

FILED

SEP 25 2013



CHIEF FINANCIAL OFFICER
JEFF ATWATER
STATE OF FLORIDA

Docketed by Eu

IN THE MATTER OF:

Case No. 121213-12-AG

UNLIMITED FULFILLMENT
SERVICES, LLC.

FINAL ORDER

This cause came on for consideration of and final agency action on the Recommended Order filed on June 28, 2013 after formal hearing conducted on March 12, 2013 by Administrative Law Judge (ALJ) John D.C. Newton. A copy of that Recommended Order (RO) is attached as Exhibit A hereto. Respondent Unlimited Fulfillment Services, LLC (Unlimited) timely filed exceptions to the RO. The Recommend Order, the transcript of proceedings, the admitted exhibits, the exceptions and applicable law were all considered in the promulgation of this Final Order.

RULINGS ON THE RESPONDENT'S EXCEPTIONS

1. Unlimited first takes exception to the findings of fact in Paragraph 10 of the RO, contending that it fails to make certain desired findings of fact specified in the exception. Section 120.57(1) (I), Fla. Stat., expressly provides that an agency may not reject or modify a finding of fact unless a complete review of the record shows that there is no competent substantial evidence to support the challenged finding. Thus, a finding of fact can be challenged on the basis that the record does not support what that finding

contains, but there is no support in the law for the proposition that a finding of fact can be challenged on the basis of what it does not find or contain. In Paragraph Ten, the ALJ found that in 2011 Unlimited entered into a certain contract with Florida insurance agent Andy Hegate, and nothing more. That finding is amply supported by the record. (Department's Exhibit 1; Tr. 67, 85-87) Accordingly, this exception is rejected.

2. Unlimited's second exception contends that Paragraph 19 of the RO fails to recognize that there are five definitions for the word "agency" , and that only one of those definitions applies to a government entity. Within the context of Paragraphs Seventeen and Eighteen, which precede and set the foundation for the finding announced in Paragraph Nineteen, Unlimited could perhaps be seen as a contractual "agent" for its contractual principal, Mr. Heygate, but it cannot be seen as an "agency" because "agency" is a concept of law explaining a relationship between a principal and an agent, as explained in the first four definitions of that term offered by Unlimited's exception. Thus, "agent" and "agency" are not interchangeable concepts as suggested by Unlimited. Therefore, the only workable definition of the term "agency" as that term was used by Unlimited in its post cards and as defined by Unlimited in this exception is the definition that evokes the concept of either a government agency or an insurance agency. There is no competent evidence in the record to establish that Unlimited is either, and Unlimited does not contend that it is either. Nonetheless, it used that term to describe itself and its affiliation status with insurance carriers. (*This agency does not have a direct affiliation with the insurance carrier through which you are currently contracted. The agency is contracted with agents licensed to conduct insurance business in your state.*) (e.s.) The challenged finding of fact is thus supported by

Unlimited's own proffered definitions of that term that alternatively define the same as a government entity. None of the other alternatives fit the relevant fact situation. Accordingly, this exception is rejected.

3. Unlimited thirdly excepts to the Findings of Fact contained in Paragraphs 21, 22, and 23 "and all other similar findings". Section 120.57(1) (k) clearly requires each exception to specifically identify the disputed portion of the RO by page or paragraph number or that does not include appropriate and specific citations to the record. Citing to "all other similar findings" does not satisfy those requirements, so no rulings are made on any paragraphs other than 21, 22, and 23.

4. The challenge to Paragraphs 21, 22, and 23 centers on the representation made in Unlimited's mailings to the public that "This communication is to inform you that you may have an annuity that has reached the end of its surrender period". Paragraph 21 finds that that language creates the impression that Unlimited has some special knowledge of the recipients' financial circumstances. In paragraph 23 the ALJ considers the remainder of the post card's language, and the "agency" reference discussed in the second exception, above, and finding that the totality of the post card creates the impression that Unlimited has financial information about, and a formal relationship, with the recipient, despite some qualified disclaimers. Unlimited contends that there is no competent substantial evidence in the record to support those factual findings.

