

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL)
SERVICES,)
)
Petitioner,)
)
vs.) Case No. 10-8924
)
ROSETTE FRANCESCA BERBAN,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, on December 2, 2010, a final hearing was conducted in this case before J. D. Parrish, a designated Administrative Law Judge of the Division of Administrative Hearings (DOAH), in Orlando, Florida.

APPEARANCES

For Petitioner: Regina Keenan, Esquire
Department of Financial Services
Division of Legal Services
200 East Gaines Street
Tallahassee, Florida 32399-0390

For Respondent: Walter A. Ketcham, Jr., Esquire
Grower, Ketcham, Rutherford,
Bronson, Eide & Telan, P.A.
Post Office Box 538065
Orlando, Florida 32853-8065

STATEMENT OF THE ISSUE

Whether Respondent, Rosette Francesca Berban (Respondent), committed the violations alleged in the Administrative Complaint issued against her and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On August 11, 2010, Petitioner, the Department of Financial Services (Petitioner or Department), issued a four-count Administrative Complaint against Respondent, notifying her that based on the allegations of wrongdoing made therein, it "intend[ed] to enter an order suspending or revoking [her] licenses and appointments as an insurance agent, or to impose such penalties as may be provided under [the law]." More specifically, the Department alleged numerous violations of law; all stemmed from Respondent's actions or omissions as a licensed life, health and variable annuity, and life and health insurance agent. Count I of the complaint set forth facts pertaining to Respondent's client, a "senior consumer," named Smith. In dealing with Ms. Smith, Petitioner claimed Respondent had: willfully used her license or appointment to circumvent the requirements or prohibitions of the insurance code; demonstrated a lack of fitness or trustworthiness to engage in the business of insurance; demonstrated a lack of reasonably adequate knowledge and technical competence to engage in the transactions authorized by license or appointment; engaged in fraudulent or

dishonest practices in the conduct of business; willfully failed to comply with or willfully violated any proper order or rule of the Department or any provision of the insurance code; engaged in the conduct of business in unfair methods of competition or in unfair or deceptive acts or practices, as prohibited under part IX of Chapter 626 or otherwise being a source of injury or loss to the public interest; violated the insurance code of ethics; failed to treat the business of insurance as a public trust; made misleading representations for the purpose of inducing a person to take out a policy of insurance; engaged in an unfair trade practice; disseminated false information; knowingly made a false entry or statement pertaining to the business of insurance; knowingly made a false or fraudulent oral statement for the purpose of obtaining a fee; made a material omission of fact regarding a replacement policy; and knowingly made material omissions tending to induce a person to take out a policy of insurance. Count II also concerned Ms. Smith, but related factually to a second encounter between Respondent and Ms. Smith. The violations alleged in Count II, paralleled the violations previously cited.

Count III alleged violations of law, pertaining to Respondent's dealings with a second consumer named DeVita. As with the prior allegations, Ms. DeVita was a "senior consumer," who sought information regarding her insurance needs.

In Count III, Petitioner claimed Respondent's actions or omissions violated the law as described above. Petitioner withdrew Count IV of the Administrative Complaint.

Respondent denied any wrong-doing connected with either Ms. Smith or Ms. DeVita, and timely requested an administrative hearing to contest the disciplinary action sought by Petitioner. The matter was forwarded to DOAH for formal proceedings on September 8, 2010. Thereafter the case was promptly scheduled for hearing.

At the hearing, Petitioner presented the testimony of Respondent, Ezelle Smith, Iris Ashley, Gwen Frasley, Mary Ann DeVita, and Bill Harrison, Jr. Petitioner's Exhibits A through H were admitted into evidence. Respondent testified on her own behalf and offered the testimony of Luis Mostow. Respondent's Exhibits 1 through 13, Z, and AA were also received into evidence.

