

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL SERVICES,)	
)	
Petitioner,)	
)	
vs.)	Case No. 10-2804PL
)	
EDUARDO ENRIQUE MENDEZ,)	
)	
Respondent.)	
_____)	
DEPARTMENT OF FINANCIAL SERVICES,)	
)	
Petitioner,)	
)	
vs.)	Case No. 10-2805
)	
INSURANCE RESOURCES OF THE AMERICAS, INC.,)	
)	
Respondent.)	
_____)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on November 5, 2010, by video teleconference, with the parties appearing in Miami, Florida, before June C. McKinney, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, who presided in Tallahassee, Florida.

APPEARANCES

For Petitioner: James B. Bossart, Esquire
Department of Financial Services
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Tallahassee, Florida 32399

For Respondent: Jed Berman, Esquire
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STATEMENT OF THE ISSUE

Whether Respondents committed the violations alleged in the Administrative Complaints, and, if so, what penalties should be imposed on either or both of them.

PRELIMINARY STATEMENT

On April 21, 2010, the Department of Financial Services ("Petitioner"), issued a two-count Administrative Complaint against Eduardo Enrique Mendez and a two-count Administrative Complaint against Insurance Resources of the Americas, Inc. ("Respondents"), wherein it was alleged that Respondents had violated various provisions of Chapter 626, Florida Statutes. Respondents timely requested a formal hearing to contest these allegations, and the matter was referred to the Division of Administrative Hearings on May 24, 2010.

The presiding administrative law judge consolidated the cases for hearing and the final hearing was set for November 5, 2010. Both parties appeared at the appointed place and time.

At hearing, Petitioner presented the testimony of three witnesses: Cesar Sastre; Roas Blanco; and Rafael Rondon. Petitioner also offered Exhibits numbered 1 through 9 and 12 and 13 that were admitted into evidence. Respondent Mendez testified on his own behalf, and Respondents presented the testimony of Rafael Garcia. Respondents offered Exhibits numbered 1 through 10, all of which were received in evidence.

The proceeding was recorded and transcribed, and the transcript was filed at the Division of Administrative Hearings on January 13, 2011. The parties filed timely Proposed Recommended Orders, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing and on the entire record of this proceeding, the following findings of fact are made:

1. Respondent, Eduardo Enrique Mendez ("Mendez"), at all times material to this matter, was a licensed insurance agent subject to the regulatory jurisdiction of the Petitioner. Petitioner issued Mendez license number A176292.

2. Mendez is licensed as a 2-18 life and health agent and a 2-20 general lines agent for the sale of property and casualty.

3. Mendez first started in the insurance business in 1969 while in Panamá. He came to the United States in 1988. In South Florida, he has been known as "Mr. Panama" in the insurance industry for approximately 20 years.

4. Respondent, Insurance Resources of the Americas, Inc. ("Insurance Resources"), is and was, at all times material in this matter, a corporation registered as a Florida insurance agent subject to the regulatory jurisdiction of Petitioner, having been issued license number R054007. Mendez is the corporation's owner and president.

5. Insurance Resources typically handles all kinds of property and casualty insurance, but for approximately the last six years has specialized in the used car dealer business by providing bonds for the car dealers to open their operation.

6. Bass Underwriters ("Bass") is a managing general agent which works with insurance agents who purchase insurance for their customers. Bass has no direct relationship with the customers only with the retail agent who is responsible for collecting the premium.

7. On January 22, 2003, Insurance Resources, as producer, and Bass signed a producer agreement which allowed Insurance Resources to sell insurance through Bass or certain carriers that Bass obtains as a wholesaler. Insurance Resources received commissions as compensation under the agreement.

8. The agreement contained a provision which guaranteed the collection of additional premiums that might arise as a result of an audit of the insurance customers. The provision provided in relevant part:

Producer shall be liable to Bass Underwriters, Inc. for the full amount of premium, fees and applicable sum taxes, less commission, including additional and/or adjustable premiums developed under audits or applicable rating plan on every insurance contract placed by Producer through Bass Underwriters, Inc. Producer shall remit Twenty Five Percent (25%) of the premium upon binding. The full amount of premium, fees and applicable state taxes, less commission is due to Bass Underwriters, Inc. not later than the 15th day of the first (1st) month after the effective date of such contract, audit, rating plan, or other adjustment.

