

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARTA R. DE LA PAZ,

Petitioner,

vs.

Case No. 14-2525F

DEPARTMENT OF FINANCIAL
SERVICES, DIVISION OF INSURANCE
AGENTS AND AGENCY SERVICES,

Respondent.

_____ /

FINAL ORDER

Pursuant to notice, a formal administrative hearing was conducted before Administrative Law Judge Mary Li Creasy, by video teleconference at sites in Tallahassee and Miami, Florida, on October 23, 2014.

APPEARANCES

For Petitioner: N. Fraser Schuh, Esquire
704 Southeast Third Avenue Extension
Hallandale, Florida 33009

For Respondent: David J. Busch, Esquire
Department of Financial Services
Division of Legal Services
612 Larson Building
200 East Gaines Street
Tallahassee, Florida 32399-0333

STATEMENT OF THE ISSUE

Whether Petitioner is entitled to an award of attorney's fees and costs, associated with defending DOAH Case No. 13-

3820PL, pursuant to section 57.111, Florida Statutes (2014), as a small business and a prevailing party.

PRELIMINARY STATEMENT

On August 27, 2013, the Department of Financial Services, Division of Insurance Agents and Agency Services (DFS), filed an Administrative Complaint against Marta R. de la Paz (de la Paz). The Administrative Complaint, consisting of one count, alleged a violation of sections 626.611 and 626.724, Florida Statutes (2013), and sought revocation of de la Paz's Florida insurance agent license, No. A182193 (license).

De la Paz timely executed an Election of Proceeding, disputed DFS' factual allegations and requested a formal administrative hearing. A final hearing was held on December 4, 2013, and January 7, 2014. A Recommended Order was entered by the undersigned on March 28, 2014, which found that DFS failed to prove, by clear and convincing evidence, that de la Paz knowingly aided, assisted, procured, advised, or abetted two unlicensed entities, International Water Safety Foundation (IWSF), and its insurance underwriter, North American Marine (NAM), when an agent working in the Marta de la Paz Agency, Inc. (MDLPA), sold what was purported to be watercraft insurance in the spring of 2009. Accordingly, it was recommended that no disciplinary action be taken against the license of de la Paz.

Neither party filed exceptions to the Recommended Order. By Agency Final Order issued on May 28, 2014, DFS adopted the Recommended Order in toto.

On May 27, 2014, de la Paz filed a Motion for Attorney's Fees and Costs (Motion) pursuant to Florida Statutes section 57.111. In support of the Motion, de la Paz asserted that she is a prevailing "small business party" within the meaning of section 57.111(3)(d)1.c. and entitled to an award of reasonable fees and costs because the action of DFS "threatened her with the destruction of her business and reputation, and the resulting loss of her source of income."

Based upon the Motion, the matter was re-styled by the Clerk's Office of the Division of Administrative Hearings as the instant action. After several unopposed motions for continuances were granted, a final hearing was held on October 23, 2014.

During the hearing, de la Paz testified on her own behalf and called Jenny Toledo Mondaca, de la Paz's daughter and the co-owner of MDLPA, as a witness. De la Paz's Exhibit 1, the affidavit of Attorney's Fees and Costs, was admitted.

DFS called the following witnesses: Barry Linnear, DFS' Chief of the Bureau of Investigations; Veronica Renee Jackson, Government Analyst I for DFS; Matthew Guy, Communications Coordinator for DFS; Shannon Bowes, Allstate employee; and Lidia Azcue, DFS Field Insurance Regional Administrator. DFS'

Exhibits 1 through 13, 25 through 28, 30, 32, 33 through 35, 37 through 40, 43, 45, 51, and 52 were admitted into evidence.

The final hearing Transcript, consisting of two volumes, was filed on November 12, 2014. On December 12, 2014, de la Paz and DFS timely filed written post-hearing closing arguments and proposed final orders that have been considered in the preparation of this Order. De la Paz also filed a Supplement to Petition seeking to recover the cost of the Transcript of the final hearing of this case (\$831.75).

