STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL SERVICES,)
)
Petitioner,)
)
vs.) Case No. 07-2127PL
)
KATHERINE ANN FITZGERALD,)
)
Respondent.)
______________________________)

RECOMMENDED ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the final hearing in this proceeding for the Division of Administrative Hearings (DOAH) on August 23 and September 24, 2007, in Orlando, Florida.

APPEARANCES

For Petitioner: Thomas A. David, Esquire
Department of Financial Services
200 East Gaines Street
612 Larson Building
Tallahassee, Florida 32399-0333

For Respondent: L. Michael Billmeier, Jr., Esquire
Galloway, Brennan & Billmeir
240 East 5th Avenue
Tallahassee, Florida 32303

Michael Rothschild, Esquire
Law Offices of Larry S. Davis, P.A.
1926 Harrison Street
Hollywood, Florida 33020

STATEMENT OF THE ISSUES

The issues are whether the sale of ancillary products to two purchasers of automobile insurance involved sliding, as that term is defined in Subsection 626.9541(1)(z), Florida Statutes (2005)[1]; whether the alleged acts violated Subsections 626.611(7) and (9), 626.621(6), and 626.9521(1), which respectively prohibit a lack of fitness or trustworthiness to engage in the business of insurance, fraudulent or dishonest practices, and unfair trade practices; and, if so, what penalty should be imposed against Respondent's insurance license.

PRELIMINARY STATEMENT

Petitioner filed a 12-count Administrative Complaint against Respondent on April 19, 2007. Respondent timely requested an administrative hearing.

At the hearing, Petitioner presented the testimony of three witnesses and submitted nine exhibits for admission into evidence. Respondent testified and identified 13 exhibits but did not submit them for admission into evidence. The identity of the witnesses and exhibits, and the rulings regarding each, are set forth in the three-volume Transcript filed on September 27 and November 2, 2007.

The ALJ reserved ruling on Respondent's objections to the admission of Petitioner's Exhibits 6 and 7. The two exhibits are admitted into evidence over objection.

Petitioner dismissed six of the 12 counts in the Administrative Complaint. Petitioner dismissed Counts IV, V, VI, X, XI, and XII. The remaining counts involve the two separate transactions at issue in this proceeding.

The ALJ granted a joint request to file proposed recommended orders (PROs) on December 3, 2007. On that date, the parties timely filed their respective PROs.

FINDINGS OF FACT

1. Petitioner is the state agency responsible for regulating insurance and insurance-related activities in Florida pursuant to Chapters 626 and 627. Respondent is licensed as a life, including variable annuity, general lines insurance agent pursuant to license number A085250.

2. From October 22, 2003, through September 2, 2005, Respondent was employed as an insurance agent by Direct General Insurance Agency, Inc. (Direct). Direct is a Tennessee corporation doing business in Florida as Cash Register Insurance (Cash Register).

3. Cash Register employed Respondent in an office located at 6325 North Orange Blossom Trail, Orlando, Florida, which conducts business as Friendly Auto Insurance Company (Friendly). Friendly-Cash Register paid Respondent a salary and commissions. Friendly-Cash Register paid commissions on the sale of ancillary products such as travel protection, accident medical protection,

and term life insurance. Commissions comprised 18 percent of the compensation paid to Respondent.

4. The two transactions at issue in this proceeding occurred on July 11 and August 29, 2005. In each transaction, Respondent sold automobile insurance and three ancillary products to Ms. Heather Dickinson and Ms. Carmen Phillips, respectively. Ms. Dickinson subsequently married and testified at the hearing as Ms. Heather Mason.

5. When Ms. Mason and Ms. Phillips entered the Friendly-Cash Register office, each consumer requested the minimum automobile insurance coverage needed to be "legal and on the road." Neither customer left the office understanding she had purchased ancillary products.

6. Ms. Mason purchased automobile insurance for a 1995 Jeep Cherokee 4x4 at an annual premium of $1,175.00. Friendly-Cash Register charged Ms. Mason a total sales price (total price) of $1,609.24. Ms. Mason agreed to pay $194.00 as a down payment and the balance in 12 installments of $117.94 at an annual percentage rate of 25.27 percent.

7. Ms. Mason purchased three ancillary products at a total cost of $278.00. Ms. Mason paid $60.00 for travel protection, $110.00 for accident medical protection, and $98.00 for term life insurance. A finance charge of $151.69 and a charge of

$4.55 for Florida documentary stamp taxes comprised other charges that are not at issue in this proceeding.

8. Ms. Phillips purchased automobile insurance for a 1992 Chevrolet Blazer 4x4 at an annual premium of $779.00. Friendly-Cash Register charged Ms. Phillips a total price of $1,271.64. Ms. Phillips agreed to pay $129.00 as a down payment and the balance in 10 installments of $114.26 at an annual percentage rate of 25.06 percent.

9. Ms. Phillips purchased three ancillary products at a total cost of $368.00. Ms. Phillips paid $60.00 for travel protection, $200.00 for accident medical protection, and $108.00 for term life insurance. A finance charge of $120.79 and a documentary stamp charge of $3.85 comprised other charges that are not at issue.

10. Both Ms. Mason and Ms. Phillips signed Friendly-Cash Register forms which disclose that the ancillary products they purchased are optional and entail additional costs. Each customer signed a package of documents numbering approximately 19 pages.[2] Page 1 of each package discloses the annual price for automobile insurance. The optional ancillary products and separate charges are disclosed in several additional pages.

11. The package of documents that Ms. Mason signed discloses the annual cost for travel protection on pages 000006 and 000014 through 000016 (hereinafter pages 6, 14, 15, etc.).

