REPRESENTING
ALEX SINK
CHIEF FINANCIAL OFFICER
STATE OF FLORIDA

FILED
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DIVISION OF ADMINISTRATIVE HEARINGS
FILED

IN THE MATTER OF:

JUAN RODRIGUEZ
______________________/

Case No: 98086-08-AG

FINAL ORDER

This cause came on for consideration of and final agency action on the Recommended Order (Exhibit A) rendered on May 28, 2009, by Administrative Law Judge (ALJ) Lisa Shearer Nelson after a formal hearing conducted on April 13, 2009. Exceptions to the Recommended Order were timely filed by Rodriguez and the Department. Rodriguez timely filed what he denominated "Exceptions" to the Department's exceptions. "Exceptions" to an exception are not authorized anywhere within Chapter 120, Fla. Stat. However, Rule 28-106.207(3), F.A.C., authorizes "responses to another party's exceptions". Rodriguez's "exceptions" to the Department's exceptions are treated as "responses" to those exceptions for purposes of promulgating this Final Order. The Recommended Order, the transcript of proceedings, the admitted exhibits, the exceptions and responses thereto, and applicable law have all been considered in the promulgation of this Final Order.

RULINGS ON THE DEPARTMENT'S EXCEPTIONS

The Department's first exception is directed to the Conclusion of Law reached in Paragraph 28 of the Recommended Order wherein the ALJ concluded that Rodriguez's actions in electronically cancelling the insurance license of his former girlfriend, Thuy

Daoheuang, was not a crime related to the business of insurance. A review of the record (Paragraphs 5-8, 28 of the Recommended Order) and applicable statutory definitions found in Sections 624.02, and 624.10, Fla. Stat., shows competent, substantial evidence to support the challenged conclusion of law. Therefore, this exception is rejected.

The Department's second exception is directed to the Conclusion of Law reached in Paragraph 26 that the Department did not prove (by clear and convincing evidence) that Rodriguez failed to provide a <u>written</u> report of his criminal *nolo contendere* plea agreement to the Department as required by Section 626.621(11), Fla. Stat. A review of the record shows that Rodriguez admitted on direct examination that he did not so notify the Department because he was "under the impression" and had assumed that the Department knew about the plea through its investigators. (Tr. 19-20) He also admitted that he did not even know of that requirement, so as to be able to fulfill it, until he was notified of that requirement by the "Licensing Department" many months after he entered his pleas. (Tr. 20) His counsel, in closing argument, conceded that Rodriguez had failed to notify the Department of his *nolo contendere* pleas as required. (Tr. 35-36)

The ALJ's exculpatory rationale for concluding that the Department had not proved Rodriguez's failure in that regard is that Rodriguez was making monthly payments, "by check", to the Department to defray the costs of its investigation of him, and, therefore, those monthly payments "by check" adequately substituted for the required written report.

The ALJ's rationale is unacceptable. First of all, the statute is clear on its face and in no need of construction; the agent in question is under an affirmative duty to self-

report to the Department, in writing, that he or she has pled guilty or *nolo contendere* to a felony. The statute does not provide for that information to be provided by impression or assumption on the part of the agent, or merely by check from the agent, or by knowledge imputed to the Department, as a whole, via its investigators. The statute unambiguously requires self-reporting in written form that the agent has so pled. To allow for the construction favored by the ALJ would render the statute of no force or effect in the real world, where agents would hide behind impressions and assumptions to evade the clear self-reporting requirement of the statute.

Secondly, it was not Rodriguez's testimony that he provided written monthly checks to the Department. Rather, it was his testimony that his payments to the Department were made either through his probation officer or by electronic withdrawal from his checking account. In what form (money order, cash, credit card) he made those payment through his probation officer was not disclosed. (Tr. 28). Thus, even if paying the Department by monthly written check, without more, was sufficient to satisfy the self-reporting requirement of Section 626.621(11), Fla. Stat., a review of the complete record shows no competent substantial evidence that Rodriguez, himself, ever did so.

This same lack of competent substantial evidence requires the modification of the Finding of Fact in Paragraph 11 of the Recommended Order to state, in pertinent part:

"...and Respondent has been making monthly payments to the Department since the acceptance..."

Section 626.621(11), Fla. Stat., is a part of the Florida Insurance Code, and thus within the substantive jurisdiction of this Department. For the above-stated reasons, the

ALJ's Conclusion of Law announced in Paragraph 26 of the Recommended Order is rejected, and the following substituted therefor:

> There is clear and convincing evidence in the record, including Rodriguez's own testimony, and the admissions of his attorney, to support a Conclusion of Law that Rodriguez failed to provide to the Department a written notice of his *nolo contendere* pleas to felonies within 30 days after plea entry. Thus, he violated the self reporting requirement of Section 626.6121(11), Fla. Stat., as alleged.

This Conclusion of Law is as or more reasonable than that which it replaces.

RULINGS ON RODRIGUEZ'S EXCEPTIONS

Rodriguez's first exception is directed to the Conclusion of Law announced in Paragraph 24 of the Recommended Order wherein it was concluded that Rodriguez had pled *nolo contendere* to a crime of moral turpitude. The exception does no more than re-argue that point, without additional, persuasive rationale or authority to the contrary of the challenged conclusion. There is competent substantial evidence in the record to support the challenged conclusion. (R.O. Paragraphs 17-24) Therefore, this exception is rejected.