9. During the term of the producer agreement, three policies were issued that Bass determined additional premiums were owed by Insurance Resources.

10. On June 29, 2005, Bass notified Insurance Resources by invoice that an additional premium was owed for the insured, L. Boulevard Café, in the amount of \$6,955.00. L. Boulevard Cafe, a restaurant, obtained a Century Surety policy through Insurance Resources effective November 15, 2004. In making the application, the restaurant declared a certain amount of projected sales. The premium was based upon the total sales recorded by the customer.

11. Century Surety did a self audit and determined that the amount of sales was significantly more than the coverage.

Subsequently, the carrier went back and assessed additional premiums to make up the difference between the amount of coverage represented and the self reported amount, which totaled \$6,955.00.

12. Around August 2005, after receiving the Bass invoice with the additional premiums, Insurance Resources notified L. Boulevard Café about the invoice and explained that the additional insurance premium of \$6,955.00 was owed because of the difference in the amount calculated from the audit.

13. Mendez notified Rafael Garcia, prior owner of L. Boulevard Café, about the additional insurance premium but L. Boulevard Cafe was having financial problems. L. Boulevard Café never made the additional premium payment.

14. On July 1, 2005, Bass notified Insurance Resources by invoice that an additional premium was owed for the insured, Winner's Circle, in the amount of \$418.00. Winner's Circle obtained a XL Specialty Insurance Company policy through Insurance Resources effective May 23, 2005. An inspection was performed after the policy quote was bound and issued. The subsequent inspection concluded that the construction code of the building was different from the construction code represented on the application. The difference triggered a premium increase of \$418.00.

15. When Insurance Resources found out about the additional premium for Winner's Circle, Mendez sent an invoice explaining the increase and requesting payment. Winner's Circle refused to pay the amount because the policy was issued under a lower premium.

16. Winner's Circle decided not to keep the policy when Respondent requested that they make payment of the additional premium amount and the balance of the premium on the policy. Payment was never made. The policy was cancelled. The account was credited and the final total owed was \$160.40, which Bass became responsible for with the carrier.

17. On July 11, 2005, Bass notified Insurance Resources by invoice that an additional premium was owed for the insured, Venecar, Inc., in the amount of \$1,298.00. Venecar, a small used car dealership, obtained a Century Surety policy through Insurance Resources effective July 18, 2004. The insurance inspectors did an inspection after the policy was issued and determined that one more employee and driver than had been represented in the application existed and that employee generated a change in the rating for the premium, which Bass ultimately decided was an additional premium of \$1,298.00.

18. After Insurance Resources learned about the results of the inspection, Mendez called Bass and told Ms. Rodriguez, the accountant, that the premium increase of \$1,298.00 was too high

and could not be the proper rate for one driver because one driver should be around \$400.00. Bass ignored Mendez's proposition.

19. Subsequently, Mendez told Venecar about the outstanding premium amount owed and they refused to pay. Insurance Resources followed up and contacted Venecar several more times requesting the additional premium payment to no avail. Soon thereafter, Venecar closed.

20. Mendez reported his efforts to Bass while he tried to collect the three changed premium amounts. Insurance Resources never collected the additional premium from L. Boulevard Café, Winner's Circle, or Venecar even though Mendez repeatedly sought to get the outstanding premiums from all three insured customers. Despite Respondents best efforts, they never received any of the additional premiums that accrued. Bass still expected Insurance Resources to pay the additional premiums pursuant to the producer agreement.

21. On May 1, 2006, Bass sent Insurance Resources a statement of account. The invoice statement informed Insurance Resources that the premium due for the three different accounts totaled \$8,021.39. The statement outlined the amount owed from each insured.

