STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL SERVICES, Petitioner, vs. ANGELA LAURA HABER, Respondent.	)	Case No. 09-4675PL

RECOMMENDED ORDER

On November 16, 2011, a duly-noticed hearing was held by video teleconferencing with sites in Jacksonville and Tallahassee, Florida, before Lisa Shearer Nelson, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Robert Alan Fox, Esquire
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399

For Respondent: Donald E. Pinaud, Jr., Esquire
Kattman & Pinaud, P.A.
4069 Atlantic Boulevard
Jacksonville, Florida 32207

STATEMENT OF THE ISSUE

The issue to be determined is whether Respondent violated section 626.611(14) or 626.621(8), Florida Statutes (2007), and if so, what penalty should be imposed?

PRELIMINARY STATEMENT

On June 19, 2009, Petitioner, the Department of Financial Services (Petitioner or the Department), filed an Administrative Complaint that charged Respondent, Laura Haber (Respondent or Ms. Haber), with violating sections 626.611(14) and 626.621(8). The allegations were based upon Respondent's nolo contendere plea to second-degree grand theft. Respondent disputed the allegations in the Administrative Complaint and requested a hearing pursuant to section 120.57(1), Florida Statutes. On August 26, 2009, the case was referred to the Division of Administrative Hearings for assignment of an administrative law judge.

On September 1, 2009, Respondent filed a motion to stay the proceedings, asserting that she had agreed to the nolo contendere plea based on the advice of counsel that such a plea would not affect her insurance license; that new counsel had moved to withdraw the plea in the criminal proceeding, and the trial court had denied the motion; and that the trial court's order denying the motion to set aside the nolo plea was under appeal. The Department did not object to the Motion, and by

Order dated September 3, 2009, the case was placed in an abated status.

The case remained in abeyance, with periodic Status Reports required, until Petitioner notified the Division on May 3, 2011, that Respondent's appeal in the criminal proceeding had been affirmed. On May 9, 2011, the parties were ordered to provide dates for hearing, and on May 20, 2011, a Notice of Hearing was issued scheduling the case to be heard on August 10, 2011.

On August 9, 2011, Respondent filed a unopposed Motion for Continuance, based on an emergency health crisis in Respondent's counsel's family. The Motion was granted, the case rescheduled for November 16, 2011, and the case proceeded as scheduled. At hearing, Petitioner submitted the testimony of Laura Haber, Matthew Guy, and Beth Allen. Petitioner's Exhibits numbered 1, 1a, 2-4, 4a, 5, 6, 6a, 6b, and 7-9 were admitted into evidence. Respondent testified on her own behalf and submitted the testimony of Jan Allen. Respondent's Exhibits numbered 1-5 were admitted into evidence, and Respondent was granted until December 30 to file a copy of the Court Order Terminating Respondent's Criminal Probation. She did so on November 22, 2011. The Order is admitted as Respondent's Exhibit 6.

At the Respondent's request, the deadline for submitting proposed recommended orders was set at December 20, 2011. The Transcript was filed with the Division on December 6, 2011, and

Respondent moved to extend the time for filing proposed recommended orders, and the deadline was extended to January 9, 2012. Both parties timely filed their Proposed Recommended Orders, which have been carefully considered in the preparation of this Recommended Order. Attached to Petitioner's Proposed Recommended Order are documents that were not produced at hearing and are not exhibits in this case. Those documents have not been considered.

FINDINGS OF FACT

1. Petitioner is the state agency charged with the licensing and regulation of the insurance industry in the State of Florida.

2. Respondent is licensed as a variable annuity and health agent, a life agent, a life and health agent, a health agent, a legal expense agent, and an independent adjuster. She holds license number A107405, which is presently valid.

3. Respondent was the neighbor of an elderly couple named Paul and Rose Weinberg. As their health declined, she assisted them with their financial affairs.

4. Paul Weinberg was diagnosed with Parkinson's Disease, and Rose had medical issues that caused her to be infirm. Respondent's assistance became labor intensive and time consuming. She obtained a power of attorney from the Weinbergs to facilitate the handling of their affairs, and at some point

her name was placed on at least Rose Weinberg's bank account and credit card.