Pages 8, 9, and 14 through 16 disclose the cost of the accident medical protection. Pages 10 and 12 through 16 each disclose the cost for term life insurance. Pages 7, 9, 14, and 15 expressly provide that the ancillary products are optional. Page 16, the Premium Finance Agreement, separates the charges for mandatory automobile insurance from the optional ancillary products and the other charges. Ms. Mason signed or initialed pages 3 through 11, pages 14 through 17, and page 19.

12. The package that Ms. Phillips signed includes disclosures similar to those in the package signed by Ms. Mason. Ms. Phillips signed or initialed relevant pages in the same manner as Ms. Mason.

13. Ms. Mason and Ms. Phillips had adequate time to review the documents they signed or initialed, but neither customer read the documents. Each consumer is a literate adult with no disability or infirmity that would impede her capacity to understand the transaction.

14. The factual disputes are whether Respondent orally explained the ancillary products that the two customers purchased, and, if so, whether the oral explanation was adequate. For reasons discussed in the Conclusions of Law, Respondent is not required to prove she did explain the ancillary products and that the explanation was adequate.

Rather, Petitioner must prove Respondent did not explain the ancillary products or that the explanation was inadequate.

15. Respondent does not recall the specific transactions at issue in this proceeding because she sold as many as 10 insurance policies each day at Friendly-Cash Register for almost two years. However, Respondent does recall that she followed the identical procedure with each customer and that the procedure she followed was carefully scripted by Friendly-Cash Register as a condition of employment.

16. Respondent orally explained each disputed transaction in this proceeding in a manner that was adequate for each consumer to understand the transaction. Respondent orally explained that the ancillary products were optional. Respondent circled the optional items in the documents and explained that each ancillary product entailed an additional cost.

17. The sixth document that Respondent reviewed with each customer is the "Explanation of Policies, Coverages, and Cost Breakdown." That page appears as page 14 in the exhibits, but page 14 is not organized in the exhibits in the same order that Respondent presented it to customers. Respondent orally explained pages pertaining to specific ancillary products after Respondent explained the page entitled "Explanation of Policies, Coverages, and Cost Breakdown."

18. The procedure scripted by Friendly-Cash Register required Respondent to first interview Ms. Mason and Ms. Phillips to gather information needed for input into a computer which printed the 19-page forms utilized by Friendly-Cash Register. The interview included questions regarding life insurance beneficiaries and questions pertaining to the medical condition of each customer.

19. After interviewing Ms. Mason and Ms. Phillips, Respondent entered the information into a computer and printed the 19-page packages. Respondent placed each package in front of the respective customer and discussed each page. Respondent circled the word "optional" when it appeared on a page, obtained the signature or initials of each customer, turned the page over, and proceeded to the next page.

20. The trier of fact finds the testimony of Respondent to be credible and persuasive. As Respondent explained:

> Q. Did you tell the customers that this quote included those ancillary products?
>
> A. Yes. I informed . . . them that they had been quoted with the optional policies.
>
> * * *
>
> Q. How is page 14 labeled at the top?
>
> A. It says "Explanation of Policies, Coverages, and Cost Breakdown." . . . I would circle the items that are circled on here, and then I would present it to the insured. And I would say, you're purchasing

the mandatory personal injury protection, bodily injury, [or] there's no property damage, there's no bodily injury. You also have the optional policies for the travel protection plan, accidental medical plan, life insurance, these are the costs, sign here.

Q. [A]re you pointing at your circles?

A. Yes. I point to each circle and I kind of run my finger down the cost to draw attention to it.

Q. You point to the cost?

A. Yes.

* * *

Q. Okay. What do you go over next?

A. The next page is the second page of the travel protection plan.

Q. This is page 7 of Exhibit 2?

A. Correct.

Q. How is that labeled at the top?

A. "Optional Travel Protection Plan." It says, "American Bankers Insurance Company." I'd point out that there's bail bond coverage, collision of loss of use [sic], personal effects loss from auto rented.

Q. Do you make those circles that we see on that page? . . . .

A. Yes. I circle them when they're sitting there and then I hand it--hand the paper to them, and I would say, "This is optional coverage, please sign here."

* * *

Q. Okay. After she signed that, what did you go over with her next?

A. Next one would be the accidental medical protection plan.

Q. Page 8 of Exhibit 2?

A. Yes.

Q. Okay. . . . [A]fter she signed that page, what did you do?

A. Page 9.

Q. Page 9 of Exhibit 2?

A. Your cost is $110. The annual benefit is $45,625. . . . Please sign here.

Q. Did you make those circles on a piece of paper?

A. Yes. Before I handed it to her, I circled the items that are circled on it and drew the line.

* * *

Q. [A]fter she signed this page, what would you do next?

A. Okay. The next page is page 10, which is the life insurance policy.

Q. This is page 10 of Exhibit 2?

A. Yes.

Q. Okay. How would you explain this page to a customer?

A. This 10,000 [sic] term policy. The premium is $108. It's not replacing any other previous life insurance policy.

Q. Did you make those circles?

> A. Yes, I did. . . .
>
> * * *
>
> Q. This is page 13 of Exhibit 2?
>
> A. Yes. It's a statement of policy cost and benefit information that I would just run my finger down and just say, "These are your benefits and the cost, please sign here."

Transcript (TR) at 251-270.

21. Petitioner proposed in its PRO a finding that Respondent did not orally explain the ancillary products to the two consumers. However, Ms. Mason and Ms. Phillips did not remember what Respondent said to them. Testimony that a witness does not remember what Respondent said is less than clear and convincing evidence that Respondent did not explain the ancillary products adequately. The testimony of Ms. Mason during cross examination is illustrative.

