STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL SERVICES,

Petitioner,

vs. Case No. 18-1656PL

VIVIAN SANTOS,

Respondent.
_____/

RECOMMENDED ORDER

On June 6, 2018, Administrative Law Judge (ALJ) J. Lawrence Johnston of the Division of Administrative Hearings (DOAH) conducted a disputed-fact hearing in this case by video teleconference at sites in Fort Myers and Tallahassee.

APPEARANCES

For Petitioner: Robert Alan Fox, Esquire
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399

For Respondent: Christopher Brown, Esquire
Brown, Suarez, Rios & Weinberg, P.A.
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STATEMENT OF THE ISSUES

Whether the Respondent, a licensed limited surety (bail bond) agent, should be disciplined on charges stated in an

Amended Administrative Complaint, DFS case 214761-17-AG; and, if so, the appropriate discipline.

PRELIMINARY STATEMENT

On January 17, 2018, the Petitioner filed an Administrative Complaint against the Respondent. The Administrative Complaint charged the Respondent with violating various statutes by not remitting premiums and other monies, as required, to Lexington National Insurance Company (Lexington). The Respondent admitted some allegations but denied others and asked for a hearing. The Petitioner forwarded the matter to DOAH to be heard by an ALJ.

At DOAH, the Administrative Complaint was amended to add a charge (designated Count II) that the Respondent falsely swore on a DFS Appointing Form that she owed no premium to any insurer, when she actually owed premiums to Lexington.

At the outset of the hearing, the parties raised an issue regarding the original charge in Count I, which alleged that, between June and mid-November 2016, the Respondent "failed to timely forward . . . premium[s] due . . . on various surety bonds" she wrote; "failed to pay numerous bail bond forfeitures that she was obligated to pay to various courts"; and "failed to comply with [certain provisions of her] Agent's Contract." During a deposition taken the week before the hearing, it became apparent that the Petitioner could not prove which, if any, surety bonds were written by the Respondent between June and

mid-November 2016. Amended Admin. Compl. ¶¶ 14, 16, 21. Counsel for the Petitioner soliloquized about the various options the Petitioner had upon discovering the limitations of the proof, including: move for a continuance and further amend the charges to expand the June to mid-November 2016 timeframe; seek leave to amend without a continuance (probably over objections by the Respondent on due process and fairness grounds); or file a separate administrative complaint addressing times other than June to mid-November 2016 (which would initiate the litigation of an additional administrative proceeding between the parties). Ultimately, the Petitioner chose against all three options, and the Respondent objected to having to try issues outside the June to mid-November 2016 timeframe under Count I. The ruling on the objection was to "exclude the evidence that's outside the timeframe of the Administrative Complaint." Tr. 14.

At the final hearing, the Petitioner called three witnesses, one being the Respondent. The Petitioner's Exhibits 1 through 3, 6, 7, 7-A, 9, 16 through 18, and 18-A through 18-C were received in evidence. The Respondent again testified briefly in her case-in-chief and did not introduce any exhibits in evidence.

A Transcript of the final hearing was filed on June 18. The Petitioner timely filed a proposed recommended order (PRO) on June 28. The Respondent filed a motion to extend the time for filing her PRO, which the Petitioner opposed. The motion was

granted, and the Petitioner was allowed to file a response to the Respondent's PRO. The response was filed on July 16. The PROs and the Petitioner's response have been considered.

In the section of the Petitioner's PRO addressing Count I (which is entitled "Close But No Cigar"), the Petitioner concedes that it was unable to prove Count I, "[a]s none of the bonds at issue can be tied directly to the June of 2016 to mid-November 2016 time frame." Pet. PRO at 21-22. For that reason, only the charge in Count II of the Administrative Complaint is addressed.

FINDINGS OF FACT

1. The Respondent holds Florida limited surety (bail bond) agent license P166880. She has held the license since 2009 and has not been disciplined for any violations before this case.

2. The Respondent entered into a contract with Braswell Surety Services, Inc. (Braswell Surety), the Florida managing general agent for Lexington on March 9, 2011, and wrote bail bonds for Lexington through mid-November 2016. The Respondent was the owner and primary bail bond agent for 1st Premier Bail Bonds (1st Premier), and conducted her business with Braswell Surety and Lexington through 1st Premier.

3. Under the Respondent's contract with Braswell Surety and Lexington, premiums for the Lexington bail bonds written by the Respondent were to be turned over to Lexington promptly.

