

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL)
SERVICES,)
)
Petitioner,)
)
vs.) Case No. 09-5353PL
)
EILEEN P. SUAREZ,)
)
Respondent.)
_____)

RECOMMENDED ORDER

This case came before Administrative Law Judge Eleanor M. Hunter as scheduled on December 4, 2009, at video teleconference sites in Miami and Tallahassee, Florida.

APPEARANCES

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

For Respondent: Eileen P. Suarez, pro se
6449 West 12 Avenue
Hialeah, Florida 33012

STATEMENT OF THE ISSUE

The issue in this case is whether Respondent committed the offenses alleged by the Department of Financial Services in the Administrative Complaint dated May 27, 2009, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

In a three-count Administrative Complaint dated May 27, 2009, the Petitioner charged Respondent, an insurance agent, with having violated certain provisions of the Florida Insurance Code.

Respondent requested an administrative hearing by filing an Election of Proceedings form dated August 12, 2009. On October 1, 2009, the case was forwarded to the Division of Administrative Hearings for the assignment of an Administrative Law Judge to conduct an evidentiary hearing. Initially assigned to Administrative Law Judge Larry J. Sartin, the case was transferred to the undersigned to conduct the final hearing that was held on December 4, 2009.

At the final hearing Petitioner presented the testimony of Paula McCartha, Steven Firestone, Daniel O'Leary, John Vila, Ileana Vila, and Marilyn Peterson. Petitioner's Exhibits Numbered 1, 1a, 2, 2a, 3, 3a, 6-11, 12a, and 13-21 were received in evidence. Respondent testified on her own behalf. Respondent's Exhibits A, B, C, D, and E were received in evidence.

The Transcript of the final hearing was filed on December 23, 2009. Petitioner filed its Proposed Recommended Order on the date it was due, January 15, 2010.

FINDINGS OF FACT

1. Petitioner, the Department of Financial Services ("Petitioner" or "the Department") has regulatory responsibility for Chapter 626, Florida Statutes (2009), the insurance licensing procedures law.

2. Respondent, Eileen P. Suarez ("Respondent" or "Suarez"), is a licensed general lines agent transacting in property and casualty insurance, under license number E129078. She operated and was the agent in charge of the Suarez Insurance Agency, Inc. ("Agency"), in Hialeah, Florida. The Agency held a valid state license from 7/21/2006 to 7/27/2009.

3. The Department filed a three-count Administrative Complaint against Respondent alleging that she violated various provisions of Chapter 626, Florida Statutes.

COUNT I

4. John Vila is the president of Vila Home Group, Inc., a trucking company that is in the business of hauling sand, soil, and gravel. In April 2005, he purchased a dump truck and, at the suggestion of the dealer, contacted Suarez for insurance.

5. Suarez sold Vila two insurance policies, for the period April 29, 2005 to April 29, 2006, one with AequiCap Insurance Company ("AequiCap") and the other with the Underwriters at Lloyds, London ("Lloyds"). The AequiCap Policy was a commercial

liability insurance policy. The Lloyds Policy was a commercial automobile physical damage insurance policy.

6. In March 2006, Vila gave Suarez a check in the amount of \$10,876.41, made payable to the Agency to renew the AequiCap and Lloyds policies, for the period April 29, 2006 to April 29, 2007. The AequiCap policy quote was approximately \$5,350.00. The Lloyds policy quote was approximately \$5,500.00.

7. The check was deposited in the Agency's trust account, but the Lloyds policy was allowed to expire on April 29, 2006, and was not renewed until October 26, 2006, creating a six-month gap in commercial automobile physical damage insurance coverage for Vila. When it was renewed, the Lloyds Policy cost \$5,712.03.

8. Vila's AequiCap policy expired on April 29, 2006, and was not renewed because Suarez failed to pay MAI Risk Management, AequiCap's managing general agent. The funds were not returned to Vila.

9. While the March 2006 quotes were pending, the registered driver of the truck, Andres Vila, was involved in an accident and was at fault for hitting a wire. Rather than risk an increase in the pending insurance quotes, Vila paid Bellsouth \$2,390.36 in damages.