The Transcript of the proceedings was filed with DOAH on December 20, 2010. The parties were granted ten days within which to file proposed recommended orders. Respondent's request for an extension of time was granted, and the parties were afforded additional time within which to file their proposed orders. Both timely submitted proposed orders that have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is the state agency charged with the responsibility and authority to regulate insurance and insurance-related activities within the State of Florida. The licenses held by Respondent are included within the Petitioner's authority.

2. At all times material to the issues of this case, Respondent has been licensed as a life, health and variable annuity insurance agent, and as a life and health insurance agent (licensee).

3. At all times material to the issues of this case, all of Respondent's acts or omission were in the course of her conducting insurance business as a licensee and agent for Penn Life-Senior Solutions, Lincoln Financial Group, or Aviva.

4. Ezelle Smith is a female retiree, who resides in Sanford, Florida. At all times material to this case, Ms. Smith was a "senior consumer," as that term is used in the statutes. Ms. Smith was born in 1922 and makes her permanent residence in Florida.

5. In November 2003, at age 80, Ms. Smith acquired a deferred annuity from Pennsylvania Life Insurance Company by paying a \$50,000.00 premium. This annuity guaranteed Ms. Smith a certain monthly income for a certain period of time.

6. Prior to January 25, 2008, Ms. Smith contacted Penn Life-Senior Solutions for the purpose of changing her beneficiary under the previously described annuity.

7. On or about January 25, 2008, Respondent went to Ms. Smith's home purportedly to handle the change of beneficiary. At the time of Respondent's visit, Ms. Smith was 85 years of age. In discussions between Respondent and Ms. Smith, the latter opined that she would like more monthly income.

8. Respondent sold Ms. Smith an equity indexed tax deferred annuity from Lincoln Financial Group (new annuity). The premium for the new annuity was funded, in part, by the Pennsylvania Life Insurance annuity. The total required to fund the new annuity was \$56,497.97. In addition to the redeemed annuity, Ms. Smith was required to write a check in the amount of \$10,000.00, for the difference in cost. Further, when the annuity was cashed in, Ms. Smith paid a surrender penalty of \$3,607.43.

9. It is found, Respondent did not fully explain the surrender penalty that would be incurred in the acquisition of the new annuity. Because Respondent did not make full disclosures regarding the new annuity, Ms. Smith did not understand the transaction and did not have a full accounting of the options available to her.

10. Additionally, when Respondent explained the transaction to Respondent's daughters, she omitted pertinent information regarding the surrender penalty. Although the daughters knew their mother was seeking an increased monthly income, Respondent did not accurately explain the entire transaction. Ms. Smith's right to cancel the new annuity provided a 20-day window after the receipt of the policy within which it was possible to cancel the transaction. Respondent knew or should have known within the cancellation period that Ms. Smith was not agreeable to the transaction.

11. Under the original annuity, Ms. Smith received a monthly income in the amount of \$123.00. Under the new annuity, the monthly income was increased to \$222.00. Mathematically, an 85-year-old woman would have to wait over three years to recover the amount surrendered when the original policy was cashed in.

12. Although Respondent claimed the new annuity was superior to the original one, Ms. Smith lost the surrender amount, and \$10,000.00 was then tied up in the new annuity. An annuity is not "more liquid" than cash. In summary, the new annuity did not afford sufficient benefits to overcome the loss of the surrender penalty and the loss of liquidity of the cash for the consumer. Respondent encouraged Ms. Smith to acquire an inappropriate investment, and thereby failed to protect the consumer's best financial interests.

13. Mary Ann DeVita is a "senior consumer," who resides in DeBary, Florida, and is a citizen of the State of Florida. Ms. Devita was born in 1935.

14. Prior to April of 2009, Ms. DeVita acquired two deferred variable annuities from John Hancock Life Insurance Company. The total invested in the annuities was well over \$550,000.00.

15. Ms. DeVita was unhappy with the performance of her investments and responded to an advertisement placed by Respondent's company. Ms. DeVita sought information as to how her retirement funds might be better invested to preserve the principle. Respondent visited Ms. DeVita in her home and explained options available regarding a new investment.