FINDINGS OF FACT

1. DFS is the state agency charged with the licensing and regulation of insurance agents in Florida and is responsible for administering the disciplinary provisions of chapter 626, pursuant to sections 20.121(2)(g) and (h), Florida Statutes.

2. At all times material to this case, de la Paz was a licensed general lines insurance agent in Florida. De la Paz also is a director and officer of the MDLPA, which she has co-owned with her daughter, Jenny Mondaca Toledo (Mondaca), since 2000.

3. On October 15, 2003, the Office of Insurance Regulation issued a cease and desist order (Order) against IWSF and NAM from conducting insurance-related activities in Florida, including but not limited to, "transacting any new or renewal insurance

business in this state, and from collecting any premiums from Florida insureds."

4. The sale of insurance products by unauthorized entities (UEs) poses a danger to Florida consumers, because UEs are not vetted by the Office of Insurance Regulation, their financial stability is questionable, they may not have sufficient reserves to pay claims for consumers, and they do not participate in the Guarantee Fund which protects consumers should a company become insolvent.

5. DFS has undertaken a variety of media campaigns in an effort to warn licensed agents about the dangers and consequences of providing insurance products through UEs. DFS regularly conducts investigations against agents for selling UE products. Generally, consumers will not know the quality of alleged insurance providers until the consumer makes a claim against their policy. For this reason, DFS cautions agents to verify the status of insurance providers prior to selling a policy. Agents can access the website for the Office of Insurance Regulation or call to inquire about the status of a particular company. The website has been available for approximately 17 years.

6. DFS tried to warn Florida insurance agents that IWSF was an UE; however, IWSF was the most prevalent UE selling in Florida, and approximately 584 consumers were provided with IWSF policies sold by various agents.

7. In an effort to stop the sale of insurance products through IWSF and NAM, DFS obtained a list of Florida customers from the Canadian bankruptcy receiver of IWSF. DFS' Bureau of Investigations sent a survey to these consumers and through the survey, it was determined that Carlos Guzman (Guzman) and Jorge Saez (Saez) purchased IWSF watercraft insurance from MDLPA in April 2009.

8. Field Insurance Regional Administrator Lidia Azcue (Azcue) and Investigator Marlene Suarez (Suarez) opened an investigation regarding this transaction. Azcue and Suarez went to MDLPA on December 4 and 5, 2012. The alleged violation being investigated was that the agency sold unauthorized products, and the purpose was to see if any others were being sold. They did not inform the staff at MDLPA of the reason for the investigation. De la Paz was not present nor was she interviewed during these visits. Azcue and Suarez asked for and received the binder book of MDLPA on a thumb drive. Mondaca was present on the first day of the investigation and was described by Azcue as cooperative. Azcue also requested and received files for other consumers who purchased marine insurance products from MDLPA.

9. As a result of the investigation, and prior to the filing of the Administrative Complaint, DFS obtained the following information and documentation regarding MDLPA and the transaction between MDLPA, Saez, and Guzman:

a. De la Paz and her daughter, Mondaca (referred to on the Bank of America signature card as "Jenny M. Toledo, President") had signature authority for the MDLPA corporate bank account at Bank of America;

b. An IWSF quote printed April 14, 2009, for the vessel owned by Saenz (sic) and Guzman, which was faxed to MDLPA by IWSF to "Odalis" (referring to Odaylis Chiullan (Chiullan), an employee of MDLPA) which references de la Paz and MDLPA as the contact;

c. A fax dated May 6, 2009, from Chiullan to IWSF asking IWSF to bind coverage for Guzman and Saez effective May 6, 2009;

d. Undated handwritten notes on a "File Action Log" form regarding "Jorge Sahel Saez" in the handwriting of Chiullan;

e. A fax dated May 6, 2009, from IWSF to "Odaylis" at MDLPA;

f. An unsigned and undated "Insurance Premium Financing Disclosure Form" to be signed by Guzman and Saez, which was obtained by Chiullan from the premium financing company. In correspondence prior to the issuance of the Administrative Complaint, de la Paz advised DFS that it was Chiullan who had the form signed by Guzman and Saez and transmitted the signed forms and check for the down payment to the finance company;

