CHIEF FINANCIAL OFFICER
JEFF ATWATER
STATE OF FLORIDA

IN THE MATTER OF:

CASE NO.: 137722-13-AG

ROBERT WILLIAM PEARSON
_____/

FINAL ORDER

THIS CAUSE came on for consideration of and final agency action on the Recommended Order issued in this matter on October 15, 2014, attached hereto as Exhibit A. Both parties timely filed exceptions to the Recommended Order and also filed responses to the exceptions.

RULINGS ON EXCEPTIONS AND RESPONSES

Petitioner's Exceptions

1st Exception – RO pp.10 ¶ 16.

The Division's first exception addresses the finding of fact in paragraph 16. Respondent filed a response to the exception. This finding relates to a transaction involving Mrs. Busing, specifically the transfer of funds from a Schwab account to a Transamerica/Pershing account and the completion of certain documents.

The ALJ concluded the Division had not met its burden of proof. Generally, an agency is not empowered to bypass the ALJ's factual exoneration of a charge simply by reweighing the evidence and making contrary findings. The ALJ's factual findings exonerated Respondent as to all charges related to Mrs. Busing. Although a different determination could well have been reached on the factual evidence presented, the ALJ's finding of fact will not be disturbed. Accordingly, the exception is rejected.

2nd Exception - RO pp.11-12 ¶ 22 :

This exception disputes the ALJ's finding of fact in paragraph 22, in which he found the evidence the Division presented regarding the Kesishs, particularly as regards what Mrs. Kesish

may have said to the witnesses, was uncorroborated hearsay. Respondent filed a response to the exception.

The finding of fact set forth in paragraph 22 is summarized in the last sentence as follows: "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."

This matter is governed by the "clear and convincing evidence" standard of proof. It is the province of the ALJ to determine the weight of the evidence as long as there is competent, substantial evidence to support that determination. The ALJ found the evidence fell short of the standard of proof imposed on the Department. It cannot be said that there is literally no competent, substantial evidence to support that finding. Additionally, the exception and response also address footnote #3 to paragraph 22. The footnote discusses the hearsay exception provided for in section 90.803(24), Florida Statutes, as regards elderly or disabled adults. However, this statutory provision addresses the admissibility of evidence, not the weight to be given to such evidence. The hearsay evidence was admitted. Neither the footnote, nor the parties' discussion of same in the exception and response, is dispositive. Ultimately, the ALJ found the affidavit testimony to be unpersuasive. Such credibility determinations are generally left to the trier of fact. Thus, although Mrs. Keshish's factual assertions would appear to be probative in evaluating the transactions at issue, the ALJ's credibility determination will not, in this instance, be disturbed.

Accordingly, for this reason, as well as the reasons stated in response to the first exception, the Petitioner's 2nd Exception is rejected.

3rd Exception – RO pp. 39 ¶ 107.

The Division's third exception is to the ALJ's conclusions of law contained in paragraphs 107 and 110. Respondent filed a response to the exception.

Section 626.621(13), Florida Statutes, provides the Department may take disciplinary action against an agent, if the agent:

> "Has 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.[1]

However, the ALJ concluded that a penalty may not be imposed for the Respondent's violation of section 626.621(13), Florida Statutes, because Rule 69B-230.090(13), *Florida Administrative Code,* which permits the Department to revoke the Respondent's license based upon the final order issued to him by OFR, was not promulgated until *after* the Respondent's illegal activities (addressed in Count IX of the amended Administrative Complaint) took place.

The ALJ's legal conclusion is premised upon the constitutional principle precluding the application of a law *ex post facto.* However, reliance on this legal principle is misplaced as it has no applicability outside of the realm of criminal law.[2] It is true that laws that impose new penalties may not be applied *retroactively.*[3] It is also true that at the time subsection 626.621(13) was enacted, there was not yet a penalty *specifically* promulgated by rule for a violation of that statutory subsection. (This only makes sense because the Department could not begin rule-making to implement subsection (13) until it became effective.) There can be no dispute that section 626.621(13), Florida Statutes, was in place at the time the Respondent entered into a stipulation with OFR on December 18, 2012, which formed the basis of the OFR's final order issued on January 11, 2013. The ALJ's legal conclusion that since the Department had not yet promulgated a specific penalty guideline for subsection (13), no penalty could be imposed is clearly erroneous. There *was* a rule in place at the time of the Respondent's offenses that specifically addresses those situations in which a particular penalty is not provided for a violation of an Insurance Code statutory provision. Rule 69B-231.120, *Florida Administrative Code* (2006), entitled "Penalties for Violation of Other Insurance Code Provisions," provides:

