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FLORIDA
DEPARTMENT OF
FINANCIAL SERVICES

FILED

TOM GALLAGHER
CHIEF FINANCIAL OFFICER
STATE OF FLORIDA

JUN 3 2005

Docketed by: GMH

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AT

IN THE MATTER OF:

BRADLEY W. BESHORE

Case No. 70073-03-AG

04-718 PL
WFQ
Closed

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FINAL ORDER

This cause came on for consideration of and final agency action on a Recommended Order entered on March 10, 2005, after a formal administrative hearing conducted by Administrative Law Judge William F. Quattlebaum. The Recommended Order concluded that the Department had carried its burden of proving its allegations against Respondent Beshore, and that Petitioner Department of Financial Services should enter a final order suspending Respondent Beshore's insurance licensure for period of 78 months. Respondent Beshore (Beshore) filed Exceptions to that Recommended Order on April 1, 2005, and the Petitioner Department of Financial Services (the Department) filed its Response to the Exceptions on April 14, 2005. The Second Amended Administrative Complaint, the Recommended Order, the transcript of proceedings, the exhibits admitted into evidence, all post-hearing filings by the parties, and applicable law have all been considered during the promulgation of this Final Order.

RULINGS ON BESHORE'S EXCEPTIONS

Beshore's First Exception urges that the ALJ erred in concluding that Section 626.901 (1), Fla. Stat. is not a strict liability statute. (Paragraph 137 of the Recommended Order) For the very reasons set forth in that Paragraph 137, this

Exception should be rejected. Moreover, the Exception would require adding into Section 626.901(1), Fla. Stat., words of which the legislature was well aware as exemplified by their usage in Section 626.901(2), Fla. Stat. It is a standard tenet of statutory construction that when the legislature uses a word or a term in one section of a statute but omits it in another section of the same statute, the courts will not imply that term where it has been excluded. Leisure Resorts, Inc., v. Frank J. Rooney, Inc., 654 So.2d 911 (Fla. 1995), on remand, 666 So.2d 1053, on remand, 683 So.2d 509. Here, Section 626.901(1), Fla. Stat., is not ambiguous, and the evident strict liability intent of the legislature is not to be disturbed by the implication of a term obviously known to, but specifically omitted from that section of the statute by, the legislature. Beshore's First Exception is rejected.

Beshore's Second Exception is directed to the Conclusions of Law set forth in Paragraph 117 of the Recommended Order. Beshore contends that it was legal error for the ALJ to conclude that Beshore had failed to carry the burden of proving his ERISA defense, because in penal proceedings the burden of proof lies with the regulator and that said burden cannot be shifted to the licensee.

While it is ultimately the burden of the regulator to prove its allegations against the licensee, once the regulator has presented prima facie evidence [that is evidence sufficient to establish a fact until and unless rebutted, Miami-Dade County v. Reyes, 772 So.2d 24, (Fla. 3rd DCA 2000)], the burden then shifts to the licensee to rebut or prove any defense to that prima facie evidence. Fla. Jur. 2d "Evidence and Witnesses", Section 82; Public Health Trust of Dade County, Florida v. Holmes, 646 So.2d 266 (Fla. 3rd DCA 1994). Contrapuntally, the regulator is then burdened with disproving that

rebuttal or defense so that the burden of proof thus passes from party to party as the case progresses. Florida Dept. of Transp. v. J.W.C. Co., Inc., 396 So.2d 778, 787 (Fla. 1st DCA 1981). It is established that the assertion of the ERISA preemption doctrine in matters of this sort is a defense. Department of Financial Services v. Clifford Eugene Kiefer, DOAH case No. 03-2041PL, Recommended Order entered April 2, 2004, Final Order issued April 28, 2004.

Upon the Department's presentation of prima facie evidence of its allegations, it was Beshore's burden to go forward with proof of his ERISA preemption defense. Beshore's Second Exception does not contend that the Department failed to present prima facie evidence of its material allegations. Rather, Beshore contends error on the basis that the Department did not either prove or disprove the ERISA preemption defense that Beshore, himself, did not prove. After the Department presented its prima facie evidence, the burden was upon Beshore, not the Department, to prove his alleged ERISA preemption defense Public Health Trust of Dade County, Florida v. Holmes, 646 So.2d 266 (Fla. 3rd DCA 1994). This he did not do, and there was no burden upon the Department to either prove or disprove that alleged defense. In view of the applicable case law, Beshore's Second Exception is clearly is without merit, and is accordingly rejected.