> Q. Would you say that what you were really paying attention to when you conducted this transaction was how much it was going to cost you?
>
> A. Yeah. Yes.
>
> Q. Cause you . . . you talked . . . [on direct] about your recollection about these things. And it was interesting that some things you were able to say you don't recall, but [counsel for Petitioner] was able to get you to commit to certain things that you absolutely said would not have happened. Such as, you know that if . . . the word "optional" had been used that you

would not have accepted the product, correct?

A. If it would have cost more, then I would not have accepted it.

Q. Okay. But you don't specifically recall what was discussed in the course of your meeting with Ms. Fitzgerald, correct?

A. No.

Q. And you acknowledged that at least when confronted with some of the paperwork, things like a beneficiary on the $10,000 benefit for the life insurance policy, that was certainly discussed with you, right?

A. I--yes, I guess. I don't--like I said, I feel so stupid because I don't--I know I said my brother's name and he's down for a beneficiary, but I don't remember why I would have--I don't understand why I did that. . . .

* * *

Q. You thought that the questions that were being asked to you about the life insurance policy--you thought that they were actually part of car insurance?

A. I don't remember being asked questions about life insurance.

Q. Do you remember being given a series of questions asking you about your health and about treatment--

A. Yes.

* * *

Q. So when . . . I ask you the question about whether or not you were told what your lump sum was going to be and you say, "I

> don't remember," that doesn't mean you
> weren't told?
>
> A. Correct.
>
> Q. It just means you don't remember?
>
> A. Correct.
>
> * * *
>
> Q. Turn to page 14. . . . Do you recall
> what explanation was given about this
> particular page?
>
> A. No.
>
> * * *
>
> Q. If you turn to page 15, please. . . .
> Fair to say that you don't recall what was
> said about this page?
>
> A. Yes.

TR at 156-170.

22. The oral explanation that Respondent provided to Ms. Mason and Ms. Phillips did not include a statement that each customer could have saved 17.27 and 28.94 percent of the total price, respectively, by declining the ancillary products. Nor did the oral explanation include a suggestion that either customer use the money to buy automobile insurance with a smaller deductible or more complete insurance.[3]

23. The omissions discussed in the preceding paragraph are not alleged in the Administrative Complaint as grounds for the statutory violations charged in the Complaint (the un-alleged

omissions). Rather, the Complaint limits the alleged grounds to a failure to "inform" Ms. Mason and Ms. Phillips that the ancillary products were:

> . . . separate from and not a part of the automobile insurance she had requested, was not required by law or a lien holder, was optional, or that there was an additional charge for this product. . . .

Administrative Complaint, paragraphs 7, 11, 15, 32, 36, 41, and 45.

24. The un-alleged omissions did not involve the exercise of discretion by Respondent and were not willful. While it is clear that Respondent was the office manager, it is less than clear and convincing that Respondent was in charge of scripting the oral explanation for Friendly-Cash Register.[4] Rather, Friendly-Cash Register required the omissions as a condition of Respondent's employment. As Respondent explained in her testimony:

> Q. . . . I don't see where [this script] asks the consumer if they actually want the optional policies. . . . So how would you know to quote the ancillary products if they had not asked for it yet?
>
> A. We were required to offer them to everybody.
>
> Q. And the method that Direct General instructed you to use was to just . . . include them in the quote; is that correct?
>
> A. State that they were optional, yes, and include them in the quote.

*   *   *

> A. I would have preferred not to quote with them on the policy--
>
> Q. Why?
>
> A. . . . I just preferred it that way, you know. . . . I didn't like it.
>
> Q. Do you feel like the way Direct General had you quote these consumers . . . may have led consumers possibly buying policies without full informed consent?
>
> A. No.

TR at 280 and 295.

25. On September 2, 2005, Respondent voluntarily left the employment of Friendly-Cash Register. Respondent is now employed by Car Insurance.com.

26. Petitioner argues in paragraph 47 of its PRO that the Friendly-Cash Register forms are "vague or ambiguous and make it difficult to decipher (document-deficiency)." The Administrative Complaint does not allege document-deficiency as a ground for the charged violations. The alleged grounds are limited, in paragraphs 7, 11, 15, 32, 36, 41, and 45, to the "failure to inform" the consumers that they were purchasing ancillary products. Moreover, Petitioner acknowledges in paragraph 43 of its PRO that the "optional nature of the ancillary products is evident" from a review of the documents.

27. If it were found that an allegation of document-deficiency is implied in the Administrative Complaint, the trier of fact finds that the ancillary products purchased by Ms. Mason and Ms. Phillips were not mis-labeled or illusory. They provided benefits to each purchaser.

28. Travel protection primarily provided daily rental reimbursement of $25.00 up to 10 days during repairs for collision damage and up to five days during travel interruption. The accident medical protection plan provided medical expense reimbursement up to $1,000.00 and daily hospital coverage of $125.00 up to 365 days. The term life insurance provided a death benefit of $10,000.00. Even if the relevant forms were found to be deficient, any deficiency is rendered moot because each consumer testified that she did not read or rely on the content of the Friendly-Cash Register forms.

CONCLUSIONS OF LAW

29. DOAH has jurisdiction over the subject matter of this proceeding and the parties. DOAH provided the parties with adequate notice of the final hearing. §§ 120.569 and 120.57, Fla. Stat. (2007).

