REPRESENTING
ALEX SINK
CHIEF FINANCIAL OFFICER
STATE OF FLORIDA

IN THE MATTER OF:

FILED

Case No.: 89486-07-AG

WILLIAM J. BURKETT

DEC 17 2007

_____/

Docketed by: RCH

FINAL ORDER

This cause came on for consideration and final agency action. On October 5, 2006, the Petitioner, William J. Burkett, submitted application for licensure as a Resident Life Including Variable Annuity & Health Agent (2-15) to the Florida Department of Financial Services (hereinafter referred to as the "Department"). On January 30, 2007, the Department (hereinafter also the "Respondent") timely issued a Notice of Denial of Petitioner's application for licensure based on its discovery that the Petitioner had been subject to prior administrative actions in another state relating to unlicensed activity and the sale of unregistered securities by Petitioner. The Respondent timely filed a request for an informal proceeding pursuant to Section 120.57(2), Florida Statutes. Pursuant to notice, the matter was heard before a hearing officer of the Department on May 22, 2007. Upon hearing the case and receiving a Proposed Recommended Order in the matter from the Respondent, the hearing officer made no findings of fact and instead entered an order referring the matter to the Division of Administrative Hearings for formal hearing pursuant to Section 120.57(1), Florida Statutes. Pursuant to notice, a formal hearing was held in the matter before R. Bruce McKibben, Administrative Law Judge, Division of Administrative Hearings, on September 15, 2007.

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After consideration of the evidence, argument, and testimony presented at hearing, the Administrative Law Judge issued his Recommended Order on November 2, 2007 (attached hereto as Exhibit "A"). The Administrative Law Judge recommended that the Department enter an order granting the Petitioner's application for licensure as a Resident Life, Variable Annuity & Health Agent. On November 13, 2007, the Respondent timely filed exceptions to the Recommended Order as to the Conclusions of Law. The Petitioner filed no exceptions. The Respondent's exceptions will be addressed below.

RULINGS ON RESPONDENT'S EXCEPTIONS

The Respondent has submitted a total of 23 exceptions to the Recommended Order. Approximately 15 of the Respondent's 23 exceptions are as to the Findings of Fact contained in the Recommended Order, with the remaining exceptions appearing, for the most part, to be directed to the Administrative Law Judge's Conclusions of Law.

Before addressing with particularity each of the Respondent's various exceptions to the Findings of Fact contained in the Recommended Order, it should be noted that most of these exceptions appears to concern the weight of the evidence presented at the hearing in this matter. The weight given to the evidence is the province of the Administrative Law Judge and cannot be disturbed by the agency unless the finding is not supported by competent, substantial evidence. Brogan v. Carter, 671 So. 2d 822 (Fla. 1st DCA 1996); see also §120.57(1)(l), Fla. Stat. (2006). Accordingly, unless the finding is not supported by competent, substantial evidence, the weight given to the evidence in the Administrative Law Judge's determination of the facts must stand. Brogan at 823. The term "competent, substantial evidence" does not describe the quality, character, probative value, or weight of the evidence. Lonergan v. Budahazi, 669 So. 2d 1062, 1064 (Fla. 5th DCA 1996) (citing Dunn v. State, 454 So. 2d 641 (Fla. 5th DCA 1977)). Instead, "substantial" requires that there be some real,

material, pertinent, and relevant evidence having definite probative value, while "competency" simply refers to its admissibility under the legal rules of evidence. Id.

The Respondent's exceptions are addressed below.

1. The Respondent's first exception is directed to the Administrative Law Judge's finding contained in the Preliminary Statement on Page 2 of the Recommended Order. The Respondent takes exception to the finding by the Administrative Law Judge that "Both parties timely filed Proposed Recommended Orders." The Respondent argues that the Department "never received a copy" of the Petitioner's Proposed Recommended Order, and "until receipt of the Recommended Order was not aware that one had been filed." While it may be the case that the Respondent never received a copy of a Proposed Recommended Order when it was filed with the Division of Administrative Hearings by the Petitioner, that in and of itself is irrelevant to the above finding. However, the case record in this matter contains no evidence of a Proposed Recommended Order being filed by the Petitioner other than the Administrative Law Judge's finding that such a PRO was filed. (Recommended Order, Page 2). Moreover, a review of the Division of Administrative Hearings' website evidences no such filing by the Petitioner recorded on the docket.

