REPRESENTING
ALEX SINK
CHIEF FINANCIAL OFFICER
STATE OF FLORIDA

FILED

SEP 6 2007

Docketed by: EU

IN THE MATTER OF:

Case No.: 86944-06-AG

JACK ALEXANDER, JR.
_____/

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DIVISION OF ADMINISTRATIVE HEARINGS

FINAL ORDER

This cause came on for consideration and final agency action. On September 27, 2006, an Administrative Complaint was filed by the Florida Department of Financial Services (hereinafter referred to as the "Department"), charging Respondent with committing various violations of the Insurance Code in connection with the mishandling and misappropriation of the insurance premiums of three Florida consumers. The Respondent timely filed a request for a proceeding pursuant to Section 120.57(1), Florida Statutes. Pursuant to notice, the matter was heard before Bram D.E. Canter, Administrative Law Judge, Division of Administrative Hearings, on March 28, 2007.

After consideration of the evidence, argument, and testimony presented at hearing, the Administrative Law Judge issued his Recommended Order on June 22, 2007 (attached hereto as Exhibit "A"). The Administrative Law Judge recommended that the Department enter an order suspending the Respondent's license for a period of six months. On July 6, 2007, the Petitioner timely filed exceptions to the Recommended Order as to the Conclusions of Law. On July 10, 2007, the Petitioner filed a Notice of Additional Authority for Exception to a Conclusion of Law in the

Recommended Order. The Respondent filed no exceptions. The Petitioner's exceptions will be addressed below.

RULINGS ON PETITIONER'S EXCEPTIONS

1. The Petitioner's First Exception is directed narrowly to the portions of the Conclusions of Law in the Recommended Order that find as a matter of law that there was no requisite insurance company "demand" for premiums paid by the consumers at issue in this case. The occurrence of a "demand" is necessary to trigger application of a disciplinary penalty for failure to remit such premiums under Section 626.621(4), Florida Statutes. Section 626.621(4) provides as follows:

> "Grounds for discretionary refusal, suspension, or revocation of agent's, adjuster's, customer representative's, service representative's, or managing general agent's license or appointment. –
>
> * * *
>
> (4) Failure or refusal, **upon demand**, to pay over to any insurer he or she represents or has represented any money coming into his or her hands belonging to the insurer." [Emphasis added].
>
> § 626.621(4), Fla. Stat.

The Petitioner asserts that the existing Producer Agreement between Insurance Depot (Respondent's agency) and managing general agent Irvin B. Green & Associates, Inc. ("I.B. Green") creates the obligatory "demand" for premiums. The Producer Agreement provides, in pertinent part:

> "Where the parties have agreed to conduct business on a cash with application basis, the Producer [Insurance Depot] hereby obligates him or itself to promptly transmit to [I.B. Green] complete applications and binders for all insurance made along with all premiums, taxes, and applicable expenses or fees required, less Producer's commission."
>
> Petitioner's Exhibit 9, Page 19.

The Petitioner's assertion that the language in the Producer Agreement creates a "demand" for premiums was flatly rejected by the Administrative Law Judge through his Conclusions of Law in discussion of the transaction involving consumers Annette and Anthony Wiley:

> "Petitioner failed to prove there was a demand for payment by I.B. Green for the Wileys' premium and a refusal to pay by Respondent. Petitioner argues that the requirement of the Producer Agreement that complete agreements and premiums be promptly transmitted to I.B. Green is sufficient to establish the necessary demand. The argument that the Producer Agreement created a continuous "demand" for purposes of establishing a violation of Subsection 621.621(4), Florida Statutes, is rejected.[endnote]"
>
> Recommended Order, Page 25, Paragraph 74.

The Administrative Law Judge further supplemented this legal conclusion by analysis in an endnote:

> "[8/] Petitioner argues that it would be "ludicrous" to expect I.B. Green to demand submittal of the premium every time a customer purchased insurance. However, **the only relevant inquiry is whether I.B. Green demanded the Wileys' premium and Respondent refused the demand**." [Emphasis added].
>
> Recommended Order, Page 35, Endnote 8.

The Administrative Law Judge's assertion that the "only relevant inquiry" under 626.621(4) is whether I.B. Green demanded payment and the "Respondent refused the demand" is misplaced. It is not necessary that the Petitioner show that the Respondent *refused* to submit premiums to I.B. Green. The clear language of 626.621(4), supra, provides that "*Failure or* refusal, upon demand ..." to remit premiums is sufficient to trigger a violation. [Emphasis added]. The Respondent's failure to remit premiums upon demand, therefore, would be a violation of the statute. As to this point, a written demand by I.B. Green that premiums be promptly submitted is evidenced in its Producer Agreement with Insurance Depot. The language of the Producer Agreement requiring that the Respondent "promptly submit" to I. B. Green all premiums received is not a mere *suggestion* that the Respondent submit premiums he receives on behalf of I.B. Green or the insurer. Rather, it is an *express demand for*

premiums.[1] The procedures outlined in this Producer Agreement governed all transactions Respondent initiated involving the managing general agent, a fact which the Respondent knew or reasonably should have known. It is clear from the terms of the Producer Agreement that I.B. Green is not required to enter into a separate Producer Agreement with Insurance Depot for each and every insurance policy it binds, but rather, that the Producer Agreement applies to "all insurance made."[2] It is equally clear that I.B. Green is not required to make a separate and specific demand for premium for each and every insurance policy its producer binds. To infer or to hold as a matter of law that Section 626.621(4) requires a verbal demand, or that it requires a specific and unique demand by an insurer or managing general agent each and every time a premium is received by one of its authorized agents, even in instances where the insurer or managing general agent may be unaware of receipt by the agent of such a premium, would be inconsistent with the plain meaning of the statutory language and the Department's interpretation of that statute, which is entitled to deference. Pub. Employees Relations Comm'n. v. Dade County Police Benevolent Ass'n., 467 So. 2d 987, 988 (Fla. 1985).