4. The Respondent also was obligated to submit a monthly execution report to Braswell Surety. The execution reports were supposed to detail all bonds executed by the Respondent's company since the last report and include a remittance equal to 20 percent of the total amount of premium written since the last report.

5. The Respondent also was obligated to submit a monthly discharge report to Braswell Surety. The discharge reports were supposed to list all bonds executed by the Respondent's company that had been discharged by the court since the previous discharge report, along with appropriate documentation evidencing the discharges.

6. The Respondent also was obligated to remit to Braswell Surety, monthly, 10 percent of the total amount of premiums written since the last execution report. This amount was to be held or invested and maintained by Braswell Surety as the Respondent's "build-up funds" (BUF) account. The purpose of the BUF account was to hold Lexington and Braswell Surety harmless from any loss, cost or expenses or for the payment of losses resulting from bail bonds written by the Respondent's company. Braswell Surety and Lexington could use money from the BUF account for those purposes at their discretion and could require money used for that purpose to be replaced by the Respondent's

company if Braswell Surety and Lexington deemed the account to be inadequate to provide full protection to them.

7. In November 2016, it came to Braswell Surety's attention that the Respondent's company cashed a $9,690 check made out to 1st Premier by the court clerk in reimbursement for a forfeiture that had been remitted. The Respondent testified that the check was cashed before it was noticed that it should not have been made out to the Respondent's company. Braswell Surety demanded that the Respondent's company give Braswell Surety or Lexington a check in that amount, which was done.

8. In November 2016, it also came to Braswell Surety's attention that the Respondent's company had several other forfeitures paid by Lexington. Braswell Surety sent the Respondent a list of them. The Respondent investigated and determined that many had been set aside and others were expected to be set aside. One still outstanding was in the amount of $35,000. In a letter dated November 9, 2016, the Respondent promised to resolve all issues involving forfeitures by the end of 2017. In her letter, the Respondent complained: "Cutting me off isn't helping anyone. I'm trying to have you and Lexington all caught up by the end of 2017. I'm working hard to make this right. It's all about money. I can't pay if I can't make money. Please reply and let me know how we can resolve our differences

without taking this to a level that can't resolve anything for anybody."

9. In November 2016, it also came to Braswell Surety's attention that the Respondent was not reporting on its inventory of Lexington powers of attorney (powers) sent to the Respondent's company at the end of 2014 for use in 2015 and at the end of 2015 for use in 2016. (Powers are essentially blank bond forms that can be used for one year.) Only one 2015 power was reported by the Respondent's company as having been used. None of the other powers for 2015 and 2016 were reported by the Respondent's company. Braswell Surety and Lexington had information from other sources about a few powers that were used in 2015 and 2016, but it was unknown in late 2016 whether any of the numerous other unreported powers were used or not, or if premiums were owed.

10. By the end of November, Braswell Surety and Lexington decided not to provide the Respondent with powers for 2017. Braswell Surety also reported to the Petitioner that the Respondent owed premiums and forfeitures, and the Petitioner initiated an investigation.

11. On January 9, 2017, Braswell Surety sent the Respondent a letter with an inventory report on the information Braswell Surety and Lexington had about the Respondent's 2015 and 2016 powers. The letter acknowledged that the Respondent had no 2017 Lexington powers and was not authorized to write any more

Lexington bonds. However, the letter stated, the Respondent's appointment was not terminated, and the Respondent was expected to report all bonds in her inventory and pay all premiums owed to Lexington.

12. During January 2017, the Respondent and Braswell Surety determined that the Respondent owed $14,906 in premiums. There was no evidence as to when any of the premiums owed became due and payable.

13. The evidence was clear and convincing that all or almost all of the $14,906 was due and payable between June and November 2016, even if they might have first become due and payable before June 2016. However, the Petitioner declined to argue that this evidence proved the charges in Count I of the Amended Administrative Complaint. To the contrary, the Petitioner conceded in its PRO that those charges were not proven.

14. An attorney for Lexington wrote the Respondent a letter on January 18, 2017, claiming that the Respondent still owed Lexington for forfeitures. The evidence did not prove whether forfeitures were still owed at that time.

15. At some point in time, the Respondent agreed to work for Shamrock Bail Bonds (Shamrock). Shamrock was owned by a bail bondsman named Brendan O'Neal, who was its main agent. The Respondent agreed to act as a sub-agent for Shamrock. Under this

arrangement, between the Respondent and Mr. O'Neal, Mr. O'Neal was primarily responsible for any bail bonds written by the Respondent for Shamrock.