> If the licensee is found to have violated a provision of the Insurance Code, the stated penalty, *unless otherwise prescribed in these rules or in the code provision violated,* shall be a six (6) month suspension if the violation was willful, or shall be a three (3) month suspension if the violation was nonwillful. (Emphasis supplied.)

Thus, it is apparent that the Department may impose a three month suspension upon the Respondent.[4] This statutory interpretation is fully buttressed by section 120.54(1)(c), Florida Statutes, which categorically states that:

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[1] Paragraph (13) of section 626,621, Florida Statutes, was enacted in 2010 with an effective date of January 1, 2011.
[2] *Lescher v. Florida Department of Highway Safety and Motor Vehicles,* 985 So.2d 1078 (Fla. 2008).
[3] *Childers v. Department of Environmental Protection,* 696 So.2d. 962 (Fla. 1st DCA 1997).
[4] The penalty under rule 69B-231.090(13), if it was applicable, would have been a permanent revocation, as the rule authorizes the imposition of the highest substantially similar penalty to the penalty imposed by OFR.

"No statutory provision shall be delayed in its implementation pending an agency's adoption of implementing rules unless there is an express statutory provision prohibiting its application until the adoption of implementing rules."

There is no provision in section 626.621, Florida Statutes, (or in any other Insurance Code provision) that contains such a statutory prohibition. As demonstrated, section 626.621 authorizes discipline for a violation of subsection (13). Rule 69B-231.120, in turn, expressly provides that in the absence of a specific penalty designated for a particular Insurance Code violation, a three to six month suspension is to be applied, and it is axiomatic that a rule properly promulgated has the effect of law. *Florida v. Jenkins*, 469 So.2d 733 (Fla. 1985). It is likewise clear that Rule 69B-231.120 was properly promulgated and in place when the Respondent's offenses were committed. Therefore, to the extent that the ALJ's conclusions of law in paragraphs 107 and 110 conflict with this legal conclusion, they are rejected, and a three month suspension will be imposed upon the Respondent on the basis of the grounds set forth in section 626.621(13), Florida Statutes. This substituted conclusion of law is as or more reasonable than the conclusions of law it replaces. Accordingly, for the reasons stated above, the Department's 3rd Exception is accepted, in part.

Respondent's Exception(s)

Exception – RO pp. 41-42 ¶'s 112 -113.

Respondent's exception disputes the ALJ's penalty calculation.[5] More specifically, Respondent's exception(s) disputes the application of aggravating factors pursuant to Rule 69B-231.160(1), Florida Administrative Code, to the ALJ's penalty calculation that converted a *six* month suspension into a *twelve* month suspension. In this exception, the Respondent apparently argues that the ALJ impermissibly relied upon subparagraph (n) of Rule 69B-231.160(1), entitled "*other factors,*" as a vehicle to, in effect, bootstrap into consideration Count IX, which the Respondent contends would somehow be inconsistent with the ALJ's conclusion that a penalty could not be imposed in the absence of a penalty guideline in effect at the time of the violation.