16. Respondent proposed that Ms. DeVita invest in two equity indexed deferred annuities with Aviva that would be funded by the John Hancock annuities and Ms. DeVita's stock market account valued in the amount of \$475,000.00. In furtherance of her proposal to Ms. DeVita, Respondent visited the home on several occasions. Each visit Respondent pitched the proposal.

17. Respondent filled out the application for the proposed transaction and eventually Ms. DeVita signed the form. Ms. DeVita did not want the transaction to be completed until her children could review the paperwork and sign off on the

deal. Respondent claimed she would consult with Ms. DeVita's family and that an additional signature would be needed to complete the transaction. In fact, no additional signatures were needed.

18. Shortly after learning about the proposed transaction, Ms. DeVita's son was contacted by Bill Harrison (Ms. DeVita's insurance agent). Mr. Harrison was concerned that by surrendering the John Hancock annuities, Ms. DeVita could potentially lose the death benefits that were valued at approximately \$286,000.00. As a result of Mr. Harrison's intercession into the matter, Respondent was not able to complete her proposed transaction.

CONCLUSIONS OF LAW

19. DOAH has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.560 and 120.57, Fla. Stat. (2010). Unless otherwise noted, all statutory references will be to Florida Statutes (2010).

20. Petitioner has the burden of proving the specific allegations of fact that support the charges by clear and convincing evidence. See Dep't of Banking & Fin., Div. of Sec. & Inv. Prot. v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); and Pou v. Dep't of Ins. & Treasurer, 707 So. 2d 941 (Fla. 3d DCA 1998).

21. Clear and convincing evidence as described by the court in Evans Packing Co. v. Dep't of Agric. & Consumer Servs., 550 So. 2d 112, 116, n. 5 (Fla. 1st DCA 1989), is:

. . . [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).

22. See also In re Graziano, 696 So. 2d 744 (Fla. 1997); In re Davey, 645 So. 2d 398 (Fla. 1994); and Walker v. Fla. Dep't of Bus. & Prof'l. Reg., 705 So. 2d 652 (Fla. 5th DCA 1998) (Sharp, J., dissenting).

23. In determining whether Petitioner has met its burden of proof, it is necessary to evaluate the evidence in light of the specific allegations of wrongdoing made in the Administrative Complaint. Due process prohibits the Department from taking disciplinary action against an agent based on matters not specifically alleged in the charging instrument, unless those matters have been tried by consent. See Trevisani v. Dep't of Health, 908 So. 2d 1108, 1109 (Fla. 1st DCA 2005).

24. The Administrative Complaint in the instant case, contains three remaining counts. Counts I and II charged that Respondent violated sections 626.611(4), (7), (8), (9), and (13); 626.621(2), (3), (6), and (9); 626.9521(1); and 626.9541(1)(e)1., (1)(e)2., (1)(k)1., (1)(k)2., and (1)(l), Florida Statutes. Count I also alleged violations of Florida Administrative Code Rules 69B-215.210 and 69B-215.215. Count III of the Administrative Complaint, claimed all of the foregoing violations and section 627.4554(4)(a), Florida Statutes.

25. Section 626.611 provides, in part:

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:

* * *

(4) If the license or appointment is willfully used, or to be used, to circumvent

any of the requirements or prohibitions of this code.

* * *

(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.

* * *

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

26. Section 626.621 provides in part:

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 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 this code or of any other law applicable to the business of insurance in the course of dealing under the license or appointment.

(3) Violation of any lawful order or rule of the department, commission, or office.

* * *

(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.

* * *

(9) If a life agent, violation of the code of ethics.

27. Section 626.9521 provides, in part:

Unfair methods of competition and unfair or deceptive acts or practices prohibited; penalties.—

(1) No person shall engage in this state in any trade practice which is defined in this part as, or determined pursuant to s. 626.951 or s. 626.9561 to be, an unfair method of competition or an unfair or deceptive act or practice involving the business of insurance.

