

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL)
SERVICES,)
)
Petitioner,)
)
vs.) Case No. 06-4202PL
)
JACK ALEXANDER, JR.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

A formal evidentiary hearing was conducted on March 28, 2007, in Port Charlotte, Florida, before Bram D.E. Canter, an Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: David J. Busch, Esquire
Department of Financial Services
Division of Legal Services
612 Larson Building
200 East Gaines Street
Tallahassee, Florida 32399-0333

For Respondent: Jed Berman, Esquire
Infantino and Berman
Post Office Box 30
Winter Park, Florida 32790-0030

STATEMENT OF THE ISSUES

The issues in this case are whether Respondent is guilty of violating provisions of the Florida Insurance Code as charged in

Petitioner's Amended Administrative Complaint, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On September 27, 2006, Petitioner issued a three-count Administrative Complaint against Respondent, a licensed insurance agent, charging Respondent with mishandling and misappropriating the insurance premiums of three customers. Respondent disputed the factual allegations of the Administrative Complaint, and the matter was referred to DOAH to conduct a formal hearing. Petitioner was subsequently granted leave to amend its complaint and the Amended Administrative Complaint was filed with DOAH on January 23, 2007.

At the final hearing, Petitioner presented the testimony of Anthony Wiley, Annette Wiley, Cecilia Hembree, Vicki Ruggiano, and Howard Johnston, Jr. Petitioner's Exhibits 5 through 9, 13 through 17, 21, 23, 36, and 37 were admitted into evidence.¹

The undersigned excluded page 31 of Petitioner's Exhibit 15 on the misunderstanding that page 31 was a cost estimate for certain repair work, rather than evidence of actual costs paid by one of the insurance customers. In preparing this Recommended Order, the undersigned discovered that page 31 indicates that the costs described were paid (which is further supported by testimony) and the document should have been

admitted along with the other evidence of actual costs paid. Therefore, page 31 has now been admitted into evidence.

Respondent testified on his own behalf and presented the testimony of Robert Schmidt and Jack Alexander, Sr. Respondent offered no exhibits into evidence.

The Transcript of the final hearing was filed with DOAH. The parties filed Proposed Recommended Orders which have been carefully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is the state agency with the statutory authority and duty to license and regulate insurance agents.

2. Respondent holds License No. A003228 as a General Lines (Property & Casualty 2-20) insurance agent in Florida. He first received the license in 1998.

3. Respondent's license has not previously been the subject of disciplinary action by Petitioner.

4. Since receiving his license, Respondent has continuously worked as an insurance agent and as a salaried employee of Insurance Depot of Charlotte County (Insurance Depot), which is located in Port Charlotte, Florida.

5. Insurance Depot is solely owned and operated by Respondent's father, Jack Alexander, Sr. Respondent is not a co-owner, officer, or director of Insurance Depot.

6. Among the types of insurance sold by Respondent at Insurance Depot is homeowners insurance. The normal procedure followed by Respondent when selling homeowners insurance is to first obtain some basic information from the customer about his or her home, either over the telephone or in person; determine what insurance company or companies represented by Insurance Depot were likely to have the lowest rates for the particular type of home; check the rate schedules of the selected companies; and give the customer a rate quote.

7. If the quoted rate is acceptable to the customer, an application form is either filled out by hand or, for some insurance companies that provided software application forms, the application form is word-processed on a computer and then printed out. The application form is then signed by Respondent and the customer.

8. The insurance companies represented by Insurance Depot require a premium payment, as well as certain additional documentation, in order to issue a homeowners' insurance policy. The insurance companies involved in this case require photographs of the home to be insured.

9. The agents at Insurance Depot ask customers to provide the photographs, and Insurance Depot has two or three Polaroid cameras to lend to customers who do not have cameras. Petitioner elicited testimony from two insurance company

representatives that they prefer the photographs to be taken by the agents, rather than by the homeowners. Despite this preference, the insurance companies routinely accept photographs taken by homeowners.

10. Respondent testified that he always tells the prospective customers when he is preparing the insurance application form that photographs are needed. That testimony was disputed by three witnesses who said they were not asked to provide photographs when they met with Respondent at Insurance Depot to apply for insurance. Respondent's testimony is more persuasive, because it is unlikely that he would fail to ask for photographs when they are always needed.

