STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL SERVICES, Petitioner, vs. JOSEPH JOHN RIPA, Respondent.	)	Case No. 06-3421PL

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 March 12 through 14, 2007, by video teleconference at sites in West Palm Beach and Tallahassee, Florida.

APPEARANCES

For Petitioner: Roxanne Rehm, Esquire
Division of Legal Services
Department of Financial Services
612 Larson Building
200 East Gaines Street
Tallahassee, Florida 32399-0333

For Respondent: Joseph John Ripa, pro se
19347 Skyridge Circle
Boca Raton, Florida 33498-6211

STATEMENT OF THE ISSUE

The issue in this case is whether Respondent, Joseph John Ripa, committed the offenses alleged in a First Amended

Administrative Complaint issued by Petitioner, the Department of Financial Services, on May 11, 2006, and amended on October 16, 2006, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On or about May 11, 2006, Petitioner issued a three-count Administrative Complaint, Petitioner's Case No. 85763-06-AG, alleging that Mr. Ripa had violated certain statutory provisions governing the conduct of Florida insurance agents. Mr. Ripa executed 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 (2006). The Election of Proceedings was filed with Petitioner along with a Petition for Adversarial Administrative Hearing and Answer of Joseph John Ripa.

A copy of the Administrative Complaint, the Election of Proceedings, and the Petition were filed with the Division of Administrative Hearings on September 12, 2006. The matter was designated DOAH Case No. 06-3421PL and was assigned to the undersigned.

The final hearing was scheduled for November 6 through 9, 2006, by Notice of Hearing entered September 25, 2006. By Order Granting Continuance and Re-Scheduling Hearing, Respondent's Unopposed Motion for Continuance was granted and the final hearing was re-scheduled for December 5 through 8, 2006.

On November 15, 2006, counsel for Respondent filed an Amended Motion to Withdraw as Counsel for Respondent. The Amended Motion was granted by an Order entered November 20, 2006. As a consequence, Mr. Ripa requested a continuance of the final hearing. That unopposed request was granted by an Order entered November 17, 2006. The final hearing was re-scheduled for January 23 through 26, 2007.

On January 8, 2007, Mr. Ripa filed another request for continuance of the final hearing due to illness. This unopposed request for continuance was granted by Order entered January 12, 2007. The final hearing was rescheduled for March 12 through 16, 2007.

An Unopposed Motion for Leave to Amend Administrative Complaint was granted by Order entered October 16, 2006.

The undersigned conducted the final hearing from Tallahassee, Florida. Counsel for Petitioner, Mr. Ripa, most witnesses, and the court reporter participated in the hearing from West Palm Beach, Florida. Two witnesses appeared by telephone.

At the final hearing, Petitioner presented the testimony of Joy B. Merrill, David J. Nye, Ph. D., Mary M. Barnes, Janet Yocum, Kenneth La Valley, Gerald Tuinstra, Marcel Donald VandenBosch, and Irene Putnam. Dr. Nye was accepted as an expert in finance and insurance. Ms. Barnes was accepted as an

expert in dementia. Petitioner also had admitted Petitioner's Exhibits numbered 1 through 28. Mr. Ripa offered limited testimony on his own behalf and had admitted Respondent's Exhibits numbered 1, 2, and 3.

Official recognition was taken of a consumer brochure offered as an Exhibit by Mr. Ripa.

The official Transcript of the final hearing was filed on April 3, 2007. By Notice of Filing Transcript issued April 4, 2007, the parties were informed that their proposed recommended orders were due on or before April 23, 2007. Mr. Ripa filed a Proposed Recommended Order on April 19, 2007. Petitioner filed its Proposed Recommended Order on April 25, 2007, along with a Motion for Extension of Time to File Proposed Recommended Order. That Motion is hereby granted. Both Proposed Recommended Orders have been fully considered in rendering this Recommended Order.

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.[1]

2. Respondent Joseph John Ripa was, at the times relevant, licensed in Florida as a life and health (2-18) insurance agent. Mr. Ripa's license number is A220906.

3. At the times relevant to this matter, Mr. Ripa was associated as an agent with Fidelity Assurance, Inc. (hereinafter referred to as "Fidelity Assurance"), an insurance agency.

4. As an agent for Fidelity Assurance, Mr. Ripa sold annuities, including equity indexed annuities, to a target clientele of individuals 65 years of age or older.

B. Equity Indexed Annuities.

5. Very broadly speaking, an "annuity" is an insurance/investment product whereby a person invests money in exchange for regular payments over a period certain, over one or more specified individuals' lifetimes, or over a combination of life(s) and a period certain. There are two primary types of annuities: one is called a "fixed" annuity because payments are made in fixed amounts or in amounts that increase by a fixed percentage; the other is called a "variable" annuity because payments vary according to the investment performance of a specific type of investments, typically bond and equity mutual funds.

6. Fixed annuities maybe "deferred" or "immediate." With a deferred fixed annuity, an investment of money is made and the

earnings thereon are deferred both in payment and for tax purposes until payment at a later time. An immediate fixed annuity is one where an investment of money is made and payments (a potion of principal and earnings) begin immediately. Immediate annuities usually have "mortality" component also: upon the death of the annuitant, payments are made to a beneficiary.

7. Within the past ten years or so, equity indexed deferred annuities, a form of fixed annuity, has been developed and marketed in Florida. The features of this type of annuity are far more complex than the traditional fixed annuity.