Beshore's Third Exception contends that the error he urges in his Second Exception carries through to the Conclusions of Law set forth in Paragraphs 118 through and including 125 of the Recommended Order. For the reasons applicable to the Second Exception, Beshore's Third Exception is likewise rejected.

Beshore's Fourth Exception expressly concedes that Findings of Fact 28, 48, and 59 support the Conclusions of Law he challenges in Paragraph 115, 120, and 123 of the Recommended Order. Those paragraphs contain conclusions that MBI was acting as an insurer. Beshore draws the Department's attention to what he views as contrary witness testimony in that regard, and invites the Department to re-weigh the fact evidence on that question so as to justify altering the challenged Conclusions of Law to conclude that MBI was not acting as an insurer.

The ALJ's Findings of Fact in those paragraphs are based on MBI's own written statements about its responsibilities for claims payments. The "facts" Beshore favors and wants accepted on that topic are based on the testimony of third parties about their differing "understandings" of those written statements. Beshore's exception overlooks that it is the very essence of an ALJ's function to weigh conflicting evidence and accord more or less weight to the conflicting portions of that evidence. Beshore's invitation to the Department to re-weigh the fact evidence to provide a predicate for the alteration of a dependent conclusion of law is patently inappropriate. An ALJ's findings of fact and dependent conclusions of law cannot be substituted unless there is no competent substantial evidence to support the findings of fact. Section 120.569(1)(l), Fla. Stat.; Berger v. Department of Professional Regulation, Bd. of Dentistry, 653 So.2d 479 (Fla. 3rd DCA 1995); Department of Business and Professional Regulation v. McCarthy, 638 So.2d 574 (Fla. 1st DCA 1994); Schumacher v. Department of Professional Regulation, 611 So.2d 75 (Fla. 4th DCA 1992); S.A. v. Department of Children and Family Services, 728 So.2d 1228 (Fla. 3rd DCA 1999); Holmes v. Turlington, 480 So.2d 150 (Fla. 1st DCA 1985). Moreover, it cannot be fairly said that rejecting the ALJ's conclusions of law

based on MBI's own written statements about its claims responsibilities and replacing them with conclusions of law based the "understandings" of third party witnesses on that subject is "as or more reasonable" than accepting the ALJ's conclusion. Section 120.57(1)(l), Fla. Stat.

Beshore's Fourth Exception also contends that the Recommended Order does not show that the ALJ considered contrary evidence relative to the question of whether MBI was acting as an insurer by, inter alia, agreeing to assume responsibility for the payment of claims. The "contrary" evidence in question is the testimony of third party witnesses regarding their expectations as to whether MBI, itself, would pay claims from its own funds or whether it would assume responsibility for securing stop-loss coverage to pay those claims. Beshore's exception in this regard overlooks the temporal distinction between what MBI and Beshore were telling potential insureds about stop-loss insurance at the time of sale, and what actual insureds later thought about the presence of stop-loss insurance based on later writings by MBI. Initially, MBI plainly stated that it had procured stop-loss coverage to pay claims in excess of employer contributions. Later, when it came to the fore that MBI had failed to procure that stop-loss insurance, MBI wrote to the employers in its plan stating that MBI was responsible for the payment of claims in excess of employer contributions. Those writings did not mention stop-loss insurance. By plainly stating that it, not a stop-loss insurer, would be responsible for claims payments, MBI stated that it, not a stop-loss insurer, was assuming the risk of paying those claims. The assumption of risk is an element of an insurance contract. Professional Lens Plan, Inc. v. Department of Ins., 387 So.2d 548 (Fla.1st DCA 1980) By stating that it, not a stop-loss insurer, would assume the risk of

claims payments MBI held itself out as, and thereby acted as, an insurer as a matter of law. The subjective understandings of those insureds who received those later writings from MBI (and who may have thought that MBI was merely and generally re-affirming its responsibility to provide stop-loss coverage) are immaterial to the question of whether MBI, by virtue of the facts described in its own written statements, was then acting as an insurer as a matter of law. Evidence that is immaterial to a question need not be considered in the determination of that question. Accordingly, this Fourth Exception is rejected.