5. Paul Weinberg died about four years after Respondent began assisting the couple. After Paul's death, Respondent continued to provide assistance to Rose for an additional six-year period. She stopped working and spent her time taking care of Rose. Respondent testified that during this time, Rose started "paying" her for her efforts. These payments were not on a weekly basis, but made by Respondent periodically making a lump sum payment toward her own bills with Rose's funds.

6. At some time after Paul's death, Rose was moved to assisted living facility. Respondent testified that as Rose's health declined and it was clear she would need more intensive care, she embarked on a Medicaid spend-down, in order to reduce the amount of Rose's funds so that she could qualify for Medicaid funding. Whether for this purpose or for some less altruistic motive, Respondent transferred $50,000 from a joint account she held with Rose to an account in her own name.

7. Although Respondent claimed that the transfer of funds was performed pursuant to an agreement entered before Rose's health began to decline, she presented no written agreement of any kind to support her claim, and presented no explanation how this transfer of funds would have been permissible under federal law. She also presented no written agreement to support the

statement that the payment of her bills out of Rose's funds was to compensate her for the assistance she provided to Rose.

8. On December 28, 2007, the State Attorney for the Nineteenth Judicial Circuit in and for St. Lucie County filed an information against Respondent, charging her with third-degree grand theft in violation of section 812.014, Florida Statutes (2006); fraudulent use of a credit card, in violation of section 817.61, a third-degree felony; criminal use of personal identification information in violation of section 817.568(2)(a), a third-degree felony; and exploitation of an elderly or disabled adult while in a position of trust, in violation of section 825.103(1)(a) and (2)(b), a second-degree felony.

9. Respondent hired T. Charles Shafer and his associate, Beth Allen, as counsel to represent her in the criminal proceedings. As part of their representation, there was some discussion of entering into a plea to resolve the criminal charges. During these discussions, Respondent inquired repeatedly whether any plea deal would have a negative effect on her insurance license.

10. Mr. Shafer and Ms. Allen advised her several times to seek advice from someone specializing in regulatory matters to address this issue. However, in response to her concerns regarding her license, Ms. Allen called the Department of

Financial Services to inquire about the ramifications of a nolo contendere plea. She presented the scenario as a hypothetical. Ms. Allen could not remember the name of the person to whom she spoke, and what she was told is in dispute. Ultimately, what she was told is not particularly relevant. After the telephone call, Mr. Shafer wrote Respondent a letter which stated in part:

> Dear Ms. Haber:
>
> I am in receipt of your September 11 e-mail correspondence to Ms. Allen. I understand your concern over how a plea and sentencing may affect your occupation, but as I advised in our last several phone calls, I do not know what collateral consequences such a sentence will have on your profession; I can only tell you with certainty how it will affect your status relative to being able to one day filing an action to seal your records in this matter.
>
> However, pursuant to your request, Ms. Allen found a telephone number on the website you provided. She called the Florida Department of Services help-line. She asked the person she spoke to what would happen to your license as a result of a no contest plea to a felony theft with a withhold of adjudication and probation. Their representative advised that since you already have a license, you would not be suspended or placed under review; however, it is your duty to notify the Bureau of Licensure of any law enforcement action, such as your current predicament. <u>Please be advised that neither I nor Ms. Allen vouch for the accuracy of this information, and, as we have suggested repeatedly in past conferences, insist that you personally validate it.</u> (Emphasis added.)

11. To give the type of answer described in the letter would be contrary to Department policy. Whether or not the description of the phone call contained in the letter is accurate, given Mr. Shafer's express qualification and directive that the information be separately verified, it was unreasonable for Respondent to rely upon it. By her own admission, she took no action to independently verify the information in the letter.

12. Respondent pleaded nolo contendere to one count of second-degree grand theft.

13. Respondent met with her attorneys on a Sunday at a Dunkin Donuts restaurant before signing the plea agreement. At that time, counsel went over the plea agreement with her, line by line. Included in the plea agreement is the statement, "I understand a conviction of a crime may cause me to lose local, state or federal licenses and can prevent me from getting certain licenses. A conviction of a felony will cause me to lose the right to vote and my right to own or possess a firearm or ammunition."