8. For any annuity, and especially an equity indexed deferred annuity, a prospective annuitant must understand a number of things about the annuity: (a) the overall product features; (b) investing; (c) tax impacts of the annuity; (d) the projected rates of return and how certain those rates are; (e) the risks associated with the insurance company, or "credit risk"; (f) liquidity of the investment; and (g) fees or costs associated with the annuity.

9. There are several features of deferred annuity products, including equity indexed deferred annuities, which can have adverse consequences for some annuitants: (a) it is far more complex than traditional fixed annuities; (b) the uncertainty of the return on the annuitant's investment; (c) the

treatment of income from the annuity as ordinary income rather than capital gains; (d) the treatment for tax purposes to beneficiaries (no stepped-up basis or capital gains); (e) the lack of liquidity and surrender charges; (f) inflexibility in changing or "rebalancing" the mix of assets invested in; and (g) fees associated with the annuity.

C. Count I: The VandenBosch Transactions.

10. In December 2003 Mr. Ripa met with Emil and Georgette VandenBosch at their Boynton Beach, Florida home. Emil was 88 years of age at the time and Georgette was 89 years of age. While the evidence failed to prove their exact net worth, they were retired and of relatively modest means.[2]

11. As a consequence of the December 2003 meeting, Mr. Ripa sold a fixed deferred annuity in the amount of $108,900.69, contract number 449001, from American Investors Life Insurance Company (hereinafter referred to as "American Investors")(hereinafter referred to as the "First VandenBosch Annuity"). The annuitant was Georgette VandenBosch.

12. The First VandenBosch Annuity, while allowing up to a 10 percent withdrawal from the annuity, after the first year the annuity was in force, once a year. For any other withdrawal from the annuity the contract provided for a 12 percent, 12-year declining surrender charge. Consequently, in order for the VandenBosches to fully access the annuity without penalty,

Ms. VandenBosch would have to live until she was at least 101 years of age. Her life expectancy at the time she purchased the First VandenBosch Annuity was only 5.35 years, a fact that Mr. Ripa knew or should have been aware of.

13. The sale of the First VandenBosch Annuity generated commissions of $7,895.30 for Mr. Ripa or his agency, Fidelity Assurance.

14. In January 2004, Mr. Ripa again met with the VandenBosches, this time selling them a $26,520.11 deferred annuity, half in a traditional fixed annuity and half in an equity indexed annuity, contract number 449729, from American Investors (hereinafter referred to as the "Second VandenBosch Annuity"). The annuitant was Emil VandenBosch.

15. Within four months after purchasing the Second VandenBosch Annuity, Mr. VandenBosch, through Mr. Ripa, invested an additional $22,200.00 into the annuity, for a total investment of $48,620.11.

16. The Second VandenBosch Annuity, while allowing up to a 10 percent withdrawal of the annuity once a year after the first year, provided for a 12 percent, 10-year declining surrender charge for any other withdrawals. Consequently, in order for Mr. VandenBosch to fully access the annuity without penalty, Mr. VandenBosch would have to live until he was at least 99 years of age. His life expectancy at the time he purchased

his annuity was only 4.85 years, a fact that Mr. Ripa knew or should have been aware of.

17. The sale of the Second VandenBosch Annuity generated commissions of $4,862.02 for Mr. Ripa or his agency, Fidelity Assurance.

18. It has been the practice of the VandenBosches, that Mr. VandenBosch handled all financial transactions impacting the family. It is, therefore, inferred that Mr. VandenBosch was responsible for the purchase of the First and Second VandenBosch Annuities.

19. While neither Emil nor Georgette VandenBosch testified at the hearing of this matter,[3] one of their children, Donald VandenBosch did. While much of his testimony constituted hearsay, not subject to any exception under Chapter 90, Florida Statutes,[4] he did testify credibly that Mr. VandenBosch was, at the times relevant to this matter, experiencing declining health. His declining health included macular degeneration, which impacted his eye sight, and a decline in his mental capacity. While the evidence failed to prove clearly and convincingly that Mr. VandenBosch was unable to read the documents involved with the purchase of the First and Second VandenBosch Annuities, it is found that, due to his declining mental capacity and the complexity of the contracts for the annuities, Mr. VandenBosch relied heavily, if not exclusively,

on Mr. Ripa's representations concerning the policies Mr. Ripa sold them.

20. In January 2005, the VandenBosches, along with their son, Donald VandenBosch, arranged to meet with Ripa. During that meeting the VandenBosches told Mr. Ripa that they desired to access their investments and needed his assistance to avoid the high penalties associated with withdrawals.[5] Mr. Ripa accurately explained that the only way to avoid the surrender penalties and access their investments currently would be to make a once-a-year withdrawal of up to 10 percent of the annuities. After emphasizing to Mr. Ripa that they did not want to incur any penalties, Mr. Ripa was instructed to arrange for them to make a 10 percent withdrawal from the First VandenBosch Annuity, which Mr. Ripa explained would amount to the equivalent of approximately $950.00 to $970.00 per month. At no time during the meeting was their any instruction given to Mr. Ripa to arrange for the cancellation of either of the annuities or the purchase of any other product. Mr. Ripa agreed to prepare the necessary paperwork to carry out the VandenBosches' instructions.

21. The events of the January 2005 meeting support a finding that the First and Second VandenBosch Annuities did not meet the VandenBosches' financial goals and were not suitable investments for them. In particular, it is inferred that the

VandenBosches did not want to invest in a product that so severely restricted their access to their assets.

