STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL SERVICES, Petitioner, vs. PATRICK ERIK NADELHOFFER, Respondent.	)	Case No. 07-3543PL

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case on October 5, 2007, by video teleconference at sites in West Palm Beach and Tallahassee, Florida, before Stuart M. Lerner, a duly-designated Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Robert Alan Fox, Esquire
Department of Financial Services
Division of Legal Services
200 East Gaines Street
612 Larson Building
Tallahassee, Florida 32399-0333

For Respondent: Daniel H. Thompson, Esquire
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STATEMENT OF THE ISSUE

Whether Respondent committed the violations alleged in the Administrative Complaint, as amended at hearing, and if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On July 6, 2007, the Department of Financial Services (Department) issued a two-count Administrative Complaint alleging: (1) that Respondent had violated Sections 626.611(14) and 626.621(8), Florida Statutes, by entering a plea of guilty to the felony offense of "Domestic Aggravated Stalking" in Palm Beach County Circuit Court on November 30, 2006 (Count I); and (2) that he had violated Section 626.621(2) and (11), Florida Statutes, by failing to inform the Department in writing of the plea within 30 days of its entry (Count II). The Administrative Complaint advised Respondent that the Department "intend[ed] to enter an Order suspending or revoking [his] licenses and appointments as an insurance agent or to impose such penalties as may be provided under the provisions of Sections 626.611, 626.621, 626.681, 626.691, and 626.9521, Florida Statutes, and under the other referenced Sections of the Florida Statutes set out in this Administrative Complaint."

Respondent subsequently requested a "formal administrative hearing to challenge the [Administrative] Complaint." On August 1, 2007, the matter was referred to DOAH for the

assignment of an Administrative Law Judge to conduct the hearing Respondent had requested.

As noted above, the hearing was held on October 5, 2007. At the outset of the hearing, counsel for the Department announced that the Department was "abandon[ing]" Count II of the Administrative Complaint. Thereafter, the parties made their evidentiary presentations. Three witnesses testified at the hearing: Officer Teak Adams, Kathy Spencer, and Respondent. In addition to the testimony of these three witnesses, 20 exhibits (Petitioner's Exhibits 1 through 9, 13 through 15, 17, 19, and 29 through 32, and Respondent's Exhibits 1 and 4) were offered and received into evidence.

At the close of the taking of evidence, the undersigned established a deadline (14 days from the date of the filing of the hearing transcript with DOAH) for the filing of proposed recommended orders.

The hearing Transcript (consisting of one volume) was filed with DOAH on January 9, 2008.

The Department and Respondent timely filed their Proposed Recommended Orders on January 22, 2008, and January 23, 2008, respectively.

FINDINGS OF FACT

Based on the evidence adduced at hearing, and the record as a whole, the following findings of fact are made:

1. Respondent is a 46-year-old man who holds the following Florida insurance licenses: a 2-16 life agent license (with an original issue date of July 25, 1987); a 2-18 life and health agent license (with an original license date of July 25, 1987); and a 2-20 general lines property and casualty agent license (with an original issue date of October 2, 1986). At no time during the period that he has held these licenses has he ever been disciplined by the Department or its predecessor.

2. For the past 20 years, Respondent has worked as an agent for State Farm.

3. On or about November 3, 2006, a criminal information was filed against Respondent in Palm Beach County (Florida) Circuit Court Case No. 06-CF013354AMB. The information alleged that Respondent, "on or between September 22, 2006, and October 8, 2006, . . . did willfully, maliciously, and repeatedly follow, harass or cyberstalk AIMEE NADELHOFFER and did make a credible threat, with the intent to place AIMEE NADELHOFFER or AIMEE NADELHOFFER'S child, sibling, spouse, parent or dependent in reasonable fear of death or bodily injury, contrary to Florida Statute 784.048(3) [Florida Statutes]."

4. Aimee Nadelhoffer, the person named as the alleged victim in the information, is Respondent's former wife. She and

Respondent are the parents of a three-year-old child for whom Respondent is paying child support.

5. On November 30, 2006, pursuant to a plea agreement, Respondent (who had no previous criminal record) pled guilty to the crime alleged in the criminal information filed against him. At the time he entered into the plea agreement, Respondent was in jail awaiting trial and concerned that he would "lose [his] State Farm agency" if he remained incarcerated until his trial was held.

6. Adjudication of guilt was withheld,[1] and Respondent was placed on probation for three years, with conditions that included: not "associat[ing], communicat[ing], or hav[ing] any contact [except for contact by e-mail in reference to child custody issues] with [the] victim," Aimee Nadelhoffer, who had suffered substantial emotional distress as a result of Respondent's admitted[2] criminal wrongdoing,[3] nor "com[ing] within 200 f[eet]t of her residence or place of employment"; undergoing a "psychological evaluation" and completing any "recommended treatment"; and submitting to random drug testing at his own expense. It was furthered ordered that Respondent could "request early termination of probation after 2 years if [he] successfully complete[d] all conditions and [there were] no violations."

