STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL
SERVICES, DIVISION OF INSURANCE
AGENT AND AGENCY SERVICES,

Petitioner,

vs. Case No. 13-4478PL

WILLIAM ROBERT PEARSON,

Respondent.
_____/

RECOMMENDED ORDER

On June 4 and 5, 2014, a final administrative hearing in this case was held in Tampa, Florida, before J. Lawrence Johnston, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: David J. Busch, Esquire
Derick Dehmer, Esquire
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Division of Legal Services
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For Respondent: John Angelo Richert, Esquire
John Richert, P.A.
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STATEMENT OF THE ISSUE

The issue in this case is whether the Respondent, William Robert Pearson, should be disciplined for alleged statutory and rule violations for his role in several insurance transactions.

PRELIMINARY STATEMENT

The Petitioner, Department of Financial Services (DFS), Division of Insurance Agent and Agency Services, filed an Administrative Complaint against the Respondent (DFS Case 137722-13-AG). The Respondent filed an Answer that disputed allegations, pled three affirmative defenses (including that DFS' Office of Financial Regulation (OFR), Division of Securities, previously settled the case with the Respondent in his capacity as securities licensee), and requested a hearing.

The parties filed a pre-hearing stipulation that included statements of position, admitted facts, agreed law, and issues to be determined. Two days before the final hearing, the Petitioner moved to amend to add Count IX. The Respondent filed an emergency motion to continue, which was denied. Leave to amend was granted, resulting in an Amended Administrative Complaint.

At the final hearing, the Petitioner called Paula Rego (a professional guardian who was appointed as the guardian of two insureds, William and Josefa Kesish), Tarek Richey (a former employer of the Respondent),[1/] Mercedes Bujans (an investigator for OFR's Division of Securities), and Karen Ortega (an

investigator for DFS's Division of Insurance Agent and Agency Services). The Petitioner also introduced the transcripts of the depositions of three insureds (Edith Paz, Geraldine Busing, and Wayne Penwarden) and an insurance agent (Glenn Cummings), each with numerous exhibits attached. The Petitioner also introduced numerous exhibits, designated as Kesish exhibits, relating to insurance and securities transactions of the Kesishes (namely, Kesish Exhibits 1 through 7, 10 through 14, 16 through 30, 32 through 38, 40 through 43, 48 through 59, 61, 62, 67, 68, 70 through 75, 77, 94, 96, and 97), and Busing contract documents 1 through 25. The Respondent objected to the admission of some of these exhibits; those objections either were overruled or were deferred and are now overruled.[2/] The Respondent testified, but offered no additional exhibits.

The Transcript of the final hearing was filed on July 16, 2014, and the parties filed proposed recommended orders that have been considered.

FINDINGS OF FACT

1. The Respondent is licensed in Florida as a life including variable annuity agent (2-14), life including variable annuity and health agent (2-15), life agent (2-16), life and health agent (2-18), and health agent (2-40), regulated by the DFS's Division of Insurance Agent and Agency Services. He was so licensed at all times pertinent to this case. He was first

licensed in 1988 and has been disciplined once, in September 2002, when he was given a Letter of Guidance for misrepresenting to a Pinellas Park resident that an annuity he sold her would generate interest in excess of 6.8 percent, when the guaranteed rate was three percent for the first year.

2. During the transactions alleged in the Amended Administrative Complaint, the Respondent also was registered with OFR's Division of Securities as a Financial Industry Regulatory Authority (FINRA) broker representative associated with Transamerica Financial Advisors, Inc. (Transamerica). On August 21, 2012, based on some of the same facts alleged in this case, OFR charged the Respondent with failing to observe high standards of commercial honor and just and equitable principles of trade because he: participated in the liquidation of variable and fixed annuities on behalf of several elderly customers referred by insurance agents not licensed as FINRA broker representatives; executed the liquidations recommended to the customers by insurance agent Richard Carter; failed to appropriately record the transactions on the books and records of Transamerica; failed to review the transactions, or have them reviewed by Transamerica, as to suitability; and provided Agent Carter with blank Transamerica letterhead to be used to facilitate the transactions. A Stipulation and Consent Agreement was entered on December 18, 2012, in which the Respondent

admitted the OFR charges and agreed to never seek a license or registration as a dealer, investment advisor, or associated person under the Florida Securities and Investor Protection Act, chapter 517, Florida Statutes. A Final Order incorporating the settlement agreement was entered on January 11, 2013. (This Final Order is the basis for Count IX, which was added to the charges in this case, as well as for one of the Respondent's affirmative defenses.)

Count I--Geraldine Busing

3. Geraldine Busing was born on December 1, 1930. She has a high school education. Her husband of 44 years died in 2001. When alive, he handled the family finances.

4. Mrs. Busing's income is from a pension of $728 a month and social security payments of $1,090 a month. In addition, she had substantial investments in two Schwab accounts.

5. During the market decline of 2007-2008, Mrs. Busing became dissatisfied with the performance of her Schwab accounts. An insurance agent named Richard Carter recommended that she invest in annuities, which would reduce her taxes. (In her deposition, testimony was elicited from Mrs. Busing that Agent Carter told her that the Respondent would do her taxes for free for the rest of her life. It is not likely that he made such a representation, and there is no evidence that the Respondent knew

about such a representation.) Mrs. Busing followed Agent Carter's recommendation.

6. Agent Carter did not have a FINRA license and approached the Respondent, who worked for Transamerica, to facilitate the liquidation of Mrs. Busing's Schwab accounts, so she could follow Agent Carter's recommendations. The Respondent agreed.

7. The Petitioner alleged that the Respondent provided blank Transamerica forms to Agent Carter and that Agent Carter "shuffled" the forms together with an EquiTrust Life Insurance Company (EquiTrust) annuity application and suitability forms and requested Mrs. Busing's signatures (although, it is alleged, one or more of the signatures on the Transamerica forms were not hers.) It is alleged that, unbeknownst to Mrs. Busing, Agent Carter gave the Respondent these forms, as well as a copy of her Schwab account statements, so he could liquidate her accounts, which totaled $627,000 at the time, "dump" the proceeds into a Transamerica account, and then "funnel" the liquidated assets into two EquiTrust annuities. It is alleged that Mrs. Busing became aware of these transactions in September 2010 after discussions with her accountant.

