

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF)
FINANCIAL SERVICES,)
)
Petitioner,)
)
vs.) Case No. 09-1504PL
)
SARAH C. FUQUAY,)
)
Respondent.)
_____)

RECOMMENDED ORDER

On June 9, 2009, a duly-noticed hearing was held in Jacksonville, Florida, before Lisa Shearer Nelson, an Administrative Law Judge appointed by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: James A. Bossart, Esquire
Department of Financial Services
Division of Legal Services
200 East Gaines Street
Tallahassee, Florida 32399-0333

For Respondent: Daniel J. Koleos, Esquire
Koleos, Rosenberg & Doyle, P.A.
8211 W. Broward Boulevard, Suite PH-4
Fort Lauderdale, Florida 33324

STATEMENT OF THE ISSUE

The issue to be determined is whether Respondent committed the violations alleged in the Administrative Complaint, and if so, what penalties should be imposed?

PRELIMINARY STATEMENT

On February 23, 2009, the Department of Financial Services (DFS or the Department) filed an Administrative Complaint alleging multiple violations of Sections 626.611, 626.621, and 626.9541, Florida Statutes (2006).^{1/} Respondent disputed the allegations in the Administrative Complaint and requested a hearing pursuant to Section 120.57(1), Florida Statutes (2008). On March 19, 2009, the matter was referred to the Division of Administrative Hearings for assignment of an administrative law judge.

On April 6, 2009, the case was noticed for hearing to be conducted June 6, 2009, and the case proceeded as scheduled. Petitioner presented the testimony of Frank Hemwey, and Petitioner's Exhibits 1-4 were admitted into evidence. Respondent testified on her own behalf and presented the testimony of Keith Lozowski. Respondent's Exhibits A-F were also admitted into evidence. A Transcript of the proceedings was filed with the Division on June 26, 2009. On July 2, 2009, Respondent requested that the time for submission of proposed recommended orders be extended until July 16, 2009. Both parties submitted Proposed Recommended Orders on that date and both submissions are considered to be timely filed.

FINDINGS OF FACT

1. At all times relevant to this proceeding, Sarah Fuquay (now known as Sarah Fowler) has been licensed as a life and health insurance agent holding license number E082826.

2. The Department is the state agency with responsibility for licensing and regulation of insurance licenses and appointments.

3. At all times relevant to these proceedings, Respondent was employed or affiliated with and appointed by Bankers Life & Casualty Company (Bankers Life), working out of the company's offices in Jacksonville, Florida. She is a captive agent, meaning she works only for Bankers Life.

4. In 2006, Frank Hemwey was a resident of the Jacksonville area and was approximately 84 years old. He was retired and was looking to invest the proceeds from the sale of some real estate.

5. In November 2006, Mr. Hemwey received a postcard in the mail which stated:

Important!

Are you like the majority of our clients and notice a drastic reduction in your income due to decreasing interest rates?

At Banker's Life and Casualty Company, we offer an Alternative to a CD. Our Security Builder Bonus Annuity (Policy LA-06T) has a 1st year Interest rate of 7%, Available thru November 30, 2006. (Includes Cash, CD's, Money Market IRA and Mutual Fund Rollovers)

You have to call me to believe it!
To take advantage of this limited time offer,
Call Frank Fowler, Licensed Agent
[904-400 3662]

6. Mr. Hemwey called the number provided. Respondent responded to the inquiry and set up an appointment at Mr. Hemwey's home for November 27, 2006.

7. During the meeting with Mr. Hemwey, Respondent filled out a written assessment used by Bankers Life to collect information about potential clients and to make recommendations regarding appropriate investments. Information gathered included information about the family's background and financial history, current expenses and tax liabilities, estate planning options and long term care needs.

8. During their conversation, Mr. Hemwey was totally focused on the prospect of the seven percent return mentioned in the postcard. Respondent explained to him that the product was not a certificate of deposit; Bankers Life does not issue certificates of deposit; and that the insurance company only issues annuities. A brochure was provided to the Hemweys describing the annuity product advertised. Respondent advised Mr. Hemwey several times that the annuity was not a one-year investment; that the seven percent interest rate applied only to the first year; and that a lower guaranteed rate applied after that point. However, because of his focus on the seven percent, he paid little or no attention to what she told him. In his

words, "I don't remember . . . anything else because I wasn't interested in anything else."

