

FILED

JAN 12 2011



REPRESENTING
CHIEF FINANCIAL OFFICER
JEFF ATWATER
STATE OF FLORIDA

Docketed by Ell

IN THE MATTER OF:

DFS Case Nos.: 109351-10-AG
109353-10-AG

ADALBERTO LUIS SOTERO and
FALCONTRUST GROUP, INC.

DOAH Case Nos.: 10-2442
10-2443

FINAL ORDER

THIS CAUSE came on before Jeff Atwater, as Chief Financial Officer, for consideration of and final agency action on the Recommended Order, submitted on September 18, 2009 by Administrative Law Judge John D. C. Newton, II, pursuant to a formal hearing conducted under the authority of and pursuant to Section 120.57(1), Florida Statutes, on August 10, 2010. Respondents, Adalberto Luis Sotero and FalconTrust Group, Inc. ("Respondents"), filed seven exceptions on October 29, 2010. The Florida Department of Financial Services ("Petitioner") filed an exception on November 1, 2010. Respondents filed a response to Petitioner's exception on November 10, 2010. On December 17, 2010, Respondents filed a Request for Oral Presentation to the Agency Head on Exceptions to the Recommended Order. This request is denied for the reasons stated herein.

The Recommended Order (a copy of which is attached as Exhibit A), the exhibits admitted into evidence, the record testimony, the exceptions and applicable law were all considered during the promulgation of the Final Order.

CORRECTION

All references to Respondent's nickname, "Alberto Luis Sotero" in the Recommended Order are amended to Respondent's legal name, "Adalberto Luis Sotero."

RULINGS ON THE PETITIONER'S EXCEPTION

1. Petitioner's exception is to paragraph 36 of the Recommended Order stating that Section 626.611(7), Florida Statutes, requires "specific intent on the part of the licensee." Specific intent *may* be included as an element to a violation of Section 626.611(7), Florida Statutes, if it "draws essential elements" from another violation that requires willfulness. [Bowling v. Department of Insurance, 394 So. 2d 165, 170-1 (Fla. 1st DCA 1981); See also Hartnett v. Department of Ins., 406 So.2d 1180, 1184 (Fla. 1st DCA 1981)] Paragraph 37 of the Recommended Order states:

37. Section 626.611(7), Florida Statutes, permits DFS to deny, suspend, or revoke the license of any insurance agent who has demonstrated a lack of fitness or trustworthiness to engage in the business of insurance. Mr. Sotero **resorted to self-help** when he concluded that Zurich was unlikely to pay the held-back commissions. **In doing so** he put his personal financial interests ahead of the interests of the insurance customers who depended on him to forward their premium payments to Zurich. This action demonstrated a lack of fitness or trustworthiness to engage in the business of insurance. DFS proved this charge by clear and convincing evidence. (Emphasis added.)

Here, the act of misappropriation constituting a violation of Section 626.611(7), Florida Statutes, does draw essential elements from the violation of Sections 626.611(10), and (13), Florida Statutes, which do contain an element of willfulness. However, the ALJ's general pronouncement that Section 626.611(7), Florida Statutes, always requires specific intent is incorrect as a matter of law. Therefore, Petitioner's exception is accepted and Paragraph 36 of the Recommended Order is amended to read:

36. The alleged violations of Section 626.611(10), and (13), Florida Statutes, require specific intent on the part of the licensee. See Bowling v. Department of Insurance, 394 So. 2d 165 (Fla. 1st DCA 1981). Clear and convincing evidence establishes that Mr. Sotero and FalconTrust intended to take the premium funds to pay the commissions they believed they were owed. Their rationalization for taking the money does not change the fact that they knew the funds were premiums and that the agreement, as memorialized in Mr. Sotero's letter, only permitted taking the initial commission percentage before forwarding the remaining money to Zurich.

RULINGS ON THE RESPONDENTS' EXCEPTIONS

2. Respondents' exceptions include an Introduction and Summary section that does not clearly identify the disputed portion of the Recommended Order. An agency need not rule on exceptions that do not clearly identify the disputed portion of the Recommended Order by page number or paragraph. [Section 120.57(1)(k), Florida Statutes] Therefore, Respondents' introductory and summary exceptions are rejected.