Furthermore, as a licensed agent, the Respondent carries a duty to use reasonable skill and diligence in matters relating to the procurement of coverage for insureds. See Warehouse Foods, Inc. v. Corporate Risk Management Services, Inc., 530 S. 2d 422, 423 (Fla. 1st DCA 1998) (it is settled law that an insurance agent is required to use reasonable skill and diligence); Southtrust Bank and Right Equipment Co. of Pinellas County, Inc. v. Export Ins. Services, Inc., 190 F. Supp. 2d 1304, 1310 (M.D.

[1] Although not addressed in Petitioner's exceptions, it is noted that, with respect to Count II (Cecilia Hembree) and Count III (the Palmers), a Federated National Insurance manual of "Underwriting Guidelines" was accepted into evidence (Petitioner's Exhibit 36, see Page 2). The Federated underwriting guidelines state that all applications and premiums are to be submitted to Federated "no later than five (5) business days from the day the application was executed." However, this cannot be equated to the clear "demand" reduced to writing in the form of a contract, the Producer Agreement between I.B. Green and Insurance Depot, which was executed by both parties.

[2] The Producer Agreement (Petitioner's Exhibit 9, Page19, Numbered Paragraph 3 entitled "Cash With Applications Submittals").

Fla. 2002) (insurance agent has duty to use "reasonable skill and diligence" when dealing with an insured) (citing Warehouse Foods, Inc.). It should be noted that the Producer Agreement referenced herein recognizes just such a duty:

> "The producer shall use care, skill, and diligence in the good faith exercise of the authority granted an in connection with all business transacted on behalf of [I.B. Green] ..."
>
> Petitioner's Exhibit 9, Page 19.

Given the various Findings of Fact in the Recommended Order which recognize instances of the Respondent accepting applications and premium payments from consumers, and the insurer or the managing general agent never receiving such applications and payments, it appears the Respondent used little or no skill and diligence in ensuring that coverage was properly procured for his clients. The act of an agent accepting a consumer's premium in connection with an insurance application, and failing to ensure the premium is properly remitted to the insurer or, as in the Wileys' case, the managing general agent on behalf of American Reliable Insurance Company, is contrary to the requisite duty to use "reasonable skill and diligence."

The Administrative Law Judge's conclusions as a matter of law, therefore, that the Producer Agreement did not create the necessary demand for premiums to be submitted, and that the only relevant inquiry should be whether the Respondent "refused" a demand, are rejected. The Petitioner's First Exception is accepted to the extent that Petitioner correctly distinguishes a written demand by the managing general agent in its Producer Agreement that requires Insurance Depot to remit premiums collected by it to I.B. Green.

Given that a "demand" for premiums for the purposes of Section 626.621(4), Florida Statutes is evidenced in the Producer Agreement between Insurance Depot and I.B. Green, and applying this

Conclusion of Law to the Findings of Fact set forth in the Recommended Order, it is clear that the Respondent violated this Statute in the case of the Wileys (Count I).

Accordingly, Paragraph 74 of the Recommended Order is rejected, and the following paragraph is substituted therefor:

> A written demand by I.B. Green that premiums be promptly submitted is evidenced in its Producer Agreement with Insurance Depot. The demand established by the Producer Agreement, combined with the failure of the Respondent to promptly forward the Wileys' premium to I.B. Green, establishes a violation of Section 626.621(4), Florida Statutes.

In light of the express demand in the Producer Agreement that premiums be "promptly" remitted to I.B. Green, as well as various Findings of Fact in the Recommended Order establishing the Respondent's failure to ensure that premiums collected by him from the Wileys were appropriately remitted to I.B. Green, this substituted Conclusion of Law is as or more reasonable than the original Conclusion of Law.

2. Petitioner's Second Exception relates to the Administrative Law Judge's omission of language from the cited text of Section 626.561(1) in the Conclusions of Law, as well as the Administrative Law Judge's application of that law to the Findings of Fact. Specifically, the Petitioner identifies Paragraph 65 of the Recommended Order, which reads:

> "The cited statutes provide as follows:
>
> § 626.561(1)
>
> All premiums, return premiums, or other funds belonging to insurers or others received by an agent ... are trust funds received by the licensee in a fiduciary capacity. An agent ... shall keep the funds ... in a separate account so as to allow the department or office to properly audit such funds."
>
> Recommended Order, Pages 20-21, Paragraph 65.

However, the cited Section *actually* reads as follows:

> All premiums, return premiums, or other funds belonging to insurers or others received by an agent, insurance agency, customer representative, or adjuster in transactions under the license are trust funds received by the licensee in a fiduciary capacity. An agent or insurance agency shall keep the funds belonging to each insurer for which an agent is not appointed, other than a surplus lines insurer, in a separate account so as to allow the department or office to properly audit such funds. The licensee in the applicable regular course of business shall account for and pay the same to the insurer, insured, or other person entitled thereto. [Emphasis added].
>
> § 626.561(1), Fla. Stat.

