

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

WILLIAM J. BURKETT, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 07-2827  
 )  
 DEPARTMENT OF FINANCIAL )  
 SERVICES, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on September 25, 2007, in Tallahassee, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: William J. Burkett, pro se  
10177 Sailwinds Boulevard, South  
Unit J101  
Largo, Florida 33773-2375

For Respondent: Bruce Pelham, Esquire  
Robin Levy, Law Clerk  
Department of Financial Services  
612 Larson Building  
200 East Gaines Street  
Tallahassee, Florida 32399-0333

STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner's application for licensure as a resident life, variable annuity, and health insurance agent should be denied or approved.

PRELIMINARY STATEMENT

Petitioner filed an application to obtain a license as a resident life, variable annuity, and health insurance agent on or about October 5, 2006. The application was denied by the Department of Financial Services (the "Department") on the basis that Petitioner was not trustworthy.

A unilateral pre-hearing stipulation was filed by the Department. At the final hearing held in this matter, Petitioner represented himself and was the only witness called to testify. Petitioner offered no independent exhibits into evidence but stipulated to and adopted Respondent's three exhibits. Respondent did not call a witness to testify at final hearing.

A Transcript of the final hearing was filed at DOAH on October 5, 2007. The parties were given ten days from the filing of the Transcript at DOAH in which to submit proposed recommended orders. Both parties timely filed Proposed Recommended Orders, and they were duly-considered by the undersigned in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is a 71-year-old man, who has been licensed to sell insurance since 1974. He was licensed in the State of Ohio to sell variable annuities, life, and health insurance; the same license he is now seeking in the State of Florida.

2. The Department is the governmental agency responsible for, inter alia, licensing and monitoring persons wishing to sell insurance in the State of Florida.

3. Petitioner obtained a license to sell insurance in the State of Ohio in 1974. He made his living selling insurance and expressed an appreciation of his occupation as being very fulfilling. He wishes to continue selling insurance at this time.

4. While residing in Ohio, Petitioner began selling limited partnerships in cable funds for an entity called CabTel. Before doing so, Petitioner inquired of the Ohio Department of Securities whether he would need a securities license to market the cable funds. He was told no such license was required as long as his employer (CabTel) duly-registered the funds.

5. CabTel would purchase the rights to sell cable services in small towns, trailer parks, and other areas around the mid-West. These rights would be packaged in individual "funds," which were numbered. Petitioner sold limited partnerships in funds from five different groups of cable funds numbered XXV, XXVI, XXVII, XVIII, and XXIX. Each of those funds was duly-registered by CabTel, and Petitioner's sales of those limited partnerships are not a concern. However, for some reason, CabTel then failed to register cable funds numbers XXX and XXXI. Petitioner has not been able to ascertain from CabTel why the

funds were not registered. The owner of CabTel, a Mr. Wilson, has not returned Petitioner's repeated telephone calls.

6. During his residency in Ohio, Petitioner sold limited partnerships to the two non-registered cable funds. He was not aware the funds had not been registered and, in fact, presumed that they were registered just like the prior groups of funds. It was CabTel's responsibility, not Petitioner's, to register the funds.

7. Then, during calendar year 2000, Petitioner moved to Florida. Upon arrival in Florida, Petitioner applied for and was issued a non-resident license to sell variable annuities, life, and health insurance. His application for licensure was full and complete at that time.

8. In January 2003, the State of Ohio sent Petitioner a Notice of Intent to issue a cease and desist order, requiring him to stop selling limited partnerships in the cable funds. Inasmuch as Petitioner had resigned from CabTel and had no intention to sell additional partnerships, he agreed to a Consent Order with the State of Ohio. The Cease and Desist Order was entered on February 23, 2007. The Order gave Petitioner a right to appeal, but he did not do so because he was in agreement with the terms of the Order, i.e., that he stop selling the limited partnerships. Meanwhile, Petitioner continued to legally sell insurance in Ohio and Florida.

9. Despite Florida regulations requiring him to do so, Petitioner failed to notify the State of Florida concerning the Cease and Desist Order entered in Ohio. There is no evidence in the record as to why Petitioner failed to notify the State of Florida about the Ohio Consent Order. Florida then offered Petitioner a settlement stipulation for Consent Order wherein Petitioner would admit he had failed to provide notice and agree to pay a fine of \$500. Petitioner agreed to the stipulation and duly-paid the fine. The Florida Consent Order stated that it was intended to "resolve all issues which pertain to the matters raised in the Department's investigation." Under the Consent Order, Petitioner's license remained in force and effect.

10. On September 15, 2005, the State of Ohio issued a second Consent Order. This one permanently revoked Petitioner's license to sell insurance in Ohio (based on the same issues as in the previous Consent Order). Petitioner initially challenged that Consent Order. Petitioner then made the decision to remain permanently in Florida, so he withdrew his challenge to the revocation of his Ohio license.

