STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL SERVICES,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 06-3862PL
	)	
RADCLIFFE H. MCKENZIE,	)	
	)	
Respondent.	)	
_____	)	

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case pursuant to Sections 120.569 and 120.57(1), Florida Statutes,[1] before Stuart M. Lerner, a duly-designated administrative law judge of the Division of Administrative Hearings (DOAH), on February 7, 2007, by video teleconference at sites in Lauderdale Lakes and Tallahassee, Florida.

APPEARANCES

For Petitioner: Greg S. Marr, Esquire
Department of Financial Services
Division of Legal Services
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Tallahassee, Florida 32399-0333

For Respondent: L. Michael Billmeier, Jr., Esquire
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STATEMENT OF THE ISSUE

Whether Respondent committed the violations alleged in the Amended Administrative Complaint issued against him, as modified at hearing, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On August 3, 2006, Petitioner issued an 11-count Administrative Complaint against Respondent notifying him that, based on the allegations of wrongdoing made therein, it "intend[ed] to enter an Order suspending or revoking [his] licenses and appointments as an insurance agent or impose such penalties as may be provided under [the law]." On August 28, 2006, Respondent filed a petition with Petitioner requesting "a hearing to contest the allegations set forth in the Administrative Complaint." On October 6, 2006, the matter was referred to DOAH.

On November 27, 2006, Petitioner filed with DOAH an unopposed Motion to Amend Administrative Complaint, along with an Amended Administrative Complaint. By order issued November 29, 2006, the motion was granted. The Amended Administrative Complaint charged Respondent with 13 counts of engaging in the prohibited practice of sliding by selling

ancillary insurance products "without [the] informed consent" of the customer (Counts I through IX and XV through XVIII, hereinafter referred to collectively as the "sliding counts"); one count of failing to "notify [Petitioner] in writing within 60 days after a change of . . . principal business address" (Count X); and six counts of selling a surplus lines insurance product without "mak[ing] a diligent effort to place the desired coverage with an insurer authorized to transact that type of insurance in this state" (Counts XI through XIV, XIX, and XX, hereinafter referred to collectively as the "lack of diligent effort counts").

On February 6, 2007, the parties filed a Pre-hearing Stipulation, which contained the following Statement of Facts Admitted:

> 1. Respondent is licensed by Petitioner as a life including variable annuity, life, and general lines agent and has been issued license number A173451.
>
> 2. Respondent was so licensed at all times relevant to the dates and occurrences referenced in the Amended Administrative Complaint.
>
> 3. The Department has jurisdiction over Respondent's insurance licenses and appointments.
>
> 4. At all times relevant to the dates and occurrences referenced in the [Amended] Administrative Complaint, Respondent was employed or affiliated with Direct General Insurance Agency, Inc., a Tennessee

corporation, doing business in Florida as Direct General Insurance Agency.

5. On or about May 7, 2004, Respondent sold Stacelyn Roberts-Hall a private passenger automobile insurance policy as evidenced by Joint Exhibit 3.

6. On or about May 7, 2004, Respondent sold Stacelyn Roberts-Hall an accident medical protection plan as evidenced by Joint Exhibit 3.

7. On or about May 7, 2004, Respondent sold Stacelyn Roberts-Hall a term life insurance poli[c]y as evidenced by Joint Exhibit 3.

8. On or about September 16, 2003, Respondent sold Rudolph Bentivegna a private passenger automobile insurance policy as evidenced by Joint Exhibit 4.

9. On or about September 16, 2003, Respondent sold Rudolph Bentivegna an accident medical . . . protection plan as evidenced by Joint Exhibit 4.

10. On or about September 16, 2003, Respondent sold Rudolph Bentivegna a travel protection plan as evidenced by Joint Exhibit 4.

11. On or about May 13, 2004, Respondent sold Kenneth Moore a private passenger automobile insurance policy as evidenced by Joint Exhibit 5.

12. On or about May 13, 2004, Respondent sold Kenneth Moore an accident medical protection plan as evidenced by Joint Exhibit 5.

13. On or about May 13, 2004, Respondent sold Kenneth Moore a travel protection plan as evidenced by Joint Exhibit 5.

14. On or about May 13, 2004, Respondent sold Kenneth Moore a term life insurance policy as evidenced by Joint Exhibit 5.

15. On or about October 31, 2005, Respondent sold Paul Booker a private passenger automobile insurance policy as evidenced by Joint Exhibit 6.

16. On or about October 31, 2005, Respondent sold Paul Booker an accident medical protection plan as evidenced by Joint Exhibit 6.

