

**FILED**

AUG 5 2020

Docketed by JAS



CHIEF FINANCIAL OFFICER  
JIMMY PATRONIS  
STATE OF FLORIDA

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DIVISION OF  
ADMINISTRATIVE HEARINGS

FILED

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

DOAH CASE NO.: 18-2737PL  
DFS CASE NOS.: 214676-17-AG

Petitioner,

v.

GARY NELSON SAVAGE,

Respondent.

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FINAL ORDER

THIS CAUSE came on for consideration of and for final agency action on a Recommended Order. Respondent timely filed exceptions to the Recommended Order. Petitioner did not file exceptions but did file a response to Respondent's exceptions.

RULING ON RESPONDENT'S EXCEPTIONS

Exceptions to a recommended order are authorized by section 120.57(1)(k), Florida Statutes (2018),<sup>1</sup> and Rule 28-106.217, *Florida Administrative Code*.

The final order shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record.

§ 120.57(1)(k), Fla. Stat.

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<sup>1</sup> Unless otherwise indicated, all citations are to the 2018 version of the Florida Statutes.

Respondent's Exception No. 1: Untimely Notice of Administrative Action

Respondent's first exception asserts that the record does not include competent, substantial evidence to support the determination by the Administrative Law Judge ("ALJ") that Respondent failed to timely notify the Department of final regulatory action taken against him by the Financial Industry Regulatory Authority, Inc. ("FINRA"). Specifically, the ALJ found that Respondent violated section 626.536, Florida Statutes, by failing to notify the Department of a Letter of Acceptance, Waiver and Consent ("AWC") within 30 days of its acceptance by FINRA. (Recommended Order ¶¶ 70, 100).

In *Prysi v. Department of Health*, 823 So. 2d 823, 825 (Fla. 1st DCA 2002), the court stated:

Factual inferences are to be drawn by the hearing officer as trier of fact . . . . An agency is not authorized to weigh evidence, judge credibility, or otherwise interpret the evidence . . . . An ALJ's findings cannot be rejected unless there is no competent, substantial evidence from which the findings could reasonably be inferred.

(citations and internal quotation marks omitted).

FINRA accepted the AWC on June 13, 2018. (P. Ex. 102). The record contains a letter from Respondent to the Department dated November 20, 2018, which begins with the statement, "[t]his is to notify you of an action before FINRA involving me as a party." (R. Ex. 50). The letter goes on to describe the disciplinary action that culminated in the AWC. *Id.* Competent, substantial evidence supports the ALJ's conclusion that Respondent first reported the FINRA action to the Department more than 30 days after its finality. Therefore, Respondent's first exception is rejected.

Respondent's Exception No. 2: Lack of Notice of Administrative Action

In his second exception, Respondent starts by repeating his argument in the first exception that no competent, substantial evidence supports the ALJ's determination that Respondent failed to timely notify the Department of the accepted AWC. This portion of the second exception is rejected for the reasons set forth above.

Respondent further argues that the ALJ's determination is erroneous because it concluded that Respondent failed to submit the AWC to the Department and the law allows for the submission of other relevant legal documents in place of the AWC. Respondent does not identify other documentation supplied by Respondent to satisfy his obligation to notify the Department of final FINRA action. Instead, Respondent argues that the record's silence on other documentation precludes the determination that he violated section 626.536, Florida Statutes.

While paragraph 100 of the Recommended Order refers to Respondent having "failed to timely submit a copy of the AWC within 30 days of its issuance," paragraph 110 is broader, stating that Respondent "fail[ed] to notify the Department within 30 days of the AWC." Similarly, paragraph 111 of the Recommended Order refers to "the lack of notice to the Department of the AWC." Thus, the ALJ found that Respondent failed to provide timely notice to the Department in any form, not merely that Respondent failed to provide a copy of the AWC. The ALJ's factual determination is supported by competent, substantial evidence. Therefore, Respondent's second exception is rejected.