3. Respondents' first exception is to the portion of paragraph 19 of the Recommended Order that states, "[b]ut, reacting to Zurich's failure to begin paying the held back commission amounts, Mr. Sotero engaged in 'self help'...[n]othing in the Agency Agreement or negotiated commission agreement authorized this action." Respondents argue that this is not supported by competent substantial evidence because it disregards "Respondent's contractual rights, established by the parties' course of dealing, included the right to deduct earned commissions from premiums received on an 'account current' basis." Respondents further contend that the finding is a mixed question of fact and law and that the ALJ "erroneously overlooks the law" and "fails to comprehend the consequences... of a course of dealing on an 'account current basis.'" However, "[e]videntiary matters such as credibility of witnesses and resolution of conflicting evidence are the prerogative of the ALJ as finder of fact in administrative proceedings." Reily Enterprises, LLC v. Florida Dept. of Environmental Protection, 990 So.2d

1248, 1251 (Fla. 4th DCA 2008). In this case, the ALJ heard conflicting evidence on this issue and found that Petitioner was not entitled to retain monies for commission amounts held back by Zurich. [Petitioner Exhibit 6; Respondents Exhibit C; Hearing Transcript, Pages 95-98, 100] Thus, there is competent substantial evidence for the ALJ's finding. Accordingly, Respondents' first exception is rejected.

4. Respondents' second exception alleges paragraph 21 of the Recommended Order is an improper use of res judicata or collateral estoppel. Paragraph 21 states:

21. But the court has entered a partial Summary Judgment determining that FalconTrust wrongfully took premium funds for the commissions that it maintained Zurich owed. The court's Order concludes that the issue is not whether Zurich owed money to FalconTrust, but whether FalconTrust was entitled to take the funds when it did. **Like the undersigned, the court determines that it was not.** (emphasis added)

The final sentence of this paragraph makes clear that the ALJ did not rely on the partial Summary Judgment to establish facts and instead made an independent determination that Respondents were not entitled to take the funds at issue. Accordingly, Respondents' second exception is rejected.

5. Respondents' third exception is to paragraphs 25-31 of the Recommended Order. The disagreement centers on the ALJ interpreting the case, Russell v. Florida Department of Insurance, 668 So.2d 276 (Fla. 2d DCA 1996), to permit Petitioner to bring this license disciplinary proceeding prior to the resolution of the circuit court dispute between Respondents and Zurich. The Russell case centered on the issue of whether the facts presented in that case supported the discipline of the licensee. The ALJ's legal conclusion that Russell Court did not make a jurisdictional determination or decide that DFS could never act on a set of facts if there was a legal proceeding involving them pending, is reasonable, supported by the evidence, not clearly erroneous and complies with essential requirements of law.

6. Respondents also cite the case, Webb v. Department of Professional Regulation, Bd. of Professional Engineers, 595 So.2d 1103 (5th DCA 1992), as holding that Petitioner has no authority to impose disciplinary action for conduct in connection with a contract dispute. However, like Russell, Webb turned on a factual determination of whether certain actions constituted misconduct. Id. In deciding otherwise, the Court found that the particular facts involved with this “mere contract dispute” did not rise to the level of misconduct. Id. at 1104. No finding was made in that case that would prohibit an agency from disciplining a licensee when there is a contract at issue.

7. Respondents cite the case, Padilla v. Liberty Mut. Ins. Co., 832 So.2d 916 (Fla. 1st DCA 2002), which upheld an agency’s dismissal of a petition for a declaratory statement, to further buttress their argument that a licensee cannot be disciplined if the matter at issue is the subject of contract litigation. However, a declaratory statement is “an agency’s opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner’s particular set of circumstances” [Section 120.565, Florida Statutes] Padilla held that a declaratory statement is not an appropriate mechanism to resolve contract disputes pending in circuit court. Unlike the circumstance in Padilla, this agency is prosecuting in an independent license disciplinary proceeding based upon specific violations of the Insurance Code, not opining on an issue in a declaratory statement. [Sections 120.569 and 120.57(1), Florida Statutes] This disciplinary proceeding involves actions that go beyond a mere contractual dispute. Respondents wrongfully retained funds that were *statutorily required* to be held in trust and placed both the insureds and the public at risk by potentially allowing insurance policies to be cancelled. In any event, the issue of whether Respondents improperly withheld monies from Zurich is no longer pending before Circuit Court, which decided that FalconTrust wrongfully took premium funds for the commissions that it maintained Zurich owed.

