STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL SERVICES, Petitioner, vs. BRADLEY WAYNE KLINE, Respondent.	)	Case No. 07-1218PL

RECOMMENDED ORDER

The final hearing in this case was held on July 2, 2007, in Orlando, Florida, before Bram D.E. Canter, an Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: David J. Busch, Esquire
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For Respondent: Bradley Wayne Kline, pro se
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STATEMENT OF THE ISSUES

The issues for determination in this case are whether Respondent violated the law as charged by Petitioner in its Administrative Complaint, and, if so, what discipline is appropriate.

PRELIMINARY STATEMENT

On February 6, 2007, Petitioner filed a four-count Administrative Complaint against Respondent, who holds a license as a Florida life and health insurance agent. The Administrative Complaint charged Respondent with numerous violations of the Florida Insurance Code and Petitioner's rules arising from alleged misrepresentations by Respondent in his sale of viatical settlement contracts and for his sale of unregistered securities. In the Administrative Complaint, Petitioner stated its intent to discipline Respondent, but did not indicate the specific discipline that it was seeking.

Respondent requested a hearing to contest the charges of the Administrative Complaint, and the matter was referred to DOAH on March 14, 2007, to conduct a formal adjudicatory hearing.

At the final hearing, Petitioner presented the testimony of Charles Simons, Floy Leuenberger, and Oscar Berge. Petitioner's Exhibits 1 through 22, 27 through 46, and 49 were admitted into evidence and included transcripts of the depositions of Allan Lenois and Joseph Long. Respondent testified on his own behalf and offered no exhibits. The 2003 and 2006 versions of Section 517.021 and Sections 626.991 through 626.99295, Florida Statutes, were officially recognized.

The two-volume Transcript of the final hearing was prepared and filed with DOAH. Petitioner filed a Proposed Recommended Order that was considered in the preparation of this Recommended Order. Respondent made no post-hearing submittal.

FINDINGS OF FACT

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

2. Respondent holds license D033674 as a life and health insurance agent.

3. At the time of the events which are the subject of this case, Respondent also held a license to sell securities.

4. At the time of the events which are the subject of this case, Respondent was employed by First Liberty Group and sold life insurance, annuities, and viatical settlement purchase agreements ("viaticals").

5. A viatical is a written agreement which provides for an investor's purchase of an interest in the proceeds of a life insurance policy of an anonymous insured person, the "viator." The agreement provides for the amount of money that the investor will receive upon the death of the viator.

6. One general principle underlying a viatical is that it provides a means for a terminally ill person who needs money to sell or assign the proceeds of a life insurance policy that

would be paid upon his or her death. Another general principle is that the viator, due to the terminal illness, has been diagnosed to have a short life expectancy. Although the identity of the viator is not revealed to the investor, the investor is provided information about the viator's gender, age, illness, and life expectancy.

Facts Common to All Counts

7. A company that "viaticates" life insurance policies and arranges for diagnoses of life expectancies by medical doctors is called a "viatical settlement provider." For all the viaticals sold by Respondent, the viatical settlement provider was Mutual Benefits Corporation.

8. Mutual Benefits Corporation was charged with and ultimately determined to have committed fraud with respect to its practices as a viatical settlement provider. The nature of the fraud was not made a part of the record in this case. Mutual Benefits Corporation was placed in a receivership to manage the remaining assets, liabilities, and contracts of the company.

9. Respondent's employer, First Liberty Group, advertised that it offered a certificate of deposit (CD) at a very competitive annual interest rate. Potential customers who came in to inquire about or to purchase a CD were also informed about annuities and viaticals. Petitioner referred to this as a "bait

and switch" technique. However, although the CD interest rate might have been the bait, there was no switch. Customers who wanted CDs were able to and did purchase CDs from First Liberty Group through Respondent at the advertised interest rate. Some customers also purchased annuities and viaticals.

10. In the advertising materials provided to the investors by Respondent and in the Viatical Settlement Purchase Agreements signed by the investors, the amount the investors would receive upon the death of the insured is described as "fixed." For example, the return on an investment in a viaticated insurance policy for a viator with a three-year life expectancy was represented to be 42 percent. The 42 percent return was fixed in the sense that on an investment of $20,000, for example, the investor would receive 42 percent of $20,000, or $8,400, when the viator died. If the viator died six months after the purchase of the viatical, the investor would receive $8,400. If the viator died three years later, the investor would receive $8,400. If the viator died ten years later, the investor would receive $8,400.