Beshore's Fifth Exception is primarily directed to the Conclusion of Law announced in Paragraph 119 of the Recommend Order, wherein the ALJ concluded that the evidence did not establish that the MBI plan qualified as an ERISA plan. Beshore contends that in reaching that conclusion the ALJ failed to consider that the U.S. Department of Labor had "exerted jurisdiction" over MBI by investigating MBI, and that the ALJ applied the wrong test in concluding that the MBI plan was not an ERISA plan.

Neither Beshore's exception nor the record shows the basis for that investigation or the results thereof, and Beshore produced no evidence that any federal agency had certified that the MBI plan qualified as an ERISA plan. The mere existence of such an investigation is not evidence that the MBI plan qualified as an ERISA plan. As pointed out by the ALJ in Paragraphs 119 through and including 125, whether an employer's health benefits plan qualifies as an ERISA plan is decided on facts other than the presence of a mere investigation by federal authorities. The investigation relied on by Beshore is therefore immaterial to that question, and an ALJ is not required to consider evidence that is immaterial to the question at hand.

Moreover, this exception overlooks the facts found by the ALJ in Paragraphs 26, 27, 33, 34, and 36, which facts certainly support the conclusion that the MBI plan did not qualify as an ERISA plan. Beshore's instant exception does not contend that those factual findings are not supported by competent substantial evidence, and the record shows such support for those findings. Accordingly, this Fifth Exception is rejected.

Beshore's Sixth Exception is directed to Paragraph 120 of the Recommended Order. There, the ALJ noted that various employers' contributions were not deposited into separate accounts, in conformity with an ERISA plan, but were commingled within a single account. The ALJ also specifically found that to be a fact in Paragraph 26 of the Recommended Order. Beshore takes exception to the Conclusion on the hypothetical basis that MBI would not have acted improperly if it had initially deposited all employers' contributions into a single account, then deducted its fees, and then moved the remaining monies into segregated accounts. There is no competent substantial evidence in the record that shows Beshore's hypothetical to be factual, while there is competent substantial evidence showing commingled accounts rather than properly segregated accounts. (Department's Composite Exhibits 5-N, 7-N, 8-L, 9-N, 11-H, 13-L, and 13-N). It should go without saying, but exceptions cannot be accepted when they are based on hypothetical conjecture rather than record evidence. Accordingly, this Sixth Exception is rejected.

Beshore's Seventh Exception is directed to the Conclusion of Law contained in Paragraph 131 of the Recommended Order, where the ALJ concluded that Beshore violated Section 626.621(6), Fla. Stat. As best as can be understood, Beshore contends that he could not have violated Section 626.621(6), Fla. Stat., because that

statute contains an unconstitutionally vague proscription of illegal behavior, and that absent that unconstitutionally vague proscription the statute is not a stand-alone proscription of other illegal behavior but a mere incorporator of the provisions of Part IX of Chapter 626, Fla. Stat., violation of which provisions were not proved for lack of proof of the element of willfulness. Thus, Beshore's contention of the constitutional infirmity of the statutory phrase "or having otherwise shown himself or herself to be a source of injury or loss to the public" underlies this entire exception.

The court in Thomas v. Dept. of Ins. and Treasurer, 559 So.2d 419 (Fla. 2nd DCA 1990) reviewed a factual scenario where the public had been overcharged for automobile insurance coverage by the undisclosed addition of a motor club membership onto the insurance premium. In short, Thomas surreptitiously charged the insurance buying public an additional 40% to purchase the desired auto insurance by adding the undisclosed cost of the motor club onto the actual insurance premium. The court there had no trouble concluding that by overcharging for the insurance coverage in question Thomas had cost the insurance-buying public the opportunity to save 40% of the price paid for the desired coverage, and had thus proved to be a source of injury or loss to the public.

Here, the proved facts of loss to the insurance buying public is even clearer and more compelling. Because of Beshore's conduct, hundreds of thousands of dollars of supposedly covered health insurance claims either went unpaid or were paid for by individual employees or by their employers despite the fact that Beshore had led those employers and employees to believe those claims were covered by insurance. Additionally, innocent individuals' credit reputations were ruined with severe financial

consequences to those individuals. Under these facts, it cannot be said that the disjunctive statutory phrase "or having otherwise shown himself or herself to be a source of injury or loss to the public" is unconstitutionally vague; medical providers, employers, and employees all suffered tangible financial losses. And, because the statute is worded in the disjunctive, the challenged phrase does constitute an independent, stand-alone proscription of illegal behavior which Beshore's conduct clearly violated. Moreover, the stand-alone independency of the challenged statutory provision in this regard dispenses with the exception's "willfulness" argument, which is premised on a dependent relationship between the non-challenged provisions of Section 626.621(6), Fla. Stat. and Part IX of Chapter 626, Fla. Stat., and the alleged constitutional infirmity of the challenged "source of injury or loss to the public" provision of Section 626.621(6), Fla. Stat. Accordingly, this Seventh Exception is rejected.