8. Mrs. Busing testified that she has never met the Respondent and does not know him. She testified that she gave all of her Schwab account information to Agent Carter and did not expect him to share it with the Respondent. She testified that

Agent Carter had her hurriedly sign a stack of papers without giving her a chance to review them. She said she was surprised when her stock broker, Barry Tallman, called to tell her that her Schwab accounts had been liquidated and used to open a Transamerica account. She denied ever receiving or signing the Schwab bank check dated July 7, 2010, used to open the Transamerica accounts; denied ever providing the Respondent and Transamerica with information for her customer account information (CAI) form used to open the Transamerica accounts; and denied that several of the Geraldine Busing signatures on the Transamerica documents used for the transactions were her signatures. She admitted to signing a Transamerica check dated August 13, 2010, which was used to purchase the EquiTrust policies.

9. The Respondent testified that he telephoned Mrs. Busing at Agent Carter's request. He testified that she told him she wanted to implement Agent Carter's recommendation to liquidate the Schwab accounts and purchase annuities. He testified that he told her his services were not required because her current broker (Mr. Tallman) could handle it for her, unless she just wanted to avoid confronting her current broker. He said she wanted the Respondent to handle it, and he replied essentially that he would do whatever she and Agent Carter wanted him to do for her.

10. The Respondent testified that he then mailed Mrs. Busing forms she had to fill out, sign, and return to him. He testified that he talked to her briefly by telephone about 15 to 20 times to answer questions she had about the forms. When she told him she received a Schwab check in the amount of about $150,000 and asked if she should mail it to him, he cautioned her that it would be better not to mail it and offered to drive to her house to get the check, which he did and returned immediately to Transamerica to open a Transamerica account with it. He testified that the Transamerica funds were used to purchase EquiTrust annuities at the direction of Agent Carter and Mrs. Busing.

11. The evidence was not clear and convincing that Mrs. Busing's version of the facts is true and that the Respondent's version is untrue. To the contrary, Mrs. Busing's memory did not seem to be very good, and she seemed confused during her testimony. The evidence was not clear and convincing that the Respondent made any investment or insurance recommendations or misrepresentations to Mrs. Busing. The Petitioner's own witnesses (DFS and OFR investigators, Karen Ortega and Mercedes Bujans) testified that the Respondent never acted as Mrs. Busing's insurance agent.

12. It was not proven by clear and convincing evidence that Mrs. Busing incurred tax and commission charges as a result of

her Schwab account being liquidated, other than Transamerica's standard "ticket charge" for the transactions, which the Respondent admitted. There was no evidence that the Respondent received any remuneration on the EquiTrust annuity sales. Those commissions went to Agent Carter.

13. The Petitioner contended in its proposed recommended order that the Respondent listed Mrs. Busing's annual income to be between $25,000 and $50,000, her investment objective as growth and income, and her investment time horizon as long-term. (Busing Deposition Exhibit 87). There was no testimony to put the exhibit in context or explain it.

14. On its face, Busing deposition Exhibit 87 was a request from Transamerica to the client to confirm certain information. The form had the Respondent's name printed on it, but it was not signed by either the Respondent or Mrs. Busing, and the evidence did not prove who completed the form. (The CAI form contained similar information and had both their signatures.)

15. The Petitioner contends that the information on the confirmation request was "absurd," because it listed Mrs. Busing's annual income as between $25,000 and $50,000, when her taxable income was $11,108 for 2009 and $8,251 for 2010. There was evidence that her total annual income was about $48,000 for 2007, $32,600 for 2008, $22,358 for 2009, and $19,001 for 2010, with the decline due to the decline in the stock market.

The evidence was not clear and convincing that the income information on that form or the CAI form was absurd.

16. The investment objective and investment time horizon on the forms were questionable, but the evidence was not clear and convincing that these were misrepresentations by the Respondent. The Transamerica account was a Pershing money market account used to facilitate the purchase of annuities. The evidence was that a separate suitability analysis would be required by the insurance company offering the annuity. The evidence was not clear that the information in the forms signed by the Respondent was used for the purchase of EquiTrust annuities on behalf of Mrs. Busing. Those purchases were recommended and executed by Agent Carter.

17. The evidence was not clear and convincing that switching Mrs. Busing's investments from Schwab to EquiTrust annuities was not suitable for Mrs. Busing or in her best interest. No expert witness testified to that effect.

Counts II through IV--The Kesishes

18. In 2010, William Kesish and his wife, Josefa, owned several annuities. Mr. Kesish had managed their business affairs before he developed Parkinson's disease and dementia in his old age. After that, Mrs. Kesish cared for him and took over the family's finances by default. Mr. Kesish died on November 26, 2010.

19. Mrs. Kesish was born in Spain in 1937. English is her second language. In 2010, she had difficulty conversing and reading in English and was unable to write in English. After her husband became mentally disabled, she used their bank account to provide for their needs, but she had no investment acumen beyond knowing generally that it was better to make more money from their investments than to make less or to lose money. She was recovering from cancer treatment in 2010 and was physically frail.

20. On May 25, 2010, Paula Rego, a professional guardian, met with an attorney who believed the Kesishes were being exploited and in need of a guardian. Ms. Rego reviewed documentation provided by the attorney and, in June 2010, agreed to Mrs. Kesish's voluntary request to become the guardian of the Kesishes' property.

21. On July 8, 2010, Ms. Rego became aware of the Respondent's involvement in the Kesishes' financial business. She telephoned the Respondent to explain her guardianship role and faxed him on July 15, 2010, to direct him to cancel any investment transactions that were underway.

22. The Petitioner presented the testimony of Ms. Rego to explain her review of the documentation she collected in her research to attempt to piece together the financial transactions involving the Kesishes. She also testified as to the surrender

charges and, to some extent, the tax liabilities that resulted from them. She also related statements made by Mrs. Kesish to her and, to some extent, to the DFS and OFR investigators, Karen Ortega and Mercedes Bujans, who also related some of the statements Mrs. Kesish made to them. The Petitioner also introduced an affidavit prepared by Ms. Ortega and signed by Mrs. Kesish on March 31, 2011. All of Mrs. Kesish's statements were hearsay. The hearsay cannot itself support a finding of fact.[3/] In general, the hearsay demonstrated that Mrs. Kesish did not have a clear recollection of her interactions with the Respondent at the time of her statements.

