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OFFICE OF INSURANCE REGULATION

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OFFICE OF INSURANCE REGULATION

KEVIN M. MCCARTY
COMMISSIONER

IN THE MATTER OF:

Case No. 91264-07

UNION LABOR LIFE
INSURANCE COMPANY

_____/

FINAL ORDER

THIS CAUSE came on before the undersigned, for consideration and final agency action.

On September 23, 2005, Union Labor Life Insurance Company (UNION LABOR LIFE) filed an application for a Certificate of Authority to transact insurance in the State of Florida with the Office of Insurance Regulation (OFFICE). On March 17, 2006, the OFFICE held a public hearing relating to UNION LABOR LIFE's application. On April 16, 2006, the OFFICE issued a letter disapproving the application.

The denial was based on:

(a) the outcome of the pending DOL investigation into Separate Account J is unclear;

(b) prior to November 22, 2002, UNION LABOR LIFE issued approximately 3,000 insurance policies in Florida on unapproved forms;

(c) between November 22, 2002 and sometime in 2003 UNION LABOR LIFE wrote hundreds of new policies despite the suspension of its Certificate of Authority;

(d) on Schedule T of its 2005 Annual Statement, UNION LABOR LIFE reported it was licensed in Florida despite expiration of its Certificate of Authority; and

(e) certain officers and directors of UNION LABOR LIFE failed to identify fines levied against UNION LABIOR LIFE in response to question 16C of their biographical affidavits.

UNION LABOR LIFE filed a petition for a Formal Administrative Hearing pursuant to Section 120.57(1), Florida Statutes. The matter was heard before the Honorable Diane Cleavinger, Administrative Law Judge, on April 10-13, 2007, In Tallahassee, Florida.

After consideration of the evidence, argument, and testimony presented at hearing, the Administrative Law Judge (ALJ) issued her Recommended Order on August 3, 2007. (Attached hereto as Exhibit "A"). The ALJ recommended that a Final Order be entered granting UNION LABOR LIFE's application for a certificate of authority to transact insurance in the State of Florida.

The OFFICE filed exceptions to the ALJ's Recommended Order on August 20, 2007. The Petitioner, UNON LABOR LIFE filed a response to the exceptions on August 28, 2007. Based upon a complete review of the record, the Recommended Order and the exceptions, responses thereto and the relevant statutes, rules, and case law, I find as follows:

RULINGS ON THE OFFICE'S EXCEPTIONS

Section 120.57(1)(l), Florida Statutes, sets forth the standard an agency must use when reviewing the Recommended Order of an administrative law judge.

Section 120.57(1)(l) in part provides:

> (l) The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of

> administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

EXCEPTIONS TO FINDINGS OF FACT

1. The OFFICE excepts to Finding of Fact #6 as not supported by competent substantial evidence. It was pointed out that Mark Singleton, the current Chief Executive Officer of UNION LABOR LIFE had answered "no" to a question on whether self-dealing by certain officers and directors had an impact on the solvency of the company. Mr. Singleton's testimony, taken out of context, may suggest that the ALJ's finding of fact is not supported by competent substantial evidence. However, as noted by the Petitioner, there was testimony on cross examination that appeared to explain or clarify Mr. Singleton's testimony and provided competent substantial evidence (see Tr.189) which supports the ALJ's finding of fact. The ALJ is allowed latitude to make factual findings and make reasonable inferences that flow therefrom. The law is well established that an agency is bound to honor a hearing officer's [now ALJ's] findings of fact unless they are not supported by competent, substantial evidence. McDonald v. Department of Banking & Fin., 346 So.2d569, 578 (Fla. 1st DCA 1977). It is the hearing officer's function to consider all the evidence, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent, substantial evidence; the agency is not authorized to perform these functions or otherwise interpret the evidence to fit its desired ultimate conclusion. Heifetz v. Department of Business Reg., 475

So.2d 1277, 1281 (Fla. 1st DCA 1985). Accord Wash & Dry Vending Co. v. Department of Business Reg., 429 So.2d 790, 792 (Fla. 3d DCA 1983) (agency may not substitute its judgment for that of the hearing officer by taking a different view of or placing greater weight on the same evidence).

