

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL)
SERVICES,)
)
Petitioner,)
)
vs.) Case No. 08-5444PL
)
HENRY SYMEAO DEMAYO,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case before Larry J. Sartin, an Administrative Law Judge of the Division of Administrative Hearings, on March 18 and 19, 2009, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Robert Alan Fox, Senior Attorney
Division of Legal Services
Department of Financial Services
612 Larson Building
200 East Gaines Street
Tallahassee, Florida 32399-0333

For Respondent: Sophie Demayo, Esquire
9100 Southwest 115th Terrace
Miami, Florida 33176

STATEMENT OF THE ISSUES

The issues in this case are whether Respondent, Henry Symeon Demayo, committed the offenses alleged in an Administrative Complaint, as amended, issued by Petitioner, the

Department of Financial Services and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On or about April 21, 2004, Petitioner issued a seven-count Administrative Complaint, Petitioner's Case No. 74314-04-AG, alleging that Henry Symeon Demayo had violated certain statutory provisions governing the conduct of Florida insurance agents. Respondent, through counsel, filed an Election of Rights form with Petitioner requesting a formal hearing to contest the allegations of fact contained in the Administrative Complaint.

A copy of the Administrative Complaint and Respondent's Election of Rights form were filed by Petitioner with the Division of Administrative Hearings on October 24, 2008. The matter was designated DOAH Case No. 08-5444PL and was assigned to the undersigned.

The final hearing was initially scheduled for January 13, 2009, by Notice of Hearing by Video Teleconference entered November 14, 2008. A request by Respondent to reschedule the hearing was granted by Order entered January 14, 2009. The final hearing was rescheduled to be heard on March 18 and 19, 2009, again by video teleconference.

On December 12, 2008, Petitioner filed Department of Financial Services' Motion to Amend Administrative Complaint. That Motion was granted by an Order entered December 22, 2008.

The Administrative Complaint, as amended, will be referred to in this case as the Administrative Complaint.

Although the final hearing had been scheduled to be conducted by video teleconference between Respondent's county of residence, Miami-Dade County, and Tallahassee, the parties and all witnesses appeared at the Tallahassee, Florida hearing location. On the first day of the hearing, only the court reporter appeared from Miami. On the second day of the hearing, all participants in the hearing appeared in Tallahassee.

At the final hearing, Petitioner presented the testimony of Carolyn M. Daniels and Sean Fisher as part of its case-in-chief and in rebuttal to Respondent's case. Petitioner also presented the testimony of Thomas Abel by deposition (Petitioner's Exhibit 11). Respondent testified on his own behalf. Petitioner also had admitted Petitioner's Exhibits numbered 1, pages 1 through 2, 12 through 17, 19 through 47, 49 through 86 of 2, 4 through 7, 8 through 9, 11 through 18, 18a, 19 through 20, and 22 through 23. A ruling on the admissibility of page 18 of Petitioner's Exhibit 2 and Petitioner's Exhibit 21 was reserved. Respondent had Respondent's Exhibit 1 admitted.

Page 18 of Petitioner's Exhibit 2 is hereby rejected because it was not properly identified. At one point during his deposition testimony, Mr. Abel indicated that page 18 was "a spreadsheet that I did on the laptop of the various policies

that I requested and looked at." Page 20, lines 7-9, Petitioner's Exhibit 11. Mr. Abel later in the deposition was asked "I'll ask you, do you recognize that document [page 18]?" to which he replied "I do not because I have worked off the spreadsheet." Page 27, lines 17-20, Petitioner's Exhibit 11.

Petitioner's Exhibit 21, to the extent relevant, is admitted.

At the commencement of the hearing, Petitioner dismissed Count VII of the Administrative Complaint.

The two-volume Transcript of the final hearing was filed on April 15, 2009. By Notice of Filing Transcript issued the same day, the parties were informed that their proposed recommended orders were due on or before May 15, 2009. On April 30, 2009, Respondent filed a Motion for Additional Time to Submit Report and Request to Share Transcript. Additional time was requested due to the medical needs of counsel for Respondent. Petitioner filed a response to the Motion indicating it had no objection, but requesting that a new date be set for the filing of post-hearing submittals. By Order entered May 6, 2009, counsel for Respondent was ordered to provide information from her treating physician on or before May 22, 2009, indicating when she could return to work. Respondent filed a response to the May 6, 2009, Order on May 22, 2009. It appearing that Respondent had not served a copy of the response on Petitioner, a Notice of Ex-

Parte Communication and Establishing Date for Filing Proposed Recommended Orders was entered on June 1, 2009. The parties were given until June 30, 2009, to file proposed recommended orders.