17. On or about October 31, 2005, Respondent sold Paul Booker a travel protection plan as evidenced by Joint Exhibit 6.

18. On or about May 12, 2005, Respondent sold Stacelyn Roberts-Hall a private passenger automobile insurance policy as evidenced by Joint Exhibit 7.

19. On or about May 12, 2005, Respondent sold Stacelyn Roberts-Hall an accident medical protection plan as evidenced by Joint Exhibit 7.

20. On or about May 12, 2005, Respondent sold Stacelyn Roberts-Hall a term life insurance policy as evidenced by Joint Exhibit 7.

21. On or about May 13, 2006, Respondent sold Stacelyn Roberts-Hall a private passenger automobile insurance policy as evidenced by Joint Exhibit 8.

22. On or about May 13, 2006, Respondent sold Stacelyn Roberts-Hall an accident medical protection plan as evidenced by Joint Exhibit 8.

23. On or about May 13, 2006, Respondent sold Stacelyn Roberts-Hall a term life

> insurance policy as evidenced by Joint Exhibit 8.
>
> 24. During the period covered by the Amended Administrative Complaint, Respondent earned approximately twenty-eight percent (28%) of his total compensation from Direct General Insurance Agency, Inc., from commissions on the sale of the accident medical protection plan, the travel protection plan, and the term life policy.

As noted above, the final hearing in this case was held on February 7, 2007. Six witnesses testified at the hearing: Robert Keegan, Kenneth Moore, Stacelyn Roberts-Hall, Rudolph Bentivegna, Sara Silot, and Respondent. In addition to these six witnesses' testimony, 13 exhibits (Joint Exhibits 1 through 8, and Petitioner's Exhibits 9, 10, 12, 13, and 16) were offered and received into evidence.[2]

After concluding the presentation of Petitioner's case-in-chief, counsel for Petitioner announced on the record that Petitioner was voluntarily dismissing eight of the 20 counts of the Amended Administrative Complaint: two of the "sliding counts" (Counts VIII and IX, both dealing with Respondent's October 31, 2005, transaction with Paul Booker) and all six of the "lack of diligent effort counts" (Counts XI through XIV, XIX, and XX).

The deadline for the filing of proposed recommended orders was set at 20 days from the date of the filing with DOAH of the hearing transcript.

The hearing transcript (consisting of one volume) was filed with DOAH on February 19, 2007.

Petitioner and Respondent filed their Proposed Recommended Orders on Monday, March 12, 2007.

FINDINGS OF FACT

Based on the evidence adduced at hearing, and the record as a whole, the following findings of fact are made to supplement and clarify the extensive factual stipulations set forth in the parties' Statement of Facts Admitted[3]:

1. Respondent has been employed by Direct General Insurance Agency, Inc. (Direct General) for the past five years.

2. He is the manager of a Direct General office located at 7558 West Commercial Boulevard, Lauderhill, Florida.

3. This has been Respondent's principal business address since September 2005.

4. Prior to September 2005, Respondent was the manager of a Direct General office located at 8300 West Oakland Park Boulevard, Sunrise, Florida.

5. Respondent did not notify Petitioner of this September 2005 change of his principal business address within 60 days of the change. He assumed, erroneously it turns out, that Direct General's "licensing department" would inform Petitioner of the change.

6. At all times material to the instant case, Respondent, as a licensed agent acting on behalf of Direct General, sold automobile insurance, along with three ancillary or "add-on" products.

7. The three "add-on" products Respondent sold were an accident medical protection plan, a travel protection plan, and a term life insurance policy (hereinafter referred to collectively as the "Add-Ons").

8. From September 2003 to May 2006, Respondent sold these Add-Ons to approximately 1300 customers, including Ms. Roberts-Hall, Mr. Bentivegna, and Mr. Moore.

9. For his efforts on behalf of Direct General, Respondent was paid an hourly wage, plus a commission for each of the Add-Ons he sold. He did not receive a commission for any automobile insurance policy sales he made.

10. Direct General had sales goals with respect to Add-Ons that it expected its agents to meet. How well an agent did in meeting these goals was an "important factor" in the job performance evaluation the agent received annually from his supervisor (as Respondent was aware). An agent's failure to meet a particular goal, however, did not inevitably lead to the "fir[ing]" of the agent. Nonetheless, it was obviously in the agent's best interest to sell as many Add-Ons as possible.

11. Respondent's supervisor was Sara Silot, a Direct General District Manager. In addition to an annual job performance evaluation, Ms. Silot provided Respondent, as well as her other subordinates, with regular feedback during the course of the year regarding their Add-On sales numbers.