Beshore's Eighth Exception is directed to the Conclusion of Law announced and Paragraph 128 of the Recommended Order, and contends that absent testimony regarding the minimum standards of professional conduct the ALJ could not conclude that Beshore violated Section 626.611(8), Fla. Stat., which addresses a demonstrated lack of reasonably adequate knowledge and technical competence to engage in transactions authorized by Beshore's license.

The exception inherently assumes that there was some level of professional knowledge or technical competence to be evaluated as to its minimal adequacy relative to Beshore's verification that the MBI plan was indeed ERISA qualified prior to the times he represented to others that it was so qualified and sold it to them. However, the ALJ specifically found that Beshore had **no** specific ERISA training, made **no** independent

effort to review the MBI plan, and made **no** effort to determine whether stop loss insurance was actually in place, or to determine whether client funds were being deposited into custodial accounts. (Recommend Order, Paragraphs 12, 38, Findings of Fact.) In other words, the ALJ specifically found as a matter of fact that Beshore had **no** personal knowledge of the MBI plan's ERISA qualifications, and undertook **no** effort to ascertain whether the MBI plan was ERISA qualified before he sold it as such. The record contains competent substantial evidence to support those findings of fact (Tr. Vol. V. pgs. 691-694, 701-702, 710-711, 718, 720-721, 727-728, 737-738, 745, 748-752, 765-769) Thus, the record shows no discernable level of professional knowledge or competence to be evaluated against any set minimal standard. Beshore had **no** personal knowledge about the MBI plan's ERISA qualifications and made **no attempt to acquire** any such knowledge before he sold the product. Such total failures on his part need no comparative evaluation to be found deficient under the provisions of Section 626.611(8), Fla. Stat, where at least "reasonably adequate" knowledge and technical competence are demanded, and may be subject to measurement by competing testimony. **No** knowledge and **no attempt to acquire** reasonably adequate knowledge or competence is a far cry from mere inadequacy in those regards. The ALJ did not err when he concluded that Beshore's total failures in these regards did not rise to the level of adequacy, regardless of the benchmark for that standard. Accordingly, this Eighth Exception is rejected.

Beshore's Ninth Exception is directed to the Conclusion of Law set forth in Paragraph 111 of the Recommend Order wherein the ALJ concluded that DOAH had jurisdiction to determine whether the MBI plan met the requirements for ERISA

qualification. This exception ignores the fact that it was Beshore, himself, who by raising ERISA qualification as a defense, made that determination necessary. There is nothing in the law stating that only select tribunals have the jurisdiction to make such a determination, while a federal district court opinion Beshore derides, without critical analysis, as unpublished and non-binding holds against his position. Moreover, whether a given health insurance plan is ERISA qualified a question of law over which the Department has substantive jurisdiction and in which it has a special expertise. The Department concurs with the ALJ's analysis and final conclusion that the MBI plan is not an ERISA qualified plan. Accordingly, this Ninth Exception is rejected.

Beshore's Tenth Exception takes umbrage with the Conclusion of Law set forth in the last sentence of Paragraph 120 of the Recommended Order, wherein the ALJ stated that employer contributions were not segregated into trust accounts, that claims were paid from commingled funds, that MBI did not obtain stop-loss coverage, and that MBI was responsible for claims payment. Beshore contends that the record evidence does not support those conclusions.

As pointed out earlier, Department's Composite Exhibits 5-N, 7-N, 8-L, 9-N, 11-H, 13-L, and 13-N conclusively establish the commingling of employers' contributions. The record contains no evidence that MBI ever obtained stop-loss insurance and much evidence in the form of unpaid claims that it did not, and MBI's own writings (Department's Exhibits 5-F, 7-F, 9-I) plainly stated that MBI was responsible for claims payments. The ALJ made the same statements in the Findings of Fact in Paragraphs 28, 33, 34, and 43, which Beshore does not address in this exception. The challenged

Conclusion of Law and the supporting Findings of Fact are supported by competent substantial evidence. Accordingly, this Tenth Exception is rejected.