23. Agent Carter introduced the Respondent to Mrs. Kesish in March 2010. The Petitioner alleged essentially that Agent Carter schemed and collaborated with the Respondent to exploit the Kesishes by tricking them into financial and insurance transactions that would not be in their best interest, but would generate commissions and fees for them. It was alleged that, as with Mrs. Busing, the Respondent's FINRA licensure was required to buy and sell securities in furtherance of the scheme.

24. The Respondent testified that Agent Carter told him about his clients, the Kesishes, and that he went to meet Mrs. Kesish in person because he had difficulty communicating with her over the telephone due to her hard-to-understand Spanish accent and limited proficiency in spoken English. He testified

that she told him she wanted to get out of the stock market and was unhappy with her current stockbroker, Doreen Scott. (That part of the Respondent's testimony was corroborated by Ms. Rego, who concurred that Mrs. Kesish did not like dealing with Ms. Scott because she talked down to her.) The Respondent testified that he went to Mrs. Kesish's house, asked if he could be of assistance to her, and discussed her financial situation with her. He testified that he then returned to his Transamerica office and mailed forms for her to fill out and sign.[4/] Similar to his dealings with Mrs. Busing, the Respondent testified that he spoke to Mrs. Kesish several times by telephone to answer questions about the forms.

25. It is reasonable to infer that the Respondent knew Agent Carter would be helping her. The Respondent testified that when the completed forms were returned to him by mail, he telephoned Mrs. Kesish to verify the information on the forms and, in some cases, get information that was omitted to add it to the forms.

26. The Petitioner attempted to prove that the Respondent knew or should have known Mrs. Kesish was mentally disabled and incapable of voluntarily instructing the Respondent to effectuate financial transactions on her behalf. Mrs. Kesish lacked knowledge in investing and was susceptible to being misled and exploited, but it was not proven that Mrs. Kesish was mentally

incapacitated or unable to consent to Agent Carter's recommendations or instruct the Respondent. Ms. Rego herself did not find it necessary to initiate involuntary proceedings to establish a plenary guardianship of Mrs. Kesish's person and property until October 2013.

27. (Count II) One of the Kesishes' investments was a Genworth Life and Annuity Insurance Company (Genworth) variable annuity (G-58), which they bought on October 31, 2008, for $86,084.89. It was designed to begin paying monthly income on October 31, 2022. It provided a waiver of surrender charges if either Kesish was hospitalized, admitted to a nursing facility, or died. As of March 31, 2010, G-58 had a contract value of $102,954.90.

28. Mrs. Kesish signed a form on letterhead of the Respondent and Transamerica that expressed her desire for the Respondent to be their insurance agent on G-58.

29. On May 27, 2010, the Respondent used an automated account transfer (ACAT) to liquidate G-58 and transfer the funds to a Transamerica brokerage account he opened for the Kesishes on the same date. The Respondent did not independently determine whether the liquidation was suitable or in the Kesishes' best interest. He relied on Agent Carter to do this.

30. The Respondent and the Kesishes signed the CAI form to open the brokerage account. The surrender of G-58 took effect on

June 14, 2010. As a result of the liquidation, the Kesishes were assessed a surrender charge of $4,576.91 and federal tax was withheld, and the net proceeds from the liquidation were $90,314.19.

31. On June 29, 2010, the funds in Mrs. Kesish's Transamerica account were added to an EquiTrust policy Agent Carter had sold her (E-92F). The Respondent testified that this was done at the direction of Agent Carter and Mrs. Kesish. The Respondent did not act as the Kesishes' EquiTrust agent and received no commissions.

32. The Petitioner alleged and proposed a finding that the liquidation of G-58 allowed Agent Carter to represent to EquiTrust that the Kesishes had no other annuities and that the addition to E-92F was not replacing another annuity, which allowed Agent Carter to avoid having Genworth attempt to "conserve" G-58 (i.e., question the Kesishes as to whether they wanted to reverse the liquidation within the grace period for doing so). The evidence cited in support of the allegation and proposed finding is documentation of the initial purchase of E-92F in April 2010, not the addition in June 2010. There was no clear and convincing evidence that actions taken by the Respondent resulted in Agent Carter circumventing the replacement notice requirement, or that the Respondent should be held

responsible for what Agent Carter did or did not do regarding the EquiTrust annuity.

33. According to the Respondent, he made no investment recommendations to Mrs. Kesish, and all such recommendations were made by Agent Carter. He testified that he only took action in accordance with the wishes of Mrs. Kesish, who was being advised by Agent Carter. He denied that his purpose was to generate commissions or fees for himself or for Agent Carter, or to enable Agent Carter to conceal the replacement of the Genworth annuity. It was not proven by clear and convincing evidence that the Respondent's testimony was false.

34. The Petitioner's proposed recommended order cites the testimony of Tarek Richey regarding his concerns about the Respondent's use of an ACAT to liquidate annuities, transfer of the proceeds to Pershing accounts at Transamerica, and use of those funds to purchase other annuities. Mr. Richey is a FINRA-licensed securities broker at Questar Capital Corporation, who employed and supervised the Respondent for about a month in early 2011, after he left Transamerica in December 2010. While supervising the Respondent, Mr. Richey was advised of OFR's investigation of the Respondent and reviewed the Respondent's documentation on the subject of OFR's investigation.

35. One of Mr. Richey's concerns from his review of the Respondent's documentation was the use of ACAT, which would not

guarantee that the client is aware of resulting surrender charges and tax consequences. He also was concerned that ACAT could have been used to bypass and avoid the use of forms required to analyze the suitability of annuities purchased for the Kesishes (and other clients). While he expressed these concerns, Mr. Richey had no personal knowledge and did not testify that the Kesishes (or the other clients) actually were unaware of surrender charges and tax consequences, or that liquidation was not suitable or in their best interest.

36. Another of Mr. Richey's concerns was that the use of ACAT could result in the replacement of annuities without completing the required forms that would provide notice to the insurance company that its annuity was in the process of being replaced and give it an opportunity to conserve its annuity. Mr. Richey did not know that the use of ACAT actually resulted in the bypass of the replacement policy notice requirements for the Kesishes and other clients. He also did not testify that the Respondent should be held responsible for what Agent Carter did or did not do regarding replacement notices.

37. Ms. Rego testified (based in part on discussions with a financial planner who did not testify) that she did not think the Genworth and EquiTrust transactions were not in the best interest of the Kesishes, mainly because of the Genworth surrender charge and tax consequences. There was no other expert testimony on the

subject, and the evidence was not clear and convincing that those transactions were unsuitable or not in their best interest.

