STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL SERVICES, Petitioner, vs. DOMINICK PAUL BELINCHAK, Respondent.	)	Case No. 11-2793PL

RECOMMENDED ORDER

A final hearing was conducted in this case before Lynne A. Quimby-Pennock, a designated Administrative Law Judge of the Division of Administrative Hearings (Division). The hearing was conducted on September 19, 2011, by video teleconference at sites in Orlando and Tallahassee, Florida, and concluded on September 27, 2011, by video teleconference at sites in Melbourne and Tallahassee, Florida.

APPEARANCES

For Petitioner: David J. Busch, Esquire
Department of Financial Services
Division of Legal Services
612 Larson Building
200 East Gaines Street
Tallahassee, Florida 32399

For Respondent: Dominick Paul Belinchak, pro se
2772 Rodeo Drive, Northeast
Palm Bay, Florida 32905-5424

STATEMENT OF THE ISSUES

The issues in this case are whether Respondent violated sections 626.8651(11), 626.611(13), or 626.621(12), Florida Statutes (2010),[1/] and Florida Administrative Code Rule 69B-220.051(3)(a), as alleged in the Administrative Complaint, and, if so, what penalty should be imposed?

PRELIMINARY STATEMENT

On April 28, 2011, Petitioner, Department of Financial Services (Petitioner), filed an Administrative Complaint against Respondent, Dominick Paul Belinchak (Respondent), alleging violations of sections 626.8651(11), 626.611(13), and 626.621(12) and rule 69B-220.051(3)(a). On May 26, 2011, Respondent filed an Election of Proceeding form, requesting an administrative hearing pursuant to section 120.57(1), Florida Statutes. On June 2, 2011, the case was referred to the Division for the assignment of an Administrative Law Judge.

A Notice of Hearing was issued on June 14, 2011, scheduling the case for hearing by video teleconference on July 29, 2011. Following one uncontested motion for continuance, the hearing was rescheduled to September 19, 2011, and, following a full day of testimony, was continued to September 27, 2011, for completion.

Seven days prior to the hearing, a number of motions or documents were filed. Each motion or document was addressed at

the beginning of the hearing. On September 13, 2011, a potential witness for Respondent, Kevin P. Cote (Mr. Cote), filed a document with the Division regarding a Subpoena Duces Tecum (subpoena) that had been served at his home in Pensacola, Florida, on September 12, 2011. At the time of service, Mr. Cote was temporarily living and working in South Carolina.[2/] The materials sought were voluminous, and Mr. Cote represented that he would need at least three months to retrieve the materials. Mr. Cote's document served as a motion to quash to the subpoena. Following argument by the parties and Mr. Cote, the motion was granted in full.

On September 15, 2011, Petitioner filed a Motion for Protective Order, setting forth that, on September 9, 2011, Respondent had served a subpoena on Barry Lanier (Mr. Lanier), Petitioner's bureau chief for the Bureau of Investigation, and Respondent had served a subpoena on Kimberly Brown (Ms. Brown), Petitioner's assistant bureau chief for the Bureau of Licensing. Each subpoena sought their respective appearance at the hearing and directed Mr. Lanier to bring documents specified in 12 distinct categories, while Ms. Brown was directed to bring documents specified in seven distinct categories. After hearing arguments from both parties, the Motion for Protective Order was granted as to the documentation requested of both witnesses.

On September 16, 2011, another potential witness for Respondent, "Tony [sic] [Tonja] Grey c/o Tower Hill" and/or Tower Hill Select Insurance Company (Tower Hill) filed a "Motion to Quash Respondent's Subpoena Duces Tecum and Motion for Entry of Protective Order regarding Deposition of Tonja Grey." This subpoena was also served on Friday, September 9, 2011, and requested Tonja Grey (Ms. Grey) to produce documents that are the property of Tower Hill and are protected by the work-product or attorney-client privileges regarding insurance company claims files. At the service time, Ms. Grey was located in Gainesville, Florida,[3/] at the Tower Hill office. After hearing the arguments of Ms. Grey's representative (Ms. Grey is not an authorized representative of Tower Hill, but an insurance adjuster employed by Tower Hill who could not speak for or on behalf of Tower Hill) and the parties, the motion to quash was granted in full.

On the eve of hearing, Respondent filed a "Motion for Additional Documentation Based on Newly Discovered Information."[4/] Petitioner's counsel briefly reviewed the contents of the motion prior to the hearing. Although Respondent had just found this "newly discovered information," it was information that was and had been in the public domain for some time. Over objection, this information was admitted; however, both parties were advised that the material would be

given its due weight when the facts of this case were considered.