7. In computing Respondent's "lowest permissible sentence"

pursuant to Section 921.0024, Florida Statutes,[4] the sentencing judge assessed no additional points in any of the following categories set forth on the Criminal Punishment Code Worksheet: "additional offenses," "victim injury," "prior record," "legal status violation," "community sanction violation," "firearm/semi-automatic or machine gun," "prior serious felony," and "enhancements." For his commission of the "primary offense" he was assessed 36 points.[5]

8. On September 19, 2007, in accordance with a request made by Aimee Nadelhoffer, the conditions of Respondent's probation were "modified to provide [that Respondent] may have 'No Violent Contact' [as opposed to no contact of any kind] with Aimee Nadelhoffer." Respondent presently has contact with Aimee Nadelhoffer, dealing with her cooperatively concerning "issues associated with [child] visitation and the like."

9. Since the entry of his guilty plea, Respondent has not spent any time in jail.

10. Respondent is still on probation.

11. No proceedings have been brought seeking to revoke his probation.

12. In November 2006, two other criminal informations were filed against Respondent. One was filed in Palm Beach County Court on November 7, 2006, and charged, in its two counts, that Respondent, on October 19, 2006, did: "willfully, after having

been served with an Injunction for Protection Against Domestic Violence issued pursuant to section 714.30 . . . , knowingly and intentionally come within 100 feet of AIMEE NADELHOFFER's motor vehicle, contrary to Florida Statute 741.31(4)(a)6." (Count 1); and "leav[e] the scene of a crash involving damage, in violation of Section 316.061, Florida Statutes" (Count 2). The other criminal information was filed in Palm Beach County Court on November 17, 2006, and charged Respondent with two counts of violating an injunction for protection (of Aimee Nadelhoffer) against domestic violence, in violation of Section 741.31(4)(a)5., Florida Statutes.[6]

13. After the Department learned of Respondent's guilty plea in Palm Beach County (Florida) Circuit Court Case No. 06-CF013354AMB, it filed the two-count Administrative Complaint against Respondent described in the Preliminary Statement of this Recommended Order. At Respondent's request, the matter was subsequently referred to DOAH for hearing.

14. During the discovery phase of the proceeding, Respondent, through his attorney, took the deposition of Kathy Spencer, whom the Department had designated under Fla. R. Civ. P. 1.310 as its representative for purposes of "explain[ing] the Department's decision as to what disciplinary action should be imposed on [Respondent] for the charges set forth in the Administrative Complaint [in this case]." In her deposition

testimony, Ms. Spencer clarified what the Department had stated in the Administrative Complaint regarding the disciplinary action it intended to take against Respondent. She testified that the Department was seeking to impose a three-month suspension for the violations alleged in Count I and an additional three-month suspension for the wrongdoing alleged in Count II. She further testified that, with respect to Count I, it was the Department's position that the crime to which Respondent had pled guilty in Palm Beach County (Florida) Circuit Court Case No. 06-CF013354AMB was a "felony involving moral turpitude."[7]

CONCLUSIONS OF LAW

15. DOAH has jurisdiction over the subject matter of this proceeding and of the parties hereto pursuant to Chapter 120, Florida Statutes.

16. "Chapters 624-632, 634, 635, 636, 641, 642, 648, and 651 constitute the 'Florida Insurance Code.'" § 624.01, Fla. Stat.

17. It is the Department's responsibility to "enforce the provisions of this code." § 624.307(1), Fla. Stat.

18. Among its duties is to license and discipline insurance agents.

19. The Department is authorized to suspend or revoke agents' licenses, pursuant to Sections 626.611 and 626.621,

Florida Statutes; to impose fines on agents of up to $500.00 or, in cases where there are "willful violation[s] or willful misconduct," up to $3,500, and to "augment[]" such disciplinary action "by an amount equal to any commissions received by or accruing to the credit of the [agent] in connection with any transaction as to which the grounds for suspension, [or] revocation . . . related," pursuant to Section 626.681, Florida Statutes; to place agents on probation for up to two years, pursuant to Section 626.691, Florida Statutes; and to order agents "to pay restitution to any person who has been deprived of money by [their] misappropriation, conversion, or unlawful withholding of moneys belonging to insurers, insureds, beneficiaries, or others," pursuant to Section 626.692, Florida Statutes.

20. The Department may impose a fine or place an agent on probation "in lieu of" suspension or revocation of the agent's license "except on a second offense or when . . . suspension [or] revocation . . . is mandatory." §§ 626.681 and 626.691, Fla. Stat.

21. The Department may take disciplinary action against an agent only after the agent has been given reasonable written notice of the charges and an adequate opportunity to request a proceeding pursuant to Sections 120.569 and 120.57, Florida Statutes. See § 120.60(5), Fla. Stat.

22. An evidentiary hearing must be held if requested by the agent when there are disputed issues of material fact. §§ 120.569 and 120.57(1), Fla. Stat.

23. At the hearing, the Department bears the burden of proving that the agent engaged in the conduct, and thereby committed the violations, alleged in the charging instrument. Proof greater than a mere preponderance of the evidence must be presented for the Department to meet its burden of proof. Clear and convincing evidence of the agent's guilt is required. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932, 935 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292, 294 (Fla. 1987); Beshore v. Department of Financial Services, 928 So. 2d 411, 413 (Fla. 1st DCA 2006); Pou v. Department of Insurance and Treasurer, 707 So. 2d 941 (Fla. 3d DCA 1998); and § 120.57(1)(j), Fla. Stat. ("Findings of fact shall be based upon a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute . . . .").