It is, therefore, presumed that the Administrative Law Judge erred by finding that Proposed Recommended Orders were filed by *both* parties. Accordingly, the Respondent's first exception is ACCEPTED. Therefore, the sentence in the Preliminary Statement contained on Page 2 of the Recommended Order which reads "Both parties timely filed Proposed Recommended Orders" is rejected, and the following is substituted therefor:

> The Respondent timely filed a Proposed Recommended Order. No Proposed Recommended Order was filed by the Petitioner.

2. The Respondent's second exception is as to the Finding of Fact contained in Paragraph 1 of the Recommended Order which reads as follows: "Petitioner is a 71-year-old-man, who has been licensed to sell insurance since 1974." It would appear that the Respondent's exception to this language is based on its implication that the Respondent is and has been continually licensed to sell insurance since 1974. As the Respondent correctly notes, and as a thorough review of the record reveals, it is undisputed that the Petitioner's insurance license was actually revoked in Ohio in 2005. (Recommended Order, Page 2, Paragraph 10; Respondent's Exhibit #2). Upon revocation of the Petitioner's Ohio license, his Florida license became invalid. (Respondent's Exhibit #2). Given that it is undisputed that the Petitioner's insurance license was revoked in Ohio in 2005, the assertion that Petitioner "has been licensed since 1974" is not supported by competent, substantial evidence. To this extent, the Respondent's second exception is ACCEPTED.

The first sentence in Paragraph 1 of the Recommended Order which reads "Petitioner is a 71-year-old-man, who has been licensed to sell insurance since 1974" is, therefore, REJECTED, and the following is substituted therefor:

> Petitioner is a 71-year-old-man who was licensed to sell insurance in Ohio for 31 years, from 1974 until 2005, when both his Ohio and Florida insurance licenses were revoked.

3. The Respondent's third exception is substantially the same as the Respondent's second exception, but pertains to the Findings of Fact contained in Paragraph 3 of the Recommended Order. More specifically, the Respondent asserts that the Recommended Order "implies, by omission of relevant facts, that [the Petitioner] has been licensed by the State of Ohio since 1974." Given that the appropriate changes have been made to Paragraph 1 of the Recommended Order, as addressed relative to the Respondent's second exception, above, no additional clarification is needed to Paragraph 3 of the

Recommended Order regarding the revocation of the Petitioner's Ohio and Florida licenses. The Respondent's third exception is, therefore, REJECTED.

4. The Respondent's fourth exception concerns the Findings of Fact contained in Paragraph 4 of the Recommended Order relating to the Petitioner's decision to begin marketing and selling unregistered securities without a securities license.

In particular, the Respondent excepts to the Administrative Law Judge's Finding of Fact which reads: "Before [selling unregistered securities], Petitioner inquired of the Ohio Department of Securities whether he would need a securities license to market the [unregistered securities]. He was told no such license was required as long as his employer (CabTel) duly-registered the funds."

The Respondent argues that it is unlikely that the Petitioner actually inquired or was otherwise informed by the Ohio Department of Securities that he needed no license to sell securities in Ohio. The Respondent's argument has merit, especially in light of the fact that the Ohio Department of Commerce, Division of Securities did, in fact, issue a Cease and Desist Order against the Petitioner for his unlicensed activity and sale of unregistered securities. (Respondent's Exhibit #2). The very fact that the State of Ohio saw fit to take action against the Petitioner for his unlicensed activities, after having purportedly informed the Petitioner that no securities license was needed by him, strains the credulity of the Petitioner's testimony in this regard.[1]

Moreover, as to the Petitioner assertion that his "employer," CabTel, was responsible to register the funds at issue (but didn't), we need look no further than the Cease and Desist Order against the Petitioner to fully understand the nature of the relationship between the Petitioner and his "employer."

[1] It should be noted that the Cease and Desist Order issued by the State of Ohio finds not only that the "funds" marketed and sold by the Petitioner were securities, and as such were required to be registered as securities, but also that the Petitioner was required to have a securities license prior to selling any security in that state. (Respondent's Exhibit #2).

At all times relevant to his unlicensed activities, the Petitioner was in actuality an *officer* of CabTel. (Respondent's Exhibit #2; see also TR Page 10, Lines 1-7). Even assuming that the Petitioner was informed by the Ohio Division of Securities that he needed no securities license to sell the securities at issue as long as CabTel "duly registered the funds," given his position with CabTel, the Petitioner would likely have not only understood his company's accountability regarding the requirement of registration, but as an officer of the corporation, the Petitioner likely would have been privy to whether such registration took place, if not directly responsible for ensuring that it did.