5. In support of this exception Unlimited cites to the hearing testimony of Ms. Phyllis Sukut, at (Tr. 24). However, that limited exchange fails to take into account her additional testimony that she was confused as to why the post card was directed to her, who it came from, and that she did not understand what it was saying about a surrender

period or why it used the term “agency”. (Tr. 17-23, 25-26.) The exception also ignores the testimony of Ms. Roxanne Rehm, an expert called by the Department, as to the confusing content of the post card. (Tr. 145-149) It is the province of an administrative law judge to weigh and resolve all conflict in evidence. *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). To the extent that there was conflicting testimony from Ms. Sukut, the ALJ properly resolved those conflicts, and there is other competent substantial evidence in the record to support those findings. (Tr. 17-23, 25-26, 145-149, 174-176). Accordingly, this exception as to Paragraphs 21 and 23 is rejected.

6. Paragraph 22 states only that the statement in the text box referenced in paragraph 20 is an accurate statement. It does not contain the language challenged in Paragraphs 21 and 23. Thus, Unlimited’s exception to Paragraph 22 is inapposite to that paragraph and is therefore rejected, no legal basis for an exception thereto having been stated. Section 120.57(1) (k), Fla. Stat.

7. Unlimited’s fourth exception, directed to Paragraph 23 of the RO, is the same as was made in its third exception. For the reasons stated in rejecting the third exception, this fourth exception is rejected.

8. Unlimited’s fifth exception, directed towards Paragraph 37 of the RO is substantially the same as its third exception’s argument about the content of Ms. Sukut’s testimony. For the reasons stated in rejecting the third exception regarding Ms. Sukut’s testimony, this fifth exception is rejected.

9. Unlimited's sixth exception is directed to the Conclusions of Law announced in Paragraphs 52 and 53 of the RO. Unlimited contends that the case of *National Federation of Retired Persons v. Department of Insurance*, 553 So.2d 1289 (Fla. 1st DCA), relied on by the ALJ is distinguishable and therefore inapplicable to this instant cause. Unlimited contends that because Mr. Hegate, a licensed insurance agent, played a role in the solicitation process engaged in by Unlimited, that his involvement somehow legitimized Unlimited's solicitation actions. It further argues that Unlimited's actions are no more than the equivalent of mass media advertising by insurance carriers and agents, so that if they can advertise without a license, Unlimited should be able to solicit without a license.

10. First of all, it must be noted that Mr. Hegate did not testify at the hearing, so any testimony about his participation in the solicitation process is suspect at best, and often consisted of uncorroborated hearsay. More to the point, Unlimited did not restrict its activities to merely mailing out postcards. It invited the recipients to call Unlimited's offices, not Mr. Hegate's office, to speak with Unlimited's unlicensed personnel about their purportedly expiring annuity. While Unlimited claims that its personnel did not "sell anything" when answering the postcard-solicited phone calls from its recipients, Unlimited's personnel routinely offered the callers the opportunity to have their annuity "reviewed" by Mr. Hegate. (Tr. 92-93) It strains credulity to the breaking point to assume that Mr. Hegate would then spend his valuable time on the phone with the caller in anticipation of merely "reviewing" their annuity for no cost, and make no attempt to sell them another insurance product. He would soon be out of business if he did not anticipate and execute sales of additional insurance products

when the opportunity to do so arose from such "reviews". In short, Unlimited was engaging in solicitation to develop leads for Mr. Hegate and was thus transacting insurance without licensure contrary to Sections 624.10 and 624.11, Fla. Stat. The central theme of Unlimited's activities is thus materially indistinguishable from the activities observed in *National Federation of Retired Persons v. Department of Insurance, supra*, where responders were referred to an agent after they responded to the solicitations sent by an unlicensed entity. The matter of whether payment for the leads is received before or after the referral is not determinative of whether the conduct in question constitutes solicitation. "Solicitation" consists of an enticement, or a drawing on a hope or desire. *National Federation, supra*, at 1290. The ALJ was correct in finding that case law definition applicable and controlling here. Moreover, Section 626.112(1) (b), Fla. Stat. provides that no person may engage in the solicitation of insurance without being licensed in one of the categories mentioned therein. There is no record evidence that any of Unlimited's personnel were so licensed. See, also, Section 626.112(2), Fla. Stat., which requires that even if one is licensed as a customer representative, and thereby entitled to solicit or otherwise transact insurance, that licensure must be related to a line of insurance for which the customer representative is then licensed and appointed to transact. There was no such evidence in the record relative to Unlimited's personnel. Finally, as to this exception, the contention that mass media advertisers are performing the same functions as Unlimited is fatuous. Mass media advertisers do not invite the public to call them rather than the carriers and agents they advertise, and they do not accept calls from the public. Here, Unlimited did both. Accordingly, this exception is rejected.

