to the Recommended Order.

Although no exceptions were filed, a thorough review of the Recommended Order reveals several items that must be addressed in this Final Order.

1. The first item is a matter of clarification for the record. This case is a license disciplinary action brought against an insurance agent who sold annuity products in Florida on behalf of an unauthorized entity, in violation of the Florida Insurance Code. The entity is Money Tree Lending Group, Inc. ("Money Tree"). In Florida, the Florida Office of Insurance Regulation ("Office of Insurance Regulation") is charged with the regulation of insurance companies, including but not limited to company licensure.[3] The Florida Office of Financial Regulation ("Office of Financial Regulation"), however, regulates depository and non-depository financial institutions and financial service entities such as certain banks, collection agencies, check cashers, mortgage lenders, and securities dealers and agents, among a wide variety of other entities. Both the Office of Insurance Regulation and the Office of Financial Regulation are considered to be part of the Financial Services Commission.[4] While Money Tree was, during all times material to this matter, licensed in Florida through the Office of Financial Regulation as a mortgage lending company, it was never licensed in Florida through the Office of Insurance Regulation as an insurance company. (Recommended Order, Paragraph #6). Because a company selling annuities in Florida must possess a certificate of authority issued by the Florida Office of Insurance Regulation to transact business as an insurer, Money Tree was considered an unauthorized entity in this regard because it lacked the requisite certificate of authority. (Recommended Order, Paragraphs #65 and #66).

Essential to the Respondent's defense in this case was his assertion that he contacted the *Department of Financial Services* prior to marketing and selling the Money Tree annuity products, and was allegedly told by the Department's representative that Money Tree was a "good, legitimate

company" and that its annuity products were "exempt" from requirement of securities registration under Chapter 517, Florida Statutes. (Recommended Order, Paragraphs #18 and #19). While a thorough review of the record evidences some confusion as to whether the Respondent actually contacted the Office of Financial Regulation or the Department of Financial Services, if he contacted any agency at all, the Respondent has asserted that his ultimate decision to sell Money Tree annuity products in Florida was based, at least in part, on an alleged conversation with the *Department of Financial Services*. (Recommended Order, Paragraph #14). This distinction is important, because as to Money Tree's licensure and ability to sell fixed annuity products in Florida, the *Office of Insurance Regulation* would have been the *only* appropriate agency to which the Respondent should have made inquiry. This is a fact that the Respondent, a licensed insurance agent in Florida, knew or reasonably should have known.

The above clarification is made without disturbing the Findings of Fact, and with deference to the Administrative Law Judge's considerations as to weight of the evidence and credibility, motivation, and purpose of the witness' testimony.

2. The second issue that must be addressed in this Final Order relates to the Conclusions of Law found in Paragraph #73 of the Recommended Order. Among the various violations of the Insurance Code the Respondent has been charged with is a violation of Section 626.611(8), Florida Statutes. That section provides, in relevant part:

> "**626.611 Grounds for compulsory refusal, suspension, or revocation of agent's, title agency's, adjuster's, customer representative's, service representative's, or managing general agent's license or appointment –**
>
> * * *
>
> (8) Demonstrated lack of reasonably adequate knowledge and technical competence to engage in the transactions authorized by the license or appointment."

The Administrative Law Judge considered the above statute to be inapplicable to the Respondent's actions, reasoning that Section 626.611(8):

> "... addresses circumstances in relation to the exercise of adequate knowledge and technical competence in those transactions that are authorized by the license or appointment. The transactions here are not within the license or appointment, as being outside what would be allowed. Therefore the need for adequate knowledge and technical competence does not enter into the discussion."
>
> (Recommended Order, Paragraph #73).

