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REPRESENTING
ALEX SINK

CHIEF FINANCIAL OFFICER
STATE OF FLORIDA

DIVISION OF
ADMINISTRATIVE
HEARINGS

Docketed by JAD

IN THE MATTER OF:

09-3088 PL

Case Nos. 91392-08-AG
91390-08-AG

NANCY L. EBERHARDT
and
RICHARD PALMER EBERHARDT

FINAL ORDER

This cause came on for consideration of and final agency action on the Recommended Order issued on April 27, 2010, by Administrative Law Judge (ALJ) Daniel M. Kilbride, after formal hearing conducted on February 17, 2010, pursuant to Section 120.57(1), Fla. Stat. The Respondents timely filed exceptions, and the Department timely responded thereto. The transcript of proceedings, admitted exhibits, the exceptions and the responses thereto, and applicable law have all been considered during the promulgation of this Final Order.

RULINGS ON THE RESPONDENTS' EXCEPTIONS

The Respondents' first exception takes issue with a hearsay ruling the ALJ made at page 7 of the Recommended Order, and invites the Department to differ with that ruling. However, since the determination of hearsay is beyond the substantive jurisdiction of executive branch agencies [*Barfield v. Department of Health, Board of Dentistry*, 805 So.2d 1008 (Fla.1st DCA 2001), reh. den. Feb 1, 2002], the Department cannot alter, amend, reject or replace the challenged hearsay ruling. Accordingly, this exception is rejected.

The Respondents' second exception argues that the ALJ erred by not taking cognizance of their selective bad faith defense. The ALJ ruled that he did not have the authority to take cognizance of that defense because it sounds in equity, and the legislature did not grant equitable powers to the Division of Administrative Hearings, citing to the case of *Florida Department of Revenue v. WHI LTD. Partnership*, 754 So.2d 205 (Fla. 1st DCA 2000) in support. While it appears that said case only obliquely supports that position, it is beyond argument that nowhere in Chapter 120, Fla. Stat., does the Legislature confer equitable powers upon or provide equitable remedies to the Division of Administrative Hearings. The Respondent's proffered defense sounds in equity, and conceivably raises constitutional equal protection questions which are also beyond the Department's jurisdiction to decide. *Department of Revenue v. Young American Builders*, 330 So.2d 864 (Fla. 1st DCA 1976); *Key Haven Associated Enters. v. Board of Trustees of the Internal Improvement Trust Fund*, 427 So.2d 153, 157-158 (Fla. 1982); *Gulf Pines Memorial Park, Inc. v. Oaklawn Memorial Park, Inc.*, 361 So.2d 695, 699 Fla. 1978). Accordingly, for the reasons stated above, this exception is rejected.

The Respondents' third exception posits that Section 626.901(2), Fla. Stat., exculpates them from liability for surrender penalties experienced by Bisch and Clark during an annuity transfer engineered by Respondents. A fair reading of that statute does not support that contention, for it deals with an unauthorized insurer's failure to make full payment for any claim or loss by making other persons associated with the initial transaction also liable for the loss. Respondent does not explain how that statute affects the surrender penalties at issue. Accordingly, this exception is rejected.

The Respondents' fourth exception, directed to a finding of fact in Paragraph 38 of the Recommended Order would, if accepted, require the Department to re-weigh the evidence to arrive at a different finding as to what a Tennessee receiver for NFOA might or might not do in the future. This it cannot do. *Perdue v. TJ Palm Associates, Ltd.*, 755 So.2d 660 (Fla. 4th DCA 1999); *Heifetz v. Department of Business Regulation, Div. of Alcoholic Beverages and Tobacco*, 475 So.2d 1277 (Fla. 1st DCA 1985); *Holmes v. Turlington*, 480 So.2d 150 (Fla. 1st DCA 1985). Accordingly, this exception is rejected.

The Respondents' fifth exception, directed to a finding of fact in Paragraph 43 of the Recommended Order would, if accepted, require the Department to re-weigh the evidence to arrive at a different finding regarding the dollar loss anticipated by Fay Ann Clark on the NFOA sale facilitated by Respondents. This it cannot do. *Perdue v. TJ Palm Associates, Ltd.*, 755 So.2d 660 (Fla. 4th DCA 1999); *Heifetz v. Department of Business Regulation, Div. of Alcoholic Beverages and Tobacco*, 475 So.2d 1277 (Fla. 1st DCA 1985); *Holmes v. Turlington*, 480 So.2d 150 (Fla. 1st DCA 1985). Accordingly, this exception is rejected.