On June 30, 2009, Respondent filed a Motion for Extension of Time to File Report and Proposed Order. Petitioner filed a response in opposition to the requested eight-day extension. By Order entered July 1, 2009, the Respondent's second requested extension of time was granted.

Petitioner filed a Proposed Recommended Order on July 8, 2009. That submittal was not docketed until July 9, 2009, the date that Respondent filed a Report and Proposed Order. Both post-hearing submittals have been fully considered in rendering this Recommended Order.

Petitioner has only addressed Counts I, III, and IV in its Proposed Recommended Order and has only requested a recommendation that Respondent be found to have violated those counts. Petitioner has also only addressed part of the facts alleged in the Administrative Complaint in support of Counts I, III, and IV. It is, therefore, assumed that Petitioner has abandoned its prosecution of Counts II, V, and VI, in addition to its dismissal of Count VII, and the facts alleged in the Administrative Complaint in support of the remaining counts not addressed in Petitioner's Recommended Order.

On June 26, 2009, Petitioner filed Department of Financial Services' Motion to Reopen the Record for the Limited Purpose of Completing the Monthly Report for the Third Quarter of 2007. That Motion, which Respondent has not responded to, is hereby granted.

The events at issue in this case were alleged to have taken place between 1999 and 2003. All references to the Florida Statutes will be to the codification applicable at the time the event at issue took place unless otherwise noted.

FINDINGS OF FACT

A. The Parties.

1. Petitioner, the Department of Financial Services (hereinafter referred to as the "Department"), is the agency of the State of Florida charged with the responsibility for, among other things, the investigation and prosecution of complaints against individuals licensed to conduct insurance business in Florida. Ch. 626, Fla. Stat.

2. Respondent Henry Symeon Demayo is currently and was at the times relevant, licensed in Florida as a surplus lines agent (01-20), general lines agent (02-20), life and health agent (02-18), and health agent (02-40).

3. Mr. Demayo's license number is A065749.

4. At all relevant times, Mr. Demayo is and was at the times relevant, "self-appointed" as to his surplus lines

license. Mr. Demayo was the president of Brokerage Insurance Group Corp., a insurance agency licensed since December 13, 2006.

B. Florida Surplus Lines Office Reviews

5. On February 3, 2003, the Florida Surplus Lines Service Office (hereinafter referred to as the "FSLSO"), through its agent, Thomas Abel, conducted a "no business review" of Mr. Demayo's surplus lines business. Mr. Abel requested and received a total of 50 business files from Mr. Demayo, which he reviewed.

6. As a part of his review, Mr. Abel scanned a number of documents from the files provided to him by Mr. Demayo (pages 19 through 42 of Petitioner's Exhibit 2). Mr. Abel also prepared a spread-sheet, pages 16 and 17 of Petitioner's Exhibit 2, summarizing his findings, and an FSLSO Compliance Review Summary (pages 14 and 15 of Petitioner's Exhibit 2).

7. On April 15, 2003, Mr. Abel returned to Mr. Demayo's business to conduct a "secondary review." Again, Mr. Abel scanned documents from Mr. Demayo's files (pages 49 through 63 of Petitioner's Exhibit 2), prepared a spread-sheet (page 48 of Petitioner's Exhibit 2), and an FSLSO Compliance Review Summary (pages 43 through 47 of Petitioner's Exhibit 2).

8. As a result of Mr. Abel's findings, the Department issued the Administrative Complaint at issue in this case.

9. At some point during the reviews, Mr. Abel suggested to Mr. Demayo that he had failed to properly report insurance transactions which are the subject of some of the charges in the Administrative Complaint. While not compelled to do so, Mr. Demayo followed Mr. Abel's advice and reported most, if not all, those transactions to FLSO, beginning in 2003. Mr. Demayo also paid surplus lines tax, discussed, infra, on some of the late reported insurance transactions.