38. (Count III) The Kesishes owned a Riversource Life Insurance Company (Riversource) annuity (R-30) that they bought on October 5, 2006. The contract had declining withdrawal charge rates that held at eight percent for the first four years. It had a death benefit rider.

39. On March 23, 2010, a letter on the Respondent's Transamerica letterhead, written in English and signed by Mrs. Kesish, directed Riversource to list the Respondent as the Kesishes' financial advisor. On April 23, 2010, Mrs. Kesish signed a form directing Riversource to liquidate R-30. She also signed a form saying she knew there would be surrender charges. On April 26, 2010, Riversource sent the Kesishes a check for $26,430.07 (which was net after $2,454.30 in surrender charges).

40. The testimony from Ms. Rego as to whether the liquidation of the Riversource annuity was contrary to the Kesishes' best interest, unsuitable, or in violation of suitability form or replacement notice requirements, was similar to her testimony with respect to the Genworth liquidation. There was no other expert or other clear and convincing evidence.

41. (Count IV) The Kesishes also had Great American Life Insurance Company (Great American) annuities in the amounts of approximately $560,854 (GA-25) and $28,785 (GA-00), which were

purchased in January 2010. GA-25 was owned by the Kesishes' trust, with Mrs. Kesish as trustee; GA-00 was owned by Mr. Kesish. By June 4, 2010, they had contract values of $580,854.71 and $29,970.46, respectively.

42. On June 18, 2010, Agent Carter took Mrs. Kesish to lunch. A letter dated June 18, 2010, signed by Mrs. Kesish for her and her husband, written in English on the Respondent's Transamerica letterhead, directed the transfer of GA-25 to a Transamerica Pershing account (TA-25). An ACAT form dated June 20, 2010, signed by Mrs. Kesish and the Respondent, directed the liquidation of Mr. Kesish's GA-00 and the transfer of the proceeds to the Kesishes' Transamerica Pershing account. This transaction took effect on July 7, 2010.[5/]

43. After becoming involved through Attorney Hook, Ms. Rego had numerous discussions with Mrs. Kesish and with Agent Carter regarding the Kesishes' investments. Agent Carter attempted to explain and justify his actions to Ms. Rego and blame other insurance agents who he claimed had essentially stolen his clients by tricking them into replacing Allianz Life Insurance Company of North America (Allianz) annuities sold to them by him with GA-25 and GA-00. Ms. Rego's research notes evidence her understanding that the Great American sales to the Kesishes were unsuitable.

44. During Ms. Rego's discussions and research throughout June 2010, the Respondent's name did not come up, and Ms. Rego was unaware of the Respondent having anything to do with the Kesishes. When she learned about the Respondent's role on July 8, 2010, she attempted to contact him. On July 15, 2010, she faxed the Respondent to instruct him to stop acting on behalf of the Kesishes. There is no clear and convincing evidence that the Respondent did not follow Ms. Rego's instructions.[6/]

45. On July 17, 2010, Great American sent Mr. Kesish a conservation letter urging him not to surrender GA-00. Ms. Rego then contacted Great American and had the surrender of GA-25 and GA-00 stopped. Had the transactions not been stopped, the Kesishes $60,000 in surrender charges would have been imposed.

46. There was no other expert testimony or other clear and convincing evidence that the liquidation of the Great American annuities was contrary to the Kesishes' best interest, unsuitable, or in violation of suitability form or replacement notice requirements.

Counts V through VI--Edith Paz

47. Edith Paz was born on January 20, 1926, and lives in Sun City Center. She has a high school diploma and held various jobs, from retailing to making plates in a dental office.

48. Mrs. Paz married a GI returning from World War II. Her husband was successful in business before his retirement.

Meanwhile, Mrs. Paz founded a successful real estate business and invested in the stock market.

49. Mr. Paz died in 1999. In 2001, Mrs. Paz created a revocable trust with herself as trustee.

50. When Mrs. Paz retired, she moved to Sun City Center. She did some investing, but was dissatisfied with her investments and her financial representative at the time. About that time, she met Glenn Cummings, an insurance agent who was a less experienced associate of Agent Carter and also not FINRA-licensed. After several conversations, Agent Cummings gained her trust and advised her to liquidate and consolidate her assets before deciding what other financial products to purchase. He referred her to the Respondent for that purpose.

51. Agent Cummings and Mrs. Paz testified that he referred Mrs. Paz to the Respondent on the advice of Agent Carter to save "exit fees" on liquidating her investments. The evidence was not clear as to how the Respondent would be able to do this. The Respondent testified to his understanding that Mrs. Paz wanted to get out of the stock market and switch to more stable investments and that she had a bad relationship with her stockbroker. The Respondent's testimony is consistent with Mrs. Paz's actual losses in the stock market and her testimony that she listened to and followed the advice of Agent Cummings because she was dissatisfied with her prior financial advisor, a Mr. Shrago.

52. Mrs. Paz testified that she spoke to the Respondent just once, briefly. That conflicts with the testimony of the Respondent and Agent Cummings. Their testimony was that there were several telephone conversations after the initial contact. They related that the Respondent mailed Mrs. Paz the forms that needed to be filled out, that Agent Cummings was with Mrs. Paz when she filled out the forms, and that both spoke to the Respondent several times during the process. According to Agent Cummings, this happened on July 29, 2010, when he visited Mrs. Paz to show her illustrations regarding the annuities he was recommending. While there, he helped her complete the forms the Respondent had sent to have her investments liquidated and consolidated into a Transamerica Pershing account.

53. There also was conflict in the testimony as to whether anyone explained investment options and consequences to Mrs. Paz. She testified that no one gave her any explanation. Agent Cummings testified that he explained everything in detail to Mrs. Paz and that she also talked to the insurance agents who represented the companies whose annuities she would be surrendering. He testified that Mrs. Paz knew exactly what she was doing. The Respondent testified that he had no involvement in those explanations. He testified that he simply made sure he understood what Mrs. Paz wanted him to do for her.

54. (Count V) In May 2007, Mrs. Paz purchased a Jackson National Life Insurance Company (Jackson National or JNL) annuity (JNL-42A) on the advice of Mr. Shrago. The initial premium was $100,000, and it was issued with a five-percent bonus. As of May 25, 2007, it had an account balance of $105,017.01 and was receiving an annual rate of return of 7.75 percent.

