

FILED

JAN 26 2015

Docketed by EU



CHIEF FINANCIAL OFFICER
JEFF ATWATER
STATE OF FLORIDA

IN THE MATTER OF
GREGORY B. SAMPLE

CASE NO.:139509-13-AG

FINAL ORDER

THIS CAUSE came on for consideration of and for final agency action on the Recommended Order issued on October 29, 2014, attached hereto as Exhibit A. Both parties timely filed exceptions to the recommended order. The Division filed a response to respondent's exceptions.

RULINGS ON EXCEPTIONS AND RESPONSES

Agency's (Petitioner) Exceptions

1st Exception – RO pp.48 ¶ 124.

The Division's exception addresses the conclusion of law in recommended order paragraph 124 that Rule 69B-231.040(3)(d), *Florida Administrative Code*, directs respondent's licenses be revoked. The exception asks that the conclusion be clarified so as to clearly state the revocation will be permanent in nature as provided for under section 626.641(3) (b), Florida Statutes. Section 626.641, Florida Statutes, was amended in 2010 to add paragraph (3)(b). The amendment, which took effect on January 1, 2011, states that if an agent's license is revoked for actions involving the solicitation or sale of an insurance product to a person 65 years or older, the department is barred from thereafter issuing a license to that person. The amendment to the law

is a constraint on future activity by the department vis-a-vis an agent whose license has been revoked and who may, thereafter, seek to be relicensed. It does not purport to impose a penalty. Further, chapter 69B-231, *Florida Administrative Code*, Penalty Guidelines for Insurance Representatives, does not reference section 626.641(3)(b). Accordingly, the exception is rejected.

Sample's Exceptions

1st Exception – RO pp. 10-12, 43-44 ¶ 16, 17, 21, and 115

Respondent's first exception addresses three findings of fact and one conclusion of law that relate to Count I; more specifically, the charges regarding the replacement of the consumer's MetLife annuity. The ALJ found clear and convincing evidence that respondent knew the consumer would incur surrender charges and willfully misled the consumer, in violation of section 626.611 (5), (7) and (9) and section 626.9541(1)(e)1., Florida Statutes.

Findings of fact 16 and 17 relate to the date of issuance of the MetLife contract. However, even if there were a basis in law to set aside the findings made in paragraphs 16 and 17 it would not change the outcome. Finding of fact 21, in pertinent part, states "[t]he totality of the evidence as to this transaction indicated that respondent willfully misled Ms. Frisani, thus causing her to be misinformed about the charges related to the surrender of her MetLife annuity." This finding is an accurate statement of the evidence in the record as regards the consumer's understanding based on her conversation with respondent that she would not lose money - including incurring surrender charges - by replacing her MetLife annuity contract (Tr. 208-210, 212). Section 120.57(1)(I), Florida Statutes, expressly provides that a finding of fact may not be rejected or modified by an agency unless a complete review of the record shows there is no competent substantial evidence to support the challenged finding. As stated in *Bemender v.*

Dep't. of Bus. and Prof. Reg., 955 So. 2d 659 (Fla. 4th DCA 2007), “It is black letter law that an agency may not reweigh evidence . . . judge the credibility of witnesses, or otherwise interpret evidence anew.” (Internal citations omitted.) Further, the factual findings support the legal conclusion that respondent engaged in fraudulent or dishonest practices. The ALJ found the Division did not meet its burden of proof regarding whether or not a surrender charge was incurred for the ING contract; therefore, the portions of the exception addressing the ING contract do not require a response. Accordingly, this exception is rejected.

2nd and 3rd Exceptions – RO pp 19-20, 44. ¶¶ 41-44, 117.