C. Count I; Failure to Remit Surplus Lines Tax.

10. Section 626.932, Florida Statutes, requires that surplus lines agents collect a tax equal to five percent of the gross premium of all insurance premiums charged for the sale of surplus lines insurance (hereinafter referred to as the "Tax") which has a Florida connection. The Tax is required to be remitted by surplus lines agents to the FLSO.

11. Surplus lines insurance on risks or exposures with no connection with the State of Florida are not subject to the Tax. As relevant to this matter, surplus lines insurance on, or with respect to, vessels, cargo, or aircraft written under Section 626.917, Florida Statutes (essentially commercial marine and aircraft surplus lines), is exempt from the Tax.

12. The Department alleged in Count I of the Administrative Complaint that Mr. Demayo sold three separate surplus lines insurance policies for which Tax was due that he

failed to remit. In its Proposed Recommended Order, the Department has conceded that Mr. Demayo was not liable for Tax on two of those policies, leaving only one policy at issue.

13. The policy which remains at issue is a policy sold to Steiner Day Spa Group (hereinafter referred to as "Steiner"), policy number 6476583, covering the period 10/31/2001 to 10/31/2002 (hereinafter referred to as the "Steiner Spa Policy").

14. Based upon documents provided to Mr. Abel by Mr. Demayo, the Steiner Spa Policy was placed with Lexington Insurance Company, a surplus lines insurer.

15. In a "FAX SHEET" dated October 29, 2001, also provided by Mr. Demayo to Mr. Abel, which was sent from Brokerage Insurance Group to "Southeastern Risk Specialists," the following is stated concerning payment for the Steiner Spa Policy:

I will bill \$54,322.42, distributed as follows:

\$51,555.	Premium
35.	Fee.
2,577.75	Tax
154.67	Service Fee

We are to handle the filings

16. Based upon another document provided by Mr. Demayo to Mr. Able (page 23 of Petitioner's Exhibit 2), Steiner Spa (formerly The Greenhouse Spa), had a location at the Portofino

Bay Hotel, Orlando, Florida, which the Department argues gives the policy a Florida connection.

17. Contrary to his representation in the "FAX SHEET," Mr. Demayo did not remit any Tax to FLSO for the Steiner Spa Policy.

18. According to Mr. Demayo, Steiner had purchased The Greenhouse Spa, including the Orlando location, prior to issuance of the Steiner Spa Policy. The Orlando location was, according to Mr. Demayo, closed before the policy took effect and, therefore, there was not risk insured in Florida.

19. Mr. Demayo did not explain, however, why the list of spa locations included with the Lexington Insurance Company policy included the Orlando location, why there is no mention in any of the documentation concerning the Steiner Spa Policy of the closing of the Orlando location, or, most importantly, why his office informed Southeastern Risk Specialists that Brokerage Insurance Group would be billing \$2,577.75 of Tax for the Steiner Spa Policy. His testimony, summarized in paragraph 18, is therefore rejected as unconvincing.

20. Based upon the foregoing, it is found that Mr. Demayo should have paid Tax for the Steiner Spa Policy.

D. Count III; Failure to File Quarterly Reports.

21. Section 626.931(1), Florida Statutes, requires that surplus lines agents file with the FLSO a quarterly affidavit,

"on forms as prescribed and furnished by the Florida Surplus Lines Service Office, stating that all surplus lines insurance transacted by him or her during such calendar quarter has been submitted to the Florida Surplus Lines Service Office as required."

22. As of May 7, 2003, Mr. Demayo had failed to file a quarterly report/affidavit with the FLSO for the following periods:

- a. October 1999 through December 1999;
- b. January 2000 through March 2000;
- c. October 2000 through December 2000;
- d. January 2001 through March 2001;
- e. July 2001 through September 2001;
- f. April 2002 through June 2002; and
- g. July 2002 through September 2002;

23 Mr. Demayo also failed to timely file a quarterly report/affidavit with FLSO for the following periods:

- a. April through June 2007;
- b. July through September 2007;
- c. October through December 2007; and
- d. January through March 2008.

E. Count IV; Filing False Quarterly Reports and Failing to Remit the Tax.

24. In the Administrative Complaint, the Department alleges that Mr. Demayo filed false quarterly reports for nine different quarters. For some of those reports, the Department also alleged that Mr. Demayo failed to remit Tax. The Department alleged specifically which policies were falsely reported and for which policies, no Tax was remitted (hereinafter collectively referred to as the "Disputed Policies").

