8-31-04

FLORIDA
DEPARTMENT OF
FINANCIAL SERVICES

FILED

OCT 14 2004

AT

Docketed by:

TOM GALLAGHER
CHIEF FINANCIAL OFFICER
STATE OF FLORIDA

IN THE MATTER OF:

Case No. 72432-03-AG

CHARLES STEVEN LIEBERMAN

04-1095
LJS

FINAL ORDER

This cause came on before Chief Financial Officer, as head of the Department of Financial Services (the Department), for consideration of and final agency action on the Recommended Order issued herein by Administrative Law Judge Larry J. Sartin (ALJ) on August 31, 2004, after a formal hearing conducted pursuant to Section 120.57(1), Fla. Stat.

Respondent Lieberman did not timely file Exceptions to the Recommended Order with the clerk of the agency as required by Rule 28-106.204 F.A.C., which clearly requires that pleadings and other documents to be filed with an agency are to be directed to and received by the agency clerk. Rather, it appears that Respondent Lieberman served copies of his Exceptions on the department's counsel of record in this matter, and another department attorney, without any delivery to the agency clerk. Filing is accomplished when the paper in question is delivered or placed into the hands *of the officer entitled to receive it.* U.S. v. Missco Homestead Assn., 185 F.2d 283 (8th Cir. 1950). Filing is complete once the paper in question is delivered to and received by *the proper officer.* Brooks By And Through McCook v. Elliott, 593 So.2d 1209 (Fla. 5th

DCA 1992); Bituminous Casualty Corp. v. Clements, 3 So.2d 865 (Fla. 1941); Cook v. Walgreen Co. 399 So.2d 523 (Fla. 2nd DCA 1981). The instant Exceptions were not filed in accordance with Rule 28-106.104, F.A.C., because they were not delivered to the agency clerk (the proper officer entitled to receive them) as required; the department's attorneys in question are not officers entitled to receive Exceptions. Rule 28-106.217, F.A.C.

Moreover, Section 120.57(1)(k), Fla. Stat., allows no more than fifteen days for the receipt of Exceptions. Unlike an administrative rule promulgated by an agency, which is necessarily directory State of Florida, Department of Environmental Regulation v. Puckett Oil Co., Inc., 577 So.2d 988 (Fla. 1st DCA 1991), the fifteen day limitation in Section 120.57(1)(k), Fla. Stat., should be seen as a jurisdictional bar against a later filing, enacted by the legislature to promote the timely administration of justice. Therefore, it seems that the instant Exceptions are jurisdictionally barred from consideration by this agency.

However, in the absence of appellate case law directly on point, and in an abundance of caution, the Respondent's Exceptions, and the department's Response thereto, have been considered. That consideration shows that the Exceptions are not persuasive.

Section 120.57(1)(k), Fla. Stat., provides that an agency need not rule on exceptions that do not clearly identify the disputed portion of the recommended order by page number or paragraph, that do not clearly identify the legal basis for the exception, or do not include appropriate and specific citations to the record. Measured against that statutory standard, the Respondent's Exceptions are inadequate. The first exception,

stated in paragraphs six through twelve of the Exceptions, contends that the ALJ erred in finding that "the papers sent to Mr. Lieberman's customers were ambiguous". That contention is without citation to the record, and a review of the record shows no such specific finding. The record references to an ambiguity among Mr. Leiberman's papers are found in Paragraphs 39, 50, and 62 of the Recommended Order where the ALJ listed that ambiguity as one of three factors supporting the specific findings of fact enunciated in those paragraphs. Moreover, taken as a whole, this exception does not contend that there is no competent substantial evidence in the record to support the ALJ's findings of fact in those, or any other, paragraphs; all this exception truly does is to argue for a re-weighing of the evidence. An agency may not re-weigh evidence or the testimony of witnesses, and can reject or modify a finding of fact only if a review of the entire record shows that the challenged finding is not supported by competent substantial evidence. Section 120.57(1)(l), Fla. Stat.; Brogan v. Carter, 671 So.2d 822 (Fla. 1st DCA 1996); Dunham v. Highlands County School Board, 652 So.2d 894 (Fla. 2nd DCA 1995). The findings of fact of the ALJ regarding the papers in question are supported by competent substantial evidence in both testimonial and exhibit form. Accordingly, it must be concluded that this exception is without merit.

