STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL SERVICES,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 07-5648PL
	)	
ODALYS CALVO,	)	
	)	
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 March 25, 2008, by video teleconference at sites in Miami and Tallahassee, Florida.

APPEARANCES

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

For Respondent: Odalys Calvo, pro se
3064 Southwest 156th Place
Miami, Florida 33185

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 November 7, 2007, the Department of Financial Services (Department) issued an eleven-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 first ten counts of the Administrative Complaint, the Department alleged that Respondent willfully and knowingly completed and submitted automobile insurance applications for ten customers (Blanca Duron (Count I); Brisaida Castillo (Count II); Ricardo Fernandez (Count III); Pedro Cruz, Sr. (Count IV); Pedro Cruz, Jr. (Count V); Arturo Fernandez (Count VI); Diamely Cosio (Count VII); Eulogio Martinez (Count VIII); Mariana Ruiz (Count IX); and Flor Miller (Count X)) that "contained false addresses of the applicants to indicate they resided in a different territory in order to obtain lower premium charges[s], thereby defrauding the insurer of the premium[s] [to which] it was entitled." In so doing, according to the allegations made by the Department in these ten

counts of the Administrative Complaint, Respondent violated Section 626.611(4), (7), (9), and (13), Florida Statutes; Section 626.621(2), (3), and (6), Florida Statutes; and Section 626.9541(1)(k)1, Florida Statutes. The eleventh and final count of the Administrative Complaint alleged that, "[a]cting in the capacity of president, owner, operator, sole officer, and registered agent of O.D.C. Insurance Services, Inc. d/b/a Allstate Insurance Agency[,] since on or before September 17, 2005, [Respondent] failed to have [her] insurance agency licensed," in violation of Section 626.112(7)(a), Florida Statutes; Section 626.611(13), Florida Statutes; and Section 626.621(2) and (3), Florida Statutes.

On or about November 26, 2007, Respondent, through counsel, filed a written request for "a proceeding to contest this action pursuant to Sections 120.569 and 120.57(1)," Florida Statutes. On December 11, 2007, the matter was referred to DOAH. Among the documents the Department transmitted to DOAH was a Motion to Dismiss Administrative Complaint that it had received from Respondent. This motion was denied by the previously assigned administrative law judge on January 14, 2008.

On February 19, 2008, Respondent's counsel of record filed a motion seeking permission to withdraw as her counsel. As required by Florida Administrative Code Rule 28-106.105(3), a copy of the motion was served on Respondent. By order issued

February 25, 2008 (a copy of which was mailed to Respondent), the motion was granted.

As noted above, the final hearing in this case was held on March 25, 2008.[2]

At the outset of the hearing, counsel for the Department announced that the Department was voluntarily dismissing Counts VI, VII, IX, and X of the Administrative Complaint.

Eight witnesses testified at the hearing: Blanca Duron; Brisaida Castillo; Ricardo Fernandez; Pedro Cruz, Sr.; Pedro Cruz, Jr.; Eulogio Martinez; Dania Darbouze; and Respondent. In addition to these eight witnesses' testimony, 47 exhibits (Petitioner's Exhibits 1 through 21, 29 through 32, and 47 through 69) were offered and received into evidence.

Upon the unopposed request of Respondent, the deadline for the filing of proposed recommended orders was set at 30 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 April 4, 2008.

The Department filed its Proposed Recommended Order on April 18, 2008.

On April 28, 2008, Respondent filed a motion requesting an extension of time to file her proposed recommended order. In her motion, she asserted that she needed the additional time "because [she had] been in the hospital since 4-7-08" and would remain there indefinitely. On April 30, 2008, the undersigned

issued an order granting Respondent's motion and giving her until May 28, 2008, to file her proposed recommended order.

