

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF)
FINANCIAL SERVICES,)
)
Petitioner,)
)
vs.) Case No. 08-6332PL
)
JUAN RODRIGUEZ,)
)
Respondent.)
_____)

RECOMMENDED ORDER

On April 13, 2009, a duly-noticed hearing was held in Tallahassee, Florida, before Lisa Shearer Nelson, Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: William Gautier Kitchen, Esquire
Division of Legal Services
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399

For Respondent: Lisa M. Hurley, Esquire
Willard Hurley, LLC
Post Office Box 1007
Tallahassee, Florida 32302

STATEMENT OF THE ISSUES

The issues to be determined are whether Respondent committed the acts alleged in the Administrative Complaint and if so, what penalties should be imposed?

PRELIMINARY STATEMENT

On November 19, 2008, the Department of Financial Services (Petitioner or Department) filed a two-count Administrative Complaint against Respondent, alleging that Respondent pled nolo contendere to two felonies: the criminal use of personal identification and an offense against intellectual properties. Based upon this plea, Count I of the Administrative Complaint alleges that Respondent violated Section 626.611(14), Florida Statutes (pleading nolo contendere to a felony involving moral turpitude), and Section 626.621(8), Florida Statutes (pleading nolo contendere to a felony), Florida Statutes. Count II charged Respondent with failing to inform the Department of the nolo plea within 30 days, in violation of Section 626.621(2) and (11), Florida Statutes.

On December 12, 2008, Respondent filed a Petition for Formal Administrative Hearing and on December 19, 2008, the Department referred the case to the Division of Administrative Hearings for assignment of an administrative law judge.

The matter was originally scheduled for March 16, 2009. Based upon a request of the parties, the case was rescheduled for April 13, 2009, and proceeded as scheduled. At hearing, Petitioner presented the testimony of Respondent and Petitioner's Exhibit 1 was accepted into evidence. Respondent submitted Respondent's Exhibits 1-7, all character references, without objection by the Department. The proceedings were recorded and

the Transcript was filed with the Division of Administrative Hearings April 27, 2009. Both parties timely submitted Proposed Recommended Orders that have been carefully considered in the preparation of this Recommended Order. Unless otherwise indicated, all references are to the 2008 codification of the Florida Statutes.

FINDINGS OF FACT

1. During all times relevant to this proceeding, Respondent has been licensed as an adjuster by the Department. Respondent has also been licensed in a similar capacity in Texas.

2. Respondent has never been the subject of a disciplinary proceeding previously.

3. On March 24, 2008, Respondent pled nolo contendere to one count of criminal use of personal information and one count of offense against intellectual property. Both offenses are felonies, and adjudication was withheld for each count.

4. As a result of this plea, Respondent was sentenced to three years probation, 200 hours of community service, required to submit to anger management counseling, and required to pay costs, \$2,121.36 in restitution to the Department for its investigative costs, and \$1,258.50 in restitution to the victim, Thuy Daoheuang, for a missing ring. \$400.00 of the amount due the victim was paid at the time of the plea, and payments of \$200.00 each to the Department and to the victim were to be paid

monthly. The terms of the plea allowed for early termination of probation if all conditions of probation were met.

5. The conduct giving rise to the charges against Respondent, and ultimately resulting in his pleas to the criminal charges, stemmed from the termination of his relationship with a former girlfriend, Thuy Daoheuang.

6. Ms. Daoheuang was also an insurance adjuster. After the termination of their relationship, Respondent accessed her insurance licensure information while performing continuing education checks for persons in his firm. Because of his relationship with her, Respondent knew the personal information necessary to have access to her profile. While viewing Ms. Daoheuang's information, Respondent selected the option to cancel her license.

7. Respondent's action was impulsive and although he testified that he regretted it immediately, he could not "undo" the selection. However, he did not take any steps to call the Department and report the action or ask that it be corrected.