11. The viatical sales literature that Respondent gave to customers disclosed that the life expectancy of the viator, as determined by a doctor, was not guaranteed. Therefore, the amount of the return on the viatical investment was not fixed in the sense of an annual interest rate. In the examples given

above, the annualized rate of return to the investor if the insured died six months later would be 84 percent (42 divided by .5 years). The annualized rate of return if the viator died three years later would be 14 percent (42 divided by 3 years). The annualized rate of return if the viator died ten years later would be 4.2 percent (42 divided by 10 years).

12. Petitioner charged Respondent with not explaining to the investors that "the real rate of return on the investment was tied to the viator's date of death." However, Petitioner failed to prove this charge. Respondent did not tell the investors that the 42 percent return, for example, was an annual rate of return. The viatical sales materials provided to customers by Respondent did not describe the return on the investment as an annual rate of return.

13. The effect that the date of the viator's death would have on the rate of return on the viatical is obvious. The sooner the viator died, the better the return; the later the viator died, the worse the return. The investors did not need specialized knowledge to understand this simple concept. No investor in this case said they did not understand that their return would be affected by when the viator died. None of the investors said they thought the "fixed rate" figure, such as 42 percent for a three-year viatical, was a guaranteed annual return. Each investor signed a Viatical Settlement Purchase

Agreement that included a statement that the returns "are fixed and not annualized returns." (Emphasis in the original).

14. Another factor affecting the actual return on a viatical investment is the possibility provided for under the terms of the viatical contract that the investor might have to pay a portion of the premiums on the life insurance policy in the event the viator lived longer than his or her life expectancy. Any payment of an insurance premium by the investor would cause a reduction in the return on the viatical investment. In the example given above, if the investor was required to pay $2,000 in premiums, his return on the $20,000 would no longer be $8,400, but only $6,400. The annualized return on the investment would be correspondingly reduced.

15. In a worse case scenario, the possibility exists that the requirement to make premium payments could completely eliminate any potential return to the investor and even jeopardize the principal.

16. The viatical advertising materials that Respondent provided to customers did not describe the possibility or impact of having to make premium payments as discussed above. The advertising materials generally downplayed the risks associated with a viatical. For example, one sales document described the viatical as appropriate for a conservative investor and

suggested that viaticals are investments that provide "peace of mind."

17. It was reasonable for Respondent and the sales materials to describe the insurance companies that issued the insurance policies as reliable and secure. However, it was not reasonable, nor accurate, to describe the viaticals as conservative investments because of the possibility that the insured person would live many years beyond his or her life expectancy and the possibility that the investor would have to make premium payments.

18. Viaticals have the potential to provide a much better investment return than other types of investments. However, in conformance with the general rule that the higher the potential return on an investment, the greater the risk, the relatively high potential return on a viatical comes with a relatively high risk.[1/]

19. Respondent disclosed to the investors that there was a possibility they might have to make future premium payments, and it was described in paragraphs 20 and 21 of the Viatical Settlement Purchase Agreements signed by the investors under the heading "Payment of Future Premiums." The agreement states that the payment of insurance premiums beyond the life expectancy of the viator is at the discretion of Mutual Benefits Corporation.

20. Respondent told the investors that Mutual Benefits Corporation had a reserve or escrow fund that was managed in a way that created a premium "pool" so that the early death of a viator provided a surplus of money that could be used to pay premiums on the insurance policies of viators who lived beyond their life expectancies. Respondent also told the investors that 85 percent of the viators died early, which created a large surplus in the escrow fund to pay future premiums. The viatical contracts, however, only stated that unused premiums "may" be retained in the reserve fund by Mutual Benefits Corporation.

21. At some point after the investors involved in this case purchased viaticals from Respondent, Mutual Benefits Corporation was the subject of enforcement action for fraud and placed in receivership. There was evidently no longer a surplus or reserve fund to pay premiums on insurance policies associated with viators who lived beyond their life expectancy, and that burden fell on the investors.

22. All the investors involved in this case told Respondent they were conservative investors with a low tolerance for risk. There is a commonality in their perceptions of viaticals derived from their discussions with Respondent, that viaticals were safe and conservative investments. However, viaticals are relatively risky investments due to their illiquidity and the fundamental conditions affecting the return

and the security of the principal that are beyond the control of the investor. Respondent knew or should have known, through the exercise of reasonable diligence on behalf of the customers who purchased viaticals, that viaticals are relatively high-risk investments.

23. Respondent misrepresented the risk character of viaticals in his discussions with the investors involved in this case. He had a motive to downplay the true risk character of the viaticals, because he received a commission for every sale of a viatical. If Respondent had informed the investors of the true risk character of viaticals, the investors might not have purchased the viaticals.