COUNT II

10. On or about October 26, 2006, Suarez provided Vila a Certificate of Liability showing that the truck was insured with AequiCap, under policy number TC012695, and with Lloyds, under policy number R641440/0251, for the period April 29, 2006 to April 29, 2007. Vila was not insured under AequiCap policy number TC012695 from April 29, 2006 to April 29, 2007. The Certificate of Liability was a false document that Suarez created on her computer, printed, and gave to Vila.

COUNT III

11. Shelly, Middlebrooks & O'Leary, Inc. ("Shelly Middlebrooks") is a licensed insurance agency, located in Jacksonville, that acts as a general agent for multiple insurance companies.

12. Suarez collected insufficient funds to include the premiums that were intended to be forwarded to Shelley Middlebrooks for policies to insure the following trucking companies: All Nations Logistics, LLC (Policy Number 486865); Jose Veiga, d/b/a JJ Freightways (Policy Number 486885); Gary Castle/Diamond Mine (Policy Number 74APN338354); and Nics Oil, Inc. (Policy Number 74APN401617).

13. For each of the four companies, she requested and received binders for insurance from Shelly Middlebrooks, followed by invoices for the premiums that were to have been

paid within ten days of the date the invoices were received. In each instance, Suarez did not pay Shelly Middlebrooks, which cancelled the policies for non-payment of the premium. It also obtained a default judgment in the Circuit Court in and for Duval County, Florida, that requires Suarez to pay it the outstanding balances due for the four policies and a \$25 insufficient funds check fee, for a total of \$8,335.60, which she has been unable to pay.

14. Instead of paying for insurance, Suarez used most of the funds she collected to pay for various other corporate expenses for the same trucking companies, including state and federal government filings for intrastate or interstate travel that were prerequisites to their becoming insurable. Suarez expected to collect the additional funds needed for insurance later, but the clients, the owners of the trucking companies, did not pay her.

15. Suarez admits that she failed her clients in 2006, after her father's death in February 2006. She realized the Vila errors and tried to correct them in October. The Agency is now closed. Suarez's husband has been unemployed for over a year, and their home is in foreclosure. She is receiving social security disability payments and has insufficient funds to file for bankruptcy.

CONCLUSIONS OF LAW

16. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat. (2009).

17. The Department seeks suspension or revocation of Respondent's license and, therefore, has the burden of proving by clear and convincing evidence that Respondent committed the violations alleged in the Administrative Complaint. Ferris v. Turlinaton, 510 So. 2d 292 (Fla. 1987); Department of Banking and Finance v. Osborne Stern & Company, 670 So. 2d 932 (Fla. 1996).

18. "Clear and convincing evidence is an intermediate standard of proof, more than the 'preponderance of the evidence standard used in most civil cases, and less than the "beyond a reasonable doubt standard used in criminal cases." Smith v. Department of Health and Rehabilitative Services of Health and Rehabilitative Services, 522 So. 2d 956, 958 (Fla. 1st DCA 1988). Clear and convincing evidence requires:

that the evidence must be found to be credible; the fact to which the witnesses testify must be precise and explicit and the witnesses must be lacking in confusion as to the fact 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.

Smith, 522 So. 2d at 958 (quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

19. The provisions of Chapter 626 that are applicable to this case have been in effect at all times material to this case.¹ Section 626.611, Florida Statutes, has provided as follows:

The department . . . shall . . . revoke, or refuse to renew or continue the license or appointment of any applicant, agent . . . 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:

* * *

(7) Demonstrated lack of fitness or trustworthiness to engage in the business of insurance.

(8) Demonstrated lack of reasonably adequate knowledge and technical competence to engage in the transactions authorized by the license or appointment.

* * *

(10) Misappropriation, conversion, or unlawful withholding of moneys belonging to insurers or insureds or beneficiaries or to others and received in conduct of business under the license or appointment.

20. Section 626.621, Florida Statutes, has provided as follows:

The department may, in its discretion . . . suspend, revoke, or refuse to renew or continue the license or appointment of any . . . agent... 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... licensee... 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 the Florida Insurance Code in the course of dealing under the license or appointment.