22. After Bass made several demands for the three accounts, Bass submitted the account to collections and the matter ultimately ended in litigation.

23. On November 5, 2007, a final judgment was entered against Insurance Resources in favor of Bass for the principal of \$8,021.39, costs of \$275.00, and prejudgment interest of \$1,298.14, for a total of \$9,594.53. The judgment remains unsatisfied.

24. On February 15, 2008, Insurance Resources paid \$1,919.00 on the judgment. On February 29, 2008, Insurance Resources paid \$640.00 on the judgment. There is a balance owed of \$7,035.53.

25. Insurance Resources also had a relationship with AAPCO, a premium finance company that financed the balance of what an insured could not pay. Respondent Insurance Resources was an authorized entity to accept premium finance contracts utilizing AAPCO premium finance. Insurance Resources had the authority to write check drafts on AAPCO's bank account for the entire premium amount owed on a customer's insurance policy and remit it to the insurer. Respondent would then submit the policy application together with the premium down payment received from the consumer to AAPCO, which would finance the rest of the policy premium.

26. In 2009, Insurance Resources was having problems financially. Mendez approached Mrs. Blanco, AAPCO's office manager, and told her Insurance Resources sales had dropped fifty percent. Mendez, on behalf of Insurance Resources requested to make a payment arrangement.¹ Blanco refused to make any type of arrangements. She insisted that Insurance Resources pay everything up front. Mendez approached her several more times but she would not negotiate. At one point, Mendez even requested that AAPCO place the \$4,000.00 in producers fees owed to Insurance Resources against the monies owed and she refused to pay Respondent the \$4,000.00

27. In 2009, Mendez submitted three checks to AAPCO's as down payments for insureds' accounts. Check number 1347 was for \$10,228.47. The check was from account number 2000034377804 Mr. Panama Inc.'s account. Check number 1342 was from the same account in the amount of \$2,828.15. However, check number 159 was for \$3,368.44 from Insurance Resources account number 2000040742805.

28. Checks 1347, 1342, and 159 totaled approximately \$16,425.00. The funds were intended to be premium down payments on insurance policies purchased by Florida insurance consumers. Insurance policies were issued for each of the checks for down payments for insured's accounts Insurance Resources submitted.

29. AAPCO deposited the three checks and they were submitted to the bank for negotiation. Each check was returned for insufficient funds. AAPCO attempted to collect the money for the three checks that were returned for non-sufficient funds. AAPCO demanded payment of the funds and even called Mendez in an effort to collect the funds.

30. Mendez admitted at hearing that the three checks bounced because he had used the funds for his business operating account since the business was doing bad financially. Insurance Resources had not yet repaid AAPCO their monies owed for the three checks.

31. AAPCO has suffered a financial loss due to nonpayment. After nonpayment, AAPCO turned the matter over to AAPCO's legal department.

32. After an investigation, Petitioner charged Respondents with numerous violations by separate Administrative Complaints dated April 21, 2010.

The Charges:

33. In Count I of the Administrative complaint filed against Mendez, Petitioner charges Mendez with violations of sections 626.561(1), 626.611(7), (9), (10), and 626.621(4), Florida Statutes, for failing to remit all premiums due to Bass.

34. In Count II, Petitioner charges Mendez with violations of sections 626.561(1), 626.611(7), 626.611(9) and (10), and

626.621(4) for submitting the three checks to AAPCO in payment of the policy down payment premiums that were returned for insufficient funds and not repaid after demand.

35. In Count I of the Administrative complaint filed against Insurance Resources, Petitioner charges Insurance Resources with violation of sections 626.561(1), 626.6251(5) (a), (d), (f), (j), and (k) for failing to remit all premiums due to Bass.²

36. In Count II Petitioner charges Insurance Resources with violations of sections 626.561(1), and 626.6251(5) (a), (d), (f), (j), and (k) for remitting three checks to AAPCO in payment of the policy down payment premiums that were returned for insufficient funds and not repaid after demand.

