

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL )  
SERVICES, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 08-6017PL  
 )  
MADELINE HERNANDEZ SYKES, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on February 5, 2009, by video teleconference, with the parties appearing in West Palm Beach, Florida, before Patricia M. Hart, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, who presided in Tallahassee, Florida.

APPEARANCES

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

For Respondent: Madeline Hernandez Sykes, pro se  
7510 Tree Lane  
Lake Clarke Shores, Florida 33406

STATEMENT OF THE ISSUE

Whether the Respondent committed the violations alleged in the Administrative Complaint dated October 24, 2008, and, if so, the penalty that should be imposed.

PRELIMINARY STATEMENT

In an Administrative Complaint dated October 24, 2008, the Department of Financial Services ("Department") charged Madeline Hernandez Sykes in Count I with violations of Sections 626.611(7), (8), and (9) and 626.621(6), Florida Statutes (2005),<sup>1</sup> based on the factual allegations that Ms. Sykes prepared and signed a bogus Certificate of Liability Insurance for a customer and in Count II with violations of Section 626.611(5), (7), (8), and (9), Florida Statutes, based on factual allegations that she back-dated an endorsement increasing the liability limits on a commercial automobile insurance policy for the same customer after the customer filed a claim under the automobile insurance policy. Ms. Sykes timely requested an administrative hearing, and the Department transmitted the matter to the Division of Administrative Hearings for assignment of an administrative law judge. Pursuant to notice, the final hearing was held on February 5, 2009.

At the hearing, the Department presented the testimony of Luz Sotomayor, Leo Canton, Thomas Matthew Burger, and David J.

Heiny; Petitioner's Exhibits 1 through 24 were offered and received into evidence. Ms. Sykes testified in her in her own behalf but did not offer any exhibits into evidence.

The two-volume transcript of the record was filed with the Division of Administrative Hearings on February 16, 2009, and the parties timely filed proposed findings of fact and conclusions of law, which have been considered in the preparation of this Recommended Order.

#### FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing and on the entire record of this proceeding, the following findings of fact are made:

1. The Department is the state agency responsible for licensing, regulating, and imposing discipline on insurance agents in Florida. See §§ 626.016(1); 626.601, Fla. Stat.

2. Ms. Sykes was licensed as a 2-14 "life including variable annuity agent" and as a 2-20 general lines agent in January 1998.

3. At the times pertinent to this proceeding, Ms. Sykes worked at an insurance agency owned by David J. Heiny ("Heiny Agency"). Deena Buell also worked for the Heiny Agency, and Ms. Sykes, Ms. Buell, and Mr. Heiny were the only three employees who were licensed as 2-20 general lines agents. The remaining two employees of Heiny Agency during the times

pertinent to this proceeding held 4-40 licenses as customer service representatives.

Certificate of Liability Insurance

4. The Heiny Agency marketed the insurance products of the Allstate Insurance Company ("Allstate") and also the products of other insurance companies at the times material to this proceeding. In 2003, Mr. Heiny decided to expand his business to include workers' compensation insurance. In July 2003, he submitted an application to the Florida Workers' Compensation Joint Underwriting Association ("FWCJUA"), the insurer of last resort in Florida for workers' compensation insurance, for authority to submit applications to it for workers' compensation insurance.

5. Mr. Heiny was notified by the FWCJUA in a letter dated July 29, 2003, that he was authorized to submit workers' compensation insurance applications to the FWCJUA until July 29, 2004. Mr. Heiny did not have authority to bind coverage for the FWCJUA, nor did he have authority to issue certificates of liability insurance showing workers' compensation insurance coverage through the FWCJUA. Under his agreement with the FWCJUA, Mr. Heiny was required to meet with and explain the workers' compensation insurance coverage to applicants and to sign all of the application forms.

6. Mr. Heiny was unfamiliar with workers' compensation insurance, and he intended for Ms. Buell to handle all of the workers' compensation insurance business because she had experience at another agency with workers' compensation insurance.

7. Mr. Heiny's office submitted one application for workers' compensation insurance, which was rejected, and he decided that the FWCJUA required too much paperwork. Mr. Heiny decided that he did not want to be involved with workers' compensation insurance, and he did not apply to renew his authorization to submit workers' compensation insurance applications to the FWCJUA. As a result, his authority to submit workers' compensation insurance applications to the FWCJUA expired on July 29, 2004. Mr. Heiny informed both Ms. Sykes and Ms. Buell that he did not intend to renew his authorization with the FWCJUA.