At hearing, Petitioner presented the testimony of three witnesses: Jill Frost (Ms. Frost), Deborah Kaye Siebern (Ms. Siebern), and Virginia Wright. Petitioner's Exhibits 1 through 4, 7 through 9, 11 through 15, and 17 through 19 were admitted into evidence. Respondent testified on his own behalf, and presented the testimony of Ms. Siebern, Ms. Brown, and Mr. Lanier. Respondent's pre-marked Exhibits B, C (only pages 1 through 3), H, I, J, O, P, R (only pages 6 through 60, 70 through 74, and 80), S (only pages 61 and 62), T, and Y were admitted into evidence.

The Transcript from the first hearing date (September 19, 2011) was filed on December 16, 2011. The Transcript from the continuation date (September 27, 2011) was filed on October 18, 2011. Petitioner requested, and Respondent agreed, to file their proposed recommended orders (PROs) within 30 days of the filing of the last Transcript, making them due on January 16, 2012. Petitioner timely filed its PRO on January 17, 2012,[5/] and it has been considered in the preparation of this Recommended Order. To date Respondent has not filed a PRO.

FINDINGS OF FACT

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

Florida and is responsible for administrating the disciplinary provisions of chapter 626, pursuant to section 20.121(2)(g) and (h), Florida Statutes.

2. At all times material to this case, Respondent was licensed as an all lines public adjuster. Respondent also owned and was the primary public adjuster for Public Adjuster Hotline, Inc. (PAH).

3. Ms. Siebern is currently a self-employed public adjuster (Florida license issued in August 2010), who, since January 2007, has owned and operated Avalon Home Inspection, a company that performs wind mitigation inspections, home inspections, and now includes public adjusting work. Between February 2010 and August 2010, Ms. Siebern was employed by Respondent (and PAH) as a licensed public adjuster apprentice (apprentice). Prior to her employment by Respondent and PAH, Ms. Siebern had worked as an apprentice for another entity and had additional insurance experience.

4. Ms. Siebern met Respondent during the fall 2009 through an advertisement wherein Respondent was seeking apprentices for PAH. In February 2010, Ms. Siebern was appointed as a licensed apprentice under Respondent's license.[6/] Although Ms. Siebern understood that Respondent was to direct her as an apprentice until she could get her own public adjuster's license, Respondent typically assented to whatever Ms. Siebern suggested

for the claims she worked, as opposed to providing her with direct supervision and guidance. Ms. Siebern took direction from Respondent with respect to how he wanted documentation filed for PAH, but his supervision of her work as an apprentice was minimal at best. Respondent provided Ms. Siebern with PAH business cards, brochures, and a magnetic car sign with the PAH logo on it. In its advertising, PAH also used a MagicJack telephone number and service that could direct calls to specific PAH representatives, including Ms. Siebern. Respondent also provided training and direction to Ms. Siebern that included how to complete a PAH contract and how to use a computer estimating program. When she was not working a specific claim, Ms. Siebern was directed to market PAH services to roofers, water extraction companies, plumbers, and other trades people. Ms. Siebern worked on a commission basis for the PAH claims she managed. Ms. Siebern was physically located in Orlando, Florida, while Respondent and PAH were physically located in Palm Bay, Florida, approximately an hour apart. Ms. Siebern's testimony is credible.

5. In March 2010, an Orlando home owner, Ms. Frost, searched for a public adjuster firm to help her with one recurring house issue, a re-activated sinkhole problem (sinkhole issue) and a relatively new issue, a damaged roof from a hail/wind event (roof issue) in 2009. Ms. Frost specifically

searched the internet for a female public adjuster. Ms. Frost located the PAH website, reviewed Ms. Siebern's biography, liked it, and called the PAH (MagicJack) telephone number provided. Ms. Frost and Ms. Siebern connected via a mutual telephone conversation on March 30, 2010, and an in-person meeting that same day at Ms. Frost's residence (Frost residence) in Orlando. Respondent and Ms. Siebern spoke on the telephone for approximately 20 to 30 minutes before Ms. Siebern met with Ms. Frost. However, Respondent was not present at this first face-to-face meeting at the Frost residence.