24. Clear and convincing evidence is an "intermediate standard," "requir[ing] more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" In re Graziano, 696 So. 2d 744, 753 (Fla. 1997). For proof to be considered "'clear and convincing' . . .

the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established." In re Davey, 645 So. 2d 398, 404 (Fla. 1994) (quoting with approval, Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)); see also In re Adoption of Baby E. A. W., 658 So. 2d 961, 967 (Fla. 1995)("The evidence [in order to be clear and convincing] must be sufficient to convince the trier of fact without hesitancy."). "Although this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous." Westinghouse Electric Corporation, Inc. v. Shuler Bros., Inc., 590 So. 2d 986, 989 (Fla. 1st DCA 1991).

25. In determining whether the Department has met its burden of proof, it is necessary to evaluate its evidentiary presentation in light of the specific allegations of wrongdoing made in the charging instrument. Due process prohibits the Department from taking disciplinary action against an agent based on matters not specifically alleged in the charging instrument, unless those matters have been tried by consent. See Shore Village Property Owners' Association, Inc. v.

Department of Environmental Protection, 824 So. 2d 208, 210 (Fla. 4th DCA 2002); Cottrill v. Department of Insurance, 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996); and Delk v. Department of Professional Regulation, 595 So. 2d 966, 967 (Fla. 5th DCA 1992).

26. The Administrative Complaint in the instant case, as modified at hearing, alleges, in its lone remaining count, that Respondent violated Section 626.611(14), Florida Statutes, and Section 626.621(8), Florida Statutes, as a consequence of his having pled guilty on November 30, 2006, in Palm Beach County (Florida) Circuit Court Case No. 06-CF013354AMB to the felony of "Domestic Aggravated Stalking" (as described in Section 784.048(3), Florida Statutes).

27. Section 626.611(14), Florida Statutes, provides as follows:

> 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:
>
> Having been found guilty of or having pleaded guilty or nolo contendere to a felony or a crime punishable by imprisonment of 1 year or more under the law of the

> United States of America or of any state thereof or under the law of any other country which involves moral turpitude, without regard to whether a judgment of conviction has been entered by the court having jurisdiction of such cases.

Section 626.621(8), Florida Statutes, provides as follows:

> The department may, in its discretion, deny an application for, suspend, revoke, or refuse to renew or continue the license or appointment of any applicant, agent, adjuster, customer representative, service representative, or managing general agent, and it may 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 under circumstances for which such denial, suspension, revocation, or refusal is not mandatory under s. 626.611:
>
> Having been found guilty of or having pleaded guilty or nolo contendere to a felony or a crime punishable by imprisonment of 1 year or more under the law of the United States of America or of any state thereof or under the law of any other country, without regard to whether a judgment of conviction has been entered by the court having jurisdiction of such cases.

28. Because they are penal in nature, these statutory provisions must be strictly construed, with any reasonable doubts as to their meaning being resolved in favor of the agent. See Capital National Financial Corporation v. Department of Insurance, 690 So. 2d 1335, 1337 (Fla. 3rd DCA 1997)("Section 627.8405 is a penal statute and therefore must be strictly construed: . . . . 'When a statute imposes a penalty, any doubt

as to its meaning must be resolved in favor of a strict construction so that those covered by the statute have clear notice of what conduct the statute proscribes.'"); and Werner v. Department of Insurance and Treasurer, 689 So. 2d 1211, 1214 (Fla. 1st DCA 1997)("[S]tatutes authorizing the revocation of a license to practice a business or profession 'must be strictly construed, and such provisions must be strictly followed, because . . . penal in . . . nature.'").

29. It is undisputed, and the record evidence clearly and convincingly establishes, that on November 30, 2006, Respondent pled guilty to the charge, made in Palm Beach County (Florida) Circuit Court Case No. 06-CF013354AMB, that he had committed "Domestic Aggravated Stalking," in violation of Section 784.048(3), Florida Statutes, which provides as follows:

> Any person who willfully, maliciously, and repeatedly follows, harasses,[8] or cyberstalks[9] another person, and makes a credible threat[10] with the intent to place that person in reasonable fear of death or bodily injury of the person, or the person's child, sibling, spouse, parent, or dependent, commits the offense of aggravated stalking,[11] a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

30. Inasmuch as "Domestic Aggravated Stalking" is a felony, Respondent's having pled guilty to this crime constituted a violation of Section 626.621(8), Florida Statutes, as alleged in Count I of the Administrative Complaint.

31. Whether the entry of this plea also constituted a violation of Section 626.611(14), Florida Statutes, as further charged in Count I of the Administrative Complaint, turns on whether "Domestic Aggravated Stalking" involves "moral turpitude."