g. A receipt prepared by Chiullan dated May 6, 2009, acknowledging delivery of \$280.00 as a "down payment" by Guzman and Saez for financing of a policy with NAM;

h. The premium finance agreement between the finance company and Guzman and Saez prepared by the finance company and sent to Chiullan. The agreement is signed by Guzman and by de la Paz on behalf of MDLPA as "broker or agent";

i. Check number 1138 dated May 6, 2009, and drawn on the bank account of Guzman payable to the finance company in the amount of \$370.00. This check was delivered to Chiullan and forwarded by her to the finance company along with the signed, original documents for the financing of the balance of the insurance premiums;

j. A fax dated May 12, 2009, from NAM to Odaylis at MDLPA, requesting confirmation of the payment plan arranged with Saez and Guzman;

k. IWSF declaration page for Guzman and Saez;

l. IWSF renewal certificate for Guzman and Saez for the period of May 6, 2010, through May 5, 2011, signed by Guzman on May 4, 2010; and

m. Correspondence from IWSF to de la Paz at MDLPA dated May 13, 2010, returning two checks, one signed by Mondaca and one signed by de la Paz, for reissuance in the name of IWSF.

10. No interviews were conducted as part of the investigation by DFS of de la Paz, Mondaca, Chiullan, Guzman, or Saez.

11. After the field investigation was concluded, the investigative file was forwarded on January 16, 2013, to Veronica Jackson, Government Analyst I, who reviewed the file for legal sufficiency.

12. On May 24, 2013, a letter from Kathy Spencer, Stipulation Program Coordinator with the Office of the Chief Financial Officer, Jeff Atwater (Atwater), was sent to de la Paz alleging that she "aided and abetted an unauthorized entity in the sale of insurance." No further details were provided, nor were any Florida Statutes cited. Attached to the correspondence was a proposed settlement stipulation for consent order which offered de la Paz a \$5,000.00 penalty and a one-year period of probation in lieu of having a formal administrative complaint filed against her.

13. On June 13, 2013, de la Paz responded with a letter to Atwater explaining that at no time had de la Paz or anyone at MDLPA received notification that IWSF and NAM were not authorized to sell insurance products in Florida. De la Paz asserted that Chiullan, who held a 220 license and only worked for MDLPA for a few weeks, was the individual who handled the transaction with Guzman and Saez. De la Paz pointed out that to be charged with

violation of section 626.734, de la Paz, as the licensed agent and owner of the insurance agency, cannot be subject to disciplinary proceedings due to Chiullan's placing this one policy with IWSF, because she was not aware of such act and the facts constituting a violation of the insurance code. Additionally, de la Paz pointed out that section 626.910 provides a person "aiding an unauthorized insurer" shall pay a civil penalty of not more than \$1000.00 for each non-willful violation. De la Paz emphasized that she personally "did absolutely nothing to violate the code, let alone commit a willful violation of the code." For this reason, she could not sign the stipulation admitting that she committed a willful violation.

14. De la Paz's letter was forwarded to Jackson who asked de la Paz for documentation supporting de la Paz's position. De la Paz corresponded with Jackson on June 29 and July 2, 2013. In this correspondence, in addition to once again supplying the requested documentation, de la Paz reiterated her lack of knowledge of IWSF as a UE and her lack of involvement in the Guzman/Saez transaction.

15. On July 2, 2013, Azcue contacted de la Paz to invite her to come to DFS' office and review the investigative file. This meeting was not mandatory. According to de la Paz's credible testimony, she asked to bring her attorney and was told she could not. De la Paz declined to attend the meeting.

16. On August 26, 2013, after negotiations with de la Paz were unsuccessful, DFS filed a one-count Administrative Complaint against de la Paz, alleging that on May 6, 2009, Guzman and Saez purchased a policy for watercraft insurance from MDLPA. De la Paz was charged with a violation of section 626.611, "Knowingly aiding, assisting, procuring, advising, or abetting any person in violation of or to violate a provision of the insurance code or any order or rule of the department, commission, or office."