55. On July 12, 2010, Mrs. Paz signed a letter directing Jackson National to make the Respondent, who held an appointment to represent Jackson National, her agent-of-record on JNL-42A. The change took effect on July 15, 2010.

56. On July 29, 2010, Jackson National faxed the Respondent a statement of account for JNL-42A, listing the balance as $108,253.48 (which reflected a prior withdrawal of $2,500 by Mrs. Paz). The statement disclosed the surrender charges in effect. After her discussions with Agent Cummings, Mrs. Paz signed forms requesting that JNL-42A be liquidated and the proceeds rolled over into a Great American Life Insurance Company (Great American or GA) annuity (GA-61). The Respondent facilitated the rollover. As a result of the rollover, Mrs. Paz incurred surrender charges of $4,871.41 and a partial recapture of the initial bonus in the amount of $2,706.34, for a total loss of $7,577.75.

57. The Petitioner alleged, and Mrs. Paz testified, that the Respondent never discussed with her that there would be

surrender charges. The Respondent did not disagree, but explained that he understood Agent Cummings already had done so and that he just made sure he was following Mrs. Paz's wishes. Concurring, Agent Cummings testified that he did explain the surrender charges to Mrs. Paz.

58. The Petitioner alleged that the Respondent's actions "insulated M[r]s. P[az] from comparative financial counseling by her then current Jackson National insurance agent Gary Mahan." This was not proven by clear and convincing evidence. To the contrary, there was evidence that it was Mrs. Paz's choice to change agents, that Mr. Mahan knew about the change, and that he had no objection to the Respondent taking over for him as agent of record on the policy.

59. The Petitioner also alleged that the Respondent "provided [Agent Cummings] with the Transamerica brokerage application, transfer forms and letter of instructions to transfer JNL 42A" to the Respondent as account representative. It was not proven that these documents were not mailed to Mrs. Paz in accordance with the Respondent's testimony.

60. There was no expert testimony or other clear and convincing evidence that the liquidation of Mrs. Paz's Jackson National annuity and purchase of a Great American annuity was contrary to her best interest, unsuitable, or in violation of suitability form or replacement notice requirements.

61. Mrs. Paz testified that Agent Cummings initially told her she would have to pay the Respondent $1,500 as a fee for his services with respect to JNL-42a and later told her the fee would be $2,600. Agent Cummings testified that the Respondent told her what his fee would be during the telephone conversation on July 29, 2010.

62. Regardless who told Mrs. Paz what the Respondent's fee would be, or what she was told it would be, Mrs. Paz made out a $2,607.28 check to Agent Cummings' company, Big Financial, on July 29, 2010. On August 2, 2010, Big Financial gave the Respondent a check made out to the Respondent for $2,530, with the notation "Paz." (It is not clear from the evidence why the Big Financial check was made out for $2,530. When the DFS investigator questioned the discrepancy, Agent Cummings reimbursed Mrs. Paz $77.28.) The Respondent deposited the check the next day.

63. The Allianz compliance guide prohibited agents from charging an additional fee for services that customarily are associated with insurance products. The Great American compliance guide prohibited fraudulent acts. By accepting the check from Big Financial, the Respondent received a fee from Mrs. Paz that was not authorized.

64. (Count VI) Prior to meeting Agent Cummings or the Respondent, Mrs. Paz had investment accounts with Wedbush (WB-37)

and Wells Fargo. There were two Wells Fargo accounts, an IRA (WF-15), and a trust account (WF-70). As of June 30, 2010, the Wedbush account (WB-37) had a balance of $349,438.11. The Wells Fargo IRA account (WF-15) had a net value of $51,737.11 prior to June 30, 2010. The Wells Fargo trust account (WF-70) had a balance of $332,798.76 prior to June 2010.

65. The Respondent and Mrs. Paz communicated in the same manner they did for the Jackson National transaction. Mrs. Paz signed forms that enabled the Respondent to transfer the funds in the Wedbush and Wells Fargo accounts into two Transamerica brokerage accounts (TA-02) and (TA-86) using ACAT. Some of the forms referred to the Respondent as Mrs. Paz's "investment professional," but the sole purpose of the Respondent's involvement was to use Transamerica as a funnel to transfer funds from one investment to another.

66. By August 11, 2010, the funds in the TA-02 account were used to purchase an Allianz annuity sold by Agent Cummings in the amount of $335,589.65. The funds in the TA-86 account were used to purchase a Great American annuity (GA-60) sold by Agent Cummings in the amount of $45,769.38.

67. There was no expert testimony or other clear and convincing evidence that the liquidation of Mrs. Paz's Wedbush and Wells Fargo accounts and purchase of an Allianz annuity was

contrary to her best interest, unsuitable, or in violation of suitability form or replacement notice requirements.

Counts VII and VIII--The Penwardens

68. Wayne Penwarden was born on December 4, 1943. His wife, Sandra, was born on October 10, 1939. They inherited some money and decided to invest it. As of August 31, 2009, they had Morgan Stanley investment accounts that totaled close to half a million dollars. They also had an annuity with ING USA Annuity and Life Insurance Company (ING) purchased for $150,000 on April 24, 2008.

69. Agent Carter became acquainted with the Penwardens and introduced them to the Respondent. The Amended Administrative Complaint alleged that the Respondent provided required forms to Agent Carter for him to get the Penwardens signatures and, then, used funds from their Transamerica accounts to fund the purchase of Allianz annuities, which was deceitful and against the wishes of the Penwardens. The Petitioner's proposed recommended order proposed no such findings, and there was no clear and convincing evidence that the Respondent was guilty of those acts, that he said or did anything to deceive or mislead or withhold information from them, or took any action regarding them without their full knowledge and consent.

70. (Count VII) On September 30, 2009, the Penwardens signed a change of agent request to make the Respondent their new

ING insurance agent. They also signed CAI forms to open Transamerica brokerage accounts and transfer the funds from the Morgan Stanley investment accounts into them, using ACAT.

71. The funds in the Transamerica accounts were then used to purchase Allianz's indexed annuities sold to the Penwardens by Agent Carter. On September 23 and October 16, 2009, the Penwardens purchased two Allianz MasterDex X annuities (MD-47) and (MD-24), respectively, with initial premium payments of $141,269.40 for MD-47 and $373,979.59, plus a premium bonus of $37,397.96, for MD-24.