22. Despite the clear instructions to Mr. Ripa concerning the VandenBosches' wishes,[6] Mr. Ripa presented the VandenBosches with forms for their execution subsequent to their January 2005 meeting which resulted in the cancellation of the First VandenBosch Annuity and the purchase of a new immediate fixed annuity from American Investors, contract number 473129. As a result of these transactions, the VandenBosches incurred a surrender penalty of $11,301.65, the very result they had explicitly told Mr. Ripa they wished to avoid.

23. The monthly payments received by the VandenBosches through the newly purchased fixed annuity were very close to the amount of money they would have received by taking a penalty-free yearly withdrawal and dividing that amount on a monthly basis. There was, therefore, no apparent reason why the VandenBosches would have incurred the penalty of $11,301.65 imposed upon them for canceling the First VandenBosch Annuity. These transactions were carried out by Mr. Ripa despite instructions to contrary, despite the severe penalty incurred by the VandenBosches, and without any discernable reason. It is, therefore, inferred that Mr. Ripa, at best, simply failed to adequately explain the transactions or, at worst, deceived the VandenBosches into believing the documents he provided for their

signature were consistent with their instructions during the January 2005 meeting.

D. Count II: The Tuinstra Transaction.

24. In May of 2004, Gerald Tuinstra met with Mr. Ripa at his Boynton Beach home. Mr. Tuinstra was 83 years of age at the time. His wife, Marcella, was 80 years of age and had recently moved into a nursing home.

25. Mr. Tuinstra contacted Mr. Ripa because he was interested in creating an income source with money he had received from the sale of some property. He wanted to create an income source in order to help with the funding of his wife's nursing home expenses, while avoiding the exhaustion of his limited assets. Additionally, Mr. Tuinstra was interested in protecting his property against possible loss which might be caused by the need to seek government funding for his wife's nursing home costs.

26. At the time of his meeting with Mr. Ripa, the money which Mr. Tuinstra was interested in investing was deposited in a bank where it was earning approximately 4 percent interest.

27. Mr. Tuinstra explained his investment goals to Mr. Ripa during their meeting and Mr. Ripa assured him that both goals could be achieved through products offered by Mr. Ripa. As to the goal of creating an income source, Mr. Ripa told Mr. Tuinstra that he would earn 7.37 percent interest on his

investment for the first year and would likely earn more in following years. Mr. Ripa told Mr. Tuinstra that he would receive $391.05 per month, writing this amount on notes he left with Mr. Tuinstra. Mr. Ripa did not inform Mr. Tuinstra that the annuity he was proposing was subject to the risk of earning even less then he was currently earning from his bank account or even earning nothing. Mr. Ripa also assured Mr. Tuinstra that his investment would be protected, meeting his second investment goal.

28. Based upon Mr. Ripa's representations, which were, at best, misleading, Mr. Tuinstra purchased a $40,000.00 equity indexed deferred annuity from American Investors, contract number 458412, recommended by Mr. Ripa (hereinafter referred to as the "Tuinstra Annuity"). Mr. Tuinstra's wife was made the annuitant. The money used to make this purchase constituted substantially all of Mr. Tuinstra's liquid assets.

29. The commission on the sale of the Tuinstra Annuity was $4,200.00.

30. The Tuinstra Annuity provided for a 17 percent surrender charge for the first three years of the contract, declining to a 3 percent charge in the 13th year.
Mr. Tuinstra's life expectancy at the time of the purchase was 6.65 years. Mr. Tuinstra was not informed of these provisions of the contract by Mr. Ripa during their meeting. In fact,

Mr. Ripa led Mr. Tuinstra to believe that he would be receiving monthly payments throughout the term of the annuity.

31. The Tuinstra Annuity that Mr. Ripa had assured Mr. Tuinstra would provide the monthly income he desired, actually failed to provide for any payment. The only provision for a return of his investment without penalty during the first 13 years of the contract was the allowance of a 10 percent withdrawal, after the first year of the contract, on an annual basis, which was not what Mr. Tuinstra asked for or was told he was limited to.

32. When the actual contract for the Tuinstra Annuity was received by Mr. Tuinstra from American Investors, he read the contract and realized that much of what Mr. Ripa had told him about what he was purchasing was incorrect. He then began making efforts to cancel the policy, which he was ultimately able to do. It was during these efforts that he learned for the first time about the withdrawal penalties, not from reading the rather lengthy contract, but from an unidentified man he spoke to about the contract at Fidelity Assurance.

E. Count III: The Putnam Transaction.

33. In March of 2005, the son of Louis Bruno, who was 90 years of age at the time, was pursuing court proceedings to be appointed Mr. Bruno's guardian. Mr. Bruno was living in Boyton

Beach, Florida at the time with his companion of 15 or so years, Irene Putnam.

34. Due to his advanced age and lack of short-term memory, Mr. Bruno was unable to manage his own finances, instead, relying upon Ms. Putnam, who had a power of attorney from Mr. Bruno. Ms. Putnam was 82 years of age at that time.

35. At some time shortly before a hearing was scheduled to be held on the guardianship matter, Ms. Putnam and Mr. Bruno discussed the upcoming proceeding with Mr. Ripa, whom Mr. Bruno and Ms. Putnam had known as a friend for a number of years. Mr. Ripa agreed to testify at the court proceeding on behalf of Mr. Bruno.