9. In the section called "Additional Information and Follow-Up Notes," Respondent recorded, "Frank says they understand annuities. Kept cutting me off says he knows. Tried to get him to leave interest in to possibly cut down on taxes & compound interest. Frank said they don't need the \$, but might as well take it. Setting up direct deposit of interest."

10. On or about November 28, 2006, Mr. Hemwey contacted Respondent and indicated he wanted to purchase the product they had discussed. Arrangements were made for him to execute the necessary documents at the Bankers Life Jacksonville office.

11. On November 29, 2009, Respondent again met with Mr. Hemwey. At that time, she reviewed the contents of the Fact Finder with him, and he signed the attestation which stated:

To the best of my knowledge, the information I have provided in this Fact Finder represents an accurate picture of my current situation and beliefs. . . . I understand that any recommendations made by the agent are based on these responses.

12. Despite this attestation, Mr. Hemwey had not divulged that he and his wife already owned an annuity account. He did include the interest from that account in his estimation of current income, but did not feel that his having an annuity was any of the company's business, as long as the interest received was included in the estimated income.

13. Respondent also went over an Annuity Suitability Questionnaire with Mr. Hemwey, which he signed. This document included the following Owner's Statement:

To the best of my knowledge and belief, all statements and answers on this form are true and complete. The information on this worksheet has been explained to me and I have been provided a copy of an Annuity Buyer's Guide. I believe that the proposed annuity will meet my current financial planning objectives. I understand that if I am not satisfied with the policy once I receive it, I may return it for a full refund according to the terms of the policy. (Emphasis added.)

14. Finally, Respondent went over the application with Mr. Hemwey. The front page of the policy specifically identifies Mr. Hemwey as an annuitant and contains the following notices:

THIRTY DAY RIGHT TO RETURN THIS POLICY
If the Owner is not satisfied with this policy, he or she may return it to Us within 30 days after getting it. The Owner may return it to Us by mail or to the agent who sold it. We will then refund any premium paid. This policy will then be void.

THIS POLICY AND THE DATE IT BEGINS
This policy is a legal contract between the Owner and Us. It consists of this and the following pages. READ THIS POLICY CAREFULLY. See the POLICY GUIDE on page 1A of this policy.

15. The policy, which Mr. Hemwey signed, repeatedly indicated that it was an annuity contract and identified the rate of return for the first year and succeeding years. For example, on page seven Mr. Hemwey signed in the box marked "signature of annuitant." At the top of that page, it reads, "I hereby apply

for an annuity. . . ." The page entitled "Schedule" identifies Mr. Hemwey as the annuitant and states that the guaranteed period is one year, with an interest rate of seven percent. After the first year, the Schedule indicates that the minimum guaranteed interest rate is 2.5 percent for the first ten policy years, and three percent for policy years 11 and after. This page also provides the withdrawal percentage applicable for withdrawal charges, which are explained in detail on page four, following the signature page.^{2/}

16. Respondent credibly testified that she explained the terms and conditions related to the annuity to Mr. Hemwey in conjunction with filling out the application and related paperwork. Mr. Hemwey tendered \$100,000 for the premium required to purchase the annuity. He named his wife as a beneficiary to the annuity.

17. The policy was delivered to Mr. Hemwey's home on or about December 18, 2006. Although he signed a receipt for the annuity, he does not remember the event. When the annuity document was delivered, Respondent went over the contents of the documents with Mr. Hemwey, specifically calling attention to the 30-day cancellation provision on page one and going over the contract summary page with him. She also prepared an annuity withdrawal request, which would enable Mr. Hemwey to receive the interest on the annuity through systematic deposits in his checking account.

18. Mr. Hemwey did not read the annuity contract documents provided to him upon receipt. In October 2007, approximately ten months into the annuity, he called Bankers Life to determine what the next year's interest rate would be. When the company could not provide that information immediately, he requested instructions on canceling the contract. His intent was to move the funds to another vehicle if he could obtain a better interest rate.

