STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL SERVICES,

Petitioner,

vs.

CHARLES STEVEN LIEBERMAN,

Respondent.

Case No. 04-1095PL

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case before Larry J. Sartin, an Administrative Law Judge of the Division of Administrative Hearings, on July 8, 2004, by video teleconferencing between West Palm Beach and Tallahassee, Florida.

APPEARANCES

For Petitioner: Robert Alan Fox, Esquire
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Department of Financial Services
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200 East Gaines Street
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For Respondent: Peter Ticktin, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether Respondent, Charles Steven Lieberman, committed the offenses alleged in an Administrative Complaint issued by Petitioner, the Department of Financial Services, on January 26, 2004, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On January 26, 2004, Petitioner issued an Administrative Complaint alleging that Respondent had violated certain statutory provisions governing the conduct of Florida insurance agents. On February 9, 2004, Respondent, through counsel, filed a document titled Election of Proceedings, disputing the factual allegations of the Administrative Complaint and requesting a hearing pursuant to Section 120.57(1), Florida Statutes (2004). A copy of the Administrative Complaint and the Election of Proceedings was filed with the Division of Administrative Hearings on March 3, 2004. The matter was designated DOAH Case No. 04-1095PL and was assigned to the undersigned.

A final hearing, to be conducted by video teleconferencing, was scheduled for May 14, 2004, by Notice of Hearing issued April 13, 2004. An unopposed Motion for Continuance was filed by Respondent on April 19, 2004. The Motion was granted by an Order entered May 4, 2004. The final hearing was rescheduled for July 8, 2004.

On May 7, 2004, Petitioner filed a Notice of Filing Confidentiality Agreement. Pursuant to the Confidentiality Agreement, the parties agreed that information and documents specifically described in the Agreement would be treated as confidential by the parties.

Prior to the commencement of the final hearing, Petitioner filed a Joint Pre-Hearing Stipulation. In this Stipulation, the parties admitted certain facts and agreed that no proof on those facts would be necessary at hearing. Those facts, to the extent relevant, have been included in this Recommended Order.

The undersigned conducted, and the parties along with Respondent's witnesses participated in, the final hearing from a public hearing room at the offices of the Division of Administrative Hearings in Tallahassee, Florida. The court reporter and Petitioner's witnesses participated in the final hearing via video telecommunication from a public office located in West Palm Beach, Florida.

At the final hearing, Petitioner presented the testimony of W.E. and J.E. Eight exhibits were also offered for identification as Petitioner's exhibits. Seven of the exhibits were marked as Petitioner's exhibits 1, 2, and 63 through 67. The eighth exhibit, Petitioner's exhibit 68, consisting of the deposition testimony of A. H., was taken after the conclusion of the final hearing and filed on July 14, 2004. The exhibits,

with the exception of Petitioner's exhibit 1, were admitted. A ruling was reserved on Petitioner's exhibit 1. That exhibit, which consists of a "Medical Discount Card Warning" from the Florida Attorney General's internet web site, is hereby rejected.

The Respondent testified on his own behalf and presented the testimony of Nanita Blevins. Respondent offered 26 exhibits for identification. All were admitted.

By Notice of Filing of Transcript issued July 22, 2004, the parties were informed that the Transcript of the final hearing had been filed on July 20, 2004. The parties, pursuant to agreement, therefore, had until August 3, 2004, to file proposed recommended orders. On August 2, 2004, Respondent filed an Unopposed Motion for Enlargement of Time to Serve and File Proposed Findings of Fact and Conclusions of Law requesting that the parties be allowed to file their post-hearing submittals on or before August 11, 2004. That Motion was granted. Both parties filed proposed orders on August 11, 2004. The post-hearing submittals have been fully considered.

On August 25, 2004, Respondent filed an Objection to Petitioner's Proposed Recommended Order. That Objection is hereby overruled.

