STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL SERVICES,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 07-3951PL
	)	
MONICA L. JONES,	)	
	)	
Respondent.	)	
_____	)	

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case pursuant to Sections 120.569 and 120.57(1), Florida Statutes,[1] before Stuart M. Lerner, a duly-designated Administrative Law Judge of the Division of Administrative Hearings (DOAH), on October 26, 2007, by video teleconference at sites in Lauderdale Lakes and Tallahassee, Florida.

APPEARANCES

For Petitioner: David J. Busch, Esquire
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Division of Legal Services
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For Respondent: James O. Walker, III, Esquire
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STATEMENT OF THE ISSUE

Whether Respondent committed the violations alleged in the Administrative Complaint issued against her and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On August 2, 2007, the Department of Financial Services (Department) issued a three-count Administrative Complaint against Respondent, notifying her that, based on the allegations of wrongdoing made therein, it "intend[ed] to enter an Order suspending or revoking [her] licenses and appointments as an insurance agent or impose such penalties as may be provided under [the law]." In the Administrative Complaint's "General Allegations," the Department asserted that, while "operating out of an agency known as A Maples Insurance Agency, Inc.," in Pompano Beach, Florida, Respondent "employed unlicensed individuals named Claudia Smith and Gus Jones, Jr., to describe the benefits or terms of insurance coverage, invite consumers to enter into insurance contracts, make recommendations as to insurance products, complete insurance applications, and otherwise advise as to insurance matters." Count I of the Administrative Complaint alleged that Respondent "knowingly and willfully provided Claudia Smith with the means to engage in . . . insurance transactions and insurance code violations" in connection with Ms. Smith's dealings with Sarah Harrington.

Count II of the of the Administrative Complaint alleged that Respondent "knowingly and willfully provided Claudia Smith and Gus Jones with the means to engage in . . . insurance transactions and insurance code violations" in connection with Ms. Smith's and Mr. Jones' dealings with Alton Barroso and Monica Barranco. Count III of the Administrative Complaint alleged that Respondent "knowingly and willfully provided Claudia Smith with the means to engage in . . . insurance transactions and insurance code violations" in connection with her dealings with Marvin Mercier.

On or about August 16, 2007, Respondent filed a written request for "a hearing pursuant to Section 120.57(1), Florida Statutes, to be held before the Division of Administrative Hearings." On August 29, 2007, the matter was referred to DOAH. Among the documents the Department transmitted to DOAH was a Motion to Dismiss and/or to Strike that it had received from Respondent. This motion was ultimately denied by the undersigned. See Wright-Simpson v. Department of Corrections, 891 So. 2d 1122, 1126 (Fla. 4th DCA 2004)("Notices of this sort [alleging misconduct] in administrative proceedings are not required to meet technical niceties or formal exactness as required of pleadings in the courts. The notice filed herein was specific enough to inform the employee with reasonable certainty of the nature of the charges against her.")(citation

omitted); Seminole County Board of County Commissioners v. Long, 422 So. 2d 938, 940 (Fla. 5th DCA 1982)("A complaint filed by an administrative agency is not required to fulfill the technical niceties of a pleading filed in a court of law. Such an administrative complaint must only be specific enough to inform the accused with reasonable certainty of the nature of the charge. The charge in this instance met that requirement. The administrative complaint was not so vague, indistinct and indefinite as to mislead the appellee or to embarrass her in the preparation of her defense."); and Florida Board of Massage v. Thrall, 164 So. 2d 20, 22 (Fla. 3d DCA 1964)("[I]n [licensure disciplinary] administrative proceedings of this nature it is not necessary that the information or accusation be cast with that degree of technical nicety required in a criminal prosecution.").

As noted above, the final hearing in this case was held on October 26, 2007. Five witnesses testified at the hearing: Monica Barranco, Marvin Mercier, Sarah Harrington, Raphael Montero, and Claudia Smith. In addition to these five witnesses' testimony, 14 exhibits (Petitioner's Exhibits 1 through 14) were offered and received into evidence.[2]

Upon the unopposed request of Respondent's attorney, the deadline for the filing of proposed recommended orders was set at 45 days from the date of the filing with DOAH of the hearing transcript.

The hearing Transcript (consisting of one volume) was filed with DOAH on November 9, 2007.

The Department filed its Proposed Recommended Order on December 21, 2007. To date, Respondent has not filed any post-hearing submittal.