The Respondents' sixth exception is directed towards Paragraph 4 of the ALJ's Recommendation that the Respondents' applications for new licensure, if any, are to be conditioned on proof of satisfaction of financial losses to their NFOA clients. The Respondents contend that said recommendation does not take into account any distribution of monies the Tennessee receiver for NFOA may make to those clients. Whether and when those distributions will be made, and their amounts, are speculative. Until either Respondent presents the Department with a new application for licensure, it

is premature to consider the matter of whether losses have been made whole. Accordingly, this exception is rejected.

The Respondents' seventh and final exception is directed to Paragraph 30 of the Recommended Order where the ALJ expressly commented on the credibility of the Respondents' testimony regarding their knowledge of the status of NFOA as a donor annuity organization. It is the function of a hearing officer to consider all the evidence presented and resolve all conflicts therein. *Walker v. Board of Professional Engineers*, 946 So.2d 604 (Fla. 1st DCA 2006); *Heifetz v. Department of Business Regulation, Div. of Alcoholic Beverages and Tobacco*, 475 So.2d 1277 (Fla. 1st DCA 1985), and agencies are not at liberty to re-weigh that evidence. *Perdue v. TJ Palm Associates, Ltd.*, 755 So.2d 660 (Fla. 4th DCA 1999); *Heifetz v. Department of Business Regulation, Div. of Alcoholic Beverages and Tobacco*, 475 So.2d 1277 (Fla. 1st DCA 1985); *Holmes v. Turlington*, 480 So.2d 150 (Fla. 1st DCA 1985). Accordingly, this exception is rejected.

Therefore, in consideration of all of the above:

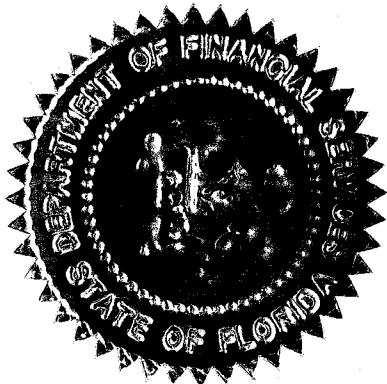
IT IS HEREBY ORDERED that the ALJ's Findings of Fact and Conclusions of Law are adopted as the Department's Findings of Fact and Conclusions of Law, and that the ALJ's recommended disposition of this case is adopted as the Department's disposition.

IT IS THEREFORE FURTHER ORDERED that the Respondents' insurance licenses and eligibility for licensure are hereby revoked. Any future application for licensure by Nancy L. Eberhardt or Richard Palmer Eberhardt will be denied until each has shown that all of the financial losses suffered by their former clients in

association with the sale of the National Foundation of America's (NFOA) insurance products have been recouped by those former clients, or their heirs and assigns.

Pursuant to Section 626.641, Florida Statutes, during the period of revocation and until reinstatement, which must be applied for in writing, neither Nancy L. Eberhardt nor Richard Palmer Eberhardt shall engage in or attempt or profess to engage in any transaction or business for which a license is required under the Florida Insurance Code, or directly or indirectly own, control, or be employed in any manner by any insurance agent, agency, or adjuster, or adjusting firm.

DONE AND ORDERED this 15th day July, 2010



A handwritten signature in black ink, appearing to read "M. Carlson", written over a horizontal line.

Michael W. Carlson
Deputy Chief of Staff

NOTICE OF RIGHTS

Any party to these proceedings adversely affected by this Order is entitled to seek review of this Order pursuant to Section 120.68, Florida Statutes, and Rule 9.110, Florida Rules of Appellate Procedure. Review proceedings must be instituted by filing a petition or notice of appeal with Julie Jones, DFS Agency Clerk, at 612 Larson Building, Tallahassee, Florida 32399-0390 and a copy of the same with the appropriate District Court of Appeal within thirty (30) days of rendition of this Order.

Copies furnished to:

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