CONCLUSIONS OF LAW

37. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the parties thereto pursuant to sections 120.569 and 120.57(1), Florida Statutes.

38. Chapter 626 Florida Statutes, under which Respondents have been charged, sets forth the acts for which the Petitioner may impose discipline.

39. A proceeding, such as this one, to suspend, revoke, or impose other discipline upon a professional license is penal in nature. State ex rel. Vining v. Fla. Real Estate Comm'n, 281

So. 2d 487, 491 (Fla. 1973). Being penal in nature, Chapter 626, Florida Statutes, "must be construed strictly, in favor of the one against whom the penalty would be imposed." Munch v. Dep't of Prof'l Regulation, Div. of Real Estate, 592 So. 2d 1136, 1143 (Fla. 1st DCA 1992).

40. Here, the Petitioner seeks to discipline Respondent's license and/or to impose an administrative fine. Accordingly, the Petitioner has the burden of proving the allegations charged in the Administrative Complaints against the Respondents by clear and convincing evidence. Dep't of Banking and Fin., Div. of Sec. and Investor Prot. v. Osborne Stern and Co., 670 So. 2d 932, 933-34 (Fla. 1996) (citing Ferris v. Turlington, 510 So. 2d 292, 294-95 (Fla. 1987)); Nair v. Dep't of Bus. & Prof'l Regulation, 654 So. 2d 205, 207 (Fla. 1st DCA 1995).

41. Regarding the standard of proof, in Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983), the Court of Appeal, Fourth District, canvassed the cases to develop a "workable definition of clear and convincing evidence" and found that of necessity such a definition would need to contain "both qualitative and quantitative standards." The court held that:

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 explicit and the witnesses must be lacking confusion as to the facts 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.

Id.

42. A licensee is charged with knowing the practice act that governs his/her license. Wallen v. Fla. Dep't of Prof'l Regulation, Div. of Real Estate, 568 So. 2d 975 (Fla. 3d DCA 1990).

43. In Petitioner's Proposed Recommended Order, Petitioner did not address all the violations alleged in the Administrative Complaints. Since sections 626.611(9), 626.6215(5)(j) were not addressed, the undersigned assumes such charges are dismissed. Further Petitioner alleges a violation of section 626.611(13) in paragraph 6 of the Proposed Recommended Order. The undersigned will not address the allegation inasmuch as Respondents were not initially charged with this violation in either Administrative Complaint and disciplinary action may only be based upon those offenses specifically alleged in the Petition. See Cottrill v. Dep't of Ins., 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996); Delk v. Dep't of Prof'l Reg., 595 So. 2d 966, 967 (Fla. 5th DCA 1992).

44. Section 626.611 provides in relevant part:

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, customer representative, service representative, or managing general 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.

* * *

(9) Fraudulent or dishonest practices in the conduct of business under 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.

45. Section 626.621 provides in relevant part:

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, customer representative, service representative, or managing general 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 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:

* * *

(4) Failure or refusal, upon demand, to pay over to any insurer he or she represents or

has represented any money coming into his or her hands belonging to the insurer.

46. Section 626.6215 provides in relevant part:

(5) Committing any of the following acts with such frequency as to have made the operation of the agency hazardous to the insurance-buying public or other persons:

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

* * *

(d) 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.

* * *

(f) Failure or refusal, upon demand, to pay over to any insurer he or she represents or has represented any money coming into his or her hands belonging to the insurer.

* * *

(k) Demonstrated lack of fitness or trustworthiness to engage in the business of insurance arising out of activities related to insurance or the insurance agency.

47. Even though Insurance Resources breached the producer agreement by failing to remit the additional premiums due to Bass, Petitioner failed to prove Respondents violated sections 626.561(1), 626.611(10), 626.6215(5)(a), 626.621(4), and 626.6215(5) in that Respondents neither received the additional

premiums requested because the three insureds never paid them. Additionally, Petitioner failed to demonstrate Mendez lacked fitness or trustworthiness to engage in the business of insurance in violation of sections 626.611(7) and 626.6215(5)(k) for Count I. Instead, the record shows Mendez made every effort to try and collect the additional premiums from failing businesses.