FINDINGS OF FACT

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

Facts Relating to All Counts

1. Respondent has held a Florida (2-20) general lines (property and casualty) insurance agent license since March 4, 2000. She had been licensed as a (4-40) customer representative in Florida for approximately one year before obtaining her 2-20 license. At no time as a licensee has she had any disciplinary action taken against her.

2. At all times material to the instant case, Respondent was employed by A Maples Insurance Agency, Inc., in Pompano Beach, Florida (Agency).

3. Respondent was one of four individuals involved in the operation of the Agency. The other three individuals were Respondent's sister, Mary Terrell (who had an ownership interest in the Agency); Respondent's brother, Gus Jones, Jr. (who was also a co-owner of the Agency), and Claudia Smith, a 25-year Agency employee. As Respondent was aware, neither Ms. Terrell,

Mr. Jones, nor Ms. Smith possessed any Florida insurance license.

4. At one time, prior to Respondent's coming to work for the Agency, Mr. Jones had been licensed in Florida as a 2-20 insurance agent, but his license was taken away by the Department's predecessor, the Department of Insurance, in 2002, and it has not been reinstated. The Department of Insurance's Final Order suspending Mr. Jones' license read, in pertinent part, as follows:

> Pursuant to Section 626.641, Florida Statutes, the Respondent shall not engage in or attempt to profess to engage in any transaction or business for which a license or appointment is required under the Insurance Code or directly or indirectly own, control, or be employed in any manner by any insurance agent or agency or adjuster or adjusting firm, during the period of suspension.
>
> Further, pursuant to Section 626.641, Florida Statutes, the licenses, appointment, or eligibility, which has been suspended shall not be reinstated except upon request for such reinstatement; but the Department shall not grant such reinstatement if it finds that the circumstance or circumstances for which the license, appointment or eligibility was suspended still exist or are likely to recur.

5. Respondent knew, when she began working at the Agency, that Mr. Jones' 2-20 license had been taken away and not been reinstated.

6. It was Mr. Jones' being stripped of his license that prompted the Agency to hire Respondent. The Agency needed a licensed agent to replace Mr. Jones so that there would be someone at the Agency able to generate commission revenues. Upon being hired, Respondent filled this role as the Agency's lone licensed producing agent.

7. Respondent's employment at the Agency was her only source of income. She was paid on a commission-only basis, receiving her commission payments in cash from Mr. Jones.

8. The business hours of the Agency were 9:00 a.m. to 5:00 p.m. Monday through Thursday and 9:00 a.m. to 6:00 p.m. on Friday. The Agency closed an hour for lunch each day.

9. Although she was the only one working at the Agency who held an insurance license, Respondent ordinarily worked just nine hours a week (three hours on Mondays, three hours on Wednesdays, and three hours on Fridays).

10. Respondent authorized Ms. Terrell, Mr. Jones, and Ms. Smith to sign Respondent's name on insurance-related documents and otherwise act in her stead so that these unlicensed individuals would be able to transact business and produce commissions for the Agency when she was out of the

office. Respondent "g[o]t credit for the[se] sale[s]" made by these three unlicensed individuals and was compensated accordingly, notwithstanding her lack of personal involvement in the transactions.

Facts Relating to Count I

11. In August 2004, Sarah Harrington went to the Agency to shop for insurance for a manufactured home she was purchasing (through financing provided by Bank of America).

12. At the Agency, Ms. Harrington dealt exclusively with Ms. Smith, whom Ms. Harrington reasonably believed was an insurance agent.

13. Based on the information Ms. Harrington provided her, Ms. Smith recommended obtaining coverage through Citizens Property Insurance Corporation (Citizens), the state-created entity that services homeowners unable to find insurance in the private market.

14. Ms. Smith told Ms. Harrington what the premiums were for this coverage, and Ms. Harrington wrote a check to the Agency for the total amount ($1,540.00) and gave it to Ms. Smith.

15. Ms. Harrington left the Agency with a two-page insurance binder (with an effective date of August 25, 2004, and an expiration date of August 25, 2005) that Ms. Smith gave her. The binder contained what purported to be Respondent's signature

in two different places. The signatures, however, were not Respondent's. They were placed there by Ms. Smith, pursuant to the grant of authority Respondent had previously given her.