72. On June 17, 2010, acting on instructions from Agent Carter on behalf of the Penwardens, the Respondent liquidated the ING annuity. On June 30, 2010, the Penwardens added the $115,281.47 proceeds from the liquidation of the ING annuity to MD-47.

73. The Petitioner proposed a finding that the surrender of the ING annuity cost $6,000 in surrender charges, which is true. The Petitioner omits from its proposed finding that the Penwardens received a premium bonus on the Allianz policy that more than offset the ING surrender charge.

74. There was no expert testimony or other clear and convincing evidence that the liquidation of the Penwardens' Morgan Stanley accounts and ING annuity and purchase of Allianz

annuities was contrary to their best interests, unsuitable, or in violation of suitability form or replacement notice requirements.

75. (Count VIII) The Penwardens became dissatisfied with Agent Carter, and on November 9, 2010, signed a letter drafted by the Respondent on Transamerica letterhead to substitute him for Agent Carter as their sole financial advisor.

76. On November 12, 2010, the Respondent was notified by Allianz that he would receive no commissions as servicing agent on policies sold to the Penwardens by another agent.

77. On or about November 22, 2010, $37,408.54 was transferred from the Allianz MD-47 annuity into a new Nationwide Life and Annuity Insurance Company (Nationwide or NW) annuity (NW-08). The Respondent also effected a partial Internal Revenue Code, section 1035, exchange from the MD-47 annuity to a new annuity purchased from Nationwide (NW-09) for $23,746.19.

78. On November 7, 2011, the Respondent faxed a request to transfer funds from the MD-24 annuity to fund a North American Company for Life and Health Insurance (North American or NA) annuity (NA-68).

79. The Petitioner proposed a finding that the Respondent undertook these transactions on November 22, 2010, and on November 7, 2011, in order to benefit himself alone by generating commissions to replace the servicing agent commissions he was not getting on the Allianz policies. This was not proven by clear

and convincing evidence. To the contrary, the Respondent explained that the transactions were done for the Penwardens' benefit after discussions regarding the benefits of diversifying out of the Allianz annuity into other annuities, which was accomplished cost-free. There was no clear and convincing evidence that these transactions were contrary to the Penwardens' best financial interest or that they were done solely to benefit the Respondent.

80. There was no expert testimony or other clear and convincing evidence that the partial transfers from the Penwardens' Allianz annuities to other Nationwide and North American annuities were contrary to their best interest, unsuitable, or in violation of suitability form or replacement notice requirements.

81. In early December 2011, Mr. Penwarden replaced the Respondent with another insurance agent. The Petitioner alleged that the Respondent went to the Penwardens home to harangue them for two hours about their decision to switch agents. The only evidence on this allegation was the deposition testimony of Mr. Penwarden and the testimony of the Respondent. Mr. Penwarden's testimony as to what occurred was vague. The Respondent agreed that he was disappointed that the Penwardens were switching agents, but testified that he went to the home to retrieve the policies he sold to the Penwardens, which would have

to be returned to the insurance companies to cancel at no cost during the "free-look" period. He testified that he waited for an hour or more while Mr. Penwarden tried to find the policies in his home. The evidence was not clear and convincing, and the Petitioner did not propose a finding as to this allegation.

Count IX and Related Affirmative Defenses

82. Count IX is based on the Final Order entered in OFR's securities case against the Respondent as an additional ground for discipline under section 626.621(13), Florida Statutes. The Respondent cites it in his affirmative defenses of res judicata and collateral estoppel on Counts I through VIII. See Finding 2, supra. The Respondent also argues that the additional charge is barred by the ex post facto clause of the Florida constitution and due process clauses of the United States and Florida constitutions.

83. As to the due process argument, the Respondent admitted the OFR Final Order in his answer to the original charges. He also had ample opportunity to demonstrate prejudice from the added charge, which he could not, and to present legal arguments, which he did.

84. As to ex post facto, section 626.621(13) was added to the Florida Statutes, effective June 1, 2011. See Ch. 175, §§ 47 and 53, Laws of Fla. (2010). That was before the Respondent entered into the Stipulation and Consent Agreement that formed

the basis for the OFR Final Order. Disciplinary guidelines for section 626.621(13) were added to the Florida Administrative Code on March 24, 2014. Fla. Admin. Code R. 69B-231.090(13).

85. As to the collateral estoppel defense, the Respondent testified that he entered into the settlement with OFR because he was under heightened supervision by his employer due to securities violations, and he did not think any employer wanted to provide the required supervision (which he referred to as "baby-sitting.") The Respondent did not testify that he relied on the OFR Final Order to bar charges by DFS or that he believed the OFR Final Order would bar DFS charges.

CONCLUSIONS OF LAW

86. The Respondent's third affirmative defense was that the Petitioner has no jurisdiction because the charges are all securities charges, not insurance charges. To the contrary, the Petitioner alleges that the Respondent is a licensed insurance agent and alleges that he committed insurance violations. Some of the actions taken by the Respondent clearly were taken as an insurance agent. The Petitioner has jurisdiction, notwithstanding that some actions taken by the Respondent were in the securities realm. When the Respondent asked for a disputed fact hearing, jurisdiction was conferred on the Division of Administrative Hearings. §§ 120.569 and 120.57(1), Fla. Stat.

87. Because the Amended Administrative Complaint seeks to impose license discipline, the Petitioner has the burden to prove its allegations by clear and convincing evidence. See Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). This "entails both a qualitative and quantitative standard. The evidence must be credible; the memories of the witnesses must be clear and without confusion; and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy." In re Henson, 913 So. 2d 579, 590 (Fla. 2005) (quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)). "Although this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous." Westinghouse Electric Corp. v. Shuler Bros., 590 So. 2d 986, 988 (Fla. 1st DCA 1991).

88. The Petitioner is limited to proving the charges and allegations pled in the Amended Administrative Complaint. Cf. Trevisani v. Dep't of Health, 908 So. 2d 1108 (Fla. 1st DCA 2005); Aldrete v. Dep't of Health, Bd. of Med., 879 So. 2d 1244 (Fla. 1st DCA 2004); Ghani v. Dep't of Health, 714 So. 2d 1113 (Fla. 1st DCA 1998); Willner v. Dep't of Prof'l Reg., Bd. of Med., 563 So. 2d 805 (Fla. 1st DCA 1990).

89. Counts I through VIII charge the Respondent with violations of various statutes and rules that are described in the following paragraphs.