On May 27, 2008, Respondent filed a motion seeking a further extension of time (of eight months to a year) to file her proposed recommended order. She asserted in her motion that she needed this additional time "because of the condition in [her] personal life." Attached to the motion was a letter, dated May 14, 2008, from a physician on the staff at Baptist Hospital of Miami. The letter indicated that Respondent had given birth prematurely to twins at the hospital on April 19, 2008; that one of the twins, unfortunately, had passed away on April 30, 2008; and that the surviving twin remained in the hospital's neonatal intensive care unit in critical condition. The letter went on to state that it was "very important for [Respondent] to be present with [the surviving twin] at the hospital," where he was expected to remain "until at least August." On June 2, 2008, the undersigned issued an Order, which provided as follows:

> Upon consideration, Respondent is hereby granted until Monday, July 14, 2008, to file her proposed recommended order. This 47-day extension of time should be sufficient to enable Respondent to either prepare and file her proposed recommended order herself or have an attorney or qualified representative do so on her behalf. To the extent that

> Respondent is requesting an extension of time greater than 47 days, the request is denied.

On July 14, 2008, Respondent filed a pleading she herself prepared.[3] In it, she addressed the merits of the charges against her, claiming that she was "innocent" and that the Department's witnesses had "lie[d] under oath."

FINDINGS OF FACT

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

Licensure

1. Respondent has held a Florida 2-20 general lines (property and casualty) insurance agent license since July 24, 1998, and a Florida 2-15 life (including variable annuity and health) insurance agent license since August 17, 2005.

Facts Common to Counts I through V and VIII

2. At all times material to Counts I through V and VIII of the Administrative Complaint, Respondent was employed by O. J. Insurance (O. J.), a Miami insurance agency she had previously owned for approximately 15 years before having sold it in January 2003.

3. Respondent went to work for O. J.'s new owners in or around June 2003.

4. She remained an employee of the agency for approximately two years.

5. During this two-year period, Respondent was the only licensed insurance agent at the agency. The agency's two other employees (one of whom was Respondent's sister, Sonia Pupo) held Florida 4-40 customer representative licenses.

6. Respondent and the agency's two customer representatives were all salaried employees. None of them received a commission.

7. The agency itself, however, received commissions from the insurance companies whose policies it sold.

8. Respondent's performance as an employee of the agency was evaluated on an annual basis. Among the factors considered in the evaluation process was Respondent's productivity (that is, the number of insurance policies she sold).

9. After her first year as an employee of the agency, Respondent received a salary increase based upon the annual evaluation she had received.

Facts Relating to Count I

10. On or about December 30, 2003, Blanca Duron went to O. J., where she purchased automobile insurance from United Automobile Insurance Company (United) through Respondent.

11. Respondent filled out the insurance application for Ms. Duron.

12. On the application, Respondent put down that Ms. Duron's address was 5205 Southwest 140th Place, Miami, Florida, knowing that this was not Ms. Duron's correct address.

13. Ms. Duron actually resided on Southwest 7th Street in Miami.

14. At no time did she ever tell Respondent that she lived at 5205 Southwest 140th Place, Miami, Florida.

15. 5205 Southwest 140th Place, Miami, Florida, was in a "territory" having lower insurance rates than the "territory" in which Ms. Duron actually lived.

16. Respondent's purpose in falsifying Ms. Duron's address on the application was to enable Ms. Duron to pay a lower premium than United would have charged had her correct address been entered on the application.

Facts Relating to Count II

17. On or about December 6, 2004, Brisaida Castillo went to O. J., where she purchased automobile insurance from United through Respondent.

18. Respondent filled out the insurance application for Ms. Castillo.

19. Respondent put down on the application that Ms. Castillo's address was 5205 Southwest 140th Place, Miami, Florida, knowing that this was not Ms. Castillo's correct address.

20. Ms. Castillo actually resided on Northwest 22nd Court in Miami.

21. At no time did she ever tell Respondent that she lived at 5205 Southwest 140th Place, Miami, Florida.

22. 5205 Southwest 140th Place, Miami, Florida, was in a "territory" having lower insurance rates than the "territory" in which Ms. Castillo actually lived.

23. Respondent's purpose in falsifying Ms. Castillo's address on the application was to enable Ms. Castillo to pay a lower premium than United would have charged had her correct address been entered on the application.