Notwithstanding this, in the instant case, a review of the record reveals that the Administrative Law Judge's findings are based substantially upon testimony given by the Petitioner at hearing. As is the case with determinations regarding the weight to be given to the evidence, the credibility of witnesses is a matter that is solely within the prefecture of the Administrative Law Judge. F.U.S.A., FTP-NEA v. Hillsborough Comm. Coll., 440 So. 2d 593, 595 (Fla. 1st DCA 1983). Where, as here, the Administrative Law Judge has placed importance on the testimony of a single witness, the judge is entitled to rely on such testimony, even when there may be competent, substantial evidence to support a contrary view. Stinson v. Winn, 938 So. 2d 554, 555 (Fla. 1st DCA 2006). Accordingly, the Findings of Fact contained in Paragraph 4 of the Recommended Order will not be disturbed. The Petitioner's fourth exception, therefore, is REJECTED.

5. The Respondent's fifth exception pertains to Findings of Fact in Paragraph 4 of the Recommended Order, and is directed to the credibility of the Petitioner's testimony at hearing. The credibility of witnesses is a matter that is solely within the prefecture of the Administrative Law Judge. F.U.S.A., FTP-NEA v. Hillsborough Comm. Coll., 440 So. 2d 593, 595 (Fla. 1st DCA 1983). The Respondent's fifth exception, therefore, is REJECTED.

6. The Respondent's sixth exception appears to also pertain to the credibility the Administrative Law Judge placed on the Petitioner's testimony at hearing. Because the credibility of witnesses is a determination to be made by the trier of fact, the Respondent's sixth exception is REJECTED. F.U.S.A., FTP-NEA v. Hillsborough Comm. Coll., 440 So. 2d 593, 595 (Fla. 1st DCA 1983).

7. The Respondent's seventh exception is directed to the Administrative Law Judge's finding that the Petitioner was not responsible for registering the securities sold by him in Ohio. Again, the credibility of the Petitioner's assertion that he was unaware of whether his "employer" CabTel had duly registered the securities he sold is strained when viewed in the light of his status as an officer of CabTel. (Respondent's Exhibit #2). However, the Administrative Law Judge has found the Petitioner to be credible in this regard. The Respondent's seventh exception, therefore, is REJECTED. F.U.S.A., FTP-NEA v. Hillsborough Comm. Coll., 440 So. 2d 593, 595 (Fla. 1st DCA 1983).

8. The Respondent's eighth exception concerns the Finding of Fact contained in Paragraph 8 of the Recommended Order. Specifically, the Respondent excepts to the finding that a "Cease and Desist Order was entered on February 23, 2007" against the Petitioner in Ohio. A thorough review of the record can only support a finding that the Cease and Desist Order was actually entered against the Petitioner in Ohio on February 27, 2003. (Respondent's Exhibit #2). It is presumed, therefore, that the date associated with the Cease and Desist Order in Paragraph 8 of the Recommended Order is a scrivener's error, and the Respondent's eighth exception is ACCEPTED.

The date February 23, 2007 is, therefore, rejected, and substituted therefor is the correct date of February 27, 2003.

9. The Respondent's ninth exception is directed to Paragraph 9 of the Recommended Order, and takes the form of an assertion that the reason for the Petitioner's failure to notify the

Department of his 2005 Ohio Consent Order revoking his Ohio insurance license is irrelevant, and immaterial to this case.[2] While this may be true, the Administrative Law Judge's Finding of Fact that "There is no evidence in the record as to why Petitioner failed to notify the state of Florida about the Ohio Consent Order" is supported by competent, substantial evidence (i.e., the lack of evidence), and as such shall remain undisturbed. Brogan v. Carter, 671 So. 2d at 823. Accordingly, the Respondent's ninth exception is REJECTED.

10. The Respondent's tenth exception concerns Paragraph 10 of the Recommended Order, but it is unclear as to precisely what the Respondent excepts. A thorough review of the record evidences that the Findings of Fact contained in Paragraph 10 of the Recommended Order are supported by competent, substantial evidence. Therefore, to the extent that the Respondent excepts to these findings, the Respondent's tenth exception is REJECTED.

11. The Respondent's eleventh exception again pertains to the finding that the Petitioner has been continually licensed to sell insurance for a period of time in Florida. To clarify a point, a resident agent of Ohio who lives in that state would be, if otherwise qualified, eligible for licensure in Florida as a non-resident agent. Once an Ohio agent's residence changes to Florida, however, it is no longer appropriate for that agent to hold Florida "non-resident" licensee status. Instead, once the agent becomes a Florida resident, the only appropriate licensure in Florida would be as a Florida resident licensee. With this in mind, the first sentence of Paragraph 11 of the Recommended Order that "As a result of losing his Ohio license, Petitioner was no longer eligible for a non-resident license in Florida" is factually accurate, because the revocation of the Petitioner's Ohio license rendered him unfit and untrustworthy in the eyes of the Department, and ineligible to hold a Florida license.