25. In its Proposed Recommended Order, the Department has addressed fewer quarterly reports and policies than alleged in the Administrative Complaint. To the extent that reports or policies included in the Administrative Complaint were not addressed in the Proposed Recommended Order, those allegations were not proved.

26. April 1999 through June 1999 Quarter.

a. Mr. Demayo signed a Quarterly Report Affidavit and Tax Return (page 78 of Petitioner's Exhibit 2)(hereinafter referred to as the "Quarterly Report"), for the April 1, 1999, through June 30, 1999, quarter, representing that "no surplus lines business was transacted during the calendar quarter." Consequently, no Tax was paid.

b. On March 11, 2003, Mr. Demayo reported to the FLSO that he had written a surplus lines policy, which was placed with Lloyd's Underwriters at London (hereinafter referred to as "Lloyd's"), for Greater Atlantic Holdings, policy number C35087/99, effective April 8, 1999 (hereinafter referred to as the "Greater Atlantic Policy").

c. The only evidence as to whether Tax was due on the Greater Atlantic Policy came from Mr. Demayo, who testified that Greater Atlantic Holdings was a Bahamian company and that all the risks for the policy, since it was placed with Lloyd's, was located outside Florida. This testimony is credited and, therefore, the transaction was not reportable and no Tax was due.

27. July 1999 through September 1999.

a. Mr. Demayo signed the Quarterly Report (page 79 of Petitioner's Exhibit 2), for the July 1, 1999, through September 30, 1999, quarter, representing that "no surplus lines business was transacted during the calendar quarter." Consequently, no Tax was paid.

b. On March 21, 2003, Mr. Demayo reported to the FLSO that he had written a surplus lines policy, which was placed with Markel International Insurance Company Limited, for Trans-Photo, policy number TE9900, effective August 5, 1999 (hereinafter referred to as the "Tans-Photo Policy").

c. The Department has correctly pointed out that Mr. Demayo's testimony concerning Markel International Insurance Company Limited and other companies with the name "Markel" in them was confusing, at best. Mr. Demayo testified clearly and convincingly, however, that the policy had no connection with Florida and was, therefore, neither a reportable policy or one subject to Tax. The only evidence concerning the nature of the Trans-Photo Policy, provided by Mr. Demayo, was that the policy was for marine cargo with no Florida exposure purchased.

28. April 2000 through June 2000.

a. Mr. Demayo signed the Quarterly Report (page 81 of Petitioner's Exhibit 2), for the April 1, 2000, through June 30, 2000, quarter, representing that "no surplus lines business was transacted during the calendar quarter." No Tax was paid.

b. On February 28, 2003, Mr. Demayo reported to the FLSLSO that he had written a renewal surplus lines policy for Image, which was placed with Lloyd's, policy number C00564/00, effective April 7, 2000 (hereinafter referred to as the "Images Policy").

c. The same date, Mr. Demayo reported to the FLSLSO that he had written a surplus lines policy for Greater Atlantic Holdings, which was placed with American International Specialty Lines Insurance, policy number EX54300046, effective April 14, 2000 (hereinafter referred to as the "Greater Atlantic Renewal

Policy"). Tax on this renewal policy was paid by Mr. Demayo on or about April 30, 2003.

d. Finally, Mr. Demayo received additional premium for a Greater Atlantic Holdings policy, policy number C35087/99, placed with Lloyd's. Additional premium was received twice, one amount effective April 8, 2000, and the other effective April 11, 2000 (hereinafter referred to as "GAH Additional Premium"). These transactions were not reported until March 6, 2003, and March 11, 2003, respectively.

e. Image is a photo concessionaire which places photo imaging equipment on ships, which is used outside of Florida. The evidence failed to prove that the coverage for the Image Policy had any connection with Florida.

e. The only evidence as to whether Tax was due on the Greater Atlantic Policy came from Mr. Demayo, who testified that Greater Atlantic Holdings was a Bahamian company and that all the risks for the policy, since it was placed with Lloyds, was located outside Florida. This testimony is credited. Therefore the Greater Atlantic Renewal Policy and the GAH Additional Premium transactions were not subject to Tax or reporting.