11. Respondent testified that if a customer applied for insurance and paid a premium, it was his usual practice to turn the customer's file over to the clerks in the office for further processing, which would include sending the signed application form, other documentation, and the premium payment to the insurance company. In the case of customers who had not yet provided photographs or other required information, the application was sometimes held until the information was submitted by the customer so that the application was complete when it was sent to the insurance company. The clerks would follow up with the customers to make sure the photographs or

other information was submitted. Respondent is not the supervisor of the clerks.

12. How soon coverage is "bound" depends on the requirements or policies of the various insurance companies. In some cases, coverage is bound immediately, but will be cancelled by the insurance company if it does not receive all of the information it requires within a specified time period, such as 30 days. When the insurance is cancelled because the application is incomplete, it is sometimes "flat cancelled," which means the insurance company does not recognize coverage to ever have been bound.

Annette and Anthony Wiley²

13. The Wileys live in Arcadia. They went to Insurance Depot on February 6, 2004, to obtain automobile insurance. While they were there, they inquired about insuring their mobile home and were directed to Respondent for assistance.

14. The Wileys asked Respondent for a rate quote to insure their mobile home for \$42,000. The Wileys were satisfied with the rate Respondent quoted for American Reliable Insurance Company (American Reliable). The Wileys gave Respondent \$189 as a down payment on the annual premium of \$533, and Respondent and Anthony Wiley signed a contract to finance the balance with Duval Premium Budget, Inc. Insurance Depot acts as agent for the financing company.

15. Counsel for Respondent points out that no insurance application form for the Wileys was offered into evidence, but Respondent testified that there "absolutely" was an application prepared for the Wileys, and they did not dispute that there was an application.

16. When the contract with the financing company was signed, Respondent created a document which contained a check ("draft") in the amount of \$533 made out to American Reliable and Irvin B. Green & Associates (I.B. Green). I.B. Green is the managing agent for a number of insurance companies, including American Reliable. The document indicates that the policy number is "Pending." The document is perforated so that it can be divided into three parts: the check and two identical receipts, one for Insurance Depot and the other for the Wileys, showing the draft number, down payment, and policy premium balance. The document was never divided. The draft was never sent to American Reliable or I.B. Green.

17. Respondent told the Wileys he needed photographs of their home to send to the insurance company. Respondent testified that when the Wileys left his office, he put their file "in the pending status on my dad's desk" to await the photographs.

18. There is a "Producer Agreement" between I.B. Green and Insurance Depot, which includes a statement that Insurance Depot

will "transmit promptly to [I.B. Green] complete applications and binders for all insurance made along with all premiums, taxes, and applicable expenses or fees required." Petitioner alleged in its Amended Administrative Complaint that Respondent did not forward the Wileys' application and premium to I.B. Green in accordance with the Producer Agreement. However, Petitioner's witness, Howard Johnston, Jr., the executive vice president of I.B. Green, was not asked whether he believed Insurance Depot had violated the requirement in the Producer Agreement for prompt transmission of the complete application in the matter of the Wileys. Mr. Johnston might have considered it to be acceptable under the Producer Agreement for the agents at Insurance Depot to wait until applications were complete before transmitting them to I.B. Green.

19. Mr. Johnston testified that I.B. Green never received the insurance application or other paperwork for the Wileys.

20. The Wileys thought their mobile home was insured when they left Insurance Depot on February 6, 2004. They continued to believe they were insured, even though months went by without their ever receiving an insurance policy in the mail or a coupon book to make monthly payments to the financing company. They never made another premium payment after their down payment.

21. Mr. Wiley testified that the Wileys did not make another premium payment because "they said not to make a payment right now."³

22. Mr. Wiley hand-delivered his car insurance payments to Insurance Depot each month, but when doing so, he never inquired about the status of his home insurance policy.

23. Mr. Wiley testified that some time in July 2004, five months after the Wileys applied for homeowner insurance, a woman called to ask for photographs of the Wileys' home. A reasonable inference from the record evidence is that the person who called was one of the clerks at Insurance Depot.⁴

24. The Wileys testified that they took photographs of their home soon after the telephone call, and they took the photographs to Insurance Depot. Mrs. Riley said Respondent was not in, and she gave the photographs to Robert Schmidt, another insurance agent employed by Insurance Depot, who placed the photographs on Respondent's desk. Mr. Schmidt does not remember seeing Ms. Riley or accepting photographs from anyone to give to Respondent.