8. Ms. Sykes is fluent in Spanish and was the only licensed agent at the Heiny Agency who spoke Spanish at the times pertinent to this proceeding. Because of her fluency in Spanish, Ms. Sykes worked with the Heiny Agency's Spanish-speaking customers, and most of her business consisted of referrals from these customers.

9. One of Ms. Sykes' long-standing customers was Mayola Campos, who owned Form Construction, Inc. ("Form Construction"),

with her husband, Fortino Campos, and Ms. Sykes handled the commercial insurance for Form Construction. Mrs. Campos came into the Heiny Agency's office regularly to pay premiums and to discuss with Ms. Sykes's the corporation's various insurance policies and changes in coverage. As a result, Ms. Sykes and Mrs. Campos were well-acquainted, and Ms. Sykes received a number of referrals from Mrs. Campos.

10. Form Construction was a trim and roofing company working in the construction industry. According to Ms. Sykes, Mrs. Campos came to her in or around July 2004 seeking workers' compensation insurance. Ms. Sykes was not familiar with workers' compensation insurance because she had never sold that type of insurance, and it was not a product normally sold through the Heiny Agency. Nonetheless, she completed an application and submitted it to Ms. Buell for processing. At the time, Ms. Sykes was aware that Mr. Heiny did not intend to renew his authority to submit applications for workers' compensation insurance to the FWCJUA and that the authority would expire at the end of July 2004.

11. Ms. Sykes cannot recall hearing anything further about Form Construction's July 2004 application for workers' compensation insurance. She was going through a particularly difficult divorce proceeding and was not working full-time at the agency. In addition, Ms. Buell was working from her home so

she could care for her infant and young daughter, and Ms. Sykes and Ms. Buell were not in regular communication.

12. Without confirming that the FWCJUA had issued workers' compensation insurance to Form Construction, Ms. Sykes signed a Certificate of Liability Insurance for Form Construction and sent it to that company. The certificate, dated October 12, 2004, reflected that, in addition to general liability and automobile insurance, Form Construction had workers' compensation insurance through the FWCJUA that was effective from October 16, 2004, to October 16, 2005. The certificate holder was identified on the certificate as Gold Construction.

13. Ms. Sykes was aware of the purpose of a Certificate of Liability Insurance since she routinely prepared and signed them for insurance companies whose products were marketed by the Heiny Agency.

14. A Certificate of Liability Insurance is used to establish that a person or company has liability, automobile, and/or workers' compensation insurance. Although some insurance companies allow insurance agents to issue certificates of liability insurance, only the FWCJUA issues certificates of liability insurance for the workers' compensation insurance coverage it provides. The only exception to this policy is when an agent requests authority to issue a certificate of liability insurance for a specific insured for a specific purpose. The

agent must request this authority in writing and specify the purpose of the certificate; the FWCJUA must give approval in writing to the agent before the agent can issue the certificate. The agent must then send a copy of the certificate to the FWCJUA for its records.

15. In the construction industry, a certificate of liability insurance is presented to a contractor to establish that a company working on a project as a subcontractor has workers' compensation insurance. If a general contractor hires a subcontractor that does not have workers' compensation insurance, the general contractor is responsible for providing workers' compensation insurance for the employees of the uninsured subcontractor who worked on the contractor's job. See § 440.10(a), (b), and (c), Florida Statutes.

16. Form Construction presented the Certificate of Liability Insurance signed by Ms. Sykes to Gold Construction, which was, at the times pertinent to this proceeding, a qualified contractor business. Gold Construction hired general contractors, which, in turn, hired subcontractors to work on its projects. The subcontractors were paid by Gold Construction, and it required all subcontractors to present a certificate of liability insurance showing that they had general liability and workers' compensation insurance at the time the subcontractors were hired. Sometimes, the subcontractor would provide the



certificate directly to Gold Construction, and sometimes Gold Construction would call the subcontractor's insurance agency and request that the certificate be sent to it, directly.

17. The Certificate of Liability Insurance signed by Ms. Sykes was presented to Gold Construction as evidence that Form Construction had liability and workers' compensation insurance, and, in November 2004, Gold Construction hired Form Construction to do truss work on two construction projects. Gold Construction was subsequently audited by its workers' compensation insurance carrier, and the auditor determined that that Form Construction did not, in fact, have workers' compensation insurance and that the Certificate of Liability Insurance was bogus. Gold Construction was, therefore, assessed an additional \$12,000.00 in workers' compensation insurance premium to add coverage for Form Construction's employees.