FINDINGS OF FACT

A. The Parties.

1. Petitioner, the Department of Financial Services (hereinafter referred to as the "Department"), is the agency of the State of Florida charged with the responsibility for, among other things, the investigation and prosecution of complaints against individuals licensed to conduct insurance business in Florida. Ch. 626, Fla. Stat. (2004).[1]

2. Respondent, Charles Steven Lieberman, is currently, and was at all times pertinent to this matter, licensed in Florida as a resident Life & Variable Annuity (2-14); Life, Health & Variable Annuity (2-15); Life (2-16); Life & Health (2-18); and Health (2-40) Agent. (Stipulated Facts). The Department has jurisdiction over Mr. Lieberman's licenses and appointments pursuant to Chapter 626, Florida Statutes. (Stipulated Facts)

3. Mr. Lieberman's license identification number is A155409. (Stipulated Facts).

4. Mr. Lieberman graduated from Columbia University. From 1974 through 1992, Mr. Lieberman worked as a trader initially on the floor of the Chicago Board of Options Exchange, and later, the Chicago Mercantile Exchange.

5. Mr. Lieberman has held his insurance licenses for ten years. This is the first administrative complaint issued against him.

B. Mr. Lieberman's Business.

6. Mr. Lieberman, at all times pertinent, served as president of Charles Lieberman, Inc. (Stipulated Facts).

7. Mr. Lieberman, at all times pertinent, was the designated primary agent, as defined in Section 626.592, Florida Statutes, of Charles Lieberman, Inc. (Stipulated Facts).

8. Charles Lieberman, Inc., at all times pertinent, owned and did business as "National Medical Services" and "The Insurance Center." (Stipulated Facts).

C. Mr. Lieberman's "Medical Benefits Plan"/"Medical Savings Plan."

9. Mr. Lieberman offers customers who are seeking medical insurance a plan which he calls a "Medical Benefits Plan" or "Medical Savings Plan" (hereinafter referred to as the "Lieberman Medical Benefits Plan").

10. The Lieberman Medical Benefits Plan consists of the following components (hereinafter referred collectively as the "Plan Products"):

a. A hospital and surgery expense payment policy (hereinafter referred to as the "Hospital Insurance Plan");

b. A Catastrophe Major Medical Insurance Plan (hereinafter referred to as the "Major Medical Insurance Plan"); and

c. A discount card titled "The Chamber Card" (hereinafter referred to as the "Chamber Card"), with a "Limited Product Warranty."

11. None of the Plan Products included insurance coverage for physician office visits, a fact which Mr. Lieberman was fully aware of.

D. The Hospital Insurance Plan.

12. The Hospital Insurance Plan provides coverage for hospital and surgical expenses. It does not provide coverage for physician office visits.

13. The Hospital Insurance Plan is a medical insurance plan offered by United American Insurance Company (hereinafter referred to as "United American").

14. Mr. Lieberman is an agent for United American.

15. Petitioner's Exhibit 64 is a copy of the hospital and surgery expense policy that constitutes the Hospital Insurance Plan sold by Mr. Lieberman. (Stipulated Facts). Petitioner's Exhibit 65 is a copy of the Schedule of Benefits for the Hospital Insurance Plan. (Stipulated Facts).

E. The Major Medical Insurance Plan.

16. The Major Medical Insurance Plan provides coverage for major medical expenses in excess of $25,000.00. It does not provide coverage for physician office visits.

17. The Major Medical Insurance Plan is also a medical insurance plan. It is offered by United States Life Insurance Company (hereinafter referred to as "U.S. Life").

18. In order to purchase a Major Medical Insurance Plan, customers are required to join one of many organizations which purchase Major Medical Insurance Plans through Seabury & Smith[2], an organization which administers the sale of health insurance for U.S. Life. Customers, once they join such an organization, are then required to purchase the Major Medical Insurance Plan through the organization they joined.

19. Mr. Lieberman is not an agent for U.S. Life or affiliated with Seabury & Smith. He does not, therefore, sell Major Medical Insurance Plans. Nor does he receive any compensation if any of his customers purchase a Major Medical Insurance Plan.

20. Mr. Lieberman does, however, recommend the purchase of a Major Medical Insurance Plan as part of the Lieberman Medical Benefits Plan. In order to facilitate the purchase, Mr. Lieberman has his customers join the "American Contract Bridge League."[3] His customers then purchase a Major Medical Insurance Plan directly based upon their League membership.

21. Petitioner's Exhibit 63 is a copy of the Major Medical Insurance Plan which by Mr. Lieberman recommended that his customers purchase. (Stipulated Facts).

F. The Chamber Card.

22. In an effort to provide some relief for cost of physician office visits, which was not covered by the Hospital Insurance Plan or the Major Medical Insurance Plan, Mr. Lieberman sold his customers the Chamber Card. The Chamber Card, which is not insurance (Stipulated Facts), is a card which entitles the holder thereof to a discount[4] for various medical services, including physician office visits.