* * *

(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.

21. Section 626.692, Florida Statutes, has provided as follows:

If any ground exists for the suspension, revocation, or refusal of a license or appointment, the department may, in addition to any other penalty authorized under this chapter, order the licensee to pay restitution to any person who has been deprived of money by the licensee's misappropriation, conversion, or unlawful withholding of moneys belonging to insurers, insureds, beneficiaries, or others

22. Subsection 626.561(1), Florida Statutes, has provided as follows:

All premiums, return premiums, or other funds belonging to insurers or others received by an agent, insurance agency, customer representative, or adjuster in transactions under the license are trust funds received by the licensee in a fiduciary capacity. An agent or insurance agency shall keep the funds belonging to each insurer for which an agent is not appointed, other than a surplus lines insurer, in a separate account so as to allow the department or office to properly audit such funds. The licensee in the applicable regular course of business shall account for and pay the same to the insurer, insured, or other person entitled thereto.

23. Subsection 626.9541 (1)(e)1., Florida Statutes, has provided, in relevant part, as follows:

The following are defined as unfair methods of competition and unfair or deceptive acts or practices:

(e) False statements and entries.

1. Knowingly:

a. Filing with any supervisory or other public official,

b. Making, publishing, disseminating, circulating,

c. Delivering to any person,

d. Placing before the public,

e. Causing, directly or indirectly, to be made, published, disseminated, circulated, delivered to any person, or placed before the public, any false material statement.

24. The evidence clearly and convincingly established that Respondent (1) failed to timely forward Vila's premium to Lloyds; (2) failed to forward Vila's premium to AequiCap; (3) failed to return the money to Vila; and (4) failed to properly manage a trust account.

25. Based on these acts and omissions, as alleged in Count I of the Administrative Complaint, Petitioner clearly and convincingly established that Respondent violated Subsections 626.611(7), (8) and (10); Subsection 626.561(1); Subsection 626.621(2); and Subsection 626.621(6), Florida Statutes.

COUNT II

26. The evidence clearly and convincingly established that Respondent issued a Certificate of Insurance showing falsely and deceptively that Vila was insured by AequiCap.

27. By showing that Respondent issued a false and deceptive Certificate of Insurance to Vila, as alleged in Count II of the Administrative Complaint, Petitioner clearly and convincingly established that Respondent violated Subsections 626.611(7) and (8), 626.9541(1)(e)1, and 626.621(6), Florida Statutes.

COUNT III

28. The evidence clearly and convincingly established that Respondent (1) caused the Shelly Middlebrooks agency to provide insurance; (2) never forwarded premiums to pay for that insurance to Shelly Middlebrooks; and (3) has failed to pay the money she owes, as confirmed by a court judgment, to Shelly Middlebrooks.

29. Based on evidence of the transactions between Respondent and Shelly Middlebrooks, Petitioner established

clearly and convincingly that Respondent violated Subsections 626.611(7), (8) and (10), 626.561(1), 626.621(2), and (6), Florida Statutes, as charged in Count III of the Administrative Complaint.

Penalty

30. Florida Administrative Code Rule 69B-231.040 sets forth the method for calculating and applying penalties, and is as follows:

69B-231.040 Calculating Penalty.

(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. (Emphasis added)

31. Penalties for violations of Chapter 626, Florida Statutes, are set forth in Florida Administrative Code Chapter 69B which provides, in relevant part, as follows:

69B-231.080 Penalties for Violation of Section 626.611.

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 of license(s) and appointment(s) is required, the following stated penalty shall apply:

* * *

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

(8) Section 626.611(8), F.S. - suspension 6 months

* * *

(10) Section 626.611(10), F.S. - suspension 12 months. This provision does not apply if the facts constitute a violation of Section 626.753, F.S.

69B-231.090 Penalties for Violation of Section 626.621.

* * *

(2) Section 626.621(2), F.S. - suspension 3 months

* * *

69B-231.100 Penalties for Violation of Subsection 626.621(6).