17. De la Paz was also charged with a violation of section 626.734, which provides that any general lines agent who is an officer, director, or stockholder of an incorporated general lines insurance agency shall remain personally and fully liable and accountable for any wrongful acts, misconduct, or violations of any provision of the code committed by such licensee by any person under his or her direct supervision and control while acting on behalf of the corporation.

18. A final hearing on the Administrative Complaint was held on December 4, 2013, and January 7, 2014. A Recommended Order was entered by the undersigned on March 28, 2014, which found that DFS failed to prove, by clear and convincing evidence, that de la Paz knowingly aided, assisted, procured, advised, or abetted two UEs when Chiullan sold what was purported to be watercraft insurance in the spring of 2009 to Saez and Guzman.

19. DFS admits that de la Paz is a "small business party" and was a "prevailing party" for purposes of the Florida Equal Access to Justice Act, section 57.111.

20. There is no dispute that de la Paz's attorney's fees for defending the underlying action in the amount of \$29,700.00 and costs in the amount of \$1,265.39 are reasonable. De la Paz's additional cost for the final hearing Transcript in the amount of \$831.75 is also reasonable.

CONCLUSIONS OF LAW

21. The Division of Administrative Hearings has jurisdiction over the subject matter and parties to this proceeding. §§ 57.111 & 120.57, Fla. Stat. (2014).

22. Attorney's fees have been sought by de la Paz in this matter pursuant to section 57.111, the Equal Access to Justice Act.

23. The legislative intent for enacting the Equal Access to Justice Act is provided in section 57.111(2) as follows:

(2) The Legislature finds that certain persons may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense of civil actions and administrative proceedings. Because of the greater resources of the state, the standard for an award of attorney's fees and costs against the state should be different from the standard for an award against a private litigant. The purpose of this section is to diminish the deterrent effect of seeking review of, or defending against, governmental

action by providing in certain situations an award of attorney's fees and costs against the state.

24. In pertinent part, section 57.111(4) (a) provides the following:

(4) (a) Unless otherwise provided by law, an award of attorney's fees and costs shall be made to a prevailing small business party in any adjudicatory proceeding or administrative proceeding pursuant to chapter 120 initiated by a state agency, unless the actions of the agency were substantially justified or special circumstances exist which would make the award unjust. (emphasis supplied).

25. Section 57.111(3) (c) defines a "prevailing small business party" as follows:

(c) A small business party is a "prevailing small business party" when:

1. A final judgment or order has been entered in favor of the small business party and such judgment or order has not been reversed on appeal or the time for seeking judicial review of the judgment or order has expired;

2. A settlement has been obtained by the small business party which is favorable to the small business party on the majority of issues which such party raised during the course of the proceeding; or

3. The state agency has sought a voluntary dismissal of its complaint.

Substantial Justification

26. The term "substantially justified" is defined in section 57.111(3) (e), as follows:

(e) A proceeding is "substantially justified" if it had a reasonable basis in law and fact at the time it was initiated by a state agency.

27. In proceedings to establish entitlement to an award of attorney's fees and costs pursuant to section 57.111, the initial burden of proof is on the party requesting the award to establish, by a preponderance of the evidence, that it prevailed in the underlying action and that it was a small business party at the time the action was initiated. Once the party requesting the award has met this burden, the burden shifts to the agency to establish that its actions in instituting the proceeding were substantially justified or that special circumstances exist that would make an award of attorney's fees and costs to the party unjust. Helmy v. Dep't of Bus. & Prof'l Reg., 707 So. 2d 366, 368 (Fla. 1st DCA 1998).

28. Because there is no dispute that de la Paz is a prevailing small business party, DFS bears the burden of establishing that its actions in initiating this proceeding were substantially justified. "The 'substantially justified' standard falls somewhere between the no justiciable issue standard of Section 57.105 . . . and an automatic award of fees to a prevailing party." Id.

