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Docketed by: SS

ALEX SINK
CHIEF FINANCIAL OFFICER
STATE OF FLORIDA

IN THE MATTER OF:

PAULA EVELYN BECKETT                                        Case No. 84530-06-AG

_______________________________/

AMENDED FINAL ORDER

THIS CAUSE came on for consideration and final agency action. On August 3, 2006, an Administrative Complaint was issued by the Department of Financial Services against the Respondent, Paula Evelyn Beckett, alleging that she violated various provisions within Chapters 624 and 626, Florida Statutes, related to her sale of ancillary products without the customers' informed consent. Respondent timely filed a request for a proceeding pursuant to Section 120.57(1), Florida Statutes. Pursuant to notice, the matter was heard before R. Bruce McKibben, Administrative Law Judge, Division of Administrative Hearings, on November 7, 2006.

After consideration of the record and argument presented at hearing, the Administrative Law Judge issued his Recommended Order on December 28, 2006. (Attached as Exhibit A). The Administrative Law Judge recommended that the Department enter a final order suspending Respondent's license(s) as a customer representative, in the State of Florida, for sixty (60) days.

On January 10, 2007, the Respondent requested an extension of the time to file exceptions to the Recommended Order and an attendant tolling of the ninety (90) day

period permitted for preparation of the Final Order. The Motion was granted and the Petitioner and the Respondent timely filed exceptions to the Recommended Order on January 19, 2007. The Petitioner filed three exceptions, directed to a clerical error, a Conclusion of Law, and the Recommended Penalty of the Recommended Order. The Respondent filed twelve exceptions to numerous Findings of Fact, Conclusions of Law, and to the Recommended Penalty of the Recommended Order. The Respondent also timely filed responses to some of the Petitioner's exceptions, which responses were inadvertently overlooked, thus necessitating this Amended Final Order. The Recommended Order, the evidence adduced at hearing, the exceptions and responses, and applicable law have all been considered during the promulgation of this Amended Final Order.

RULINGS ON RESPONDENT'S EXCEPTIONS

1. Respondent excepts to Finding of Fact #5, of the Recommended Order, and states that the Administrative Law Judge erred when he found that the Respondent generally provides a quote for tag insurance, the travel protection plan, the accident medical protection plan, "and others." A careful review of the hearing transcript and admitted exhibits does not reveal any evidence that the Petitioner offered any coverage beyond tag insurance, the travel protection plan and the accident medical protection plan. [See generally Transcript; Joint Ex. 2-4] Thus, pursuant to Section 120.57(1)(l), F.S., the record does not show that the finding, relative to other coverage, was based on competent substantial evidence:

> The term "competent substantial evidence" does not relate to the quality, character, convincing power, probative value or weight of the evidence but refers to the existence of some evidence (quantity) as to each essential element as to the legality and admissibility of

> that evidence. Competency of evidence refers to its admissibility under legal rules of evidence. "Substantial" requires that there be some (more than a mere iota or scintilla), real, material, pertinent, and relevant evidence (as distinguished from ethereal, metaphysical, speculative or merely theoretical evidence or hypothetical possibilities) having definite probative value (that is, "tending to prove") as to each essential element of the offense charged.

See, Dunn v. State, 454 So.2d 641, 649 (Fla. 5th DCA 1984).

Accordingly, the Administrative Law Judge's Finding of Fact #5 is MODIFIED so that the words "and others" are stricken and the Respondent's First Exception is ACCEPTED, to the extent modified herein.

2. The Respondent excepts to Finding of Fact #6 and asserts that the Administrative Law Judge's claim that the Respondent did not "explain each Section unless the customer asked her questions" is not supported by the record. However, the Respondent's assertion is not a complete and accurate statement of the finding. The Respondent concedes in its Exceptions that the Respondent gave "some" explanation of the insurance coverage being offered which comports with the Administrative Law Judge's assessment that the review was "somewhat superficial." As well, the Respondent's testimony was "[a]nd then I show them there is a list of things. I say it covers more than that, but that's just an idea of what it does cover." [Tr. 87] Further, the Respondent stated that "[a]nd we don't read that whole thing. We just show them that that's their hospital coverage." [Tr. 87] Thus, it is clear that the Respondent did not explain all of the relevant information contained in each Section of the policy. Moreover, the record, as evidenced by the testimony of Ms. Sanchez and Ms. Battle, establishes that the Respondent did not adequately explain the documents. [Tr. 18-20, 40-41] It is

well-established that the credibility of the witnesses' testimony and the weight to be given the evidence is the province of the Administrative Law Judge. The agency cannot overturn such findings unless they are not supported by competent substantial evidence. Brogan v. Carter, 671 So.2d 822 (Fla. 1st DCA 1996). As demonstrated above, there is competent substantial evidence in the record to support the Administrative Law Judge's Finding of Fact #6. Thus, the exception is REJECTED.