30. The burden of proof is on Petitioner. Petitioner must show by clear and convincing evidence that Respondent committed the acts alleged in the Administrative Complaint and the appropriateness of any proposed penalty. Department of Banking

and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932, 935 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

31. The Administrative Complaint alleges, in relevant part, that the sale of ancillary products to Ms. Mason and Ms. Phillips is an unfair trade practice, within the meaning of Subsections 626.621(6) and 626.9521(1), which is defined in Subsection 626.9541(1) to include sliding. Subsection 626.9541(1)(z) defines sliding as the act or practice of:

> 1. Representing to the applicant that a specific ancillary coverage or product is required by law in conjunction with the purchase of insurance when such coverage or product is not required[5];
>
> 2. Representing to the applicant that a specific ancillary coverage or product is included in the policy applied for without additional charge when such charge is required; or
>
> 3. Charging an applicant for a specific ancillary coverage or product, in addition to the cost of the insurance coverage applied for, without the informed consent of the applicant.

32. The Administrative Complaint further alleges that the transactions demonstrate a lack of fitness or trustworthiness to engage in the business of insurance and constitute fraudulent or dishonest practices in the conduct of business within the meaning of Subsections 626.611(7) and (9), respectively. The

Administrative Complaint seeks penalties authorized in Sections 626.611 and 626.621 and in Subsection 626.9521(2).

33. The relevant Friendly-Cash Register documents do not satisfy the definition of sliding in Subsection 626.9541(1)(z). However, judicial decisions interpret the statutory definition of sliding to mean that a licensee may not rely on the content of documents. The licensee must provide an oral explanation to the customers. Mack v. Department of Financial Services, 914 So. 2d 986, 987 (Fla. 1st DCA 2005); Thomas v. Department of Insurance and Treasurer, 559 So. 2d 419, 421 (Fla. 2d DCA 1990).

34. In Thomas, the licensees relied on forms signed by the consumers and provided no oral explanation of ancillary products. See Thomas, 559 So. 2d at 421 (licensees did not orally explain ancillary products). Unlike the facts in Thomas, Respondent provided an oral explanation to the consumers.

35. Petitioner argues in its PRO that the outcome of this proceeding is controlled by the agency's final order in Department of Insurance v. Leigh, Case Number 02-2115 (DOAH December 4, 2002), pursuant to the doctrine of administrative stare decisis. See Gessler v. Department of Business and Professional Regulation, 627 So. 2d 501, 504 (Fla. 4th DCA 1993) (applying judicial doctrine of stare decisis to administrative proceedings). However, the facts in Leigh are distinguishable from those in this proceeding. In Leigh, neither the agent nor

any other employee of the agency provided an oral explanation to the consumer.

36. Petitioner argues in paragraphs 48 and 70 of its PRO that the consumers requested the minimum coverage necessary to be "legal and on the road," and it is "logical" for the consumers to "trust" the licensee to provide only that coverage. The ALJ agrees, but the statute does not define sliding as the sale of ancillary products when none are requested. The statute defines sliding as the sale of ancillary products without adequate representations and information. One may question the wisdom of the statute, but the terms of the statute are clear.[6]

37. Statutory terms in a penal statute must be construed strictly in favor of the licensee and against the imposition of discipline. State ex. rel. Jordan v. Pattishall, 99 Fla. 296, 126 So. 147 (1930); Ocampo v. Department of Health, 806 So. 2d 633 (Fla. 1st DCA 2002); Equity Corp. Holdings, Inc. v. Department of Banking and Finance, Division of Finance, 772 So. 2d 588, 590 (Fla. 1st DCA 2000); Jonas v. Florida Department of Business and Professional Regulation, 746 So. 2d 1261 (Fla. 3d DCA 2000); Loeffler v. Florida Department of Business and Professional Regulation, 739 So. 2d 150 (Fla. 1st DCA 1999); Elmariah v. Department of Professional Regulation, Board of Medicine, 574 So. 2d 164 (Fla. 1st DCA 1990); Rush v. Department of Professional Regulation, 448 So. 2d 26 (Fla. 1st DCA 1984);

Ferdego Discount Center v. Department of Professional Regulation, 452 So. 2d 1063 (Fla. 3d DCA 1984); Bowling v. Department of Insurance, 394 So. 2d 165 (Fla. 1st DCA 1981); Lester v. Dept. of Professional and Occupational Regulations, 348 So. 2d 923 (Fla. 1st DCA 1977). The Legislature may authorize an administrative agency to interpret a statute, and an agency's interpretation may be entitled to deference when the interpretation is within the agency's expertise, but the authority to interpret a statute does not include the authority to alter a statute. Fla. Const., Art. II, § 3; § 120.52(8), Fla. Stat. (2007); Chiles v. Children A, B, C, D, E, and F, 589 So. 2d 260, 264-265 (Fla. 1991); Mack, 914 So. 2d at 989; Carver v. State of Florida, Division of Retirement, 848 So. 2d 1203, 1206 (Fla. 1st DCA 2003); Whitaker v. Department of Insurance, 680 So. 2d 528, 531 (Fla. 1st DCA 1996).

38. Petitioner argues in paragraphs 48, 59, and 97 of its PRO that the oral explanation from Respondent was inadequate because the consumers left the Friendly-Cash Register office without understanding they had purchased ancillary products. The argument measures the adequacy of a licensee's oral explanation subjectively by the state of mind of a consumer. Subsections 626.9541(1)(z)1. and 2. measure the adequacy of an oral explanation by the licensee's representations, and Subsection 626.9541(1)(z)3. focuses on the information provided

in the oral explanation. The Legislature may authorize administrative agencies to interpret, but never to alter statutes. Fla. Const., Art. II, § 3; § 120.52(8), Fla. Stat. (2007); Chiles v. Children A, B, C, D, E, and F, 589 So. 2d 260, 264-265 (Fla. 1991); Mack, 914 So. 2d at 989; Carver v. State of Florida, Division of Retirement, 848 So. 2d 1203, 1206 (Fla. 1st DCA 2003) (citing Cortez v. State Board of Regents, 655 So. 2d 132, 136 (Fla. 1st DCA 1995)).