(2) Except as provided in subsection (3), any person who violates any provision of this part is subject to a fine in an amount not greater than \$5,000 for each nonwillful violation and not greater than \$40,000 for each willful violation. Fines under this subsection imposed against an insurer may not exceed an aggregate amount of \$20,000 for all nonwillful violations arising out of

the same action or an aggregate amount of \$200,000 for all willful violations arising out of the same action. The fines may be imposed in addition to any other applicable penalty.

* * *

(4) A licensee must make all reasonable efforts to ascertain the consumer's age at the time an insurance application is completed.

28. Section 626.9541 provides, in part:

Unfair methods of competition and unfair or deceptive acts or practices defined.

(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:

* * *

(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.

2. Knowingly making any false entry of a material fact in any book, report, or statement of any person, or knowingly omitting to make a true entry of any material fact pertaining to the business of such person in any book, report, or statement of such person.

* * *

(k) Misrepresentation in insurance applications.—

1. Knowingly making a false or fraudulent written or oral statement or representation on, or relative to, an application or negotiation for an insurance policy for the purpose of obtaining a fee, commission, money, or other benefit from any insurer, agent, broker, or individual.

2. Knowingly making a material omission in the comparison of a life, health, or Medicare supplement insurance replacement policy with the policy it replaces for the purpose of obtaining a fee, commission, money, or other benefit from any insurer, agent, broker, or individual. For the purposes of this subparagraph, a material omission includes the failure to advise the insured of the existence and operation of a preexisting condition clause in the replacement policy.

* * *

(l) Twisting.—Knowingly making any misleading representations or incomplete or fraudulent comparisons or fraudulent material omissions of or with respect to any insurance policies or insurers for the purpose of inducing, or tending to induce, any person to lapse, forfeit, surrender, terminate, retain, pledge, assign, borrow on, or convert any insurance policy or to take out a policy of insurance in another insurer.

29. Section 627.4554 provides, in part:

Annuity investments by seniors.-

(1) PURPOSE; CONSTRUCTION.-

(a) The purpose of this section is to set forth standards and procedures for making recommendations to senior consumers which result in a transaction involving annuity products to appropriately address the insurance needs and financial objectives of senior consumers at the time of the transaction.

* * *

(2) APPLICATION.-This section applies to any recommendation to purchase or exchange an annuity made to a senior consumer by an insurance agent, or an insurer where no agent is involved, and which results in the purchase or exchange recommended.

(3) DEFINITIONS.-For purposes of this section, the term:

(a) "Annuity contract" means a fixed annuity, equity indexed annuity, fixed equity indexed annuity, or variable annuity that is individually solicited, whether the product is classified as an individual annuity or a group annuity.

(b) "Accredited investor" means any person who comes within any of the following categories, or who the issuer reasonably believes comes within any of the following categories, at the time of the sale of an annuity to that person:

1. The person's net worth or joint net worth with his or her spouse, at the time of the purchase, exceeds \$1 million; or

2. The person had an individual income in excess of \$200,000.00, in each of the 2 most

recent years, or joint income with his or her spouse in excess of \$300,000.00, in each of those years, and has a reasonable expectation of reaching the same income level in the current year.

(c) "Recommendation" means advice provided by an insurance agent, or an insurer if no insurance agent is involved, to an individual senior consumer which results in a purchase or exchange of an annuity in accordance with that advice.

(d) "Senior consumer" means a person 65 years of age or older. In the event of a joint purchase by more than one party, a purchaser is considered to be a senior consumer if any of the parties is age 65 or older.

(4) DUTIES OF INSURERS AND INSURANCE AGENTS.-

(a) In recommending to a senior consumer the purchase or exchange of an annuity that results in another insurance transaction or series of insurance transactions, an insurance agent, or an insurer if no insurance agent is involved, must have an objectively reasonable basis for believing that the recommendation is suitable for the senior consumer based on the facts disclosed by the senior consumer as to his or her investments and other insurance products and as to his or her financial situation and needs.