24. The definition of "security" in Section 517.021, Florida Statutes, was amended in 2006 to specifically identify "viatical settlement investment" as a type of security. Respondent does not dispute that a viatical is a security.

25. There is no dispute that the viaticals sold by Respondent, which are the subject of this case, were not registered securities when Respondent sold them in 2003.

Count I - Simons

26. Charles Simons was 81 years old in 2003. He has eight years of education. He used to work as a truck driver in a quarry associated with a cement plant, but is now retired. He

owns real estate and has an annual income over $100,000 and a net worth of $600,000 to $700,000.

27. Mr. Simons saw the CD advertised by First Liberty Group and came in with his wife to invest $100,000 he had acquired from the recent sale of real estate. They met with Respondent in July 2003.

28. Mr. and Mrs. Simons invested $50,000 in two or more CDs and an annuity. They also purchased two viaticals for $50,000.

29. Mr. and Mrs. Simons purchased two three-year viaticals, meaning that medical doctors who had purportedly examined the medical records of the insured persons expected them to die of their terminal illnesses within three years. The Simons invested $25,000 in each of the viaticals.

30. Although four years have passed since the Simons purchased the three-year viaticals, neither of the insured persons has died. Mr. Simons has had to make a premium payment of approximately $2,000 on one of the underlying policies.[2/]

Count II – Lenois

31. Allan Lenois was 70 years old in 2003. He is a high school graduate, studied accounting and taxation, and worked for a lumber company where he supervised 300 employees. His wife, Marion, was an accountant. They are now retired.

32. In August 2003, Mr. and Mrs. Lenois went to see Respondent after seeing the CD advertisement in the newspaper. While in Respondent's office, they noticed a poster advertisement on the office wall about viaticals and asked Respondent about them.

33. Mr. Lenois' deposition testimony that Respondent called the viaticals "guaranteed" is not persuasive, given Respondent's testimony at the final hearing that he used these kinds of words to describe the industry rating of the insurance companies involved and the federal-insured reserve fund account, not the viatical itself. However, as previously found, Respondent misrepresented the viaticals to be relatively conservative investments to all the investors.

34. Mr. and Mrs. Lenois invested $20,000 in an annuity. In a deposition of Mr. Lenois, he stated that he thought he had purchased a CD from Respondent, not an annuity, and was surprised that he had to pay a surrender penalty. Petitioner makes this same allegation in its Proposed Recommended Order, but Mr. Lenois' testimony is not persuasive because he signed a disclosure document that states "I understand that I have purchased an annuity . . . and not a Bank Certificate of Deposit," and the word "annuity" is written on the personal check used to purchase the annuity. Furthermore, the allegation was not included in the Administrative Complaint.

35. Mr. and Mrs. Lenois purchased one three-year viatical for $10,000.

36. Although four years have passed since they purchased the viatical, the viator is still alive.

37. Mr. and Ms. Lenois have not yet had to make a premium payment associated with their viatical.

Count II – Luenberger

38. Floy Leuenberger is a retired school teacher. She has a master's degree in counseling and education. Her husband is a retired bank employee. The Leuenbergers have a net worth just over $500,000.

39. The Leuenbergers saw the CD advertised by First Liberty Group and came in to invest $75,000. They met with Respondent in October 2003. They saw a poster on the wall of Respondent's office about viaticals and asked Respondent about them.

40. The Leuenbergers invested $50,000 in CDs and purchased two viaticals for $12,500 each.

41. One of the viaticals purchased by the Leuenbergers "paid out" because the viator died, and they received the return Respondent quoted to them. The other viatical they purchased from Respondent has not yet paid out.

42. The Leuenbergers have had to make a premium payment of approximately $1,500 on the remaining viatical.

Count III – Berge

43. Oscar Berge is retired from the United States Air Force and from a subsequent job as a maintenance supervisor for a health care facility. Mr. Berge obtained a college degree in avionics instrument technology while in the Air Force.

44. Mr. Berge saw the CD advertised by First Liberty Group. He and his wife met with Respondent in late 2002 and, in January 2003, invested in two annuities and five viaticals.

45. Mr. and Mrs. Berge purchased two three-year viaticals for $30,000 each and three five-year viaticals for $30,000 each; a total investment of $150,000.

46. Although four years have passed since the Berges purchased the three-year viaticals, the two viators have not died. The Berges have had to make two premium payments totaling approximately $5,000.