32. The Florida Insurance Code does not contain a definition of what constitute "crimes involving moral turpitude."[12]

33. Such a definition, however, is found in Florida Administrative Code Rule Chapter 69B-231. "The purpose of this rule chapter is to implement the Department's duty under Sections 624.307(1) and 626.207(2), F.S., to enforce Sections 626.611, 626.621, 626.631, 626.641, 626.681 and 626.691, F.S., by establishing standards for penalties described in those statutory sections, and interpreting provisions in those sections as they relate to penalties imposed upon licensees specified in Rule 69B-231.020, F.A.C."

34. Among the rule provisions in Florida Administrative Code Rule Chapter 69B-231 is Florida Administrative Code Rule 69B-231.030(4), which defines "[c]rimes involving moral turpitude" as "each felony crime identified in subsection 69B-211.042(21), F.A.C., and each felony crime not identified in subsection 69B-211.042(21), F.A.C., that is substantially similar to a crime identified in subsection 69B-211.042(21),

F.A.C." See also Fla. Admin. Code R. 69B-211.042(7)(d)("The lists are not all-inclusive. Where a particular crime involved in an application is not listed in this rule, the Department has the authority to analogize the crime to the most similar crime that is listed. No inference is to be drawn from the absence of any crime from this list, to the effect that said crime is not grounds for adverse action under this rule.").

35. "Domestic Aggravated Stalking" is not identified in Florida Administrative Code Rule 69B-211.042(21), but is "substantially similar" to a felony crime that is so identified, specifically, "Aggravated Assault" (which is identified in Florida Administrative Code Rule 69B-211.042(21)(yy)). An "aggravated assault" is "an assault[13]: (a) With a deadly weapon without intent to kill; or (b) With an intent to commit a felony." § 784.021(1), Fla. Stat.

36. "The stalking statute [that is, Section 784.048, Florida Statutes, which includes the crimes of simple stalking (a first degree misdemeanor) and aggravated stalking] bears a family resemblance to the assault statutes," with which it is grouped in Chapter 784, Florida Statutes. Bouters v. State, 659 So. 2d 235, 238 (Fla. 1995)(quoting with approval, Pallas v. State, 636 So. 2d 1358, 1361 (Fla. 3d DCA 1994)); see also Pallas, 636 So. 2d at 1360 n.3 ("The stalking statute is codified as part of chapter 784, entitled 'Assault; Battery;

Culpable Negligence.'"). Furthermore, it has been said that "[a]ggravated stalking is in the nature of an aggravated form of assault." Bouters, 659 So. 2d at 239 (Kogan, J., specially concurring).

37. Both aggravated stalking and aggravated assault are third degree, "forcible" felonies[14] involving the threat of physical harm to another individual. See § 776.08, Fla. Stat. ("'Forcible felony' means treason; murder; manslaughter; sexual battery; carjacking; home-invasion robbery; robbery; burglary; arson; kidnapping; aggravated assault; aggravated battery; aggravated stalking; aircraft piracy; unlawful throwing, placing, or discharging of a destructive device or bomb; and any other felony which involves the use or threat of physical force or violence against any individual."); § 784.021(2), Fla. Stat. ("Whoever commits an aggravated assault shall be guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084."); and § 784.048(3), Fla. Stat.

38. The Department, in a recent case, In the Matter: Michael McBeth, No. 90852-07-AG, slip op. at 2-3 (DFS November 8, 2007)(Final Order), had occasion to consider whether aggravated stalking was a crime involving moral turpitude and determined that it was, finding it to be "more analogous to the crime of Aggravated Assault [which is listed in Florida

Administrative Code Rule 69B-211.042(21)] [than to the crime of] Simple Assault [which is not so listed]." There is no good reason for the Department to reach a contrary conclusion in the instant case.

39. Inasmuch as "Domestic Aggravated Stalking" is a felony involving "moral turpitude," Respondent's having pled guilty to this crime constituted not only a violation of Section 626.621(8), Florida Statutes, but also a violation of Section 626.611(14), Florida Statutes (rendering him subject to mandatory suspension or revocation of his insurance licenses), as alleged in Count I of the Administrative Complaint.

40. To determine what specific disciplinary action the Department should take against Respondent for committing these violations, it is necessary to first consult the Department's "penalty guidelines" set forth in Florida Administrative Code Rule Chapter 69B-231, which impose restrictions and limitations on the exercise of the Department's disciplinary authority. See Parrot Heads, Inc. v. Department of Business and Professional Regulation, 741 So. 2d 1231, 1233 (Fla. 5th DCA 1999)("An administrative agency is bound by its own rules . . . creat[ing] guidelines for disciplinary penalties."); cf. State v. Jenkins, 469 So. 2d 733, 734 (Fla. 1985)("[A]gency rules and regulations, duly promulgated under the authority of law, have the effect of law."); Buffa v. Singletary, 652 So. 2d 885, 886 (Fla. 1st DCA

1995)("An agency must comply with its own rules."); Decarion v. Martinez, 537 So. 2d 1083, 1084 (Fla. 1st 1989)("Until amended or abrogated, an agency must honor its rules."); and Williams v. Department of Transportation, 531 So. 2d 994, 996 (Fla. 1st DCA 1988)(agency is required to comply with its disciplinary guidelines in taking disciplinary action against its employees).