23. In an effort to enhance the discounts from the Chamber Card available to Mr. Lieberman's customers, Mr. Lieberman also provided what he termed a "Limited Product Warranty" which he offered through Charles Lieberman, Inc., d/b/a National Medical Services. This Limited Product Warranty is also not insurance.

24. Pursuant to Mr. Lieberman's Limited Product Warranty, Mr. Lieberman purportedly agreed to provide reimbursement of the cost of any physician office visit in excess of $15.00, an amount which he referred to as a "copay," which was not paid for by the Chamber Card. The additional discounts were dependant, however, on Mr. Lieberman's ability to negotiate a reduction in the fees incurred by his customers directly from the physician.[5]

25. In describing the Chamber Card and the Limited Product Warranty sold by Mr. Lieberman, he used the acronyms "PPO" and "PHCS," and terms like "copay" and "claims" normally associated with the insurance industry.

G. Customer W.E. (Count I of the Administrative Complaint).

26. Prior to September 12, 2002, W.E. spoke with Mr. Lieberman by telephone. She explained to him that she was interested in purchasing health insurance, and before she could explain what she meant in any detail, he informed her that he could provide any health insurance she wanted as long as she did not have high blood pressure, which she did not.

27. On September 12, 2002, W.E. met with Mr. Lieberman (Stipulated Facts) at his home to discuss purchasing health-care insurance. She explained to Mr. Lieberman that she wanted a health insurance plan similar to what she had had before she recently moved to Florida and that she wanted a plan with minimum co-payments. She also indicated that she wanted a basic insurance plan until she was able to find employment where her health insurance would be provided for her.

28. W.E. did not specifically tell Mr. Lieberman that she wanted insurance that covered physician office visits.[6] Rather, she reasonably assumed that by telling Mr. Lieberman that she wanted to purchase "health insurance" that, as an insurance agent, he would understand that she wanted coverage for physician office visits.

29. Mr. Lieberman, rather than providing the insurance coverage which he knew or should have known W.E. was seeking,

coverage which included physician office visits, suggested that she purchase the Lieberman Medical Benefits Plan. While Mr. Lieberman attempted to give some limited explanation of his plan to W.E., based upon the manner in which he explained his plan at hearing, it is understandable that W.E. did not understand what she was purchasing, or, more specifically, that the plan, while including some health care coverage, did not include coverage for physician office visits.

30. On September 12, 2002, Mr. Lieberman sold or arranged for the sale of the Plan Products, as more fully described in Findings of Fact 9 through 25, to W.E.:

a. W.E. signed an application for membership in the American Contract Bridge League (Stipulated Facts);

b. W.E. wrote a check for her membership in the American Contract Bridge League (Stipulated Facts);

c. W.E. signed an application and wrote checks for the Chamber Card and a United American Hospital Insurance Plan (Stipulated Facts); and

d. W.E. signed an application for a Major Medical Insurance Plan from U.S. Life and wrote a check to Seabury & Smith. (Stipulated Facts).

31. Mr. Lieberman knew or should have known that he was selling W.E. a product which she was not interested in purchasing and that he was not providing her with a significant

part of the insurance coverage she was interested in purchasing, coverage of physician office visits.

32. While Mr. Lieberman gave some limited explanation of what the Chamber Card was, he did not fully explain to W.E. that it was not an insurance program, plan, or policy; that it would not pay for physician office visits; or that it only provided some unspecified discount on the cost of physician office visits.

33. W.E. did not understand what she was purchasing. She even believed incorrectly that she had not been provided any insurance at all by Mr. Lieberman. While this incorrect assumption was based in part upon comments she perceived were made by a Department investigator, her comments show that she was unknowledgeable about insurance and, therefore, placed her full reliance on upon Mr. Lieberman.

34. Even though W.E. issued separate checks made payable to "A.C.B.L." (the American Contract Bridge League), Seabury & Smith (for the Major Medical Insurance Plan), United American (for the Hospital Insurance Plan), and National Medical Services (for the Chamber Card); signed an Acknowledgement & Disclaimer and an Acknowledgement & Disclosures (both of which are quoted, infra, in Finding of Fact 35); and signed a document titled "Medical Benefits Plan" which contained an acknowledgement (quoted, infra. In Finding of Fact 36), W.E., unlike

Mr. Lieberman, did not understand that she was purchasing a product which she had not requested and did not want.