[2] Although the Respondent's exception cites Paragraph 8, Page 6 of the Recommended Order, the language excepted to is found in Paragraph 9, Page 5 of the Recommended Order.

Specifically, however, the Respondent excepts to the following language in the second sentence of Paragraph 11 regarding the Petitioner's license status as a Florida agent *after* losing his Ohio license: "[the Petitioner] therefore applied for a resident license so he could continue to sell insurance in this state as he had been doing since 2000." Although the record does not reveal precisely when he changed residence, it is clear that sometime between 2003 (when he was subject to a Consent Order in Florida as a Non-resident licensee) and 2006 (when he applied for licensure as a resident of Florida), the Petitioner moved from Ohio to Florida. When he made this change of residence, the Petitioner's Non-resident license in Florida would have been invalid, and he would have been required to apply for licensure as a resident agent. A thorough review of the record supports only the finding that the Petitioner held dual licensure in Florida and in Ohio until the fall of 2005. In September, 2005, the Florida Department of Financial Services notified the Petitioner that his Non-resident license in Florida was no longer valid. (Respondent's Exhibit #2; TR Page 16, Lines 15-20). Subsequent to this, the Petitioner's October, 2006 application for licensure as a resident agent in Florida was denied. (Respondent's Exhibit #1; see also TR Page 13, Lines 24-25, Page 14, Lines 1-3).

Therefore, it is concluded that the Administrative Law Judge's finding that the Petitioner "... applied for a resident license so he could continue to sell insurance in this state as he had been doing since 2000" is not supported by competent and substantial evidence. The Respondent's eleventh exception is ACCEPTED to the extent it requires clarification of the Petitioner's license status during the years 2005 to present. Accordingly, the second sentence of Paragraph 11 of the Recommended Order is rejected, and the following language substituted therefor:

> The Department notified the Petitioner that his Florida Non-resident license was no longer valid in September, 2005. A year later, in October, 2006, the Petitioner applied for licensure in Florida as a resident agent, and was denied.

The above language is as or more reasonable than the language it replaces.

12. The Respondent's twelfth exception does not appear to be directed toward any specific paragraph, nor does it reference particular language of the Recommended Order. Instead, the Respondent simply references "All of this factual information ..." Therefore, it is presumed that the Respondent's twelfth exception pertains to the Findings of Fact previously addressed in response to the Respondent's eleventh exception, above. The Respondent's twelfth exception is, therefore, REJECTED.

13. The Respondent's thirteenth exception is in the form of a statement of fact that appears to be undisputed, and fails to cite to a specific paragraph or page of the Recommended Order at issue. Section 120.57, Florida Statutes, provides in relevant part:

> "... an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record."

§ 120.57(1)(k), Fla. Stat. (2007).

In consideration of the above, no ruling is needed or justified in response to the Respondent's thirteenth exception.

14. The Respondent's fourteenth exception is directed to the Findings of Fact contained in Paragraph 13 of the Recommended Order relating to the credibility of the Petitioner's testimony. Again, the consideration that an Administrative Law Judge gives to credibility of the witnesses is solely within his prefecture. F.U.S.A., FTP-NEA v. Hillsborough Comm. Coll., 440 So. 2d at 595. Where, as here, the Administrative Law Judge has placed importance on the testimony of a single witness, the judge is entitled to rely on such testimony, even when there may be competent, substantial evidence to support a contrary view. Stinson v. Winn, 938 So. 2d at 555. The Respondent's fourteenth

exception is, therefore, REJECTED to the extent that it concerns the weight and/or credibility of the evidence. As a conclusion of law, however, this paragraph is addressed more specifically in Item 20, *infra*.

15. The Respondent's fifteenth exception concerns the Administrative Law Judge's Finding of Fact in Paragraph 15 of the Recommended Order that there exists "no credible evidence in this proceeding that Petitioner's actions in Ohio and/or Florida indicate a lack of fitness or trustworthiness." As the Respondent correctly notes, the Petitioner himself has admitted selling unregistered securities without the appropriate securities license. Orders from the State of Ohio were admitted into evidence further outlining the Petitioner's unlicensed conduct in that state. (Respondent's Exhibit #2). The Respondent's exception is well-founded in this regard.