29. July 2000 through September 2000.

a. Mr. Demayo signed the Quarterly Report (page 80 of Petitioner's Exhibit 2), for the July 1, 2000, through September 30, 2000, quarter, representing that "no surplus lines

business was transacted during the calendar quarter" and that zero Tax was paid.

b. On March 11, 2003, Mr. Demayo reported to the FLSO that he had received additional premium for a Greater Atlantic Holdings policy, placed with Lloyd's, policy number C35087/99, effective August 18, 2000 (hereinafter referred to as the "Third GAH Additional Premium").

c. The only evidence as to whether Tax was due on the Third GAH Premium came from Mr. Demayo, who testified that Greater Atlantic Holdings was a Bahamian company and that all the risks for the policy for which the additional premium was paid, since it was placed with Lloyds, was located outside Florida. This testimony is credited. Therefore the Third GAH Additional Premium transaction was not subject to Tax or reporting.

30. April 2001 through June 2001.

a. Mr. Demayo signed the Quarterly Report (page 83 of Petitioner's Exhibit 2), for the April 1, 2001, through June 30, 2001, quarter, representing that "no surplus lines business was transacted during the calendar quarter" and that zero Tax was paid.

b. On February 28, 2003, Mr. Demayo reported to the FLSO that he had placed a renewal policy for Image, placed with

Lloyd's, policy number C00564/01, effective May 11, 2001 (hereinafter referred to as the "Image Renewal Policy").

c. The only evidence as to whether Tax was due on the Image Renewal Policy came from Mr. Demayo, who testified that the Image Renewal Policy was a marine policy with no Florida exposure. This testimony is credited. Therefore the Image Renewal Policy was not subject to Tax or reporting.

31. October 2001 through December 2001.

a. Mr. Demayo signed the Quarterly Report (page 84 of Petitioner's Exhibit 2), for the October 1, 2001, through December 31, 2001, quarter, representing that "no surplus lines business was transacted during the calendar quarter" and that zero Tax was paid.

b. On February 6, 2003, Mr. Demayo reported to the FLSO that he had placed a new business policy for Maritime Telecommunication, placed with Lloyd's, policy number C00606/01, effective November 9, 2001 (hereinafter referred to as the "Maritime Policy").

c. On the same date, Mr. Demayo also reported that he had placed a renewal policy for Image Photo Services, Inc., with American International Specialty Lines Insurance Company, policy number EX54300010, effective November 30, 2001 (hereinafter referred to as the "IPS Renewal Policy"). Tax on the IPS Renewal Policy was paid on or about April 30, 2003.

d. Finally, Mr. Demayo also reported that he had placed a renewal policy for Ocean Images with Lloyd's, policy number 51/2001LP, effective October 19, 2001 (hereinafter referred to as the "Ocean Renewal Policy").

e. The only evidence as to whether Tax was due on the Image Renewal Policy or the Ocean Renewal Policy came from Mr. Demayo, who testified that both were marine policies with no Florida exposure. This testimony is credited. Therefore the Image Renewal Policy and the Ocean Renewal Policy were not subject to Tax or reporting.

32. January 2003 through March 2003.

a. Mr. Demayo signed the Quarterly Report (page 86 of Petitioner's Exhibit 2), for the January 1, 2003, through March 31, 2003, quarter, representing that "no surplus lines business was transacted during the calendar quarter" and that zero Tax was paid.

b. On March 18, 2003, Mr. Demayo reported to the FLSO that he had placed a renewal policy for Image, placed with Lloyd's, policy number C7027/00, effective February 20, 2003 (hereinafter referred to as the "2003 Image Renewal Policy").

c. The only evidence as to whether Tax was due on the 2003 Image Renewal Policy came from Mr. Demayo, who testified that the 2003 Image Renewal Policy was a marine policy with no

Florida exposure. This testimony is credited. Therefore the 2003 Image Renewal Policy was not subject to Tax or reporting.