It would seem that the Administrative Law Judge reasons that an annuity contract is not insurance if it is issued by an unauthorized insurer. This is not the case. Annuity contracts are defined and regulated as insurance contracts, necessitating the requirement of licensure as an insurance company for any company seeking to sell such contracts in Florida. That the contracts themselves were issued by an insurer that did not possess the requisite certificate of authority in Florida is irrelevant to the fact that the contracts themselves are still considered insurance. By offering for sale and selling these insurance contracts in Florida, the agent illegally transacted insurance. Similarly, surplus lines carriers selling insurance in Florida do not possess (and are not required to possess) certificates of authority to transact in this state, yet such surplus lines policies are still insurance, the act of selling surplus lines policies is still transacting insurance, and agents transacting in surplus lines are still subject to the disciplinary provisions of the Florida Insurance Code. As to the Administrative Law Judge's observation that selling annuity contracts issued by an unauthorized insurer is "not within the license or appointment" and, therefore, not subject to Section 626.611(8), Florida Statutes, subsection (16) of that same statute provides the necessary guidance as to whether a licensed agent may still be subject to the disciplinary provisions of the Insurance Code relative to transactions involving products

that have not been properly registered or authorized for sale in Florida. That subsection provides for mandatory refusal, suspension, or revocation of an agent's license in the event of "Sale of an unregistered security that was required to be registered, pursuant to Chapter 517." § 626.611(16), Fla. Stat. (2007). Viewing these two subsections of the same statute together, it is clear that an agent's conduct is still subject to the disciplinary provisions of the Insurance Code, even when the product he or she sells is not fully in compliance with the law.

The requirement of reasonably adequate knowledge and technical competence is unquestionably important in this matter, because every agent should have the basic knowledge and technical competence to be able to undertake due diligence to determine if the sale he or she is effectuating is in violation of the law. In the instant case, the Respondent has claimed that he contacted the entity he believed responsible for making a determination regarding Money Tree's authorization to sell fixed annuities. As a licensed non-resident insurance agent in Florida for the last 10 years, the Respondent knew or reasonably should have known that annuities are insurance contracts, and that all companies selling annuity contracts in Florida are required to possess a certificate of authority. Further, the Respondent should have been aware that the Florida entity regulating such insurance company activity is neither the Department of Financial Services nor the Office of Financial Regulation, but is instead the Office of Insurance Regulation. Had the Respondent placed a single telephone call to the Office of Insurance Regulation to inquire about Money Tree, or had he accessed that Office's website for its online public inquiry database relative to licensed companies, he would have been able to quickly ascertain that the annuity products he was about to sell were issued by an unauthorized entity.

Moreover, the act of selling insurance of any kind in Florida requires that the person selling the contract be not only licensed to sell that particular product, but also *appointed* with that insurance

carrier.[5] Even if the Respondent failed to place a telephone call ahead of time to determine if Money Tree was an authorized insurer, as an agent selling its products, the Respondent was undoubtedly aware that he was *required* to hold an appointment with the company in order to sell its products, as he was required to have with each and every company whose products he sold. Indeed, a review of the Respondent's license and appointment status record reveals that the Respondent never obtained an appointment to sell for Money Tree. (Petitioner's Exhibit #1). The fact that the Respondent either never attempted to apply for appointment or was otherwise unsuccessful in becoming appointed with Money Tree is strong evidence of the likelihood that the Respondent knew or should have known prior to selling the Money Tree annuities that these sales lacked legitimacy.

The Conclusion of Law contained in Paragraph #73 of the Recommended Order is, therefore, modified to read as follows:

> "Counts I through IV in the Amended Administrative Complaint refer to a violation of Section 626.611(8), Florida Statutes, which provides for mandatory discipline to be imposed where there is a "demonstrated lack of reasonably adequate knowledge and technical competence" to engage in transactions authorized by the license or appointment. As a licensed non-resident life and health agent, the Respondent is authorized to transact fixed annuity products in Florida. And as a licensed non-resident insurance agent in Florida for the last 10 years, the Respondent knew or reasonably should have known that annuities are insurance contracts, and that all companies selling annuity contracts in Florida are required to possess a certificate of authority. As the Respondent should have also known, the Florida entity regulating such insurance company activity is not the Office of Financial Regulation, but the Office of Insurance Regulation. Had the Respondent placed a single telephone call to the Office of Insurance Regulation to inquire about Money Tree, or had he accessed that Office's website for its online public inquiry database relative to licensed insurance companies, he would have been able to ascertain that the products he was about to sell were issued by an unauthorized entity. Moreover, the act of selling insurance of any kind in Florida requires that the agent be not only licensed to sell that product, but also appointed with the insurance carrier whose products he sells. Even if the Respondent failed to inquire as to whether Money Tree was an authorized insurer, as an agent selling its products, the Respondent was undoubtedly aware that he was required to hold an appointment with the company in order to sell its products, as was the case with each and every company whose products he sold.

§ 626.112(1)(a), Fla. Stat. (2004). Had the Respondent made reasonable inquiry regarding the possibility of an appointment with Money Tree prior to any if his sales of its products, it is likely he quickly would have become aware that the company lacked the requisite certificate of authority as an insurer, and could not possibly have appointed him to sell such a product. Indeed, a review of the Respondent's license and appointment status record reveals that the Respondent never obtained an appointment to sell for Money Tree. (Petitioner's Exhibit #1). In each of Counts I through IV, therefore, the Respondent has demonstrated a clear lack of reasonably adequate knowledge and technical competence as an insurance agent, and has violated the provisions of Section 626.611(8), Florida Statutes."

The above modification to the Conclusions of Law is made in view of the Administrative Law Judge's Findings of Fact and the applicable provisions of Florida Law, and is as or more reasonable than the original Conclusion of Law it replaces.

3. The third issue that must be addressed by way of this Final Order is the Administrative Law Judge's recommended penalty as disposition of the case. Reviewing discussion in the Recommended Order relative to the assessment of the appropriate penalty, it is unclear how the Administrative Law Judge arrived at the decision that a 6 month suspension of the agent was the appropriate disciplinary penalty in this instance.

A thorough review of the Recommended Order evidences the following:

(a) As to Count I of the Amended Administrative Complaint, the Administrative Law Judge found that the Respondent violated Sections 624.11(1) (Paragraph #69); 626.611(7) (Paragraph #72); 626.621(2) (Paragraph #79); 626.621(6) (Paragraph #75); 626.901(1) (Paragraph #77); and 626.9541(1)(a)1., Florida Statutes (Paragraph #81). Paragraph #73 of the Recommended Order, as modified herein and correctly applying the provisions of Section 626.611(8), Florida Statutes, sets forth that the Respondent violated the provisions of that Section in his conduct as a licensee relative to Counts I through IV. Of the above-referenced statutes, Section 624.11(1) provides a 6 month suspension for each willful violation, 3 month for non-willful; Section 626.621(2) provides a 3 month

suspension, and each of the others provide a 6 month suspension, with Sections 626.611(7) and (8) each providing for a compulsory 6 month suspension. Rule 69B-231.040(1)(a), Florida Administrative Code, sets forth that where multiple violations exist under Sections 626.611 and 626.621, Florida Statutes for a single count, only the violation specifying the highest stated penalty will be considered as penalty for that individual count. Of the violations proven in Count I, the highest stated penalty for this Count is a compulsory 6 month suspension. Therefore, the appropriate associated penalty for the violations in Count I is a compulsory 6 month suspension.

(b) As to Count II of the Amended Administrative Complaint, the Administrative Law Judge found as a matter of law that the Respondent violated Sections 624.11(1) (Paragraph #69); 624.11(1) (Paragraph #69); 626.611(7) (Paragraph #72); 626.621(2) (Paragraph #79); 626.621(6) (Paragraph #75); 626.901(1) (Paragraph #77); and 626.9541(1)(a)1., Florida Statutes (Paragraph #81). Paragraph #73 of the Recommended Order, as modified herein and correctly applying the provisions of Section 626.611(8), Florida Statutes, to this and the other Counts, sets forth that the Respondent violated the provisions of that Section in his conduct as a licensee. As was the case with Count I, of the violations proven in Count II, the highest stated penalty for this Count is a compulsory 6 month suspension. Therefore, the appropriate associated penalty for the violations in Count II is a compulsory 6 month suspension.