35. The Acknowledgement & Disclaimer and Acknowledgement & Disclosures signed by W.E. provided the following:

ACKNOWLEDGEMENT AND DISCLAIMER

I understand that the US Life Catastrophic Insurance Policy is being purchased through the mail from Seabury & Smith (Group Insurance Plans), who are the brokers for that plan. Although I am purchasing other insurance from Charles Lieberman, I realize that Mr. Lieberman is in no way representing Seabury & Smith or US Life and that he is only making me aware that this plan is available.

I acknowledge that it is my sole responsibility to review this plan and its features to determine suitability once the policy is received.

_________________ _____________
Insured Date

ACKNOWLEDGEMENT AND DISCLOSURES

I hereby acknowledge that I am purchasing insurance that covers approximately 75% of the first $10,000 in the hospital then covers 100% hospitalization above $25,000.

Although my PHCS PPO Access/Medical Savings Card (which is not insurance) will, in most cases, reduce this potential liability; through negotiated savings, it is not guaranteed to eliminate it in it [sic] entirety.

_________________ _____________
INSURED DATE

The foregoing Acknowledgement & Disclaimer and the Acknowledgement & Disclosures are misleading at best, and deceiving at worst. While the Acknowledgement & Disclosures includes the language "which is not insurance," that language is included after the terms "PHCS PPO Access/Medical Savings Card," terms which are not clearly identified or explained and are, along with other terminology used in the Disclosures (i.e., "PPO" and "copay") reasonably associated with health-care insurance. More importantly, the Acknowledgement & Disclaimer and the Acknowledgement & Disclosures do not explain that physician office visits are not being provided through health care insurance. Finally, W.E. was not given an opportunity by Mr. Lieberman to read the Acknowledgement & Disclaimer, the Acknowledgement & Disclosures, or any other documents shown to her by Mr. Lieberman. He simply placed most of the documents which she had to sign in front of her with only the part she was required to sign visible and told her to sign them, which she did.

36. The following acknowledgment was also contained in a document titled "Medical Benefits Plan" which W.E. signed:

> By signing below, I agree that all information provided above is complete, accurate, and truthful. I recognize that because of the high cost of health insurance, National Medical Savings, plan administrator, has attempted to put together a "medical savings/benefit plan" which

> allows clients to purchase reasonably priced hospitalization insurance from well known a-rated insurance companies and combine it with a product which is not insurance to better suit the clients' needs. I understand that anything associated with the PPO repricing or copay rebates is part of the "medical savings plan" and is in no way to be considered as insurance, but rather as an affordable alternative to satisfy the need to reduce medical costs.

Like the Acknowledgments quoted in Finding of Fact 35, this acknowledgement, which appears after a paragraph titled "Pre-Authorized Payment Plan" on the form, is misleading. It is not clear that it is referring to the Chamber Card, it contains terms normally associated with insurance coverage in spite of the disclaimer, and Mr. Lieberman gave W.E. no reasonable opportunity to read the disclaimer before having her sign it.

37. After enrolling W.E. in the Lieberman Medical Benefits Plan, Mr. Lieberman mailed all the documents which W.E. had signed on September 12, 2002, to her. This was her first realistic opportunity to read the documents.

38. After receiving the documents concerning the Lieberman Medical Benefits Plan, W.E. cancelled all of the Plan Products.

39. Although there was some language in the Acknowledgement and Disclosures and the form titled "Medical Benefits Plan" signed by W.E. indicating that some part of the Lieberman Medical Benefits Plan was not insurance, due to the ambiguity of the language of the Acknowledgement and the

disclaimer, the lack of opportunity that W.E. had to read the documents, the other language normally associated with insurance used in the documents, and the lack of coherent explanation provided by Mr. Lieberman, it is found that, as to W.E., Mr. Lieberman:

a. Did not inform her that the Chamber Card was not an insurance program, plan, or policy;

b. "Portrayed" the Chamber Card as an insurance program, plan, or policy; and

c. Sold her products, none of which provided insurance coverage for the cost of physician office visits.

H. Customer A.H. (Count II of the Administrative Complaint).

40. Prior to April 11, 2003, Mr. Lieberman contacted and spoke to A.H. by telephone. A.H. told Mr. Lieberman that she was interested in purchasing health insurance, including insurance covering physician office visits, with co-pay, and hospitalization expenses, with a deductible.