36. At some point during their discussion, Mr. Ripa asked Mr. Bruno and Ms. Putnam whether they realized that, if Mr. Bruno lost the court proceeding, his son would have authority over all of his assets, including $18,000.00, which Mr. Bruno maintained in two separate bank accounts. This money represented Mr. Bruno's liquid assets at the time. The possibility of losing control of his money was not something that Mr. Bruno or Ms. Putnam had considered and, in response to Mr. Ripa's warning, they asked him if he knew how they could avoid this result. Mr. Ripa told Mr. Bruno and Ms. Putnam that he knew how the money could be protected until after the proceeding. They unequivocally explained to Mr. Ripa that they

did want to protect the money, but for only a short period of time. Their intent, which was fully explained to Mr. Ripa, was to re-take possession of the money immediately after the guardianship proceeding ended, in which they expected to prevail.

37. Instead of carrying out Mr. Bruno's clear, unequivocal goal, Mr. Ripa, no more than two or three days before the March 2005 guardian proceeding, sold Mr. Bruno an $18,000.00 equity indexed deferred annuity from American Investors, contract number 476076, with Ms. Putnam as the annuitant[7] (hereinafter the "Putnam Annuity").

38. The Putnam Annuity provided for penalties for withdrawal of the annuity during the first 10 years of the contract, starting at 12 percent during the first year and declining thereafter. Ms. Putnam, whose life expectancy was 8.45 years, would have had to survive to age 92 in order to withdraw the full annuity without penalty. Mr. Bruno would have had to live to age 100 to do so.

39. The commission on the sale of the Putnam Annuity was $1,800.00.

40. Following Mr. Bruno's successful defense of the guardianship proceeding, Ms. Putnam spoke to Mr. Ripa about the retrieval of the $18,000.00 investment. Having received the actual contract, however, Ms. Putnam realized that the Putnam

Annuity was not what Mr. Bruno and she had believed they were purchasing. Indeed, having relied totally on Mr. Ripa to protect Mr. Bruno's money for a very short time, including allowing him to complete all of the paperwork for them, she had not even realized that Mr. Bruno had purchased an annuity of any kind prior to receiving the contract. In response to her inquiry, Mr. Ripa suggested that Ms. Putnam have Mr. Bruno surrender another annuity which he owned, one without surrender charges, thereby obtaining cash for his immediate needs and avoiding any surrender charges on the Putnam Annuity. While this suggestion would have allowed Mr. Bruno to replace the $18,000.00 he had tied up in the Putnam Annuity, it was not an option that had ever been discussed with Mr. Bruno or Ms. Putnam and was contrary to what they had requested that Mr. Ripa do with the $18,000.00.

F. Count IV: The LaValley Transactions.

41. In September 2005, Mr. Ripa met with Virginia LaValley at her Boyton Beach, Florida home. Ms. LaValley, who lived alone, was 75 years of age at the time.

42. Ms. LaValley had been evidencing signs of dementia as early as 2003, and her symptoms had continued to increase up to the time Mr. Ripa met with her.[8] She had begun to have difficulty remembering simple words to describe objects as early as 2003. During 2005 (prior to September), she had expressed

the belief that a computer-generated form letter had been personally written to her; she had begun piling her mail on the dining room table rather than deal with it; she believed that she would "go to jail" if she threw out any of the mail sent to her; she had sealed return envelopes from solicitations she had received and written words to the effect that she would not mail them until the addressees provided her with stamps, a demand that the addressees could not be aware of without the letters being mailed to them, a fact that Ms. LaValley did not understand; and she had stopped reconciling her checkbook or otherwise keeping up with her personal finances.[9]

43. Janet Yocum, a friend and an individual who had sold annuities to Ms. LaValley in the 1990's, noticed as early as 2003 that Ms. LaValley was having difficulty following simple instructions concerning the completion and return of a form that Ms. Yocum had sent to Ms. LaValley. It was obvious to Ms. Yocum, although she did not see Ms. LaValley on a regular basis, that Ms. LaValley was losing her ability to understand even simple matters long before Mr. Ripa's meeting with Ms. LaValley.

44. While Mr. Ripa was not aware of some of the foregoing events, it is found that Ms. LaValley's state of health in September 2005 should have been evident to Mr. Ripa when he met with her. If nothing else, Mr. Ripa should have realized that

Ms. LaValley was not capable of understanding the complexities of fixed annuity contracts, much less equity indexed deferred annuity contracts.

45. Despite what must have been obvious to him, Mr. Ripa convinced Ms. LaValley during his September 2005 meeting to surrender six annuities which she had purchased from Jackson National Life Insurance Company (hereinafter referred to as "Jackson National") between 1993 and 1997. Mr. Ripa also convinced Ms. LaValley to use the proceeds from the Jackson National annuities, which were old enough to avoid any surrender charges for their surrender and provided for a minimum return of at least 3 percent, to purchase two American Investors annuities (hereinafter referred to jointly as the "LaValley Annuities").

46. One of the LaValley Annuities, contract number 499901, was an equity indexed deferred annuity for which Ms. LaValley paid $19,500.00. The other, contract number 500794, was also an equity indexed deferred annuity in the amount of $19,079.49. Both provided surrender penalties over 15 years, with a penalty for the first year of 19 percent. Ms. LaValley, whose life expectancy at the time was 12.6 years, would have to live until she was 91 years of age to avoid any surrender penalty. The minimum interest on the annuities was 2 percent compared to the minimum 3 percent rate of the Jackson National policies.