16. In September 2005, Ms. Harrington received a letter from her mortgage lender, Bank of America, advising her that her "hazard insurance policy ha[d] potentially lapsed, effective 08/25/2005" and that the bank was "unable to pay the premium for [her] new hazard insurance coverage because [it had] not received a bill from [her] insurance agent/company."

17. Ms. Harrington reacted to this advisement by telephoning the Agency and speaking with Ms. Smith. Ms. Smith told Ms. Harrington that the Agency was a "little behind in processing [the paperwork for the renewal of Ms. Harrington's insurance coverage]" and would be sending Bank of America a bill shortly.

18. Approximately a month later, Ms. Harrington received a second letter from Bank of America. In the letter, the bank informed her that it had still not received anything concerning the renewal of her insurance coverage.

19. Ms. Harrington again telephoned the Agency and spoke with Ms. Smith. Ms. Smith told Ms. Harrington that the Agency "had already billed Bank of America" and that "everything was fine."

20. On October 24, 2005, Hurricane Wilma made landfall in South Florida and "took off two sides of [Ms. Harrington's] home." The home was a total loss.

21. When Ms. Harrington telephoned Citizens to initiate the claim process, she was told that there was no record of her being insured.

22. Ms. Harrington thereafter went to the Agency to inquire about the matter and met with Ms. Smith. Ms. Harrington demanded to see proof of her insurance. Ms. Smith was unable to provide such proof.

23. Ms. Harrington returned to the Agency for a follow-up visit. This time she met with Mr. Jones, as well as Ms. Smith.

24. Mr. Jones gave Ms. Harrington the first two pages of an application for insurance he said he had mailed, on her behalf, to Citizens on October 19, 2005. Mr. Jones told Ms. Harrington that the payment for this insurance "was being processed" and that Ms. Harrington's "house was going be covered" inasmuch as she "had insurance."

25. Upon examining the two pages that Mr. Jones had given her, Ms. Harrington noticed that it contained erroneous information concerning her occupation, her date of birth, and the age of her home. She pointed out these errors to Mr. Jones and Ms. Smith. Ms. Smith subsequently wrote, and signed Respondent's name to, a memorandum to Citizens, dated

November 7, 2005, correcting the information that Ms. Harrington had identified as being erroneous.

26. After this follow-up visit to the Agency, Ms. Harrington requested, and later received from Citizens, the entire application package that the Agency had submitted to Citizens on October 19, 2005, on her behalf. There were initials and signatures on the documents in this package that purported to be Ms. Harrington's, but were actually forgeries. These documents also contained signatures purporting to be Respondent's that were placed there by Ms. Terrell, Mr. Jones, and/or Ms. Smith, pursuant to the grant of authority Respondent had previously given them.

27. Ms. Harrington's claim for the destruction of her home was ultimately paid by Citizens, as Mr. Jones and Ms. Smith said it would be. Ms. Harrington received $74,000.00.

28. At no time did Respondent have any dealings or interaction with Ms. Harrington.

Facts Relating to Count II

29. Alton Barroso is the owner of Barroso Pools, Inc. (Company).

30. In March of 2005, the Company, through the Agency, obtained insurance from Grenada Insurance Company (Grenada) for three Company vehicles.

31. Ms. Terrell had signed Respondent's name on the application for this insurance, pursuant to the grant of authority Respondent had previously given her. Respondent had no personal involvement in this insurance transaction.

32. After the effective date of the Company's policy with Grenada, a Company vehicle was involved in an accident resulting in damages to the vehicle costing approximately $7,500.00 to repair.

33. The Company submitted a claim requesting that Grenada cover these damages under the Company's insurance policy with Grenada.

34. Grenada refused to pay the claim, advising the Company that the Company vehicle "which was involved in [the] accident . . . was not listed as a covered vehicle under [its] auto policy at the time of the loss."

35. Mr. Barroso, who does not "speak or write English very well," had a friend of his, Monica Barranco, go to the Agency to inquire about the matter.

36. Ms. Barranco made several trips to the Agency. She dealt primarily with Ms. Smith, but met once with Mr. Jones, who gave her a copy of the Company's policy. She had no contact at all with Respondent.

37. Despite Ms. Barranco's efforts, the Company never received any payment for the damages to the Company vehicle that was involved in the accident.

Facts Relating to Count III

38. Marvin Mercier is Ms. Smith's brother. He has obtained automobile insurance through the Agency for the past five or six years.