41. On April 11, 2003, A.H. met with Mr. Lieberman (Stipulated Facts) at his home to discuss purchasing health-care insurance. She again explained to Mr. Lieberman that she was interested in a policy that covered physician office visits, with a co-pay, and hospitalization expenses, with a deductible.

42. Mr. Lieberman, rather than providing insurance coverage which he knew or should have known A.H. was seeking, coverage which included physician office visits, suggested that she purchase the Lieberman Medical Benefits Plan. While Mr. Lieberman attempted to give some limited explanation of his plan to A.H., based upon the manner in which he explained his plan at hearing, it is understandable that A.H. did not understand what she was purchasing, or, more specifically, that the plan, while including some health care coverage, did not include coverage for physician office visits.

43. On April 11, 2003, Mr. Lieberman sold or arranged for the sale of the same Plan Products to A.H. that he had sold to W.E., described in Finding of Fact 30, supra. (Stipulated Facts).

44. Mr. Lieberman knew or should have known that he was selling A.H. a product which she was not interested in purchasing and that he was not providing her with a significant part of the insurance coverage she was interested in purchasing, coverage of physician office visits.

45. While Mr. Lieberman gave some limited explanation of what the Chamber Card was, he did not fully explain to A.H. that it was not an insurance program, plan, or policy; that it would not pay for physician office visits; or that it only provided

some unspecified discount on the cost of physician office visits.

46. Like W.E., A.H. signed the Acknowledgment and Disclaimer and the Acknowledgement and Disclosures quoted, supra, in Finding of Fact 35, and the disclaimer quoted, supra, in Finding of Fact 36. The Acknowledgements and the disclaimer were deficient for the same reasons described in Findings of Fact 35 and 36.

47. Like W.E., even though A.H. issued separate checks made payable to "A.C.B.L." (the American Contract Bridge League), Seabury & Smith (for the Major Medical Insurance Plan), United American (for the Hospital Insurance Plan), and National Medical Services (for the Chamber Card); signed the Acknowledgement & Disclaimer and an Acknowledgement & Disclosures; and signed the disclaimer contained in a form titled "Medical Benefits Plan," A.H., unlike Mr. Lieberman, did not understand that she was purchasing a product which she had not requested and did not want. Having explained to Mr. Lieberman that she wanted a policy that covered physician office visits and not having been told that was not what she was purchasing, she simply relied upon Mr. Lieberman.

48. After enrolling A.H. in the Lieberman Medical Benefits Plan, Mr. Lieberman mailed all the documents which A.H. had signed on April 11, 2003, to her.

49. Some time after receiving the documents concerning the Lieberman Medical Benefits Plan, A.H. cancelled all of the Plan Products.

50. Although there was some language in the Acknowledgement and Disclosures and the form titled "Medical Benefits Plan" signed by A.H. indicating that some part of the Lieberman Medical Benefits Plan was not insurance, due to the ambiguity of the language of the Acknowledgement and the Disclaimer, the other language normally associated with insurance used in the documents, and the lack of coherent explanation provided by Mr. Lieberman, it is found that, as to A.H., Mr. Lieberman:

a. Did not inform her that the Chamber Card was not an insurance program, plan, or policy;

b. "Portrayed" the Chamber Card as an insurance program, plan, or policy; and

c. Sold her products, none of which provided insurance coverage for the cost of physician office visits.

I. Customer R.G. (Count III of the Administrative Complaint).

51. R.G. did not testify at the final hearing. The factual allegations of Count III of the Administrative Complaint were not proved.

J. Customer J.E. (Count IV of the Administrative Complaint).

52. Prior to January 17, 2003, J.E. spoke with Mr. Lieberman by telephone. J.E. explained to Mr. Lieberman that he was interested in purchasing health insurance to replace the Blue Cross/Blue Shield health-care insurance he currently had.

53. On January 17, 2003, J.E. met with Mr. Lieberman (Stipulated Facts) at his home to discuss purchasing health-care insurance. He explained to Mr. Lieberman that he was interested in a policy to replace his current policy with Blue Cross/Blue Shield. J.E. specifically requested a policy that covered physician office visits.

54. Mr. Lieberman, rather than providing insurance coverage which he knew or should have known J.E. was seeking, coverage which included physician office visits, suggested that he purchase the Lieberman Medical Benefits Plan. While Mr. Lieberman attempted to give some limited explanation of his plan to J.E., based upon the manner in which he explained his plan at hearing, it is understandable that J.E. did not understand what he was purchasing, or, more specifically, that the plan, while including some health care coverage, did not include coverage for physician office visits.

