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Docketed by EU

CHIEF FINANCIAL OFFICER
JEFF ATWATER
STATE OF FLORIDA

IN THE MATTER OF:

YURAY RODRIGUEZ

Case No. 108750-10-AG

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FINAL ORDER

This cause came on for consideration of and final agency action on the Recommended Order (Exhibit A) rendered on September 2, 2011 by Administrative Law Judge (ALJ) Edward T. Bauer after a formal hearing concluded on July 22, 2011, via video teleconference. The Department's attorney timely filed exceptions to the Recommended Order, and the Respondent Yuray Rodriguez timely filed responses thereto. The Recommended Order, the transcript of the proceedings, the admitted exhibits, the Department's exceptions, Rodriguez's responses, and applicable law have all been considered during the promulgation of this Final Order.

RULINGS ON THE DEPARTMENT'S EXCEPTIONS

The Department's First Exception is directed to Paragraph 10 of the Findings of Fact wherein the ALJ found that the Respondent believed that the blank enrollment forms he had signed could not be misused because only the signing agent, the Respondent, himself, could submit them to the insurance carrier, thus justifying his inaction in reporting the lost forms to the insurance carrier. The Department's exception takes issue with the exclusivity of that finding. A review of the record shows, in accord with the Department's exception, that the Respondent testified that the signed forms could *also* be submitted to the insurance carrier via mail by an applicant. (Tr. 118) That

is an acknowledgment that the Respondent knew that some third party "applicant" could complete the application forms and submit them to the insurer through the mail, without his participation or the insurance carrier's knowledge of that fact. That acknowledgement effectively destroys the sole purported explanation for Respondent's failure to notify the carrier of the signed, blank forms. Thus, there is no competent substantial evidence in the record to support the Finding of Fact # 10 that the Respondent believed that because only he could submit the forms in question to the carrier there was no need to notify the carrier of the situation; his own testimony negatives that purported finding. (Tr. 118) Whether that third party was a bona fide applicant, or, as turned out to be the case, a bogus applicant, was recklessly and irresponsibly left to chance by the Respondent, and indirectly facilitated the delivery of a false material statement to the insurance carrier. Moreover, the insurance carrier's Director of Enrollment and Member Administration testified that the applications could also be received via facsimile transmission. (Tr. 35) Accordingly, the exception is granted, and Paragraph 10 of the Recommended Order is rejected and the following substituted therefor:

> Although the Respondent knew or, under the circumstances, should have known that that the otherwise blank forms he had signed as the company's appointed producing agent could be clandestinely completed by third parties and submitted to the carrier by mail, and thus appear to be legitimate applications upon which the carrier could and, in these instances did, rely upon to enroll the purported applicant. Further, once the Respondent had reason to suspect that there was a problem, he took no action to notify the carrier of those facts. Thus, the Respondent indirectly but knowingly caused to be delivered to the insurance carrier a false statement to the effect that he had assisted the applicant in completing the application and that the purported applicant was legitimately applying for HMO membership when that was not the case, a statement obviously

material to the carrier's decision to accept the applications and the underlying risk.

The Department's Second Exception is directed to Paragraphs 21 and 22 of the Recommended Order wherein the ALJ made the factual determinations that the Department had failed to present clear and convincing evidence of specified statutory violations. The Department contends that those factual findings are constructions of the statutes, thus rendering them Conclusions of Law rather than Findings of Fact. Determinations of statutory violations are matters of fact, not law, and the record contains competent substantial evidence to support the ALJ's findings in question. Accordingly, that exception is rejected.

The Department's Third Exception, directed to Paragraph 31 of the Conclusions of Law, takes issue with the ALJ's Conclusion of Law that the Department had correctly conceded that the Respondent's act of signing the blank application forms "was not improper in and of itself". The Department asserts that the Conclusion of Law is incomplete and inaccurate because it virtually ignores the express limitation in the stipulation to the effect that if the pre-signed application "... was never left out of his possession or nothing was done with it, there would be no violation." The Department's exception is well-taken. The cited stipulation is fundamentally irrelevant in determining the Respondent's culpability, because the Respondent willfully abandoned possession of the application forms to unknown individuals, who ultimately misused them. (Tr. 25-48, 68-82) Thus, the stipulation, by its own terms, does not apply to the Respondent's actual actions in this matter. A review of the record shows that the Department presented clear and convincing evidence that the Respondent irresponsibly surrendered

possession of the blank, signed insurance applications to purported brokers that fraudulently misused those applications. Thus, there is not substantial competent evidence to support the challenged Conclusion of Law. Accordingly, the Department's exception is accepted, and Paragraph 31 of the Recommended Order is rejected and the following substituted therefor:

> Although the Department conceded that the signing of blank application forms is not improper in and of itself, that stipulation is irrelevant to the determination of whether the Respondent's actual actions were violative of the Insurance Code.