Facts Relating to Count III

24. On or about December 10, 2004, Ricardo Fernandez went to O. J., where he purchased automobile insurance from United through Respondent.

25. Respondent filled out the insurance application for Mr. Fernandez.

26. Respondent put down on the application that Mr. Fernandez's address was 5205 Southwest 140th Place, Miami, Florida, knowing that this was not Mr. Fernandez's correct address.

27. Mr. Fernandez actually resided on Essex Avenue in Hialeah, Florida.

28. At no time did he ever tell Respondent that he lived at 5205 Southwest 140th Place, Miami, Florida.

29. 5205 Southwest 140th Place, Miami, Florida, was in a "territory" having lower insurance rates than the "territory" in which Mr. Fernandez actually lived.

30. Respondent's purpose in falsifying Mr. Fernandez's address on the application was to enable Mr. Fernandez to pay a lower premium than United would have charged had his correct address been entered on the application.

Facts Relating to Count IV

31. On or about February 1, 2005, Pedro Cruz, Sr., went to O. J., where he purchased automobile insurance from United.

32. It is unclear from the record whether it was Respondent or her sister, Ms. Pupo, who filled out Mr. Cruz, Sr.'s insurance application.[4]

33. The application indicated that Mr. Cruz, Sr.'s address was 5205 Southwest 140th Place, Miami, Florida.

34. This was not his correct address.

35. He actually resided on Northwest 18th Street in Miami.

36. At no time did he ever tell Respondent that he lived at 5205 Southwest 140th Place, Miami, Florida.

37. 5205 Southwest 140th Place, Miami, Florida, was in a "territory" having lower insurance rates than the "territory" in which Mr. Cruz, Sr., actually lived.

38. Consequently, Mr. Cruz, Sr., paid a lower premium than United would have charged had his correct address been entered on the application.

Facts Relating to Count V

39. On or about December 6, 2004, Pedro Cruz, Jr., went to O. J., where he purchased automobile insurance from United through Respondent.

40. Respondent filled out the insurance application for Mr. Cruz, Jr.

41. Respondent put down on the application that Mr. Cruz, Jr.'s address was 5521 Southwest 163rd Court, Miami, Florida.[5]

42. Mr. Cruz, Jr., actually resided on Northwest 18th Street in Miami.

43. At no time did he ever tell Respondent that he lived at 5521 Southwest 163rd Court, Miami, Florida.[6]

Facts Relating to Count VIII

44. On or about February 3, 2005, Eulogio Martinez went to O. J., where he purchased automobile insurance from United through Respondent.

45. Respondent filled out the insurance application for Mr. Martinez.

46. Respondent put down on the application that Mr. Martinez's address was 5205 Southwest 142nd Place, Miami, Florida.

47. Mr. Martinez actually resided on Northwest 5th Street in Miami.

48. At no time did he ever tell Respondent that he lived at 5205 Southwest 142nd Place, Miami, Florida.[7]

Facts Relating to Count XI

49. Since September 2005, O.D.C. Insurance Services, Inc. (O.D.C.) has operated an insurance agency (selling Allstate insurance products) at 13860 Southwest 56th Street in Miami, Florida, for which it has not obtained a license.

50. During this period of time, Respondent has been owner, sole officer (president), and registered agent of O.D.C. and responsible for the day-to-day operations of O.D.C.'s Allstate insurance agency.

51. At all times material to Count XI of the Administrative Complaint, Respondent was unaware of the requirement that insurance agencies, such as O.D.C.'s, be licensed.

CONCLUSIONS OF LAW

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

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

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

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

56. 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[8]; 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.

57. 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.

58. 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.

59. 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 . . . .").

60. 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).

61. 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 Trevisani v. Department of Health, 908 So. 2d 1108, 1109 (Fla. 1st DCA 2005); Aldrete v. Department of Health, Board of Medicine, 879 So. 2d 1244, 1246 (Fla. 1st DCA 2004); 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).