25. Hurricane Charley hit Florida on August 13, 2004. It destroyed the Wileys' mobile home. Mr. Wiley testified that they still owed about \$45,000 on the mobile home that was destroyed.

26. After the hurricane, the Wileys' went to Insurance Depot to make a claim for the loss of their mobile home. They were informed by Jack Alexander, Sr., that they had no insurance coverage. They did not speak to Respondent.

27. A Federal Emergency Management Agency (FEMA) representative advised the Wileys to get a written statement from Insurance Depot about their lack of insurance coverage, which FEMA would use to determine whether the Wileys qualified for federal disaster assistance. Mr. Wiley received a written statement from Jack Alexander, Sr., that states in part:

Due to a mix up or miss communication [sic] due to the insurance company never receiving pictures of her home the policy was never bound by the company.

28. The Wileys received a FEMA grant of \$19,000, which they used as a down payment to purchase a new mobile home.

29. Jack Alexander, Sr., repaid the Wileys the \$189 premium down payment they had given Respondent in February 2004.

Cecilia Hembree

30. Cecilia Hembree resides in Port Charlotte and owns her single-family residence.

31. Ms. Hembree testified that she visited Insurance Depot in December 2003, and Respondent assisted her in applying for homeowners insurance. Before she left Insurance Depot that day,

she paid the annual premium in full with a check in the amount of \$728.

32. Ms. Hembree testified that sometime in January 2004, she became concerned when she had not received an insurance policy for her home. She testified that she spoke to Respondent, and he informed her that the policy had been mailed to her, but he would mail it again. She never got a copy of the policy in the mail. Respondent was not questioned about the alleged January 2004 conversation with Ms. Hembree.

33. Neither Respondent nor Ms. Hembree was asked to explain how a Federated National Insurance Company (Federated) application form signed by Respondent and Ms. Hembree on February 10, 2004 (Petitioner' Exhibit 23), came into existence. No earlier application was presented. Without an explanation in the record, it is found that Ms. Hembree was mistaken about the date she applied for insurance. She did not apply in December 2003, but on February 10, 2004. Similarly, it is found that Ms. Hembree was mistaken about calling Respondent in January 2004 to inquire about her policy. If she made such an inquiry, it must have been after February 10, 2004.

34. Ms. Hembree testified that Respondent did not ask for photographs of her home on the day she applied for insurance, but she got a call from Respondent "a couple of days later" in which he told her that he needed photographs "by the end of the

week." Respondent testified that it is his regular practice to ask customers for photographs when he first meets with them, because photographs are always required by the insurance companies and that he asked Ms. Hembree for photographs on the first day he met with her. To the extent that it is material, it is found that Respondent asked for photographs at their first meeting.

35. Ms. Hembree testified that she went to Insurance Depot the same day she was asked for the photographs and gave the photographs to Respondent after waiting for him to finish with another customer. Respondent testified that he remembered Ms. Hembree coming into Insurance Depot, waiting for a while, and then leaving without seeing him. He claims she never gave him photographs.

36. Respondent's testimony on this point is problematic because he saw and recognized Ms. Hembree and should have understood that she was there to give him the photographs he had requested. Yet, he did not describe any effort on his part to get the photographs from Ms. Hembree before she left. Furthermore, it is difficult to believe that Ms. Hembree made a trip to Insurance Depot to give Respondent the photographs, but left without giving the photographs to Respondent or asking someone in the office to give them to Respondent or ever returning thereafter with the photographs. Finally, Respondent

did not mention the issue of missing photographs in his subsequent discussions with Ms. Hembree that are discussed below. Therefore, it is found that Ms. Hembree provided photographs to Respondent, probably in February 2004.

37. Unlike American Reliable, Federated had an internet website that its authorized agents could use to prepare applications and generate a declaration page showing the basic terms of coverage. Insurance coverage was bound for Ms. Hembree on February 10, 2004, subject to later cancellation by Federated.

38. Federated never received the signed application form or Ms. Hembree's check for \$728.

39. Ms. Hembree did not reconcile her bank statements during this period and did not notice that the check had never come to her bank for payment, and the amount was not deducted from her checking account.