39. In Mack, the licensee orally explained the ancillary product to the consumer, but the explanation was inadequate. The administrative complaint alleged that the oral explanation was inadequate because it did not explain that the ancillary product was "separate from the policy and entailed additional cost." Mack, 914 So. 2d at 987. In this proceeding, the oral explanation by Respondent explained that the ancillary products were optional and entailed additional cost.

40. The ruling in Mack suggests that more is required for an oral explanation to be adequate. The court held that the oral explanation was inadequate because it did not "satisfy the requirements of Thomas." Mack, 914 So. 2d at 989.

41. The "requirements of Thomas" presumably refer to five factors that could have been included in an oral explanation, if the licensees had provided an oral explanation. By failing to provide any oral explanation, the licensees in Thomas did not

orally explain that: the ancillary product was optional, the ancillary product was not part of the insurance coverage requested by the customer, the customers could save roughly 40 percent of the total price by declining the ancillary product; the ancillary product was not actually life or automobile insurance, and the customer should use the cost of the product to buy auto insurance with a smaller deductible or more complete coverage. Thomas, 559 So. 2d at 421.

42. Unlike the facts in Thomas, the ancillary products at issue in this proceeding were properly labeled in the signed documents, and the products conveyed the benefits they purported to convey. See Thomas, 559 So. 2d at 421 (document mis-labeled touring membership as "auto accidental death coverage," and agent did not inform customer that touring club membership was not actually life insurance). The relevant requirement of Thomas is inapplicable to the facts in this proceeding.

43. Although Respondent does not have the burden of proving that she orally explained the ancillary products to the consumers and that the explanation was adequate, the trier of fact found Respondent's narration of the oral explanation to be credible and persuasive. The fact-finder is the sole arbiter of credibility. Stinson v. Winn, 938 So. 2d 554, 555 (Fla. 1st DCA 2006); Bejarano v. State, Department of Education, Division of Vocational Rehabilitation, 901 So. 2d 891, 892 (Fla. 4th DCA

2005); Hoover, M.D. v. Agency for Health Care Administration, 676 So. 2d 1380, 1384 (Fla. 3d DCA 1996); Goss v. District School Board of St. Johns County, 601 So. 2d 1232, 1234 (Fla. 5th DCA 1992).

44. The fact-finder must resolve conflicts in the testimony of witnesses. Werner v. State, Department of Insurance and Treasurer, 689 So. 2d 1211, 1213 (Fla. 1st DCA 1997) (citing Osborne Stern, 670 So. 2d at 933). The fact-finder must decide factual issues one way or the other. Dunham v. Highlands County School Board, 652 So. 2d 894, 896 (Fla. 2d DCA 1995); Heifetz v. Department of Business Regulation, Division of Alcoholic Beverages & Tobacco, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985); Department of Professional Regulation v. Wagner, 405 So. 2d 471, 473 (Fla. 1st DCA 1981).

45. Petitioner argues repeatedly in its PRO that the testimony of its witnesses was credible and persuasive. However, credible and persuasive testimony is not necessarily clear and convincing.

46. The clear and convincing standard is an intermediate standard of proof. It requires Petitioner to prove factual allegations in the Administrative Complaint by more than a preponderance of the evidence, but the proof need not be beyond and to the exclusion of a reasonable doubt. Inquiry Concerning a Judge No. 93-62, 645 So. 2d 398, 404 (Fla. 1994); Lee County

v. Sunbelt Equities, II, Limited Partnership, 619 So. 2d 996, 1006 n. 13 (Fla. 2d DCA 1993).

47. The Florida Supreme Court has addressed the clear and convincing standard with attention to detail. In relevant part, the court stated:

> This intermediate level of proof entails both a qualitative and quantitative standard. The evidence must be credible; the memories of witnesses must be clear and without confusion; and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy. . . . [T]he facts to which witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witness 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.

Inquiry Concerning a Judge, 645 So. 2d at 404 (quoting from Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

48. In order to satisfy the qualitative standard for clear and convincing evidence, incriminating evidence must be credible, material facts must be "distinctly remembered," and testimony must be "precise" and "explicit." The qualitative standard has been adopted by each district court of appeal in the state. E.F. v. State, 889 So. 2d 135, 139 (Fla. 3d DCA 2004); K-Mart Corporation v. Collins, 707 So. 2d 753, 757 n.3 (Fla. 2d DCA 1998); McKesson Drug Co. v. Williams, 706 So. 2d

352, 353 (Fla. 1st DCA 1998); Kingsley v. Kingsley, 623 So. 2d 780, 786-787 (Fla. 5th DCA 1993); Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

49. The testimony of Ms. Mason and Ms. Phillips is conclusory. Each witness testified she trusted Respondent to sell her what she requested and would not have purchased ancillary products if she had known the products were optional and increased her costs. However, neither witness listened to the oral explanation from Respondent. Neither of the witnesses distinctly remembered the oral explanation provided by Respondent; and neither of the witnesses testified precisely and explicitly as to what Respondent told her. Conclusory testimony, unsubstantiated by other evidence, is insufficient to satisfy the qualitative standard for clear and convincing evidence. Boller v. State, 775 So. 2d 408, 410 (Fla. 1st DCA 2000). See also E.F., 889 So. 2d at 139 (delusion that patient is a free man lacks evidence to support a finding that delusion poses a real and present threat of escape). Compare Inquiry Concerning a Judge, 645 So. 2d at 404 (testimony as to when various meetings took place and what transpired during the meetings was direct, unequivocal, and consistent), with Inquiry Concerning a Judge, 645 So. 2d at 405 (testimony that lacks specific recollection or exhibits doubt or confusion is not clear and convincing).