62. The Administrative Complaint in the instant case contains seven remaining counts: six counts (Counts I, II, III, IV, V, and VIII) charging Respondent with violating Section 626.611(4), (7), (9), and (13), Florida Statutes; Section 626.621(3) and (6), Florida Statutes; and Section 626.9541(1)(k)1, Florida Statutes, by willfully and knowingly completing and submitting automobile insurance applications that "contained false addresses of the applicants to indicate they resided in a different territory in order to obtain lower premium charges[s], thereby defrauding the insurer of the premium[s] [to which] it was entitled"; and one count (Count XI) charging Respondent with having "failed to have [her] insurance agency licensed," in violation of Section 626.112(7)(a), Florida Statutes; Section 626.611(13), Florida Statutes; and Section 626.621(2) and (3), Florida Statutes.

63. At all times material to the instant case, Section 626.611(4), (7), (9) and (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:
>
> * * *
>
> (4) If the license . . . is willfully used, or to be used, to circumvent any of the requirements or prohibitions of this code.
>
> * * *
>
> (7) Demonstrated lack of fitness or trustworthiness to engage in the business of insurance.
>
> * * *
>
> (9) Fraudulent or dishonest practices in the conduct of business under the license . . . .
>
> * * *
>
> (13) 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.

64. At all times material to the instant case, Section 626.621(2), (3) and (6), 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:
>
> * * *
>
> (2) Violation of any provision of this code or of any other law applicable to the business of insurance in the course of dealing under the license or appointment.
>
> * * *
>
> (3) Violation of any lawful order or rule of the department, commission, or office.
>
> * * *
>
> (6) In the conduct of business under the license or appointment, engaging in unfair methods of competition or in unfair or deceptive acts or practices, as prohibited under part IX of this chapter, or having otherwise shown himself or herself to be a source of injury or loss to the public.

65. Among the "unfair methods of competition" and "unfair or deceptive acts or practices, as prohibited under part IX of [Chapter 626, Florida Statutes]" (referenced in Section 626.621(6), Florida Statutes) are those described in Section 626.9541(1)(k)1., Florida Statutes, which provides as follows:

> UNFAIR METHODS OF COMPETITION AND UNFAIR OR DECEPTIVE ACTS. --The following are defined as unfair methods of competition and unfair or deceptive acts or practices:

Misrepresentation in insurance applications.

Knowingly making a false or fraudulent written or oral statement or representation on, or relative to, an application or negotiation for an insurance policy for the purpose of obtaining a fee, commission, money, or other benefit from any insurer, agent, broker, or individual.

66. Section 626.112(7)(a), Florida Statutes, provides as follows:

Effective October 1, 2006, no individual, firm, partnership, corporation, association, or any other entity shall act in its own name or under a trade name, directly or indirectly, as an insurance agency, unless it complies with s. 626.172 with respect to possessing an insurance agency license for each place of business at which it engages in any activity which may be performed only by a licensed insurance agent. Each agency engaged in business in this state before January 1, 2003, which is wholly owned by insurance agents currently licensed and appointed under this chapter, each incorporated agency whose voting shares are traded on a securities exchange, each agency designated and subject to supervision and inspection as a branch office under the rules of the National Association of Securities Dealers, and each agency whose primary function is offering insurance as a service or member benefit to members of a nonprofit corporation may file an application for registration in lieu of licensure in accordance with s. 626.172(3). Each agency engaged in business before October 1, 2006, shall file an application for licensure or registration on or before October 1, 2006.

1. If an agency is required to be licensed but fails to file an application for licensure in accordance with this section,

> the department shall impose on the agency an administrative penalty in an amount of up to $10,000.
>
> 2. If an agency is eligible for registration but fails to file an application for registration or an application for licensure in accordance with this section, the department shall impose on the agency an administrative penalty in an amount of up to $5,000.

67. 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 Beckett v. Department of Financial Services, 982 So. 2d 94, 100 (Fla. 1st DCA 2008)("[A]gencies are not permitted to extend the requirements of [penal] statutes by construction."); and 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.'").