29. To be substantially justified, the government agency must have a solid, though not necessarily correct, basis in fact

and law in its actions initiating the underlying case based upon the information available to the agency at the time of initiation of the agency action. Dep't of HRS v. S.G., 613 So. 2d 1380 (Fla. 1st DCA 1993); AHCA v. MVP Health Inc., 74 So. 3d 1141, 1143-44 (Fla. 1st DCA 2011).

30. In analyzing whether DFS had a solid basis in law, it is appropriate to examine the law cited as authority in the Administrative Complaint.

31. In this case, DFS charged de la Paz with a violation of section 626.611, which requires "knowingly" aiding and abetting a person in violating an order of the department. Although DFS had de la Paz's signature on the finance agreement, all other information showed that the 2009 transaction with Guzman and Saez was conducted by Chiullan, not de la Paz. Although DFS now points to the fact that de la Paz reissued the check to ISWF in 2010 for the automatic renewal of the policy, de la Paz was not charged with any violation for the 2010 transaction in the Administrative Complaint.

32. More importantly, even though it is arguable that de la Paz had some tangential knowledge of the transaction with Guzman and Saez, DFS presented no evidence that de la Paz had knowledge that IWSF and NAM were UEs, which is the critical inquiry. DFS makes this assumption based upon the fact that it undertook a campaign to educate agents about the danger of UEs,

including IWSF, but there was no evidence linking that campaign to de la Paz or her agency. DFS had no evidence to refute that no one at MDLPA, including de la Paz or Chiullan, had reason to believe IWSF was a UE. Nor did DFS produce any evidence to refute de la Paz's credible testimony that calling DFS' office or checking its website, even as late as the date of the hearing, would not result in a determination that IWSF is a UE. An assumption, standing alone, falls far short of "substantial" justification.

33. DFS also sought to impose a penalty against de la Paz for the 2009 Guzman/Saez transaction conducted by Chiullan based upon section 626.734, which holds an agent liable for any wrongful acts committed by any person under his or her direct supervision and control while acting on behalf of the corporation.

34. As discussed in the Recommended Order in the underlying case, in a proceeding to revoke a license, "the licensing body cannot rely solely on wrongdoing or negligence committed by an employee of the licensee; instead, the licensing body must prove that the licensee was at fault somehow for the employee's conduct, due to the licensee's own negligence, intentional wrongdoing, or lack of due diligence." Bridlewood Grp. Home v. Ag. for Pers. with Disab., 136 So. 3d 652, (Fla. 2nd DCA 2013) citing Ag. for Pers. with Disab. v. Help is on the Way, Inc.,

Case No. 11-1620 (Fla. DOAH Feb. 3, 2012; Fla. APD Apr. 16, 2012); Ganter v. Dep't of Ins., 620 So. 2d 202, 203 (Fla. 1st DCA 1993).

35. In Pic N' Save Central Florida v. Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco, 601 So. 2d 245, 250 (Fla. 1st DCA 1992), the court, when analyzing liability under the theory of respondeat superior and revoking a party's right to conduct business, held "that one's license to engage in an occupation is not to be taken away except for misconduct personal to the licensee." Only when the employees act in a "persistent and practiced manner" so as to justify being described as "flagrant," is "the factual inference that the violations were either fostered, condoned, or negligently overlooked by the licensee" justified. Id. at 253-254.

36. As a matter of law, Chiullan's one transaction with IWSF on behalf of MDLPA cannot be construed as "consistent or practiced." The selling of one policy by Chiullan to Guzman and Saez for a premium of less than \$1,200.00 is not "flagrant."^{1/}

Special Circumstances

37. DFS asserts that "special circumstances" exist in this case which would make an award of fees and costs unjust. In support of this argument, DFS alleges that de la Paz "refused to meet with Department investigators to discuss and resolve

allegations of misconduct prior to the Administrative Complaint being filed." DFS also claims the decision to file the Administrative Complaint turned on the assessment of witness credibility and that de la Paz was not credible.