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

Scope. 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.

31. Rule 69B-215.215, provides:

Twisting. Twisting is declared to be unethical. No person shall make any misleading representations or incomplete or fraudulent comparison of any insurance policies or insurers for the purpose of inducing, or tending to induce, any person to lapse, forfeit, surrender, terminate, retain, or convert any insurance policy, or to take out a policy of insurance in another insurer.

32. Because they are penal in nature, the foregoing provisions must be strictly construed, with any reasonable doubts, as to their meaning being resolved in favor of the licensee. See Beckett v. Dep't of Fin. Servs., 982 So. 2d 94 (Fla. 1st DCA 2008).

33. First, with regard to Counts I and II, pertaining to consumer Smith, the Department has established by clear and convincing evidence that Respondent violated provisions of law. Specifically, it is concluded that Respondent misled Ms. Smith and her daughters, as to the acquisition of the new annuity. Ms. Smith was adamant that she would not have made the transaction if she had fully understood the surrender penalty; and that Respondent did not fully and accurately disclose the terms of the transaction was further supported by Ms. Smith's

daughters. For less than \$100.00 per month more in income, Ms. Smith was required to expend \$10,000.00, of her savings and the value (less the penalty) of her other annuity. This was not an advantageous financial decision for Ms. Smith. Ms. Smith lost the liquidity of her cash as well as \$3,600.00. The alleged benefits of the new annuity could not justify the transaction. As a "senior consumer," Ms. Smith was entitled to preferential consideration regarding whether the investment would be appropriate. Simply stated, Respondent did not put Ms. Smith's interests first.

34. As to Count III of the Administrative Complaint, it is concluded Petitioner failed to meet its burden of proof. Ms. DeVita was confused and inconsistent in her recollection of the events and the proposed transaction. In contrast to Ms. Smith, Ms. DeVita did not recall details or specifics necessary to conclude that Petitioner met its burden of proof. With regard to this count, the paper trail alone is insufficient to verify the representations made to Ms. DeVita. This is especially true since the proposed transaction was aborted prior to completion.

35. The public has an expectation of trust in a person conducting the business of insurance in the State of Florida. It is concluded Respondent violated that trust.

36. The Department clearly and convincingly proved that Respondent violated sections 626.611(7), 626.621(2), (3), (6), and (9), and 626.9541.

37. Florida Administrative Code Rule 69B-231.080 provides:

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:

(1) Section 626.611(1), F.S. - revocation

(2) Section 626.611(2), F.S. -

(a) Suspension 12 months if, had the license application been accurate, the application would have been granted, based on the statutes and Department licensing rules applicable to the application at the time the Department issued the license, and the documentation in the applicant's file at the time the Department issued the license,

(b) Revocation if, had the license application been accurate, the application would have been denied, based on the statutes and Department licensing rules applicable to the application at the time the Department issued the license.

(3) Section 626.611(3), F.S. - revocation

(4) Section 626.611(4), F.S. - suspension 6 months

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

(6) Section 626.611(6), F.S. - suspension 9 months

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

- (8) Section 626.611(8), F.S. - suspension
6 months
- (9) Section 626.611(9), F.S. - suspension
12 months
- (10) Section 626.611(10), F.S. - suspension
12 months. This provision does not apply if
the facts constitute a violation of Section
626.753, F.S.
- (11) Section 626.611(11), F.S. - suspension
6 months
- (12) Section 626.611(12), F.S. - suspension
3 months
- (13) Section 626.611(13), F.S. - suspension
6 months
- (14) Section 626.611(14), F.S. - see Rule
69B-231.150, F.A.C.
- (15) Section 626.611(15), F.S. - suspension
12 months
- (16) Section 626.611(16), F.S. - suspension
12 months
- (17) Section 626.611(17) (a), (c) or (d),
F.S. - suspension 12 months
- (18) Section 626.611(17) (b), F.S. -
revocation.