40. Vicki Ruggiano, an underwriting supervisor at Federated, testified that when the webpage interface with Federated is used by an agent to generate an application and declaration page, the software system automatically triggers a cancellation notice in 30 days if all required documentation has not been received by Federated. Federated issued a Notice of Cancellation of Ms. Hembree's policy on March 9, 2004. The notice indicated "No application/premium received."

41. Respondent testified that he was never informed about Federated's cancellation of Ms. Hembree's policy.

42. Ms. Hembree testified that on or about March 23, 2004, she noticed that her bank had made a large withdrawal from her checking account to purchase insurance coverage. Ms. Hembree inquired about the withdrawal, and she was told that the bank purchased insurance for her home because they had no evidence that she had obtained insurance coverage.⁵

43. Ms. Hembree then called Respondent to tell him what the bank told her, and Respondent said he had mailed the bank proof of coverage, but he would do it again. Ms. Hembree told Respondent she had never received an insurance policy and asked Respondent to "fax" proof of insurance to her and to the bank. Respondent sent her the declaration page for Ms. Hembree's Federated policy that he downloaded from the Federated website.

44. On the same date, Respondent told Ms. Hembree she would have to sign a "no loss statement." Respondent provided Ms. Hembree with a no loss statement form on Insurance Depot letterhead, which contained a Federated policy number, and the following statement:

I, [space provided for insured's name], as a condition precedent to the reinstatement of my policy, state that no losses have occurred for which coverage might be claimed under my policy between the date of [space provided for a date] and the date and time indicated above.

45. The no loss statement signed by Ms. Hembree was dated March 23, 2004. However, there was no beginning date filled in on the form. Without a beginning date, the no loss statement would seem to be meaningless, unless the absence of a date would be deemed by Federated to cover all possible dates.

46. When asked why he requested that Ms. Hembree sign a no loss statement, Respondent testified that Federated would reinstate a policy if the customer stated that no losses had occurred in the interim. That testimony contradicts Respondent's testimony that on March 23, 2004, he thought Ms. Hembree's policy was still "pending" for lack of photographs. He did not explain why a pending policy would need to be reinstated or why the need for reinstatement was not an indication that the policy had been cancelled. He did not describe any effort he made to inform Ms. Hembree about the continued need for photographs or to solve that alleged problem.

47. After Hurricane Charley hit on August 13, 2004, Ms. Hembree went to Insurance Depot to ask for an insurance adjuster to view the damage to her home. Ms. Hembree said she talked to a female employee who, after looking at Ms. Hembree's file, told Ms. Hembree her insurance company was Federated and gave Ms. Hembree Federated's telephone number. When Ms. Hembree called Federated, she was told she had no insurance coverage.

48. In August or September 2004, Ms. Hembree called Insurance Depot and spoke to Jack Alexander, Sr. On September 24, 2004, Mr. Alexander prepared an application for Ms. Hembree for coverage by Universal Property and Casualty Insurance Company (Universal). The application indicates that the annual premium was \$1,149. Mr. Alexander paid the premium, although it was about \$400 more than the premium Ms. Hembree had paid for the Federated policy.⁶

49. Neither Mr. Alexander nor Ms. Hembree said whether Ms. Hembree had to provide new photographs of her home to send to Universal.

50. Mr. Alexander testified that when he was confronted by Ms. Hembree about her Federated insurance, he discussed it with Respondent, who told Mr. Alexander that "it was taken care of and should have been in force." Respondent testified that he was unaware of his father's conversations with Ms. Hembree and that his father had purchased a Universal policy for her.

51. Ms. Hembree presented invoices showing that she paid \$9,576 to repair damage to her home she claimed was caused by Hurricane Charley.

The Palmers

52. William and Terese Palmer went to Insurance Depot on February 23, 2004, to purchase homeowner insurance for their

residence in Port Charlotte. They were assisted at Insurance Depot by Respondent.

53. Most insurance companies charge a higher premium for insurance on a seasonal residence, because the risk of loss is greater. Mr. Palmer testified that the Port Charlotte residence is now his primary residence, but when he applied for insurance in 2004, he was living in McHenry, Illinois, and he told Respondent that the Port Charlotte property was for seasonal use. Respondent denies that he was told that the Port Charlotte residence was only used seasonally by the Palmers. The Federated application form prepared by Respondent and signed by Terese Palmer and Respondent indicates that the insurance was for a primary residence.