CONCLUSIONS OF LAW

47. DOAH has jurisdiction over the subject matter pursuant to Section 120.569 and Subsection 120.57(1), Florida Statutes (2006).[3/]

48. Petitioner must prove the factual allegations in its 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).

49. 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 a 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).

50. In each count of its Administrative Complaint, Petitioner charged Respondent with violating Subsections 626.611(5), (7), (9), (16), and 626.621(9), Florida Statutes. These statutes provide as follows:

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

* * *

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

* * *

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

* * *

(16) Sale of an unregistered security that was required to be registered, pursuant to chapter 517.

§ 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 grounds exist under circumstances for which denial, suspension, revocation, or refusal is not mandatory under s. 626.611:

* * *

(9) If a life agent, violation of the code of ethics.

51. Petitioner proved by clear and convincing evidence that Respondent, by his own statements and through the advertising materials he provided to the investors, willfully misrepresented the risk character of the viaticals. By doing so, Respondent violated each of the statutes set forth above.

52. Respondent objects to being charged with selling unregistered securities, because viaticals were not specifically defined as securities until 2006. Petitioner claims that, although viaticals were not specifically defined as securities in Section 517.021, Florida Statutes, in 2003, the prior definition, which included "investment contracts," was sufficient to include viaticals. Petitioner further asserts that viaticals have all the elements of a security as established by the case law.

53. Petitioner is correct that a viatical met the definition of a security under the law that existed in 2003. However, the Administrative Law Judge does not agree with Petitioner's argument that this interpretation of the law was clear and settled in 2003. The regulation of viaticals under the insurance code was a cause of confusion.

Appropriate Penalty

54. Under Florida Administrative Code Rule 69B-231.080, the penalty for each violation of Subsections 626.611(5) and (7), Florida Statutes, is a six-month suspension; the penalty for each violation of Subsection 626.611(9), Florida Statutes, is a nine-month suspension; and the penalty for each violation of Subsection 626.611(16), Florida Statutes, is a 12-month suspension.

55. Florida Administrative Code Rule 69B-231.090 provides that the penalty for each violation of Subsection 626.621(9), Florida Statutes, is a three-month suspension.

56. However, under Florida Administrative Code Rule 69B-231.040(1)(a), the "penalty per count" cannot exceed the highest penalty for any violation under the count, which in this case is the 12-month suspension for sale of an unregistered security. Therefore, based on the four counts of the Administrative Complaint, the "total penalty" would be four years.

57. Florida Administrative Code Rule 69B-231.160 sets forth the aggravating and mitigating factors to be considered in imposing an appropriate final penalty. Among these, willfulness and personal financial gain are applicable aggravating factors with respect to the misrepresentations made by Respondent regarding the risk character of the viaticals. The Administrative Law Judge disagrees with Petitioner's contention that the age of the victims is an aggravating factor. None of the investors involved in this case was lacking in intelligence, common sense, or any mental capacity that made them more likely to rely on the misrepresentations made by Respondent. The record also does not show that the amount invested by these individuals was a large percentage of their net worth or otherwise had significance based on their ages.

58. A mitigating factor is the unsettled state of the law in 2003 regarding the legal status of viaticals as securities. However, even if the penalty for the sale of unlicensed securities were eliminated altogether and the penalty per count were reduced to a nine-month suspension, the total penalty would be suspension for 36 months. Subsection 626.641(1), Florida Statutes, does not permit Petitioner to suspend a license for more than two years. Therefore, the required penalty in this case is revocation of Respondent's license.

RECOMMENDATION

Based on the Findings of Fact and Conclusions of Law set forth above, it is

RECOMMENDED that a final order be entered which finds that Respondent Bradley Kline violated Subsections 626.611(5), (7), (9), and (16) and 626.621(9), Florida Statutes, and revokes his license as an insurance agent.

DONE AND ENTERED this 9th day of October, 2007, in Tallahassee, Leon County, Florida.

BRAM D. E. CANTER
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Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of October, 2007.

ENDNOTES

[1/] Petitioner describes viaticals as a "crap shoot" or "rip-off scheme," but those are not legal in Florida, and viaticals are legal investments.

[2/] Petitioner claims that Mr. Simons also had to pay a $190 insurance premium on the other viaticated policy. However, this amount, which was also paid by some of the other viators, appears to be a management fee charged by Viatical Services, Inc. See Mr. Berge's testimony at page 223 of the Transcript of the final hearing and Mr. Lenois' testimony at page 56 of his deposition transcript.

[3/] Unless otherwise indicated, all future references to the Florida Statutes are to the 2006 codification.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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