18. The only records the FWCJUA has relating to Form Construction is an application for workers' compensation insurance for Fortino and Mayola Campos, d/b/a Form Construction, which was signed by Mr. Heiny and dated August 27, 2003; a date stamp on the application shows that it was received by the FWCJUA on September 17, 2003. In a letter dated October 16, 2003, the FWCJUA notified Mr. Heiny that the application for Form Construction was being returned with no coverage having been bound, and there is nothing in the records

of the FWCJUA showing that it received another application for workers' compensation insurance for Form Construction or that it provided compensation insurance for Form Construction.

Automobile insurance endorsement

19. The Heiny Agency wrote commercial automobile insurance through Allstate. Ms. Sykes joined the agency in 1995, after having worked for another agency that marketed Allstate insurance products. Ms. Sykes was recommended by one of Allstate's district managers, and her familiarity with the Allstate computer system and her fluency in Spanish were considered by Mr. Heiny to be very important contributions to his agency.

20. Form Construction had commercial automobile insurance coverage with Allstate, which was written through the Heiny Agency. Ms. Sykes was the only agent at the Heiny Agency that worked with Mrs. Campos on insurance matters. Mrs. Campos visited the Heiny Agency's office frequently to pay premiums and to discuss the various insurance policies issued to Form Construction. Mrs. Campos always spoke with Ms. Sykes when she came into the office because none of the other agents or employees of the agency spoke Spanish.

21. Form Construction's commercial automobile insurance policy came up for renewal in April 2005. When Mrs. Campos came in to pay the renewal premium, she and Ms. Sykes discussed

raising the policy's bodily injury liability limits from \$25,000.00 per person and \$50,000 per occurrence. Mrs. Campos told Ms. Sykes that she needed to speak to her husband before she could raise the liability limits.

22. Ms. Sykes did not hear anything from Mrs. Campos until June 2005, when Mrs. Campos came into the office and requested that Ms. Sykes add another vehicle to Form Construction's commercial automobile insurance policy. Ms. Sykes again advised Mrs. Campos that she should consider raising the policy's bodily injury liability coverage limits to at least \$250,000. Mrs. Campos asked Ms. Sykes how much such an increase in coverage would cost, and Ms. Sykes went into the Allstate computer system and partially prepared an endorsement to the automobile insurance policy showing the increased limits so she could get a quote for Mrs. Campos on the price. Ms. Sykes did not submit the endorsement at that time, and it remained pending in the Allstate computer system.

23. On or about July 12, 2005, Mrs. Campos visited the Heiny Agency's office and reported to Ms. Sykes that Mr. Campos had been involved in an automobile accident while driving a vehicle owned by Form Construction and that he had hit a person on a bicycle. Ms. Sykes advised her that her commercial automobile bodily injury liability coverage limits were \$25,000.00 per person and \$50,000.00 per occurrence. Ms. Sykes

also reminded Mrs. Campos that she had advised her several times to raise the Form Construction's bodily injury liability limits.

24. Ms. Sykes immediately submitted the claim to the Allstate claims Department, where it was assigned to Thomas Burger.

25. On July 15, 2005, Mrs. Campos contacted Ms. Sykes and told her to raise the bodily injury liability limits in Form Construction's automobile insurance policy to \$500,000.00 per person and \$500,000.00 per occurrence. Ms. Sykes went into the Allstate computer system and prepared and submitted the endorsement to Allstate.

26. The endorsement submitted by Ms. Sykes on July 15, 2005, carried an effective date of July 10, 2005, two days prior to the date on which Mrs. Campos reported the claim relating to Mr. Campos's automobile accident. A copy of the endorsement was sent to Mrs. Campos on July 16, 2005, and Mrs. Campos visited the Heiny Agency's office several days later with a check for the additional premium attributable to the increase in bodily injury liability limits.

27. The Allstate claims department was, at the times pertinent to this proceeding, separate from the department handling commercial automobile insurance policies. The information available to Mr. Burger at the time the Form Construction claim was submitted showed bodily injury liability

limits of \$25,000.00 per person and \$50,000.00 per occurrence on the Form Construction policy. On July 29, 2005, Allstate tendered a check to the person injured by Mr. Campos for the policy limit of \$25,000.00. This check was not cashed.