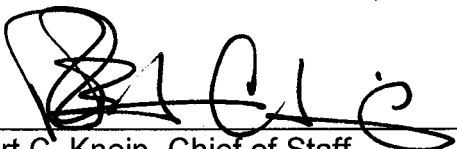
11. Unlimited's seventh exception is directed at Paragraphs 57, 58, and 59 of the RO where the ALJ concludes that the post cards in question are deceptive in their content. Unlimited contends that the large number of post cards sent in comparison with the low number of complaints received about them shows that they were not deceptive. It further contends that one of the complainants ultimately testified that that she understood everything about the post card, and that Dr. Cronin's study purporting to show lack of confusion was improperly taken out of context. The test for deceptiveness does not rest with mere numbers. As Unlimited pointed out in its defense, it has no way of knowing the nature of its recipients other than by the demographic classification desired by the insurance agent (Tr. 88, 119), and that its post cards routinely produce a response rate of less than 1%. (Tr.90) Unlimited offered no evidence to support its contention that a reliable conclusion as to deceptiveness could be drawn from those limited facts. Dr. Cronin's study was given no weight by the ALJ because it lacked a showing of statistical reliability. (RO 59) However, the ALJ properly noted that if the study were to be given weight, it would prove rather than disprove deceptiveness. (RO 60) The test for deceptiveness is whether a person of ordinary intelligence would be confused and thus misled about the content of a given writing. In that regard, Ms. Sukut testified that she was confused about the content of the post card (Tr. 17-23, 25-26), and Ms. Rehm testified that the post card contents were deceptive for some of the same reasons stated by Ms. Sukut. (Tr. 145-149, 174-176). Unlimited produced no witness testimony or other competent substantial evidence to counter Ms. Rehm's testimony. Thus, there is competent substantial evidence in the record to support the challenged Conclusions of Law reached by the ALJ. Accordingly, this exception is denied.

12. In its eighth and last exception, Unlimited attacks Paragraph 18 of the RO where the ALJ factually found the print on the front of the post cards was "very small". The attack is based on the testimony of a Mr. Matthew Dilday that he believed that everything in the post card was printed in 12 point font. (Tr. 94) However, a simple visual examination of an exemplar of that post card, attached to Department's Exhibit 1, shows that belief to be mistaken. The font in question is obviously significantly smaller than that on the back of the post card. Accordingly, this exception is rejected.

WHEREFORE, IT IS HEREBY ORDERED that the Findings of Fact and Conclusions of Law in the Recommended Order are adopted in full as the Department's Findings of Fact and Conclusions of Law, and that UNLIMITED FULFILLMENT SERVICES LLC is hereby ORDERED to immediately cease and desist all written and oral solicitation of insurance transactions in the State of Florida until such time as it and its personnel become properly licensed under the Florida Insurance Code.

DONE AND ORDERED this 25th day of September, 2013.




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.

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Copies to:
ALJ John D.C. Newton
Brennan Donnelly
David Busch

Client says "NO" (If setting Life Appointments jump to Life Script below)

"That's fine Mr. / Mrs. [Customer Last Name]; We'll just stay in touch if we come across something we think will be of interest to you, OK?"

Client says "OK"

SET AS A LEAD

Client says "NO"

Ok, just disregard the notice, should you ever have the need for a financial professional, please give us a call again.

Client says "YES"

This review will cover important contract features and make sure you are receiving all the benefits you are entitled to, as well as important tax law changes that could impact your income.

Do you have a pen and paper handy? I need you to write down some information. "[Agent Name] is the servicing agent that will be conducting your review. He / She is currently scheduling on [Date]. Would you like a Morning or an Afternoon appointment?"

