FILED

APR 30 2012

Docketed by

CHIEF FINANCIAL OFFICER
JEFF ATWATER
STATE OF FLORIDA

IN THE MATTER OF:

WESTON PROFESSIONAL TITLE GROUP, INC.

Case No. 112260-10-AG
DOAH CASE NO. 11-1088

/

FINAL ORDER

THIS CAUSE came on for consideration of and final agency action on the Recommended Order issued on February 8, 2012, attached hereto as Exhibit A. Pursuant to Section 120.57(1), Florida Statutes, a formal hearing was conducted on August 25, 2011, via video teleconference between sites in Miami and Tallahassee, Florida and concluded on October 27-28, 2011, via video teleconference in Miami and Tallahassee, Florida, before Administrative Law Judge Claude B. Arrington. The Department timely filed exceptions to which no responses were filed. The Respondent (Weston) timely filed excerptions to which the Department timely responded. The transcript of proceedings, the admitted exhibits, the exceptions, responses thereto, and applicable law were all considered in the promulgation of this Final Order.

RULINGS ON THE EXCEPTIONS

Weston's first exception posits that because the sellers chose to void the proceeds check tendered to them at closing and instructed Weston to send those proceeds to various third parties, that Weston was at liberty to follow those instructions and, without the knowledge or consent of either the buyer or the lender, depart from the HUD-1 requirement that the sellers proceeds from the sale/purchase transaction, funded by lender Magnus Financial Corporation, be delivered directly and exclusively to

the sellers. In support of that proposition, Weston relies on the Final Order issued in the case of *In The Matter of: Tim Vincent Milianta and Surf Title, Inc.*, Case No. 114770-11-AG.

That reliance is misplaced. The distinguishing facts in Milianta are that the title company conducting the closing (but not writing the title insurance policy) followed the HUD-1 payment directives, but due to inadequate address information supplied to the company by the seller as to her third party creditors, certain proceed checks were later returned to the title company as undeliverable. Upon return, Milianta, the owner of Surf Title, Inc., contacted the lending bank as to what to do with those returned proceeds. The bank told him that in its view the closing had been finalized, and that any excess proceeds (the returned checks) were the property of the seller. Subsequently, the seller instructed Milianta to send those proceeds to Seal Credit, a debt negotiation company, owned by one Lee Fragameno, for the purpose of locating and negotiating reduced debt with those creditors. Unfortunately, Fragameno absconded with those funds. Thus, unlike here, the title company followed the HUD-1 distribution instructions, and when those instructions could not be fully executed, notified both the lender and the seller as to the situation and obtained the lender's tacit acquiescence before following the sellers express instructions to send the proceeds elsewhere. Here, the HUD-1 instructions were not followed, and neither the purported buyer nor the lender were notified of the seller's directive to divert the proceeds to other parties. (The ALJ so found at paragraph 20 of the Recommended Order.) The lender had every legal right to expect that the title company would adhere to the HUD-1 distribution requirements; it had agreed to lend monies to the sellers, not to pay monies to the seller's creditors or any other third party.

The HUD-1 requirements bind all parties to the closing, and one party cannot unilaterally elect to depart therefrom by so instructing the closing agent. The departure from the HUD-1 requirements by Weston facilitated the prompt default on the mortgage loan by the purported buyer, and the loss of loan proceeds so diverted. This, as the ALJ found and concluded, violated RESPA provisions and Sections 626.8473 (2) and (4), Fla. Stat. Accordingly, this exception is rejected.

Weston's second exception argues that the Department failed to accord Weston due process regarding the Notice of Compliance procedures set forth in Section 120.695(2), Fla. Stat. However, as the Department's response correctly points out, those procedures are applicable to minor rule violations, not to statutory or significant rule violations. Weston was charged with the statutory violation of failing to keep its surety bond in force and effect, which is a statutory requirement of licensure and not a minor rule violation. Accordingly, this exception is rejected.

Weston's third exception asks for a re-weighing of the evidence relative to the penalty recommended by the ALJ, pointing to several "factors" it deems mitigating. However, Weston's exception fails to point out where in the record those factors were presented for consideration by the ALJ, and a review of the record does not reveal any such evidentiary presentation. Moreover, it is well established that agencies cannot re-weigh evidence to come to a different result than that reached an ALJ. *Perdue v. TJ Palm Associates, Ltd.*, 755 So.2d 660 (Fla. 4th DCA 1999); *Heifetz v. Department of Business Regulation, Div. of Alcoholic Beverages and Tobacco*, 475 So.2d 1277 (Fla. 1st DCA 1985); *Holmes v. Turlington*, 480 So.2d 150 (Fla. 1st DCA 1985); *Howard Johnson v. Kilpatrick*, 501 So.2d 61 (Fla. 1st DCA 1987); *Nat. Ins. Serv. v. Fla. Unemp.*

App. Com'n, 495 So.2d 244 (Fla. 2nd DCA 1986); *Groves-Watkins Const. v. Dept. of Transp.*, 511 So.2d 323 (Fla. 1st DCA 1987). Accordingly, this exception is rejected.