While there is no discussion by the Administrative Law Judge in his Recommended Order as to precisely why he considers the Ohio orders to be less than credible, his determination is, nevertheless, as to the weight of the evidence. The weight given to the evidence is the province of the Administrative Law Judge and cannot be disturbed by the agency unless the finding is not supported by competent, substantial evidence. Brogan v. Carter, 671 So. 2d 822 (Fla. 1st DCA 1996); see also §120.57(1)(l), Fla. Stat. (2006). Therefore, to the extent that the Respondent's fifteenth exception concerns a determination or finding of fact by the Administrative Law Judge in relation to the evidence presented, the Respondent's exception is REJECTED. As a conclusion of law, however, this paragraph is addressed in Item 20, *infra*.

16. The Respondent's sixteenth exception relates to the Conclusions of Law contained in Paragraph 17 of the Recommended Order, and appears to simply restate the conclusions in that Paragraph with no apparent legal basis for an exception. Accordingly, no ruling is needed or justified in response to the Respondent's sixteenth exception. § 120.57(1)(k), Fla. Stat. (2007).

17. The Respondent's seventeenth exception appears to again recite the Conclusions of Law, this time those Conclusions contained in Paragraph 18 of the Recommended Order. The entirety of Paragraph 18 of the Recommended Order is a recitation of the applicable provisions of the Florida Statutes charged in this matter (Sections 626.611(1), (2), and (7); Section 626.785(1); and Section 626.831(1), Florida Statutes) without further discussion or application by the Administrative Law Judge of the facts to the law. Because it is presumed that the Respondent does not except to the statutes charged by the Department in this matter, and no other legal basis for an exception has been asserted with respect to Paragraph 18, no ruling appears to be needed or justified in response to the Respondent's seventeenth exception. § 120.57(1)(k), Fla. Stat. (2007).

18. The Respondent's eighteenth exception relates to the Conclusions of Law contained in Paragraph 19 of the Recommended Order. Although he has not specifically cited Section 626.611(7) in Paragraph 19, the Administrative Law Judge has applied his Findings of Fact to precisely this statute in concluding "There is no factual basis in the instant case on which to equate Petitioner's actions with untrustworthiness as is used in the aforementioned statutes. Respondent did not show any ill intent on the part of Petitioner, nor did Respondent present any testimony to even insinuate that Petitioner's actions were somehow done knowingly. These statutes require a showing of untrustworthiness based on a person's actions, not simply based on the agency's whim."

While the Administrative Law Judge is correct in stating that a showing of untrustworthiness under Section 626.611(7) must be based on some action (or inaction) on the part of the agent, his application of the facts to the law is misguided. The pertinent statute, Section 626.611(7), Florida Statutes, reads as follows:

> "The department shall deny an application for, suspend, revoke, or refuse to renew or continue the license or appointment of any applicant, agent, title agency, adjuster, customer representative, services representative, or managing general agent, and it shall

suspend or revoke the eligibility to hold a license or appointment of any such person, if it finds that as to the applicant, licensee, or appointee any one or more of the following applicable grounds exist:

* * *

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

Section 626.611(7), Florida Statutes does not require a showing of "willfulness" to prove a violation. In the Matter of Jennifer Sophia D'Alessandro, Case No. 84221-06-AG, DOAH Case No. 06-0754PL, Final Order March 28, 2007 (*Final Order holding that willfulness is not a necessary element of 626.611(7), Florida Statutes*). One of the first rules of statutory construction is that the plain meaning of a statute is controlling. Jackson County Hosp. Corp. v. Aldrich, 835 So. 2d 318, 329 (Fla. 1st DCA 2002). Moreover, the Florida Supreme Court has held that, where the legislature has used a term in one section of a statute but omitted the term in another section, the court will not imply the term into the section where it was omitted. Leisure Resorts, Inc. v. Frank J. Rooney, Inc., 654 So. 2d 911, 914 (Fla. 1995). The language of Section 626.611(7) is clear and unambiguous. Within Section 626.611, subsections (4),(5),(6), and (13) each contain some express requirement of bad intent or willfulness. Noticeably absent from Section 626.611(7) is that same requirement. The requirement of "willfulness," therefore, is not applicable to Section 626.611(7). Moreover, the phrase "lack of fitness" does not, by its terms, contemplate an element of willfulness. The Administrative Law Judge's application of a *willfulness* or *knowingly* requirement under Section 626.611(7) is inconsistent with the plain meaning of the statutory language, as well as the Department's interpretation of that statute, which is entitled to deference. Pub. Employees Relations Comm'n. v. Dade County Police Benevolent Ass'n., 467 So. 2d 987, 988 (Fla. 1985); In the Matter of Jennifer Sophia D'Alessandro, Case No. 84221-06-AG, DOAH Case No. 06-0754PL, Final Order March 28, 2007.