3. Respondent excepts to Finding of Fact #9, contending that the Administrative Law Judge's finding that the Ms. Sanchez was "in a hurry" is not based on competent substantial evidence. The record does not show that Ms. Sanchez was in a hurry. Rather, her testimony was that "[j]ust the process was quick. I wasn't in a hurry." There is not competent, substantial evidence to support this finding, which is largely immaterial to the resolution of the ultimate fact issues in this case. Accordingly, the Administrative Law Judge's Finding of Fact #5 is MODIFIED so that the words "she was in a hurry" are hereby deleted, and the Respondent's Third Exception is ACCEPTED, to the extent modified herein.

4. Respondent excepts to Finding of Fact #12 of the Recommended Order arguing that the Administrative Law Judge erred in his finding that Amber Battle "did not read (and probably would not have understood) the insurance documents that she signed." The Respondent bases her exception on Ms. Battle's testimony that she "probably" understood that the accident medical protection was optional. [Tr. 56] Based on that selected testimony, the Respondent asserts that Finding of Fact #12 should be modified to state that Ms. Battle "might not have understood every document that she signed, but she would have understood that the accident medical protection was an optional product." Given the totality of Ms. Battle's testimony relative to her

understanding of the insurance transaction in question, that assertion is not persuasive. For example, Ms. Battle also recalled instances where she did not understand either the insurance product or the accompanying documents. [Tr. 35, 41, 56] Additionally, the testimony relied upon by the Respondent in this exception was equivocal in nature. When asked whether she would have understood, on that day, that the coverage was optional, Ms. Battle stated "[O]h yes. *Probably*, yes." (Emphasis added.) [Tr.56] Thus, it appears that the Administrative Law Judge properly assessed the totality of Ms. Battle's testimony relative to her understanding of the questioned insurance transaction before finding that Ms. Battle "probably would not have understood" that the accident medical protection plan was: coverage she did not ask for, coverage not related to the insurance coverage she did ask for, coverage not required by the state, and coverage resulting in an additional premium. As stated above, the weighing of such testimony is the province of the Administrative Law Judge. As there is competent substantial evidence to support the ALJ's finding, the Respondent's exception to Finding of Fact #12 is REJECTED.

5. Respondent next excepts to Finding of Fact #22 asserting that the Administrative Law Judge erred by finding that while the Respondent "never prohibits the customer from fully reviewing the written documents, she does not encourage them to do so either." Essentially, the Respondent argues that the evidence established that the Respondent asks each customer if he or she would like to read each document. However, the word "encourage" is not a neutral term. According to the Merriam-Webster Dictionary, the term means "to attempt to persuade," "urge," or "to spur on." The Respondent's testimony in response to the question whether "you tell all your customers, tell them to read everything" was "[i]f they would like. I always ask them,

"[w]ould you like to read that paper."" [Tr. 90] Hence, the Respondent's stated practice with regard to this issue was to neutrally offer her customers the opportunity to review the documents. In other words, the Respondent said nothing that would urge or encourage the customer to read the documents that evidenced coverage. An Administrative Law Judge serves in the capacity of fact-finder. The Respondent, in her exception to this finding, misapprehends the meaning of "encourage" and then asks that the Department reweigh the evidence in light of that misapprehension. As noted earlier herein, the Department cannot reweigh evidence. The assignment of weight to the evidence is reserved for the Administrative Law Judge, and cannot be disturbed by the agency unless the findings are not supported by competent substantial evidence. See, Brogan v. Carter, 671 So.2d at 823. In this instance, there is competent substantial evidence to support the Administrative Law Judge's finding that the Respondent did not "encourage" customers to read each document involved in the questioned insurance transaction. Accordingly, the Respondent's exception to Finding of Fact #22 is REJECTED.

6. The Respondent excepts to Conclusion of Law #28. The Respondent again argues that because Amber Battle stated that she probably would have understood that the accident medical protection plan was optional had she actually read the documents she signed, any legal conclusion that the Respondent's oral presentation and explanation of the accident medical protection plan was legally inadequate is not supported by competent substantial evidence. Although the Respondent's recitation of a portion of Ms. Battle's testimony on this question is correct, as discussed previously, Ms. Battle's testimony was equivocal on this point, and there were various times in her testimony where Ms. Battle stated that she did not understand the insurance products.

[Tr. 35, 41, 56] Further, the Administrative Law Judge's Conclusion represents a broader view of the evidence than the Respondent contemplates. Clearly, in this Conclusion of Law, the Administrative Law Judge is referring to the insurance documents for that transaction as a whole, rather than just the accident medical protection plan. [See, Petitioner's Composite Exhibit 2.] In Finding of Fact #12, the Administrative Law Judge weighed the substance and credibility of the both the testimony and the documentary evidence in determining that Ms. Battle did not give her informed consent to the purchase of the accident protection plan at issue. Conclusion of Law #28 is wholly consistent with Finding of Fact #12. As previously discussed, assignment of the weight to be given to the evidence is reserved for the Administrative Law Judge. See, Brogan v. Carter, supra. Accordingly, Respondent's exception to Conclusion of Law #28 is rejected.