AFTER THE APPOINTMENT IS SET

"Ok Ma'am / Sir, [Agent Name] will come right to your home for your review. He / She will be calling prior to his / her visit to introduce himself / herself. Just be sure you have a recent copy of your statement.

Re-verify the agents name and the date and time of the appointment. Thank you for calling.

APPOINTMENTS FOR LIFE INSURANCE

Do you have any other investments for which you are receiving a statement or have questions about?

Client says "NO"

Do you have any life insurance policies that you have held for 8 years or longer?

Client says "NO"

Ok, just disregard the notice, should you ever have the need for a financial professional, please give us a call again.

SET AS NOT INTERESTED

Client says "YES"

Do you have a pen and paper handy? I need you to write down some information. "[Agent Name] is the servicing agent in your area. He / She will be sitting down with you to make sure your policy is going to pay as expected and not be in danger of lapsing. He / She is currently scheduling on [Date]. Would you like a Morning or an Afternoon appointment?"

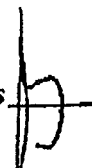
AFTER THE APPOINTMENT IS SET

"Ok Ma'am / Sir, [Agent Name] will come right to your home for your review. He / She will be calling prior to his / her visit to introduce himself / herself. Just be sure you have a recent copy of your statement.

Re-verify the agents name and the date and time of the appointment. Thank you for calling.

EXHIBIT A

Agent initials



Agent Acknowledgement

You the customer referred to herein as "You" "Your(s)" or "User" agrees as follows:

Immediately upon receipt of payment of fees, UNLIMITED FULFILLMENT SERVICES LLC will prepare and execute a mass mailing developed by the user targeted towards individuals who meet a demographic profile selected by the user; accept incoming responses from consumers according to an inbound call script developed by the user to screen those incoming responses for the purpose of making appointments or developing leads in accordance with the instructions issued by the user. The use of such materials and services is at the user's own risk. I also understand that a reasonable amount of undeliverable mail is to be expected during such mailing campaigns and that all undelivered mail will be returned to the address provided by the customer.

I warrant that I have not submitted to UNLIMITED FULFILLMENT SERVICES LLC:

- Materials that are unlawful, (threatening, abusive, defamatory, obscene or which invade another person's privacy or further the commission or concealment of a crime;
- Materials that are the subject of, or which infringe upon, any patent, trademark, trade name, trade secret, copyright, right of publicity, moral right or other intellectual property right of another person or entity.

I, "User" have reviewed the above material and approve and instruct the use of such materials by UNLIMITED FULFILLMENT SERVICES LLC in performing marketing services on my behalf.

Signature: _____

Date: _____

[Handwritten Signature]

[Handwritten Date]

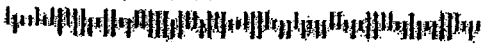
A

Scheduling Department *Andy Heygate*



(Please see notice on reverse side)

T14 P1 ** 3088 *****AUTO**3-DIGIT 339
PHYLLIS BUSH
5284 FAIRFIELD DR
FORT MYERS, FL 33919-1608



Privacy Law Notice. This notice is provided in accordance with Federal Privacy Laws. The Policy of this agency is to protect the privacy rights of all consumers who respond to this notice. **This agency DOES NOT POSSESS OR DISCLOSE NON-PUBLIC PERSONAL INFORMATION TO THIRD PARTIES IN ANY INSTANCE.** If you choose to have an existing policy or contract reviewed by a licensed agent, that agent is also required to adhere to the state and federal consumer and privacy protection laws. Important information: This notice is being sent to you as a possible holder of an in-force annuity contract. This agency does not have a direct affiliation with the insurance carrier through which you are currently contracted. The agency is contracted with agents licensed to conduct insurance business in your state. This notice should be disregarded if you do not currently have an in-force annuity contract.

This communication is to inform you that you may have an annuity that has reached the end of its surrender period.

The end of a surrender period is a positive event that means an owner may cash in an annuity or make withdrawals without incurring a surrender charge. A surrender charge is a fee levied by an insurance company on an annuity contract for withdrawals before the end of the time set by the contract (the surrender period). Withdrawals may, however, still be subject to tax consequences.

Please contact our Scheduling Department to discuss your options.

(877) 836-2333

EXHIBIT B

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