54. One of the documents provided to Respondent at the time the Palmers were applying for insurance was a settlement statement used in conjunction with the Palmer's loan from the U.S. Department of Housing and Urban Development to purchase the Port Charlotte residence. It shows the address of Mr. Palmer, the "borrower," as McHenry, Illinois. Petitioner argues that this is proof that Respondent knew that the Palmers' primary residence was in Illinois and the Port Charlotte residence had to be seasonal. However, the address on the loan form was also consistent with Respondent's belief that the Palmers had

purchased the Port Charlotte residence to make it their primary residence.

55. There was no motive for Respondent to falsify the application form by indicating the Palmers' residence was primary, rather than seasonal. The application form was signed by Mrs. Palmer, attesting to the accuracy of the information on the form. It is found that Respondent either was not told by the Palmers or did not hear them say that the Port Charlotte residence was seasonal.

56. On the same day they met with Respondent, February 23, 2004, the Palmers paid the premium of \$1,014 by credit card. Admitted into evidence was an Insurance Depot check to Federated, signed by Respondent and dated February 24, 2004, in the amount of \$1,014. The Palmers' next credit card statement showed the premium was paid.

57. On March 29, 2004, Federated issued a notice of cancellation of the Palmers' insurance policy. The notice showed the reason for cancellation as "No application/premium received."

58. Mr. Palmer said he received Federated's notice of cancellation in the mail. He called and informed Respondent, who told Mr. Palmer that "it occasionally happens" and Respondent would "reapply" and the problem would be corrected.

The record evidence shows that Federated received a check for the Palmers' insurance premium from Insurance Depot by mail on April 5, 2004, but Federated did not accept the payment because the policy had been cancelled. The Palmers were not informed that Federated had not reinstated their insurance policy.

59. Subsequently, Mr. Palmer visited Insurance Depot to inquire about occupational insurance and asked about the deductible provision on his homeowner policy while he was there. The woman he spoke to informed him that she could not find a file on him.

60. Mr. Palmer then complained to Petitioner about the handling of his insurance by Respondent. Following his complaint, Mr. Palmer got a postcard from Insurance Depot requesting that he come in to discuss the problem. When Mr. Palmer went in, Respondent gave him a check to reimburse him for the unused premium payment.

CONCLUSIONS OF LAW

61. DOAH has jurisdiction over the subject matter pursuant to Section 120.569 and Subsection 120.57(1), Florida Statutes.⁷

62. Petitioner must prove the factual allegations in the Amended Administrative Complaint by clear and convincing evidence. Department of Banking and Finance v. Osborne Stern and Company, Inc., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

63. The "clear and convincing" evidence standard has been described as follows:

[C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the 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 the firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

The First District Court of Appeal has commented that

"[a]lthough this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous." Westinghouse Electric Corp., Inc. v. Shuler Brothers, Inc., 590 So. 2d 986, 988 (Fla. 1st DCA 1991).

64. The Amended Administrative Complaint charged Respondent with mishandling and misappropriating the insurance premiums of the Wileys, Cecilia Hembree, and the Palmers. In all three counts, Petitioner asserts that the alleged acts of Respondent violate Subsections 626.561(1), 626.611(7) and (10), and 626.621(4) and (6), Florida Statutes.

65. 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.

* * *

§ 626.611

The department shall deny an application for, suspend, revoke, or refuse to renew or continue the license or appointment of any . . . agent . . . if it finds that . . . any one or more of the applicable grounds exist:

* * *

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

* * *

(10) Misappropriation, conversion, or unlawful withholding of moneys belonging to insurers or insureds or beneficiaries or to others and received in conduct of business under the license or appointment.

* * *

§ 626.621

The department may, in its discretion, deny an application for, suspend, revoke, or refuse to renew or continue the license or appointment of any . . . agent . . . if it finds that . . . any one or more of the following applicable circumstances for which denial, suspension, revocation, or refusal is not mandatory under s. 626.611:

* * *

(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.

* * *

(6) In the conduct of business under the license or appointment, engaging in unfair methods of competition or in unfair or deceptive acts or practices, as prohibited under part IX of this chapter, or having otherwise shown himself or herself to be a source of injury or loss to the public.