Beshore's Eleventh Exception attacks the Conclusions of Law set forth in Paragraph 124 of the Recommended Order as being unsupported speculation by the ALJ. The ALJ does state that the evidence "suggests" that commingling continued even after clients executed trust documents and that it is "reasonable to presume" that claims monies would have had to come from pooled funds. However, an ALJ is entitled draw inferences from the evidence presented. Goss v. District School Bd. Of St. Johns County, 601 So.2d 1232 (Fla. 5th DCA 1992); Heifetz v. Department of Business Regulation, Div. Of Alcoholic Beverages and Tobacco, 475 So.2d 1277 (Fla. 1st DCA 1985). Here, those inferences are logical and consistent with the record evidence. Moreover, they do not go to the ultimate findings and conclusions, so they serve as little more than aside observations that are not outcome determinative. Accordingly, this Eleventh Exception is rejected.

Beshore's Twelfth Exception is substantially the same as his Second Exception, and is rejected for the same reasons.

Beshore's Thirteenth Exception disputes the relevancy of Paragraph 133, and urges that said Conclusion of Law contains "factual conclusions" unsupported by competent substantial evidence. In that paragraph, the ALJ stated that there was no evidence that Beshore made any attempts to verify the existence of trust accounts, no credible evidence that he made any attempts beyond telephone calls to verify the existence of the stop-loss insurance he had represented to buyers, and that Beshore made no serious effort to obtain information about the MBI plan other than what MBI

told him about the plan. In each statement, the ALJ employed important qualifiers in describing his conclusions; *no* evidence, no *credible* evidence, and no *serious* effort, displaying a reasoned weighing of the evidence before him. If there is substantial competent evidence to support those conclusions, even in the face of conflicting evidence, those conclusions cannot be substituted by the agency because they are not within the agency's substantive jurisdiction. And, if they are to be regarded as findings of fact, as Beshore seems to urge, they are supported by competent substantial evidence and therefore cannot be disturbed by the agency. Accordingly, this Thirteenth Exception is rejected.

Beshore's Fourteenth Exception contends that the maximum lawful suspension of his licenses and eligibility for licensure is limited to a maximum of 24 months, citing to Section 626.641(1), Fla. Stat. Beshore is correct. Suspensions that would otherwise exceed 24 months become revocations. Accordingly, this Fourteenth Exception is accepted and that acceptance is further addressed in the penalty to be imposed herein.

Beshore's Fifteenth Exception invites the department to re-weigh the evidence relative to the presence of mitigating or aggravating factors. The ALJ's findings and conclusions in those regards are supported by competent substantial evidence. This invitation is therefore declined and the Fifteenth Exception is rejected.

Beshore's Sixteenth Exception contends that Findings of Fact 9 & 10 are not supported by competent evidence. To the contrary, Beshore's own testimony, cited in the rejection of his Eighth Exception, shows that he merely accepted at face value whatever MBI told him orally or in writing, and that he made no effort to independently

ascertain the truth of those representations. The ALJ's use of the term "presumed" Is more than justified under those facts. Accordingly, this Sixteenth Exception is rejected.

Beshore's Seventeenth Exception extends the ALJ's Finding of Fact in Paragraph 17 past its literal content and then attacks the extension. The ALJ did not employ the word "all", inferred by Beshore, and there is competent substantial evidence to support the finding actually made; that Beshore delivered MBI documents to clients. Accordingly, this Seventeenth Exception is rejected.

Beshore's Eighteenth Exception is directed to the Finding of Fact in Paragraph 26 of the Recommended Order where the ALJ found that the record contains no evidence that custodial accounts were established by MBI, or that employer monies were deposited into those accounts. However, Beshore points to no record evidence that such accounts were established or funded, and a review of the record shows no evidence to that effect. Thus, the ALJ's finding is correct. The record does, however, contain ample evidence that rather than being deposited into segregated custodial accounts, as required to fulfill ERISA requirements, employers contributions were commingled in contravention of ERISA requirements. (Department's Composite Exhibits 5-N, 7-N, 8-L, 9-N, 11-H, 13-L, and 13-N). Moreover, as a critical component of his ERISA plan defense, it was incumbent on Beshore to present evidence tending to prove the existence and funding of such accounts. This he failed to do, and it was not the department's burden to prove the negative of that non-presented defensive element. Public Health Trust of Dade County, Florida v. Holmes, 646 So.2d 266 (Fla. 3rd DCA 1994).