12. Each of the customers (Ms. Roberts-Hall, Mr. Bentivegna, and Mr. Moore, hereinafter referred to collectively as the "Complaining Customers") referenced in Counts I through VII and XV through XVIII of the Amended Administrative Complaint (hereinafter referred to collectively as the "remaining sliding counts") purchased the policies referenced in these counts in person at Respondent's office, where they were given paperwork to review and to then initial, sign, and/or date in numerous places in order to consummate the transaction. This paperwork consisted of, depending on the transaction, as few as 14, and as many as 20, pages of various documents (hereinafter referred to collectively as the "Transactional Paperwork"). The Transactional Paperwork clearly and conspicuously informed the reader, consistent with what Petitioner orally explained at the time of purchase to each of the Complaining Customers, that the Add-Ons being purchased were optional policies that were separate and distinct from the automobile insurance policy also being purchased and that these Add-Ons carried charges in addition to the automobile insurance policy premium. In

providing his oral explanation to the Complaining Customers, Respondent circled (with a writing utensil) language in the Transactional Paperwork that conveyed this information about the Add-Ons. His purpose in doing so was to bring this language to the attention of the Complaining Customers. In view of the contents of the Transactional Paperwork, including the portions highlighted by Respondent, and what Respondent told the Complaining Customers concerning the Add-Ons, it was reasonable for Respondent to believe that the Complaining Customers were informed about the Add-On products they were being sold and were (by executing the paperwork) consenting to purchase them.

13. The Transactional Paperwork included, among other things, a one-page Accident Medical Protection Plan form; a one-page Accident Medical Protection Plan Application form; a one-page American Bankers Insurance Company Optional Travel Protection Plan form; a one-page Statement of Policy Cost and Benefit Information-One Year Term Life Insurance Policy form; a one-page Explanation of Policies, Coverages and Cost Breakdown form; a multi-page Premium Finance Agreement; and a one-page Insurance Premium Financing Disclosure form.

14. Among the information contained on the top half of the Accident Medical Protection Plan form was the cost of the plan. The bottom half of the form read as follows:

THIS IS A LIMITED POLICY. READ IT CAREFULLY.

I the undersigned understand and acknowledge that:
This Policy does not provide Liability Coverage for Bodily Injury and Property Damage, nor does it meet any Financial Responsibility Law. I am electing to purchase an optional coverage that is not required by the State of Florida. My agent has provided me with an outline of coverage and a copy of this acknowledgment.

If I decide to select another option or cancel this policy, I must notify the company or my agent in writing.

I agree that if my down payment or full payment check is returned for any reason, coverage will be null and void from the date of inception.

_____ _____
Insured's Signature Date

I HEREBY REJECT THIS VALUABLE COVERAGE:

_____ _____
Insured's Signature Date

15. The Accident Medical Protection Plan Application form indicated what the annual premium was for each of the three categories of coverage offered: individual, husband and wife, and family.

16. The top half of the American Bankers Insurance Company Optional Travel Protection Plan form summarized the benefits available under the plan. The bottom half of the form read as follows:

Please Read Your Policy Carefully for a Full Explanation of Benefits

Purchasing the Optional Travel Protection Plan is not a condition of purchasing your automobile liability policy.

I hereby acknowledge I am purchasing an Optional Travel Protection Plan, and that I have received a copy of this acknowledgement.

_____ _____
Insured's Signature Date

I HEREBY REJECT THIS VALUABLE COVERAGE:

_____
Insured's Signature

_____
Date

17. The Statement of Policy Cost and Benefit Information-One Year Term Life Insurance Policy form noted the amount of the "Annual Premium for this policy" and that the "Annual Premium included a $10.00 policy fee that [was] fully earned."

18. On the Explanation of Policies, Coverages and Cost Breakdown form, the Add-Ons were listed under the heading of "optional Policies" and the cost of each Add-On was separately stated.

19. The first page of the Premium Finance Agreement also contained an itemization of the cost of each Add-On, as did the Insurance Premium Financing Disclosure form. On this latter form, the Add-Ons were included in a section entitled "Optional

insurance coverage." The form also advised, in its prefatory paragraph, that:

> Florida law requires the owner of a motor vehicle to maintain Personal Injury Protection and Property Damage liability insurance. Under certain circumstances as provided in Chapter 324, Florida Statutes, additional liability insurance may be required for Bodily Injury liability. Also, additional insurance is usually required by a lienholder of a financed vehicle. Florida law does not require other insurance. The direct or indirect premium financing of auto club membership and other non-insurance products is prohibited by state law.

20. Each of the Complaining Customers was capable of reading the above-described documents and understanding that purchasing the Add-Ons was optional, not mandatory, and involved an additional cost.[4] Respondent gave each of them as much time as they wanted to read these documents, and he did not refuse to answer any of their questions.