19. Mr. Hemwey was advised that withdrawal of the annuity funds would be subject to the withdrawal schedule specified in the annuity contract, i.e., eight percent after the first year. Mr. Hemwey was dissatisfied with this response. Respondent then went to see him, reminded him of the terms of the annuity and tried to see if there was anything that would satisfy him. Mr. Hemwey wanted to continue to earn seven percent.

20. Mr. Hemwey also spoke to Respondent's supervisor, Keith Lozowski, about his confusion regarding the terms of the annuity. He did not claim at that time that Respondent had made any misrepresentation. He maintained that he wanted to continue to receive the seven percent introductory interest rate. Mr. Lozowski explained to Mr. Hemwey that he did not have the authority to guarantee such a rate, and that his contract did not provide for seven percent beyond the first year.

21. At hearing, Mr. Hemwey insisted that he did not know he was purchasing an annuity. His testimony simply is not credible

in this regard. He responded to an advertisement for an annuity and signed a document that indicated prominently its status as an annuity. Simply put, Mr. Hemwey paid attention to the advertised introductory interest rate and ignored everything else told or provided to him. He received \$7,000 in interest the first year; \$3,700 in interest the second year; and is receiving 3.6% interest in the third year. His original investment of \$100,000 remains in the annuity. No evidence was presented to indicate that, had Mr. Hemwey been able to withdraw the original investment, he could have received a higher return on his money elsewhere.

22. Respondent did not misrepresent, either by commission or omission, the characteristics of the annuity product that Mr. Hemwey purchased. She did not pressure him to purchase the product he chose.

CONCLUSIONS OF LAW

23. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with Sections 120.569 and 120.57(1), Florida Statutes (2008).

24. This disciplinary action by Petitioner is a penal proceeding in which Petitioner seeks to suspend Respondent's license as an insurance agent. Petitioner bears the burden of proof to demonstrate the allegations in the Administrative Complaint by clear and convincing evidence. Department of

Banking and Finance v. Osborne Sterne & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

25. Clear and convincing evidence:

[R]equires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and lacking in confusion as to the facts in issue. The evidence must be of such a weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In re Henson, 913 So. 2d 579, 590 (Fla. 2005), quoting Slomowitz v. Walker, 429 So. 797, 800 (Fla. 4th DCA 1983).

26. The factual allegations in the Administrative Complaint include the following:

7. On or about November, 2006, F.E.H. stated to you, SARAH C. FUQUAY, that he desired to put his money in a short term financial contract of no more than one year duration that would earn interest. You, SARAH C. FUQUAY, stated to F.E.H. that you had such a product and could sell to him a one year term financial instrument that would yield 7%.

8. On or about November, 2006, you, SARAH C. FUQUAY, fraudulently induced F.E.H. to utilize the above-mentioned \$100,000 to purchase a Bankers Life Insurance Deferred annuity.

9. In the process of inducing the sale and purchase of the annuity, you, SARAH C. FUQUAY, willfully misrepresented and/or omitted material information regarding the nature and sale of the annuity. The misrepresentations, both by omission and commission, include, but are not limited to, the following:

(a) You, SARAH C. FUQUAY, failed to disclose to F.E.H. that he was purchasing an annuity with a ten year contract duration. F.E.H. had no desire nor need to purchase a ten year annuity. F.E.H. desired to purchase and actually thought he was purchasing a financial contract similar to a Certificate of Deposit that would be of one year duration. You, SARAH C. FUQUAY, sold the annuity to F.E.H. without his knowledge or informed consent. You, SARAH C. FUQUAY, were aware of this fact.

(b) You, SARAH C. FUQUAY, represented to F.E.H. that the annuity he was purchasing would pay an interest yield of 7%. In fact, the annuity only had a 7% yield for the first year only. Thereafter, the guaranteed interest rate is only 2.5%. You, SARAH C. FUQUAY, failed to disclose this fact to F.E.H.

(c) You, SARAH C. FUQUAY, failed to disclose to F.E.H. the annuity surrender penalties; specifically, that he could not withdraw any funds at all without paying a surrender penalty of 8% for the first two years of the policy and only gradually declining to 0% on a declining scale over ten years.