16. In order to write bail bonds for Shamrock as a sub-agent, the Respondent had to be appointed as a limited surety agent. On January 20, 2017, the Respondent filled out Form DFS-H2-1544 to be appointed by Palmetto Surety Corporation. The form is mandated and controlled by the Petitioner and is adopted by rule. See § 648.382(1), (2), Fla. Stat. (2016)[1/]; Fla. Admin. Code R. 69B-221.155(3) (2016).[2/] In signing the form, the Respondent swore under oath that she owed no premiums to any insurer. This was untrue, as she did not pay Lexington the $14,906 she owed in premiums until February 20, 2017. The signed form was filed with the Petitioner, as required by statute. See § 648.382(1), (2), Fla. Stat.

17. The Respondent claims not to have known that she was swearing falsely when she signed the Form DFS-H2-1544 because she did not read the form carefully and did not think a sub-agent would be required to swear to owing no premium to any insurer. She claims she would have waited to sign the form until after paying the premium she owed to Lexington if she knew what the form said. However, the evidence was clear that Braswell Surety attempted to motivate the Respondent to pay the premiums owed to Lexington by warning that she could not write bonds for any other

insurer until the debt to Lexington was paid. The Respondent also admitted that she knew this from the time she learned it in "bond school" prior to licensure as a bail bondsman and knew it from experience ever since. Her testimony that her status as a sub-agent of Mr. O'Neal confused her is not credible. The evidence, taken as a whole, was clear and convincing that the Respondent intended to misrepresent when she signed the form. Her misrepresentation was relied on by Palmetto Surety and Shamrock.

CONCLUSIONS OF LAW

18. Because the Petitioner seeks to impose license discipline, it has the burden to prove the allegations by clear and convincing evidence. See Dep't of Banking & Fin. v. Osborne Stern & Co., Inc., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). This "entails both a qualitative and quantitative standard. The evidence must be credible; the memories of the witnesses must be clear and without confusion; and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy." In re Davey, 645 So. 2d 398, 404 (Fla. 1994). See also Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983). "Although this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that

is ambiguous." Westinghouse Elec. Corp. v. Shuler Bros., Inc., 590 So. 2d 986, 988 (Fla. 1st DCA 1991).

19. Disciplinary statutes and rules "must be construed strictly, in favor of the one against whom the penalty would be imposed." Munch v. Dep't of Prof'l Reg., Div. of Real Estate, 592 So. 2d 1136, 1143 (Fla. 1st DCA 1992); see Camejo v. Dep't of Bus.& Prof'l Reg., 812 So. 2d 583, 583-84 (Fla. 3d DCA 2002); McClung v. Crim. Just. Stds. & Training Comm'n, 458 So. 2d 887, 888 (Fla. 5th DCA 1984)("[W]here a statute provides for revocation of a license the grounds must be strictly construed because the statute is penal in nature. No conduct is to be regarded as included within a penal statute that is not reasonably proscribed by it; if there are any ambiguities included, they must be construed in favor of the licensee." (citing State v. Pattishall, 126 So. 147 (Fla. 1930)).

20. The grounds proven in support of the Petitioner's assertion that the Respondent's license should be disciplined must be those specifically alleged in the Amended Administrative Complaint. See e.g., Trevisani v. Dep't of Health, 908 So. 2d 1108 (Fla. 1st DCA 2005); Cottrill v. Dep't of Ins., 685 So. 2d 1371 (Fla. 1st DCA 1996); Kinney v. Dep't of State, 501 So. 2d 129 (Fla. 5th DCA 1987); Hunter v. Dep't of Prof'l Reg., 458 So. 2d 842 (Fla. 2d DCA 1984). Due process prohibits the Petitioner from taking disciplinary action against a licensee

based on matters not specifically alleged in the charging instruments, unless those matters have been tried by consent. See Shore Vill. Prop. Owners' Ass'n, Inc. v. Dep't of Envtl. Prot., 824 So. 2d 208, 210 (Fla. 4th DCA 2002); Delk v. Dep't of Prof'l Reg., 595 So. 2d 966, 967 (Fla. 5th DCA 1992).

21. The Petitioner conceded in its PRO that the specific allegations in Count I of the Amended Administrative Complaint were not proven by clear and convincing evidence.