This Conclusion of Law is as or more reasonable than that for which it is substituted.

The Department's Fourth Exception, directed to Paragraphs 35 and 37 of the Conclusions of Law, wherein the ALJ concluded that the Department had not shown a violation of Section 626.611(8), Fla. Stat., is also based on its contention that the ALJ misconstrued the Department's stipulation that the signing of the otherwise blank application forms by Respondent was not in and of itself improper conduct. The Department's exception is directed to the use of that stipulation by the ALJ to conclude that the Respondent had not falsely certified by his signature that he had assisted a consumer in completing the application, even though the signed form so certified and no such assistance was rendered. The Department's exception is well-taken in this limited respect. Although pre-signing insurance applications may not, *per se*, constitute an Insurance Code violation, the *circumstances* under which insurance applications are pre-signed may indeed constitute an Insurance Code violation. However, for the reasons stated below, and based strictly upon the evidence presented in this case, the Department will defer to the ALJ's conclusion that the Department failed to prove a violation of Section 626.611(8), Fla. Stat. To prove a violation of Section 626.611(8),

Fla. Stat., the Department must prove by clear and convincing evidence that the agent in question lacks the requisite knowledge of the insurance business or the technical competence needed to lawfully engage in the insurance business. *See, Dep't. of Fin. Servs. v. Sibble-McLeod*, Case No. 04-3423PL, 2005 Fla. Div. Adm. Hear. LEXIS 855, *5-6, Paragraph 11 (Fla. DOAH Feb. 23, 2005). While the Department has proved other violations of the Insurance Code relative to Respondent's facilitation of the misuse of the forms in question by others, that misuse does not clearly and convincingly demonstrate the lack of requisite knowledge or the lack of technical competence needed to lawfully engage in the business of insurance. Accordingly, this exception is rejected.

The Department's Fifth Exception is directed to Paragraph 37 of the Conclusions of Law, wherein the ALJ concluded that the Department had failed to prove by clear and convincing evidence that the Respondent lacked the requisite knowledge and competence to engage in the business of insurance. For the reasons stated in rejecting this same exception relative to this same paragraph above, this exception is rejected. Moreover, a review of this exception, which focuses on Respondent's actions and inactions subsequent to delivering the signed but otherwise blank application forms to the purported brokers, may show his failure to "do the right thing" by notifying the insurance carrier of the situation, but there was insufficient evidence presented in this case that clearly and convincingly demonstrates his lack of knowledge relative to insurance products or his lack of technical competence needed to lawfully engage in the insurance business. In that regard, the exception is akin to an invitation for the Department to re-weigh the fact evidence, and come to a different conclusion than was

reached by the ALJ. This, the Department 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. Accordingly, this exception is rejected.

The Department's Sixth Exception focuses on Paragraph 43 of the Conclusions of Law, and argues that the ALJ should have found that Respondent violated the provisions of Section 626.9541(1)(e), Fla. Stat. A person violates said statute by

> 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.

For the reasons stated in accepting the Department's First Exception, this exception is accepted. By helping others to obtain and maintain possession of the otherwise blank application forms the Respondent had signed while knowing that they could be fraudulently delivered to the insurance carrier by others through the mail, the Respondent indirectly but knowingly facilitated the delivery of a false material statement to the insurance carrier. It takes credulity beyond the breaking point to conclude that the Respondent, under those circumstances, could not foresee the eventuality that third parties could covertly complete those forms and mail them to the insurance carrier, seeming, for all appearances, as legitimate applications that he personally completed as the company's appointed producing agent. The ALJ appears to interpret Section 626.9541(1)(e), Fla. Stat., to mean that if a reasonable person would not be misled by a