This exception also contends the existence of an internal contradiction between the finding that the record contains no evidence showing that funds were deposited into custodial accounts, and the finding that there was no credible evidence as to the distribution of the "deposited funds." Beshore apparently contends that if funds were "deposited", that finding contradicts the finding that funds were not deposited into segregated custodial accounts. This contention ignores the simple fact that the latter finding is directed to funds deposited into a commingled account, not into segregated custodial accounts. There is no record evidence of segregated custodial accounts. Accordingly, this Eighteenth Exception is rejected.

Beshore's Nineteenth Exception contends that the use of the word "source" in Paragraph 28 of the Findings of Fact is not supported by competent substantial evidence. The evidence clearly supports that finding. In 2002 the question of whether stop-loss insurance would be renewed, and thus be available as a "source" of claims funds, arose. If that stop-loss insurance would no longer be available to pay claims over and above employer contributions, there would have to be an alternate "source" for that purpose. Thus, the use of the word "source" fairly describes the evidence. Accordingly, this Nineteenth Exception is rejected.

Beshore's Twentieth Exception attacks the Finding of Fact in Paragraph 29 to the effect that there were "concerns" regarding the soundness of MBI and its ability to "handle losses", contending that said finding is unsupported by competent substantial evidence. The record on this point shows that said finding was made in conjunction with the uncontested finding that in March of 2002, Beshore became aware that the stop-loss coverage MBI had supposedly (but not in actuality) obtained for its plan would not

be renewed for the forthcoming year. Consequently, Beshore began to search for alternate benefit plans in which to switch "those Meridian employers" if Meridian could not timely procure a stop-loss carrier for its plan. (Tr. Vol. V. pgs. 702-703) Under these record facts it cannot be said that the use of the words "concerns" and "handle losses" are anything other than fair descriptions of the status of the MBI plan, if not MBI, itself, at that point in time. Thus, the record supports the use of those descriptive terms. Accordingly, this Twentieth Exception is rejected.

Beshore's Twenty-first Exception relative to Paragraph 38 of the Recommended Order is substantively indistinguishable from his Eighth and Thirteenth Exceptions, and is rejected on the same grounds.

Beshore's Twenty-second Exception misstates the Finding of Facts he attacks in Paragraph 39. Beshore's exception conceptually inserts the word "first" into the finding to have it state that on February 20, 2003 employers were *first* advised that they would be required to reimburse MBI for account deficits. The ALJ did not use the word "first" in his finding, and did not fairly imply the use of that word. Beshore's unsupported inference of that word is without record support, while the ALJ's finding is amply supported by competent substantial evidence, both testimonial and documentary. Accordingly, this Twenty-second Exception is rejected.

Bsehore's Twenty-third Exception concedes its own incorrectness. The ALJ did not find that Beshore was the *only person* to whom an accounting request was directed but that he was *a person* to whom such a request was directed, a fact that his exception expressly admits. The record contains substantial competent evidence to support the challenged finding. Accordingly, this Twenty-third Exception is rejected.

Beshore's Twenty-fourth Exception, directed to the Finding of Fact set forth in Paragraph 52 of the Recommended Order, indulges in an attack upon his own subjective and hypothetical inference that expands the finding beyond its stated terms. However, the exception does not contend that the actual finding is unsupported by competent substantial evidence. Accordingly, this Twenty-fourth Exception is rejected.

Beshore's Twenty-fifth Exception, directed to the Finding of Fact set forth in Paragraph 61 of the Recommended Order indulges in another attack upon another subjective and hypothetical inference that expands the finding beyond its stated terms. Beshore does not contest that the letter in question was sent, and he does not point to any evidence showing whether he sent it or MBI sent it. That is precisely what the ALJ's finding states. The exception does not contend that the actual finding is unsupported by competent substantial evidence, but contends that an unfavorable inference Beshore (not the ALJ) draws from that evidence is unsupported. The record fully supports the actual finding made by the ALJ. Accordingly, this Twenty-fifth Exception is rejected.