As a licensed insurance agent in Ohio for more than twenty years prior to the time he began selling unregistered securities in that state, the Petitioner knew or reasonably should have known that the sale of securities, just as is the case with the sale of insurance (if not more so), requires proper licensure. As the Respondent appropriately points out, the likelihood that the Petitioner would have believed that he needed no license to sell securities in Ohio is tantamount the Petitioner believing that he didn't need a license to sell insurance for Allstate, as long as Allstate had been approved to sell insurance.

Moreover, as a licensed insurance agent for decades, the Petitioner should have been able to exercise the reasonable skill and diligence required in determining whether the products he was soliciting were in violation of the law. The Petitioner used no skill or diligence in attempting to determine whether the securities he was selling were in violation of the law, a fact which should have been easy for the Petitioner to determine as an officer of the company offering these securities.[3] By selling securities without the appropriate securities license, the Petitioner demonstrated a clear lack of fitness and trustworthiness. By selling securities that the Petitioner was aware, or should have been aware, were required to be registered without undertaking any due diligence to determine if those

[3] Although not addressed by the Respondent, it should be noted that the only place in the record where any evidence exists regarding the Petitioner's assertion that he had been duly authorized to sell several other securities funds prior to the securities at issue in the Ohio Cease and Desist Order (purportedly Cable Fund(s) 25, 26, 27, 28, and 29) is the Petitioner's own testimony. (TR Page 10, Lines 7-15). While the Petitioner admitted that these were "registered securities," there is no evidence in the record to suggest that the Petitioner was ever licensed to sell securities in Ohio. (See Cease and Desist Order, Respondent's Exhibit #2). Viewing this fact in light of the State of Ohio's Cease and Desist Order which plainly states that these types of limited partnership interests were securities, that the transactions were "sales" as that term is defined under the law, that because of these sales the Petitioner was considered a "dealer" in securities, and that no person may act as a dealer in Ohio without a securities license, it would stand to reason that there may have been unlicensed activity on the part of the Petitioner in relation to his purported sales of Cable Funds 25 through 29 as well.

securities were, in fact, appropriately registered as such, the Petitioner demonstrated a clear lack of fitness and trustworthiness.

The Respondent's eighteenth exception is, therefore, ACCEPTED. Accordingly, Paragraph 19 of the Recommended Order is REJECTED in its entirety, and the following paragraph is substituted therefor:

> As a licensed insurance agent in Ohio for more than twenty years prior to the time he began selling unregistered securities in that state, the Petitioner knew or reasonably should have known that the sale of securities, as is the case with the sale of insurance, requires proper licensure. Moreover, the Petitioner has admitted that he was aware the investments he sold were classified as securities, and as such were required to be registered prior to sale. As a licensed insurance agent for decades, the Petitioner should have been able to exercise the reasonable skill and diligence required in determining whether the products he was soliciting were in violation of the law. The Petitioner used no skill or diligence in attempting to determine whether the securities he was selling were in violation of the law, a fact which should have been simple for the Petitioner to determine as an officer of the company offering these securities. The Petitioner proceeded on not one, but on at least 15 separate instances, to sell thousands of dollars of unregistered securities to unwitting investors who, presumably, believed that they were purchasing legitimate investments from a licensed professional, when in fact each sale was in violation of the law. By selling securities without the appropriate securities license, and by selling securities that he was aware were required to be registered without undertaking any due diligence to determine if those securities were, in fact, appropriately registered as such, the Petitioner demonstrated a clear lack of fitness and trustworthiness.

The above modification to the Conclusion of Law in Paragraph 19 is as or more reasonable than the language it replaces.

19. The Respondent's nineteenth exception concerns the Conclusion of Law found in Paragraph 20 of the Recommended Order relating to how the Department should be allowed to interpret "untrustworthiness" under its own statutes in this matter.

In particular, the Administrative Law Judge refuses to apply the keystone case of Natelson v. Department of Insurance, 454 So. 2d 31 (Fla. 1st DCA 1984) to the instant case, implying instead that Natelson only "refers to intentional, criminal actions on the part of the applicant." This logic fails to

recognize that the Natelson case, while its facts may not be precisely analogous to the instant case, actually stands for the proposition that an agency (not just a criminal justice agency) is afforded a wide discretion in the interpretation of its own statutes. As the Department has consistently held, an insurance agent is not required to exhibit criminal behavior, or even intentional acts, to demonstrate a showing of unfitness or untrustworthiness. In the Matter of Jennifer Sophia D'Alessandro, Case No. 84221-06-AG, DOAH Case No. 06-0754PL, Final Order March 28, 2007 (*Final Order holding that bad intent or willfulness is not a necessary element of 626.611(7), Florida Statutes*); see also In the Matter of Jack Alexander, Jr., Case No. 86944-06-AG, DOAH Case No. 06-4202PL, Final Order September 6, 2007 (*Final Order holding that willfulness is not a necessary element of 626.611(7)*).