47. During his meeting with Ms. LaValley, Mr. Ripa gave her a company brochure from American Investors' parent, "Amerus." There were a number of handwritten notations on the brochure written by Mr. Ripa. One notation indicates "7%" and is followed by Mr. Ripa's initials. Next the heading "Fixed Strategy" is the notation "3%." While there was no evidence explaining what was said about these notations, they all emphasize "positive" aspects or selling points for the annuity products sold to Ms. LaValley. What Ms. LaValley took from the meeting and, likely, the notations, is that she would be earning 7 percent each year on the LaValley Annuities.[10]

48. As further evidence of her declining mental state, when Ms. LaValley received a letter from American Investors' parent company within two weeks after purchasing the LaValley Annuities congratulating her on her purchases. Ms. LaValley, apparently not realizing what the letter meant, wrote a note dated "10/4/200[5]"[11] on it stating that "I do not want American Investors Life. Please Cancel." Her signature followed this note. This letter, with her handwritten reply, was returned to American Investors.

49. Whether Ms. LaValley intended to "cancel" the LaValley Annuities or simply thought the letter was a solicitation to purchase insurance is not clear. If the former, she clearly evidenced intent to cancel the LaValley Annuities; if the

latter, she evidenced a lack of understanding about what she had done only two weeks before.

50. American Investors apparently treated Ms. LaValley's instructions literally as evidence of her intent to cancel the LaValley Policies, apparently informing Mr. Ripa. Mr. Ripa then revisited Ms. LaValley and prepared a letter for her signature repudiating her attempt to cancel the annuities. The letter, Petitioner's Exhibit 10, was faxed from Fidelity Assurance's fax machine on October 13, 2005.

G. The Unsuitability of the VandenBosch, Tuinstra, Putnam and LaValley Annuities.

51. Given the ages of the annuitants at the time of the purchase of the various annuities at issue in this case (all except one of which were equity indexed deferred annuities; the other was a deferred fixed annuity), their relatively modest financial situations, the long-term nature of the annuities and the high penalties associated with accessing their investments should the need arise (all of the individuals involved would have had to outlive their life expectancies in order to access their investments without penalty), the VandenBosch Annuities, the Tuinstra Annuity, the Putnam Annuity, and the LaValley Annuities were not suitable investments for those individuals, a fact which Mr. Ripa knew or should have known.

52. The foregoing conclusion is also supported by the VandenBosches' efforts not too long after purchasing their annuities to unsuccessfully access their investments and their expression of disappointment upon learning of the severe withdrawal penalties associated with accessing their investments; Mr. Tuinstra's explanation of his intended investment goals when he purchased his annuity and the failure of the Tuinstra Annuity to meet those goals; Ms. Putnam's and Mr. Bruno's explanation of their intended short-term investment goal when the Putnam Annuity was purchased and the failure of the Putnam Annuity to meet that goal; and Ms. LaValley's obvious impaired ability to understand the nature of the transactions carried out by Mr. Ripa, transactions that make no sense from a financial point of view.

53. Finally, the conclusion that the investments at issue in this case were sold to inappropriate purchasers is based upon the obvious failure of Mr. Ripa to perform a basic suitability analysis at the time he sold the annuities to the any of the individual involved or, if he did perform such an analysis, his failure to recognize that the annuities were not a suitable investment for those individuals. The VandenBosches, the Tuinstras, Ms. Putnam and Mr. Bruno, and Ms. LaValley were all individuals of somewhat advanced age and modest financial resources. It is hard to imagine how Mr. Ripa could have

performed the type of financial risk analysis he should have performed for these individuals and still concluded that the annuities sold to them were appropriate. None of the individuals were looking for such long-term investments and it was proved that some expressed interest in short-term investments or investments that would create an immediate income stream: the VandenBosches expressed their desire for a return of their funds shortly after Mr. Ripa sold them their annuities; Mr. Tuinstra testified convincingly of his desired investment outcome (income producing and asset protection); and Ms. Putnam testified convincingly that she and Mr. Bruno only wanted to protect his funds for a few weeks. Despite these known goals, Mr. Ripa sold the VandenBosches, the Tuinstras, and Ms. Putnam and Mr. Bruno a product which did nothing but thwart those goals.

CONCLUSIONS OF LAW

A. Jurisdiction.

54. 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 (2006).

B. The Burden and Standard of Proof.

55. The Department seeks to impose penalties against Mr. Ripa 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).

56. 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.

57. 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.

58. 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.

59. The Amended Administrative Complaint in this case contains four counts. In all four counts it is alleged that Mr. Ripa violated the following statutory provisions: Sections 626.611(5), (7), (8), (9), and (13); 626.621(6); and 626.9541(1)(l), Florida Statutes. It has also been alleged that he violated Florida Administrative Code Rule 69B-215.210.

60. Section 626.611, Florida Statutes, provides, in pertinent part, the following:

> The department shall . . . suspend, revoke, or refuse to renew or continue the license or appointment of any applicant, agent, title agency, adjuster, customer representative, service representative, or managing general agent, and it shall suspend or revoke the eligibility to hold a license or appointment of any such person, if it finds that as to the applicant, licensee, or appointee any one or more of the following applicable grounds exist:

(5) Willful misrepresentation of any insurance policy or annuity contract or willful deception with regard to any such policy or contract, done either in person or by an form of dissemination of information or advertising.

. . . .

(7) Demonstrated lack of fitness or trustworthiness to engage in the business of insurance.