Accordingly, this exception is REJECTED.

2. The OFFICE excepts to several findings of fact, which it asserts, attempts to absolve the current management of UNION LABOR LIFE from the violations committed by the company. The ALJ has apparently minimized the weight and impact of the acknowledged violations of the insurance code, ie: selling policies while under suspension as late as mid 2003, and selling of certain policies on unapproved forms which occurred under former managment. The OFFICE correctly notes that a certificate of authority is issued to an "insurer" as an entity, which may only act through its management, officers, directors and employees. The collective activities of the insurer, through its employees and agents, reflect on the trustworthiness of the management, officers and directors. The ALJ has apparently minimized the significance of the proven violations and concluded that the new management is competent and trustworthy to assure that past violations have been corrected and will not occur again in the future.

To the extent the ALJ's findings suggest that past violations by former management may not be considered in determining the trustworthiness of new management, this conclusion is rejected. An insurer cannot avoid responsibility for past misconduct by terminating its certificate of authority (voluntarily or otherwise) and then reapplying with new management. New management has a burden to establish that the past misconduct will not recur. However, the standard to revise the ALJ's finding of fact has not been met for the reasons set forth in Exception 1. above.

Accordingly, this exception is REJECTED.

3. The OFFICE sets forth the actual Findings of Fact by the ALJ and does not specifically dispute said findings. It is apparent from the record that the ALJ carefully weighed the significance of these violations and did not conclude that they adversely affected the trustworthiness of the current management, officers and directors.

Accordingly, this exception is REJECTED.

4. The OFFICE takes exception to Finding of Fact #48 which asserts that violations that occurred under the former management do not reflect on the trustworthiness of current management, officers or directors. The statement by the ALJ that past violations should not serve as a basis for denying a certificate of authority is not supported as a matter of law. The OFFICE correctly points out that whether or not current management is not responsible for the violations, the violations were committed by UNION LABOR LIFE. An insurer can, in fact, act only through its agents, such as officers and directors. *Shropp v. Crown Eurocars, Inc.* 654 So2d 1158 (Fla.1995). However, a corporation is not absolved of its responsibilities for the acts of those agents simply because it removes such an agent. In this instance, the **insurer** committed violations of the Insurance Code while the **insurer** was not properly licensed. These violations are not personal to the management, officers and directors at the time the violations were committed, but must inure to the detriment of the insurer. However, it is apparent from the record, that the violations were considered by the ALJ, and based on the overall weight of the evidence overcame the impact of the past violations with respect to the trustworthiness of the management, officers and directors.

Accordingly, this exception is REJECTED in part and ACCEPTED in part.

5. The OFFICE further excepts to the above referenced portion of Finding of Fact # 48 as not constituting a finding of fact. As discussed in 4. above, this exception is ACCEPTED.

6. The OFFICE takes exception to Finding of Fact # 47 regarding the current ongoing investigation by the United States Department of Labor (USDOL). Record evidence contained in Respondents Exhibits 49-50, and 52-55, indicates that the investigation has been ongoing since at least April 11, 2002 and has continued for the duration of the current management's tenure at UNION LABOR LIFE. The cloud of a pending investigation of investment activities and fee arrangements with UNION LABOR LIFE's J for Jobs Account is of grave concern. There is no evidence in the record which supports a finding that this investigation is purely speculative.

Accordingly, to the extent the ALJ has determined that the investigation is speculative, this finding is deemed pure conjecture and not supported by competent substantial evidence. However, it is equally apparent from the record that the ALJ was not persuaded by the greater weight of the evidence, that the allegations arising out of the investigation were significant enough to adversely affect the trustworthiness of the management, officers and directors.

The OFFICE's exception is REJECTED in part and ACCEPTED in part.

7. The OFFICE further excepts to the ALJ's Finding of Fact # 48 asserting that it is inconsistent with Findings of Fact # 27 and # 34 and implies that UNION LABOR LIFE's new management first learned of the USDOL investigation of its activities in September 2004.