22. Count II charges several violations of section 648.45(2) based on the allegation that the Respondent swore falsely that she owed no premium to any insurer on the Form DFS-H2-1544 she filled out to be appointed by Palmetto Surety as a limited surety agent. Specifically, Count II charges violations of the following listed paragraphs of subsection (2) of the statute because the Respondent: (b) "[h]as made a material misstatement, misrepresentation, or fraud in obtaining a license or appointment"; (e) "[h]as demonstrated lack of fitness or trustworthiness to engage in the bail bond business"; (o)1. "[h]as signed and filed a report or record in the capacity of an agent which the licensee knows to be false or misleading"; and (p) "[h]as demonstrated a course of conduct or practices which indicate that the licensee is incompetent, negligent, or dishonest or that property or rights of clients cannot safely be entrusted to him or her."

23. The Respondent contends that the Petitioner failed to prove the element of intent in the violations charged in Count II. The post-hearing submittals by the parties argue about the nature of the intent element under the various charged paragraphs of section 648.45(2). It suffices to say that the intent element for each violation was proven by clear and convincing evidence, even if the strictest formulation proposed by the Respondent applied.

24. Because only Count II was proven, the appropriate penalty, before adjusting for any aggravating or mitigating factors, is the highest single penalty for the proven violations. See Fla. Admin. Code R. 69B-241.040. The highest single penalty for the proven violations is the penalty for the violation of section 648.45(2)(b), which is revocation. See Fla. Admin. Code R. 69B-241.090(3)(b); compare Fla. Admin. Code R. 69B-241.090(6), (16).

25. The Petitioner can increase or decrease the penalty based on aggravating or mitigating factors. See Fla. Admin. Code R. 69B-241.160. The Petitioner's post-hearing submittals propose that these factors warrant an adjustment of the calculated penalty; the imposition of a suspension, rather than revocation; and a 25 percent reduction of the two-year maximum suspension allowed under section 648.49(1)—i.e., an 18-month suspension. The Respondent's PRO does not address the rules on calculating

the penalty. It simply proposes no penalty and just a caution based on the Respondent's supposedly credible testimony. While the Respondent's proposal is rejected, the Petitioner's proposal does not adjust properly for the aggravating and mitigating factors.

26. The Respondent was personally (and not just vicariously) responsible for filling out and signing the Form DFS-H2-1544 to be appointed by Palmetto Surety as a limited surety agent. Fla. Admin. Code R. 69B-241.160(2)(i). Her conduct was willful. Fla. Admin. Code R. 69B-241.160(2)(a). She was motivated by the prospect of some potential financial gain from writing bonds for Palmetto Surety a little sooner than she would have if she had waited until she paid the premiums owed to Lexington. Fla. Admin. Code R. 69B-241.160(2)(f), (g), (h). Nobody suffered actual injury or financial loss, and the potential for injury was minimal. Fla. Admin. Code R. 69B-241.160(2)(b), (c). There was no victim, and restitution was not an issue. Fla. Admin. Code R. 69B-241.160(2)(e). Although not victims, the other parties involved were sophisticated insurers who were able to protect themselves well, not vulnerable due to age or capacity. Fla. Admin. Code R. 69B-241.160(2)(d), (e). There were "secondary violations" in Count II, but that just means the same conduct violated more than one statute. Fla. Admin. Code R. 69B-241.160(2)(k). There were no previous

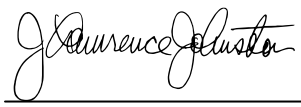
disciplinary orders or prior warnings. Fla. Admin. Code R. 69B-241.160(2)(l). There was no evidence as to any related criminal charges. Fla. Admin. Code R. 69B-241.160(2)(j).

27. A more appropriate balancing of the aggravating and mitigating factors supports a one-year suspension.

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 dismissing Count I of the Amended Administrative Complaint, finding the Respondent guilty under Count II, and suspending her licenses and appointments for one year.

DONE AND ENTERED this 3rd day of August, 2018, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of August, 2018.

ENDNOTES

[1/] Unless otherwise indicated, the cited Florida Statutes refer to the 2016 codification, which contains the statutes that were in effect in late 2016 and early 2017, when the alleged violations occurred.

[2/] All rule citations are to the rules that were in effect in late 2016 and early 2017, when the alleged violations occurred.

COPIES FURNISHED:

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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.