(d) You, SARAH C. FUQUAY, failed to disclose to F.E.H. that he could not have full penalty free access to his funds until 2016, the annual maturity date, when F.E.H. would be 94 years old. It is actuarially unlikely that F.E.H. will live to be 94 years old; therefore, it is unlikely he can receive a benefit from this annuity.

10. The misrepresentations and omissions made by you, SARAH C. FUQUAY, described herein were false and material misstatements of fact. You, SARAH C. FUQUAY, were fully aware of these facts.

11. The conduct and actions describe (sic) herein constitute unfair and deceptive acts or practices in violation of Section 626.9541, Florida Statutes.

12. F.E.H. justifiably relied on the representations and information conveyed to him by you, SARAH C. FUQUAY concerning the annuity. The annuity would not have been purchased but for these representations.

13. You, SARAH C. FUQUAY, have violated a public trust in violation of Rule 69B-215.210, Florida Administrative Code. As a result, F.E.H. has suffered financial harm.

27. The Department failed to prove the foregoing allegations by clear and convincing evidence. To the contrary, the persuasive evidence presented indicates that Mr. Hemwey responded to an advertisement specifically identifying an annuity as the product advertised. Respondent told him repeatedly that Bankers Life did not offer certificates of deposit and that the financial instrument was an annuity. She described the features of an annuity and left him a brochure regarding its characteristics.

28. The persuasive evidence presented at hearing indicates that Respondent advised Mr. Hemwey and Mr. Hemwey understood that the introductory rate of seven percent was for one year only, and a guaranteed but lesser interest rate would control subsequent years. Respondent credibly testified that she went over the features of the annuity with Mr. Hemwey, including the withdrawal charges. Moreover, the allegations in paragraph 9(c) are not consistent with the terms of the annuity document itself. See endnote 2.

29. The more credible evidence demonstrated that while the annuity would not mature for a ten-year period, Mr. Hemwey is

able to and does receive the interest on his investment during the life of the contract, and may continue to do so until the maturity date. There is no evidence presented that Mr. Hemwey could have received a better return on investment elsewhere. In short, the Department did not prove, much less by clear and convincing evidence, that Respondent made any misrepresentation or omission or that Mr. Hemwey suffered any financial harm.^{3/}

30. The Administrative Complaint alleges that Respondent's conduct violated Subsections 626.611(5),(7), (9) and (13); 626.621(2) and (6); and 626.9541(1)(a)1. and (1)(e)1., Florida Statutes. The Department has indicated in its Proposed Recommended Order that it is not pursuing the charge that Respondent violated Section 626.611(9), Florida Statutes, because a single act of misconduct cannot form the basis of a "fraudulent or dishonest practices" charge, based upon Werner v. Department of Insurance, 689 So. 1211 (Fla. 1st DCA 1997). Accordingly, no further discussion of Subsection 626.611(9) is necessary.

31. Relevant portions of Section 626.611, Florida Statutes, provide as follows:

626.611 Grounds for compulsory refusal, suspension, or revocation of agent's, title agency's, adjuster's, customer representative's, service representative's, or managing general agent's license or appointment.--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 representation 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 a lack of fitness or trustworthiness to engage in the business of insurance.

* * *

(13) Willful failure to comply with, or willful violation of, any proper order or rule of the department or will violation of any provision of this code.

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

626.621 Grounds for discretionary refusal, suspension, or revocation of agent's, adjuster's, customer representative's, service representative's, or managing general agent's license or appointment.-- The department may, in its discretion, deny an application for, suspend, revoke, or refuse to renew or continue the license or appointment of any . . . agent, . . . 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 . . . licensee . . . , any one or more of the following applicable grounds exist under the circumstances for which such denial, suspension, revocation, or refusal is not mandatory under s. 626.611:

* * *

(2) Violation of any provision of this code or of any other law applicable to the business of insurance in the course of dealing under the license or appointment.

* * *

(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.