6. During the course of this first meeting between Ms. Frost and Ms. Siebern, various solicitous statements were made by Ms. Siebern regarding her years of insurance experience and what PAH could do for Ms. Frost's two issues. The purpose for Ms. Siebern to go to the Frost residence was to "photograph the loss, to interview the potential client, to go with the contract, and have Jill Frost sign the contract and to get started on the claim." At some point in that first meeting, once Ms. Frost and Ms. Siebern completed their contract negotiations, Ms. Siebern filled in specific blanks on two PAH contracts and provided both contracts to Ms. Frost for her review and signature. One PAH contract was for the recurring sinkhole issue, and the other was for the roof damage issue. Ms. Frost executed both PAH contracts. Ms. Frost clearly

thought that based on her actions and statements that Ms. Siebern was her public adjuster from PAH. Ms. Frost had no knowledge of Respondent's involvement in her claim at the time she signed the two contracts.

7. Respondent takes the position that Ms. Frost solicited PAH or Ms. Siebern when Ms. Frost used the PAH MagicJack telephone number on March 30, 2010, to contact Ms. Siebern. While this is true initially, once Ms. Siebern began her PAH sales pitch, she, on behalf of PAH, was attempting to sell the services of PAH and what PAH could do for Ms. Frost and her claims. Ms. Siebern was in fact soliciting Ms. Frost and did in fact solicit Ms. Frost's business without Respondent's direct supervision or guidance. Respondent's telephone call with Ms. Siebern prior to her arrival at the Frost residence cannot be considered direct supervision or guidance, as he was not present when the details of the contracts were completed.

8. It is uncontroverted that Respondent pre-signed the PAH contracts that Ms. Frost executed on March 30, 2010. These contracts were signed by Respondent and provided to Ms. Siebern as a means for her to solicit business. Ms. Frost executed those two contracts only after discussing and agreeing to contract terms which were written on the contracts by PAH's representative, Ms. Siebern.

9. Ms. Frost first learned that Ms. Siebern was an apprentice on July 29, 2010, when Respondent arrived at the Frost residence and spoke with an engineer who was inspecting it. Only after Respondent left the Frost residence did Ms. Siebern explained to Ms. Frost that she (Ms. Siebern) was an apprentice and that Respondent was actually supervising Ms. Siebern's work. Ms. Frost was terribly unhappy or upset with this news, as Respondent did not appear to know anything about her claims when he arrived at her residence.

10. At some time in early August 2010, Ms. Siebern's period of apprenticeship ended, and she left PAH's employ. In August and thereafter, the working relationship between Ms. Frost and Respondent/PAH deteriorated. Ms. Frost was unable to get the assistance she felt she needed from Respondent. Although they did communicate on occasion, when Ms. Frost complained to Respondent of alleged wrong-doing with respect to her claims, Respondent blamed Ms. Siebern's lack of experience for the problems.[7/]

11. Respondent did not feel it necessary to tell Ms. Frost (or anyone else) that Ms. Siebern was an apprentice.[8/] Ms. Brown confirmed that an apprentice does not have to disclose that he or she is an apprentice to a client.

12. Respondent became a licensed public adjuster in May 2009, after having studied and taken the examination for

that licensure. As part of his studies, Respondent became familiar with Petitioner's rules regarding public adjusting. However, Respondent's position that rule 69B-220.051(3)(a) "may not be applicable to public adjuster apprentices . . ." is most troubling. When asked directly if the rule (69B-220.051(3)(a)) would be applicable to him, Respondent replied in a conflicting statement:

> Sure, but I am a public adjustor, so it doesn't apply. Do you understand? This is for a roofer. This is for people that are pretending to be an adjustor. This is for plumbers that are trying to represent a homeowner with their insurance claim. This is not for public adjustors or public adjustor apprentices.

Respondent's credibility is greatly diminished with this response.

CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 & 120.57, Fla. Stat. (2011).

14. This is a disciplinary action by Petitioner in which Petitioner seeks to suspend or revoke Respondent's license as a pubic adjuster. Petitioner bears the burden of proof to substantiate the allegations in the Administrative Complaint by clear and convincing evidence. Dep't of Banking & Fin. v.

Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

15. As stated by the Florida Supreme Court:

> 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. 2d 797, 800 (Fla. 4th DCA 1983)).

16. The Administrative Complaint charges Respondent with violating section 626.8651(11). Section 626.8651(11) provides in pertinent part:

> A public adjuster apprentice has the same authority as the licensed public adjuster . . . except that an apprentice may not execute contracts for the services of a public adjuster or public adjusting firm and may not solicit contracts for the services except under the direct supervision and guidance of the supervisory public adjuster. An individual may not be, act as, or hold . . . herself out to be a public adjuster apprentice unless the individual is licensed and holds a current appointment by a licensed public all-lines adjuster or a public adjusting firm that employs a licensed all-lines public adjuster.