55. On January 17, 2003, Mr. Lieberman sold or arranged for the sale to J.E. of the same Plan Products he sold to W.E. described in Finding of Fact 30, supra. (Stipulated Facts).

56. Mr. Lieberman knew or should have known that he was selling J.E. a product which he was not interested in purchasing and that he was not providing him with a significant part of the insurance coverage he was interested in purchasing, coverage for physician office visits.

57. While Mr. Lieberman gave some limited explanation of what the Chamber Card was, he did not fully explain to J.E. that it was not an insurance program, plan, or policy; that it would not pay for physician office visits; or that it only provided some unspecified discount on the costs of physician office visits.

58. Like W.E. and A.H., J.E. also signed the Acknowledgment and Disclaimer and the Acknowledgement and Disclosures quoted, supra, in Finding of Fact 35, and the disclaimer quoted, supra, in Finding of Fact 36. The Acknowledgements and the disclaimer were deficient for the same reasons described in Findings of Fact 35 and 36.

59. Like W.E. and A.H., even though J.E.. issued separate checks made payable to "A.C.B.L." (the American Contract Bridge League), Seabury & Smith (for the Major Medical Insurance Plan), United American (for the Hospital Insurance Plan), and National

Medical Services (for the Chamber Card); signed the Acknowledgement & Disclaimer and an Acknowledgement & Disclosures; and signed the disclaimer contained in a form titled "Medical Benefits Plan," J.E., unlike Mr. Lieberman, did not understand that he was purchasing a product which he had not requested and did not want. Having explained to Mr. Lieberman that he wanted a policy that covered physician office visits and not having been told that was not what he was purchasing, he simply relied upon Mr. Lieberman.

60. After enrolling J.E. in the Lieberman Medical Benefits Plan, Mr. Lieberman mailed all the documents which J.E. had signed on January 17, 2003, to him.

61. Some time after receiving the documents concerning the Lieberman Medical Benefits Plan, J.E. cancelled all of the Plan Products.

62. Although there was some language in the Acknowledgement and Disclosures and the form titled "Medical Benefits Plan" signed by J.E. indicating that some part of the Lieberman Medical Benefits Plan was not insurance, due to the ambiguity of the language of the Acknowledgement and the disclaimer, the lack of opportunity to read the documents before he signed them, the other language normally associated with insurance used in the documents, and the lack of coherent

explanation provided by Mr. Lieberman, it is found that, as to J.E., Mr. Lieberman:

a. Did not inform him that the Chamber Card was not an insurance program, plan, or policy;

b. "Portrayed" the Chamber Card as an insurance program, plan, or policy; and

c. Sold him products, none of which provided insurance coverage for the cost of physician office visits.

K. The Administrative Complaint.

63. On January 26, 2004, the Department issued a four-count Administrative Complaint against Mr. Lieberman. (Stipulated Facts).[7]

64. The Administrative Complaint contains four counts, one each for Mr. Lieberman's association with W.E. (Count I), A.H. (Count II), R.G. (Count III), and J.E. (Count IV).

65. The Administrative Complaint alleges that Mr. Lieberman's conduct with all four individuals violated Section 626.611(6), (7), and (8), Florida Statutes, and Section 626.621(2), Florida Statutes. The Administrative Complaint also alleges that, as to A.H., Mr. Lieberman violated Section 626.621(6), Florida Statutes.

66. In support of the alleged statutory violations, the Department alleged, in part, that with regard to all four individuals:

a. Mr. Lieberman "did not inform [his customers] that The Chamber Card was not an insurance program, plan or policy";

b. Mr. Liberman "portrayed The Chamber Card as an insurance program, plan or policy"; and

c. That "[n]one of the products you, CHARLES STEVEN LIEBERMAN, sold to [W.E., A.H., R.G., and J.E.] provide insurance coverage for the cost of doctors' visits."

CONCLUSIONS OF LAW

A. Jurisdiction.

67. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2004).

B. The Burden and Standard of Proof.

68. The Department seeks to impose penalties against Mr. Lieberman through the Administrative Complaint that include mandatory and discretionary suspension or revocation of his licenses. Therefore, the Department has the burden of proving the specific allegations of fact that support its charges by clear and convincing evidence. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); and Pou v. Department of Insurance and Treasurer, 707 So. 2d 941 (Fla. 3d DCA 1998).