33. Section 626.9541(1), Florida Statutes, provides in pertinent part:

(1) UNFAIR METHODS OF COMPETITION AND UNFAIR OR DECEPTIVE ACTS.--The following are defined as unfair methods of competition and unfair or deceptive acts or practices:

(a) Misrepresentations and false advertising of insurance policies.--Knowingly making, issuing, circulating, or causing to be made, issued, or circulated, any estimate, illustration, circular, statement, sales presentation, omission, or comparison which:

1. Misrepresents the benefits, advantages, conditions, or terms of any insurance policy.

* * *

(e) False statements and entries.--

1. Knowingly:
 - a. Filing with any supervisory or other public official,
 - b. Making, publishing, disseminating, circulating,
 - c. Delivering to any person,
 - d. Placing before the public,
 - e. Causing, directly or indirectly, to be made, published, disseminated, circulated, delivered to any person, or placed before the public, any false material statement.

34. Florida Administrative Code Rule 69B-215.210 provides:

The Business of Life Insurance is hereby declared to be a public trust in which service all agents of all companies have a common obligation to work together in serving the best interests of the insuring public, by understanding and observing the laws governing Life Insurance in letter and in spirit by presenting accurately and completely every fact essential to a client's decision, and by being fair in all relations with colleagues and competitors always placing the policyholder's interests first.

35. For the reasons expressed in paragraphs 27-29, the Department has not presented clear and convincing evidence to support any violation Section 626.611 or 626.621, Florida Statutes. There was no misrepresentation, willful or otherwise, regarding the terms of the annuity contract. No evidence has been presented to demonstrate that Respondent is unfit or untrustworthy to engage in the business of insurance, and the Department has not proven any failure to comply with or willful violation of any provision of the Insurance Code or rule adopted pursuant thereto, including those provisions defining unfair methods of competition and unfair or deceptive acts or practices.

RECOMMENDATION

Upon consideration of the facts found and conclusions of law reached, it is

RECOMMENDED:

That a final order be entered dismissing the Administrative Complaint.

DONE AND ENTERED this 10th day of August, 2009, in
Tallahassee, Leon County, Florida.



LISA SHEARER NELSON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of August, 2009.

ENDNOTES

^{1/} Unless otherwise indicated, all references to the Florida Statutes are to the 2006 codification in effect at the time of the conduct alleged in the Administrative Complaint.

^{2/} With respect to withdrawals and partial withdrawals, the annuity provides the following:

WITHDRAWAL CHARGE:

A Withdrawal Charge is an amount which may be charged when any portion of the Cash Value is withdrawn from this policy. It is equal to the amount withdrawn multiplied by the Withdrawal Charge Percentage. The Withdrawal Charge Percentage is shown in the Schedule.

PARTIAL WITHDRAWALS:

The Owner may take Partial Withdrawals of at least \$100. A Partial Withdrawal may be taken if the Cash Value less the sum of the Partial Withdrawal and any applicable Withdrawal Charge is not less than the Minimum Cash Value shown in the Schedule. We will allow Partial Withdrawals to be taken without a Withdrawal Charge, if the Partial Withdrawals and any Systematic Withdrawals in that Policy Year total no more than 10% of the Cash Value at the time of the first Partial Withdrawal or Systematic Withdrawal in

that Policy Year. Any amount withdrawn in excess of this 10% will be subject to a Withdrawal Charge.

After the first Policy Year, if no Withdrawal is taken in the previous Policy Year, We will allow Partial Withdrawals to be taken without a Withdrawal Charge if the Partial Withdrawals and any Systematic Withdrawals in that Policy Year total no more than 20% of the Cash Value at the time of the first Partial Withdrawal or Systematic Withdrawal in that Policy Year. When 20% is allowed, any amount withdrawn in excess of the 20% will be subject to a Withdrawal Charge.

^{3/} The Department's only witness was Mr. Hemwey. His testimony regarding the substance of the conversations with Respondent simply does not rise to the level of clear and convincing evidence. He did not remember how many times he spoke with her; did not remember providing the information in the Fact Finder, although he signed it; did not remember who he talked to on the telephone regarding the annuity; did not remember how long he held the funds from the sale of his real estate before seeking to place it in the annuity; and did not recall what he and Respondent discussed other than the fact that the first year, the annuity would earn 7% interest. He candidly admitted that the interest rate that first year was all he was interested in.

COPIES FURNISHED:

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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.