41. These "penalty guidelines" were adopted pursuant to the rulemaking authority delegated to the Department by Section 626.207(2), Florida Statutes, which provides as follows:

> The department shall adopt rules establishing specific penalties against licensees for violations of s. 626.611, s. 626.621, s. 626.8437, s. 626.844, s. 626.935, s. 634.181, s. 634.191, s. 634.320, s. 634.321, s. 634.422, s. 634.423, s. 642.041, or s. 642.043. The purpose of the revocation or suspension is to provide a sufficient penalty to deter future violations of the Florida Insurance Code. The imposition of a revocation or the length of suspension shall be based on the type of conduct and the probability that the propensity to commit further illegal conduct has been overcome at the time of eligibility for relicensure. The revocation or the length of suspension may be adjusted based on aggravating or mitigating factors, established by rule and consistent with this purpose.

42. Florida Administrative Code Rule 69B-231.040 explains how the Department goes about "[c]alculating [a] penalty." It provides as follows:

> (1) Penalty Per Count.

(a) The Department is authorized to find that multiple grounds exist under Sections 626.611 and 626.621, F.S., for disciplinary action against the licensee based upon a single count in an administrative complaint based upon a single act of misconduct by a licensee. However, for the purpose of this rule chapter, only the violation specifying the highest stated penalty will be considered for that count. The highest stated penalty thus established for each count is referred to as the "penalty per count."

(b) The requirement for a single highest stated penalty for each count in an administrative complaint shall be applicable regardless of the number or nature of the violations established in a single count of an administrative complaint.

(2) Total Penalty. Each penalty per count shall be added together and the sum shall be referred to as the "total penalty."

(3) Final Penalty.

(a) The final penalty which will be imposed against a licensee under these rules shall be the total penalty, as adjusted to take into consideration any aggravating or mitigating factors;

(b) The Department may convert the total penalty to an administrative fine and probation if the licensee has not previously been subjected to an administrative penalty and the current action does not involve a violation of Section 626.611, F.S.;

(c) The Department will consider the factors set forth in rule subsection 69B-231.160(1), F.A.C., in determining whether to convert the total penalty to an administrative fine and probation.

(d) In the event that the final penalty would exceed a suspension of twenty-four (24) months, the final penalty shall be revocation.

43. Florida Administrative Code Rule 69B-231.080 is entitled, "Penalties for Violation of Section 626.611." It provides, in pertinent part, as follows:

> If it is found that the licensee has violated any of the following subsections of Section 626.611, F.S., for which compulsory suspension or revocation is required, the following stated penalty shall apply:
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> * * *
>
> (14) Section 626.611(14), F.S. -- see Rule 69B-231.150, F.A.C.

44. Florida Administrative Code Rule 69B-231.090 is entitled, "Penalties for Violation of Section 626.621." It provides, in pertinent part, as follows:

> If it is found that the licensee has violated any of the following subsections of Section 626.621, F.S., for which suspension or revocation of license(s) and appointment(s) is discretionary, the following stated penalty shall apply:
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> * * *
>
> (8) Section 626.621(8), F.S. -- see Rule 69B-231.150, F.A.C.
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> * * *

45. Florida Administrative Code Rule 69B-231.150 provides, in pertinent part, as follows:

* * *

> (3) If a licensee is not convicted of, but has been found guilty of or has pleaded guilty or nolo contendere to, a felony or a crime punishable by imprisonment of 1 year or more under the law of the United States of America or of any state thereof or under the law of any other country, which is a crime involving moral turpitude or is a crime involving breach of trust or dishonesty, the penalties are as follows:
>
> * * *
>
> (c) If the conduct is not related to the business of insurance and does not involve dishonesty or breach of trust, the penalty shall be a 6 month suspension.[15]
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> * * *

46. Accordingly, in the instant case, the "penalty per count" (as described in Florida Administrative Code Rule 69B-231.040(1)) for Count I of the Administrative Complaint is a six-month suspension. Because Count I is the lone remaining count of the Administrative Complaint (Count II having been "abandon[ed]" by the Department), a six-month suspension is also the "total penalty" (as described in Florida Administrative Code Rule 69B-231.040(2)) in this case.

47. The "aggravating/mitigating factors" that must be considered to determine whether any "adjust[ment]" should be made to this "total penalty" are set forth in Florida Administrative Code Rule 69B-231.160(2), which provides as follows:

> The Department shall consider the following aggravating and mitigating factors and apply them to the total penalty in reaching the final penalty assessed against a licensee under this rule chapter. After consideration and application of these factors, the Department shall, if warranted by the Department's consideration of the factors, either decrease or increase the penalty to any penalty authorized by law.
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> * * *
>
> (2) For penalties assessed under Rule 69B-231.150, F.A.C., for violations of Sections 626.611(14) and 626.621(8), F.S.:
>
> (a) Number of years that have passed since criminal proceeding;
>
> (b) Age of licensee at time the crime was committed;
>
> (c) Whether licensee served time in jail;
>
> (d) Whether or not licensee violated criminal probation;
>
> (e) Whether or not licensee is still on criminal probation;
>
> (f) Whether or not licensee's actions or behavior resulted in substantial injury to victim[16];
>
> (g) Whether or not restitution was, or is being timely paid;
>
> (h) Whether or not licensee's civil rights have been restored; and
>
> (i) Other relevant factors.