69. What constitutes "clear and convincing" evidence was described by the court in Evans Packing Co. v. Department of Agriculture and Consumer Services, 550 So. 2d 112, 116, n. 5 (Fla. 1st DCA 1989), as follows:

> . . . [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 evidence 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 the firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established. Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

See also In re Graziano, 696 So. 2d 744 (Fla. 1997); In re Davey, 645 So. 2d 398 (Fla. 1994); and Walker v. Florida Department of Business and Professional Regulation, 705 So. 2d 652 (Fla. 5th DCA 1998)(Sharp, J., dissenting).

C. The Department's Charges.

70. Section 626.611, Florida Statutes, mandates that the Department suspend or revoke the license of any insurance agent if it finds that the agent has committed any of a number of acts specified in that Section.

71. Section 626.621, Florida Statutes, gives the Department the discretion to suspend or revoke the license of

any insurance agent if it finds that the agent has committed any of a number of acts specified in that Section.

72. The Department has alleged that Mr. Lieberman, in his dealings with W.E., A.H., and J.E., violated the following acts described in Section 626.611, Florida Statutes:

> (7) Demonstrated lack of fitness or trustworthiness to engage in the business of insurance.
>
> (8) Demonstrated lack of reasonable adequate knowledge and technical competence to engage in the transactions authorized by the license or appointment; and
>
> (9) Fraudulent or dishonest practices in the conduct of business under the license or appointment.

73. The Department has alleged that Mr. Lieberman, in his dealings with W.E., A.H., and J.E., committed the following act in violation of Section 626.621, Florida Statutes:

> (2) Violation of any provision of this code or of any other law applicable to the business of insurance in the course of dealing under the license or appointment.

74. Finally, the Department alleged that, as to A.H., Mr. Lieberman committed the following act in violation of Section 626.621, Florida Statutes:

> (6) In the conduct of business under the license or appointment, engaging in unfair methods of competition or in unfair or deceptive acts or practices, as prohibited under part IX of this chapter, or having otherwise shown himself or herself to be a

> source of injury or loss to the public or
> detrimental to the public interest.

D. Mr. Lieberman's Violation of Section 626.611; Incompetence or Dishonesty?

75. Based upon the allegations of the Administrative Complaint, the Department believed when it issued the Administrative Complaint that Mr. Lieberman was either:

(a) Incompetent, in that his treatment of W.E., A.H., and J.E. had demonstrated: a lack of fitness to engage in the business of insurance in violation of Section 626.611(7), Florida Statutes; and a lack of reasonably adequate knowledge and technical competence to engage in transactions authorized by his licenses in violation of Section 626.611(8), Florida Statutes; or

(b) Dishonest, in that he had: demonstrated a lack of trustworthiness to engage in the business of insurance in violation of Section 626.611(7), Florida Statutes; and had engaged in fraudulent or dishonest practices in the conduct of his insurance business in violation of Section 626.611(9), Florida Statutes.

76. In the Department's Proposed Recommended Order, the Department has taken the position that Mr. Lieberman violated Section 626.611(7) and (8), Florida Statutes, as alleged in Counts I, II, and IV, but not Section 626.611(9), Florida

Statutes, apparently abandoning any assertion that Mr. Lieberman's actions were dishonest.

77. The Department's position as to the W.E., A.H., and J.E. is consistent with the evidence in this case. The facts clearly and convincingly proved that Mr. Lieberman knew or reasonably should have known that W.E., A.H., and J.E. came to him with the desire to purchase health insurance that included coverage of physician office visits. Mr. Lieberman also knew that the Lieberman Medical Plan did not include such insurance and, therefore, that he was not providing specifically what his customers were seeking.

78. Giving him the benefit of any doubt, it is concluded that where Mr. Lieberman fell short was in his explanation or lack thereof of what the Lieberman Medical Plan consisted of, or more precisely, what it did not include: he failed to adequately explain to W.E., A.H., and J.E. that the Chamber Card was not insurance that would cover physician office visits, the very thing they were seeking from him. Mr. Lieberman was too terse in his explanation of the Lieberman Medical Plan. He failed to recognize that these customers were reasonably relying upon his "expertise" to provide them with what they had requested. The written explanations and acknowledgements he had them sign were confusing. He used some terminology commonly

associated with insurance. He gave them little time, if any, to read the documentation and acknowledgements they signed.