21. Ms. Roberts-Hall rejected the travel protection plan, and signed and dated the American Bankers Insurance Company Optional Travel Protection Plan form so indicating, in 2004, 2005, and 2006.

22. Mr. Bentivegna rejected the term life insurance policy, as documented by his signature next to the word "Rejected," which was written in by hand at the bottom of the Statement of Policy Cost and Benefit Information-One Year Term Life Insurance Policy form.

23. As noted above, unlike Mr. Bentivegna, Ms. Roberts-Hall and Mr. Moore each signed up for a term life insurance policy.

24. On Mr. Moore's Application for Life Insurance, his three children, Melissa Moore, Kenneth Moore, Jr., and Timothy Brown-Moore, were named as "Beneficiar[ies]." While Kenneth Moore, Jr., and Timothy Brown-Moore were listed as "Members of Applicant's Household" on Mr. Moore's application for automobile insurance, Melissa Moore (who, at the time, was away at college) was not.

25. Elsewhere on Mr. Moore's Application for Life Insurance, in the "Insurability Data" section, the question, "Have you during the past two (2) years had, or been told you have, or been treated for . . . a) Heart trouble or high blood pressure?" was answered, incorrectly, in the negative. Mr. Moore placed his initials next to this answer.

26. Several days after her May 2004 purchases, Ms. Roberts-Hall telephoned Respondent and told him that she was having second thoughts about her accident medical protection plan purchase. Respondent suggested that she come to his office and speak with him in person, which she did. During this follow-up visit, Respondent went over with her the benefits of the plan, after which she told him that she was going to keep the coverage.

27. Ms. Roberts-Hall took no action to cancel either of the Add-Ons (the accident medical protection plan and term life insurance policy) she had purchased in May 2004. In fact, she renewed these coverages in May 2005 and again in May 2006 (along with her automobile insurance policy).

28. Prior to these renewals, in February 2005, when contacted by one of Petitioner's investigators who was conducting an investigation of possible "sliding" by Respondent, Ms. Roberts-Hall had expressed her displeasure that Respondent had "given her these additional products."

29. Mr. Bentivegna and Mr. Moore were also contacted by Petitioner's investigative staff to discuss the Add-On purchases they had made from Respondent.

30. Mr. Moore was contacted approximately ten months after his May 2004 purchases. The three Add-Ons he had purchased were still in effect at the time, but he took no action to cancel any of these policies. He did not renew them, however; nor did he do any other business with Respondent following his May 2004 purchases.

31. Petitioner's policy is have its investigators "make it very clear from the beginning," when interviewing aggrieved consumers, that no promises are being made that these consumers will be "getting their money back" if they cooperate in the

investigation. It does not appear that there was any deviation from this policy in Petitioner's investigation of Respondent.

32. The investigation of Respondent led to the charges against him that are the subject of the instant case.

CONCLUSIONS OF LAW

33. DOAH has jurisdiction over the subject matter of this proceeding and of the parties hereto pursuant to Chapter 120, Florida Statutes.

34. "Chapters 624-632, 634, 635, 636, 641, 642, 648, and 651 constitute the 'Florida Insurance Code.'" § 624.01, Fla. Stat.

35. It is Petitioner's responsibility to "enforce the provisions of this code." § 624.307, Fla. Stat.

36. Among its duties is to license and discipline insurance agents.

37. Petitioner is authorized to suspend or revoke agents' licenses, pursuant to Sections 626.611 and 626.621, Florida Statutes; to impose fines on agents of up to $500.00 or, in cases where there are "willful violation[s] or willful misconduct," up to $3,500, and to "augment[]" such disciplinary action "by an amount equal to any commissions received by or accruing to the credit of the [agent] in connection with any transaction as to which the grounds for suspension, [or] revocation . . . related," pursuant to Section 626.681, Florida

Statutes; to place agents on probation for up to two years, pursuant to Section 626.691, Florida Statutes[5]; and to order agents "to pay restitution to any person who has been deprived of money by [their] misappropriation, conversion, or unlawful withholding of moneys belonging to insurers, insureds, beneficiaries, or others," pursuant to Section 626.692, Florida Statutes.

38. Petitioner may take disciplinary action against an agent only after the agent has been given reasonable written notice of the charges and an adequate opportunity to request a proceeding pursuant to Sections 120.569 and 120.57, Florida Statutes.

39. An evidentiary hearing must be held if requested by the agent when there are disputed issues of material fact. §§ 120.569 and 120.57(1), Fla. Stat.