However, the Respondent has fundamentally misconstrued the ALJ's Recommended Order. Based upon the violation of section 626.611(7), Florida Statutes, that the ALJ found the Respondent to have committed with regard to *Count V* (the illegal, unauthorized charge received

[5] Although the Respondent's heading indicates there are exceptions, there appears to be only one exception. In any event, the exception(s) is dealt with in its entirety.

from Mrs. Paz), the ALJ (in paragraph 112 of his RO) expressly enumerates the exacerbating and mitigating factors contained in Rule 69B-231.160(1), and "after taking all of the factors into consideration," properly concluded that exacerbation of the six month suspension was "warranted." [6] It was only after reaching that conclusion that the ALJ separately concluded that the Respondent's suspension should also be augmented as a result of the Respondent's illegal actions that led to his settlement agreement (banning him from ever obtaining licensure) with OFR, which the ALJ found subjected him to, and constituted a violation of, section 626.621(13), Florida Statutes. (In paragraph 108 of the RO, the ALJ expressly finds that the Respondent violated this statutory section.) The Division correctly states in paragraph 12 of its response that the original administrative complaint alleged the issuance of a final order by the Office of Financial Regulation prohibiting the Respondent from ever being licensed as a result of the Respondent's egregious violations of chapter 517, Florida Statutes, which then subjects the Respondent to Department discipline. Moreover, the Respondent admitted the truth of the Department's allegation that a final order was entered against him due to his failure "to observe high standards of commercial honor and just and equitable principles of trade" in his answer to the Department's administrative complaint. Respondent previously admitted to all of the allegations set forth in OFR's administrative complaint and expressly stipulated to the finding cited above. Thus, there is no "bootstrapping" of the ALJ's exacerbation of the penalty as the Respondent contends. The penalty increase imposed by the ALJ was properly based upon the Respondent's egregious violations memorialized and admitted to OFR's Stipulation and Consent Agreement. This is precisely the type of aggravating factor contemplated by section 69B-231.160(1)(n). Furthermore, as explained and found herein, there *was* an applicable penalty rule in place for a violation of section 626.621(13), namely, Rule 69B-231.120, which designates a suspension period of six months. Therefore, for the above-described reasons, the Respondent's exception(s) is rejected.

ACCORDINGLY, after a complete review of the entire record, including all admitted exhibits, the official transcript of proceedings, the proposed recommended orders filed by all parties to the proceeding, the exceptions to the Recommended Order filed by the Respondent and

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[6] The aggravating factors considered by the ALJ to be warranted are apparent from the record: the capacity and age of the victim (Mrs. Paz is 88 years of age); lack of restitution by the Respondent to the victim, motivation of the licensee; financial gain to the licensee, etc.

the Division and the responses to same, and after being fully apprised in all other material premises:

IT IS HEREBY ORDERED that the ALJ's findings of fact are adopted as the Department's findings of fact. The ALJ's conclusions of law are adopted as the Department's conclusions of law, with the exception of paragraphs 107 and 110 which did not take into account the specified penalty of three months provided by Rule 69B-231.120, *Florida Administrative Code*, and are therefore rejected.

IT IS HEREBY FURTHER ORDERED that the penalty recommendation in the Recommended Order is modified for the reasons stated herein, and that Robert W. Pearson's insurance agent licenses and eligibility for licensure are hereby suspended for a period of fifteen (15) months.

DONE and ORDERED on this 5th day of February, 2015.

Robert C. Kneip
Chief of Staff

NOTICE OF RIGHT TO APPEAL

A party adversely affected by this final order may seek judicial review as provided in section 120.68, Florida Statutes, and Florida Rule of Appellate Procedure 9.190. Judicial review is initiated by filing a notice of appeal with the Agency Clerk, and a copy of the notice of appeal, accompanied by the filing fee, with the appropriate district court of appeal. The notice of appeal must conform to the requirements of Florida Rule of Appellate Procedure 9.110(d), and must be filed (i.e., received by the Agency Clerk) within thirty days of rendition of this final order.

Filing with the Department's Agency Clerk may be accomplished via U.S. Mail, express overnight delivery, hand delivery, facsimile transmission, or electronic mail. The address for overnight delivery or hand delivery is Julie Jones, DFS Agency Clerk, Department of Financial Services, 612 Larson Building, 200 East Gaines Street, Tallahassee, Florida 32399-0390. The facsimile number is (850) 488-0697. The email address is Julie.Jones@myfloridacfo.com.

Copies furnished to:

J. Lawrence Johnston, Administrative Law Judge
John A. Richert, Esq., Attorney for Respondent
David Busch, Esq., Attorney for Petitioner
Derick Dehmer, Esq., Attorney for Petitioner