79. The evidence clearly and convincingly proved that Mr. Lieberman violated Sections 626.611(7) and (8), Florida Statutes, as alleged in Counts I, II, and IV of the Administrative Complaint. The evidence failed to prove that he violated Sections 626.611(7) or (8), Florida Statutes, as alleged in Count III, or Section 626.611(9), Florida Statutes as alleged in any Count.

E. Discretionary Grounds; Section 626.621, Florida Statutes.

80. Independent of the violations of Section 626.611(7) and (8), Florida Statutes, the evidence failed to prove that Mr. Lieberman violated "any provision of this code or any other law applicable to the business of insurance" in violation of Section 626.621(2), Florida Statutes.

81. As to A.H. and Count II of the Administrative Complaint, the evidence did prove clearly and convincingly that Mr. Lieberman's conduct of business under his licenses was detrimental to the public interest, in violation of Section 626.621(6), Florida Statutes. This violation, however, is subservient to violations of Section 626.611, Florida Statutes, as to penalty. See Dyer v. Department of Insurance and Treasurer, 585 So. 2d 1009, at 1014 (Fla. 1st DCA 1991).

F. Penalty.

82. Florida Administrative Code Rule 69B-231.080, sets out guidelines for the appropriate penalty for a violation of Section 626.611, Florida Statutes:

a. For a violation of Section 626.611(7), Florida Statutes, the recommended penalty is a six month suspension. Fla. Admin. Code R. 69B-231.080(7); and

b. For a violation of Section 626.611(8), Florida Statutes, the recommended penalty is also a six month suspension.

83. Florida Administrative Code Rule 69B-231.040 limits the aggregate suspension for the three counts of violating Sections 6262.611(7) and (8), Florida Statutes, to 18 months.

84. Given the lack of any substantial financial loss to W.E., A.H., and J.E.; the fact that Mr. Lieberman has committed no other violations of Chapter 626, Florida Statutes; and the Department's failure to prove that he intentionally deceived his customers, the length of the suspension should be reduced to 12 months. See Fla. Admin. Code R. 69B-231.080(7) and (8).

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered by the Department finding that Charles Steven Lieberman violated Sections 626.611(7) and (8), Florida Statutes, as alleged in

Counts I, II, and IV of the Administrative Code; dismissing Count III of the Administrative Code; and suspending his licenses for a period of 12 months from the date of the final order.

DONE AND ENTERED this 31st day of August, 2004, in Tallahassee, Leon County, Florida.

LARRY J. SARTIN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of August, 2004.

ENDNOTES

[1]/ All references to Chapter 626, Florida Statutes, or sections thereof, are to those versions pertinent to the times alleged in the Administrative Complaint.

[2]/ Seabury & Smith sent a letter to Mr. Lieberman suggesting that he needed to be sure that he provided a disclosure to his customers that he was not an agent for U.S. Life. Mr. Lieberman suggested that the letter was "nasty," but this testimony was not convincing. The letter was not offered in evidence

[3]/ The American Contract Bridge League is an organization intended generally for individuals who play the card game, bridge. Members were not required, however, to actually be bridge players in order to join the League.

[4]/ The evidence failed to prove the amount of the discount Chamber Card purchasers were entitled to receive.

[5]/ Mr. Lieberman explained how the Limited Product Warranty worked at the final hearing and had admitted Respondent's exhibits numbered 3, 22, and 23. Based upon a review of those exhibits and Mr. Lieberman's explanation, which was difficult, at best, to follow, it is concluded that the Chamber Card with the Limited Product Warranty does not guarantee that a customer will indeed only pay $15.00 for physician benefits.

[6]/ W.E. did testify on cross-examination that she told Mr. Lieberman that she wanted coverage for physician office visits, but that testimony was inconsistent with her testimony on direct examination and is not credited.

[7]/ Mr. Lieberman has proposed findings of fact as to how the investigation of him began, suggesting, without clear explanation, involvement of the American Contract Bridge League, Seabury & Smith, and U.S. Life. None of those proposed findings of fact are relevant to this matter. If the evidence proves, as it has in this case, that Mr. Lieberman has indeed committed any of the violations alleged in the Administrative Complaint, it does not matter how the Department learned of the violations or the motive of those complaining.

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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.