The complete exclusion by the Administrative Law Judge of the emphasized statutory text above is, as the Petitioner correctly points out, a significant omission. The significance of this omission becomes even more apparent in light of the absolute exclusion of the above-emphasized provisions of Section 626.561(1) from the Administrative Law Judge's application of the law to the Findings of Fact.

A thorough review of the Recommended Order reveals no application of the omitted statutory text of Section 626.561(1) in the Administrative Law Judge's Conclusions of Law in discussions regarding any of the three consumer-counts contained in Paragraphs 66 through 86. Instead, with respect to Section 626.561(1), the Administrative Law Judge observes only that in the Respondent's dealings with each of the three consumers, there was "no evidence" that the premiums were "misused" or "not kept in a separate account" by the Respondent. See Recommended Order: Page 22, Paragraph 68; Page 27, Paragraph 78; and Pages 29-30, Paragraph 83.

Section 626.561(1) clearly declares that premium funds, such as the funds received by the Respondent from the Wileys, Ms. Hembree, and the Palmers, are "trust funds," and squarely places on the Respondent, as the receiver of these trust funds, the duty to account for and pay

the funds to the insurer or, as may be the case with the Wileys, the managing general agent.[3] It is evident from a thorough review of the record, though, that the statutory language setting forth this duty was not considered by the Administrative Law Judge in his application of the law.

Applying the pertinent language of 626.561(1) to the conduct of the Respondent, it becomes clear and convincing that the Respondent failed to account for and pay the "trust funds" received by him to the insurer or managing general agent in the applicable regular course of business. For example, as to the Wileys:

> "The Wileys gave Respondent $189 as a down payment on the annual premium of $533 ... Respondent created a document which contained a check ("draft") in the amount of $533 made out to American Reliable and [I.B. Green] ... the draft was never sent to American Reliable or I.B. Green ..."
>
> Recommended Order, Pages 6-7; Paragraphs 14, 16.

And Ms. Hembree:

> "Ms. Hembree ... paid the annual premium in full with a check in the amount of $728 ... Federated never received the signed application form or Ms. Hembree's check for $728 ... after Hurricane Charley hit on August 13, 2004 ... When Ms. Hembree called Federated, she was told she had no insurance coverage."
>
> Recommended Order, Pages 10, 13, 15; Paragraphs 31, 38, 47.

And finally, as to the Palmers:

> "On the same day they met with Respondent, February 23, 2004, the Palmers paid the premium of $1,014 by credit card ... the Palmers' next credit card statement showed the premium was paid ... The record evidence shows that Federated received a check for the Palmers' insurance premium ... on April 5, 2004, but Federated did not accept the payment because the policy had been cancelled."

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[3] It is the Respondent, as the licensee receiving the "trust funds," who bears the responsibility of ensuring that those funds are properly remitted under 626.561(1), not the "clerks in the office" as Respondent infers. See Recommended Order, Page 5, Paragraph 11.

Recommended Order, Pages 18-19; Paragraphs 56, 58.

Previous findings by other Administrative Law Judges in previous cases, reduced to final orders, have already established standards for how to apply the requirement of forwarding premiums in "the regular course of business." In The Matter of Janet Joyce Buck, DOAH Case No. 91-7566, Final Order No. 92-249 FOF (*delay from early December, 1990 to February 5, 1991 constituted failure to procure insurance in a timely manner*); In The Matter of Duane Alexander Zolinski, DOAH Case No. 96-5055, Final Order No. 14707-95-A (*February to April, 1996 constituted failure to forward premiums in applicable course of business*); and In The Matter of Roosevelt King Jones, DOAH Case No. 83-2151, Final Order No. 83-L-140EH (*delays from February 1 through May 10, 1982, and September 1982 to April, 1983 constituted failure to promptly forward applications and premiums*). The Respondent failed to remit to I.B. Green the trust funds entrusted to him by the Wileys on February 6, 2004 for a period of time that spanned not just the spring season, but the bulk of the 2004 hurricane season, and by the time Hurricane Charley hit in August 13, 2004, the Wileys' premiums still had not been forwarded by the Respondent. Cecilia Hembree handed the Respondent her $728 check representing a year's premium in February, 2004, and walked out of his office believing she had insurance coverage on her home. Again, it was not until after Hurricane Charley hit that August that Ms. Hembree discovered her premium payment had never been forwarded on her behalf to her insurer. And in the case of the Palmers, their February, 2004 visit with the Respondent concluded with them making a payment of $1,014 by credit card, only to discover some time after April 5, 2004, that their payment had not been properly forwarded, and coverage not bound, on their behalf. By any account, the length of time that elapsed from the time the Respondent accepted these trust funds in the case of the Wileys (5 months), Ms. Hembree (5 months), and the Palmers (more than 1 month), was far greater

than what can be considered "in the regular course of business" under Section 626.561(1), Florida Statutes. Applying the law and the omitted statutory language from Section 626.561(1), therefore, the record can only support the conclusion that the Respondent failed to remit the trust funds received by him to the insurer or, in the case of the Wileys the managing general agent, in the applicable regular course of business.