(8) Demonstrated lack of reasonably adequate knowledge and technical competence to engage in the transactions authorized by the license or appointment;

(9) Fraudulent or dishonest practices in the conduct of business under the license or appointment.

. . . .

(13) Willful failure to comply with, or willful violation of, any proper order or rule of the Department of willful violation of any provision of this code.

. . . .

61. Section 626.621(6), Florida Statutes, provides:

The department may, in its discretion, deny an application for, suspend, revoke, or refuse to renew or continue the license or appointment of any applicant, agent, adjuster, customer representative, service representative, or managing general agent, and it may suspend or revoke the eligibility to hold a license or appointment of any such person, if it finds that as to the applicant, licensee, or appointee any one or more of the following applicable grounds exist under circumstances for which such denial, suspension, revocation, or refusal is not mandatory under s. 626.611:

. . . .

(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 to be a source of injury or loss to the public interest.

62. Section 626.9541(1)(l), Florida Statutes, is contained within Chapter 626, Part IX, Florida Statutes. This statutory provision defines "unfair methods of competition and unfair or deceptive accts or practices", including the one at issue in this proceeding:

(1) UNFAIR METHODS OF COMPETITION AND UNFAIR OR DECEPTIVE ACTS.- The following are defined as unfair methods of competition and unfair or deceptive acts or practices:

. . . .

(l) *Twisting*.- Knowingly making any misleading representations or incomplete or fraudulent comparisons or fraudulent material omissions of or with respect to any insurance policies or insurers for the purpose of inducing, or tending to induce, any person to lapse, forfeit, surrender, terminate, retain, pledge, assign, borrow on, or convert any insurance policy or to take out a policy of insurance in another insurer.

63. Finally, Florida Administrative Code Rule 69B-215.210 provides the following:

The Business of Life Insurance is hereby declared to be a public trust in which

> service all agents of all companies have a common obligation to work together in serving the best interests of the insuring public, by understanding and observing the laws governing Life Insurance in letter and in spirit by presenting accurately and completely every fact essential to a client's decision, and by being fair in all relations with colleagues and competitors always placing the policyholder's interests first.

D. Summary of All Four Counts.

64. Summarizing the charges against Mr. Ripa, the Department has charged him with essentially six offenses:

a. Willfully making misrepresentations to, or willfully deceiving all four victims in this case;

b. Demonstrating lack of fitness or trustworthiness;

c. Demonstrating lack of knowledge and technical competence;

d. Fraudulent or dishonest practices;

e. Failing to comply with Florida Administrative Code Rule 69B0215.210; and

f. Employing an unfair or deceptive act or practice--"twisting."

65. The offenses summarized in paragraph 64a., b., d., e., and f. are related and somewhat similar offense and they all require a finding of some specific intent on the part of a licensee. See Bowling v. Department of Insurance, 394 So. 2d 165 (Fla. 1st DCA 1981). It is difficult to find that a person

committed any of those offenses without also finding the individual knew what he or she was doing. The offense summarized in paragraph 64c. relates to the ability of a licensee to practice insurance and may result in punishment of a licensee despite his or her best intentions.

66. While there was some evidence presented concerning Mr. Ripa's knowledge about, or lack thereof, the transactions involved in this matter, that evidence was not clear and convincing. The testimony concerning Mr. Ripa's lack of knowledge was limited to opinion testimony without the source of those opinions, Mr. Ripa's deposition testimony, being also offered in evidence. It was, therefore, not possible to review the context in which Mr. Ripa's "incorrect" responses was given. Additionally, a finding that Mr. Ripa lacks "reasonably adequate knowledge and technical competence . . ." to engage in the insurance business would be a finding inconsistent with the other charges against him, all of which require some element of intent on Mr. Ripa's part. If Mr. Ripa didn't know what he was doing, it simply cannot be found that he made willful misrepresentations or was willfully deceptive in his dealings with the VandenBosches, Mr. Tuinstra, Ms. Putnam and Mr. Bruno, or Ms. LaValley; that he acted in such a way as to be considered untrustworthy; that he acted fraudulently or dishonestly in his dealings with them; that he willfully failed to comply with

Florida Administrative Code Rule 69B-215.210; or that he knowingly mislead the VandenBosches and Ms. LaValley to surrender annuities and purchase new products from him.

67. Because it is concluded that the Department proved clearly and convincingly that Mr. Ripa knew what he was doing when he sold insurance products to the individuals involved in this case, it cannot be concluded that he violated Section 626.621(8), Florida Statutes.

68. What the evidence did prove clearly and convincingly is that Mr. Ripa's actions with regard to all of the individuals involved in this case were so contrary to the interests of those individuals that he had to have knowingly and, thus, willfully misrepresented the products he sold them in violation of Section 626.611(5), Florida Statutes; in so doing, his actions demonstrate a lack of trustworthiness to engage in the insurance business in violation of Section 626.611(7), Florida Statues; his actions also constituted dishonest practices in the conduct of insurance business in violation of Section 626.611(9), Florida Statutes; and, finally, as to all the individuals involved, Mr. Ripa's actions were inconsistent with the duty imposed upon him by Rule 69B-215.210, in violation of Section 626.611(13), Florida Statutes.