8. Respondents cite Fleishman v. Department of Professional Reg., 441 So.2d 1121 (Fla. 3rd DCA 1983), for the proposition that “violations of mere contractual rights are concerns only of the courts, and may not be enforced by disciplinary action undertaken by a regulatory agency.” Unlike Fleishman, this matter involves much more than a mere violation of contractual rights. Again, by withholding the premiums, Respondents wrongfully retained funds that were to be held in trust and placed both the insureds and the public at risk by potentially allowing insurance policies to be cancelled. This is the reason Section 626.561, Florida Statutes, specifies that premiums, return premiums, or other funds belonging to insurers are *trust funds* received by an agent in a fiduciary capacity.

9. Respondents’ citation to Deltona Corp. v. Mayo, 342 So.2d 510 (Fla. 1977), fails on similar grounds. The Deltona Court held that, “[i]f Deltona has engaged in an unfair business practice or committed fraud, however, it may be a concern of other state agencies or the basis for private law suits (on which we express no opinion), but it is not a matter of statutory concern to the Public Service Commission.” Contrary to the facts in Deltona, the taking of insurance premiums is a matter of statutory concern to Petitioner. [Chapter 626, Florida Statutes] More specifically, the Department is charged with regulating an agent’s misappropriation of moneys owed to insurers. [Sections 626.561 and 626.611(10), Florida Statutes; Pou v. Department of Ins. and Treasurer, 707 So.2d 941 (Fla. 3rd DCA 1998); Russell v. Florida Department of Insurance, 668 So.2d 276 (Fla. 2d DCA 1996); Pappas v. Department of Ins. and Treasurer, 568 So. 2d 500 (Fla. 3rd DCA 1990); Bowling v. Department of Ins., 394 So.2d 165 (Fla. 1st DCA 1981); and Brewer v. Insurance Com’r and Treasurer, 392 So. 2d 593 (Fla. 1st DCA 1981)]

10. For the foregoing reasons, the ALJ’s legal conclusion that Petitioner may bring this license disciplinary proceeding prior to the resolution of the circuit court dispute between Respondents and Zurich is reasonable, supported by the evidence and public policy

considerations, not clearly erroneous and complies with essential requirements of law. Therefore, Respondents' third exception is rejected.

11. Respondents' fourth exception is to paragraphs 32-36, the first paragraph 37, the first paragraph 38, and the second paragraph 37 of the Recommended Order, alleging that the paragraphs, "incorrectly interpret Sections 626.651(1) and 626.611(7),(10),(13), Florida Statutes, to mean that all premiums always 'belong to' the insurer regardless of the contractual course of dealing established between the agent and the insurer." This exception reiterates the reasoning in Respondents' first exception, namely, that the ALJ did not consider the contractual dealings of the parties when concluding Respondents misappropriated premiums in violation of Sections 626.651(1) and 626.611(7),(10),(13), Florida Statutes. For the reasons set forth in the ruling on Respondents' first exception, the ALJ's conclusion is reasonable, supported by the evidence, not clearly erroneous and complies with essential requirements of law. Therefore, Respondents' fourth exception is rejected.

12. Respondents' fifth exception is to paragraph 39 of the Recommended Order, which states:

39. Section 626.561(1), Florida Statutes, makes all premiums received by insurance agents and agencies trust funds, requires agents to keep the funds in a separate account, and requires agents to pay the funds to the insurer or insured entitled to the funds. The funds that Mr. Sotero and FalconTrust collected after receiving the December 8, 2006, letter from Zurich were premium funds to which Zurich was entitled. FalconTrust did not pay them to Zurich as required. DFS proved a violation of Section 626.561(1) by clear and convincing evidence.

Respondents present an argument similar to its first and fourth exception, alleging that the premiums did not belong to the insurer due to their contractual dealings on an "aggregate, account current basis." For the reasons set forth in the ruling on Respondents' first exception, the ALJ's conclusion is reasonable, supported by the evidence, not clearly erroneous and complies with

essential requirements of law. Therefore, Respondents' fifth exception is rejected.

13. Respondents' sixth exception to paragraph 41 of the Recommended Order is the same argument found in Respondents' first, fourth, and fifth exceptions. Paragraph 41 states:

41. FalconTrust's willful and deliberate decision to take premium funds to pay the held-back commissions that it maintained Zurich owed establishes by clear and convincing evidence that FalconTrust committed each of the offenses described in subsections (a), (d), (f), and (k). The only remaining question is whether FalconTrust committed the offenses "with such frequency as to have made the operation of the agency hazardous to the insurance-buying public or other persons."