40. At the hearing, Petitioner bears the burden of proving that the agent engaged in the conduct, and thereby committed the violations, alleged in the charging instrument. Proof greater than a mere preponderance of the evidence must be presented by Petitioner to meet its burden of proof. Clear and convincing evidence of the licensee's guilt is required. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932, 935 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292, 294 (Fla.

1987); Pou v. Department of Insurance and Treasurer, 707 So. 2d 941 (Fla. 3d DCA 1998); and § 120.57(1)(j), Fla. Stat. ("Findings of fact shall be based upon a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute . . . .").

41. Clear and convincing evidence is an "intermediate standard," "requir[ing] more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" In re Graziano, 696 So. 2d 744, 753 (Fla. 1997). For proof to be considered "'clear and convincing' . . . the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony 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 a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established." In re Davey, 645 So. 2d 398, 404 (Fla. 1994), quoting, with approval, from Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983); see also In re Adoption of Baby E. A. W., 658 So. 2d 961, 967 (Fla. 1995)("The evidence [in order to be clear and convincing] must be sufficient to convince the trier of fact without hesitancy."). "Although this standard of proof may be met where the evidence is in conflict, . . . it seems to

preclude evidence that is ambiguous." Westinghouse Electric Corporation, Inc. v. Shuler Bros., Inc., 590 So. 2d 986, 989 (Fla. 1st DCA 1991).

42. In determining whether Petitioner has met its burden of proof, it is necessary to evaluate its evidentiary presentation in light of the specific allegations of wrongdoing made in the charging instrument. Due process prohibits an agency from taking penal action against an agent based on matters not specifically alleged in the charging instrument, unless those matters have been tried by consent. See Shore Village Property Owners' Association, Inc. v. Department of Environmental Protection, 824 So. 2d 208, 210 (Fla. 4th DCA 2002); Cottrill v. Department of Insurance, 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996); and Delk v. Department of Professional Regulation, 595 So. 2d 966, 967 (Fla. 5th DCA 1992).

43. The charging instrument in the instant case, the Amended Administrative Complaint, as modified at hearing, contains 12 counts.

44. Among them are the 11 "remaining sliding counts," each alleging that Petitioner violated Sections 624.11(1), 626.611(4),(7), (8), (9), and (13), 626.621(2), (3), and (6), and 626.9541 (1)(z)1 through 3, Florida Statutes, by selling an ancillary insurance product to a customer without the customer's "informed consent." Count I concerns Ms. Roberts-Hall's May 7,

2004, purchase of an accident medical protection plan from Respondent. Count II concerns Ms. Roberts-Hall's May 7, 2004, purchase of a term life insurance policy from Respondent. Count III concerns Mr. Bentivegna's September 16, 2003, purchase of an accident medical protection plan from Respondent. Count IV concerns Mr. Bentivegna's September 16, 2003, purchase of a travel protection plan from Respondent. Count V concerns Mr. Moore's May 13, 2004, purchase of an accident medical protection plan from Respondent. Count VI concerns Mr. Moore's May 13, 2004, purchase of a travel protection plan from Respondent. Count VII concerns Mr. Moore's May 13, 2004, purchase of a term life insurance policy from Respondent. Count XV concerns Ms. Roberts-Hall's May 12, 2005, purchase of an accident medical protection plan from Respondent. Count XVI concerns Ms. Roberts-Hall's May 12, 2005, purchase of a term life insurance policy from Respondent. Count XVII concerns Ms. Roberts-Hall's May 13, 2006, purchase of an accident medical protection plan from Respondent. Count XVIII concerns Ms. Roberts-Hall's May 13, 2006, purchase of a term life insurance policy from Respondent.

45. Count X, the only other count of the Amended Administrative Complaint that remains following the voluntary dismissals announced by Petitioner's counsel at the close of Petitioner's case-in-chief at hearing, alleges that Respondent

violated Sections 624.11(1) and 626.621(2), Florida Statutes, by failing to "notify [Petitioner] in writing within 60 days after a change of . . . principal business address," as required by Section 626.551, Florida Statutes.

46. At all times material to the instant case, Section 624.11(1), Florida Statutes, has provided as follows:

> No person shall transact insurance in this state, or relative to a subject of insurance resident, located, or to be performed in this state, without complying with the applicable provisions of this code.

47. At all times material to the instant case, Section 626.611(4), (7), (8), (9), and (13), Florida Statutes, has provided, in pertinent part, as follows:

> The department shall . . . suspend [or] revoke . . . the license . . . of any . . . agent . . . , and it shall suspend or revoke the eligibility to hold a license . . . of any such person, if it finds that as to the . . . licensee . . . any one or more of the following applicable grounds exist:
>
> * * *
>
> (4) If the license . . . is willfully used, or to be used, to circumvent any of the requirements or prohibitions of this code.
> (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 . . . .