38. Rule 69B-231.090 is entitled, "Penalties for Violation of Section 626.621, Florida Statutes." It specifies the penalties that may be considered when a violation of section 626.621 has been established. The rule provides:

If it is found that the licensee has violated any of the following subsections of Section 626.621, F.S., for which suspension or revocation of license(s) and appointment(s) is discretionary, the following stated penalty shall apply:

- (1) Section 626.621(1), F.S. - revocation
- (2) Section 626.621(2), F.S. - suspension 3 months
- (3) Section 626.621(3), F.S. - suspension 3 months
- (4) Section 626.621(4), F.S. - suspension 9 months
- (5) Section 626.621(5), F.S. - suspension 6 months
- (6) Section 626.621(6), F.S. - see Rule 69B-231.100, F.A.C.
- (7) Section 626.621(7), F.S. - suspension 6 months
- (8) Section 626.621(8), F.S. - see Rule 69B-231.150, F.A.C.
- (9) Section 626.621(9), F.S. - suspension 3 months
- (10) Section 626.621(10), F.S. - suspension 6 months and re-exam
- (11) Section 626.621(11), F.S. - suspension 3 months
- (12) Section 626.621(12), F.S. - suspension 6 months

39. The aggravating and mitigating factors that must be considered in this case are found in Florida Administrative Code Rule 69B-231.160. The rule provides:

The Department shall consider the following aggravating and mitigating factors and apply them to the total penalty in reaching the final penalty assessed against a licensee under this rule chapter. After consideration and application of these factors, the Department shall, if warranted by the Department's consideration of the factors, either decrease or increase the penalty to any penalty authorized by law.

(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) Restitution to victims;
- (f) Motivation of licensee;
- (g) Financial gain or loss to licensee;
- (h) Financial loss to victim;
- (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) Violation of any part of Sections 626.9541, and 627.4554. F.S., in relation to the sale of a life insurance policy or annuity to a senior citizen; and
- (n) Other relevant factors.

(2) For penalties assessed under Rule 69B-231.150, F.A.C., for violations of Sections 626.611(14) and 626.621(8), F.S.:

(a) Number of years that have passed since criminal proceeding;

(b) Age of licensee at time the crime was committed;

(c) Whether licensee served time in jail;

(d) Whether or not licensee violated criminal probation;

(e) Whether or not licensee is still on criminal probation;

(f) Whether or not licensee's actions or behavior resulted in substantial injury to victim;

(g) Whether or not restitution was, or is being timely paid;

(h) Whether or not licensee's civil rights have been restored; and

(i) Other relevant factors.

40. Having considered the pertinent rules, the age of the consumers, as well as, the possible financial harm that was and potentially could have been inflicted as a result of the transaction, it is concluded that Respondent's licenses should be suspended for a period of 180 days. Petitioner failed to establish Respondent's actions were willful. Instead, giving Respondent the benefit of the doubt, it is concluded that Respondent acted without malice, but with great indifference to the interests of Ms. Smith, her age, and circumstances.

RECOMMENDATION

It is recommended that the Department of Financial Services enter a final order finding Respondent guilty of the violations alleged in Counts I and II of the Administrative Complaint as set forth above, suspending her license for a period of 180 days, and imposing an administrative fine in the amount of \$2,500.00.

DONE AND ENTERED this 1st day of June, 2011, in Tallahassee, Leon County, Florida.



J. D. PARRISH
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of June, 2011.

COPIES FURNISHED:

Regina M. Keenan, Esquire
Department of Financial Services
Division of Legal Services
200 East Gaines Street
Tallahassee, Florida 32399-0390

Walter A. Ketcham, Jr., Esquire
Grower, Ketcham, Rutherford, Bronson,
Eide & Telan, P.A.
Post Office Box 538065
Orlando, Florida 32853-8065

Julie Jones, CP, FRP, Agency Clerk
Department of Financial Services
Division of Legal Services
200 East Gaines Street
Tallahassee, Florida 32399-0390

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.