8. Respondent's action resulted in the cancellation of Ms. Daoheuang's insurance license. The Department mailed her a letter indicating that her license had been canceled and upon her inquiry, reinstated the license. There was no evidence presented to indicate that her ability to transact insurance was disrupted.

9. Respondent was contacted by investigators from the Department regarding the cancellation of Ms. Daoheuang's license. He admitted his actions and cooperated fully with their investigation.

10. Respondent's employer was informed of the conduct and the resultant criminal action. The company withheld Respondent's annual raise in salary, but did not penalize him otherwise. He remains employed with the same company.

11. The Department was integrally involved in the prosecution of Respondent, and Respondent has been making monthly payments to the Department by check since the acceptance of his plea, as required by his sentence.

12. Respondent also completed the anger management course and has been remorseful for his actions. The criminal proceeding has been a source of great humiliation and Respondent has accepted responsibility for his actions.

CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with Sections 120.569 and 120.57(1), Florida Statutes.

14. The Department seeks to revoke Respondent's license as an insurance adjuster. It therefore has the burden of proving the allegations of the Administrative Complaint by clear and convincing evidence. Department of Banking and Finance v.

Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

15. Count I of the Administrative Complaint asserts a violation of Sections 626.611(14) and 626.621(8), Florida Statutes. Count II charges Respondent with failure to notify of the Department of pleading nolo contendere to any crime punishable by imprisonment of 1 year or more, in violation of Subsections 626.621(2) and (11), Florida Statutes. Section 626.611(14) provides:

626.611 Grounds for compulsory refusal, suspension, or revocation of agent's, title agency's, adjuster's . . . license or appointment. The department shall deny an application for, suspend, revoke, or refuse to renew or continue the license or appointment of any applicant, agent, title agency, adjuster, . . . and it shall suspend or revoke the eligibility to hold a license or appointment of any such person, if it finds that as to the applicant, licensee or appointee any one or more of the following applicable grounds exist:

* * *

(14) Having been found guilty of or having pleaded guilty or nolo contendere to a felony or crime punishable by imprisonment of 1 year or more under the law of the United States of America or of any state thereof or under the law of any other country which involves moral turpitude, without regard to whether a judgment of conviction has been entered by the court having jurisdiction of such cases.

16. Subsections 626.621(2), (8), and (11), Florida Statutes, provide:

626.21 Grounds for discretionary refusal, suspension, or revocation of agent's, adjuster's, . . . license or appointment. The department may, in its discretion, deny an application for, suspend, revoke, or refuse to renew or continue the license or appointment of any applicant, agent, adjuster, . . . and it may suspend or revoke the eligibility to hold a license or appointment of any such person, if it finds that as to the applicant, licensee, or appointee any one or more of the following applicable grounds exist under circumstances for which such denial, suspension, revocation, or refusal is not mandatory under s.626.611:

* * *

(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.

* * *

(8) Having been found guilty of or having pleaded guilty or nolo contendere to a felony or a crime punishable by imprisonment of 1 year or more under the law of the United States of America or of any state thereof or under the law of any other country, without regard to whether a judgment of conviction has been entered by a court having jurisdiction of such cases.

* * *

(11) Failure to inform the department in writing within 30 days after pleading guilty or nolo contendere to, or being convicted or found guilty of, any felony or a crime punishable by imprisonment of 1 year or more under the law of the United States or of any state thereof, or under the law of any other country without regard to whether a judgment of conviction has been entered by the court having jurisdiction of the case.

17. There is no dispute that Respondent pled nolo contendere to two offenses that are third-degree felonies in the State of Florida. What is not as clear is whether either of these felonies would be considered a crime of moral turpitude. If they are considered crimes of moral turpitude, then Respondent is in violation of Section 626.611(14), Florida Statutes, which mandates suspension or revocation of his license. If they are not crimes of moral turpitude, then he is guilty of violating Section 626.621(8), Florida Statutes, where suspension or revocation is discretionary.