Conclusion of Law 65, Pages 20-21 of the Recommended Order embodying a redacted statute is rejected, and the following corrected language is substituted therefor:

> The cited statutes provide as follows:
>
> All premiums, return premiums, or other funds belonging to insurers or others received by an agent, insurance agency, customer representative, or adjuster in transactions under the license are trust funds received by the licensee in a fiduciary capacity. An agent or insurance agency shall keep the funds belonging to each insurer for which an agent is not appointed, other than a surplus lines insurer, in a separate account so as to allow the department or office to properly audit such funds. The licensee in the applicable regular course of business shall account for and pay the same to the insurer, insured, or other person entitled thereto.
>
> § 626.561(1), Fla. Stat.
>
> Accordingly, Paragraph 68 of the Recommended Order is modified to read as follows:
>
> Petitioner presented no evidence that the $189 premium down payment the Wileys gave to Respondent was misused by him or not kept in a separate account. Respondent did not manage, supervise, or have control of the accounts at Insurance Depot. Only Jack Alexander, Sr., exercised such authority at Insurance Depot. The Petitioner did not establish that the Respondent personally held up the Wiley paperwork or that he was even aware of the delay associated with the Wileys' application. However, Section 626.561(1) clearly declares that premium funds, such as the funds received by the Respondent from the Wileys, are "trust funds," and squarely places on the Respondent, as the receiver of these trust funds, the duty to account for and pay the funds to the insurer or, as was the case with the Wileys, the managing general agent. Moreover, the Respondent had a duty to use reasonable skill and diligence in procuring insurance for the Wileys. See Warehouse Foods, Inc. v. Corporate Risk Management Services, Inc., 530 S. 2d 422, 423 (Fla. 1st DCA 1998) (it is settled law that an insurance agent is required to use reasonable skill and diligence); Southtrust Bank and Right Equipment Co. of Pinellas County, Inc. v. Export Ins. Services, Inc., 190 F. Supp. 2d 1304, 1310

(M.D. Fla. 2002) (insurance agent has duty to use "reasonable skill and diligence" when dealing with an insured) (citing Warehouse Foods, Inc.). The Respondent not only failed to ensure that these "trust funds" he received were properly remitted to I.B. Green in accordance with Section 626.561(1), Florida Statutes, he also failed to exercise reasonable skill and diligence in his dealings with the Wileys.

Appropriate to this point, the last sentence of Paragraph 69 following discussion of the Respondents' practice of "dividing tasks" between agents and other employees and tasking "employees other than Respondent" with the responsibility to ensure premiums are mailed to insurance companies, which reads "Petitioner cited no statutes, rules, or court decisions that indicate such a practice is unlawful" is rejected, and the following sentence is substituted therefor:

> Insurance Depot's practice of dividing tasks between agents and other employees, however, in no way absolves the Respondent of his statutory duty under Section 626.561(1) to submit premiums received by him from the Wileys to I.B. Green.

Similarly, the last sentence of Paragraph 78 addressing the application of Section 626.561(1) to the Respondent's role in processing Cecelia Hembree's premium payment is rejected:

> Petitioner did not prove by clear and convincing evidence that Respondent personally held up Ms. Hembree's paperwork or withheld her premium payment from Federated in violation of Subsection 626.526(1), Florida Statutes. [*sic*]
>
> The following is substituted therefor:
>
> However, the Respondent had a duty to use reasonable skill and diligence in procuring Ms. Hembree's insurance. Warehouse Foods, Inc. v. Corporate Risk Management Services, Inc., 530 S. 2d at 423; Southtrust Bank and Right Equipment Co. of Pinellas County, Inc. v. Export Ins. Services, Inc., 190 F. Supp. 2d at 1310. He used little or no skill and diligence in this regard. Furthermore, it was the Respondent, as the licensee who received Ms. Hembree's premiums, who bore the ultimate responsibility under Section 626.561(1) to ensure that those trust funds were promptly remitted to Federated. The Respondent failed in this responsibility.

Finally, with respect to the Palmers' transaction, Paragraph 83 of the Conclusions of Law in the Recommended Order is rejected in its entirety, and the following paragraph substituted therefor:

> By failing to forward the Palmers' premium payment for an unreasonable period of time (February to April, 2004), during which the Palmers reasonably believed their home was insured, the Respondent violated Section 626.561(1), Florida Statutes. In The Matter of Janet Joyce Buck, DOAH Case No. 91-7566, Final Order No. 92-249 FOF (*delay from early December, 1990 to February 5, 1991 constituted failure to procure insurance in a timely manner*); In The Matter of Duane Alexander Zolinski, DOAH Case No. 96-5055, Final Order No. 14707-95-A (*February to April, 1996 constituted failure to forward premiums in applicable course of business*); and In The Matter of Roosevelt King Jones, DOAH Case No. 83-2151, Final Order No. 83-L-140EH (*delays from February 1 through May 10, 1982, and September 1982 to April, 1983 constituted failure to promptly forward applications and premiums*).

The circumstances set forth in the Findings of Fact with respect to each of the three consumer-counts support the conclusion, by clear and convincing evidence, that the Respondent violated Section 626.561(1), Florida Statutes, by failing to, in the applicable course of business, account for and pay the premium "trust funds" received by him to the insurer or, as in the case with the Wileys, the managing general agent.

Given the application of the omitted statutory language to the Findings of Fact, and the established standards with respect to what constitutes a violation of a licensee's duty under Section 626.561(1) to remit premiums "in the applicable regular course of business," these modified Conclusions of Law are as or more reasonable than the original Conclusions of Law.