Despite the OFFICE's assertions that the new management knew of the USDOL investigation much earlier, the specific Finding of Fact is supported by competent substantial evidence.

Accordingly, this exception is REJECTED.

8. (Designated as 9. in the Exceptions) The OFFICE takes exception to Finding of Fact # 46 which makes an ultimate finding that the sole issue in this matter is whether the current management of UNION LABOR LIFE is sufficiently trustworthy to transact insurance in the State of Florida. This statement is less of fact and more of an erroneous legal conclusion. The OFFICE correctly points out that a Certificate of Authority is issued to an insurer, not to the management of the insurer. The trustworthiness of the current management admittedly is a critical issue, but the overall entitlement of the insurer to a certificate of authority is governed by all provisions of Section 624.404, Florida Statutes. The replacement of high level management by an insurer which has violated the insurance code does not excuse the insurer from being held accountable for these violations and may constitute sufficient grounds to deny an application for a Certificate of Authority. To the extent the ALJ's Finding of Fact is an incorrect conclusion of law, this exception is ACCEPTED.

EXCEPTIONS TO CONCLUSIONS OF LAW

1. This is a statement and not an exception.

2. The OFFICE takes exception to Conclusion of Law # 73 which concludes that past infractions may not be used as a basis to deny UNION LABOR LIFE's application. Clearly UNION LABOR LIFE violated Section 624.420, Florida Statutes by issuing 12 life insurance policies,1,200 certificates and 691 accidental death and dismemberment policies after the date of suspension, and violated Section 624.410, Florida Statutes by issuing approximately 3,067 certificates of insurance under a group life insurance policy on an unapproved form (see FOF #24). Some of the violations had occurred after the new management had joined the insurer in mid 2003. Furthermore, Section 624.404, Florida Statutes in part reads:

624.404 General eligibility of insurers for certificate of authority. To qualify for and hold authority to transact insurance in this state, and insurer must otherwise be in compliance with the code.....

Accordingly this exception is ACCEPTED.

3. The OFFICE proposes the following substituted conclusion of law:

> The business of insurance is greatly affected with the public trust. *Natelson v. Department of Insurance,* 454 So2d 31 (Fla. 1st DCA 1984). To safeguard that public trust, the Legislature has made the OFFICE statutorily responsible to ascertain whether an applicant meets the requirements of the Florida Insurance Code. Therefore, as a matter of law, past proven violations of the Florida Insurance Code, may certainly legally form the basis for denial of an application for a certificate of authority even though the new management, officers and directors were not responsible for those violations.

The standard for review of a conclusion of law is set forth in Section 120.57(1)(l) in part as follows:

> The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejection or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact.

An agency's interpretation of the statute it is charged with enforcing is afforded great deference. Florida Hospital v. Agency for Health Care Administration, 823 So2d 844 (Fla. 1st DCA 2002). The ALJ has incorrectly interpreted the provisions of Section 624.404, Florida Statutes to disallow consideration of past misconduct of an insurer as grounds for denying an application of a certificate of authority. The offenses in this case are serious breaches of the law

and some were committed at the time the new management had joined the insurer in mid 2003. A clear reading of Section 624.404, Florida Statutes, indicates that the insurer must be in compliance with the insurance code in order to obtain a certificate of authority. It would undermine the public trust to allow an insurer to commit serious violations then turn around and hire a new upper management team to escape accountability for prior violations. This interpretation is as or more reasonable that the interpretation afforded by the ALJ.

Accordingly, this exception is ACCEPTED and the above Conclusion of Law is substituted for Conclusion of Law # 73.

4. The OFFICE takes exception to Conclusion of Law # 74 regarding the unresolved investigation by the USDOL into the activities of UNION LABOR LIFE. The ALJ appears to dismiss the relevance of the investigation as grounds to either impact or affect the trustworthiness of the management or the qualifications of the insurer to obtain a certificate of authority. The OFFICE also takes exception to the ALJ's conclusion that an investigation is not sufficient to constitute evidence of untrustworthiness. The ALJ has incorrectly construed the conclusions and legal reasoning reached in Comprehensive Medical Access Inc. v. Office of Insurance Regulation, 2006 WL 3148809 (Fla. Div. Admin. Hrgs. November 1, 2006). The OFFICE proposes the following substituted Conclusion of Law.