68. An examination of the evidentiary record in this case reveals that the Department clearly and convincingly proved that Respondent violated Section 626.611(4), (7), (9), and (13), Florida Statutes; Section 626.621(2), (3), and(6), Florida Statutes; and Section 626.9541(1)(k)1, Florida Statutes, as

alleged in Counts I through III of the Administrative Complaint, by willfully and knowingly completing and submitting automobile insurance applications for Ms. Duron (Count I), Ms. Castillo (Count II), and Mr. Fernandez (Count III) that "contained false addresses of the applicants to indicate they resided in a different territory in order to obtain lower premium charges[s], thereby defrauding the insurer of the premium[s] [to which] it was entitled."

69. The Department failed to prove by clear and convincing evidence that Respondent was the insurance agency employee who completed and submitted Mr. Cruz, Sr.'s automobile insurance application, as alleged in Count IV of the Administrative Complaint. Accordingly, Count IV of the Administrative Complaint (which is predicated upon the factual allegation that Respondent had engaged in such conduct) must be dismissed.[9]

70. While record evidence establishes that Respondent completed and submitted automobile insurance applications for Mr. Cruz, Jr., and Mr. Martinez that "contained false addresses," there is not clear and convincing proof that she did so willfully and knowingly with the intent to defraud United, as alleged in Counts V and VIII of the Administrative Complaint. Accordingly, these counts of the Administrative Complaint must too be dismissed.

71. The Department also failed to establish Respondent's guilt of the violations alleged in Count XI of the Administrative Complaint. Although the Department's proof clearly and convincingly established that O.D.C.'s Allstate insurance agency has failed to obtain an insurance agency license in violation of Section 626.112(7)(a), Florida Statutes, it is the "agency" (that is, O.D.C., the corporate entity), not Respondent, that is liable for this violation under the statute. That Respondent has been, at all material times, the owner, sole officer (president), and registered agent of O.D.C. and responsible for its day-to-day operations is, standing alone, an insufficient basis upon which to impose liability upon Respondent. See Gasparini v. Pordomingo, 972 So. 2d 1053, 1055 (Fla. 3d DCA 2008)("A general principle of corporate law is that a corporation is a separate legal entity, distinct from the persons comprising them. To 'pierce the corporate veil' three factors must be proven: (1) the shareholder dominated and controlled the corporation to such an extent that the corporation's independent existence, was in fact non-existent and the shareholders were in fact alter egos of the corporation; (2) the corporate form must have been used fraudulently or for an improper purpose; and (3) the fraudulent or improper use of the corporate form caused injury to the claimant. In this case, none of these factors were alleged or proven. Moreover, the

mere fact that Gasparini is a stockholder and officer of International Trading does not, without more, create personal liability. The law is clear that the mere ownership of a corporation by a few shareholders, or even one shareholder, is an insufficient reason to pierce the corporate veil. '[E]ven if a corporation is merely an alter ego of its dominant shareholder or shareholders, the corporate veil cannot be pierced so long as the corporation's separate identity was lawfully maintained.'")(citations omitted). Accordingly, Count XI of the Administrative Complaint must be dismissed.

72. To determine the penalty the Department should impose on Respondent for committing the violations alleged in Counts I through III of the Administrative Complaint, 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).

73. 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.

74. 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:

* * *

(4) Section 626.611(4), F.S. - suspension 6 months

* * *

(7) Section 626.611(7), F.S. - suspension 6 months

* * *

(9) Section 626.611(9), F.S. - suspension 9 months

* * *

(13) Section 626.611(13), F.S. - suspension 6 months

75. 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:
>
> * * *
>
> (2) Section 626.621(2), F.S. - suspension 3 months
>
> (3) Section 626.621(3), F.S. - suspension 3 months
>
> * * *
>
> (6) Section 626.621(6), F.S. - see Rule 69B-231.100, F.A.C.