false statement of fact, such a statement could not be "materially false", and would therefore not satisfy a necessary element of the violation. However, the ALJ misapprehends that statutory section. The section does not require a statement to be "materially false", but instead defines as an unfair or deceptive trade act the knowing placement of a false material statement before any person. The materiality requirement applies to the statement itself, not to the degree of its falsity. The test to determine if a statement is false is not whether its falsity would be "obvious to any reasonable person", but rather whether or not the statement is *true*. See Whitaker v. Dep't of Ins. and Treasurer, 680 So.2d 528, 532 (Fla. 1st DCA 1996) (affirming violation of Section 626.9541(1)(e)1.e. as found in Dep't of Ins. and Treasurer v. Whitaker, Case No. 93-5436 1995 WL 1052646 (Fla. DOAH 1996) (holding that for the purpose of Section 626.9541(1)(e), Fla. Stat., it is irrelevant whether Respondent intended for false statements to confuse or mislead anyone; it only mattered that they were knowingly prepared and disseminated). It is undisputed that the Respondent, at the time that he signed the enrollment application form on a line reserved for any individual who had assisted an applicant in completing the application, *knew he had not done so*. [Recommended Order ¶ 7; Jt. Pre-Hr'g Stip. (e)(4), (13), and (21); Tr. at 159-160]. The ALJ also contends that even if a "materially false" statement was made by the Respondent, it was not done so knowingly, because it was the *intention* of the Respondent to ultimately meet with consumers and assist them in completing the applications he had signed. However, this interpretation of the application clause certified by Respondent is contrary to the meaning given to the clause by the Respondent himself, who acknowledged that he interpreted it to indicate that one

should sign only if one actually had helped in completing the application. [Pet'rs Ex. No. 16 at 70-71].

Further, the ALJ's interpretation of the term "knowingly" is inconsistent with the plain meaning of the statute. All that is required for Respondent's actions to fall within the ambit of the statute is for the Respondent to know that the material statement he was making was false at the time he was making it. See Whitaker, supra. It is irrelevant that the Respondent *intended* to retroactively rectify the false statements at some point in the future; at the time he affixed his signature to the applications indicating that he assisted the applicants in their completion and then placed said applications in the hands of the purported brokers, he violated the above-cited statutory section. Accordingly, this exception is accepted, and Paragraph 43 of the Recommended Order is rejected, and the following is substituted therefor:

> Although the Respondent knew or, under the circumstances, should have known that that the otherwise blank forms he had signed as the company's appointed producing agent could be covertly completed by third parties and submitted to the insurance carrier by mail, and thus appear to be legitimate applications upon which the carrier could and, in these instances did, rely upon to enroll the purported applicant, he took no action to notify the carrier of those facts. Thus, the Respondent indirectly but knowingly caused to be delivered to the insurance carrier a false statement to the effect that the purported applicant was legitimately applying for HMO membership under the auspices of the Respondent's licensure when that was not the case, a statement obviously material to the carrier's decision to accept the applications and the underlying risk. Thus, the Respondent has, by his actions, violated Sections 626.9521 and 626.9541(1)(e)1.e., Fla. Stat.

This Conclusion of Law is as or more reasonable than that for which it is substituted.

The Department's Seventh Exception, directed to Paragraph 45 of the Conclusions of Law, argues that the ALJ should have concluded that the Respondent violated Sections 626.9521 and 626.9541(1)(k)1., Fla. Stat., which prohibit the making of a false or fraudulent written or oral statement on or relative to an application for an insurance policy for the purpose of obtaining a fee, commission, money or other benefit from an insurer. For the reasons addressed in ruling upon the Department's Sixth Exception above, it is found that the Respondent, in signing and distributing the applications at issue, made a false material statement. Additionally, a review of the record conclusively demonstrates (and the ALJ concedes) that the "sole purpose" of the Respondent's conduct was to earn a commission or fee from the "deal" proposed by the purported brokers. Thus, at the time the Respondent falsely attested to the applications, it is uncontroverted that he was motivated by his desire to financially benefit from the transaction. Therefore, the Respondent violated the above-cited statutory provisions. Accordingly, the exception is accepted and Paragraph 45 of the Recommended Order is rejected and the following is substituted therefor:

> The Respondent, by signing and distributing the applications at issue made false material statements for the purpose of obtaining a fee, commission, money or other benefit from an insurer in violation of Sections 626.9521 and 626.9541(1)(k)1., Fla. Stat.