48. As to counts II of the Administrative Complaints, there is no dispute that the three checks drawn on Respondent's corporate bank accounts to AAPCO totaling approximately \$16,425.00 were intended to be the premium payments on insurance policies purchased by Florida insurance consumers. Petitioner met its burden and demonstrated that the checks were returned for non-sufficient funds and at the time of the hearing AAPCO had not received the monies. Petitioner proved as stated in its Proposed Recommended Order that "Respondents failed to remit premiums due to the insurer and wrongfully retained for their own use and benefit." Respondent Mendez's admission shows that the money went in the Insurance Resources business operating account to keep the business afloat during a financial struggle.

49. Even though Insurances Resources is obligated to AAPCO through their transactions, as a corporate officer Respondent Mendez is responsible for the acts of the corporation pursuant to section 626.734. Therefore, Petitioner demonstrated by clear

and convincing evidence that each Respondents' failure to keep the trust funds received in a fiduciary capacity and the Respondents spending the monies for Insurance Resources business violated section 626.561(1). Such actions would also show a lack of fitness for Respondents to engage in the business of insurance in violation of sections 626.622(7) and 626.6215(5) (k). Furthermore, by failing to deliver the monies over to AAPCO upon demand, Respondents were unlawfully withholding monies in violation of sections 626.611(10) and 626.6215(5) (a). The aforementioned violations also subject Respondent Insurance Resources to a violation of section 626.6215(5) (d).

Disciplinary Guidelines

50. Pursuant to Florida Administrative Code Rule 69B-231, Petitioner has established disciplinary guidelines establishing the range of penalties that will be imposed on licensees guilty of violating chapter 626.³

51. The guidelines mandate that the penalty **per count** cannot exceed the highest penalty for any violation found under the count pursuant to rule 69B-231.040(1) (a). Violation of section 626.611(10) for Respondent Mendez is punishable by a 12-month suspension and is the highest penalty for any of the violations in Count II. Such would be the highest penalty that the undersigned can find for Mendez.

52. The undersigned finds that Mendez's actions of informing AAPCO of Insurance Resources' financial problems and requesting payment arrangements on several occasions demonstrates that Respondents did not willfully withhold the monies from AAPCO but did not have the cash. The guidelines set forth the range of punishment for Insurance Resources' violations of sections 626.6215(5)(a)(d)(f),(k), and 626.561(1) as a three-month suspension since Respondent's action were not willful. Therefore, three months would be the highest penalty for Respondent Insurance Resources for Count II.

53. In conclusion, the discipline to be imposed in this case is Respondent Mendez's license should be suspended for twelve months with reinstatement conditioned upon paying AAPCO back the monies owed and Respondent Insurance Resources license should be suspended for three months with reinstatement conditioned upon paying AAPCO back the monies owed.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Financial Services enter a final order that: (a) finds Respondents not guilty as charged in Count I, of the Administrative Complaints; (b) finds Respondents guilty in Count II; (c) suspends Respondent Mendez's license for 12 months with reinstatement conditioned upon repayment to AAPCO; and (d) suspends Respondent Insurance

Resources' license for three months with reinstatement conditioned upon repayment to AAPCO.

DONE AND ENTERED this 28th day of February, 2011, in Tallahassee, Leon County, Florida.



JUNE C. MCKINNEY
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of February, 2011.

ENDNOTES

¹ Blanco denied ever having a conversation with Mendez regarding a payment plan request. The undersigned finds Mendez's testimony to the contrary more persuasive.

² Petitioner inverts the statute's numbers in the Administrative Complaint and lists the statute as 626.6251. The undersigned finds the listing to be a scrivener's error since the Administrative Complaint details the correct language of Section 626.6215, Florida Statutes and adequately places Respondent on notice as to the nature of the charges.

³ All references to Florida Administrative Code Rule 69B-231 are to the 2006 version that was in effect at the time of the incidents charged.

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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.