7. Respondent next excepts to Conclusion of Law #29. The Respondent argues that the Administrative Law Judge did not properly construe the holding in Thomas v. State of Florida Department of Insurance and Treasurer, 559 So. 2d 419 (Fla. 2d DCA 1990), rev. denied 570 So.2d 1307 (Fla. 1990). In Conclusion of Law #29, the ALJ stated that Thomas "stands for the general proposition that an insurance agent's failure to orally explain that additional products were optional was a violation of the insurance code." Respondent argues that Thomas stands for the broader proposition that both the oral and written representations by the agent are to be considered in determining whether informed consent was received from the purchaser, and contends that the Respondent's written representations and Respondent's account of her oral representations to the purchaser were adequate to obtain the purchaser's informed consent.

The factual background of the Thomas case is very similar to the instant case. In Thomas, the written documents gave no disclosure that the ancillary products were optional, there was no written explanation that the ancillary products were in addition to, not a part of, what the customer had requested, and there was no written notice that the ancillary product would require an additional premium. Against the background of those deficient written documents, the Thomas court was very specific in delineating misconduct that constituted willful deception. The court expressly found that: failing to orally explain that a motor club membership was optional, neglecting to orally inform the customer that the coverage was not part of the coverage that the customer requested, failing to orally inform customers that they could save money be declining the coverage, and not orally advising the customer that they could buy an actual life or health insurance policy constituted willful deceit. Thomas, 559 So. 2d at 421.

In the instant case, the customers all requested "tag insurance", or PIP coverage, exclusively. Rather than honoring her customers' stated wishes, the Respondent surreptitiously solicited these customers to purchase additional ancillary products supplementary to the required auto insurance coverage. In only one undistinguished line on one of the multiple forms Respondent utilized in this transaction was the word "optional" visibly present. [Petitioner's Composite Exhibit 2.] As in Thomas, there was no evidence that Respondent orally informed the customer that the ancillary products were not part of the minimal auto insurance coverage requested by the customer. Further, the Respondent did not orally inform her customers that the addition of ancillary products would raise their insurance premiums, and did not orally advise her customers that they could buy life or health insurance rather than the ancillary products that she

offered. In short, the Respondent's deceitful conduct was materially the same as that in Thomas.

While it is true that the Thomas holding does not examine only oral failures to disclose ancillary products, their cost, the fact that they are not part of the insurance originally requested, that they are not required by law, and that more suitable products may be available, an acknowledgment that the Thomas court also evaluated the written disclosures there at issue does not alter the ultimate finding here.

That is because in this exception, Respondent cherry-picks the evidence most favorable to her, and requests that such limited evidence receive greater weight than the remainder of the evidence. As afore-stated, an agency is not allowed the liberty to reweigh evidence. Brogan v. Carter, supra. Moreover, Thomas establishes that a licensee owes a greater duty than that of simple silence to explain to a customer the licensee's unilateral and un-requested inclusion of ancillary products.

There is competent substantial evidence in the records to support the ALJ's ultimate finding that the Respondent's disclosures, both oral and written, relative to the ancillary products were insufficient to obtain the purchaser's informed consent. Accordingly, Respondent's exception to Conclusion of Law #29 is rejected in part and accepted in part. The challenged sentence in Conclusion of Law #29 is modified to read:

> Thomas stands for the proposition that that the lack of, or inadequate, written disclosures of the agent's inclusion of ancillary products and the consequences of the purchases thereof is not cured by the lack of, or inadequate, oral disclosures of the same.

This modified Conclusion of Law is as or more reasonable than that for which it is substituted.

8. The Respondent excepts to Conclusion of Law #30, where the ALJ stated that an insurance agent owes a fiduciary duty to his or her customers, and that while an agent may offer additional ancillary products to the customers, the agent must make it clear that the quoted price includes charges for products that are in addition to the coverage requested by the customer, and that those products are not required by law. Under Section 626.9541(1)(z), Florida Statutes, sliding occurs when a representation is made that an ancillary product or coverage is required by law, or an applicant is charged for an ancillary coverage or product without the applicant's informed consent. The Administrative Law Judge properly concluded that under the facts of this case, and in view of the fiduciary duty owed to the customer, the Respondent's explanation of coverage was not sufficient to obtain the customer's informed consent to the inclusion of additional insurance products not initially requested by the customer.

In this exception, the Respondent also asserts that only insurance brokers enter into a fiduciary relationship with a customer, and "[i]t is the "broker," not the "agent," who stands in a fiduciary relationship with the insured regarding the procurement of insurance." The Respondent's argument that agents have no fiduciary relationship with their customers is patently incorrect. It is axiomatic that "Insurance is a business greatly affected by the public trust, and the holder of an agent's license stands in a fiduciary relationship to both the client and insurance company." <u>Natelson v. Department of Insurance</u>, 454 So.2d 31, 32 (Fla. 1st DCA 1984). Pursuant to Section 626.561, Florida Statutes, all premiums, returned premiums, or other funds belonging to others are received by an insurance agent in a fiduciary capacity. The First District Court expressly stated that the agent enters into a fiduciary relationship with both his client and the insurance company he is representing in an insurance transaction. <u>See</u>

Natelson, 454 So.2d at 32. For all the reasons stated above, Respondent's exception to Conclusion of Law #30 is rejected.