Further, the Administrative Law Judge cites Werner v. State of Florida, Department of Insurance and Treasurer, 689 So. 2d 1211 (Fla. 1st DCA 1997) in an attempt to distinguish the conduct in the instant case from that which may be considered *unfitness* or *untrustworthiness*. Citing Werner, the Administrative Law Judge asserts that a finding of lack of fitness or trustworthiness "contemplates more than a solitary lapse." Read more carefully, the Werner case does not stand for the proposition that a single, solitary lapse in judgment is insufficient to find that an agent has demonstrated a lack of fitness or trustworthiness under Section 626.611(7), Florida Statutes. Instead, the Werner case clearly stands for the proposition that a single, solitary lapse in judgment is insufficient to prove *fraudulent or dishonest practices* under Section 626.611(9), Florida Statutes. See Werner at 1214 (*While it has been held that a single act or a single criminal conviction may demonstrate "lack of fitness or trustworthiness" within the meaning of 626.611(7) ...the statutory term "practices" in 626.611(9) contemplates more than a solitary lapse).*

In the instant case, the record reveals that the Petitioner has exhibited multiple instances of highly questionable judgment. Moreover, it is clear that the Petitioner evidences a pattern of

untrustworthiness. For example, the Petitioner has admitted he was aware that the "funds" he sold were classified as securities. As a licensed insurance professional for decades in Ohio, the Petitioner should have known that the sale of securities in that state (or any other) required proper licensure, and should have taken the steps necessary to ensure that he obtained proper licensure before he sold any security, but has failed to do so. Similarly, the Petitioner admitted that he was aware that all of the securities at issue were required to be registered before they could be sold. Yet the Petitioner failed to exercise any skill or diligence in ensuring that these securities were duly registered as such. Further, without a license, the Petitioner proceeded on not one, but on at least 15 separate instances, to sell thousands of dollars of unregistered securities to unwitting investors who, presumably, believed that they were purchasing legitimate investments from a licensed professional, when in fact each sale was in violation of the law. Each of these instances is an example of a fundamental lack of judgment. It is undisputed that the Petitioner failed to disclose the truth about his Ohio regulatory issues to Florida, and subsequently also failed to disclose his Florida regulatory issues to Ohio, ignoring the fact that he was required to do so by law in each instance. At best, the Petitioner's conduct can be considered unfit or untrustworthy. At worst, it could be considered fraudulent behavior.

The Respondent's nineteenth exception is, therefore, ACCEPTED. The Conclusion of Law contained in Paragraph 20 of the Recommended Order is rejected in its entirety, and the following is substituted therefor:

> Moreover, in addition to his multiple instances of questionable judgment, it is clear that the Petitioner has demonstrated a lack of trustworthiness. For example, it is now undisputed that the Petitioner failed to disclose the truth about his Ohio regulatory issues to Florida, and subsequently also failed to disclose his Florida regulatory issues to Ohio, ignoring the fact that he was required to do so by law in each instance. At best, the Petitioner's conduct in this regard can be considered unfit or untrustworthy.

The above modifications to the Conclusions of Law are as or more reasonable than that which they replace.

20. The Respondent's twentieth exception pertains to the Conclusion of Law contained in Paragraph 21 of the Recommended Order. The Respondent excepts to the Administrative Law Judge's conclusion that the Petitioner has met his burden to prove that he meets the requirements for licensure in Florida.

Given that a demonstrated lack of fitness and trustworthiness under Section 626.611(7), Florida Statutes, has been shown in the instant case, the Respondent's twentieth exception is ACCEPTED. The entirety of Paragraph 21 of the Conclusions of Law is, therefore, rejected. The following paragraph is substituted in its place:

> The Petitioner's actions of selling securities without a license, selling securities he knew or reasonably should have known were unregistered and in violation of the law, failing to disclose to Florida the disciplinary action he had faced in Ohio, and failing to disclose to Ohio the disciplinary action he faced in Florida, each constitute evidence of unfit and untrustworthy behavior. The Petitioner has, therefore, failed to meet his burden of proving that he is entitled to licensure as an insurance agent in Florida.