38. No evidence supports the contention that de la Paz refused to meet with the Department. To the contrary, the evidence demonstrated that the unannounced field investigation was conducted at MDLPA when de la Paz was away from the office on a cruise. Despite her unavailability, and the fact that the investigators did not explain why they were at MDLPA or what they were investigating, de la Paz directed her staff to fully comply and respond to DFS' requests for files and documents. Azcue confirmed that the DFS timely received everything that was requested from MDLPA.

39. De la Paz wrote to DFS three times explaining why she was not guilty of any violation and why she could not admit to a willful violation. When Azcue invited de la Paz to come in to review the file, de la Paz indicated she would like to do so and would need to bring an attorney or friend to help her interpret between English and Spanish. De la Paz was told she could not bring her attorney, and she therefore declined to meet with DFS. At no time was de la Paz informed that the meeting was mandatory or would be interpreted as a refusal to cooperate with the

investigation. It is specious, at best, to now claim this is a "special circumstance" to deny attorney's fees and costs.

40. DFS' argument, that the decision to file the Administrative Complaint was based on a credibility assessment, and therefore constitutes special circumstances, also stretches the bounds of credulity. The cases cited by DFS for this proposition are misplaced. More importantly, there simply was no weighing of credibility undertaken by DFS.

41. At the time of the filing of the Administrative Complaint, the sum total of the investigation was a review of documents (which overwhelmingly demonstrate Chiullan, not de la Paz, conducted the transaction at issue) and the likely testimony of DFS' investigator. Although the DFS received correspondence from de la Paz, she was never interviewed as part of the investigation. In fact, none of the pertinent witnesses-- Chiullan, Mondaca, Saez, or Guzman--were ever interviewed.^{2/}

42. DFS' two defenses to an award of fees and costs, "substantial justification" and "special circumstances," are not supported by law or facts.

43. The attorney's fees and costs were reasonable and necessary to defend against de la Paz. Likewise, the additional cost of the Transcript incurred by de la Paz was reasonable and necessary to the determination of entitlement to such fees and

costs. Nordal v. Dep't of Prof'l Reg., Div. of Real Estate, Case No. 89-3441F (DOAH Feb. 9, 1990).

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Marta R. de la Paz's Motion for Attorney's Fees and Costs is GRANTED. The Department of Financial Services, Division of Insurance Agents and Agency Services, shall pay to Marta R. de la Paz, within 30 days, the sum of \$31,797.14 for attorney's fees and costs incurred in DOAH Case No. 13-3820PL.

DONE AND ORDERED this 18th day of December, 2014, in Tallahassee, Leon County, Florida.



MARY LI CREASY
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 18th day of December, 2014.

ENDNOTES

^{1/} DFS cites to de la Paz's obtaining watercraft insurance for her son and boyfriend through IWSF as proof that she was negligent in checking whether IWSF was a UE. However, the

information regarding these additional transactions between MDLPA and IWSF was first revealed at the final hearing, only after the filing of the Administrative Complaint.

^{2/} At the final hearing on the issue of fees and costs, DFS solicited the testimony of an Allstate employee, Shannon Bowes, who stated that Allstate would never have given a list of other insurance carriers that were not fully vetted and which included UEs such as IWSF. Although Bowes was very credible, her testimony was not relevant. Bowes' testimony failed to take into account that the assertion, that IWSF was on a list provided by Allstate, came from Chiullan, not de la Paz. Bowes stated that she was not aware of IWSF until asked to testify in the de la Paz fees and costs proceeding. Therefore, this information was not available to DFS prior to the filing of the Administrative Complaint and could not have been included in a "credibility" determination.

COPIES FURNISHED:

David J. Busch, Esquire
Department of Financial Services
Division of Legal Services
612 Larson Building
200 East Gaines Street
Tallahassee, Florida 32399-0333
(eServed)

N. Fraser Schuh, Esquire
704 Southeast Third Avenue Extension
Hallandale, Florida 33009
(eServed)

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

NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.