14. At the plea hearing on September 15, 2008, the trial judge questioned Respondent regarding her change of plea. In the plea colloquy, the following occurred:

> THE COURT: Okay. Please tell me your name.
>
> MS. HABER: Angela Haber.
>
> THE COURT: And how old are you?

MS. HABER: Forty-two.

THE COURT: And how far have you gone in school?

MS. HABER: Some college.

THE COURT: Okay. And you read, write and understand English?

MS. HABER: Yes.

THE COURT: Are you -- don't take offense at any of these questions, I ask them of everyone because sometimes I'll go through this and if you don't ask these questions someone will come back later and say, "I was under the influence of drugs and I don't understand English when I entered my plea." Even though it's clear that they were. So you understand English?

MS. HABER: Yes sir.

THE COURT: And you're not under the influence of alcohol or any illegal narcotics?

MS. HABER: No sir.

THE COURT: Okay. Are -- did -- did you fully read this plea agreement from beginning to end?

MS. HABER: Yes.

THE COURT: These are initials at the bottom of each page and a signature at the end?

MS. HABER: Yes.

THE COURT: And did you fully understand each and every provision including the rights you're giving up by entering this plea?

MS. HABER: Yes.

THE COURT: Okay. You are charged with second degree grand theft, that's a second degree felony, its punishable by up to fifteen years in prison, a ten thousand dollar fine or both. You are also charged with fraudulent use of a credit card, criminal use of personal identification and exploitation of elderly or disabled adult, position of trust. And those charges would be dropped or dismissed at the time of sentencing. But it's my understanding that you wish to enter a plea to count one, second degree grand theft. Is that what you wish to do?

MS. HABER: Yes.

* * *

THE COURT: Are you entering this plea because you're guilty or because you feel it's in your best interest?

MS. HABER: I feel it's in my best interest.

THE COURT: Okay. And is there any objection by the defense to the court taking judicial notice of the complaint affidavit for factual basis?

MR. SHAFER: No sir.

THE COURT: And both sides stipulate there's a factual basis for the plea?

MR. SHAFER: Yes sir, for the plea.

MS. BALDREE: Yes sir. And we would add that additionally, that this offense occurred in Saint Lucie County.

THE COURT: Ma'am, are you entering this plea freely and voluntarily?

MS. HABER: Yes.

THE COURT: Has anyone threatened you or forced you or coerced you to enter this plea?

MS. HABER: No.

THE COURT: Has anyone mistreated you or misled you to enter this plea?

MS. HABER: No.

THE COURT: Has anyone made any promises to you other than what's contained in this petition?

MS. HABER: No.

THE COURT: If they have you need to know they're not binding on the court. Have you had enough time to talk to your attorney?

MS. HABER: Yes.

THE COURT: Do you need more time to talk to your attorney now in private?

MS. HABER: No.

THE COURT: Are you satisfied in all respects with his advice and counsel?

MS. HABER: Yes.

* * *

THE COURT: Do you understand you're giving up your right to appeal all matters relating to the judgment, including the issues of guilt or innocence?

MS. HABER: Yes.

THE COURT: Do you understand that if you are adjudicated it would make you a convicted felon and you would lose certain civil rights?

> MS. HABER: Yes.
>
> * * *
>
> THE COURT: Do you have any questions for your attorney or the court concerning anything about your case, this petition or these proceedings?
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> MS. HABER: No.
>
> THE COURT: Understanding everything we just went over do you still want to enter this plea?
>
> MS. HABER: Yes.
>
> THE COURT: Okay. I will accept the plea. I find there's a factual basis for it. I find the defendant does not appear to be under the influence of drugs or alcohol at this time. She appears to be aware of the nature of the crime to which she has pled, the consequences, her legal rights and the plea recommendations. I find the plea is freely and voluntarily entered upon a knowing and intelligent waiver of rights. . . .

15. Respondent was sentenced on November 14, 2008. At that time, adjudication of guilt was withheld. She was placed on probation for a period of ten years and ordered to make restitution to Rose Weinberg in the amount of $50,000.

16. On April 17, 2009, Respondent filed a Motion for Post-Conviction Relief and to Vacate Judgment Pursuant to Rule 3.850, Fla. R. Crim. P. In the Motion, Respondent sought to withdraw her nolo plea, based upon ineffective assistance of counsel. The basis for her claim was counsel's failure to advise her that

a nolo plea would have a negative effect on her professional licensing.