3. The Petitioner's Third Exception is directed to Paragraph 91, Page 33 of the Recommended Order. There, the Administrative Law Judge concluded as a matter of law that a violation of Section 626.611(7), Florida Statutes, could not be proven without a showing of "willfulness." Specifically, in discussions regarding the application of aggravating and

mitigating factors his Recommended Order, Paragraph 91, the Administrative Law Judge stated as to the aggravating factor of *willfulness*: "Because willfulness is already a necessary element of the violation of Subsection 626.611(7), Florida Statutes (and there was no unique willfulness shown by the evidence), and willfulness was not proven in the case of subsection 626.621(6), Florida Statutes, this aggravating factor should not be applied."

The pertinent statute, Section 626.611(7), Florida Statutes, reads as follows:

> "The department shall deny an application for, suspend, revoke, or refuse to renew or continue the license or appointment of any applicant, agent, title agency, adjuster, customer representative, services 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:
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> * * *
>
> (7) Demonstrated lack of fitness or trustworthiness to engage in the business of insurance."

Section 626.611(7), Florida Statutes does not require a showing of "willfulness" to prove a violation. In the Matter of Jennifer Sophia D'Alessandro, Case No. 84221-06-AG, DOAH Case No. 06-0754PL, Final Order March 28, 2007 (*Final Order holding that willfulness is not a necessary element of 626.611(7), Florida Statutes*). One of the first rules of statutory construction is that the plain meaning of a statute is controlling. Jackson County Hosp. Corp. v. Aldrich, 835 So. 2d 318, 329 (Fla. 1st DCA 2002). Moreover, the Florida Supreme Court has held that, where the legislature has used a term in one section of a statute but omitted the term in another section, the court will not imply the term into the section where it was omitted. Leisure Resorts, Inc. v. Frank J. Rooney, Inc., 654 So. 2d 911, 914 (Fla. 1995). The language of Section 626.611(7) is clear and unambiguous. Within Section 626.611, subsections (4),(5),(6), and (13) each contain some express requirement of bad intent or

willfulness. Noticeably absent from Section 626.611(7) is that same requirement. The requirement of "willfulness," therefore, is not applicable to Section 626.611(7). Moreover, the phrase "lack of fitness" does not, by its terms, contemplate an element of willfulness. The Administrative Law Judge's application of a "willfulness" requirement under Section 626.611(7) is inconsistent with the plain meaning of the statutory language, as well as the Department's interpretation of that statute, which is entitled to deference. Pub. Employees Relations Comm'n. v. Dade County Police Benevolent Ass'n., 467 So. 2d 987, 988 (Fla. 1985); In the Matter of Jennifer Sophia D'Alessandro, Case No. 84221-06-AG, DOAH Case No. 06-0754PL, Final Order March 28, 2007. The Administrative Law Judge's Conclusion of Law applying a "willfulness" standard to Section 626.611(7), therefore, is rejected.

This rejection of the Administrative Law Judge's implication of a "willfulness" standard to 626.611(7), however, is made with deference to the Administrative Law Judge's conclusion that no showing of "willfulness" on the part of the Respondent was made so as to warrant application of an aggravating factor in this regard under Rule 69B-231.160, Florida Administrative Code. Recommended Order, Paragraph 91, Page 33.

Paragraph 91 of the Recommended Order is, therefore, accepted in part and rejected in part. Accordingly, the language of Paragraph 91 of the Recommended Order which reads as follows: "Because willfulness is already a necessary element of the violation of Subsection 626.611(7), Florida Statutes (and there was no unique willfulness shown by the evidence), and willfulness was not proven in the case of subsection 626.621(6), Florida Statutes, this aggravating factor should not be applied," is rejected, and the following is substituted therefor:

> The Respondent's conduct is insufficient in and of itself to warrant aggravation of the total applicable penalty based on "willfulness."

The relevant circumstances set forth in the Findings of Fact support the conclusion, by clear and convincing evidence, that the Respondent has demonstrated a lack of fitness or trustworthiness to engage in the business of insurance as to each of the three consumer-counts contained in the Administrative Complaint.

Having addressed the incorrect application of a willfulness standard to Section 626.611(7), and although not excepted to by Petitioner, it should also be noted that the Administrative Law Judge prescribed a "willfulness" standard to Section 626.561(1), Florida Statutes, where none exists.

With respect to a statement made by the Respondent's father and supervisor, Jack Alexander, Sr., that once an agent starts with a customer, "*its basically their responsibility to finish up with a customer*," the Administrative Law Judge opined: "... this single statement by Mr. Alexander is not clear and convincing evidence of the knowledge and willfulness required to prove a violation of Subsection 626.561(1), Florida Statutes." Recommended Order, Page 23, Paragraph 69. [Emphasis added].

The application of a willfulness standard to Section 626.651(1) by the Administrative Law Judge, where none exists, is especially noteworthy given that the Administrative Law Judge cited the following text from Copeland Ins. Agency v. Home Ins. Co. two paragraphs prior, in Paragraph 67:

> "We do not agree that an intent to misappropriate is a necessary element to prove a violation of section 626.561(1). Liability arises upon a showing that a person has direct supervision and control over an agency and its employees, and that insurance premiums are collected by the agency, but not accounted for or turned over to the insurance company for whom the agency is acting."
>
> Recommended Order, Page 22, Paragraph 67, citing Copeland Ins. Agency v. Home Ins. Co., 502 So. 2d 93, 95 (Fla. 5th DCA 1987).