18. Moral turpitude has been defined by the Supreme Court of Florida as "anything done contrary to justice, honesty, principle, or good morals, although it often involves the question of intent as when unintentionally committed through error of judgment when wrong was not contemplated." State ex rel. Tullidge v. Hollingsworth, 108 Fla. 607, 146 So. 660, 661 (1933).

19. The Department has also adopted rules that, in part, define those offenses that would be considered crimes of moral turpitude. Florida Administrative Code Rule 69B-231.030(4) defines "crimes involving moral turpitude" as "each felony crime identified in subsection 69B-211.042(21), F.A.C., and each felony crime not identified in subsection 69B-211.042(21), F.A.C., that is substantially similar to a crime identified in subsection 69B-211.042(21), F.A.C."

20. Florida Administrative Code Rule 69B-211.042(21) splits crimes into three different categories. Class A crimes are considered crimes of moral turpitude. Class B and C crimes are not. While the lists are extensive, neither of the crimes for which Respondent entered a plea are included. Class A crimes include crimes such as submitting false insurance claims or applications; crimes relating to workers' compensation insurance; theft or other dishonest dealings with premiums or claims money; making false reports to insurance regulatory officials; grand theft or embezzlement from an insurance company or agency; armed robbery (face-to-face theft by threat of force or force); extortion; bribery; misuse of public office; obstructing justice; treason against the United States, or a state, district, or territory; abuse of elderly or disabled person; altering public documents; forgery; perjury; racketeering; witness tampering; child abuse; fraud; tax evasion; shoplifting; robbery; unlawful possession of a postal key; securities fraud; defrauding the government; conspiracy; murder in all degrees; aggravated battery or assault; sexual battery or molestation of a minor; carrying a concealed weapon; and kidnapping.

21. Class B crimes include crimes such as manslaughter, simple assault, simple battery, gambling, possession of burglary tools, resisting arrest with violence; and criminal mischief. Class C crimes include public drunkenness; driving under the influence; trespassing; disorderly conduct; solicitation of

prostitution; bigamy; sale of fireworks; cruelty to animals; personal use of or possession of controlled substances; domestic disturbance not involving violence; and illegal possession of a weapon.

22. With the exception of unlawful possession of a postal key, the relationship between the listed crimes in Class A and the concept of moral turpitude is clear. Many involve deliberate acts for the purpose of financial gain; others involve actions where the victims are injured either physically or financially.

23. Rule 69B-231.030(4) requires that where the crime is not listed, it must be compared to those crimes that are listed in the rule. Respondent contends that the crimes at issue here are comparable to domestic disturbance not involving violence, a Class C crime. Petitioner contends that the appropriate comparison is to crimes such as making a false report to insurance regulatory officials; altering public documents, or any of the other crimes in Class A involving fraud or false information.

24. For whatever temporary period before Ms. Daoheuang was notified, Respondent's actions had the effect of altering a public document, or publicly available information, i.e., Ms. Daoheuang's licensure information. Altering a public document is a Class A crime. Fla. Admin. Code R. 69B-211.042(21)(m). Accordingly, it is found that Respondent has

committed a crime of moral turpitude in violation of Section 626.611(14), as charged in Count I.

25. Count II charges Respondent with failure to notify the Department of pleading nolo contendere of any crime punishable by imprisonment of one year or more, in violation of Section 626.621(2) and (11), Florida Statutes. Here, the undisputed evidence is that Respondent was interviewed by Department investigators during the investigation of this matter, and cooperated fully with them. Part of his sentence involved payment of restitution on a monthly basis to the Department, and the undisputed evidence is that he has complied with this requirement.

26. Respondent readily admits that he did not provide a separate writing informing the Department of the existence of plea (about which it clearly knew and had input in crafting). However, the burden is on the Department to show the lack of written notice. In light of the testimony that Respondent has paid the Department by check on a monthly basis the restitution due under the plea agreement, the Department has not proven that Respondent did not provide a writing that informed it of the plea agreement and resultant obligation to the Department. Therefore, the Department has failed to prove the violations in Count II of the Administrative Complaint.