17. On June 26, 2009, the Honorable Robert E. Belanger entered a detailed Order Denying Defendant's Motion for Post Conviction Relief. The Order states in pertinent part:

> Defendant claims that she is entitled to withdraw her plea because of her counsel's deficient performance, i.e., in providing affirmative misadvise concerning a collateral matter. This is not even a close call. The court finds the motion to be totally devoid of merit.
>
> * * *
>
> The defense stipulated to a factual basis for the charge, and the defendant acknowledged that by entering a plea, she was giving up any defenses to the offense charged. Any defenses were abandoned when she entered the plea. Stano v. State, 520 So. 2d 278 (Fla. 1988); Dean v. State, 580 So. 2d 808 (Fla. 3d DCA 1991).
>
> Significantly, the court conducted a detailed plea colloquy, asking the defendant the required questions to ensure that the plea was being entered freely, knowingly, intelligently, and voluntarily. Defendant, who was under oath, testified that she had signed the plea form and was aware of the waiver of her various rights. She further testified that she had sufficiently discussed the change of plea with her attorney and that no one had threatened her, coerced her or mislead her into entering the plea. She also confirmed that no one had made any promises to her, except those contained in the plea form.
>
> A plea conference is not a meaningless charade to be manipulated willy-nilly after

> the fact; it is a formal ceremony, under oath, memorializing a crossroads in the case. What is said and done at a plea conference carries consequences. . . .

18. Respondent appealed the trial court's order. On April 13, 2011, the Fourth District Court of Appeal affirmed the trial court decision. Haber v. State, 59 So. 3d 123 (Fla. 4th DCA 2011). The Fourth District's mandate issued May 13, 2011.

19. Respondent paid $10,000.00 toward the required restitution at the time of sentencing. On October 26, 2011, Respondent moved to have her probation terminated upon payment of $11,000.00 for restitution. On that same day, the trial court ordered that upon payment of the $11,000.00, the court would enter an order terminating Respondent's probation, and the balance of the amount owed by Respondent for restitution, i.e., $15,552.86, would convert to a civil judgment. Respondent paid the $11,000.00 plus court costs and on November 6, 2011, the court entered the Order Terminating Probation.

CONCLUSIONS OF LAW

20. 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 (2011).

21. This disciplinary action by Petitioner is a penal proceeding in which Petitioner seeks to suspend Respondent's

license as an insurance agent. Petitioner bears the burden of proof to demonstrate the allegations in the Administrative Complaint by clear and convincing evidence. Dep't of Banking & Fin. v. Osborne Sterne & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

22. As stated by the Supreme Court of Florida,

> Clear and convincing evidence requires that 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 lacking in confusion as to the facts in issue. The evidence must be of such a 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 Henson, 913 So. 2d 579, 590 (Fla. 2005), (quoting Slomowitz v. Walker, 429 So. 797, 800 (Fla. 4th DCA 1983)).

23. The Administrative Complaint charges Respondent with violating sections 626.611(14) and 626.621(8), which provide the following:

> **626.611 Grounds for compulsory refusal, suspension, or revocation of agent's, title agency's, adjuster's, customer representative's, service representative's, or managing general agent'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 . . . agent,. . . 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 a crime punishable by imprisonment of 1 year or more under the law of the United States of America or of any state thereof or under the law of any other country which involves moral turpitude, without regard to whether a judgment of conviction has been entered by the court having jurisdiction of such cases.

* * *

626.621 Grounds for discretionary refusal, suspension, or revocation of agent's, adjuster's, customer representative's, service representative's, or managing general agent'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:

* * *

(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
the court having jurisdiction of such cases.

24. The text of these provisions is readily available to Respondent, and anyone else, for that matter. Respondent was presumed to know the laws regulating her profession, and both the Florida Statutes and rules governing her profession specifically address whether a plea of guilty or nolo contendere for grand theft would subject Respondent to discipline. Fla. Bd. of Pharmacy v. Levin, 190 So. 2d 768, 770 (Fla. 1966); Wallen v. Dep't of Prof'l Reg., 568 So. 2d 975 (Fla. 3d DCA 1990).