48. With respect to the "factor" set forth in Florida Administrative Code Rule 69B-231.160(2)(a), it has been slightly

more than a year since Respondent entered his guilty plea in Palm Beach County (Florida) Circuit Court Case No. 06-CF013354AMB.

49. With respect to the "factor" set forth in Florida Administrative Code Rule 69B-231.160(2)(b), Respondent was a few months shy of his 45th birthday at the time of the "Domestic Aggravated Stalking" to which he pled guilty.

50. With respect to the "factor" set forth in Florida Administrative Code Rule 69B-231.160(2)(c), Respondent was not sentenced to any jail time as a result of his plea.[17]

51. With respect to the "factor" set forth in Florida Administrative Code Rule 69B-231.160(2)(d), no charges have been filed against Respondent alleging that he has violated his probation.

52. With respect to the "factor" set forth in Florida Administrative Code Rule 69B-231.160(2)(e), Respondent is still on probation.

53. With respect to the "factor" set forth in Florida Administrative Code Rule 69B-231.160(2)(f), while there is no record evidence that Respondent's criminal wrongdoing resulted in any physical "injury to [the] victim," Aimee Nadelhoffer, the evidentiary record does establish that Ms. Nadelhoffer suffered substantial emotional distress as a result of Respondent's actions.[18]

54. With respect to the "factor" set forth in Florida Administrative Code Rule 69B-231.160(2)(g), Respondent was not ordered to pay any restitution as part of his sentence.

55. With respect to the "factor" set forth in Florida Administrative Code Rule 69B-231.160(2)(h), Respondent did not lose his civil rights as a result of his guilty plea.

56. "Other relevant factors" include the following: as a licensee, Respondent has an unblemished prior disciplinary record; at Aimee Nadelhoffer's request, the conditions of Respondent's probation were "modified to provide [that Respondent] may have 'No Violent Contact' [as opposed to no contact of any kind] with Aimee Nadelhoffer"; and Respondent presently has contact with Aimee Nadelhoffer and is acting cooperatively with her in addressing matters relating to their child.[19]

57. Having considered the facts of the instant case in light of the provisions Florida Administrative Code Rule 69B-231.160(2), the undersigned concludes that the aggravating and mitigating factors in the instant case are in equipoise and that therefore neither an increase, nor a decrease, in the "total penalty" is warranted based on these factors. Therefore, the "final penalty" (as described in under Florida Administrative Code Rule 69B-231.040(3)) in this case is a six-month suspension.

58. The Department, however, is foreclosed from imposing upon Respondent a penalty as harsh as a six-month suspension due to its failure to have given Respondent adequate advance warning that he was at risk of having his licenses suspended for this length of time for having committed the violations alleged in Count I of the Administrative Complaint. Because the Department, through its designated representative, Kathy Spencer, advised Respondent prior to hearing that, with respect to Count I, it was seeking only a three-month suspension, three months is the longest that Respondent's licenses may be suspended for the wrongdoing alleged in this lone, remaining count of the Administrative Complaint. See Williams v. Turlington, 498 So. 2d 468 (Fla. 3d DCA 1986)("Since Williams was not given notice by either the complaint or later proceedings that he was at risk of having his license permanently revoked, the Commission's imposition of the non-prayed-for relief of permanent revocation, even if justified by the evidence, was error."); and Department of Business and Professional Regulation, Construction Industry Licensing Board v. Hufeld, No. 94-6781, 1995 Fla. Div. Adm. Hear. LEXIS 4518 *8 (Fla. DOAH May 3, 1995)(Recommended Order)("[R]espondents in license discipline cases are entitled to notice of the penalty sought by the agency, and the penalty imposed cannot be more severe than the most severe potential penalty of which a

respondent had notice.")(Recommended Order); cf. Cobas v. State, 671 So. 2d 838, 839 (Fla. 3d DCA 1996)("Finally, the trial court erred in imposing a habitual offender sentence in lower court case 89-33369, where Cobas was not given prior notice of the intent to seek enhanced penalties before the plea was accepted.").

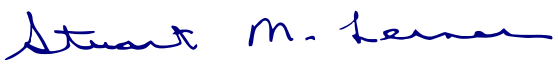
59. In view of the foregoing, the penalty that the Department should impose in the instant case is a three-month suspension of Respondent's licenses.[20]

RECOMMENDATION

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

RECOMMENDED that the Department issue a Final Order finding Respondent guilty of the violations alleged in Count I of the Administrative Complaint and suspending his licenses for three months for committing these violations.

DONE AND ENTERED this 4th day of February, 2008, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 4th day of February, 2008.

ENDNOTES

[1] Accordingly, Respondent's civil rights were not suspended pursuant to Section 944.292(1), Florida Statutes, which provides as follows:

> Upon conviction of a felony as defined in s. 10, Art. X of the State Constitution, the civil rights of the person convicted shall be suspended in Florida until such rights are restored by a full pardon, conditional pardon, or restoration of civil rights granted pursuant to s. 8, Art. IV of the State Constitution.