Copeland, as Petitioner notes, was not a license disciplinary proceeding. Instead, it was a civil action against an agency for withholding of funds. What is significant, though, about the cited text from Copeland, is that the notion that willfulness is required to prove a violation of Section 626.561(1) was clearly (and correctly) rejected by the Fifth District Court of Appeal. Long-established canons of statutory interpretation dictate that the plain meaning of Section 626.561(1) is controlling. Jackson County Hosp. Corp. v. Aldrich, 835 So. 2d 318 at 329. The imputation of a "willfulness" standard under Section 626.651(1) is inconsistent with the plain meaning of the statutory language, as well as the Department's interpretation of that statute, which is entitled to deference. Pub. Employees Relations Comm'n. v. Dade County Police Benevolent Ass'n., 467 So. 2d at 988. The absence of the express requirement of "willfulness" in Section 626.561 indisputably indicates that *reckless* or irresponsibly *careless* behavior on the part of agents with respect to trust funds received by them, such as that evidenced in the instant case, is sufficient to trigger a violation of the statute. Ascribing the requirement of willfulness to this statute would mean a conclusion that the legislature *cannot* intend for clearly careless and irresponsible behavior on the part of agents with respect to their handling of "trust funds" to be a violation of Section 626.561(1), Florida Statutes. Such a conclusion would be anomalous, and should not be adopted. Allied Fidelity Ins. Co. v. State, 415 So. 2d 109, 111 (Fla. 3d DCA 1982) (*it is an axiom of statutory construction that an interpretation of a statute which leads to an unreasonable or ridiculous conclusion or a result obviously not designed by the Legislature will not be adopted*). The Administrative Law Judge's imputation of a "willfulness" standard as a necessary element to trigger a violation of Section 626.561(1) is, therefore, rejected a being an incorrect application of the law.

Accordingly, Paragraph 69, as modified previously herein with respect to Petitioner's Exception #1, on Page 11, supra, is further modified as follows: the portion of the Conclusion of Law which reads "However, this single statement by Mr. Alexander is not clear and convincing evidence of the knowledge and willfulness required to prove a violation of Subsection 626.561(1), Florida Statutes" is rejected as being a misapplication of the statute.

Similarly, Paragraph 84, Page 30 is accepted in part, and rejected in part. The last sentence of Paragraph 84 is rejected:

> However, Petitioner did not prove that Respondent lied about the Palmers' insurance application and, as explained above, Petitioner did not prove that Respondent willfully withheld the Palmers' premium payment.

The following is substituted therefor:

> While the Petitioner did not prove that the Respondent lied about the Palmers' insurance application, such a showing was not required to trigger a violation of Sections 626.611(7) or 626.561(1), Florida Statutes.

A thorough review of the record substantiates that the foregoing modifications and rejections to the Conclusions of Law contained in the Recommended Order are as or more reasonable than the original Conclusions of Law.

4. Petitioner's Fourth Exception to the Recommended Order pertains specifically to the portion of the Recommended Order dealing with aggravation or mitigation of the total applicable penalty to be imposed in this matter. The Department sought aggravation of the total applicable penalty pursuant to Rule 69B-231.160, Florida Administrative Code, in consideration of factors enumerated by that Rule that are applicable in this case. The Petitioner excepts to the method by which the Administrative Law Judge considered and applied the aggravating and mitigating factors under Rule 69B-231.160.

Reviewing the Administrative Law Judge's discussion in the Recommended Order relative to the assessment of the appropriate penalty, it is clear that some consideration was given to weighing the applicable aggravating and mitigating factors, and as to whether any of these factors sought by the Petitioner should serve to increase the total applicable penalty. The Petitioner's criticism, however, appears to be narrowly focused on the weight that the Administrative Law Judge has chosen to give to the absence of any prior disciplinary orders or warnings against the Respondent. Here is the Administrative Law Judge's limited discussion regarding the absence of prior disciplinary action against the Respondent:

> " ... The degree of potential injury was high because of Florida's regular experience with hurricanes. Therefore, this aggravating factor should be applied. A mitigating factor in the rule that is also applicable is Respondent's previous disciplinary orders or warnings, of which there are none. The aggravating and mitigating factors off-set one another."
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> Recommended Order, Page 33, Paragraph 91.

The Petitioner argues that, because it appears two factors were weighed evenly so as to off-set on another, the Administrative Law Judge's analysis amounts to a mechanical interpretation of the applicable factors, and that a "mathematical one for one canceling of aggravating and mitigating factors is not contemplated [by the Rule] ... by reason of the inclusion of "other relevant factors"" as a listed consideration in Rule 69B-231.160, Florida Administrative Code. [Petitioner's Exception to Conclusions of Law, Page 10, Paragraph 22]. Although this may be true, it is also true that the Rule itself does not give direction as to the appropriate weight to be given to one factor over another.

While the existence of prior disciplinary action(s) against a licensee would seem to be contemplated under Rule 69B-231.160 as a reason for *aggravation* of a penalty, it would

certainly stand to reason that the absence of prior disciplinary action against a licensee would serve more as a *standard of behavior* for all licensees, rather than a *mitigating* factor against which a prescribed penalty under the law must be reduced. However, given the brevity of discussion on this point in the Recommended Order, it is not absolutely clear that the Administrative Law Judge, in consideration of the degree of potential injury versus the absence of prior disciplinary action against the Respondent, placed exactly the same amount of importance or weight on each factor considered. The only thing that is clear is that the Administrative Law Judge regarded any aggravating factors considered to be insufficient to warrant aggravation of the total applicable penalty.