The Wileys

66. Petitioner claims that Respondent violated Subsection 626.561(1), Florida Statutes, by holding on to the Wileys' premium down payment for over six months, during which period the Wileys reasonably believed their mobile home was insured.

67. In Copeland Ins. Agency v. Home Ins. Co., 502 So. 2d 93, 95 (Fla. 5th DCA 1987), the court stated:

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.

68. 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. Petitioner did not establish that Respondent personally held up the Wiley paperwork or that he was even aware of the delay associated with the Wileys' application.

69. Petitioner repeatedly made references to a statement by Jack Alexander, Sr., that once an agent of Insurance Depot starts with a customer, "it's basically their responsibility to finish up with a customer." Petitioner argues that this statement is proof that Respondent had responsibility to obtain any missing documentation that was needed to make the application complete and to keep informed about the status of the application until a policy was issued. 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. There was evidence to support Respondent's testimony that a common practice of Insurance Depot was to divide tasks between the agents and other employees and that employees other than Respondent were routinely tasked to follow up to obtain missing documentation, to mail applications and premiums to the insurance companies, and to deal with cancellation notices. Petitioner cited no statutes, rules, or court decisions that indicate such a practice is unlawful.

70. With regard to Subsections 621.611(7) (lack of fitness or trustworthiness) and 621.611(10) (unlawful withholding of money), Florida Statutes, Petitioner makes a general argument, applicable to all three counts that:

The totality of the evidence suggests not so much simple ignorance or ineptitude, but rather a dishonest practice in the conduct of Respondent's insurance business during 2004 so as to lie regarding insurance application statements and withhold premium payments from either a company or a customer.

71. Petitioner did not prove that Respondent lied about the Wileys' insurance application.

72. Willfulness is a necessary element to prove a violation of Subsection 626.611(10), Florida Statutes. Bowling v. Department of Insurance, 394 So. 2d 165, 170 (Fla. 1st DCA 1981). Petitioner's evidence fell short of clear and convincing evidence that Respondent willfully withheld the Wileys' premium down payment.

73. Neither party presented the testimony of the clerk at Insurance Depot who called Mr. Wiley and asked for photographs. That testimony would likely have helped to clarify the internal processing of the Wiley application. The evidence in the record only established that Respondent considered the Wiley application incomplete because of the lack of photographs and that he passed the paperwork he had prepared and the Wileys'

premium down payment of \$189 to other employees of Insurance Depot for further processing. It would have been commendable if Respondent had kept himself informed about the status of the Wiley application until he ascertained that a policy was issued to them, but his failure to do so does not catapult his actions to proof that he lied to the Wileys or unlawfully withheld their premium. Petitioner failed to prove by clear and convincing evidence the facts necessary to show Respondent violated Subsection 626.611(7) or Subsection 626.611(10), Florida Statutes, with regard to the Wileys.

74. With regard to Petitioner's claim that Respondent violated Subsection 621.621(4), Florida Statutes, for failing to pay, upon demand by an insurer, money belonging to the insurer, 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.⁸ Furthermore, Petitioner did not establish that I.B. Green would not accept Respondent's practice to transmit the

premium when the application was complete (including photographs), as compliant with the Producer Agreement.

75. With regard to Petitioner's claim that Respondent violated Subsection 621.621(6), Florida Statutes, Petitioner argues that Respondent has shown himself to be a source of injury or loss to the public because the Wileys suffered losses from Hurricane Charley that were not insured. The record evidence established that the Wiley matter was mishandled by Insurance Depot because the photograph issue was not resolved and the premium down payment was not returned in a reasonable amount of time.⁹ However, the evidence was insufficient to show clearly and convincingly that Respondent was personally responsible for the mishandling.

76. Mr. Wiley admits that he was told, probably by Respondent, not to make a premium payment, from which it is reasonable to infer that he was told the reason why. Therefore, it is less than clear and convincing that Respondent failed to inform the Wileys that the insurance coverage would not begin until photographs were provided.

Cecilia Hembree

77. Petitioner claims that Respondent violated Subsection 626.561(1), Florida Statutes, by holding on to Ms. Hembree's premium for months, during which period Ms. Hembree reasonably believed her home was insured.

78. Petitioner presented no evidence that Ms. Hembree's \$728 premium payment was misused by Respondent 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. 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.