69. The final alleged violation, that Mr. Ripa engaged in unfair or deceptive acts or practices, was also proven clearly

and convincingly by the Department as to his dealings in Count I, the VandenBosches, and Count IV, Ms. LaValley. Both surrender policies under circumstances which, in the case of the VandenBosches were contrary to their specific instructions, and in both cases made virtually no financial sense to anyone. It is concluded that, as to Counts I and IV but not Counts II and III, the department has proved that Mr. Ripa engaged in "twisting" as defined in Section 926.9541(1)(l), Florida Statutes, in violation of Section 626.621, Florida Statutes.

E. Penalty.

70. Florida Administrative Code Rule Chapter 69B-231 provides guideline penalties for violations of Sections 626.611 and 626.621, Florida Statutes. Florida Administrative Code Rule 69B-231.080 provides the following penalty guidelines for the violations proved in this case: a suspension of nine months for a violation of Section 626.611(5), Florida Statutes; a suspension of six months for a violation of Section 626.611(7), Florida Statutes; a suspension of nine months for a violation of Section 626.611(9), Florida Statutes; and a suspension of six months for a violation of Section 626.611(13), Florida Statutes. Florida Administrative Code Rule 69B-231.090(6) refers to Florida Administrative Code Rule 69B-231.100, for the appropriate penalty for a violation of Section 626.621(6), Florida Statutes. Florida Administrative Code Rule 69B-

231.100(12), provides for a nine-month suspension for a violation of Section 626.9541(1)(l), Florida Statutes.

71. Section 626.9521(2), Florida Statutes, also provides for the imposition of an administrative fine for the commission of unfair and deceptive practices in violation of Section 626.9541, Florida Statutes, of not greater than $2,500.00 for a non-willful violation (maximum aggregate of $10,000.00), and $20,000.00 for each willful violation (maximum aggregate of $100,000.00).

72. Florida Administrative Code Rule 69B-231.040, provides the following with regard to the calculation of the appropriate penalty where multiple violations are found:

> (1) Penalty Per Count.
>
> (a) The Department is authorized to find that multiple grounds exist under Sections 626.611 and 626.621, F.S., for disciplinary action against the licensee based upon a single count in an administrative complaint based upon a single act of misconduct by a licensee. However, for the purpose of this rule chapter, only the violation specifying the highest stated penalty will be considered for that count. The highest stated penalty thus established for each count is referred to as the “penalty per count”.
>
> (b) 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.

(2) Total Penalty. Each penalty per count shall be added together and the sum shall be referred to as the "total penalty".

(3) Final Penalty. The final penalty which will be imposed against a licensee under these rules shall be the total penalty, as adjusted to take into consideration any aggravating or mitigating factors, provided however the Department shall convert the total penalty to an administrative fine and probation in the absence of a violation of Section 626.611, F.S., if warranted upon the Department's consideration of the factors set forth in rule subsection 69B-231.160(1), F.A.C.

73. Florida Administrative Code Rule 69B-231.160 provides the following relevant aggravating and mitigation factors:

(1) For penalties other than those assessed under Rule 69B-231.150, F.A.C.:

(a) Willfulness of licensee's conduct;
(b) Degree of actual injury to victim;
(c) Degree of potential injury to victim;
(d) Age or capacity of victim;
(e) Timely restitution;
(f) Motivation of agent;
(g) Financial gain or loss to agent;
(h) Cooperation with the Department;
(i) Vicarious or personal responsibility;
(j) Related criminal charge; disposition;
(k) Existence of secondary violations in counts;
(l) Previous disciplinary orders or prior warning by the Department; and
(m) Other relevant factors.

74. In this case, the highest prescribed disciplinary action is a nine-month suspension and a fine of $20,000.00. Having proved four violations of Section 626.611(5), (7), (9), and (13), Florida Statutes, and two violations of Section

626.621(6), Florida Statutes, the total aggregate suspension of 36 months, with a limitation imposed by Section 626.641(1), Florida Statutes, of two years, and a fine of $40,000.00 ($20,000.00 each for Count I, the VandenBosches, and Count IV, Ms. LaValley).

75. The Department has reasonably argued that, considering the willfulness of the violations, the age and capacity of the individuals involved, and the injury sustained by those individuals, the need to deter such exploitation of elderly consumers, and Ms. Ripa's gain from the transactions, support the revocation of his license.

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 Joseph John Ripa violated the provisions of Chapter 626, Florida Statutes, described, supra, requiring that he pay an administrative fine of $40,000.00 and revoking his licensure as a life and health agent.

DONE AND ENTERED this 16th day of May, 2007, in Tallahassee, Leon County, Florida.

S

LARRY J. SARTIN
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of May, 2007.

ENDNOTES

[1]/ The events at issue in this case took place in 2003, 2004, and 2005. The pertinent Florida Statutes during this period of time remained materially the same. All references, unless otherwise noted, will be to the statute applicable to the events for which findings of fact or conclusions of law are made.

[2]/ Relying upon the testimony of Donald VandenBosch, the son of Emil and Georgette VandenBosch, it is been argued that the VandenBosches' net worth was approximately $400,000.00. Donald VandenBosch also testified about what he believed the $400,000.00 was made up of. This testimony is not credited, however, because inadequate testimony concerning the basis for Donald VandenBosches' testimony on this subject was elicited. It was not, therefore, proved clearly and convincingly that this testimony was based upon knowledge or speculation or a combination of both.

[3]/ Mr. VandenBosch had been placed in a nursing home shortly before the final hearing. Why Mrs. VandenBosch did not testify was not clearly proved.

[4]/ It was suggested during the hearing and in Petitioner's Proposed Recommended Order that a number of hearsay exceptions apply in this case. The evidence failed to support some of Petitioner's assertions.