28. Mr. Burger did not learn until October 2005 that a policy endorsement raising the bodily injury liability limits had been submitted July 15, 2005, with an effective date of July 10, 2005. According to Ms. Sykes, someone from Allstate contacted her in August 2005 to question her about the endorsement, and she explained that the retroactive increase in bodily injury liability limits was a mistake and that the policy limits were \$25,000.00 per person and \$50,000.00 per occurrence at the time of the accident on July 12, 2005.

29. Mr. Burger interviewed Ms. Sykes and Mr. Heiny on January 13, 2006, regarding the endorsement, and Ms. Sykes told Mr. Burger that she could not recall why she would have back-dated the endorsement. Ms. Sykes told Mr. Burger of the problems she had experienced with endorsements to automobile insurance policies being lost in the Allstate computer system.

30. On January 26, 2006, the attorney representing the person injured by Mr. Campos wrote Allstate demanding disclosure of the policy limits of Form Construction's automobile insurance policy.

31. In a letter dated February 3, 2006, Allstate notified Mr. Heiny and Ms. Sykes that it might seek indemnification from the Heiny Agency because it attributed the back-dated increase in bodily injury liability limits to agent error. Shortly thereafter, Mr. Heiny asked if Allstate could change the limits back to the original \$25,000.00 per person and \$50,000.00 per occurrence as of the date of the accident, but Allstate had already determined that the increased limits were effective July 10, 2005, because of the effective date on the endorsement and because of Mrs. Campos's payment of the premium for the additional coverage.

32. In a letter dated February 17, 2006, Mr. Burger advised the attorney representing the injured person of the increase in the bodily injury liability limits, and, on March 2, 2006, Allstate tendered a check to the injured person's attorney in the amount of \$500,000.00.

33. Ms. Sykes attributed the back-dating of the endorsement to a glitch in the Allstate computer system by which the endorsement she submitted July 15, 2005, was automatically back-dated to July 10, 2005. Ms. Sykes had complained to Mr. Heiny on numerous occasions about problems with endorsements disappearing from the system, which required her to resubmit the endorsements. Ms. Sykes was not, however, aware of any endorsements being automatically back-dated by the system except

for the July 2005 endorsement to Form Construction's commercial automobile insurance policy.

34. Under the Allstate computer system, there are only two ways in which an endorsement's effective date can be established. The usual procedure requires the agent to complete the endorsement and submit it into the system; the system then automatically records on the endorsement the date it was submitted and the effective date of the endorsement. The other alternative is for an authorized agent to manually back-date the effective date of an endorsement and then submit it into the system.

35. Mr. Heiny tested the Allstate computer system repeatedly, trying to determine whether the system would automatically back-date an endorsement. None of the test endorsements prepared by Mr. Heiny was automatically back-dated, and Mr. Heiny is aware of no instance in which an endorsement was automatically back-dated except for the Form Construction endorsement at issue herein.

#### Findings of ultimate fact

##### A. Certificate of Liability Insurance

36. The evidence presented by the Department is sufficient to establish with the requisite degree of certainty that, when she signed the Certificate of Liability Insurance on October 12, 2004, showing that Form Construction had workers' compensation

insurance issued by the FWCJUA with effective dates of October 16, 2004, through October 15, 2005, Ms. Sykes knew that Form Construction did not have workers' compensation insurance placed by the Heiny Agency through the FWCJUA and knew that Gold Construction would rely on the Certificate of Liability Insurance as evidence that Form Construction had workers' compensation insurance. Ms. Sykes' action demonstrates her lack of fitness and trustworthiness to engage in the business of insurance, and Ms. Sykes caused injury to Gold Construction because, as a result of its reliance on the Certificate of Liability Insurance, it was required to pay additional premium to its workers' compensation insurance carrier.