79. With regard to Subsection 621.611(7), Florida Statutes (lack of fitness or trustworthiness), Petitioner claims that Respondent lied about Ms. Hembree's insurance coverage. Petitioner proved by clear and convincing evidence that Respondent lied to or misled Ms. Hembree about the status of her insurance coverage during their conversations in March 2004 when she was asking for proof of coverage. The evidence shows clearly that, even under Respondent's version of events, he knew that her coverage had already been cancelled or would be cancelled by Federated, and he failed to inform her. He misled her to believe that there was no problem with her coverage when he knew there was a problem. Furthermore, he did not make reasonable efforts to rectify the problem. Respondent failed to act as a fiduciary in his relationship to Ms. Hembree. These

actions are a violation of Subsection 626.611(7), Florida Statutes.¹⁰

80. With regard to Subsection 621.611(10), Florida Statutes (unlawful withholding of money), Petitioner claims that Respondent unlawfully withheld Ms. Hembree's premium payment from her or from Federated. Although the evidence shows that Respondent knew in March 2004 that Ms. Hembree's insurance coverage was cancelled or in jeopardy of being cancelled, it appears that he believed her coverage would be reinstated by Federated. Petitioner did not prove by clear and convincing evidence that Respondent knew Federated had not received Ms. Wileys' premium and that he willfully withheld the premium in violation of Subsection 626.611(10), Florida Statutes.

81. With regard to Petitioner's claim that Respondent violated Subsection 621.621(4), Florida Statutes, for failing to pay, upon demand by an insurer, money belonging to the insurer, Petitioner failed to prove there was a demand for payment by Federated for Ms. Hembree's \$728 premium payment and a refusal to pay by Respondent. Petitioner argues that the provision in Federated's Homeowners Manual Underwriting Guidelines for applications and documentation to be submitted within five business days is sufficient to establish the necessary demand. The argument that Federated's guidelines created a continuous

"demand" for purposes of establishing a violation of Subsection 626.621(4), Florida Statutes, is rejected.

82. With regard to Petitioner's claim that Respondent violated Subsection 626.621(6), Florida Statutes, Petitioner argues that Respondent has shown himself to be a source of injury or loss to the public, because Ms. Hembree suffered losses from Hurricane Charley that were not insured. The record evidence established that the Hembree matter was mishandled by Insurance Depot because there was no reasonable explanation for the delay in submitting the required documentation and premium to Federated within 30 days or in not returning the premium to Ms. Hembree. Unlike the situation with the Wileys, Respondent was shown to have a personal role in the mishandling of the Hembree matter. Respondent's failure to inform Ms. Hembree of the problem with her coverage in March 2004 or to make reasonable efforts to rectify the problem, was sufficient to show clearly and convincingly that Respondent was a cause of her losses.

The Palmers

83. Petitioner claims that Respondent violated Subsection 626.561(1), Florida Statutes, by holding on to the Palmer's premium payment for an unreasonable period of time, during which period the Palmers reasonably believed their home was insured.

However, Petitioner presented no evidence that the \$1,014 premium payment 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. Petitioner did not establish that Respondent personally held up payment of the Palmers' premium to Federated. The evidence shows that when Mr. Palmer told Respondent on or about March 29, 2004, that the insurance had been cancelled, Respondent sent documentation and the premium payment to Federated within a few days. There is no evidence that Respondent knew before March 29, 2004, that the documents had not been sent to Federated and withheld them in violation of Subsection 626.526(1), Florida Statutes.

84. With regard to Subsections 621.611(7) (lack of fitness or trustworthiness) and 621.611(10) (unlawful withholding of money), Florida Statutes, Petitioner claims that Respondent lied regarding the Palmers' insurance application and withheld the premium payment from either Federated or the Palmers. 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.

85. With regard to Petitioner's claim that Respondent violated Subsection 621.621(4), Florida Statutes, for failing to

pay, upon demand by an insurer, money belonging to the insurer, Petitioner failed to prove there was a demand for payment by Federated for the Palmers' \$1,014 premium payment and a refusal to pay by Respondent. The argument that the Federated's guidelines created a continuous "demand" for purposes of establishing a violation of Subsection 621.621(4), Florida Statutes, is rejected.

86. Petitioner's claim that Respondent violated Subsection 621.621(6), Florida Statutes, by showing himself to be a source of injury or loss to the public must fail because the Palmers had no losses.