> (9) Fraudulent or dishonest practices in the conduct of business under the license . . . .
>
> * * *
>
> (13) Willful failure to comply with, or willful violation of, any proper order or rule of the department or willful violation of any provision of this code.

48. At all times material to the instant case, Section 626.621(2), (3), and (6), Florida Statutes, has provided, in pertinent part, as follows:

> The department may, in its discretion, . . . suspend [or] revoke, . . . the license . . . of any . . . agent . . . , and it may suspend or revoke the eligibility to hold a license . . . of any such person, if it finds that as to the . . . licensee . . . any one or more of the following applicable grounds exist under circumstances for which such . . . suspension [or] revocation . . . is not mandatory under s. 626.611:
>
> * * *
>
> (2) Violation of any provision of this code or of any other law applicable to the business of insurance in the course of dealing under the license . . . .
>
> (3) Violation of any lawful order or rule of the department . . . .
>
> * * *
>
> (6) In the conduct of business under the license . . . , engaging in unfair methods of competition or in unfair or deceptive acts or practices, as prohibited under part IX of this chapter, or having otherwise

> shown himself or herself to be a source of injury or loss to the public . . . .

49. At all times material to the instant case, Section 626.9541 (1)(z)1 through 3, Florida Statutes, has provided as follows:

> (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:
>
> * * *
>
> (z) Sliding. --Sliding is the act or practice of:
>
> 1. Representing to the applicant that a specific ancillary coverage or product is required by law in conjunction with the purchase of insurance when such coverage or product is not required;
>
> 2. Representing to the applicant that a specific ancillary coverage or product is included in the policy applied for without an additional charge when such charge is required; or
>
> 3. Charging an applicant for a specific ancillary coverage or product, in addition to the cost of the insurance coverage applied for, without the informed consent of the applicant.

50. Of the foregoing statutory provisions, the latter, Section 626.9541(1)(z)3, Florida Statutes, most specifically addresses the conduct described in the "remaining sliding counts." Under Florida case law (which the undersigned is bound to follow[6]), an agent violates this statutory provision if he or

she fails to provide the applicant an adequate "oral explanation" of the ancillary nature of the product in question, notwithstanding that the applicant is given and signs paperwork that, if "read with care," would provide the applicant with such information. See Mack v. Department of Financial Services, 914 So. 2d 986, 989 (Fla. 1st DCA 2005); and Thomas v. State, Department of Insurance and Treasurer, 559 So. 2d 419 (Fla. 2d DCA 1990). This is because of the fiduciary relationship that exists between the agent and the agent's customers. See Thomas, 559 So. 2d at 421; see also Sewall v. State, 783 So. 2d 1171, 1178 (Fla. 5th DCA 2001)("[T]he victims' ages coupled with the fact that Sewall, their insurance agent who stood in a fiduciary relationship with them, would be sufficient to justify the departure."); Natelson v. Department of Insurance, 454 So. 2d 31, 32 (Fla. 1st DCA 1984)("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."); and Beardmore v. Abbott, 218 So. 2d 807, 808-809 (Fla. 3d DCA 1969)("We accept the view that the record herein establishes that a confidential relationship existed between the parties and that it was one in which Beardmore reposed trust and confidence in his insurance counselor, Abbott.").

51. At all times material to the instant case, Section 626.551, Florida Statutes, has provided as follows:

> Every licensee shall notify the department in writing within 60 days after a change of name, residence address, principal business street address, or mailing address. Any licensed agent who has moved his or her residence from this state shall have his or her license and all appointments immediately terminated by the department. Failure to notify the department within the required time period shall result in a fine not to exceed $ 250 for the first offense and, for subsequent offenses, a fine of not less than $500 or suspension or revocation of the license pursuant to s. 626.611 or s. 626.621.

This duty to notify imposed by Section 626.551 on agents who change their "name, residence address, principal business street address, or mailing address" is nondelegable.

52. Because they are penal in nature, the foregoing statutory provisions must be strictly construed, with any reasonable doubts as to their meaning being resolved in favor of the licensee. See Capital National Financial Corporation v. Department of Insurance, 690 So. 2d 1335, 1337 (Fla. 3rd DCA 1997)("Section 627.8405 is a penal statute and therefore must be strictly construed: . . . . 'When a statute imposes a penalty, any doubt as to its meaning must be resolved in favor of a strict construction so that those covered by the statute have clear notice of what conduct the statute proscribes.'").