The Petitioner's Fourth Exception, therefore, is rejected.

Notwithstanding the rejection of the Petitioner's Fourth Exception, the Administrative Law Judge's lack of discussion regarding the degree of *actual injury* to the consumers involved in this case, and his apparent reluctance to consider such in application of aggravation to the total penalty, cannot go unnoticed in this matter. Rule 69B-231.160 very clearly provides not only that the degree of potential injury may be considered in consideration of the total applicable penalty, but also that the Department "shall" consider the "degree of actual injury to the victim" in assessing the final penalty assessed against a licensee. Here, the Administrative Law Judge correctly points out that the "degree of potential injury was high because of Florida's regular experience with hurricanes." Recommended Order, Page 33, Paragraph 91. Remarkably absent from this analysis is the impact that Hurricane Charley of 2004 had on consumers Anthony and Annette Wiley and Cecilia Hembree. The Findings of Fact clearly set forth that both the Wileys and Ms. Hembree believed that they had insurance coverage on their

homes in place when the storm hit in August, 2004, but in fact, the Respondent had failed to ensure that such coverage was procured for either consumer. In the case of the Wileys, their mobile home was destroyed as a result of the storm. The record reflects that Ms. Hembree paid $9,576.00 to repair damage to her home from the storm. These financial losses were significant, and the record reflects no evidence that these consumers were ever subsequently made whole.

Had the Respondent exercised diligence and follow-through in ensuring that insurance coverage was bound for the Wileys and Ms. Hembree after collecting their insurance premiums, it is likely that such coverage would have served to mitigate some, if not all, losses suffered by these consumers as a result of the storm. These considerations of the actual injuries suffered by the Wileys and Ms. Hembree are significant, and certainly of the variety that would warrant application of aggravation of the total applicable penalty against the Respondent under Rule 69B-231.160, Florida Administrative Code.

Paragraph 91 of the Recommended Order which was previously modified herein in consideration of Petitioner's Third Exception, Page 14, is, therefore, further modified to read as follows:

> Florida Administrative Code Rule 69B-231.160 identifies aggravating and mitigating factors to be considered in assessing the appropriate penalty. The Petitioner argues that the aggravating factors of the willfulness of the licensee's conduct, degree of potential injury, degree of actual injury, and motivation (for financial gain) are applicable in this case. Petitioner did not establish a financial motive of Respondent for any of the alleged violations. Any degree of willfulness evidenced by the Respondent's conduct is insufficient in and of itself to warrant aggravation of the total applicable penalty. The degree of potential injury was high because of Florida's regular experience with hurricanes. The degree of *actual* injury or loss to the victims is also high. In the case of the Wileys, their mobile home was destroyed as a result of Hurricane Charley. The record further reflects that Ms. Hembree paid $9,576.00 to repair damage to her home from the storm. Had the Respondent exercised diligence and follow-through in ensuring that insurance coverage was bound for the Wileys and Ms. Hembree after collecting their insurance premiums, it is likely that such coverage would have served to mitigate

some, if not all, losses suffered by these consumers as a result of the storm. These considerations of the actual injuries suffered by the Wileys and Ms. Hembree are significant, and certainly warrant application of aggravation of the total applicable penalty against the Respondent under Rule 69B-231.160, Florida Administrative Code.

The above modifications to the Conclusions of Law are made in view of the Administrative Law Judge's Findings of Fact and the applicable provisions of the Florida Administrative Code, and are as or more reasonable than the original Conclusions of Law.

In view of the modifications made herein to the Conclusions of Law with respect to each consumer-count discussed in the Recommended Order, it is appropriate that related modifications be made to the Administrative Law Judge's "Summary of Conclusions on Petitioner's Claims." Accordingly, Paragraph 87 of the Recommended Order is rejected in its entirety.

Substituted therefor is the following:

With respect to each of Counts I, II, and III, violations of Sections 626.611(7) (lack of fitness and trustworthiness) and 626.561(1) (failure to forward trust funds in the applicable regular course of business) were proven by clear and convincing evidence. In Count I, a violation of Section 626.621(4) (failure to pay, upon demand, moneys belonging to insurer) was proven by clear and convincing evidence given the demand created by the Producer Agreement and the Respondent's failure to remit premiums to I.B. Green. In each of Counts I and II, a violation of Section 626.621(6) (having shown himself ... to be a source of injury or loss to the public) was proven in light of the immediate losses suffered after Hurricane Charley by the Wileys (Count I), for whom the Respondent never placed coverage and whose mobile home was destroyed, and also for Cecilia Hembree (Count II), for whom the Respondent never placed coverage and who suffered in excess of $9,500.00 in damage to her home. A violation of Section 626.611(10) was not proven by clear and convincing evidence in any of the three Counts against the Respondent.

It is similarly appropriate that modifications be made to the Administrative Law Judge's discussion regarding "The Appropriate Penalty." Consequently, the following sentence is added as the last sentence in Paragaph 88 of the Recommended Order:

> A violation of Section 626.611(7) was shown for each of Counts I, II, and III. The appropriate resulting penalty, therefore, is a six-month suspension for each of Counts I, II, and III.

The last sentence of Paragraph 89 of the Recommended Order, which reads: "Therefore, the appropriate penalty on this record would be the three-month suspension" is rejected, and the following is substituted therefor:

> Non-willful violations of Section 626.621(6) were shown in the case of the Wileys (Count I) and Cecelia Hembree (Count II). The appropriate associated penalty, therefore, is a three-month suspension per Count for each of Counts I and II.