9. The Respondent excepts to Conclusion of Law #31. The Respondent asserts that the Administrative Law Judge incorrectly concluded that her customers were not fully aware of the additional products they purchased. However, the testimony of all three victims was that they were not aware of what products they purchased. [Tr. 18, 40, 68] In further support of that conclusion, it must be noted that the loan quotations in the premium finance documents are misleading. The handwritten portions of those documents all include the phrase "Mandatory Cov." And/or "Fla. Tag Ins. Only." [Joint Ex. 5-7]. Below the words "Mandatory Cov.," the Respondent misleadingly listed the ancillary products that she had unilaterally included in the coverage. Thus, the Respondent deceptively combined the required insurance products with the ancillary products on those forms.

Additionally, most of the Respondent's arguments in support of the inclusion of the ancillary products in these insurance transactions erroneously focus on the Respondent's alleged summary of the actual benefits of each ancillary product, rather than on the fact that the Respondent failed to explain that they were optional products with additional premiums that were unilaterally included in the quote without the informed consent of the customer. Section 626.9541(1)(z), Florida Statutes, does not provide for amelioration in instances where the ancillary products sold without proper disclosure provide some useful benefits. Rather, the statutory focus is on whether the agent or customer representative provided the customer with the requisite information regarding the ancillary product and obtained the informed consent of the customer for the purchase. In this case, the Respondent failed to do so.

Further, the Respondent argues that because there is no statutory definition of "informed consent," Section 626.9541(1)(z), Florida Statutes, is impermissibly vague. If accepted, that argument would result in the statute being declared unconstitutional. It is well-established that only the courts, not executive branch agencies can declare a statute unconstitutional. Key Haven Associated Enterprises, Inc. v. Board of Trustees of Internal Imp. Trust Fund, 427 So.2d 153 (Fla. 1983); Department of Administration, Div. of Personnel v. Department of Administration, Div. of Administrative Hearings, 326 So.2d 187 (Fla. 1st DCA 1976); Commission on Ethics v. Sullivan, 430 So.2d 928 (Fla. 1st DCA 1983). Therefore, that argument must be rejected. In any event, the term "informed consent" has a plain, understandable meaning and has been adequately defined in and by cases such as Thomas and Whitaker v. Dept. of Insurance, 680 So.2d 528 (Fla. 1st DCA 1996), so this term has a meaning understandable to the ordinary person.

In this same exception, the Respondent cites Vasquez v. Bankers Insurance Co., 502 So.2d 894 (Fla. 1987), for the proposition that "one who signs an insurance form cannot generally escape the consequences of one's signature by alleging that the form was not read or understood", and argues that Respondent's insureds are similarly bound to accept the ancillary products in question. However, Vasquez is easily distinguished from the instant case. In Vasquez, after experiencing an auto accident with an uninsured motorist, Ms. Vasquez attempted to assert that her written rejection of uninsured motorist coverage was made without her informed consent. In rejecting that after-the-fact attempt, the court noted that there was no evidence to support the insured's contention that she had not knowingly and voluntarily rejected the coverage in question. Thus, it is clear that the facts in this case are far closer to Thomas than to

Vasquez. Moreover, the Thomas court reviewed Vasquez and found it easily distinguishable. Thomas, at 421. Finally, the anomalous position urged by Respondent reach would render the anti-sliding protections of Section 626.9541(1)(z), Florida Statutes, meaningless. Sliding, *by definition*, involves the manipulation by an agent of the customer to purchase ancillary coverage, by failing to present the customer with an explanation of the additional coverage sufficient to obtain informed consent to the purchase.

Respondent further argues in this exception that the vagueness of the customers' testimony at hearing prevents that testimony from serving as a basis for finding that Respondent violated the Insurance Code. Particularly, Respondent draws attention to the fact that customers had difficulty remembering certain aspects of Respondent's presentation of the ancillary products. As in the previous exceptions, Respondent focuses solely on those aspects of the testimony that support her contentions. Respondent's exception ignores the testimony of all three witnesses who were sure of the fact that they did not want any products that were not required by Florida law, and were also certain that they did not know that Respondent had indeed sold them optional coverage. [Tr. 19, 43. 67-68] Further, as discussed previously, the handwritten portion of the premium finance documents, which designated the ancillary coverage as mandatory, was clearly misleading. [Joint Ex. 5-7] Moreover, Respondent's testimony was itself problematic. Respondent testified that she did not specifically remember the customers that were the subject of the Administrative Complaint, and yet went on to give very specific self-serving testimony detailing her transactions with the very same customers. [Tr. 75, 81, 85, 89, 91] Such an internal conflict in her testimony logically calls Respondent's credibility into question. The record includes more than credible

testimony from which the Administrative Law Judge could conclude that the customers were not aware that ancillary products were being added to the basic coverage they requested. [Tr. 18, 40, 68] Therefore, the challenged conclusion cannot be altered See Brogan v. Carter, supra, and therefore, Respondent's exception to Conclusion of Law #31 is REJECTED.