This Conclusion of Law is as or more reasonable than that for which it is substituted.

The Department's Eighth Exception, directed to Paragraphs 46 through 49 of the Conclusions of Law, argues that based upon the Respondent's violation of Sections 626.9521 and 626.9541(1)(e)1.e., Fla. Stat., Respondent should also be found to have violated Section 626.621(6), Fla. Stat., which provides for the discretionary suspension or revocation of an insurance agent's license if the agent is found to have violated any

provision of Part IX of Chapter 626 Fla. Stat., or otherwise shown himself or herself to be a source of injury or loss to the public. Sections 626.9521 and 626.9541, Fla. Stat., are within Part IX of Chapter 626, Fla. Stat. The violation of those sections of Part IX of Chapter 626, Fla. Stat., having been established by the record as noted herein, the concomitant violation of Section 626.621(6), Fla. Stat. is also established. Accordingly, this exception is accepted, and Paragraphs 46 through 49 of the Recommended Order are rejected because there is no competent substantial evidence in the record to support them.

In view of the above, the recommended dismissal of all charges is rendered inappropriate. Rule 69B-231.100, F.A.C. imposes a twelve month suspension for a violation of Section 626.9541 (1)(e)1.e., Fla. Stat., which Respondent has been found to have violated. Additionally, Rule 69B-231.090, F.A.C., by cross reference to Rule 69B-231.100, F.A.C., also imposes a twelve month suspension for a violation of Section 626.621(6), Fla. Stat., which Respondent also violated. However, as a violation of Section 626.9541(1)(e)1.e., Fla. Stat., is necessarily a violation of Section 626.621(6), Fla. Stat., the imposition of a twelve month suspension for each statutory violation is unduly duplicative. A violation of Sections 626.9521 and 626.9541(1)(k)1., Fla. Stat. calls for a nine month suspension of the license in question. Therefore, a 21 month suspension could properly be imposed prior to consideration of aggravating or mitigating factors as authorized by Rule 69B-231.160, F.A.C.

A review of applicable aggravating or mitigating factors shows more negligence than willfulness on Respondent's part, although he did knowingly sign and distribute the application forms in question. The potential injury to those involved derived from

Respondent's failure to either regain possession of the application forms or to inform his appointed carriers of the situation. None of the enrolled persons suffered any actual injury, and any injury suffered by Suncoast Physician's Health Plan (Suncoast) was as much a result of its own negligence in failing to verify the content of the forms as it was caused by Respondent's actions. (Tr. 40-43; Recommended Order, Paragraph 12) There was no allegation or evidence of financial loss to anyone, and no financial gain to Respondent. None of the enrollees suffered any loss of coverage. The Respondent has no previous negative disciplinary history with the Department. While Respondent's general motivation to prematurely sign and attest to the applications was to profit through a bulk enrollment into the Suncoast plan, there is no evidence of any specific intent to do so through illegal means. In view of these factors, a mitigation of the penalty is appropriate. Accordingly, the imposition of a one year period of probation and an administrative fine in the amount of $2500 against the Respondent is deemed to be warranted. Sections 626.681 and 626.691, Fla. Stat.

ACCORDINGLY, in consideration of all of the above:

IT IS HEREBY ORDERED that Yuray Rodriguez shall pay an administrative fine in the amount of $2,500 to the Department within thirty (30) days from the date hereof. Failure to so remit said administrative fine will result in the suspension of all licenses held by Rodriguez under the Florida Insurance Code until such time as said fine is paid, and for a period of sixty (60) days thereafter. Further, all licenses held by Rodriguez pursuant to the Florida Insurance Code are hereby placed on probationary status for a period of one year from the date hereof. During the period of probation, Rodriguez shall abide by all provisions of the Florida Insurance Code and all applicable department

administrative rules, and shall not sign any application forms prior to the completion of the application process with and in the presence of the actual applicant.

DONE AND ORDERED this 1st day of December, 2011.

Robert C. Kneip, 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, 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. facsimile transmission, or electronic mail.

Copies to:

Jacek Stramski
Douglas Dolan
Frank L. Hollander
ALJ Edward T. Bauer