33. The evidence presented by the Department in support of the allegations of Count IV was circumstantial and indirect. The Department has suggested that the following proposed facts support its position with regard to the April 1999 through June 1999 Quarterly Report, paragraph 35 of the Department's Proposed Recommended Order:

- Respondent filed the policy with FLSLSO [Dept. Ex. No. 2 at 73]
- Respondent did not backout the policy from the FLSLSO system. [Dept. Ex. No. 13].
- If the policy should never have been filed with FLSLSO, as Respondent now asserts, then Respondent would have backed out the policy from the FLSLSO system. Southpoint Pharmacy, 596 So.2d at 109 (an ALJ may make reasonable inferences).
- After all, Respondent has backed out dozens of other policies and additional premium transactions that he filed with FLSLSO, [Depart. Ex. No. 13], including the contemporaneously filed policies identified in Paragraphs 19a, 19d, and 19e of the Amended Complaint. [Dept. Ex. No. 2 at 73, 74]; [Dept. Ex. No. 2 at 73 (Respondent entered new business for Greater Atlantic Holdings (policy number 361261011999) on 3/19/2003 with FLSLSO and backed out of that transaction the very following day (the Department incorrectly charged the Respondent with the backout in ¶ 19b of the Amended Complaint))]; [Dept. Ex. No. 13 at First Quarter 2007 at page 3].

- And Respondent has had nearly six years to back out this policy. [Dept. Ex. No. 2 at 73 (policy filed with FLSO on 3/19/2003)]. Yet, Respondent hasn't done so. [Dept. Ex. No. 13].
- Additionally, Respondent claims that Matt Webster and Lisa French, employees of FLSO, assisted him in backing out policies that he filed in error, such as policies that had no Florida risk. [Tr. At 168, 238-239]. If Matt Webster and Lisa French assisted Respondent, there is a good reason why this policy was not backed out of the FLSO system; the policy was required to be filed with FLSO. Southpointe Pharmacy, 596 So.2d at 109 (an ALJ may make reasonable inferences).

The Department has suggested essentially the same proposed facts support its position with regard to all of the Quarterly Reports at issue in Count IV.

34. The Department's argument that the suggested inferences support the allegations of the Administrative Complaint, is rejected. Mr. Demayo explained why he reported the Disputed Policies: Mr. Able suggested that he do so, and Mr. Demayo, concerned about the consequences of not reporting them, followed Mr. Abel's advice. Mr. Demayo's explanation for why the Disputed Policies were reported to FLSO was a reasonable one and, given the lack of evidence to the contrary, has been credited. Therefore, no inference can reasonably be drawn from the fact that Mr. Demayo reported the Disputed

Policies to FLSO. Without this suggested inference, little is left to support the Department's allegations.

35. Ultimately, while Mr. Demayo's testimony was often self-serving and somewhat misleading, it was not his burden to prove the true nature of the coverage of the Disputed Policies. It was the Department that was required to prove, clearly and convincingly, that the coverage of the Disputed Policies had a connection with Florida. Virtually no such proof was presented by the Department, while Mr. Demayo testified that none of the policies had any connection with Florida. Mr. Demayo offered an explanation of the nature of the coverage of each of the Disputed Policies while the Department offered essentially no direct evidence. The Department failed to prove that the Disputed Policies had any connection with the State of Florida and, therefore, Mr. Demayo was not required to report them in a Quarterly Report or make payment of any Tax on them.

CONCLUSIONS OF LAW

A. Jurisdiction.

36. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2009).

B. The Burden and Standard of Proof.

37. The Department seeks to impose penalties against Mr. Demayo through the Administrative Complaint that include mandatory and discretionary suspension or revocation of his licenses. Therefore, the Department has the burden of proving the specific allegations of fact that support its charges by clear and convincing evidence. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); and Pou v. Department of Insurance and Treasurer, 707 So. 2d 941 (Fla. 3d DCA 1998).

38. What constitutes "clear and convincing" evidence was described by the court in Evans Packing Co. v. Department of Agriculture and Consumer Services, 550 So. 2d 112, 116, n. 5 (Fla. 1st DCA 1989), as follows:

. . . [C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the evidence must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact the firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established. Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

See also In re Graziano, 696 So. 2d 744 (Fla. 1997); In re

Davey, 645 So. 2d 398 (Fla. 1994); and Walker v. Florida Department of Business and Professional Regulation, 705 So. 2d 652 (Fla. 5th DCA 1998)(Sharp, J., dissenting).

C. The Department's Charges.

39. Section 626.935, Florida Statutes (the "Surplus Lines Law"), mandates that the Department revoke or suspend the appointment of a surplus lines agent and all other insurance licenses and appointments if an agent has committed any of a number of acts specified therein.