39. In February 2006, Mr. Mercier was informed that the insurance policy he had on his 1990 Ford Aerostar van would not be renewed because of an at-fault accident in which he had been involved.

40. Mr. Mercier thereafter spoke with Ms. Smith, who offered to "get [him] a [new] policy" with another insurer. Mr. Mercier accepted his sister's offer of assistance.

41. Approximately a week later, on or about March 11, 2006, in accordance with Ms. Smith's instructions, Mr. Mercier met with Ms. Smith at the Agency "to sign the application [for the new policy] and to give a down payment."

42. In obtaining this new policy for his van, Mr. Mercier dealt exclusively with Ms. Smith. Respondent had no involvement whatsoever in the transaction.

CONCLUSIONS OF LAW

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

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

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

46. Among the Department's duties is to license and discipline insurance agents.

47. 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[3]; 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.

48. The Department may take such 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.

49. 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.

50. 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); 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 . . . .").

51. 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, from 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, 988 (Fla. 1st DCA 1991).

52. 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).

53. The Administrative Complaint in the instant case charges Respondent with three counts of violating Section 626.611(13), Florida Statutes, and Section 626.621.621(12), Florida Statutes, by knowingly and willfully enabling unlicensed Agency personnel to engage in activities requiring an insurance license.

54. At all times material to the instant case, Section 626.611(13), Florida Statutes, has provided, in pertinent part, as follows:

> The department shall . . . suspend [or] revoke . . . the license . . . of

> any . . . agent . . . , and it shall suspend or revoke the eligibility to hold a license . . . of any such person, if it finds that as to the . . . licensee . . . any one or more of the following applicable grounds exist:
>
> * * *
>
> Willful failure to comply with, or willful violation of, any proper order or rule of the department or willful violation of any provision of this code.

55. At all times material to the instant case, Section 626.621(12), Florida Statutes has provided, in pertinent part, as follows:

> The department may, in its discretion, . . . suspend [or] revoke, . . . the license . . . of any . . . agent . . . , and it may suspend or revoke the eligibility to hold a license . . . of any such person, if it finds that as to the . . . licensee . . . any one or more of the following applicable grounds exist under circumstances for which such . . . suspension [or] revocation . . . is not mandatory under s. 626.611:
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> * * *
>
> Knowingly aiding, assisting, procuring, advising, or abetting any person in the violation of or to violate a provision of the insurance code or any order or rule of the department, commission, or office.

56. Engaging in insurance activities without a license is prohibited by the following "provision[s] of the insurance code" and "rule of the [D]epartment" (which were cited in the Administrative Complaint):

§ 626.112. License and appointment required; agents, customer representatives, adjusters, insurance agencies, service representatives, managing general agents

(1)(a) 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[4] and appointed by an appropriate appointing entity or person.

(b) Except as provided in subsection (6) or in applicable department rules, and in addition to other conduct described in this chapter with respect to particular types of agents, a license as an insurance agent, service representative, customer representative, or limited customer representative is required in order to engage in the solicitation of insurance. For purposes of this requirement, as applicable to any of the license types described in this section, the solicitation of insurance is the attempt to persuade any person to purchase an insurance product by:

1. Describing the benefits or terms of insurance coverage, including premiums or rates of return;

2. Distributing an invitation to contract to prospective purchasers;

3. Making general or specific recommendations as to insurance products;

4. Completing orders or applications for insurance products;

5. Comparing insurance products, advising as to insurance matters, or interpreting policies or coverages; or

6. Offering or attempting to negotiate on behalf of another person a viatical

settlement contract as defined in s. 626.9911.

* * *

(9) Any person who knowingly transacts insurance or otherwise engages in insurance activities in this state without a license in violation of this section commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

§ 626.0428. Agency personnel powers, duties, and limitations

* * *

(2) No employee of an agent or agency may bind insurance coverage unless licensed and appointed as a general lines agent or customer representative.

(3) No employee of an agent or agency may initiate contact with any person for the purpose of soliciting insurance unless licensed and appointed as a general lines agent or customer representative.[5]

69B-222.060. Unlawful Activities by Unlicensed Insurance Agency Personnel.

The following actions are never allowable by unlicensed personnel.

(1) Comparing insurance products; advising as to insurance needs or insurance matters; or interpreting policies or coverages.