Summary of Conclusions on Petitioner's Claims

87. Except for violations of Subsections 626.211(7) and 626.621(6), Florida Statutes, with regard to the Hembree matter, the evidence was insufficient to prove the unlawful acts of Respondent claimed by Petitioner. Clear and convincing evidence against Respondent requires more than clear evidence that someone at Insurance Depot mishandled these insurance matters. The evidence must show that it was Respondent. Petitioner's evidence suggests that Respondent might be guilty of other wrongdoing, but the evidence did not to meet the applicable standard of proof on the other claims.

The Appropriate Penalty

88. Under the penalty guidelines set forth in Florida Administrative Code Rule 69B-231.080(7), the penalty for a violation of Subsection 626.611(7), Florida Statutes (lack of fitness or trustworthiness), is suspension of the agent's license for six months.

89. Under the penalty guidelines set forth in Florida Administrative Code Rule 69B-231.120, the penalty for a willful violation of Subsection 626.621(6), Florida Statutes (showing oneself to be a source of injury or loss), is suspension of the agent's license for six months. The penalty for a non-willful violation is a three-month suspension. Although Respondent misled Ms. Hembree about the status of her insurance coverage, it was not shown that Respondent intended, desired, or expected Ms. Hembree to suffer a loss as a result. Therefore, the appropriate penalty on this record would be the three-month suspension.

90. Florida Administrative Code Rule 69B-231.040(1)(a) limits Petitioner to assessing a single highest penalty for a single count of an administrative complaint, even if several provisions of Section 626.611 or Section 626.621, Florida Statutes, have been violated. Only violations in Count II of the Amended Administrative Complaint were determined by the

undersigned. Therefore, the highest penalty that is called for is a six-month suspension of Respondent's license.

91. Florida Administrative Code Rule 69B-231.160 identifies aggravating and mitigating factors to be considered in assessing the appropriate penalty. Petitioner argues that the aggravating factors of the willfulness of the licensee's conduct, degree of potential 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. 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 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.

92. Taking into consideration the penalty guidelines and related rules, the appropriate penalty is a six-month suspension of Respondent's license.

RECOMMENDATION

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

RECOMMENDED that Petitioner enter a final order suspending Respondent's license for six months.

DONE AND ENTERED this 22nd day of June, 2007, in Tallahassee, Leon County, Florida.



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

Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of June, 2007.

ENDNOTES

^{1/} Because most of the exhibits were composite exhibits and there were pages of some composite exhibits that were not admitted, clarification is warranted. The following pages of Petitioner's exhibits were admitted into evidence: 10 through 17, 17b through 17j, 18 through 20, 26 through 29, 31b through 31d, 32 through 35, 43 through 56, 58 through 60, 66, 67, all of Exhibit 36, all pages of the deposition testimony in Petitioner's Exhibit 37, plus pages 42 through 56 of the documents attached to the deposition.

2/ The Transcript incorrectly shows the name "Wylie "

3/ Mr. Wiley said the statement was made by Respondent or his father.

4/ Mrs. Wiley stated that Mr. Wiley was told about the photographs when he called Insurance Depot to find out why they had not yet received an insurance policy, but that is contrary to Mr. Wileys' testimony.

5/ It can reasonably be inferred that Ms. Hembree's bank (more specifically, her credit union) was the mortgagee of her home, and the mortgage contract provided the bank with authority to withdraw funds from her bank account to purchase insurance for the mortgaged home.

6/ Mr. Alexander thinks he asked Ms. Hembree to reimburse him, but that testimony was not credible.

7/ All citations to the Florida Statutes are to the 2006 codification.

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.

9/ The Wileys, themselves, were not vigilant to protect their own interests, but a insurance customer's lack of vigilance does not excuse or diminish the duties imposed on insurance agents by the Florida Insurance Code.

10/ The circumstances of the Wiley matter are different because there was not clear and convincing proof that Respondent was aware of a problem with the Wiley file.

COPIES FURNISHED:

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

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

David J. Busch, Esquire
Department of Financial Services
Division of Legal Services
612 Larson Building
200 East Gaines Street
Tallahassee, Florida 32399-0333

Jed Berman, Esquire
Infantino and Berman
Post Office Box 30
Winter Park, Florida 32790-0030

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.