Beshore's Twenty-sixth Exception, once again, takes issue with the use of but a single word within the challenged finding of fact. Paragraph 63 of the Recommended Order uses the word "assurances" in describing Beshore's oral statements to the employers relative to the presence of the stop-loss coverage in the MBI plan. It is uncontested on the record that Beshore made such oral representations to the employers. Whether they are a called "representations" or "assurances" is of no moment to their material content, which was an affirmative statement that said coverage was an element of the MBI plan Beshore was selling. The record amply supports that finding. Accordingly, this Twenty-sixth Exception is rejected.

Beshore's Twenty-seventh Exception posits that there is no competent substantial evidence to support the Finding of Fact in Paragraph 81 that the CFS representative had asked Beshore for a copy of the stop-loss (reinsurance) policy. This contention is refuted by the testimony of that representative, including testimony given in specific response to precise questioning on that very matter by the ALJ. (Tr. Vol. II, pgs 187-188, 224-226.) Accordingly, this Twenty-seventh Exception is rejected.

Beshore's Twenty-eighth Exception inherently concedes the correctness of the finding he challenges. The record shows that Beshore did make certain representations to Cheddar's representative at the time in question, and that Cheddar relied on those representations. (Tr. Vol. II, pgs. 294-295, 297-299) That MBI was the source of Beshores representations is immaterial to the fact that he made them, and if he made them without investigation or verification as Cheddar's representative testified (Tr. Vol. II. pgs. 334-335) that omission would be inculpatory rather than exculpatory as to the department's allegations of lack of reasonably adequate knowledge and technical competence. Accordingly, Beshore's Twenty-eighth Exception is rejected.

THEREFORE, in consideration of all of the foregoing, and after a review of the entire record,

IT IS HEREBY ORDERED that the Findings of Fact and Conclusions of Law set forth in the Recommended Order are adopted as the Findings of Fact and Conclusions of Law of the Department of Financial Services in this matter.

IT IS HEREBY FURTHER ORDERED that the licenses and eligibility for licensure of Respondent Bradley Beshore are hereby revoked. This change in the recommended penalty is made after a review of the complete record, and in view of the

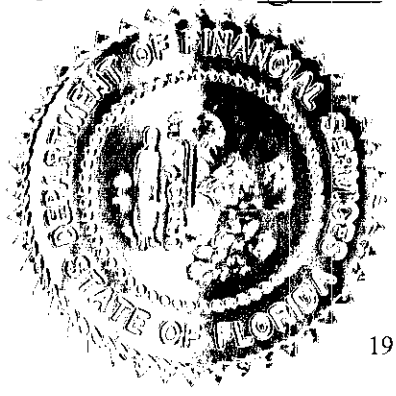
temporal limitation on suspensions imposed by Section 626.641(1), Fla. Stat. The record establishes insurance code violations that cumulatively exceed that temporal limitation, thus justifying an increase in the penalty from suspension to revocation. To do otherwise would reward those offenders who commit the most violations by limiting their punishment to the same as those offenders who commit fewer violations. Revocation of Beshore's licenses and eligibility for licensure applies to all licenses and eligibility held by Beshore under the Florida Insurance Code.

Pursuant to Section 626.641, Florida Statutes, during the period of revocation and until reinstatement, which must be applied for in writing, Beshore shall not engage in or attempt or profess to engage in any transaction or business for which a license is required under the Florida Insurance Code, or directly or indirectly own, control, or be employed in any manner by any insurance agent, agency, or adjuster or adjusting firm.

NOTICE OF RIGHTS

Any party to these proceedings adversely affected by this Order is entitled to seek review of this Order pursuant to Section 120.68, Florida Statutes, and Rule 9.110, Fla. R. App. P. Review proceedings must be instituted by filing a petition or notice of appeal with the General Counsel, acting as the agency clerk, at 612 Larson Building, Tallahassee, Florida, and a copy of the same with the appropriate district court of appeal within thirty (30) days of rendition of this Order.

DONE AND ORDERED this 3rd day of ~~May~~ June, 2005.



Karen Chandler
Deputy Chief Financial Officer

COPIES FURNISHED:

William Quattlebaum, Administrative Law Judge
Division of Administrative Hearings
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060

David Prescott, Esquire
Post Office Box 551
Tallahassee, Fl. 32302-0551

Philip Payne, Esq.
Department of Financial Services
612 Larson Building
200 East Gaines Street
Tallahassee, Florida 32399-0333