

FILED

AUG 19 2011

Docketed by



CHIEF FINANCIAL OFFICER  
JEFF ATWATER  
STATE OF FLORIDA

IN THE MATTER OF:

ROSETTE FRANCESCA BERBAN

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Case No. 110490-10-AG

FINAL ORDER

This cause came on for consideration of and final agency action on the Recommended Order rendered in this cause by Administrative Law Judge J.D. Parrish (ALJ) on June 1, 2011, after hearing conducted on December 2, 2010. Respondent Berban (Berban) timely filed an exception. No response to the exception was filed.

**RULING ON THE RESPONDENT'S EXCEPTION**

A review of the Respondent's fifteen page exception shows that, although detailed, it is written in brief form and, for the most part, amounts to nothing more than an invitation to this agency to re-weigh the evidence considered by the ALJ, and come to a conclusion or conclusions favorable to the Respondent. For instance, at page seven of the exception the Respondent argues that the ALJ "erred in accepting the veracity of Ms. Smith and her daughters". That is not an acceptable form of exception. It is firmly established that it is the function of a hearing officer or an administrative law judge to consider all the evidence presented and resolve all conflicts therein, including decisions as to the veracity of witnesses *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 that agencies cannot thereafter 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); *Howard Johnson v. Kilpatrick*, 501 So.2d 61 (Fla. 1st DCA 1987); *Nat. Ins. Serv. v. Fla. Unemp. App. Com'n*, 495 So.2d 244 (Fla. 2nd DCA 1986); *Groves-Watkins Const. v. Dept. of Transp.*, 511 So.2d 323 (Fla. 1st DCA 1987); *United Health v. Dept. of Health & Rehab.*, 511 So.2d 684 (Fla. 2nd DCA 1987); *Greseth v. Dept. of Health & Rehab. Serv.*, 573 So.2d 1004 (Fla. 4th DCA 1991); *Asphalt Pavers, Inc. v. State, Dept. of Transp.*, 602 So.2d 558 (Fla. 1st DCA 1992); *Dept. of Business and Pro. Reg. v. McCarthy*, 638 So.2d 574 (Fla. 1st DCA 1994); *Brown v. Crim. Just. Stand. & Training*, 667 So.2d 977 (Fla. 4th DCA 1996); *DHRS v. Yhap*, 680 So. 2d 559 (Fla. 1st DCA 1996); *Prysi v. Department of Health*, 823 So.2d 823, (Fla. 1st DCA 2002); *Rogers v. Dep't. of Health*, 920 So.2d 27 (Fla. 1st DCA 2005); *Richardson v. Florida Parole Com'n*, 924 So.2d 908 (Fla. 1st DCA 2006).

The exception does contains one legal argument that needs to be addressed. At page nine of the exception, Berban contends that Ms. Smith, the victim of the offenses in question, failed in her duty to read the annuity contract in question prior to signature, and therefore is estopped from avoiding the contract. However, as the court made abundantly clear in *Thomas v. Dept. of Ins. and Treasurer*, 559 So.2d 419 (Fla. 2<sup>nd</sup> DCA 1990), that duty arises only in the context of the relationship between the insurance carrier and the insured, not between the agent and the insured. *Thomas, supra*, at 421. Therefore, the concept of estoppel affords no relief to Berban, here the agent.

Otherwise, as written, the exception consists of nothing more than repeated disagreements with the ALJ's Findings and Conclusions based on conflicting views of the evidence. Accordingly, the exception is rejected.

IT IS THEREFORE ORDERED AND ADJUDGED that the Findings of Fact and Conclusions of Law stated in the Recommended Order are adopted as the Department's Findings of Fact and Conclusions of Law, and that all licenses held by Respondent Rosette Francesca Berban under the Florida Insurance Code, and all eligibility for licensure under the same, are suspended for a period of 180 days from the date of this Final Order.

IT IS FURTHER ORDERED that Berban shall pay an administrative penalty in the amount of \$2,500 to the Department prior to submission of any application for reinstatement, which application must be made in writing.

Pursuant to Section 626.641, Fla. Stat., during the period of suspension, Berban shall not engage in or attempt or profess to engage in any transaction or business for which licensure is required under the Florida Insurance Code, or directly or indirectly own, control, or be employed in any manner by any insurance agent or agency or adjuster or adjusting firm.

DONE AND ORDERED this 19th day of August, 2011.



A handwritten signature in black ink, appearing to read "Robert C. Kneip". The signature is written over a horizontal line.

Robert C. Kneip  
Chief of Staff

Copies to:

Regina Keenan, Esq.  
Walter A. Ketcham, Jr., Esq.  
J. D. Parrish, ALJ

#### 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, Fla. R. App. P. Review proceedings must be instituted by filing a petition or notice of appeal with Julie Jones, DFS Agency Clerk, Department of Financial Services, 612 Larson Building, 200 East Gaines Street 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. Filing may be accomplished via U.S. Mail, express overnight delivery, or hand delivery. Filing cannot be accomplished by facsimile transmission or electronic mail.