50. The conclusory testimony of the consumers invades the province of the trier of fact. It deprives the fact-finder of the opportunity to review and evaluate the specific and precise words uttered by each person who was present during the transactions at issue. It also deprives the fact-finder of the opportunity to independently decide the legal significance of words uttered by the respective parties. Petitioner cited no legal authority that requires the testimony of Respondent to be clear and convincing.

51. Petitioner argues throughout its PRO that a consumer who requested minimal insurance coverage would not have purchased more coverage but for the inadequacy of the oral explanation provided by Respondent. Inference and surmise do not satisfy the clear and convincing standard. Tenbroeck v. Castor, 640 So. 2d 164, 167-168 (Fla. 1st DCA 1994).

52. In a "world ensnarled by false assumptions and hasty judgments," an agency's proof at the formal hearing must be as serious-minded as the penalty. Bowling v. Department of Insurance, 394 So. 2d 165, 172 (Fla. 1st DCA 1981). The trier of fact weighed the proof against Respondent at the formal hearing and found it less than clear and convincing.

53. If it were found that the disputed transactions satisfied the statutory definition of sliding, Petitioner admits in paragraph 88 of its PRO that neither motive nor intent is an

element of sliding. The absence of culpable motive or intent deprives the ALJ of the evidential predicate necessary to find that Respondent is untrustworthy, engaged in fraudulent or dishonest practices, or engaged in deceptive acts within the meaning of Subsections 626.611(7) and (9) and 626.621(6). See Morris v. Department of Professional Regulation, 474 So. 2d 841, 843 (Fla. 5th DCA 1985); Hartnet v. Department of Insurance, 406 So. 2d 1180, 1184 (Fla. 1st DCA 1981).

54. Like the facts in Thomas, the oral explanation that Respondent provided did not include a statement that Ms. Mason and Ms. Phillips could have saved 17.27 and 28.94 percent from the respective total price in each transaction by declining the ancillary products. Nor did the oral explanation include a suggestion that the customer use the money to buy automobile insurance with a smaller deductible or more complete insurance. However, the Administrative Complaint does not allege the foregoing omissions as grounds for the charged statutory violations. Id. Similarly, the Complaint does not allege document-deficiency as a ground for the charged violations.

55. The ALJ cannot find Respondent guilty of a charged violation based on evidence of grounds not specifically alleged in the Administrative Complaint. Ghani v. Department of Health, 714 So. 2d 1113 (Fla. 1st DCA 1998); Cotrill v. Department of Insurance, 685 So. 2d 1371 (Fla. 1st DCA 1996).

> Predicating disciplinary action against a licensee on conduct never alleged in an administrative complaint . . . violates the Administrative Procedure Act. To countenance such a procedure would render nugatory the right to a formal administrative proceeding to contest the allegations of an administrative complaint.

Cotrill, 685 So. 2d at 1372. See also Lusskin v. State of Florida Agency for Health Care Administration, Board of Medicine, 731 So. 2d 67, 68 (Fla. 4th DCA 1999); Arpayoglou v. Department of Professional Regulation, 603 So. 2d 8 (Fla. 1st DCA 1992); Sternberg v. Department of Professional Regulation, Board of Medical Examiners, 465 So. 2d 1324, 1325 (Fla. 1st DCA 1985); Hunter v. Department of Professional Regulation, 458 So. 2d 842, 844 (Fla. 2d DCA 1984); Wray v. Department of Professional Regulation, Board of Medical Examiners, 435 So. 2d 312, 315 (Fla. 1st DCA 1983).

56. In Ghani, the agency charged a physician with practicing medicine below the applicable standard of care and found the physician guilty, in relevant part, on the ground that the physician did not order ambulance transport to the hospital for a female patient he treated in his office for supraventricular tachycardia (SVT). Rather, the physician directed the patient's husband to drive her to the hospital (the private-transport decision). The court reversed the agency's finding and explained:

> Although, as the agency argues in its answer brief, the private-transport decision could be broadly characterized as one of the purportedly substandard decisions that Dr. Ghani made during the course of his office treatment, the plain language of the complaint addresses only his initial decision to care for her at his office. (emphasis not supplied)

Ghani, 714 So. 2d 1115.

57. If it were found that Respondent violated the statutory prohibition against sliding based on the un-alleged omissions and un-alleged document-deficiency, it is clear that neither un-alleged ground was willful. The documents and the scripted oral explanation were office procedures required by Friendly-Cash Register as a condition of employment. Compare findings in paragraphs 15 and 24, supra, with Roche Surety and Casualty Company, Inc. v. Department of Financial Services, 895 So. 2d 1139, 1141 (Fla. 2d DCA 2005) (existence of court order prevented willful violation), and Prysi v. Department of Health, 823 So. 2d 823, 825 (Fla. 1st DCA 2002) (nurses signatures on written prescriptions were part of office procedure implemented by physician's superior and beyond physician's control). Willfulness is a question of fact to be determined by the trier of fact. Roche, 895 So. 2d at 1141.