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:

* * *

(5) Section 626.9541(1)(e), F.S. - suspension 6 months; except that the penalty for a violation of Section 626.9541(1)(e)1., F.S., shall be a suspension of 12 months.

69B-231.110 Penalties for Violation of Other Specific Provisions of the Florida Insurance Code.

* * *

(8) Section 626.561(1), F.S. - suspension 9 months

69B-231.120 Penalties for Violation of Other Insurance Code Provisions.

If the licensee is found to have violated a provision of the Insurance Code, the stated penalty, unless otherwise prescribed in these rules or in the code provision violated, shall be a six (6) month suspension if the violation was willful, or shall be a three (3) month suspension if the violation was nonwillful.

32. For Count I, the highest stated penalty, for violation of Subsection 626.611 (10), Florida Statutes, is a 12-month license suspension.

33. For Count II, the highest stated penalty, for a violation of Subsection 626.9541(1)(e)1., Florida Statutes, is a 12-month license suspension.

34. For Count III, the highest stated penalty for a violation of Subsection 626.611(10), Florida Statutes, is a 12-month suspension of the violator's licenses and appointments.

35. The total penalty to be imposed against Respondent is a 36-six month suspension (12-month suspension for Count I, 12-month suspension for Count II, plus a 12-month suspension for Count III). As provided in Florida Administrative Code Rule 69B-231.040(2), the penalty exceeds a 24-month suspension and is, therefore, revocation.

36. The penalty can be altered if there is evidence of any of the following aggravating and mitigating factors:

- (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.

Fla. Admin. Code R. 69B-231.160.

37. In mitigation, Respondent has no previous disciplinary history and her father's death affected her ability to function.

38. As aggravating factors, Respondent knowingly, intentionally, and personally committed the acts and omissions charged, with every count having secondary violations. There is no evidence of Respondent's incapacity or aging issues at the time these incidents were occurring. Respondent created a high degree of potential harm by leaving a large commercial vehicle uninsured for six months. Respondent has not made restitution

to Mr. Vila from whom she collected \$10,876.41, and belatedly used \$5,712.03 to secure insurance for him, keeping for her use the balance of \$5,164.38. Respondent has not made restitution in the amount of \$8,335.60 to Shelly Middlebrooks for the insurance coverage for the trucking companies.

39. After considering the mitigating and aggravating factors, it is determined that no change to the penalty is warranted and that the final penalty should be revocation. See Department of Financial Services v. Noel, DOAH Case No. 05-2728PL, 2006 Fla. Div. Adm. Hear. LEXIS 14 (R.O. 1/13/06, F.O. 3/17/06); and Hannifin v. Department of Financial Services, DOAH Case No. 05-1339PL (R.O. 12/05/05; F.O. 3/03/06); per curium affirmed 946 So. 2d. 1073 (Fla. 1st DCA 9/18/06).

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a Final Order be entered by the Department of Financial Services:

1) Finding Respondent guilty of violating Subsections 626.611(7), (8) and (10); Subsection 626.561(1); and Subsections 626.621(2) and (6), Florida Statutes, as charged in Count I of the Administrative Complaint;

2) Finding Respondent guilty of violating Subsections 626.611(7) and (8); Subsection 626.621(6); and Subsection

626.9541 (1)(e)1., Florida Statutes, as charged in Count II of the Administrative Complaint;

3) Finding Respondent guilty of violating Subsections 626.611(7), (8) and (10); Subsection 626.561(1); and Subsections 626.621(2) and (6), Florida Statutes, as charged in Count III of the Amended Complaint;

4) Revoking Respondent's licenses and appointments issued or granted under or pursuant to the Florida Insurance Code;

5) Ordering Respondent to make restitution to John Vila in the amount of \$5,164.38; and

6) Ordering Respondent to make restitution to Shelly Middlebrooks & O'Leary in the amount of \$8,335.60.

DONE AND ENTERED this 16th day of February, 2010, in Tallahassee, Leon County, Florida.



ELEANOR M. HUNTER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of February, 2010.

ENDNOTE

¹ All references to Florida Statutes include the years 2006 through 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.