STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF AGRICULTURE AND
CONSUMER SERVICES,

Petitioner,

Case No. 19-5832

vs.

VLADIMIR MAGLOIRE, D/B/A ADRENALINE
FITNESS STUDIO,

Respondent.
_____/

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham, Division of Administrative Hearings ("DOAH"), for final hearing by video teleconference on January 8, 2020, at sites in Tallahassee and Lauderdale Lakes, Florida.

APPEARANCES

For Petitioner: Genevieve Hall, Esquire
Amanda B. McKibben, Esquire
Department of Agriculture and
Consumer Services
407 Calhoun Street, Suite 520
Tallahassee, Florida 32399-0800

For Respondent: Vladimir Magloire, pro se
Adrenaline Fitness Studio
10370 Northwest 40th Place
Coral Springs, Florida 33065

STATEMENT OF THE ISSUES

The issues in this case are whether, as Petitioner has charged, Respondent offered for sale training in a program of physical exercise, or the right or privilege to use equipment in furtherance of a program of physical exercise, at an unregistered business location, in violation of section 501.015(1), Florida Statutes; and, if so, whether a penalty should be imposed.

PRELIMINARY STATEMENT

On September 12, 2019, Petitioner Department of Agriculture and Consumer Services ("Department") issued an Administrative Complaint against Respondent Vladimir Magloire ("Magloire"), charging him with offering health studio services at an unregistered business location, in violation of section 501.015(1). Magloire timely requested a formal hearing to determine his substantial interests. The Department referred the matter to DOAH on November 1, 2019, and the undersigned scheduled the final hearing for January 8, 2020.

The hearing took place as scheduled, with both parties present. The Department called one witness, an investigator named Amanda Hazlett. Petitioner's Exhibits A, B, C, D, E, and F were received in evidence. Magloire testified on his own behalf and offered no exhibits.

The final hearing was recorded but not transcribed. The Department timely filed a Proposed Recommended Order ahead of the deadline, which was February 3, 2020. Magloire did not submit a proposed order.

Unless otherwise indicated, citations to the official statute law of the State of Florida refer to Florida Statutes 2019.

FINDINGS OF FACT

1. The Department is the state agency responsible, among other things, for administering the laws regulating health studios. For purposes of circumscribing the Department's jurisdiction, the term *health studio* "means any person who is engaged in the sale of services for instruction, training, or assistance in a program of physical exercise or in the sale of services for the right or privilege to use equipment or facilities in furtherance of a program of physical exercise." § 501.0125(1), Fla. Stat.

2. Magloire is a person who meets the definition of a "health studio" subject to the Department's regulatory jurisdiction.

3. During the period from, roughly, December 2018 until December 2019, Magloire operated a gym under the name "Adrenaline Fitness," which was located at 3700 Northwest 124th Avenue, Coral Springs, Florida (the "Gym"). There is no dispute that Magloire allowed persons to use equipment or facilities at the Gym for the purpose of physical exercise. It is also undisputed that Magloire never registered the Gym with the Department, which would have been required if the Gym were a "business location." *See* § 501.015, Fla. Stat.

4. A health studio constitutes a "business location" if "studio services" are performed onsite. The term *studio services* "means privileges or rights offered for sale or provided by a health studio." § 501.0125(2), Fla. Stat.

5. Magloire maintains that the Gym was a "private facility" where services were not "offered for sale" to the public, but rather were made available as a convenience to his personal friends and acquaintances. The relevant distinction here, however, is not between *private* and *public* facilities, per se, but between *commercial* and *noncommercial* gyms. A homeowner who installs exercise equipment in his garage for personal use and invites a few friends over for a workout once in a while does not thereby turn his home into a "business location." Magloire's Gym did not involve this kind of obviously personal, noncommercial use.

6. Magloire testified that many of the persons who worked out at the Gym did not pay him with money for the privilege, although a few did, occasionally, tender cash; the undersigned accepts this as true. Magloire admitted, however, that he received other valuable consideration from guests, such as services, in exchange for his letting them use the Gym's equipment and facilities.