In particular, as it relates to statements made to relatives and friends of the VandenBosches and Virginia LaValley, who is discussed, infra, Petitioner suggested that Section 90.803(24), Florida Statutes, applies to hearsay statements made to those relatives and friends which were reported during the hearing. This assertion is not supported by that limited exception to the hearsay rule. The exception of Section 90.903(24), Florida Statutes, applies to statements of "elderly persons or disable persons, as defined in s. 825.101." The statements that are excepted, however, are limited to statements "describing any act of abuse or neglect, act of exploitation . . . on the declarant elderly person . . . ." While the individuals who did not testify in this proceeding, in particular the VandenBosches and Ms. LaValley, come within the definition of "elderly persons" under Section 825. 101, the hearsay statements of their family members and friends who did testify were, in large part, not about the alleged "act of abuse or neglect" or "act of exploitation" involved in this case. Rather, they were statements of a very general nature not subject to any exception to the hearsay rule.

Secondly, Petitioner has argued that Section 90.803(3), Florida Statutes, applies to statement reported by Ms. LaValley's son, Kenneth LaValley. It is doubtful that any statements made by Ms. LaVelley which Mr. LaValley testified to come within this exception. The statements which may be relied upon under Section 90.803(3), Florida Statutes, are only those of the declarant describing the "declarant's then-exiting state of mind, emotion, or physical sensation . . . ." No such statements made by Ms. LaValley were testified to.

[5]/ The statements made by the VandenBosches during this meeting were reported by Donald VandenBosch. Donald VandenBosches' testimony, to the extent it related instructions which he heard his father give to Mr. Ripa and his statements of displeasure about the products sold to him by Mr. Ripa are not hearsay statements. They are not hearsay because they were not offered to prove the truth of a statement; instead, they were offered to prove an event which was witnessed by Donald VandenBosch. As an example, if someone testifies they heard a woman yell "there is a fire, everyone run", the statement could not be relied upon to

find that there was "a fire", but it could be relied upon to prove that an instruction was given to "run."

[6]/ Mr. Ripa's testimony that he had a telephone conversation with Donald VandenBosch about surrendering the First VandenBosch Annuity is not credited. Mr. Ripa's testimony in this regard was self-serving, he failed to raise the issue during his cross-examination of Donald VandenBosch, and, most importantly, such a request defies logic. Mr. Ripa gave no explanation as to why Donald VandenBosch would make such a request or why he would honor such a request from anyone other than the annuitant.

[7]/ Petitioner has suggested that a finding of fact be made concerning the fact that Mr. Ripa listed Ms. Putnam as Mr. Bruno's spouse, when Mr. Ripa knew that this was not correct. While the evidence supports such a finding, it is not relevant to prove the charges of the Amended Administrative Complaint. Mr. Ripa has not been charged with knowingly including false information in an insurance application.

[8]/ It was suggested in Petitioner's Proposed Recommended Order that Ms. LaValley has been "diagnosed as having dementia and deemed mentally incapacitated." Competent, non-hearsay evidence or hearsay evidence subject to an exception to the hearsay evidence rule was not offered to substantiate this proposed finding. The evidence relied upon consisted of two physician prescription pad pages attached to a letter which is purportedly from Joseph M. Lee, Esquire, a lawyer hired by Ms. LaValley's son to represent her in efforts to obtain the cancellation of the products sold to her by Mr. Ripa. Petitioner has suggested that these documents, more particularly, the physician notes, come under the exception to the hearsay rule of Section 90.803(4), Florida Statutes. Petitioner's position is rejected for two reasons. First, neither the letter, nor, more importantly, the physician notes were identified by the authors. Secondly, even if the documents had been authenticated properly, the exception to the hearsay rule does not apply to the physician statements. Section 90.803(4), Florida Statutes, provides an exception for statements made by a person for purposes of medical treatment or diagnosis. Thus, statements of Ms. LaValley to a physician might be subject to the exception. The exception does not, however, extend to the actual resulting treatment prescribed by or the diagnosis of the physician, which is what the statements contained in the physician notes and relied upon by Petitioner are.

[9]/ It has been suggested by Petitioner that the testimony of Kenneth LaValley which formed the basis for these findings is admissible as an exception to the hearsay rule found in Section 90.803(3), Florida Statutes. That argument has been rejected. See Endnote 3, supra. His testimony, however, is admissible because it reflects things that he witnessed and heard. Ultimately, these facts, along with similar antidotal facts testified to by Janet Yocum, a friend of Ms. LaValley, were found to support a finding as to Ms. LaValley's mental state.

[10]/ This finding is based upon a hearsay statement made by Ms. LaValley to her son which comes with the exception to the hearsay rule of Section 90.803(24), Florida Statutes.

[11]/ Ms. LaValley dated her note "2004", an obvious error.

COPIES FURNISHED:

Roxanne Rehm, Esquire
Division of Legal Services
Department of Financial Services
612 Larson Building
200 East Gaines Street
Tallahassee, Florida 32399-0333

Joseph John Ripa
19347 Skyridge Circle
Boca Raton, Florida 33498-6211

Honorable Alex Sink
Chief Financial Officer
Department of Financial Services
The Capitol, Plaza Level 11
Tallahassee, Florida 32399-0300

Daniel Sumner, General Counsel
Department of Financial Services
The Capitol, Plaza Level 11
Tallahassee, Florida 32399-0307

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.