Respondent’s second and third exceptions address four findings of fact and one conclusion of law that relate to Count II; more specifically, completion of the annuity suitability form as regards the consumers’(a married couple) financial profile. Rec. Order ¶¶ 41-44. The exception mounts a two-pronged attack on the referenced findings. The first prong challenges the reliability and credibility of the testimony of the witnesses regarding their assets. Rec. Order ¶¶ 41-43. However, it is the ALJ’s exclusive province to judge a witnesses’ credibility and the weight to be given his or her testimony. The second prong is aimed at recommended order paragraph 44, to the extent it finds the misrepresentations and false entries were made to meet the new insurer’s underwriting standards. The exception correctly notes there is no evidence in the record regarding the replacing insurer’s underwriting standards, but the ALJ’s finding of the reasons for the misrepresentations in paragraph 44 are a reasonable inference from the record evidence. The Department’s response to the exception aptly notes the reason the respondent made the false statements is not dispositive; the fact he made false statements establishes the violation. The findings of fact in paragraphs 41-44, finding respondent had the consumers sign blank forms, to which he later added false statements and willful misrepresentations regarding

their financial profile, are supported by competent substantial evidence in the record (Tr. 514-515, 518-519, 527-528; Exh.43). Further, the factual findings support the legal conclusion that respondent engaged in fraudulent or dishonest practices. Accordingly, the exceptions are rejected.

4th Exception – RO pp.25, 45 ¶ 63, 118.

Respondent's fourth exception relates to Count III and incorporates the arguments made in the second exception as regards the replacing insurers' underwriting standards, and further challenges the credibility determinations of the ALJ. The finding of fact in paragraph 63, that respondent included false information regarding the consumers' net worth on certain forms, is supported by competent substantial evidence in the record (Tr.645-648, 743, 747-748). This finding is sufficient to support the legal conclusion that respondent engaged in fraudulent or dishonest practices. Accordingly, this exception is rejected.

5th and 6th Exceptions – RO pp.35-36, 39, 45 ¶ 90, 97, 119.

Respondent's fifth and sixth exceptions relate to Count VI. The fifth exception takes issue with the finding in recommended order paragraph 90 that respondent had no objectively reasonable basis to believe the consumer wanted a yearly benefit withdrawal rider added to the annuity contract (Tr.62, 91-92, 101, 111-112). The sixth exception contests the finding in paragraph 97 that respondent made willful misrepresentations regarding the consumer's financial profile. Both of these findings are supported by competent substantial record evidence (Tr. 57, 83-90). Respondent's fifth and sixth exceptions are rejected.

7th Exception – RO pp.46 ¶ 120

The seventh exception objects to the penalty recommendation in regards to Count I. Recommended order paragraph 120 concludes the highest possible penalty is the one imposed

under the penalty guidelines for a violation of section 626.611(9), which is a twelve-month suspension. Respondent argues that because the law refers to “fraudulent practices” and only one charge was proven under Count I, this law/rule is not applicable. The exception is correct to the extent case law requires more than one instance of fraudulent activity to establish “practices.” 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). However, whether a penalty of twelve months is imposed under section 626.611(9) or a shorter penalty obtains under section 626.611(5) or (7), which the ALJ concluded respondent also violated, is of no moment. Even if no penalty were imposed for Count I, the aggregate penalties under Counts II, III, and IV, would exceed twenty-four months, resulting in the revocation of respondent’s licenses. In other words, the error, if any, is harmless. Accordingly, this exception is rejected.

8th Exception – RO pp.47-48 ¶126-127

The eight exception challenges the imposition of a monetary penalty in regards to Counts I, III and VI for the willful violation of section 626.9541, Florida Statutes. The gist of the exception is that a penalty in the amount of \$140,000.00 is so excessive “it shocks the conscience.” The recommended penalty, however, is well within the range set forth by the law. It is worth noting the ALJ found respondent, on multiple occasions made false statements and willful misrepresentations in connection with the replacement of annuity contracts involving older consumers. Accordingly, this exception is rejected.

WHEREFORE, after a review of the record, including admitted exhibits, and considering applicable law, and otherwise being fully apprised in all material premises:

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.

IT IS HEREBY FURTHER ORDERED that the penalty recommendation in the recommended order is adopted in full as the Department's penalty and Gregory B. Sample's insurance agent licenses are revoked and a penalty in the amount of \$140,000.00 is imposed.

DONE and ORDERED this 26th day of January, 2015.



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

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:

Linzie F. Bogan, Administrative Law Judge
Robert J. Coleman, Attorney for Respondent
David Busch and Jessica Harmsen, Attorneys for Petitioner