10. Finally, the Respondent excepts to Conclusion of Law #32. However, the Respondent's exception constitutes no more than a general objection to the Administrative Law Judge's conclusion that the Petitioner met its burden of proving that the Respondent engaged in unfair or deceptive acts. For the reasons stated in the rulings on the Respondent's exceptions to Conclusions of Law #28-31, Respondent's exception to Conclusion of Law #32 is rejected.

RULINGS ON PETITIONER'S EXCEPTIONS

1. Petitioner first excepts to page eleven of the Recommended Order, wherein the Administrative Law Judge made reference to Subsection 626.21." The Petitioner argues that the correct citation is "Section 626.621." As this appears to be merely a scrivener's error in paragraph 26 of the Conclusions of Law, this exception is accepted and Conclusion of Law #26, page 11 is modified to reflect that "subsection 626.21" should read "Section 626.621."

2. Petitioner also excepts to the Conclusion of Law #27 of the Recommended Order arguing that the Administrative Law Judge erred in finding the evidence was less than clear and convincing that the Respondent violated provisions of Section 626.611, Florida Statutes. Further, the Petitioner argues that this Conclusion of Law is actually a finding of fact.

With respect to the argument that the Conclusion of Law is actually a Finding of Fact, the Petitioner cites J.J. Taylor Companies, Inc., v. Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco, 724 So.2d 192 (Fla. 1st DCA 1999), and cases cited therein. A review of those cases sustains Petitioner's contention that the determination of a statutory violation is a finding of fact, and not a conclusion of law, regardless of the ALJ's erroneous labeling. Thus, the challenged Finding of Fact can only be rejected or modified if there is no competent substantial evidence in the record to support it, or if the proceedings on which the Administrative Law Judge based the challenged finding did not comply with the essential requirements of law. [Section 120.57 (1)(l), Florida Statutes.]

The Administrative Law Judge made no evaluation of the evidence relative to Sections 626.611(7) and 626.611(9), Florida Statutes, so it is not possible to discern his reasoning relative to the evidence as it bears on each of those subsections. It appears clear, though, that the challenged Conclusion of Law #27 (Finding of Fact) does not comport with established case law dealing with violations of those statutory subsections, and thus does not comply with the essential requirement of law that inferior tribunals must follow the applicable precedent of superior tribunals.

Sections 626.611(7) and 626.611(9), F.S., both of which were charged in the instant Administrative Complaint, were both at issue and thoroughly discussed in Thomas v. State of Florida, Department of Insurance and Treasurer, 559 So.2d 419 (Fla. 2nd DCA 1990), which case was acknowledged and cited by the Administrative Law Judge in Paragraph 29 of the Recommended Order. In Thomas, the court analyzed conduct materially indistinguishable from the Respondent's in the instant case; specifically, the act of charging an applicant for a specific ancillary coverage or product

without the informed consent of the applicant. In Thomas, the ancillary product charged for without informed consent was a motor club membership. Here, the ancillary products charged for without informed consent were a "Travel Protection Plan" and an "Accident Medical Protection Plan".

In its review, the Thomas court noted that the Department had alleged and the Administrative Law Judge had found, inter alia, that by charging for the ancillary motor club without the informed consent of the applicant, the Thomases' actions had violated both Section 626.611(7), Florida Statutes, because their conduct demonstrated a lack of fitness or trustworthiness to engage in the business of insurance, and Section 626.611(9), Florida Statutes, because those same actions were fraudulent or dishonest. In affirming that charge and the ALJ's findings, the Second District Court of Appeal specifically held that: "[t]hese 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." In accord with that holding is precedent from the First District Court of Appeal, Whitaker v. Department of Insurance, supra. Thus, the Thomas court, and the Whitaker court, have both found that the same activity that is at issue here, charging for a specific ancillary coverage or product without the informed consent of the applicant, constituted a violation of both Sections 626.611(7), and 626.611(9), Florida Statutes. Also, In The Matter of Charles Steven Lieberman, Department Final Order No. 72432-03-AG, October 14, 2004, DOAH Case No. 04-1095, this same type of activity was found to have violated Section 626.611(7), Florida Statutes.

This same unlawful activity is also legislatively codified as "sliding", an unfair insurance trade practice. See, Section 626.9541(1)(z), Florida Statutes. Thus, the same

unlawful conduct of "sliding" can and, in this case, does violate both Sections 626.611 (7) and (9), Florida Statutes, as well as Section 626.9541(1)(z), Florida Statutes. More succinctly, and under the facts of this case, including the ALJ's finding of *intentional* wrongdoing by the Respondent (RO Para. 23), the act of charging an applicant for a specific ancillary coverage or product without the informed consent of the applicant violates both the specific anti-sliding provisions of Section 626.9541(1)(z), Florida Statutes, and the fitness and trustworthiness provisions of Section 626.611(7), Florida Statutes, as well as the dishonesty provision of Section 626.611(9), Florida Statutes. The Petitioner charged those same three violations here, correctly alleging that that Respondent's actions in charging for the ancillary products without the informed consent of the applicant violated Section 626.9541(1)(z) Florida Statutes, and subsections (7) and (9) of Section 626.611, Florida Statutes.