11. As a result of losing his Ohio license, Petitioner was no longer eligible for a non-resident license in Florida. He therefore applied for a resident license so he could continue to sell insurance in this state as he had been doing since 2000.

12. The Department denied Petitioner's license application on the basis of three cited statutory sections:

Sections 626.611, 626.785, and 626.831, Florida Statutes (2007). No testimony or evidence was introduced at final hearing to explain facts which would make those statutory references pertinent to this case. It may be reasonably inferred that the entry of two consent orders in Ohio forms the basis for the Department's action.

13. Petitioner's unrefuted testimony at final hearing is credible. His demeanor and frankness lead to the conclusion that his improper sale of securities in Ohio was unintentional, excusable, and absent any intent to deceive or mislead anyone.

14. Petitioner has admitted all aspects of his licensure history in Ohio to the Department. He has voluntarily paid the fine imposed by the Department for failing to timely disclose the existence of the Ohio Consent Order. There has been no showing of untrustworthiness by the evidence presented at final hearing.

15. There is no credible evidence in this proceeding that Petitioner's actions in Ohio and/or Florida indicate a lack of trustworthiness. To the contrary, Petitioner's actions were at worst negligent or due to carelessness.

#### CONCLUSIONS OF LAW

16. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to Section 120.569 and Subsection 120.57(1), Florida Statutes (2007).

17. Petitioner has the burden to prove entitlement to a license by a preponderance of the evidence. See Department of Banking and Finance, Division of Investor Protection v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); and Pou v. Department of Insurance and Treasurer, 707 So. 2d 941 (Fla. 3d DCA 1998).

18. The following provisions of the Florida Statutes, taken directly from the Department's Notice of Denial in this case, are relevant to this matter:

[Subsection] 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. "The department shall deny an application for, suspend, revoke, or refuse to renew or continue the license or appointment of any applicant, agent, title agency, adjuster, customer representative, service representative, or managing general agent, and it shall suspend or revoke the eligibility to hold a license or appointment of any such person, if it finds that as to the applicant, licensee, or appointee any one or more of the following applicable grounds exist:

(1) Lack of one or more of the qualifications for the license or appointment as specified in this code.

(2) Material misstatement, misrepresentation, or fraud in obtaining the license or appointment or in attempting to obtain the license or appointment.

[ \* \* \* ]

(7) Demonstrated lack of fitness or trustworthiness to engage in the business of insurance."

[Subsection] 626.785 Qualifications for license. "(1) The department shall not grant or issue a license as life agent to any individual found by it to be untrustworthy or incompetent, or who does not meet the following qualifications:"

[ \* \* \* ]

[Subsection] 626.831 Qualification for license. "(1) The department shall not grant or issue a license as health agent as to any individual found by it to be untrustworthy or incompetent, . . ."

19. Respondent attempts to infer from its reading of the statutes that Petitioner's actions are, ipso facto, untrustworthy in nature. Even though an agency has broad discretion to interpret statutes which it administers. See Pan American World Airways, Inc. v. Florida Public Service Commission, 427 So. 2d 716, 719 (Fla. 1983). There is no factual basis in the instant case on which to equate Petitioner's actions with untrustworthiness as used in the aforementioned statutes. Respondent did not show any ill intent on the part of Petitioner, nor did Respondent present any testimony to even insinuate that Petitioner's actions were somehow done knowingly. The statutes require a showing of untrustworthiness based on a person's actions, not simply based on the agency's whim.



20. Respondent in its Proposed Recommended Order cites to Natelson v. Department of Insurance, 454 So. 2d 31 (Fla. 1st DCA 1984), for the proposition that the Department may interpret its governing statutes to arrive at a conclusion of untrustworthiness in the instant case. The cited case refers to intentional, criminal actions on the part of the applicant. In this case, there was an unintentional mistake made by Petitioner, followed by acceptance of and acquiescence to the imposed sanctions. That behavior did not rise to the level of "untrustworthiness" as contemplated by the statutes. As stated by the Court in Werner v. State of Florida, Department of Insurance and Treasurer, 689 So. 2d 1211 (Fla. 1st DCA 1997), a finding of lack of fitness or trustworthiness "contemplates more than a solitary lapse." Petitioner has not shown a propensity toward behavior which could be deemed untrustworthy.

21. Petitioner has satisfied his burden of proof to show that he meets the requirements for a license to sell insurance in this state. His testimony sufficiently refutes any suggestion by Respondent that Petitioner is unworthy to sell insurance. Petitioner's status as a licensed insurance salesman for the past seven years in this state confirms his satisfaction of all relevant requirements for the license now being sought.

#### RECOMMENDATION

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

RECOMMENDED that a final order be entered by the Department of Financial Services granting Petitioner a license as a resident life, variable annuity, and health insurance agent.

DONE AND ENTERED this 2nd day of November, 2007, in Tallahassee, Leon County, Florida.

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R. BRUCE MCKIBBEN  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 2nd day of November, 2007.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 10 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.