76. Florida Administrative Code Rule 69B-231.100 is entitled, "Penalties for Violation of Subsection 626.621(6)." It provides, in pertinent part, as follows:

> If a licensee is found to have violated subsection 626.621(6), F.S., by engaging in unfair methods of competition or in unfair or deceptive acts or practices as defined in

> any of the following paragraphs of subsection 626.9541(1), F.S., the following stated penalty shall apply:
>
> * * *
>
> (11) Section 626.9541(1)(k), F.S. - suspension 9 months

77. In the instant case, the "penalty per count" for each of Counts I through III of the Administrative Complaint is a nine-month suspension, making the "total penalty" a 27-month suspension.

78. 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.

79. Examining the evidentiary record in the instant case in light of these "aggravating/mitigating factors" results in the conclusion that a decrease of the "total penalty" (which is a suspension in excess of 24 months) is not warranted.

80. Accordingly, the "final penalty" in the instant case, pursuant to Florida Administrative Code Rule 69B-231.040(3)(d), is the revocation of Respondent's licenses.

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, revoking her licenses for

having committed these violations, and dismissing the remaining counts of the Administrative Complaint.

DONE AND ENTERED this 24th day of July, 2008, in Tallahassee, Leon County, Florida.

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

Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of July, 2008.

ENDNOTES

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

2/ The hearing was originally scheduled for February 14, 2008, but was continued at Respondent's request.

3/ Respondent explained in the pleading that she had not been able to retain an attorney due to lack of funds.

4/ At the final hearing, Mr. Cruz, Sr., gave internally conflicting testimony on the matter.

5/ In its Proposed Recommended Order, the Department asks the undersigned to make a finding of fact that "Sonia Pupo resides at 5521 Southwest 163rd Court in Miami, Florida." The only record evidence concerning Ms. Pupo's residence --a printout of the result of a November 16, 2006 www.whitepages.com search showing that she resided at that address-- constitutes hearsay evidence. Inasmuch as it has not been shown that this evidence

would have been admissible over objection in a civil proceeding in Florida (under Section 90.803(17), Florida Statutes, or any other exception to the rule excluding hearsay evidence), it is insufficient to support a finding of fact in this administrative proceeding. See § 120.57(1)(c)("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."). Moreover, this evidence only addresses Ms. Pupo's residency as of the date of the www.whitepages.com search--November 16, 2006.

6/ The evidentiary record does not support a finding that 5521 Southwest 163rd Court, Miami, Florida, was in a "territory" having lower insurance rates than the "territory" in which Mr. Cruz, Jr., actually lived.

7/ The evidentiary record does not support a finding that 5205 Southwest 142nd Place, Miami, Florida, was in a "territory" having lower insurance rates than the "territory" in which Mr. Martinez actually lived.

8/ 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.

9/ The Department suggests in its Proposed Recommended Order that Respondent can be held responsible for any wrongdoing engaged in by her sister and the agency's other customer representative in completing and processing insurance applications, apparently relying on Section 626.7354(5), Florida Statutes, which provides that "[a]ll business transacted by a customer representative under his or her license shall be in the name of the agent or agency by which he or she is appointed, and the agent or agency shall be responsible and accountable for all acts of the customer representative within the scope of such appointment." Such a theory, however, cannot support a finding of guilt in the instant case inasmuch as it was not advanced in the Administrative Complaint. See Department of Insurance and Treasurer v. Gottlieb, No. 92-1902, 1993 Fla. Div. Adm. Hear. LEXIS 5893 *6 (Fla. DOAH 1993)(Recommended Order)("Agencies cannot take disciplinary action against a licensee on the basis of facts not alleged in the Administrative Complaint on or the

basis of legal theories not asserted in the Administrative Complaint.").

COPIES FURNISHED:

W. Gautier Kitchen, Esquire
Department of Financial Services
Division of Legal Services
612 Larson Building
200 East Gaines Street
Tallahassee, Florida 32399-0333

Odalys Calvo,
3064 Southwest 156th Place
Miami, Florida 33185

Honorable Alex Sink
Chief Financial Officer
Department of Financial Services
The Capitol, Plaza Level 11
Tallahassee, Florida 32399-0300

Daniel Sumner, General Counsel
Department of Financial Services
The Capitol, Plaza Level 11
Tallahassee, Florida 32399-0307

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.