Despite the identical nature of the facts proving the alleged statutory violations, the Administrative Law Judge found that Respondent had violated Section 626.9541(1)(z), Florida Statutes, but had not violated Sections 626.611(7) and 626.611(9), Florida Statutes, finding that the evidence as to the charge of sliding was sufficient to establish that violation, but that the same fact evidence was "less than clear and convincing" to establish violations of the relevant Section 626.611 subsections. Essentially, the ALJ ruled that an agent who intentionally "slides" his or her customers in violation of Section 626.9541(1)(z), Florida Statutes, is nonetheless fit and trustworthy to hold an insurance license, and that intentional sliding is not dishonest. How the ALJ reached such conflicting conclusions as to the sufficiency of the evidence bearing on the alleged statutory offenses, when both the elements of alleged offenses and the evidence proving the presence of those elements are factually identical, was not

explained by the Administrative Law Judge. Nonetheless, the salient point is that the Administrative Law Judge's failure to follow the Thomas and Whitaker precedents relative to the alleged 626.611(7) and (9) violations, given the facts of this case, is unquestionably inconsistent with the law, has no support in the record, and is clearly erroneous.

While the ALJ offered no express rationale for his contrary rulings, a review of Paragraph 30 of the Conclusion of Law sheds some light on that ruling. There, the ALJ stated that the Respondent's actions were "[s]omewhat mitigated by the fact that her employer encouraged and expected her to offer additional products to each and every customer. She was a long-time employee and felt pressure to comply with her employer's directives." It thus appears that the Administrative Law Judge's conclusion that the evidence of the alleged 626.611 violations was "less than clear and convincing" was based upon on his finding that the Respondent's actions were "somewhat mitigated" for the reasons he expressed. However, this reasoning is erroneous. While mitigating factors are appropriate for consideration relative to the final penalty to be imposed pursuant to Rule 69B-231.160, F.A.C., they are not appropriate to the determination of whether the evidence will support the finding of a statutory violation. The fallacy of considering mitigating factors in an analysis of whether a statutory violation has occurred is especially apparent where, as here, there is controlling precedent from two appellate courts and the Division of Administrative Hearings that establish that the intentional commission of the unfair trade insurance practice of sliding necessarily evidences a lack of fitness and untrustworthiness, and also constitutes a dishonest practice. A factual finding that an insurance agent intentionally and surreptitiously caused an insurance applicant to purchase more than the applicant

requested by "sliding" the applicant additional coverages constitutes clear and convincing evidence that the surreptitious agent is also untrustworthy and dishonest. Thus, the Administrative Law Judge's own detailed findings establish the truth of the alleged violations of Sections 626.611(7), and 626.611(9), Florida Statutes. Nonetheless, the Administrative Law Judge failed to follow established precedent and find the Respondent guilty of those alleged violations, and improperly considered mitigation when determining guilt, and thereby departed from the essential requirements of the law.

Because the Administrative Law Judge's actions and proceedings failed to comply with the essential requirements of law, "Conclusion of Law" (Finding of Fact) #27 is rejected, and the following paragraph is substituted and states as follows:

> The Petitioner proved by clear and convincing evidence that Respondent violated the provisions of Sections 626.611(7), and (9), Florida Statutes.

The above substituted Finding of Fact has been made after a review of the entire record.

The Respondent's response to this exception likewise ignores the Thomas, Whitaker, and DOAH case precedents cited above as they apply to the offenses of sliding and an agent's lack of fitness and/or trustworthiness and the presence of dishonesty and/or fraud in a given insurance transaction. Therefore, the response is not persuasive. Moreover, the response mistakenly interprets the holding in Thomas to assert that the presence of any oral explanation of ancillary products is sufficient to obtain a customer's informed consent. That is clearly neither the law, nor the holding in Thomas. The oral explanation must be made with such a degree of clarity that the ordinary person may make a deliberate and knowledgeable choice among the options

presented. Otherwise, any explanation, no matter how inadequate to obtain informed consent, would legally insulate an agent who was intentionally seeking to mislead a customer. Here, the ALJ expressly found that the oral explanations provided by the Respondent did not effectively inform the customers about the ancillary products she was offering, and that she intentionally provided the customers more than they had asked for and, left it to them to distinguish between the coverages they requested and the coverages she provided. (RO. Paras. 23, 31) An ineffective oral explanation has the same legal weight as no oral explanation because neither is adequate to obtain a customer's informed consent. The ALJ's Finding of Fact relative to the ineffectiveness of the Respondent's oral explanations of the ancillary products she was offering to her customers is supported by competent substantial evidence and, therefore, will not be disturbed.