53. Whether Petitioner met its burden of proof with respect to the "remaining sliding counts" turns on the undersigned's assessment of the hearing testimony of the Complaining Customers that, in Respondent's oral presentations to them, he made no mention of the Add-On products he sold them and led them to believe that they were purchasing just automobile insurance and nothing else (hereinafter referred to as the "Complaining Customers' Testimony"). If the undersigned is not "convinced . . . without hesitancy" of the truthfulness of the Complaining Customers' Testimony, these counts must be dismissed.

54. The Complaining Customers' Testimony was not unrefuted. Respondent testified at hearing that, in his oral presentations to the Complaining Customers, he told them about each of the Add-Ons, explaining that they were optional and entailed separate, additional charges. According to Respondent's testimony, as he provided this explanation to the Complaining Customers, he circled portions of the Transactional Paperwork that described these features of the Add-Ons so as to bring them to the attention of the Complaining Customers. Significantly, an examination of the Transactional Paperwork (which is part of the evidentiary record in this case) reveals such circular markings, and these documents therefore corroborate his testimony.

55. Respondent may not have been entirely forthright in his responses to questions asked, during his depositions, about his knowledge concerning Add-On sales production scores, and he may have, in his hearing testimony, embellished details of his encounters with the Complaining Customers. Nonetheless, the undersigned finds Respondent's version of these encounters, at its essential core, to be more credible than the Complaining Customers' testimony to the contrary. Tipping the balance in favor of such a finding is the improbability of the Complaining Customers' claims that they left Respondent's office, following their transactions, believing that they had purchased nothing more than automobile insurance, when those pages of the Transactional Paperwork that they had initialed, signed, and/or dated during the transactions contained prominently displayed, easy-to-read language, including that highlighted by Respondent, that plainly provided otherwise.[7]

56. Inasmuch as the undersigned is not "convinced . . . without hesitancy" of the truthfulness of the Complaining Customers' Testimony, he concludes that the "remaining sliding counts" are not supported by clear and convincing evidence and that they therefore should be dismissed.[8]

57. Petitioner did, however, prove by clear and convincing evidence that, as alleged in Count X of the Amended Administrative Complaint, Respondent failed to "notify

[Petitioner] in writing within 60 days after a change of . . . principal business address," as required by Section 626.551, Florida Statutes. That Respondent may have "relied on [his] company to update that address for [him]," as he testified at hearing, does not excuse his noncompliance with the notification requirement of Section 626.551.

58. There is no evidence that Respondent has previously been disciplined for violating Section 626.551, Florida Statutes. Accordingly, the undersigned recommends that, for violating Section 626.551, Florida Statutes, Respondent be fined $250.00, the maximum punishment for a first offense under the statute.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby

RECOMMENDED that Petitioner issue a Final Order finding Respondent guilty of committing the violation of Section 626.551, Florida Statutes, alleged in Count X of the Amended Administrative Complaint, fining him $250.00 for such violation, and dismissing the remaining counts of the Amended Administrative Complaint.

DONE AND ENTERED this 29th day of March, 2007, in Tallahassee, Leon County, Florida.

S

STUART M. LERNER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of March, 2007.

ENDNOTES

[1] Unless otherwise noted, all references in this Recommended Order to Florida Statutes are to Florida Statutes (2006).

[2] Petitioner's Exhibits 13 and 16 were transcripts of depositions given by Respondent. On February 22, 2007, with leave of the undersigned, Respondent filed a post-hearing pleading entitled "Objections to Specific Portions of Respondent's Deposition[s]." Having carefully considered these objections, the undersigned hereby sustains objection numbers 1, 5, 7 through 12, 15, and 16 relating to Respondent's November 17, 2006, deposition and overrules the remaining objections made in Respondent's post-hearing pleading.

[3] The undersigned has accepted these factual stipulations. See Columbia Bank for Cooperatives v. Okeelanta Sugar Cooperative, 52 So. 2d 670, 673 (Fla. 1951)("When a case is tried upon stipulated facts the stipulation is conclusive upon both the trial and appellate courts in respect to matters which may validly be made the subject of stipulation."); Schrimsher v. School Board of Palm Beach County, 694 So. 2d 856, 863 (Fla. 4th DCA 1997)("The hearing officer is bound by the parties' stipulations."); and Palm Beach Community College v. Department

of Administration, Division of Retirement, 579 So. 2d 300, 302 (Fla. 4th DCA 1991)("When the parties agree that a case is to be tried upon stipulated facts, the stipulation is binding not only upon the parties but also upon the trial and reviewing courts. In addition, no other or different facts will be presumed to exist.").

[4] Mr. Bentivegna has only an eighth grade formal education, but has the ability to read and comprehend what he is reading.