37. Ms. Sykes's testimony regarding the circumstances in which she signed the Certificate of Liability Insurance was replete with inconsistencies and improbabilities and was wholly insufficient to support her contention that, when she signed the Certificate of Liability Insurance, she had a good faith belief that Form Construction had workers' compensation insurance issued by the FWCJUA. Mr. Heiny told Ms. Sykes that he did not intend to renew his authorization to submit workers' compensation insurance applications to the FWCJUA after it expired in July 2004, and, because she was the only agent at the Heiny Agency that dealt with Mrs. Campos, Ms. Sykes would necessarily have known if Form Construction had been issued a



workers' compensation insurance policy by the FWCJUA. It is reasonable to infer, therefore, that Ms. Sykes was aware on October 12, 2004, that Form Construction was not, and had never been, covered by workers' compensation insurance issued by the FWCJUA as a result of an application submitted by Mr. Heiny. Finally, Ms. Sykes' testimony that, before signing the Certificate of Liability Insurance, she reviewed the Form Construction file and saw a check and a Federal Express receipt showing that "it all went out to the FWCJUA"<sup>2</sup> directly conflicts with her testimony that Form Construction's records were destroyed when the Heiny Agency's office flooded in September 2004.<sup>3</sup>

38. Although the evidence presented by the Department is sufficient to establish that Ms. Sykes demonstrated a complete lack of knowledge about workers' compensation insurance, she was not authorized to submit applications to the FWCJUA and did not engage in any transactions involving workers' compensation insurance except for signing the Certificate of Liability Insurance for Form Construction. This act is not sufficient to establish that Ms. Sykes engaged in transactions involving workers' compensation insurance.

B. Automobile insurance endorsement

39. The evidence presented by the Department is sufficient to establish with the requisite degree of certainty that

Ms. Sykes' deliberately back-dated an endorsement to Form Construction's commercial automobile insurance policy increasing the bodily injury liability policy limits so that the increased limits were effective two days before Mr. Campos was involved in an accident while driving a vehicle owned by Form Construction. Ms. Sykes' action constitutes willful misrepresentation of the coverage limits actually in effect on the date of the accident, and it demonstrates Ms. Sykes' unfitness and untrustworthiness to engage in the business of insurance. Ms. Sykes' explanation that the endorsement was automatically back-dated by the Allstate computer system is rejected as not credible.

40. The evidence presented by the Department is not sufficient to establish that Ms. Sykes lacked in any respect adequate knowledge of or technical competence in commercial automobile insurance.

41. Finally, the evidence presented by the Department is sufficient to establish by the requisite degree of certainty that, because Ms. Sykes committed misconduct relating to the signing of the Certificate of Liability Insurance, she engaged in dishonest practices while engaging in the business of insurance when she back-dated the endorsement to the Form Construction commercial automobile insurance policy.

CONCLUSIONS OF LAW

42. 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 (2008).

43. In its Administrative Complaint, the Department seeks to impose penalties against Ms. Sykes that include the suspension or revocation of her license and/or the imposition of an administrative fine. The Department, therefore, has the burden of proving by clear and convincing evidence that Ms. Sykes committed the violations alleged in the Administrative Complaint. Department of Banking & Finance, Division of Securities & Investor Protection v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

44. In Evans Packing Co. v. Department of Agriculture and Consumer Services, 550 So. 2d 112, 116, n. 5 (Fla. 1st DCA 1989), the court explained:

[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 of 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).

Judge Sharp, in her dissenting opinion in Walker v. Florida Department of Business and Professional Regulation, 705 So. 2d 652, 655 (Fla. 5th DCA 1998)(Sharp, J., dissenting), summarized several pronouncements on clear and convincing evidence:

Clear and convincing evidence requires more proof than preponderance of evidence, but less than beyond a reasonable doubt. In re Inquiry Concerning a Judge re Graziano, 696 So. 2d 744 (Fla. 1997). It is an intermediate level of proof that entails both qualitative and quantitative [sic] elements. In re Adoption of Baby E.A.W., 658 So. 2d 961, 967 (Fla. 1995), cert. denied, 516 U.S. 1051, 116 S. Ct. 719, 133 L. Ed. 2d 672 (1996). The sum total of evidence must be sufficient to convince the trier of fact without any hesitancy. Id. It must produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established. Inquiry Concerning Davie, 645 So. 2d 398, 404 (Fla. 1994).

45. In Count I of the Administrative Complaint, the Department has charged Ms. Sykes with violations of Section 626.611(7), (8), and (9), Florida Statutes, and of Section 626.621(6), Florida Statutes; in Count II of the Administrative Complaint, the Department has charged Ms. Sykes with violations of Section 626.611(5), (6), (8), and (9), Florida Statutes.

46. Section 626.611, Florida Statutes, provides in pertinent part:

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, 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:

\* \* \*

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

\* \* \*

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

(8) Demonstrated lack of reasonably adequate knowledge and technical competence to engage in the transactions authorized by the license or appointment.