The Respondent's response also contends that a finding that a violation of Section 626.9541(1)(z), Florida Statutes, also constitutes a per se violation of the pertinent Section 626.611 subsections would render the prescribed penalty for a violation of Section 626.9541(1)(z) a nullity, and therefore an absurdity. That argument is not persuasive. To accept that a violation of Section 626.9541(1)(z), Florida Statutes is not also a per se violation of Section 626.611(7), Florida Statutes, is to accept the proposition that an agent who intentionally slides additional and unwanted insurance coverges onto his or her customers without their informed consent is nonetheless fit and trustworthy to possess and use an insurance license. Such a proposition defies logic, and is therefore rejected. It is not the case, however, that a violation of Section 626.9541(1)(z), Florida Statutes, is automatically a per se violation of Section 626.611(9), Florida Statutes. That is because evidence of intent is necessary to prove

fraud or dishonesty that violates Section 626.611(9), Florida Statutes, but is not necessary to prove a violation of Section 626.9541(1)(z), Florida Statutes. Here, however, the ALJ specifically found that the Respondent *intentionally* slid her customers. (RO Para. 23) Therefore, the record evidence sustains a finding that the Respondent violated both Sections 626.9541(1)(z), Florida Statutes, and 626.611(9), Florida Statutes.

Moreover, in deciding the penalty to be imposed in this case one must consider the content of Rules 69B-231.080 and 69B-231.100 F.A.C., wherein it is provided that that the standard penalty for a violation of Section 626.9541(1)(z), Florida Statutes, is a six month suspension, that the standard penalty for a violation of Section 626.611(7), Florida Statutes, is also a six month suspension, and that the standard penalty for a violation of Section 626.611(9), Florida Statutes, is a nine month suspension. All such penalties are susceptible to the application of the "highest penalty per count" provisions of rule 69B-231.040, F.A.C., which requires that only the highest penalty per count be utilized in calculating the total penalty in a given case. Application of that rule to the instant case results in the six month penalties for the violations of both Sections 626.9541(1)(z), and 626.611(7), Florida Statutes, being subsumed into the nine month penalty prescribed for violation of Section 626.611(9), Florida Statutes. Thus, the matter of whether the violation of the one statute is also a per se violation of the other has no bearing on the penalty to be imposed under the facts of this case because the ALJ specifically found the intent necessary to sustain a stand-alone finding that the Respondent violated Section 626.611(9), Florida Statutes. That is not, as the Respondent contends, an absurd result; it is merely following the penalty rule, which benefits transgressors by limiting their punishments to only one penalty per count

instead of allowing cumulative penalties per count. Quite simply, the ALJ specifically found that the Respondent intentionally, that is, willfully, caused her customers to purchase more coverage than they had requested (RO Para. 23), which proves an intent to act dishonestly and thereby bringing her actions within the ambit of Section 626.611(9), Florida Statutes, independently of Section 626.9541(1)(z), Florida Statutes.

3. The Petitioner also excepts to the Penalty Recommendation, stating that it departs from the requirements of Chapter 69B-231, F.A.C. The Administrative Law Judge recommended a sixty (60) day suspension in the instant case. A review of the record and the applicable penalty guidelines demonstrates that the Administrative Law Judge's recommendation was erroneous. Rule 69B-231.100(26), F.A.C., provides for a six (6) month suspension for a violation of Section 626.9541(1)(z), Florida Statutes. Rule 69B-231.080(7), F.A.C., provides for a six (6) month suspension for each violation of subsection 626.611(7), Florida Statutes, and Rule 69B-231.080(9), F.A.C., provides for a nine (9) month suspension for each violation of Section 626.611(9), Florida Statutes. Additionally, pursuant to Rule 69B-231.040(b), F.A.C., "the requirement for a single highest stated penalty for each count in an administrative complaint shall be applicable regardless of the number or nature of the violations established in a single count of an administrative complaint." In the instant case, there were four counts pled and each count of the Administrative Complaint included a charge that the Respondent violated Sections 626.611(7), (9) and 626.954(1)(z), Florida Statutes. For the reasons stated herein, the Petitioner proved the three alleged statutory violations in each of the four counts by clear and convincing evidence. The single highest stated penalty, per count, based on a violation of Section 626.611(9), Florida Statutes., is nine (9) months. The four Section 626.611(9), F.S. violations thus amount to a total penalty of 36 months

[nine months suspension for each of the four counts], prior to considering mitigating circumstances. However, any suspension in excess of twenty-four (24) months becomes a revocation. [Rule 69B-231.040(3)(d), F.A.C.]

However, the total penalty can be enhanced or reduced, depending upon aggravating and mitigating circumstances, to arrive at a final penalty. [Rule 69B-231.160, F.A.C.] Here, the Administrative Law Judge failed to explicitly state what mitigating circumstances he considered, and how he weighted those circumstances to arrive at his recommendation of a 60 day suspension. However, the evidence submitted in the case and the Administrative Law Judge's findings in the case indicate that mitigating factors do exist. In Finding of Fact #7 and Conclusions of Law #30 and #31, the Administrative Law Judge found and concluded that the Respondent's actions were required by her employer, that the Respondent did not directly benefit from the sale of ancillary products, and that all of the individual violations arose out the same activity. The Administrative Law Judge did not identify any aggravating factors he may have considered.