58. The absence of willfulness deprives the ALJ of the factual predicate necessary for a finding that the un-alleged grounds show Respondent is untrustworthy, fraudulent or

dishonest, or deceptive. See §§ 626.611(7) (untrustworthiness), 626.611(9) (fraudulent or dishonest practices), and 626.621(6) and 626.9521(1) (dishonest practices). Statutory terms in a penal statute must be construed strictly in favor of the licensee and against the imposition of discipline. Pattishall, 126 So. 147; Ocampo, 806 So. 2d at 633; Equity Corp., 772 So. 2d 590; Jonas, 746 So. 2d 1261; Loeffler, 739 So. 2d 150; Elmariah, 574 So. 2d 164; Rush, 448 So. 2d 26; Ferdego, 452 So. 2d 1063; Bowling, 394 So. 2d 165; Lester, 348 So. 2d 923.

59. Unlike untrustworthy conduct, fraud, dishonesty, and deception, a lack of fitness to engage in the business of insurance, within the meaning of Subsection 626.611(7), may involve negligence or gross negligence, rather than willfulness or culpable intent. Similarly, willfulness may not be required to find that the un-alleged grounds are unfair trade practices within the meaning of Subsections 626.621(6) and 626.9541(1)(z). However, Petitioner improperly calculates the proposed penalty by considering both statutes to determine the highest penalty authorized by rule.

60. Petitioner argues in paragraphs 114 through 116 of its PRO that the total penalty for violations of Sections 626.611 and 626.621 is properly based on the highest penalty prescribed

in its rules for a violation of either statute. Petitioner interprets Florida Administrative Code Rules 69B-231.040, 69B-231.160, and 69B-231.180 to mean that the total penalty is a suspension for 54 months and invokes the automatic revocation provision in its rule for a suspension in excess of 24 months.

61. The highest penalty for violations of both Sections 626.611 and 626.621 is limited to the highest penalty authorized in Section 626.611. The penalties prescribed for a violation of Section 626.621 are statutorily authorized only if guilt is based on grounds for which "denial, suspension, revocation, or refusal is not mandatory under s. 626.611." § 626.621, Fla. Stat. (2005); Dyer v. Department of Insurance and Treasures, 585 So. 2d 1009, 1013 (Fla. 1st DCA 1991).[7]

62. An administrative agency such as DOAH cannot interpret a rule in a manner that amends or enlarges the relevant statutes. See § 120.52(8), Fla. Stat. (2007); Greenburg v. Cardiology Surgical Association and Claims Center - Lakeland, 855 So. 2d 234, 238 (Fla. 1st DCA 2003) (rule cannot enlarge, modify or contravene statute). If the terms of a rule conflict with a statute, the statute takes precedence over the rule. One Beacon Insurance v. Agency for Health Care Administration, 958 So. 2d 1127, 1129 (Fla. 1st DCA 2007); Zimmerman v. Florida Windstorm Underwriting Association, 873 So. 2d 411, 415 (Fla. 1st DCA 2004); Broward Children's Center, Inc. v. Hall, 859 So.

2d 623, 627 (Fla. 1st DCA 2003); Department of Children and Families v. R.H., 819 So. 2d 858, 860 (Fla. 5th DCA 2002); Department of Children and Family Services v. L.G., 801 So. 2d 1047, 1053 (Fla. 1st DCA 2001); Willette v. Air Products and Bassett and Department of Labor and Employment Security, Division of Workers' Compensation, 700 So. 2d 397, 399 (Fla. 1st DCA 1997).

63. In Willette, the court explained:

> Executive branch rulemaking is authorized in furtherance of, not in opposition to, legislative policy. Just as a court cannot give effect to a statute (or administrative rule) in a manner repugnant to a constitutional provision, so a duly promulgated rule, although "presumptively valid until invalidated in a section 120.56 rule challenge [citations omitted]," must give way in judicial proceedings to any contradictory statute that applies. (emphasis supplied)

Willette, 700 So. 2d at 399.

64. After the decision in Willette, the court explained:

> While an administrative law judge presiding in a section 120.57 proceeding will deem controlling duly promulgated administrative rules never challenged under section 120.56, it is open to a reviewing court to adjudicate an administrative rule at odds with the statute it purports to implement, even when there is no administrative rule challenge proceeding below. (citations omitted)

Clemons v. State Risk Management Trust Fund, 870 So. 2d 881, 884 (Fla. 1st DCA 2004).

65. The decisions in Willette and Clemons interpret Article V, Section 4(b)(2) of the Florida Constitution, to mean that the absence of a rule challenge in an administrative hearing does not preclude a reviewing court from interpreting a rule to conform with a statute. See Clemons, 870 So. 2d at 884; Willette, 700 So. 2d at 398. Neither of the decisions interprets the separation of powers doctrine in Article II, Section 3 of the Florida Constitution, to mean that an administrative agency may interpret a rule to amend, enlarge, or modify a statute merely because the party who requested a hearing pursuant to Subsection 120.57(1), Florida Statutes (2007) (a 120.57 proceeding), did not file a rule challenge pursuant to Section 120.56, Florida Statutes (2007) (a 120.56 rule challenge).

66. The separation of powers doctrine encompasses two prohibitions. No branch of government may encroach upon the powers of another, and no branch may delegate its constitutional power to another. Fla. Const., Art. II, § 3. The second prohibition is the non-delegation doctrine. Chiles, 589 So. 2d at 264-265.

67. The non-delegation doctrine prohibits the Legislature from delegating legislative authority to an agency of the executive branch. Chiles, 589 So. 2d at 266. The administration of legislative programs by executive agencies

must be pursuant to minimal standards and guidelines that are ascertainable by reference to statutory terms enacted by the Legislature and implemented in the agency's rules. Id.