40. Section 626.611, Florida Statutes, mandates that the Department suspend or revoke the license of any insurance agent if it finds that the agent has committed any of a number of acts specified in that Section.

41. Section 626.621, Florida Statutes, gives the Department the discretion to suspend or revoke the license of any insurance agent if it finds that the agent has committed any of a number of acts specified in that Section.

42. The Administrative Complaint contains seven counts. The allegations of all of those counts, except part of Count I and part of Count III, were either dismissed or not proved by clear and convincingly evidence. Additionally, in its Proposed Recommended Order, the Department has failed to argue that all of the statutory violations alleged in the Administrative Complaint concerning Counts I and III were proved.

43. As to Count I, it is alleged in the Department's Proposed Recommended Order that Mr. Demayo violated the following statutory provisions: Sections 626.611(7) (incorporated into the Surplus Lines Law by Section 626.935(1)(j)); 626.621(2) (incorporated into the Surplus Lines Law by Section 926.935(2)); and 626.935(1)(e) and (i), Florida Statutes.

44. As to Count III, it is alleged in the Department's Proposed Recommended Order that Mr. Demayo violated the following statutory provisions: Sections 626.931(1); 626.611(7) (incorporated into the Surplus Lines Law by Section 626.935(1)(j)); 626.621(2) (incorporated into the Surplus Lines Law by Section 626.935(2)); and 626.935(1)(i), Florida Statutes.

45. Count IV is not addressed because the evidence failed to prove clearly and convincingly that Mr. Demayo committed any of the acts alleged in that count.

D. Count I.

46. Section 626.935, Florida Statutes (see footnote 7 of the Department's Proposed Recommended Order, which is hereby incorporated into this Recommended Order), provides the following:

(1) The department shall . . . suspend, revoke, or refuse to renew the appointment of a surplus lines agent and all other licenses and appointments held by the

licensee under this code, upon any of the following grounds:

. . . .

(d) Failure to make and file his or her quarterly reports when due as required by s. 626.931.

(e) Failure to pay the tax on surplus lines premiums, as provided for in this Surplus Lines Law.

. . . .

(i) Violation of this Surplus Lines Law.

(j) For any other applicable cause for which the license of a general lines agent could be suspended, revoked, or refused under s. 626.611.

(2) The department may, in its discretion, deny an application for, suspend, revoke, or refuse to renew the license or appointment of any surplus lines agent upon any applicable ground for which a general lines agent's license could be suspended, revoked, or refused under s. 626.621.

47. Section 626.611, Florida Statutes, provides, in pertinent part, the following:

The department shall . . . suspend, revoke, or refuse to renew or continue the license or appointment of any applicant, agent, title agency, adjuster, customer representative, service 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.

. . . .

48. Section 626.621(2), Florida Statutes, provides:

The department may, in its discretion, deny an application for, suspend, revoke, or refuse to renew or continue the license or appointment of any applicant, agent, adjuster, customer representative, service representative, or managing general agent, and it may 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 under circumstances for which such denial, suspension, revocation, or refusal is not mandatory under s. 626.611:

(2) Violation of any provision of the Florida Insurance Code in the course of dealing under the license or appointment.

. . . .

49. Section 626.932(2)(a), Florida Statutes, requires the payment of the Tax by surplus lines agents such as Mr. Demayo:

The surplus lines agent shall make payable to the Department of Insurance the tax related to each calendar quarter's business as reported to the Florida Surplus Lines Service Office, and remit the tax to the Florida Surplus Lines Service Office at the same time as provided for the filing of the quarterly affidavit, under s. 626.931.

50. The evidence proved clearly and convincingly that Mr. Demayo failed to pay Tax as required by Section 626.932(2)(a), Florida Statutes, on the Steiner Spa Policy.

Having violated this requirement of Florida Statutes, Mr. Demayo has violated Section 626.935(1)(e), Florida Statutes, by having failed "to pay the tax or service fee on surplus lines premiums, as provided for in this Surplus Lines Law."

51. As a consequence of having failed to comply with Section 626.932(2)(a), Florida Statutes, and having violated Section 626.935(1)(e), Florida Statutes, Mr. Demayo has also violated Section 626.935(1)(i) and (j), and (2), Florida Statutes; and Section 626.621(2), Florida Statutes.

52. Having failed to pay Tax on only one policy, the evidence failed to prove that Mr. Demayo lacks fitness or trustworthiness to engage in the business of insurance in violation of Section 626.611(7), Florida Statutes.