17. The Administrative Complaint also charges Respondent with violating rule 69B-220.051(3)(a), which provides:

> (3) Communications Concerning Public Adjuster Services.
>
> (a) Solicitation. The solicitation of public adjusting business for compensation is deemed to be a material part of the business of public adjusting and, therefore, requires licensure as a public adjuster under the laws of Florida and the rules of the department, and shall be engaged in only by persons licensed by the department as public adjusters. Unlicensed persons shall not engage in such activity even under the supervision of a licensed public adjuster. The phrase "solicitation of public adjusting business" and similar phrases as used in this rule means, for compensation, initiating contact with any person, whether in person, by mail, by telephone, or otherwise, and therein seeking, causing, urging, advising, or attempting:
>
> 1. To have any person enter into any agreement engaging the services of a public adjuster in any capacity; or
>
> 2. To have any person subsequently speak or meet with a licensed public adjuster for the purpose of engaging the services of a public adjuster in any capacity or for the purpose of being advised by a public adjuster in any regard.

18. Respondent was not present and did not provide direct supervision and guidance when Ms. Siebern, his apprentice, completed the solicitation of Ms. Frost, which resulted in the execution (by Ms. Frost) of two contracts with Respondent's company. The fact that Respondent pre-signed the contracts is

not determinative of his failure to directly supervise and guide the solicitation act by Ms. Siebern.

19. Further, Respondent's position, that rule 69B-220.051 is not applicable to him, reflects a serious misunderstanding as to his responsibilities and duties as a public adjuster.

20. The Administrative Complaint charges Respondent with violating section 626.621(12). Section 626.621 (12) provides in pertinent 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 . . . 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 . . . 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:
>
> * * *
>
> (12) Knowingly aiding, assisting, procuring, advising, or abetting any person in the violation of or to violate a provision of the insurance code or any order or rule of the department, commission, or office.

21. The Administrative Complaint also charges Respondent with violating section 626.611(13), which provides in pertinent part:

> The department shall deny an application for, suspend, revoke, or refuse to renew or continue the license or appointment of any

> . . . 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 . . . licensee, . . . any one or more of the following applicable grounds exist:
>
> * * *
>
> (13) Willful failure to comply with, or willful violation of, any proper order or rule of the department or willful violation of any provision of this code.

22. Respondent provided Ms. Siebern with business cards, brochures, a MagicJack telephone number, and pre-signed contracts for her use in soliciting business for PAH. Thus, he aided or assisted a person to violate a provision of the insurance code or a rule of Petitioner. These actions amount to a willful violation.

23. Petitioner proved through clear and convincing evidence that Respondent was, at all times pertinent, licensed as an all lines public adjuster, owned PAH, and was to supervise Ms. Siebern.

24. Petitioner proved through credible testimony that Respondent did not accompany, nor provide direct supervision and guidance when Ms. Siebern met with and solicited a client. Respondent knowingly provided pre-signed contracts to Ms. Siebern in order to facilitate her solicitous actions to secure business for his company. This is in direct contravention to section 626.8651(11) and rule 69B-

220.051(3)(a). The issue now becomes what penalty should be imposed.

25. The Administrative Complaint put Respondent on notice of the penalties that could be assessed against him via sections 626.11, 626.621, 626.681, 626.691, 626.692, and 626.9521,[9/] as well as Petitioner's intention "to seek aggravation of all such penalties in accordance with the provisions of rule 69B-231.160."

26. Section 626.611 provides the mandatory language of "shall" suspend the license if a violation is found. Section 626.621 provides that Petitioner "may" suspend the license if a violation is found.

27. Petitioner notified Respondent that it intended to seek an aggravation of any penalty through rule 69B-231.160. That rule provides in pertinent part:

> The Department shall consider the following aggravating and mitigating factors and apply them to the total penalty in reaching the final penalty assessed against a licensee under this rule chapter. After consideration and application of these factors, the Department shall, if warranted by the Department's consideration of the factors, either decrease or increase the penalty to any penalty authorized by law.
>
> (1) For penalties other than those assessed under Rule 69B-231.150, F.A.C.:
>
> (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) Restitution to victims;

(f) Motivation of licensee;

(g) Financial gain or loss to licensee;

(h) Financial loss to victim;

(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) Violation of any part of Sections 626.9541 and 627.4554. F.S., in relation to the sale of a life insurance policy or annuity to a senior citizen; and

(n) Other relevant factors.