RULINGS ON BOTH PARTY'S EXCEPTIONS TO THE RECOMMENDED PENALTY

In view of the ruling on the exceptions set forth above, the recommended penalty must be modified to take into account an appropriate penalty to be imposed for Count II of the Administrative Complaint for a proved violation of Section 626.621(11), Fla. Stat. Rule 69B-231.090(11), F.A.C. prescribes a penalty of a three (3) month suspension for violation of Section 626.621(11), Fla. Stat. Thus, three months must be added to any other penalty found appropriate in this cause.

The prescribed penalty found in Rule 69B-231.150 (2), F.A.C. for a violation of Section 626.611(14), F.A.C., is, if the crime involves both moral turpitude and a breach

of trust or dishonesty, revocation. In determining that cancelling his girlfriend's licensure constituted a Class A crime involving moral turpitude, the ALJ utilized a standard case law definition of moral turpitude that inherently includes dishonesty as an element thereof. *See, State ex rel. Tulledge v. Holingsworth*, 146 So. 660 (Fla. 1933). That same definition was quoted with approval in *Pearl v. Fla. Bd. of Real Estate*, 394 So.2d 189 (Fla. 3rd DCA 1981), involving a real estate license, and is in accord with *Black's* definition of that term, also quoted with approval in *Pearl, supra,* at 191. Therefore, under applicable case law definitions, any crime involving dishonesty necessarily is a crime of moral turpitude. It cannot be gainsaid that the knowing and malicious (even if the malice was fleeting) cancellation of a former girlfriend's insurance license by using confidential information acquired during the course of the previous romantic relationship is not a breach of trust and contrary to the basic principle of honest dealings with another. Thus, the penalty (revocation) prescribed by Rule 69B-231.150(2), F.A.C., is, by case law definition of the term "moral turpitude", applicable to the established facts of this case, and not the penalty prescribed by Rule 69B-231-150(3)(d), F.A.C. (a six month suspension), mistakenly applied by the ALJ.

However, the ALJ declined to recommend even a six month suspension based on mitigating factors set forth in Paragraphs 29-32, and instead recommended a four month suspension. Considering the unique facts of this case, especially the emotional aspects thereof and the lack of substantial harm to the victim who quickly re-acquired her license, and the other mitigating factors found by the ALJ, the Department agrees with the ALJ that revocation is too harsh a penalty, even with Count Two being

reinstated. For the reasons set forth above, it is determined that a seven month penalty is appropriate in this case.

Accordingly, Paragraphs 27 and 28, and the last sentence of Paragraph 32 of the Recommended Order are rejected. Substituted therefor is the following:

Controlling case law defines "moral turpitude" to inherently include dishonesty. Thus, under the Department's Rule 69B-231.150(2) the applicable penalty (prior to consideration of mitigation) is revocation.

This Conclusion of Law is as or more reasonable than that which it replaces.

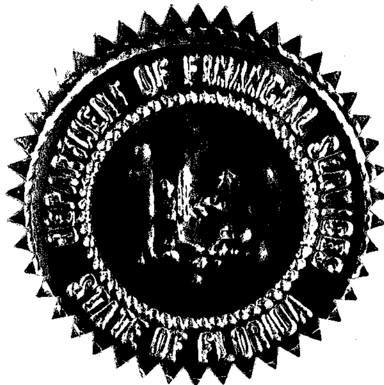
Count Two of the Administrative Complaint having been reinstated, the recommended penalty, for the reasons set forth above, is modified from four months to seven months.

THEREFORE, in consideration of all of the above,

IT IS HEREBY ORDERED that the ALJ's Findings of Fact, except as modified above, are adopted as the Department's Findings of Fact, and that the ALJ's Conclusions of Law, except as modified above, are adopted as the Department's Conclusions of Law.

IT IS FURTHER HEREBY ORDERED that the insurance licenses and eligibility for licensure of Juan Rodriguez are suspended for a period of seven months from the date hereof. Pursuant to Section 626.641, Florida Statutes, during the period of suspension and until reinstatement Rodriguez shall not engage in or attempt or profess to engage in any transaction or business for which a license is required under the Florida Insurance Code, or directly or indirectly own, control, or be employed in any manner by any insurance agent, agency, or adjuster or adjusting firm.

DONE AND ORDERED this 26th day of August 2009.



Tammy Teston
Deputy Chief Financial Officer

NOTICE OF RIGHTS

Any party to these proceedings adversely affected by this Order is entitled to seek review of this Order pursuant to Section 120.68, Florida Statutes, and Rule 9.110, Fla. R. App. P. Review proceedings must be instituted by filing a petition or notice of appeal with the General Counsel, acting as the agency clerk, at 612 Larson Building, Tallahassee, Florida, and a copy of the same with the appropriate district court of appeal within thirty (30) days of rendition of this Order.

COPIES FURNISHED:

ALJ Lisa Shearer Nelson
Lisa M. Hurley
Gautier Kitchen