E. Count III.

53. Section 626.931, Florida Statutes, provides, in relevant part, the following:

Each surplus lines agent shall on or before the end of the month next following each calendar quarter file with the Florida Surplus Lines Service Office an affidavit, on forms as prescribed and furnished by the Florida Surplus Lines Service Office, stating that all surplus lines insurance transacted by him or her during such calendar quarter has been submitted to the Florida Surplus Lines Service Office as required.

This provision unambiguously requires the filing of an affidavit from all Florida surplus lines agents representing that they

have properly submitted or reported all surplus lines insurance transactions. The affidavit is required to be filed, even in there is no insurance placed by an agent with a Florida connection, to give the FLSO a sworn assurance that an agent is complying with the law.

54. Mr. Demayo has argued that the language "as required" which ends Section 626.931 means that an agent is required to file an affidavit only if he or she has written insurance with a Florida connection. This argument is rejected. The "as required" language modifies, not the requirement that an affidavit be filed, but rather, that the agent has reported all transactions in the proper manner.

55. The evidence proved clearly and convincingly that Mr. Demayo failed to file the affidavit required by Section 626.931, Florida Statutes, for most of the periods alleged in Count III. He, therefore, violated Section 626.935(1)(d), Florida Statutes: "[f]ailure to make and file his or her affidavit or reports when due as required by s. 626.931." As a consequence, Mr. Demayo has also violated Section 626.935(1)(i) and (j), and (2), Florida Statutes; and Section 626.621(2), Florida Statutes.

56. The evidence failed to prove that Mr. Demayo lacks fitness or trustworthiness to engage in the business of insurance in violation of Section 626.611(7), Florida Statutes, due to his failure to file affidavits.

E. Penalty.

57. Florida Administrative Code Rule Chapter 69B-231 provides guideline penalties for violations of 626.621, Florida Statutes. The suggested penalty for a violation of Section 626.621(2), Florida Statutes, is a suspension of three months. Fla. Admin. Code R. 69B-231.090(2).

58. Section 626.961(1), Florida Statutes, authorizes the Department to fine a Surplus Lines agent who fails to file an affidavit or Quarterly Report "up to \$50 per day for each day the neglect continues, beginning the day after the report or affidavit was due until the date the report or affidavit is received."

59. Section 626.961(2), Florida Statutes, authorizes the Department to fine a Surplus Lines agent who fails to pay Tax "up to \$500 per day for each day the failure to pay continues, beginning the day after the tax or service fees were due."

60. Florida Administrative Code Rule 69B-231.160 provides the following relevant aggravating and mitigation factors:

- (1) For penalties other than those assessed under Rule 69B-231.150, F.A.C.:
 - (a) Willfulness of licensee's conduct;
 - (b) Degree of actual injury to victim;
 - (c) Degree of potential injury to victim;
 - (d) Age or capacity of victim;
 - (e) Timely restitution;
 - (f) Motivation of agent;
 - (g) Financial gain or loss to agent;
 - (h) Cooperation with the Department;

- (i) Vicarious or personal responsibility;
- (j) Related criminal charge; disposition;
- (k) Existence of secondary violations in counts;
- (l) Previous disciplinary orders or prior warning by the Department; and
- (m) Other relevant factors.

61. The Department has suggested that Mr. Demayo's licenses be suspended for a period of six months and that he be required to pay a fine of \$20,000.00. These recommendations, however, are based upon the assumption that the Department proved more of the violations than have been found in this Recommended Order to have been committed by Mr. Demayo. Additionally, the Department has apparently not taken into account the actual severity of the violations proven (the failure to remit Tax on only one policy) and the fact that the affidavits which were not filed were during periods for which no Florida connected insurance was shown to have been written, it is concluded that a suspension of 30 days and a fine of \$2,500.00 is more reasonable.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered by the Department finding that Henry Symeon Demayo violated the provisions of Chapter 626, Florida Statutes, described, supra; dismissing all other charges; suspending his licenses for a

period of three months; and requiring that he pay an administrative fine of \$2,500.00.

DONE AND ENTERED this 19th day of August, 2009, in Tallahassee, Leon County, Florida.



LARRY J. SARTIN
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
This 19th day of August, 2009.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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