It is well-established that an agency may increase or decrease a penalty recommended by an Administrative Law Judge. Criminal Justice Standards v. Bradley, 596 So.2d 661 (Fla. 1992); Department of Law Enforcement v. Hood, 601 So.2d 1194 (Fla. 1992). So long as there are standards for the imposition of a penalty, and adherence to those standards, an agency is free to increase or decrease a penalty recommended by an Administrative Law Judge, if it states its reasons with particularity. In the present case, the standards for the imposition of the penalty are enumerated in Sections 626.611 and 626.9541(1), Florida Statutes and Rule Chapter 69B-231, F.A.C. In view of the above, and in light of the Administrative Law Judge's mitigation findings, it

is determined that an amended penalty requiring a suspension of 12 months, reflecting a deduction of six months mitigation on each count of the Administrative Complaint (approximately the same period of time the ALJ apparently attributed to the mitigating factors referenced in the Recommended Order, given the violations he found, the applicable rule penalties, and the recommended penalty), is appropriate in this case. A complete review of the record has been made, as evidenced by the above discussions, and justifies this action.

The Respondent's response to this exception is not persuasive. The record shows that the ALJ apparently paid no specific attention to the applicable penalty guideline rules, and inappropriately considered mitigation of the otherwise applicable rule penalties during the guilt determination phase of this proceeding, giving no explanation as to how he arrived at his recommendation of a sixty day suspension. The mitigation found by the ALJ should have been considered during his deliberations upon the appropriate penalty to be placed into the Recommended Order, and an explanation of that penalty provided, as the Department does here.

Therefore, upon careful consideration of the entire record, the submissions of the parties, and being otherwise fully advised in the premises, it is ORDERED:

1. The Findings of Fact of the Administrative Law Judge are adopted, as modified herein, as the Department's Findings of Fact.

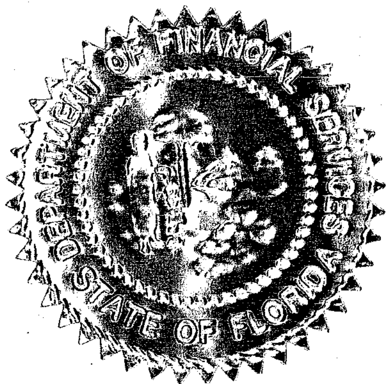
2. The Conclusions of Law of the Administrative Law Judge are adopted, as modified herein, as the Department's Conclusions of Law.

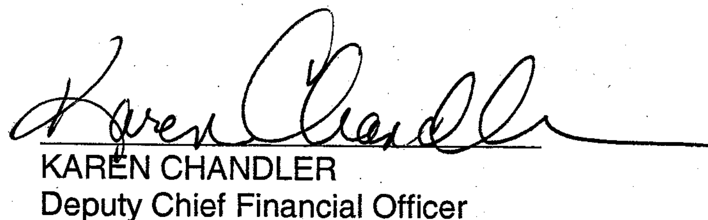
3. The Administrative Law Judge's recommendation that the Department enter a Final Order suspending the Respondent's license(s) and eligibility for licensure in the State of Florida for sixty (60) days is rejected. A twelve (12) month suspension of

the Respondent's license(s) and eligibility for licensure in the State of Florida is approved as being the appropriate disposition of this case.

ACCORDINGLY, it is ORDERED that Respondent PAULA EVELYN BECKETT's, license(s) and eligibility for licensure are hereby SUSPENDED for twelve (12) months effective immediately upon issuance of this Final Order. Pursuant to Section 626.651, Florida Statutes, the suspension of Respondent's license(s) and eligibility for licensure is applicable to all licenses and eligibility held by the Respondent under the Florida Insurance Code. Pursuant to Section 626.641(4), Florida Statutes, the Respondent shall not engage in or attempt or profess to engage in any transaction or business for which a license or appointment is required under the Insurance Code or directly or indirectly own, control, or be employed in any manner by any insurance agent or agency or adjuster or adjusting firm during the period of suspension. Pursuant to Section 626.641(1), Florida Statutes, the Respondent's licensure shall not be reinstated except upon written request for such reinstatement, and the Respondent shall not engage in the transaction of insurance until her licensure is reinstated. The Department shall not grant reinstatement if it finds that the circumstance or circumstances for which the Respondent's licenses were suspended still exist or are likely to recur.

DONE and ORDERED this 3rd day of May, 2007.



KAREN CHANDLER
Deputy Chief Financial Officer

## NOTICE OF RIGHTS

Any party to these proceedings adversely affected by this Order is entitled to seek review of the 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 200 East Gaines Street, Tallahassee, FL 32399-0333, and a copy of the same and the filing fee with the appropriate District Court of Appeal within thirty (30) days of the rendition of this Order.

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