28. Although Petitioner suggested in its PRO the following aggravating factors: "Respondent's conduct was willful; resulted in a lawsuit over fees due the licensee, was motivated by financial gain; and . . . Respondent was personally responsible for the transgression," the undersigned finds only one aggravating factor: Respondent's conduct was willful. The lawsuit ended in a draw, and there was no credible testimony as to any financial gain made by Respondent.

RECOMMENDATION

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

RECOMMENDED that the Department of Financial Services enter a final order finding Respondent guilty of violating sections 626.611(13), 626.621(12), and 626.8651 and rule 69B-220.051(3)(a) and suspending his license for seven (7) months.

DONE AND ENTERED this 30th day of January, 2012, in Tallahassee, Leon County, Florida.

LYNNE A. QUIMBY-PENNOCK
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of January, 2012.

ENDNOTES

[1/] The Administrative Complaint does not specify which codification of the Florida Statutes is being charged. In this instance, the conduct is alleged to have occurred, in large part, between March 2010 through August 2010, making the relevant statutes Florida Statutes (2009) and for a very short period Florida Statutes (2010). However, a review of the language of the 2009 and 2010 statutes indicates that the relevant subsections, specifically sections 626.611, 626.621(12), 626.681, 626.691, 626.8641, and 626.692, have not

been changed in any material way. Accordingly, all references are to the 2010 statutory version unless otherwise indicated.

[2/] The distance between Pensacola, Florida, and the closest hearing location was greater than 100 miles. It is also noted that South Carolina is more than 100 miles from Tallahassee.

[3/] The distance between Gainesville, Florida, and either hearing location (Orlando or Tallahassee) was greater than 100 miles.

[4/] Respondent submitted three documents including: a Florida attorney general advisory opinion, AGO 93-64, with a subject title: Arrest powers of auxiliary law enforcement officers; a Professional Ethics Opinion of the Florida Bar, Opinion 07-2; and a copy of the Supreme Court opinion in Jones v. Chiles, 638 So. 2d 48 (Fla. 1994).

[5/] January 16, 2012, was a legal holiday; thus, the PROs were due no later than the close of business on Tuesday, January 17, 2012.

[6/] A public adjuster apprentice must be licensed by the Department of Financial Services. The apprentice must work with a licensed and appointed public adjuster for 12 months and must be in full compliance with chapter 626. An apprentice has the same authority as a licensed public adjuster except they cannot execute contracts for the services of a public adjuster or public adjusting firm, and they cannot solicit contracts for the services except under the direct supervision and guidance of the supervisory public adjuster. By operation of law, once an apprentice reaches the requisite hours of supervision and so notifies the Department, the apprentice status is removed, and the individual is a public adjuster.

[7/] The deterioration of the professional relationship led to a small claims case filed by Respondent against Ms. Frost, alleging her liability under one of the executed contracts. However, the Final Judgment entered in that case "ordered and adjudged that neither party shall recover from the other by this action." Further, it is noted that the Administrative Complaint did not allege this small claims action.

[8/] Respondent's Exhibit H, apparently printed out on May 15, 2011, contains a Department of Financial Services (copyright 2010) "Frequently Asked Questions" section dealing with the Division of Agent and Agency Services. There are two questions and answers that are relevant: "9. Does the 31-20 Public

Adjuster Apprentice have to disclose that he is an apprentice to the client?" and "10. Does the supervising Public Adjuster's name need to be on the Apprentice's Business Card?" The printed answer to both is "No."

[9/] Although the Administrative Complaint notified Respondent that Petitioner could look to sections 626.681 (administrative fine in lieu of or in addition to suspension), 626.691 (probation), 626.692 (restitution), and 626.9521 (penalties for unfair methods of competition and unfair or deceptive acts or practices) for discipline (penalties) if a violation was found, these sections are not being considered and will not be discussed.

COPIES FURNISHED:

David J. Busch, Esquire
Department of Financial Services
Division of Legal Services
612 Larson Building
200 East Gaines Street
Tallahassee, Florida 32399

Dominick Belinchak
2772 Rodeo Drive, Northeast
Palm Bay, Florida 32905-5424

Julie Jones, CP, FRP, Agency Clerk
Department of Financial Services
Division of Legal Services
200 East Gaines Street
Tallahassee, Florida 32399-0390

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.