> UNION LABOR LIFE bears the burden of proving entitlement to a Certificate of Authority by a preponderance of the evidence, a burden borne each and every step of the licensing process. *Department of Banking & Finance v. Osborne Stern & Company,* 670 So2d 932 (Fla.1996) By finding that the unresolved investigation by the USDOL has no bearing on the application, the ALJ is essentially placing the burden upon the OFFICE to prove the outcome of the USDOL investigation. This is legally inappropriate. Inter alia, the USDOL could find a breach of fiduciary duty and criminal violations of ERISA and remove UNION LABOR LIFE as a fiduciary for Separate Account J. The distinction drawn by the ALJ, therefore, permits UNION LABOR LIFE to benefit from the unresolved status of the

> USDOL investigation. According to the ALJ, it is only when the investigation ripens to specific allegations of wrongdoing that the OFFICE may be sufficiently troubled by such an investigation. But as long as the investigation remains unresolved, the company may act as if it does not exist. Again, this creates a burden upon the OFFICE that does not otherwise exist. That is, to prove the outcome of ongoing investigation into the fiduciary responsibilities of an insurer. Therefore, an investigation by an administrative or regulatory agency may be properly utilized in making a determination of trustworthiness.
>
> The reasoning utilized in Comprehensive Medical Access applies here. The fact that a complaint has not been filed is not controlling. The subject matter of the investigation raises grave concerns as to the propriety of the business practices of an insurer. The ALJ has summarily dismissed the potential consequences that a federal investigation of improper business and fiduciary practices of an insurer may have on the eligibility of an insurer to conduct business in this State.

For the reasons set forth herein and upon determining that the substituted Conclusion of Law is as or more reasonable than that of the ALJ, Conclusion of Law # 74 is rejected and the above substituted Conclusion of Law adopted.

Accordingly this exception in ACCEPTED.

5. This exception does not reference a specific Conclusion of Law, however it does point out that UNION LABOR LIFE's failure to disclose the pending USDOL investigation for a period from 2002 until June 1, 2005 does appear to indicate that the investigation was something more than an insignificant event. It is troubling that this was not reported to the OFFICE for a period of approximately three (3) years.

Accordingly, this exception is REJECTED.

IT IS THEREFORE ORDERED:

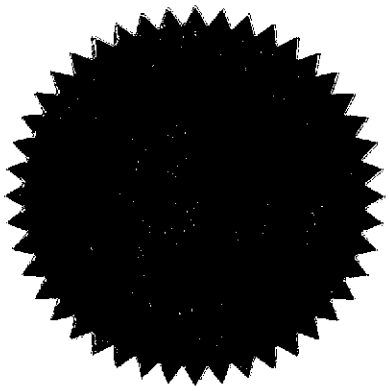
1. The Findings of Fact of the ALJ, are adopted in full as the OFFICE's Findings of Fact, except where noted herein.

2. The Conclusions of Law of the ALJ, are adopted as the OFFICE's Conclusions of Law, except as provided herein, and the substituted Conclusions of Law are adopted.

3. The Recommendation of the ALJ is ACCEPTED.

ACCORDINGLY, UNION LABOR LIFE's application for a Certificate of Authority to transact insurance in the State of Florida is GRANTED.

DONE and ORDERED this 14th day of November, 2007.



Kevin M. McCarty, Commissioner
Office of Insurance Regulation

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, Florida Rules of Appellate Procedure. Review proceedings must be instituted by filing a Notice of Appeal with the General Counsel, acting as Agency Clerk, 200 East Gaines Street, 612 Larson Building, Tallahassee, Florida, 32399-0333 and a copy of the same and filing fee, with the appropriate District Court of Appeal within thirty (30) days of rendition of this Order.

Copies furnished to:

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