[2] Respondent's guilty plea constituted an admission that he had engaged in the criminal conduct alleged in the information filed against him. See Johnson v. Wainwright, 238 So. 2d 590, 593 (Fla. 1970) (quoting with approval, McCarthy v. United States, 394 U.S. 459, 466 (1969) and Boykin v. Alabama, 395 U.S. 238, 243 (1969))("'[A] guilty plea is an admission of all the elements of a formal criminal charge . . . .'"); and Paterno v. Fernandez, 569 So. 2d 1349, 1351 (Fla. 3d DCA 1990)("In pleading guilty to an information charging her with the crime of grand

theft in the first degree, the defendant admitted all facts contained in the information, that she committed the crime of grand theft in the first degree when she took $20,000.00 or more from the plaintiffs with the intent to deprive them of the right to their property and appropriated the property for her use or for the use of others. Thus, we find that the facts underlying the criminal offense were stipulated through a guilty plea.").

[3] Officer Teak Adams of the City of Greenacres Public Safety Department credibly testified at hearing that, when he arrived at Aimee Nadelhoffer's home on September 29, 2006, in response to her complaint concerning "obscene and harassing phone calls," Ms. Nadelhoffer was visibly "upset" and "shaking," and she told him that "she was very nervous and scared for her life" as a result of the harassment she was being subjected to by Respondent. Officer Adams' testimony as what Ms. Nadelhoffer said to him regarding her being "very nervous and scared for her life" is sufficient to support a finding in this administrative proceeding concerning the emotional distress Ms. Nadelhoffer was experiencing, notwithstanding the testimony's hearsay nature, inasmuch as it would be admissible over objection in a civil proceeding pursuant to the "then existing mental, emotional, or physical condition" exception to the hearsay rule. See § 90.801(1)(c), Fla. Stat. ("'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."); § 90.802, Fla. Stat. ("Except as provided by statute, hearsay evidence is inadmissible."); § 90.803(3)(a)1., Fla. Stat. ("The provision of s. 90.802 to the contrary notwithstanding, the following are not inadmissible as evidence, even though the declarant is available as a witness: A statement of the declarant's then-existing state of mind, emotion, or physical sensation, including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health, when such evidence is offered to: Prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when such state is an issue in the action."); § 120.57(1)(c), Fla. Stat. ("Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions."); and Peede v. State, 474 So. 2d 808, 816 (Fla. 1985)("[T]he state urges that the daughter's testimony that her mother said she was scared was not prejudicial in light of the fact that the daughter testified that her mother seemed nervous and scared. Moreover, the state argues, those statements challenged below

were properly admitted under the hearsay exception to show the declarant's state of mind which was relevant to the kidnapping charge which formed the basis for the state's felony murder theory. We agree. The daughter's testimony in this regard established Darla's [the mother's] state of mind. Under the 'state of mind' hearsay exception, a statement demonstrating the declarant's state of mind when at issue in a case is admissible. . . . The victim's statements to her daughter just prior to her disappearance all serve to demonstrate that the declarant's state of mind at that time was not to voluntarily accompany the defendant outside of Miami or to North Carolina. We hold that the trial did not abuse its discretion in admitting the testimony at issue.").

[4] "The lowest permissible sentence is the minimum sentence that may be imposed by the trial court, absent a valid reason for departure." § 921.0024(2), Fla. Stat.

[5] Pursuant to Section 921.0024(2), Florida Statutes, where the "total sentence points" are 44 or less, the "lowest permissible sentence is any nonstate prison sanction."

[6] The evidentiary record in this case does not reveal the disposition of these two criminal informations.

[7] The Department staff person who had initially reviewed Respondent's case, Richard Walker, an analyst with the Department, had come to a contrary conclusion and had "recommended [a] monetary fine" rather than taking action against Respondent's license. Mr. Walker, however, was overruled by his superiors.

[8] "Harass," as used in Section 784.048, Florida Statutes, "means to engage in a course of conduct directed at a specific person that causes substantial emotional distress in such person and serves no legitimate purpose." § 784.048(1)(a), Fla. Stat.

[9] "Cyberstalk," as used in Section 784.048, Florida Statutes, "means to engage in a course of conduct to communicate, or to cause to be communicated, words, images, or language by or through the use of electronic mail or electronic communication, directed at a specific person, causing substantial emotional distress to that person and serving no legitimate purpose." § 784.048(1)(d), Fla. Stat. A "course of conduct," for purposes of this statutory definition, is "a pattern of conduct composed of a series of acts over a period of time, however short,

evidencing a continuity of purpose." § 784.048(1)(b), Fla. Stat.

[10] "Credible threat," as used in Section 784.048, Florida Statutes, "means a threat made with the intent to cause the person who is the target of the threat to reasonably fear for his or her safety. The threat must be against the life of, or a threat to cause bodily injury to, a person." § 784.048(1)(c), Fla. Stat.