The Department's first exception challenges the Conclusion of Law announced in Paragraph 67 of the Recommended Order, wherein the ALJ found that after review of Rule 69B-231.120 there were no mitigating or aggravating factors present to be considered in imposing a penalty. The exception does not point out the existence of any such factors but merely re-argues the effect of fact findings made by the ALJ elsewhere in the Recommended Order without showing that those findings have no support in the record. Essentially, this exception challenges the finding of fact made in Paragraph 31 of the Recommended Order that while a certain transaction was fraudulent there was insufficient evidence to clearly and convincingly prove that the Respondent was complicit in that fraud. It is well established the function of a hearing officer or an ALJ to consider all the evidence presented and resolve all conflicts therein. *Walker v. Board of Professional Engineers*, 946 So.2d 604 (Fla. 1st DCA 2006); *Heifetz v. Department of Business Regulation, Div. of Alcoholic Beverages and Tobacco,* 475 So.2d 1277 (Fla. 1st DCA 1985). Agencies cannot thereafter re-weigh that evidence to reach a different result. *Perdue v. TJ Palm Associates, Ltd.*, 755 So.2d 660 (Fla. 4th DCA 1999); *Heifetz v. Department of Business Regulation, Div. of Alcoholic Beverages and Tobacco*, 475 So.2d 1277 (Fla. 1st DCA 1985); *Holmes v. Turlington*, 480 So.2d 150 (Fla. 1st DCA 1985); *Howard Johnson v. Kilpatrick*, 501 So.2d 61 (Fla. 1st DCA 1987); *Nat. Ins. Serv. v. Fla. Unemp. App. Com'n*, 495 So.2d 244 (Fla. 2nd DCA 1986); *Groves-Watkins Const. v. Dept. of Transp.*, 511 So.2d 323 (Fla. 1st DCA 1987). Because the exception invites such a re-weighing, it is rejected.

The Department's second exception seems to take issue with the recommended penalty and seeks to increase the same on the basis that Rule 69B-231-120 does not apply to title insurance agents or agencies, such as Respondent. While that is true, it does not serve to alter the ALJ's recommendation of a three month and six month suspension, each to run concurrently. Section 120.57(1)(l), Fla. Stat., requires the agency to review the entire record and state with particularity its reasons for reducing or increasing the recommended penalty. The reason proffered in support of the exception seems to be that although the evidence bearing on Respondent's complicity in the fraudulent Collonade Drive transaction was not clear and convincing so as to hold the Respondent accountable for that fraud, that evidence could still be used to increase the recommended penalty. In short, the exception posits that there are two standards of proof to be used in Section 120.57 (1) licensure disciplinary proceedings; clear and convincing to determine a violation of the insurance code, and an unnamed but lesser standard to determine the penalty. Such a proposition is clearly contrary to Section 120.57(1)(j), Fla. Stat., and established case law such as *Dep't of Banking and Fin., Div. of Sec. & Investor Prot. v. Osborne Stern & Co.,* 670 So.2d 932 (Fla. 1996), and others cited in paragraph 58 of the Recommended Order which allow for but one standard of proof in such cases, to wit; clear and convincing. In short, if the evidence is not clear and convincing, it is not evidence and cannot be used for any purpose in the proceeding. Accordingly, this exception is rejected.

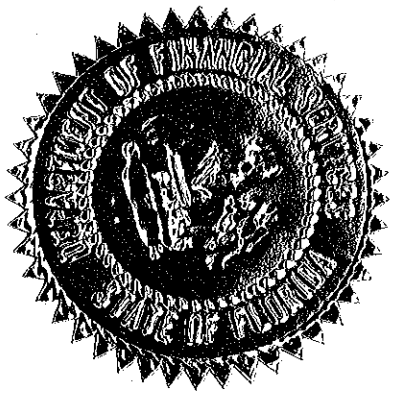
After review of the record, including the transcript of proceedings, admitted exhibits, and the Respondent's exceptions, and being otherwise fully apprised in all material premises,

IT IS HEREBY ORDERED that the ALJ's Findings of Fact and Conclusions of Law set forth in the Recommended Order are adopted as the Department's Findings of Fact and Conclusions of Law, and that it is found and concluded that Weston Professional Title Group, Inc. has violated Sections 626.8473(2), and (4), Florida Statutes, as alleged in Count I of the Amended Administrative Complaint, failed to maintain a surety bond as required by Section 626.8418(2), Florida Statutes, and has violated Section 626.8437(1), Florida Statutes, as alleged in Count III of the Amended Administrative Complaint, but that it is not culpable for the remaining violations alleged in the Amended Administrative Complaint. However, the ALJ's recommendation that the periods of suspension for those violations run concurrently is rejected. There is no provision in Rule Chapter 69B-231, F.A.C. for concurrent suspension periods, and Rule 69B-231.040 provides for suspensions to be calculated on the basis of the highest penalty per count. Here, there are two counts on which penalties are being assessed, one carrying a six month suspension and the other a three month suspension. Following the penalty per count provisions of Rule 69B-321.040, F.A.C., a nine month suspension is the appropriate penalty.

IT IS THEREFORE FURTHER ORDERED that Weston Professional Title Group, Inc's. license and eligibility for licensure be suspended for a period of six (6) months for the alleged violation found in Count I of the Amended Administrative Complaint, and for three (3) months for violation in Count III of the Amended Administrative Complaint, those periods of suspension to run consecutively for a cumulative suspension of nine months from the date hereof. Pursuant to Section 626.641, Florida Statutes, during the period of suspension and until reinstatement, Weston Professional Title Group, Inc.,

shall not engage in or attempt or profess to engage in any transaction or business for which a license is required under the Florida Insurance Code, or directly or indirectly own, control, or be employed in any manner by any insurance agent, agency, or adjuster or adjusting firm.

DONE and ORDERED this 27th day of April, 2012.



Robert C. Kneip
Chief of Staff

NOTICE OF RIGHTS

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, Florida Rules of Appellate Procedure. Review proceedings must be instituted by filing a petition or notice of appeal with Julie Jones, DFS Agency Clerk, at 612 Larson Building, Tallahassee, Florida 32399-0390 and a copy of the same with the appropriate District Court of Appeal within thirty (30) days of rendition of this Order.

Copies furnished to:
Victor K. Rones, Esquire, for Weston Professional
Melinda Butler, Esquire, For the Department
Claude B. Arrington, ALJ