27. The Department has adopted several rules that must be consulted in determining the appropriate penalty for a violation

of Section 626.611, Florida Statutes. The disciplinary guidelines rule, Florida Administrative Code Rule 69B-231.080, refers to Rule 69B-231.150, which is entitled "Criminal Proceedings. That rule provides in pertinent part:

(3) If a licensee is not convicted of, but has been found guilty of or has pleaded guilty or nolo contendere to, a felony or a crime punishable by imprisonment of 1 year or more under the law of the United States of America or of any state thereof or under the law of any other country, which is a crime involving moral turpitude or is a crime involving breach of trust or dishonesty, the penalties are as follows:

(a) If the conduct directly relates to activities involving the business of insurance, the penalty shall be revocation.

(b) If the conduct indirectly relates to the business of insurance or involves dishonesty or breach of trust, such as theft of money or property, or mishandling or misappropriation of money, the penalty shall be a 12-month suspension.

(c) If the conduct is not related to the business of insurance and does not involve dishonesty or breach of trust, the penalty shall be a 6-month suspension.

(d) If the conduct is not related to the business of insurance and does not involve dishonesty or breach of trust, the penalty shall be a 6-month suspension.

28. The conduct at issue in this case best fits under Subsection (3)(d) of the rule. The conduct did not involve any insurance transaction and did not involve any funds in any way. Respondent was able to access the information on Ms. Daoheuang's insurance profile not because he was an insurance adjuster, but

because he had knowledge of her license number and birthdate as a result of their previous personal relationship. Therefore, the presumptive penalty would be a six-month suspension.

29. Florida Administrative Code Rule 69B-231.160 identifies aggravating and mitigating factors to be applied in reaching the final penalty to be imposed. This rule provides in pertinent part:

- (2) For penalties assessed under Rule 69B-231.150, F.A.C., for violations of Sections 626.611(14) and 626.621(8), F.S.:
- (a) Number of years that have passed since criminal proceeding;
- (b) Age of licensee at time the crime was committed;
- (c) Whether licensee served time in jail;
- (d) Whether or not licensee violated criminal probation;
- (e) Whether or not licensee is still on criminal probation;
- (f) Whether or not licensee's actions or behavior resulted in substantial injury to the victim;
- (g) Whether or not restitution was, or is being timely paid;
- (h) Whether or not licensee's civil rights have been restored; and
- (i) Other relevant factors.

30. Subsection (1) of the rule identifies additional factors considered in cases not involving criminal actions. Those factors relevant to these proceedings include the cooperation with the Department and lack of previous disciplinary orders. Fla. Admin. Code R. 69B-231.160(1)(h) and (l).

31. The time since the incident has been relatively brief, in that the plea was entered in March 2008. However, Respondent did not serve any time in jail, has not violated his criminal

probation and has faithfully paid the restitution awards on a timely basis. The conduct giving rise to the criminal proceeding did not result in substantial injury to the victim. In addition, Respondent cooperated fully with the Department's investigation and has never had disciplinary action against him before.

32. There is no question that Respondent acted rashly and with disregard for the consequences to Ms. Daoheuang. His actions were simply wrong. He is fortunate that no further damage resulted from his conduct. However, there is no evidence that Respondent has ever violated the trust that his clients have placed in him, and his employer has retained him despite his actions. Respondent has paid dearly for one impulsive act. To revoke his license or even suspend it for six months is a penalty that is simply disproportionate to the crime.

RECOMMENDATION

Upon consideration of the facts found and conclusions of law reached, it is

RECOMMENDED:

That a final order be entered finding that Respondent has violated Section 626.611(14), Florida Statutes, as alleged in Count I of the Administrative Complaint;

Dismissing Count II of the Administrative Complaint; and

Suspending Respondent's license as an adjuster for a period of four months.

DONE AND ENTERED this 28th day of May, 2009, in Tallahassee,
Leon County, Florida.



LISA SHEARER NELSON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of May, 2009.

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.