The second exception, set forth in paragraphs thirteen through thirty-five of the Respondent's Exceptions, does not contain even a single citation to the record but argues that the department failed to introduce evidence establishing minimum standards defining fitness or trustworthiness.

The record evidence shows numerous instances where Respondent's failure to provide adequate oral explanations of the products he was selling was noted by the

ALJ. See, Paragraphs 29, 32, 39, 42, 45, 54, 57, 62, and 78 of the Recommended Order. All those findings are supported by competent substantial evidence. Additionally, the ALJ specifically found that the written instruments utilized by Mr. Lieberman were misleading (Paragraph 35 of the Recommended Order), containing common health insurance terms even though some of the instruments, if read carefully, admitted that product they described was not health insurance (Paragraphs 25, 35, 36, 39, 46, 50, 57, 58, 62, and 78 of the Recommended Order), and that Mr. Lieberman gave his customers little if any opportunity to read those written instruments before requiring them to sign the same. (Paragraphs 35, 36, 39, 46, 58, and 78 of the Recommended Order.) All those findings are supported by competent substantial evidence.

In Thomas v. State, Dept. of Ins. and Treasurer, 559 So.2d 419 (Fla. 2nd DCA 1990), rev. den. 570 So.2d 1307, the court reviewed a final order suspending the insurance licenses of the respondents for one year because of the inadequacy of their oral explanations of the non-insurance products they had sold to their customers, even though the written instruments associated with those sales, if read carefully, disclosed the non-insurance nature of those products. The one-year suspension was ordered by the department on the basis that such conduct "...demonstrated a lack of fitness or trustworthiness to engage in the business of insurance ...". Thomas, at 421. Upholding the one-year suspension, the court concluded its analysis of the facts and applicable law by stating:

> These legal conclusions are based on a correct interpretation of the applicable statutes, are supported by competent substantial evidence, and have been reached under the correct burden of proof.
> Thomas, at 421-422.

Thus, Thomas, decided fourteen years ago, established the minimum standards about which the Respondent, in his Exceptions, now feigns ignorance. Accordingly, the exception is found to be without merit.

The agency is aware of the court's decision in Whitaker v. Dept. of Insurance and Treasurer, 680 So.2d 528 (Fla. 1st DCA 1996), and has considered its impact upon the Recommended Order, but finds it unnecessary to address the same in the Final Order because the recommended penalty was not based on a violation of Section 626.621(6), Fla. Stat.

Having considered the Recommended Order, the Respondent's Exceptions, and the Department's Response thereto, and the record of proceedings conducted in accordance with Section 120.57(1), Florida Statutes, and being fully apprised in all material premises,

IT IS HEREBY ORDERED that the findings of fact and conclusions of law set forth in the Recommended Order are hereby adopted as the findings of fact and conclusions of law of the Department of Financial Services in this cause, and

Accordingly, IT IS HEREBY ORDERED that Respondent Lieberman's insurance licenses and eligibility for licensure are hereby suspended, effective immediately, for one year from the date hereof. Pursuant to Section 626.651, Florida Statues, the revocation of Lieberman's licenses and eligibility for licensure applies to all licenses and eligibility held by Lieberman under the Florida Insurance Code.

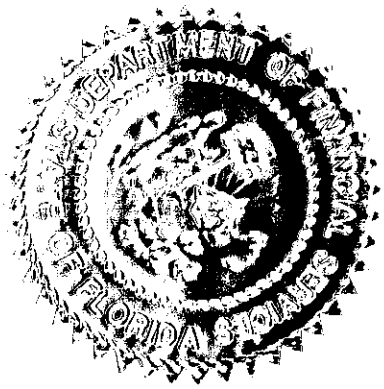
Pursuant to Section 626.641, Florida Statutes, Charles Steven Lieberman shall not, during the time of this suspension and until and unless again licensed, engage in or attempt or profess to engage in any transaction or business for which a license is

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 14th day of October, 2004.



Karen Chandler
Deputy Chief Financial Officer

xc: Robert Alan Fox
200 E. Gaines Street
612 Larson Bldg.
Tallahassee, Fl. 32399

Peter Ticktin
Boca Financial and Legal Plaza
5295 Town Center Road, Third Floor
Boca Raton, Fl. 33486