[11] Through this statute, "the [L]egislature has proscribed willful, malicious, and repeated acts of harassment which are directed at a specific person, which serve no legitimate purpose, and which would cause substantial emotional distress in a reasonable person." Bouters v. State, 659 So. 2d 235, 238 (Fla. 1995)(quoting with approval, Pallas v. State, 636 So. 2d 1358 (Fla. 3d DCA 1994)). "In determining if an incident causes substantial emotional distress, courts use a reasonable person standard, not a subjective standard." Slack v. Kling, 959 So. 2d 425, 426 (Fla. 2d DCA 2007); see also D. L. D. v. State, 815 So. 2d 746, 748 (Fla. 5th DCA 2002)("[I]n determining whether an incident or series of incidents creates substantial emotional distress for a victim, the distress should be judged not on a subjective standard (was the victim in tears and terrified), but on an objective one (would a reasonable person be put in distress when subjected to such conduct?).").

[12] The Florida Supreme Court has observed that "[m]oral 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." State ex rel. Tullidge v. Hollingsworth, 146 So. 660, 661 (Fla. 1933).

[13] "An 'assault' is an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent." § 784.011, Fla. Stat.

[14] In contrast, simple assault (a crime not identified in Florida Administrative Code Rule 69B-211.042(21), which, Respondent claims, resembles aggravated stalking "more so tha[n] aggravated assault") is merely a second degree misdemeanor. § 784.011(2), Fla. Stat.

[15] If "Domestic Aggravated Stalking" were a crime not involving "moral turpitude," Subsection (4)(c) of Florida Administrative Code Rule 69B-231.150, which provides as follows, would be applicable to the instant case:

> (4) If a licensee is not convicted of, but has been found guilty of or has pleaded guilty or nolo contendere to, a felony or a crime punishable by imprisonment of 1 year or more under the laws of the United States of America or of any state thereof or under the law of any other country, which is not a crime involving moral turpitude and is not a crime involving breach of trust or dishonesty, the penalties are as follows:
>
> * * *
>
> (c) If the conduct is not related to the business of insurance, the penalty shall be a 3-month suspension.

[16] The injury may be physical, emotional, or both. Cf. Craig v. State, 804 So. 2d 532, 534 (Fla. 3rd DCA 2002)("[T]hat case involved the 1973 version of the Baker Act which provided, in part, that a patient could be committed if '[l]ikely to injure himself or others if allowed to remain at liberty . . .' The 1973 statute was broad enough to include emotional injury as well as physical injury. The Baker Act was subsequently amended. It now specifies 'serious bodily harm,' rather than 'harm.' The master and the trial court erred in concluding that a purely emotional injury satisfies this statutory element.")(citations omitted).

[17] Respondent did spend time in jail awaiting trial prior to the entry of his plea, but this should not be taken into consideration in determining what disciplinary action should be taken against him in this proceeding.

[18] Respondent gave self-serving testimony at hearing that he was not "aware of any actual injury that occurred to Ms. Nadelhoffer." The record evidence establishes, however, that, whether Respondent was aware of it or not, his criminal wrongdoing caused his former wife substantial emotional distress.

[19] In its Proposed Recommended Order, the Department contends that among the "[o]ther relevant factors" to consider in this case is the filing of the criminal informations described Finding of Fact 12 of this Recommended Order. The undersigned disagrees, inasmuch as these criminal informations merely accused Respondent of criminal wrongdoing. See Dougan v. State, 470 So. 2d 697, 701 (Fla. 1985)("An indictment or information is not evidence against an accused, but, rather, is nothing more or less than the vehicle by which the state charges that a crime has been committed. The standard jury instructions point this up in the pretrial instructions by stating that the charging document is not evidence and that the jury is not to consider it as any proof of guilt."); and Clark v. School Board of Lake County, 596 So. 2d 735,739 (Fla. 5th DCA 1992)("The charge of abuse is certainly not evidence of the commission of the act in our system of justice."). Neither does the undersigned agree with the argument made by Respondent in his Proposed Recommended Order that the "[o]ther relevant factors" in this case include that "[a]judication of guilt [in Palm Beach County (Florida) Circuit Court Case No. 06-CF013354AMB] was withheld" and that "[t]here is no evidence that the ["Domestic Aggravated Stalking"] offense [to which Respondent pled guilty in that criminal case] had any bearing on Respondent's insurance agency obligations." These factors have already been taken into consideration in the preceding phases of the penalty calculation process (described in Florida Administrative Code Rule 69B-231.040(1) and (2)), resulting in a less severe "penalty per count" (six-month suspension) and "total penalty" (six-month suspension) than otherwise would have been the case. See Fla. Admin. Code R. 69B-231.150(1)("If a 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 immediate revocation."); and Fla. Admin. Code R. 69B-231.150(3)(a) and (b)("If a licensee is not convicted of, but . . . has pleaded guilty . . . to, a felony or a crime punishable by imprisonment of 1 year or more under the law of the United States of America or of any state thereof or under the law of any other country, which is a crime involving moral turpitude . . . , the penalties are as follows: (a) If the conduct directly relates to activities involving the business of insurance, the penalty shall be revocation. (b) If the conduct indirectly relates to the business of insurance . . . , the penalty shall be a 12 month suspension.").

[20] This is the same penalty that the undersigned would have recommended had he determined that "Domestic Aggravated

Stalking" was a felony not involving "moral turpitude." See Fla. Admin. Code R. 69B-231.150(4)(c).

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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.