90. Rule 69B-215.210[7/] declared the business of life insurance to be a public trust that obligates insurance agents to work together in serving the best interests of the public by understanding and observing the laws governing life insurance, presenting accurate and complete facts essential to a client's decision, and being fair in all relations with colleagues and competitors, always placing the policyholder's interests first.

91. Rule 69B-215.230(1) declared insurance sales misrepresentations as to terms, benefits, and advantages of insurance products to be unethical and prohibited.

92. Section 627.4554(4)(a), Florida Statutes,[8/] made it a violation for an insurance agent to recommend to a senior consumer the purchase or exchange of an annuity that results in another insurance transaction or series of transactions, unless the agent has reasonable grounds to believe that the recommendation is suitable based on facts disclosed by the consumer as to his or her investments and other insurance products and financial situation and needs. Section 627.4554(4)(c)2. made it a violation for an insurance agent to make a recommendation unless it is reasonable under all the circumstances known to the agent at the time of the

recommendation. Section 627.4554(4)(d) made it a violation for the insurance agent who has recommended replacement or exchange of an annuity contract to execute the replacement or exchange without providing to the insurer the form adopted by the Petitioner to explain the differences between the contracts under consideration by the consumer. Rule 69B-162.011 adopted the form required by section 627.4554(4)(d) and also made it a violation for the insurance agent recommending the purchase or exchange of an annuity contract not to perform an alternative suitability analysis, with contract comparison on the adopted forms, before executing a purchase or exchange of an annuity to a senior consumer.

93. Section 626.611(5) made it a violation for an insurance agent to willfully misrepresent any insurance policy or annuity contract or to willfully deceive with regard to such a contract.

94. Section 626.611(7) made it a violation for an insurance agent to demonstrate a lack of fitness or trustworthiness to engage in the business of insurance.

95. Section 626.611(9) made it a violation for an insurance agent to engage in fraudulent or dishonest practices in the conduct of licensed business.

96. Section 626.611(13) made it a violation for an insurance agent to willfully fail to comply with, or willfully violate, any adopted rule or willfully violate any provision of

the Insurance Code. This statute is a derivative of other violations requiring willfulness, adds nothing of substance to those violations, and does not warrant additional discipline for the violations from which it is derived.

97. Section 626.621(2) made it a violation for an insurance agent to violate any provision of the Insurance Code or any other law applicable to the conduct of a licensed business of insurance. This statute similarly is a derivative of other violations, adds nothing of substance to the other violations, and does not warrant additional discipline for the violations from which it is derived.

98. Section 626.9541(1)(a)1., which is in Part IX of chapter 626, made it a violation for an insurance agent to knowingly make, issue, circulate, or cause to be made, issued, or circulated, any estimate, illustration, circular, statement, sales presentation, omission, or comparison, which misrepresents the benefits, advantages, conditions, or terms of any insurance policy.

99. Section 626.9541(1)(e)1., which is in Part IX of chapter 626, made it a violation for an insurance agent to knowingly make, publish, disseminate, circulate, deliver, or place before the public any false statement.

100. Section 626.9541(1)(l), which is in Part IX of chapter 626, made it a violation for an insurance agent to

knowingly make 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 on another insurer (also known as "twisting").

101. Section 626.621(6) made it a violation for an insurance agent to engage in unfair methods of competition, or unfair or deceptive acts or practices prohibited by Part IX of chapter 626, or otherwise be a source of injury or loss to the public.

102. Section 626.9521(2) subjected anyone who violated the Unfair Insurance Trade Practices Act, which is Part IX of chapter 626 and includes section 626.9541, to a fine of not greater than $40,000 per violation, in addition to any other applicable penalty.

103. With one exception, the violations charged in Counts I through VIII were not proven by clear and convincing evidence. Section 627.4554 required proof that the Respondent, as opposed to Agents Carter and Cummings, made insurance recommendations. The violations also required proof that the Respondent, as opposed to the other agents, made statements that were false, inaccurate or incomplete, misleading, or dishonest. Those

elements of the violations were not proven by clear and convincing evidence. Contrary to the argument made in the Petitioner's proposed recommended order, the "contracts standing alone" do not establish the violations. (If they did, there would be no need for a hearing.)

104. Of the charges in Counts I through VIII, the only one proven by clear and convincing evidence was the one in Count V, paragraph 84(c), that the Respondent charged and collected a $2,500 fee from Mrs. Paz, through Agent Cummings, that was not authorized. By charging and collecting that fee, the Respondent demonstrated a lack of fitness or trustworthiness to engage in the business of insurance, in violation of section 626.611(7). It also establishes a violation of rule 69B-215.210. The single lapse of misconduct was not enough to establish that the Respondent was guilty of fraudulent or dishonest practices in the conduct of licensed business in violation of section 626.611(9). See Robert v. Dep't of Ins., 854 So. 2d 681, 684 (Fla. 2d DCA 2003); Werner v. Dep't of Ins. & Treasurer, 689 So. 2d 1211, 1214 (Fla. 1st DCA 1997); Natelson v. Dep't of Ins., 454 So. 2d 31 (Fla. 1st DCA 1984).

105. Count IX charged a violation of section 626.621(13), which made it a violation if an insurance licensee "[h]as been the subject of or has had a license, permit, appointment, registration, or other authority to conduct business subject to

any decision, finding, injunction, suspension, prohibition, revocation, denial, judgment, final agency action, or administrative order by any court of competent jurisdiction, administrative law proceeding, state agency, federal agency, national securities, commodities, or option exchange, or national securities, commodities, or option association involving a violation of any federal or state securities or commodities law or any rule or regulation adopted thereunder, or a violation of any rule or regulation of any national securities, commodities, or options exchange or national securities, commodities, or options association."

106. The Respondent argues that the addition of this charge violates his due process rights. That argument has no merit, as there was no dispute as to the existence of the OFR Final Order on which the additional charge is based, and the Respondent had ample opportunity to defend himself against the additional charge.

107. The Respondent also argues that the additional charge violates his rights under the ex post facto clause of the Florida Constitution. He does not, however, actually argue that the use of section 626.621(13) violates the ex post facto clause. It does not, since it was enacted before he entered into the Stipulation and Consent Agreement that formed the basis of the OFR Final Order. Rather, the Respondent's argument focuses on

rule 69B-231.090(13), the disciplinary guideline adopted on March 24, 2014, under the authority of the statute. That argument is well-taken. Werner v. Dep't of Ins. & Treasurer, supra, at 1215. The mandatory revocation specified in the rule cannot be applied to the Respondent under Count IX.