(c) As to Count III of the Amended Administrative Complaint, the Administrative Law Judge found as a matter of law that the Respondent violated Sections 624.11(1) (Paragraph #69); 626.611(7) (Paragraph #72); 626.621(2) (Paragraph #79); 626.621(6) (Paragraph #75); 626.901(1) (Paragraph #77); and 626.9541(1)(a)1., Florida Statutes (Paragraph #81). Paragraph #73 of the Recommended Order, as modified herein and correctly applying the provisions of Section 626.611(8), Florida Statutes,

to this and the other Counts, sets forth that the Respondent violated the provisions of that Section in his conduct as a licensee. As was the case in Counts I and II, of the violations proven in Count III, the highest stated penalty for this Count is a compulsory 6 month suspension. Therefore, the appropriate associated penalty for the violations in Count III is a compulsory 6 month suspension.

(d) As to Count IV of the Amended Administrative Complaint which was a general count involving the approximately 87 additional consumers to whom the Respondent Money Tree annuities, the Administrative Law Judge found as a matter of law that the Respondent violated Sections 624.11(1) (Paragraph #69); 626.621(2) (Paragraph #79); and 626.901(1), Florida Statutes (Paragraph #77). Paragraph #73 of the Recommended Order, as modified herein and correctly applying the provisions of Section 626.611(8), Florida Statutes, to this and the other Counts, sets forth that the Respondent violated the provisions of that Section in his conduct as a licensee. Section 626.611(8) provides a compulsory 6 month suspension. Of the violations proven in Count IV, the highest stated penalty for this Count, then, is a compulsory 6 month suspension. Therefore, the appropriate associated penalty for the violations in Count IV is a compulsory 6 month suspension.

Rule 69B-231.040(2), Florida Administrative Code provides that the total penalty to be imposed against the Respondent must be determined by adding each of the four counts together. With Counts I – IV each providing a compulsory 6 month suspension as the highest penalty per Count, the total penalty then becomes a compulsory 24 month suspension. With this in mind, and based on a thorough review of the Recommended Order, it is unclear how the Administrative Law Judge arrived at his recommended final penalty of a 6 month suspension.

While the Administrative Law Judge stated in his Recommended Order that in deciding the appropriate penalty in this case, he utilized the applicable penalty provisions in Rules 69B-231.040,

69B-231.080, and 69B-231.090 as well as the aggravating/mitigating factors in Rule 69B-231.160, the Recommended Order contains no analysis as to how these Rules were applied. Given the total penalty resulting from application of Rules 69B-231.040, 69B-231.080 and 69B-231.090, F.A.C., which is a *mandatory* 24 month suspension, it would stand to reason that the Administrative Law Judge must have applied only mitigation to the total penalty, using Rule 69B-231.160, in order to reduce it by 18 months to a 6 month suspension. However, noticeably absent from the Recommended Order is any discussion as to what mitigating factor or factors, if any, the Administrative Law Judge considered to be applicable in this instance, and whether such mitigating factor(s) were weighed against the seriousness of the demonstrably obvious aggravating factors. For instance, if the Administrative Law Judge applied mitigation to the total penalty in consideration of a possible mitigating factor, it is unclear whether that factor was also weighed against such aggravating factors as the degree of potential and actual injury to the victims, as evidenced by the actual financial harm that has been suffered by the consumers in this case, none of whom have been made whole to date. It is equally unclear whether the Administrative Law Judge considered the motivation or financial gain to the Respondent in weighing these factors.[6] It would seem that no applicable mitigating factor, if any, could outweigh the degree of actual financial injury to the victims in this case.