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

47. Section 626.621, Florida Statutes, provides in pertinent part:

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:

\* \* \*

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

48. Based on the findings of fact herein, the Department has proven by clear and convincing evidence that, with respect to Count I, Ms. Sykes is guilty of having violated Sections 626.611(7) and 626.621(6), Florida Statutes. Ms. Sykes demonstrated a lack of fitness and trustworthiness to engage in the business of insurance by signing a Certificate of Liability Insurance when she knew that the Form Construction had not secured workers' compensation insurance with the FWCJUA through the Heiny Agency, an action which resulted in actual harm to Gold Construction, a member of the public.

49. Because a violation of Section 626.611(9), Florida Statutes, requires more than a solitary act, however, the

Department has failed to prove that Ms. Sykes is guilty of a violation of that statutory section based on the single act of misconduct that occurred when she signed the bogus Certificate of Liability Insurance. See Robert v. Department of Insurance, 854 So. 2d 681, 683 (Fla. 2d DCA 2003)(single episode of misconduct should be punished as such, so no violation of Section 626.611(9), Florida Statutes, occurred with respect to first count of administrative complaint; second instance of misconduct gave rise to multiple practices that supported violation of Section 626.611(9), Florida Statutes, with respect to second count of administrative complaint).

50. Based on the findings of fact herein, the Department has proven by clear and convincing evidence that, with respect to Count II, Ms. Sykes is guilty of having violated Section 626.611(5), (7), and (9), Florida Statutes.

a. Ms. Sykes' action in back-dating the endorsement constituted a willful misrepresentation of the actual date on which Mrs. Campos asked for the increased bodily injury liability limits. Ms. Sykes deliberately entered the Allstate computer system and manually entered the effective date of the endorsement, knowing that the endorsement would retroactively bind Allstate to significantly higher bodily injury liability limits that those actually in effect on the date of the accident. See Metro Dade County v. Department of Env't'l

Prot., 714 So. 2d 512, 516-17 (Fla. 3d DCA 1998) ("In interpreting statutory terms, words must be given their plain and ordinary meaning. . . . The court in Thunderbird Drive-In . . . conclud[ed] that the usual meaning assigned to 'willful' 'is that the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow . . . .' Thunderbird Drive-In, 571 So. 2d at 1344 (quoting Smith v. Sno Eagles Snowmobile Club, Inc., 823 F.2d 1193 (7th Cir. 1987).").

b. Ms. Sykes demonstrated her unfitness and untrustworthiness to engage in the business of insurance when she back-dated the endorsement to Form Construction's commercial automobile insurance policy.

c. Finally, Ms. Sykes engaged in dishonest practices in the business of insurance because this act of misconduct, together with the act of misconduct committed when she signed the bogus Certificate of Liability Insurance, resulted in the multiple infractions that are necessary to establish that an insurance agent has engaged in dishonest business practices.

51. Based on the findings of fact herein, the Department failed, however, to prove by clear and convincing evidence that Ms. Sykes violated Section 626.611(8), Florida Statutes, with respect to either Count I or Count II.



Penalty

52. Florida Administrative Code Rule 69B-231.080 sets out the penalties for violations of Section 626.611, Florida Statutes, as follows:

If it is found that the licensee has violated any of the following subsections of Section 626.611, F.S., for which compulsory suspension or revocation of license(s) and appointment(s) is required, the following stated penalty shall apply:

\* \* \*

(5) Section 626.611(5), F.S. - suspension  
9 months

\* \* \*

(7) Section 626.611(7), F.S. - suspension  
6 months

\* \* \*

(9) Section 626.611(9), F.S. - suspension  
9 months

53. Florida Administrative Code Rule 69B-231-090 sets out the penalties for violations of Section 626.621, Florida Statutes, but no penalty is stated for a violation of Section 626.621(6), Florida Statutes. Rather, reference is made to Florida Administrative Code Rule 69B-231.100, which provides penalties for a person guilty of having violated Section 626.621(6), Florida Statutes, by "engaging in unfair methods of competition or in unfair or deceptive acts or practices" Florida Administrative Code Rule 69B-231.100 does

not include a penalty for a person guilty of violating Section 626.621(6), Florida Statutes, by "having otherwise shown himself or herself to be a source of injury or loss to the public," and Florida Administrative Code Rule 69B-231.120 provides that the penalty for a person found guilty of having violated a provision of the Florida Insurance Code for which no specific penalty is set out in the Florida Administrative Code is a three-month suspension if the violation is not willful.