108. Section 626.621(13) provides that the Petitioner may, in its discretion, suspend or revoke the Respondent's insurance licenses based on a "decision, finding, injunction, suspension, prohibition, revocation, denial, judgment, final agency action, or administrative order by any . . . administrative law proceeding [or] state agency . . . involving a violation of any federal or state securities . . . law or any rule or regulation." (Emphasis added.) The evidence establishes a violation of the statute.

109. The Respondent argues that the statute plainly requires a hearing and finding of another violation before it can be applied and that the OFR Final Order does not qualify because it is based on a settlement. However, in the Stipulation and Consent Agreement, the Respondent admitted the charges. For that reason, the OFR Final Order clearly qualifies, according to the plain meaning of the statute, and the violation has been proven.

110. Under rule 69B-231.080(7), the stated penalty for a violation of section 626.611(7) is a six-month suspension. Under rule 69B-231.130, the stated penalty for a violation of rule

69B-215.210 is a six-month suspension because it was a willful violation. Without rule 69B-231.090(13), there is no stated penalty for Count IX.

111. Rule 69B-231.040(1) allows for multiple violations based on a single count or based on a single act of misconduct. However, only the violation specifying the highest stated penalty will be considered for the count. In this case, the highest stated penalty is a six-month suspension. Rule 69B-231.040(1) provides that, for multiple counts, the highest stated penalties per count are to be added.

112. Rule 69B-231.160(1) provides for aggravating and mitigating factors to be applied to the total penalty in reaching the final penalty. These include: (a) the licensee's willfulness; (b) the degree of actual injury to the victim; (c) the degree of potential harm to the victim; (d) the age or capacity of the victim; (e) restitution to the victim; (f) motivation of the licensee; (g) financial gain or loss to the licensee; (h) financial loss to the victim; (i) vicarious or personal responsibility; (j) related criminal charge and disposition; (k) secondary violations in counts; (l) previous discipline or warnings; (m) violations of sections 626.9541 and 627.4554, relating to sales to senior citizens; and (n) other factors. Taking all of the factors into consideration, aggravation of the calculated final penalty would be warranted.

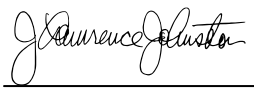
In addition, the Count IX violation should be considered under paragraph (n).

113. Taking all factors into consideration, an appropriate penalty would be a 12-month suspension. (Rule 69B-231.040(3)(b) authorizes conversion of the total penalty to an administrative fine, but that is not recommended in this case.)

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Financial Services, Division of Agent and Agency Services, enter a final order finding the Respondent guilty of violating section 626.611(7) and rule 69B-215.210 under Count V, and section 626.621(13) under Count IX, dismissing the other charges, and suspending the Respondent's insurance licenses for 12 months.

DONE AND ENTERED this 15th day of October, 2014, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of October, 2014.

ENDNOTES

[1/] The Respondent objected to some of Mr. Richey's testimony as being inappropriate expert opinion testimony from a witness not listed as an expert. The objections were overruled. The Respondent made further written argument in a post-hearing brief on the subject. The argument was based primarily on the decision in Fittipaldi USA, Inc. v. Castroneves, 905 So. 2d 182, 185 (Fla. 3d DCA 2005). The objectionable testimony in Fittipaldi is distinguishable from Mr. Richey's testimony. Alternatively, if some of Mr. Richey's testimony were expert opinion testimony, it was not established that the failure to list Mr. Richey as an expert prejudiced the Respondent. For these reasons, the rulings made during the hearing stand.

[2/] Ruling also was deferred on the Respondent's objection to the use of hearsay statements from Mrs. Kesish as the sole support for findings of fact. The Respondent further addressed the issue in its proposed recommended order. That issue is addressed in Endnote 3.

[3/] Section 120.57(1)(c), Fla. Stat. (2014) ("Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.") Section 90.803(24) is an exception for the hearsay statements made by an elderly person or disabled adult. There is case law that the statute is an unconstitutional violation of a criminal defendant's right to confront his or her accuser unless the elderly or disabled person is mentally disabled. Compare Conner v. State, 748 So. 2d 950 (Fla. 1999), with Hosty v. State, 944 So. 2d 255 (Fla. 2006), and State v. Townsend, 635 So. 2d 949 (Fla. 1994). It is not clear whether the statute similarly would be unconstitutional as applied in an administrative case. Cf. State ex. rel. Vining v. Fla. Real Estate Comm'n, 281 So. 2d 487, 491 (Fla. 1973). If not, it still was not proven that Mrs. Kesish was mentally disabled at the times she was interacting with the Respondent. See Finding 26. Also, the statute only applies to hearsay "describing . . . any act of exploitation," whereas Mrs. Kesish's hearsay essentially describes her lack of knowledge concerning exploitation. In addition, the use of the 90.803(24) exception requires a finding "that the time, content, and circumstances of the statement provide sufficient safeguards of reliability." Such a finding "may consider the mental and physical age and maturity of the elderly person or disabled adult, the nature and duration of the abuse or offense, the relationship of the victim to the offender,

the reliability of the assertion, the reliability of the elderly person or disabled adult, and any other factor deemed appropriate." Taking into consideration all appropriate factors, such a finding cannot be made as to Mrs. Kesish's hearsay.

[4/] The Respondent admitted to charges in the OFR case that he provided Agent Carter with blank stationery with Transamerica letterhead for him to use to get the Kesishes' authorizations. The greater weight of the evidence was that the Respondent mailed the Kesishes either blank stationery or stationery with some writing on it, and Agent Carter helped the Kesishes complete the authorizations. See Finding 25.

[5/] The Petitioner's proposed findings of fact 46-47 do not appear to be supported by the evidence.

[6/] The Respondent admitted to the charges in the OFR case that, after directing Transamerica to stop the transaction when so instructed by Ms. Rego, he later talked to Agent Carter and then asked Transamerica if it was too late to reinstate the transaction, which it was.

[7/] Unless otherwise noted, all rule references are to the version of the Florida Administrative Code that was in effect at the time of the transactions that form the bases of the charges.

[8/] Unless otherwise indicated, statutory references are to the version in effect at the time of the transactions that form the bases of the charges.

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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.