[5] Petitioner may impose a fine or place an agent on probation "in lieu of" suspension or revocation of the agent's license "except on a second offense or when . . . suspension [or] revocation . . . is mandatory." §§ 626.681 and 626.691, Fla. Stat.

[6] See Malu v. Security National Insurance Co., 898 So. 2d 69, 73 n.3 (Fla. 2005)("The trial court was bound to follow Hunter since it was the only district court decision that had pronounced a ruling on the issue."); Pardo v. State, 596 So. 2d 665, 666 (Fla. 1992)("[I]n the absence of interdistrict conflict, district court decisions bind all Florida trial courts."); Weiman v. McHaffie, 470 So. 2d 682, 684 (Fla. 1985)("District court decisions 'represent the law of Florida unless and until they are overruled by this Court.'"); Mikolsky v. Unemployment Appeals Commission, 721 So. 2d 738, 740 (Fla. 5th DCA 1998)("An agency of this state, such as the Commission, must follow the interpretations of statutes as interpreted by the courts of this state. Like trial courts, if there is a controlling interpretation by a district court of appeal in this state, the Commission must follow it, even if the court of appeal is located outside the district of the trial court. If there is a conflict between interpretations by different courts of appeal, that may provide a basis to reach the supreme court for a final interpretation. Thereafter, the supreme court's interpretation of the statute must prevail, barring future legislative changes to the statute."); Wood v. Fraser, 677 So. 2d 15, 19 (Fla. 2d DCA 1996)("[I]n accord with the doctrine of stare decisis, . . . once a point of law has been decided by a judicial decision, it should be adhered to by courts of lesser jurisdiction, until overruled by another case, because it establishes a precedent to guide the courts in resolving future similar cases. "); Putnam County School Board v. Dubose, 667 So. 2d 447, 449 (Fla. 1st DCA 1996)("Under the doctrine of stare decisis, lower courts are bound to adhere to the rulings of higher courts when considering similar issues even though the

lower court might believe the law should be otherwise."); Dean v. Dean, 607 So. 2d 494, 499 n.6 (Fla. 4th DCA 1992)("In the absence of controlling precedent from its own district court, any trial court in Florida, irrespective of the district in which it sits, is required to follow the decision of any other district court of appeal in Florida."); and State v. Hayes, 333 So. 2d 51, 53 (Fla. 4th DCA 1976)("[I]t is logical and necessary in order to preserve stability and predictability in the law that . . . trial courts be required to follow the holdings of higher courts--District Courts of Appeal. The proper hierarchy of decisional holdings would demand that in the event the only case on point on a district court level is from a district other than the one in which the trial court is located, the trial court be required to follow that decision. . . . Alternatively, if the district court of the district in which the trial court is located has decided the issue, the trial court is bound to follow it.").

[7] The undersigned finds particularly implausible Ms. Roberts-Hall's testimony that, after learning that, during her May 2004, visit to Respondent's office, Respondent had sold her Add-On products without his having had made any mention of them to her, she nonetheless returned to his office in 2005 and again in 2006 to renew her automobile insurance policy and that she "just signed where [Respondent] told [her] to sign the forms," without reading them, because she trusted Respondent.

[8] It is within the province of the administrative law judge in a disciplinary proceeding against an agent to determine whether Petitioner's proof is clear and convincing. See Stinson v. Winn, 938 So. 2d 554, 555 (Fla. 1st DCA 2006)("Credibility of the witnesses is a matter that is within the province of the administrative law judge, as is the weight to be given the evidence. The judge is entitled to rely on the testimony of a single witness even if that testimony contradicts the testimony of a number of other witnesses."); Dyer v. Department of Insurance & Treasurer, 585 So. 2d 1009 (Fla. 1st DCA 1991)("It is not the function of this court when reviewing an agency order by appeal to substitute our judgment for that of the agency as to the weight of the evidence on any disputed issue of fact, nor is it our function to determine whether the evidence as a whole satisfies the clear and convincing standard of proof; these functions lie with the trier of fact."); see also United States v. Jordan, 256 F.3d 922, 933 (9th Cir. 2001)("We remand to the district court to determine whether the evidence is clear and convincing that Jordan possessed a firearm during the bank

robbery and whether he abducted Howard to facilitate his escape. As we are not in a position to weigh conflicting evidence, which is an important responsibility of the district court, we state no opinion on what the district court's determination should be under this heightened standard of proof."); and State v. Uriarte, 194 Ariz. 275, 283 (Ariz. Ct. App. 1998)("Terms like 'convincing,' 'probable,' 'firm belief' or 'conviction' require an assessment of the persuasiveness of the evidence, i.e., its credibility, a function unique to the trial court.").

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.