54. The Department has proven that, with respect to Count I of the Administrative Complaint, Ms. Sykes is guilty of having violated one statutory provision carrying a six-month suspension and one provision carrying a three-month suspension. The Department has proven that, with respect to Count II of the Administrative Complaint, Ms. Sykes is guilty of having violated one statutory provision carrying a six-month suspension and two provisions carrying a nine-month suspension.

55. Florida Administrative Code Rule 69B-231.040 defines the manner in which penalties shall be calculated for violations of the Florida Insurance Code and provides in pertinent part:

(1) Penalty Per Count.

(a) The Department is authorized to find that multiple grounds exist under Sections 626.611 and 626.621, F.S., for disciplinary action against the licensee based upon a single count in an administrative complaint based upon a single act of misconduct by a licensee. However,

for the purpose of this rule chapter, only the violation specifying the highest stated penalty will be considered for that count. The highest stated penalty thus established for each count is referred to as the "penalty per count".

(b) The requirement for a single highest stated penalty for each count in an administrative complaint shall be applicable regardless of the number or nature of the violations established in a single count of an administrative complaint.

(2) Total Penalty. Each penalty per count shall be added together and the sum shall be referred to as the "total penalty".

(3) Final Penalty.

(a) The final penalty which will be imposed against a licensee under these rules shall be the total penalty, as adjusted to take into consideration any aggravating or mitigating factors.

The highest "penalty per count" with respect to Ms. Sykes' violation of Sections 626.611(7) and 626.621(6), Florida Statutes, in Count I is a six-month suspension. The highest "penalty per count" with respect to Ms. Sykes' violation of Sections 626.611(5), (7), and (9), Florida Statutes, in Count II is a nine-month suspension. The total penalty to be levied against Ms. Sykes is, therefore, a 15-month suspension, without adjustments for aggravating and mitigating factors.

56. Aggravating and mitigating factors are set forth in Florida Administrative Code Rule 69B-231.160(1). With respect to Ms. Sykes, the following are aggravating factors pursuant to

the rule: Ms. Sykes' act of signing the bogus Certificate of Liability Insurance caused actual injury to Gold Construction, which was entitled to rely on the representations in the certificate; Ms. Sykes' act of back-dating the endorsement to Form Construction's commercial automobile insurance policy was willful; and Ms. Sykes was personally responsible for both acts of misconduct. These "aggravating factors" are, however, necessary elements of the violations with which Ms. Sykes was charged, and, as such, should not be used to increase the penalty that the Department has set out in Florida Administrative Code Rules 69B-231.080(5), (7), and (9) and 69B-231.120. In mitigation of the penalty, Ms. Sykes has not previously been the subject of any disciplinary orders or warnings from the Department.

57. An adjustment to the total penalty upon consideration the mitigating factor is not warranted in this case, given the seriousness of Ms. Sykes' offenses. Accordingly, a 15-month suspension of Ms. Sykes' license to engage in business as a general lines insurance agent is the appropriate penalty.

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Financial Services enter a final order

1. Finding Madeline Hernandez Sykes guilty of one count of having violated Sections 626.611(7) and 626.621(6), Florida Statutes;

2. Finding Ms. Sykes guilty of one count of having violated Section 626.611(5), (7), and (9), Florida Statutes; and

3. Suspending Ms. Sykes' license to engage in business as a general lines insurance agent for a period of 15 months.

DONE AND ENTERED this 30th day of April, 2009, in Tallahassee, Leon County, Florida.



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PATRICIA M. HART  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 30th day of April, 2009.

ENDNOTES

<sup>1/</sup> Ms. Sykes was charged with violations that occurred in 2004 and 2005. The provisions of the statutes cited in the Administrative Complaint are the same for both years. Accordingly, references to the Florida Statutes herein are to the 2005 edition unless otherwise indicated.

<sup>2/</sup> Transcript, volume 2, page 214.

<sup>3/</sup> In her proposed findings of fact and conclusions of law, Ms. Sykes attributed the flooding to the hurricanes that battered West Palm Beach, Florida, in July, August, and September 2004.

COPIES FURNISHED:

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Tracey Beal, Agency Clerk  
Department of Financial Services  
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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.