Paragraph 90 of the Recommended Order is rejected in its entirety. The following is substituted therefor:

> Florida Administrative Code Rule 69B-231.040(1)(a) limits the Petitioner to assessing the single highest penalty per count for violations contained in each count of the Administrative Complaint, even if multiple provisions of the Insurance Code were charged and proven with respect to each count. In each of Counts I, II, and III, violations of Sections 626.611(7) (6 month suspension) and 626.561(1) (3 month suspension for non-willful violations under Rule 69B-231.120, Florida Administrative Code) were shown. A violation of Section 626.621(4) (nine months suspension) was shown only with respect to Count I. Non-willful violations of Section 626.621(6) (3 months per count) were shown in both Counts I and II. Applying Rule 69B-231.040(1)(a), the single highest penalty per count is: 9 months suspension for Count I; 6 months suspension for Count II; and 6 months suspension for Count III. The total applicable penalty prior to application of aggravating/mitigating factors, therefore, is twenty-one (21) months suspension.

Paragraph 92 is similarly rejected in its entirety, and substituted therefor is the following:

> The Petitioner argues that the appropriate final penalty in this case is revocation of the Respondent's license. To this point, the Petitioner cites Section 626.641(1), Florida Statutes, which provides that the Department may not suspend a licensee for any period exceeding two years. It would appear, however, that a 3 month aggravating factor should be imposed, bringing the total penalty to 24 months suspension. Consequently, Petitioner's argument is rejected.

These substituted and modified Conclusions of Law, therefore, as or more reasonable than the original Conclusions of Law. The above modifications to the Conclusions of Law are made without disturbing the Administrative Law Judge's considerations of credibility, motivation, and purpose of the witness' testimony at hearing. Nonetheless, the substituted and modified Conclusions of Law necessarily have an impact on the Administrative Law Judge's application of the law to the Findings of Fact in this case.

Finally, the Petitioner, in his Exceptions, points out several scriveners' errors that should appropriately be addressed by way of this Final Order. These are as follows:

References to Section 626.621(4) as 621.626(4) in Paragraphs 74, 75, 78, 79-81 and 85 (twice).

References to Section 626.621(4) as 626.526(1) in Paragraphs 78 and 83.

Reference to Section 626.611(7) as 626.211(7) in Paragraph 87.

Reference to the Wileys as the Rileys in Paragraph 24.

The Department's exception to the scriveners' errors as outlined above are accepted, and the erroneous citations contained in the Recommended Order are corrected so as to reflect the appropriate and accurate statutory and other references indicated above. These modifications are as or more reasonable than the citations they replace.

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

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

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

3. In light of the modifications to the Conclusions of Law, the Administrative Law Judge's recommendation that the Department enter a Final Order suspending the Respondent's license for six (6) months s rejected as being an inappropriate disposition of this case. The relevant circumstances set forth in the Findings of Fact support the inference, by clear and convincing evidence, that the Respondent violated multiple provisions of the Florida Insurance Code in connection with his dealings with consumers Anthony and Annette Wiley, Cecilia Hembree, and William and Terese Palmer. The applicable penalty associated with these violations, prior to application of aggravating and mitigating factors, is twenty-one (21) months suspension of the Respondent's license. Taking into account the degree of potential and actual loss or injury to the victims in this matter, however, aggravation of the total applicable penalty is appropriate. In the case of the Wileys, their mobile home was destroyed as a result of Hurricane Charley. The record further reflects that Ms. Hembree paid $9,576.00 to repair damage to her home from the storm. Had the Respondent exercised reasonable skill and diligence by properly forwarding premiums and applications on behalf of his clients, and ensuring that insurance coverage was bound for the Wileys and Ms. Hembree after collecting their insurance premiums, it is likely that such coverage would have served to mitigate some, if not all, losses suffered by these consumers as a result of the storm. The actual financial injuries suffered by the Wileys and

Ms. Hembree are significant. A twenty-four (24) month suspension of the Respondent's license, therefore, is the appropriate penalty.

ACCORDINGLY, IT IS ORDERED that the licenses and eligibility for licensure of Respondent Jack Alexander, Jr. are hereby SUSPENDED for a period of twenty-four (24) months. Suspension of Alexander, Jr.'s licenses and eligibility for licensure applies to all licenses and eligibility held by Alexander, Jr. under the authority of the Florida Insurance Code. Pursuant to Section 626.641, Florida Statutes, during the period of suspension and until reinstatement, which must be applied for in writing, Alexander, Jr. may not engage in or attempt to profess to engage in any transaction or business for which a license is required under the Florida Insurance Code, or directly or indirectly own, control, or be employed in any manner by any insurance agent, agency, or adjuster or adjusting firm.

DONE and ORDERED this 6th day of September, 2007.

KAREN CHANDLER
Deputy Chief Financial Officer

NOTICE OF RIGHTS

Any party to these proceedings adversely affected by this Order is entitled to seek review of this Order pursuant to Section 120.68, Florida Statutes, and Rule 9.110, Florida Rules of Appellate Procedure. Review proceedings must be instituted by filing a petition or notice of appeal with the General Counsel, acting as agency clerk, at 612 Larson Building, Tallahassee, Florida, and a copy of the same with the appropriate district court of appeal within thirty (30) days of rendition of this Order.

Copies furnished to:

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