(2) Binding new, additional, or replacement coverage for new or existing customers; or binding coverage on or recording additional property under existing policies.

(3) Soliciting the sale of insurance by telephone, in person, or by other communication. However, the unlicensed

> person may telephone persons to set appointments for licensed and appointed agents, customer representatives, or solicitors, or to obtain basic policy information as to existing insurance coverage. The unlicensed person may not engage in a substantive discussion of insurance products.

57. Because they are penal in nature, the foregoing statutory provisions must be strictly construed, with any reasonable doubts as to their meaning being resolved in favor of the licensee. 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.'").

58. An examination of the evidentiary record in this case reveals that the Department clearly and convincingly proved that, as alleged in Counts I through III of the Administrative Complaint, Respondent knowingly and willfully enabled unlicensed Agency personnel to engage in insurance activities in connection with their dealings with Ms. Harrington (Count I), Mr. Barroso and Ms. Barranco (Count II), and Mr. Mercier (Count III), in violation of Section 626.611(13), Florida Statutes, and Section 626.621(12), Florida Statutes, by giving these unlicensed

persons, in effect, a carte blanche to use her 2-20 license and act in her stead to generate business and commission revenue for the Agency.[6]

59. To determine the penalty the Department should impose on Respondent for the commission of these violations, it is necessary to 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).

60. Florida Administrative Code Rule 69B-231.040 explains how Petitioner 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.

61. 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:
>
> * * *
>
> (13) Section 626.611(13), F.S. - suspension 6 months

62. 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:
>
> * * *
>
> (12) Section 626.621(12), F.S. - suspension 6 months

63. In the instant case, the "penalty per count" for each of the three counts of the Administrative Complaint is a six-month suspension, making the "total penalty" an 18-month suspension.

64. 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, which provides, in pertinent part, 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.
>
> (1) For penalties other than those assessed under Rule 69B-231.150, F.A.C.:
>
> (a) Willfulness of licensee's conduct;
>
> (b) Degree of actual injury to victim;
>
> (c) Degree of potential injury to victim;
>
> (d) Age or capacity of victim;
>
> (e) Timely restitution;
>
> (f) Motivation of licensee;
>
> (g) Financial gain or loss to licensee;
>
> (h) Cooperation with the Department;

(i) Vicarious or personal responsibility;

(j) Related criminal charge; disposition;

(k) Existence of secondary violations in counts;

(l) Previous disciplinary orders or prior warning by the Department; and

(m) Other relevant factors.

65. In its Proposed Recommended Order, the Department takes the position that "the appropriate final penalty [in this case] is revocation of Respondent's license," arguing as follows:

> 76. . . . . The evidence at hearing demonstrated that Respondent's conduct was willful; that there was a substantial degree of actual and potential injury to the victims; that the agent was motivated by financial gain; and that Respondent was responsible for all of the unlicensed business practices at the agency, including those that served to allow a suspended licensee to flaunt a Department order suspending his license and thus continue to engage illegally in the insurance business.
>
> 77. It is this latter aggravating factor that alone serves as justification for the revocation of Respondent's license. By allowing her license to be abused by a suspended licensee, she provided the means to enable him to continue in the insurance business from which he had been banned, and she compounded this wrongdoing by allowing two other unlicensed individuals to also prey upon an unsuspecting public. Even the appointed insurance carriers had no reason to suspect the agency's essentially unlicensed operation, so long as

> Respondent's falsified signatures appeared on the appropriate documents. It was a deliberate and deceitful scam, rather like hav[ing] a surgeon popping into the operating room on occasion, while an unlicensed nurse removes a healthy kidney, leaves the diseased one, and then signs the doctor's name to the medical notes.
>
> 78. There is no mitigating factor to offset these aggravating factors.

66. The undersigned does not agree entirely with the Department's analysis. He takes issue with the Department's suggestion that the proof submitted at hearing is sufficient to establish that Respondent's violations caused "a substantial degree of actual . . . injury to the victims." Furthermore, he disagrees that there are "no mitigating factor[s]" in this case. One mitigating factor is Respondent's unblemished disciplinary record (which does not contain any "[p]revious disciplinary orders or prior warning by the Department"). Another mitigating factor is Respondent's "[c]ooperation with the Department." Although she could have invoked her right to remain silent,[7] Respondent gave incriminating answers to questions posed by the Department's counsel during her deposition, and this deposition testimony of hers was the linchpin of the Department's proof against her at hearing.