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

1. With the clarification for the record as set forth herein in Paragraph 1., the Administrative Law Judge's Findings of Fact are adopted as the Department's Findings of Fact.

2. As so modified herein, the Administrative Law Judge's Conclusions of Law are adopted as the Department's Conclusions of Law.

3. In light of the modifications to the Conclusions of Law and the correct application of the penalty Rules, the Administrative Law Judge's recommendation that the Department enter a Final Order suspending the Respondent's license for six (6) months is REJECTED as being an inappropriate disposition of this case. The relevant circumstances set forth in the Findings of Fact support the inference, by clear and convincing evidence, that the Respondent violated multiple provisions of the Florida Insurance Code in connection with his dealings with consumers Sophia and James Todd, Gary Holte, Jacquelyn Coy, and approximately 87 other Florida consumers. The applicable penalty associated with these violations is a mandatory twenty-four (24) month suspension of the Respondent's license.

ACCORDINGLY, IT IS FURTHER ORDERED that the licenses and eligibility for licensure of Respondent Felton Eugene Turner are hereby SUSPENDED for a period of twenty-four (24) months. Suspension of Respondent's licenses and eligibility for licensure applies to all licenses and eligibility held by the Respondent under the authority of the Florida Insurance Code. Pursuant to Section 626.641, Florida Statutes, during the period of suspension and until reinstatement, which must be applied for in writing, the Respondent may not engage in or attempt to profess to engage in any transaction or business for which a license is required under the Florida Insurance Code, or directly or indirectly own, control, or be employed in any manner by any insurance agent, agency, or adjuster or adjusting firm.

DONE and ORDERED this 21st day of December, 2007.

KAREN CHANDLER
Deputy Chief Financial Officer

[1] The reference to at least four consumers is based on the three separate consumer-counts set forth in the original and Amended Administrative Complaint against the Respondent, however, two of the three consumer-counts relative to named consumers involved couples.

[2] The Petitioner filed its Proposed Recommended Order on August 29, 1007. The Respondent did not file a proposed recommended order.

[3] *See* § 624.05(3), Fla. Stat. *("Office" means the Office of Insurance Regulation of the Financial Services Commission)*; *see also* § 624.09(1), Fla. Stat. (*an "authorized" insurer is one duly authorized by a subsisting certificate of authority issued by the office to transact insurance in this state*).

[4] *See generally* § 20.121(3), Fla. Stat. (2007).

[5] "No person may be, act as, or advertise or hold himself or herself out to be an insurance agent, insurance adjuster, or customer representative unless he or she is currently licensed by the department *and appointed by an appropriate appointing entity or person.*" § 626.112(1)(a), Fla. Stat. (2004). [Emphasis Added]; *also see generally* § 626.112(b), Fla. Stat. (2007).

[6] No evidence was introduced by the Petitioner and no testimony elicited from the Respondent as to how much the Respondent earned in commissions on the specific annuity products he sold relative to the consumers in the Amended Administrative Complaint. However, the Recommended Order sets forth that the Respondent earned approximately $130,000 in commissions on the sale of approximately 90 of these annuity products for the unauthorized entity. (Recommended Order, Paragraph #8).

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 Rule 9.110, Florida Rules of Appellate Procedure. Review proceedings must be instituted by filing a petition or notice of appeal with the General Counsel, acting as agency clerk, at 612 Larson Building, Tallahassee, Florida, and a copy of the same with the appropriate district court of appeal within thirty (30) days of rendition of this Order.

Copies furnished to:

JAMES A. BOSSART, ESQ.
Department of Financial Services
624 Larson Building
200 East Gaines Street
Tallahassee, Florida 32399-0333

FELTON EUGENE TURNER
8464 Vickers Road
Hahira, Georgia 31632

HON. CHARLES C. ADAMS
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060