The above modification to the Conclusion of Law in Paragraph 21 is as or more reasonable than the language it replaces.

Additionally, in Paragraph 13 of the Recommended Order, the Administrative Law Judge states that the Petitioner's improper sale of securities in Ohio was "unintentional, *excusable*, and absent any intent to deceive or mislead." The word "excusable," as used in this Finding of Fact, is actually a Conclusion of Law. Because the Final Order in this matter is ultimately issued by the Department, not the Administrative Law Judge, it is the Department's jurisdiction to determine whether the Petitioner's conduct is "excusable" as the term was used in the Recommended Order. Correctly applying the law to the Findings of Fact, it is clear that the Petitioner's conduct evidences a lack of fitness or

trustworthiness under Section 626.611(7), Florida Statutes. Given this, it is patently inappropriate to state that the Petitioner's conduct, even if unintentional, is *excusable*. Accordingly, the word "excusable" as used in Paragraph 13 of the Recommended Order is REJECTED.

Similarly, the language contained in Paragraph 14 of the Findings of Fact which reads "There has been no showing of untrustworthiness by the evidence presented at final hearing" is also clearly a Conclusion of Law, not a Finding of Fact, and correctly applying the provisions of Section 626.611(7), as addressed herein, it is REJECTED.

In Paragraph 15 of the Findings of Fact contained in the Recommended Order the Administrative Law Judge has likewise concluded an issue as a matter of law. The Administrative Law Judge finds "There is no credible evidence in this proceeding that Petitioner's actions in Ohio and/or Florida indicate a lack of trustworthiness." Correctly applying the provisions of Section 626.611(7), which require no showing of bad intent, willfulness, criminal conduct, or pattern, it is evident that the Petitioner sold unregistered securities, did so without a license, and was less than honest with both Ohio and Florida regulators. His conduct is demonstrably untrustworthy. For that reason, Paragraph 15 of the Recommended Order (which is in actuality a Conclusion of Law, even if not labeled such) is REJECTED, and the following substituted therefor:

> The evidence does not prove clearly and convincingly that the Petitioner acted with intent, but does evidence negligence or carelessness on the part of the Petitioner.

The above modification to Paragraph 15 is as or more reasonable than the language it replaces.

21. The Respondent's exceptions twenty-one through twenty-three appear to be nothing more than a recitation of opinion and fail to cite to a specific paragraph or page of the Recommended Order at issue, or any legal basis for an exception. Accordingly, no rulings are needed or justified in

response to the Respondent's twenty-first through twenty-third exceptions. § 120.57(1)(k), Fla. Stat. (2007).

The above modifications to the Conclusions of Law are made without disturbing the Administrative Law Judge's considerations of credibility, motivation, and purpose of the witness' testimony at hearing. The substituted and modified Conclusions of Law necessarily have an impact on the Administrative Law Judge's application of the law to the Findings of Fact in this case. The relevant circumstances set forth in the Findings of Fact support the conclusion, by clear and convincing evidence, that the Respondent has demonstrated a lack of fitness or trustworthiness to engage in the business of insurance. These substituted and modified Conclusions of Law are, for that reason, as or more reasonable than the original Conclusions of Law.

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

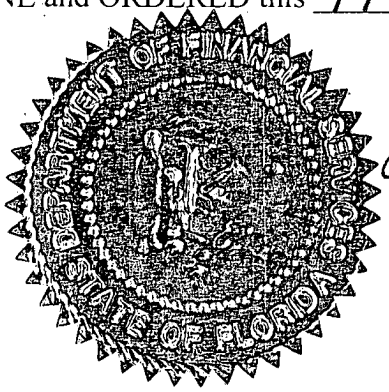
1. As so modified herein, the Administrative Law Judge's Findings of Fact are adopted as the Department's Findings of Fact.

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

3. In light of the modifications to the Conclusions of Law, the Administrative Law Judge's recommendation that the Department enter a Final Order granting the Petitioner a license as a resident life, variable annuity and health agent is rejected as being an inappropriate disposition of this case. The relevant circumstances set forth in the Findings of Fact support the inference, by clear and convincing evidence, that the Petitioner has a demonstrated lack of fitness and trustworthiness to engage in the business of insurance in this state.

ACCORDINGLY, IT IS ORDERED that the license application denial of William J. Burkett be upheld, and that the Respondent's application for licensure is hereby DENIED.

DONE and ORDERED this 17th day of December, 2007.



KAREN CHANDLER
Deputy Chief Financial Officer

NOTICE OF RIGHTS

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

Copies furnished to:

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HON. BRUCE MCKIBBEN
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