25. Respondent clearly pleaded nolo contendere to a felony, for which adjudication was withheld. Both statutory provisions authorize discipline for such a plea. Respondent is, however, accorded the opportunity to explain the circumstances of her plea. Ayala v. Dep't of Prof'l Reg., 478 So. 2d 1116 (Fla. 1st DCA 1985). Respondent's explanation of her actions only serves to confirm the factual basis for the plea.

26. There is no question that Respondent violated section 626.621(8) by virtue of her plea of nolo contendere to a felony. This statute makes the imposition of a suspension or revocation discretionary. Should Respondent be guilty of section 626.611(14), which requires a finding that the felony for which

she pleaded nolo contendere is a crime of moral turpitude, then suspension or revocation of her licenses is mandatory.

27. Generally, the Supreme Court of Florida has stated:

> Moral turpitude involves the idea of inherent baseness or depravity in the private social relations or duties owed by man to man or by man to society. It has also been defined as anything done contrary to justice, honesty, principle, or good morals, though 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 (Fla. 1933); Cambas v. Dep't of Bus. & Prof'l Reg., 6 So. 3d 668, 670 (Fla. 5th DCA 2009). The Department has also addressed what crimes it considers to be crimes of moral turpitude by rule. Florida Administrative Code Rule 69B-231.030(4) defines crimes of "moral turpitude" to include "each felony crime identified in subsection 69B-211.042(21)," which in turn expressly includes grand theft as a crime of moral turpitude. Rule 69B-211.042(21)(s).

28. Moreover, even viewing the facts shown at hearing in the light most favorable to Respondent, the crime for which she pleaded nolo contendere is a crime of moral turpitude. She was dealing with the funds of an elderly woman who could not care for herself. As an insurance agent, she should have known the importance of written documents to memorialize agreements

related to money, especially where she was acting in a position of trust. Yet, she paid her own bills out of the funds of Ms. Weinberg, and produced no written agreement that would allow such payments. She transferred $50,000.00 to a bank account in her own name, presumably to accomplish a Medicaid spend-down. Once again, she produced no written agreement that would have allowed for such a transfer, and no satisfactory explanation for what would happen to the funds once transferred to her own name. The Fifth District determined in Hamilton v. State, 447 So. 2d 1008, 1008-1009 (Fla. 5th DCA 1984), that grand theft is a crime of dishonesty, and such a determination is borne out in this case.

29. Respondent is thus guilty of violating both section 626.611(14) and section 626.621(8).

30. Where both violations are proven, section 626.611 governs the penalty to be imposed. Dyer v. Dep't of Ins. & Treas., 585 So. 2d 1009, 1014 (Fla. 1st DCA 1991). For a violation of section 626.611(14), the penalty identified by rule is revocation of her licenses and appointments. Rule 69B-231.150(2).

31. The Department has also adopted a rule that identifies aggravating and mitigating factors to be considered when imposing a disciplinary penalty. Pursuant to rule 69B-231.160(2), these factors include the number of years that have

passed since the criminal proceeding; the age of the licensee when the crime was committed; whether or not the licensee violated criminal probation or is still on criminal probation; whether the licensee's actions resulted in substantial injury to the victim; whether restitution was or is being timely paid; and whether the licensee's civil rights have been restored.

32. The judgment and sentence in Respondent's case was rendered in November 2008, just three years ago. She was 42 at that time. She did not serve time in jail, and her criminal probation was terminated early. While she has satisfied a large portion of the restitution due to Ms. Weinberg, there was not evidence that she has satisfied that portion of the restitution that was converted to a civil judgment. The victim, an elderly woman unable to care for herself, was deprived of the use of a substantial sum of money, and no evidence was presented to indicate that Respondent's civil rights have been restored.

33. Consideration of these factors does not tilt the scales in favor of a downward departure from the guideline penalty.

RECOMMENDATION

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

RECOMMENDED that the Department of Financial Services enter a Final Order finding that Respondent has violated sections

626.611(14) and 626.621(8), and revoking Respondent's licenses and appointments issued or granted under or pursuant to the Florida Insurance Code.

DONE AND ENTERED this 1st day of February, 2012, 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 1st day of February, 2012.

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.