Respondent's Exception No. 3: Finding of Willfulness

Respondent's third exception argues that no substantial evidence supports the finding in the Recommended Order that Respondent's failure to notify the Department of

the FINRA action was willful. Willfulness is a question of fact. *McGann v. Fla. Elec. Comm'n*, 803 So. 2d 763, 764 (Fla. 1st DCA 2001).

As explained in the Recommended Order, the ALJ found that Respondent's omission was willful because Respondent's stated reason for failing to provide timely notice of the FINRA action—that he did not believe that the action was final until the conclusion of his appeal of the arbitration award—had no merit. The ALJ found that “the appeal of the arbitration award had no impact on the other violations found and suspensions imposed in the AWC.” (Recommended Order ¶ 110). Because competent, substantial evidence supports the ALJ's finding of willfulness, Respondent's third exception is rejected.

#### Respondent's Exception No. 4: Enhanced Penalty

In his fourth exception, Respondent objects to the ALJ's recommendation that the penalty imposed be increased from a six-month suspension to a 12-month suspension. In objecting to the enhanced penalty, Respondent relies in part upon his first three exceptions, which have been rejected. Respondent further argues that his age and the effort he has had to expend in defending against certain claims for which no violation was found warrant decreasing the penalty.

The ALJ's penalty recommendation is based on the aggravating findings of willfulness and the degree of financial loss to Respondent's elderly clients and is within the range of permissible penalties. (Recommended Order ¶ 109). Accordingly, Respondent's fourth exception is rejected.

Respondent's Exception No. 5: Penalty Recommendation

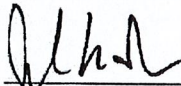
Respondent's fifth exception again takes issue with the ALJ's recommended penalty and is based on the arguments set forth in his first four exceptions, all of which are rejected. Because the penalty recommendation is within the scope of the guidelines established by the Department and is consistent with the purpose set forth in section 626.207(8), Florida Statutes (2018), Respondent's fifth exception is rejected.

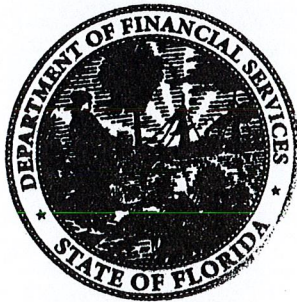
Adoption of Recommended Order

After reviewing the record, including all testimony and admitted exhibits, considering applicable law, and otherwise being fully apprised in all material premises, the Recommended Order is adopted.

Accordingly, Respondent's license is suspended for a period of 12 months.

DONE and ORDERED this 5 day of August, 2020.

 John MacIver for  
Peter Penrod  
Chief of Staff



NOTICE OF RIGHT TO APPEAL

A party adversely affected by this Final Order may seek judicial review as provided in section 120.68, Florida Statutes, and Florida Rule of Appellate Procedure 9.190. Judicial review is initiated by filing a notice of appeal with the Agency Clerk, and a copy of the notice of appeal, accompanied by the filing fee, with the appropriate district court of appeal. The notice of appeal must conform to the requirements of Florida Rule of Appellate Procedure 9.110(d), and must be filed (i.e., received by the Agency Clerk) within thirty days of rendition of this Final Order.

Filing with the Department's Agency Clerk may be accomplished via U.S. Mail, express overnight delivery, hand delivery, facsimile transmission, or electronic mail. The address for overnight delivery or hand delivery is Julie Jones, DFS Agency Clerk, Department of Financial Services, 612 Larson Building, 200 East Gaines Street, Tallahassee, Florida 32399-0390. The facsimile number is (850) 488-0697. The email address is Julie.Jones@myfloridacfo.com.

Copies furnished to:

Andrew D. Manko  
Administrative Law Judge  
Division of Administrative Hearings  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060

Michael Buchholtz, Esq.  
The Law Office of Michael Buchholtz  
Post Office Box 13015  
St. Petersburg, Florida 33777  
michael@buchholtzlaw.com

David Busch  
Senior Attorney  
Department of Financial Services  
200 East Gaines Street  
Tallahassee, Florida 32399-0333  
David.Busch@myfloridacfo.com