68. The Legislature may authorize administrative agencies to interpret, but never to alter statutes. Carver, 848 So. 2d at 1206 (citing Cortez, 655 So. 2d at 136). Rules are entitled to a presumption of constitutional validity. R.H., 819 So. 2d at 860. The validity of rules should be preserved by interpreting them consistently with the statutes they implement.

69. When the literal terms of a promulgated rule conflict with a statute in a 120.57 proceeding, the absence of a 120.56 rule challenge does not negate the non-delegation doctrine. The ALJ, who sits in place of the head of an executive agency,[8] must interpret the rule in a manner that is consistent with the statute. A substantially affected party in a 120.57 proceeding is not required to file a duplicative 120.56 rule challenge if the interpretation of a rule is adequately addressed in the 120.57 proceeding. St. Joe Paper Company v. Florida Department of Natural Resources, 536 So. 2d 1119, 1122 (Fla. 1st DCA 1989); Department of General Services v. Willis, 344 So. 2d 580, 592 (Fla. 1st DCA 1977).

70. The absence of a 120.56 rule challenge in a 120.57 proceeding may preclude the ALJ from invalidating the rule, but the non-delegation doctrine limits the ALJ to an interpretation

of the rule that does not modify, enlarge, or contravene the statute. By analogy, an ALJ without authority to declare a statute unconstitutional must interpret the statute in a manner that is consistent with the constitution.

71. If it were found that the sun-alleged grounds demonstrated a lack of fitness to engage in the business of insurance and constituted unfair methods of competition, within the meaning of Subsections 626.611(7) and 626.621(6), the total penalty must be based on the highest penalty prescribed by rule for a violation of Subsection 626.611(7). Dyer, 585 So. 2d at 1013. The highest penalty per count for each violation of Subsection 626.611(7) is suspension for six months. The two un-alleged violations for two customers amounts to four violations. The total suspension does not exceed 24 months and is insufficient to invoke automatic revocation. The un-willful nature of the un-alleged violations limits the maximum fines that are authorized in Subsection 626.9521(2) in addition to other applicable penalties to $2,500.00 for each violation.

72. The un-willful nature of the un-alleged grounds is relevant to the aggravating and mitigating factors described in Florida Administrative Code Rule 69B-231.160. Rule 69B-231.040 authorizes Petitioner to consider such factors in determining whether to convert the total penalty for the un-alleged grounds to an administrative fine and probation.

73. Two aggravating factors are present. Respondent enjoyed financial gain and has not made restitution for any harm caused by the un-alleged violations.

74. Several mitigating factors are present. The un-alleged grounds were not willful. The consumers had the opportunity and capacity to read documents they signed and ask questions during the oral explanation, but they chose to do neither. There are no secondary violations, no resulting criminal charges, and no previous discipline. Respondent voluntarily disengaged from the un-alleged grounds when she left the employment of Friendly-Cash Register.

75. If the un-alleged grounds were found to violate the statutory prohibition against sliding, the aggravating and mitigating factors would support a reduced penalty. On balance, the aggravating and mitigating factors would support conversion of the total penalty to a $1,000.00 fine and six-month probation.

RECOMMENDATION

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

RECOMMENDED that Petitioner enter a final order finding Respondent not guilty of the allegations in the Administrative Complaint.

DONE AND ENTERED this 18th day of January, 2008, in Tallahassee, Leon County, Florida.

DANIEL MANRY
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 18th day of January, 2008.

ENDNOTES

[1/] References to subsections, sections, and chapters are to Florida Statutes (2005), unless stated otherwise.

[2/] The packages signed by the consumers are identified as Exhibits 2 and 4. The first page of each exhibit is a cover page and was not part of the packages signed by the consumers. The first page of each signed package is numbered by Bates stamp number 000002, and the last page is numbered 000020.

[3/] This finding pertains to disclosures discussed in Thomas v. Department of Insurance and Treasurer, 559 So. 2d 419, 421 (Fla. 2d DCA 1990).

[4/] In Thomas, each of the two respondents was the agent in charge. Thomas, 559 So. 2d at 420.

[5/] The relevant counts in the Administrative Complaint do not charge that Respondent committed sliding defined in Subsection 626.9541(1)(z)1. Count III alleges, in relevant part, that Respondent violated Section 626.9521, as more fully set forth in Count I, but Count I limits the charged violation to Subsections 626.9521(1)(z)2. and 3.

[6] Petitioner reasons in paragraph 53 of its PRO that a customer who "enters a restaurant and orders grouper" is justified in trusting her server to bring her grouper. The ALJ agrees, but if the server brings tuna or salmon and says she explained it is optional and will cost more and the customer does not pay attention to what the server is saying or cannot recall under oath what the server said, the customer cannot demonstrate by clear and convincing evidence that the server did not make the representations required in Subsection 626.9521(1)(z)2. and did not provide the information required in Subsection 626.9521(1)(z)3.

[7] The statutory language interpreted in Dyer involved the 1987 statutes, but the relevant language remains unchanged.

[8] See McDonald v. Department of Banking and Finance, 346 So. 2d 569, 581-584 (Fla. 1st DCA 1977) (hearing officer sits in the place of the agency head and, unlike a judge whose duty is limited to findings of facts and conclusions of law, has the additional duty of critiquing agency policy).

COPIES FURNISHED:

L. Michael Billmeier, Jr., Esquire
Galloway, Brennan & Billmeier
240 East 5th Avenue
Tallahassee, Florida 32303

Michael Rothschild, Esquire
Law Offices of Larry S. Davis, P.A.
1926 Harrison Street
Hollywood, Florida 33020

Thomas A. David, Esquire
Department of Financial Services
200 East Gaines Street
612 Larson Building
Tallahassee, Florida 32399

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 32399-0300

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.