67. The foregoing mitigating factors offset the aggravating factors present in the instant case, but only partially. Inasmuch as the aggravating factors predominate, an

increase in the "total penalty" is warranted. An additional six months should be added to the period her license is suspended.

68. Accordingly, the "final penalty" that the Department should impose in the instant case is a 24-month suspension of Respondent's license.

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 Counts I through III of the Administrative Complaint and suspending her license for a total of 24 months for having committed these violations.

DONE AND ENTERED this 7th day of January, 2008, in Tallahassee, Leon County, Florida.

S

STUART M. LERNER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of January, 2008.

ENDNOTES

[1] Unless otherwise noted, all references in this Recommended Order to Florida Statutes are to Florida Statutes (2007).

[2] Petitioner's Exhibit 14 was a transcript of a deposition given by Respondent on October 17, 2007. The statements Respondent made during her deposition testimony constitute party admissions (within the meaning of Section 90.803(18)(d), Florida Statutes) that would be admissible over a hearsay objection in a civil proceeding in Florida and therefore are, in and of themselves, sufficient to support a finding of fact in this administrative proceeding. See § 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 Castaneda v. Redlands Christian Migrant Association, 884 So. 2d 1087, 1091 (Fla. 4th DCA 2004)("[T]he statements of the Redlands employees are admissions within the meaning of section 90.803(18)(d) as the statements concerned matters regarding this specific accident arising from their employment and were made while the deponents were still employees of Redlands.").

[3] 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.

[4] This prohibition extends to all persons not holding a current license, including those, like Mr. Jones, whose license has been suspended or revoked by the Department. See also § 626.641(4), Fla. Stat. ("During the period of suspension or revocation of the license or appointment, the former licensee or appointee shall not engage in or attempt or profess to engage in any transaction or business for which a license or appointment is required under this code or directly or indirectly own, control, or be employed in any manner by any insurance agent or agency or adjuster or adjusting firm.").

[5] Subsection (1) of Section 626.0428, Florida Statutes, provides as follows:

> An individual employed by an agent or agency on salary who devotes full time to clerical work, with incidental taking of insurance applications or quoting or receiving

> premiums on incoming inquiries in the office of the agent or agency, is not deemed to be an agent or customer representative if his or her compensation does not include in whole or in part any commissions on such business and is not related to the production of applications, insurance, or premiums.

[6] In her deposition testimony (the transcript of which was offered into evidence by the Department and received as Petitioner's Exhibit 14), Respondent claimed that the Department had entered into an agreement allowing Ms. Terrell, Mr. Jones, and Ms. Smith to "work as customer service reps," notwithstanding that they were not licensed by the Department to do so. This testimony, which was not corroborated by any evidence adduced at hearing, has been rejected as incredible and unworthy of belief.

[7] See Kozerowitz v. Florida Real Estate Commission, 289 So. 2d 391, 392 (Fla. 1974)("In Vining, we explained that Kozerowitz was based upon the premise that the self-incrimination clause of the Fifth Amendment extended only to proceedings criminal in nature. Our Vining opinion, however, concluded that the proscription against self-incrimination also applies to any administrative proceeding of a 'penal' character. We held that a revocation or suspension hearing before the Florida Real Estate Commission is a proceeding of this nature, and we specifically held that Florida Statutes, Section 475.30(1), F.S.A., was unconstitutional to the extent that it required a defendant in a discipline proceeding before the Real Estate Commission to respond to the charges against him."); State ex rel. Vining v. Florida Real Estate Commission, 281 So. 2d 487, 491 (Fla. 1973)("[I]t is our view that the right to remain silent applies not only to the traditional criminal case, but also to proceedings 'penal' in nature in that they tend to degrade the individual's professional standing, professional reputation or livelihood."); Best Pool and Spa Service Co., Inc. v. Romanik, 622 So. 2d 65, 66 (Fla. 4th DCA 1993)("We agree that requiring Kassover to answer these questions does violate his right against self-incrimination which applies not only to criminal matters but also administrative proceedings such as licensing."); and McDonald v. Department of Professional Regulation, Board of Pilot Commissioners, 582 So. 2d 660, 663 n.2 (Fla. 1st DCA 1991)("Because license revocation or suspension proceedings are penal in nature, the fifth amendment

right to remain silent applies.").

COPIES FURNISHED:

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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.