For the reasons set forth in the ruling on Respondents' first exception, the ALJ's conclusion is reasonable, supported by the evidence, not clearly erroneous and complies with essential requirements of law. Therefore, Respondents' sixth exception is rejected.

14. Respondents' seventh objection is to Paragraphs 45, 46, 47, and 48 of the Recommended Order, which state:

45. Florida Administrative Code Rule 69B-231.160 lists aggravating and mitigating factors that may be considered. The following aggravating circumstances are present: willfulness of the licensee's conduct, motivation of the licensee, and financial gain to the licensee. The only mitigating circumstance is the lack of previous disciplinary orders or warnings.

46. In consideration of the facts and all the aggravating and mitigating circumstances, a suspension of Mr. Sotero's license for nine months is appropriate in light of the deliberate, willful nature of his actions and the amount of premium moneys that he took.

47. FalconTrust's violation of Section 626.561(1) is punishable with a nine-month suspension per violation. Fla. Admin. Code R. 69B-231.110. This is the highest penalty for any violation by FalconTrust established in this case. The discussion of aggravating and mitigating factors above applies equally to determining the penalty for FalconTrust.

48. In consideration of the facts and all of the aggravating and mitigating circumstances, a suspension of FalconTrust's license for nine months is also appropriate in light of the deliberate, willful

nature of the actions and the amount of premium moneys taken.

Respondents take exception to the willfulness finding and the subsequent calculation of the penalty. Again, “[e]videntiary matters such as credibility of witnesses and resolution of conflicting evidence are the prerogative of the ALJ as finder of fact in administrative proceedings.” [Reily, 990 So.2d at 1251 (Fla. 4th DCA 2008)] The ALJ considered the evidence and set forth the willfulness finding in paragraph 36 of the Recommended Order which states, in part:

Clear and convincing evidence establishes that Mr. Sotero and FalconTrust intended to take the premium funds to pay the commissions they believed they were owed. Their rationalization for taking the money does not change the fact that they knew the funds were premiums and that the agreement, as memorialized in Mr. Sotero's letter, only permitted taking the initial commission percentage before forwarding the remaining money to Zurich.

Respondents knew or should have known the funds at issue represented premium funds governed by statute. Respondents acted willfully by withholding those premiums because they knew such withholding was contrary to the agreement with Zurich. This conclusion is reasonable, supported by the evidence, not clearly erroneous and complies with essential requirements of law. Therefore, Respondents’ seventh exception is rejected.

CONCLUSION

Therefore, after a complete review of the record and being otherwise fully apprised in all material premises,

IT IS HEREBY ORDERED AND ADJUDGED that the Request for Oral Presentation to the Agency Head on Exceptions to the Recommended Order is denied because there is no provision for such oral presentation and such presentation is unnecessary in light of the comprehensive record in this case.

IT IS HEREBY FURTHER ORDERED AND ADJUDGED that the Findings of Fact

made by the ALJ are adopted as the Department's Findings of Fact, and that the Conclusions of Law reached by the ALJ, as modified herein, are adopted as the Department's Conclusions of Law.

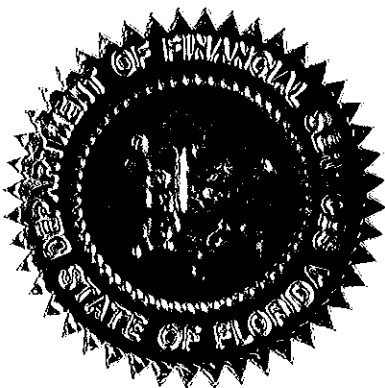
IT IS HEREBY FURTHER ORDERED AND ADJUDGED that that the licenses of Adalberto Luis Sotero are SUSPENDED for nine months.

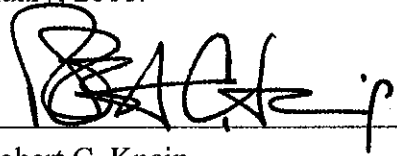
IT IS HEREBY FURTHER ORDERED AND ADJUDGED that that the licenses of FalconTrust Group, Inc. are SUSPENDED for nine months.

NOTICE OF RIGHT TO APPEAL

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 32399-0333, and a copy of the same with the appropriate District Court of Appeal within thirty (30) days of rendition of this Order.

DONE and ORDERED this 12 day of January, 2011.





Robert C. Kneip
Chief of Staff

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