7. The undersigned determines as a matter of ultimate fact, based on clear and convincing evidence, that the Gym constituted a "business location" where "studio services" were "offered for sale." Magloire, therefore, was required to register the Gym with the Department pursuant to section 501.015(1), which he failed to do, in violation of the law.

CONCLUSIONS OF LAW

8. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes.

9. The Department charged Magloire, in his capacity as a health studio, with the operation of an unregistered business location, in violation of section 501.015(1).

10. Section 501.015(1) provides that each health studio shall "[r]egister each of its business locations with the [D]epartment in a form and manner as required by the [D]epartment."

11. A proceeding to impose discipline, such as this one, is penal in nature. *State ex rel. Vining v. Fla. Real Estate Comm'n*, 281 So. 2d 487, 491 (Fla. 1973). Accordingly, the Department must prove the charges against Magloire by clear and convincing evidence. *Dep't of Banking & Fin., Div. of Sec. & Investor Prot. v. Osborne Stern & Co.*, 670 So. 2d 932, 933-34 (Fla. 1996) (citing *Ferris v. Turlington*, 510 So. 2d 292, 294-95 (Fla. 1987)); *Nair v. Dep't of Bus. & Prof'l Reg., Bd. of Med.*, 654 So. 2d 205, 207 (Fla. 1st DCA 1995).

12. Regarding the standard of proof, in *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983), the court developed a "workable definition of clear and convincing evidence" and found that of necessity such a definition would need to contain "both qualitative and quantitative standards." The court held that:

> [C]lear 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 explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such 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.

Id. The Florida Supreme Court later adopted the *Slomowitz* court's description of clear and convincing evidence. *See In re Davey*, 645 So. 2d 398, 404 (Fla. 1994). The First District Court of Appeal also has followed the *Slomowitz* test, adding the interpretive comment that "[a]lthough 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), *rev. denied*, 599 So. 2d 1279 (Fla. 1992) (citation omitted).

13. As reflected in the findings above, the Department carried its burden of proving, by clear and convincing evidence, that Magloire failed to register a business location, and thus that he is guilty, as charged, of violating section 501.015(1).

14. Section 501.019(4)(a)1. authorizes the Department to "enter an order imposing one or more of the penalties set forth in [section 501.019(4)(b)] if the [D]epartment finds that a health studio" has "[v]iolated or is operating in violation of any of the provisions of" part I of chapter 501. Section 501.019(4)(b)2. provides that "[f]or a violation of s. 501.015 or s. 501.016,

[the Department may enter an order] imposing an administrative fine in the Class II category pursuant to s. 570.971 for each violation."

15. For a violation in the Class II category, "a fine not to exceed $5,000 may be imposed." § 570.971(1)(b), Fla. Stat.

16. Under the Department's penalty guidelines, the failure to comply with section 501.015(1) is classified as a "major violation." Fla. Admin. Code R. 5J-4.015(8)(c). "Major violations shall result in the imposition of an administrative fine of $1,000 to $5,000, denial, suspension, or revocation of the license." *Id.*

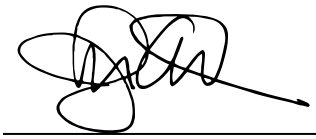
17. The Department intends to impose a fine of $1,000, if Magloire is found guilty. Because this sum is the *minimum* monetary penalty that will be imposed for a major violation, and because the imposition of a fine is the *least restrictive* sanction available within the range of penalties that will be imposed for a major violation, it is unnecessary to consider aggravating factors, which afford grounds for increasing a penalty.

18. The mitigating factors, which might justify a reduction in the penalty, are specified in Florida Administrative Code Rule 5J-4.015(5)(b). Of these, only one is present: "The violator has a low risk of, or did not result in, harm to the public health, safety, or welfare." Consideration of this factor warrants the imposition of a fine at the bottom of the range, i.e., $1,000, which is what the Department has urged.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Agriculture and Consumer Services enter a final order imposing a fine of $1,000 against Magloire for providing studio services at an unregistered business location in violation of section 501.015(1), Florida Statutes.

DONE AND ENTERED this 24th day of February, 2020, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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this 24th day of February, 2020.

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.