STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JEAN-ANN DORRELL AND SENIOR FINANCIAL SECURITY, INC.,

Petitioners,

vs. Case No. 19-1622F

DEPARTMENT OF FINANCIAL SERVICES,

Respondent.
_____/

FINAL ORDER

Pursuant to notice, a formal administrative hearing was conducted before Administrative Law Judge Garnett W. Chisenhall of the Division of Administrative Hearings ("DOAH"), in Tallahassee, Florida, on August 8, 2019.

APPEARANCES

For Petitioner: Jed Berman, Esquire
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For Respondent: David J. Busch, Esquire
Marshawn Michael Griffin, Esquire
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STATEMENT OF THE ISSUE

The issue to be determined is whether Petitioner ("Senior Financial Security")[1/] is entitled to an award of attorney's fees and costs pursuant to section 57.111, Florida Statutes (2019).[2/] Senior Financial Security is entitled to such an award if: (a) the Department of Financial Services' ("the Department") actions were not substantially justified; or (b) no special circumstances exist that would make an award of fees and costs unjust.

PRELIMINARY STATEMENT

The Department issued a 10-count Administrative Complaint on April 25, 2017, alleging that Jean-Ann Dorrell and/or Senior Financial Security committed multiple violations of authorities governing the insurance industry: (a) willfully deceiving four annuity consumers; (b) demonstrating a lack of trustworthiness; (c) demonstrating a lack of technical competence; (d) conducting fraudulent or dishonest practices; (e) failing to comply with rules promulgated by the Department; (f) failing to place policyholders' interests first; (g) engaging in deceptive acts; (h) violating an applicable code of ethics; (i) knowingly aiding and abetting unlawful insurance transactions; (j) selling unsuitable annuities to senior consumers; (k) using unlicensed employees to sell insurance products; and (l) making misleading statements intended to induce clients to surrender one policy

and purchase another when the transactions were not in their best interests.

After a final hearing conducted over a total of seven days in November of 2017, and February of 2018, the undersigned issued a Recommended Order concluding that the Department failed to prove any of its allegations by clear and convincing evidence. The proceeding that resulted in the aforementioned Recommended Order will hereinafter be referred to as "the underlying proceeding."

Senior Financial Security filed an "Application for an Award of Attorney's Fees and Costs" on March 13, 2019, pursuant to section 57.111, the Florida Equal Access to Justice Act ("FEAJA").

The parties filed a Pre-hearing Stipulation on July 31, 2019, stating there was no dispute that Senior Financial Security was a "prevailing small business party" within the meaning of section 57.111(3). The parties also indicated that there was no dispute that Senior Financial Security would be entitled to attorneys' fees of $50,000.00 and costs of $18,395.51 if it prevailed in the instant case.

After one continuance, the final hearing was convened on August 8, 2019, and completed that day. Rather than calling witnesses, Senior Financial Security sought to introduce the deposition testimony of Elmer Sanchez. In response to an

objection from the Department, the undersigned issued a ruling on September 5, 2019, accepting Mr. Sanchez as an expert in the area of investigations. See Am. Gen. Life Ins. Co. v. Schoenthal Family, LLC, 555 F.3d 1331, 1338 (11th Cir. 2009)(noting that "[a] district court may decide that nonscientific expert testimony is reliable based upon personal knowledge or experience."). However, the undersigned ultimately found that Mr. Sanchez's testimony was not particularly relevant to the issue of whether the Department was substantially justified when it issued the Administrative Complaint. Moreover, the undersigned gave no weight to Mr. Sanchez's testimony to the extent that he was making a legal conclusion that there was no substantial justification supporting the Administrative Complaint. See Seibert v. Bayport Bch. & Tennis Club Ass'n, 573 So. 2d 889, 891 (Fla. 2d DCA 1990)(noting that "[a]n expert should not be allowed to testify concerning questions of law."); Cnty. of Volusia v. Kemp, 764 So. 2d 770, 773 (Fla. 5th DCA 2000)(noting that "an expert should not be allowed to render an opinion which applies a legal standard to a set of facts.").

Petitioner's Exhibits A, Bii, Biii, Biv, Bv, C, and E were accepted into evidence during the final hearing. The video deposition and transcript of Elmer Sanchez was marked for identification as Petitioner's Exhibit D and ultimately accepted

into evidence as discussed above. The undersigned officially recognized the Administrative Complaint that initiated the underlying proceeding.

The Department presented the testimony of Susan Alexander and the following Exhibits from the Department were accepted into evidence: 8 through 13, 15 through 22, 49, 50, 55, 56, 59 through 68, 70 through 97, 99 through 174, 185, 188 through 196, 200 through 220, 223, 290 through 303, 379 through 384, 391, 393, 394, 434, 436, and 464.

After one extension, the parties filed timely proposed final orders, and those proposed final orders were considered in the preparation of this Final Order.

FINDINGS OF FACT

Based on the oral and documentary evidence adduced at the final hearing, matters subject to official recognition, the Recommended Order and the Final Order from the underlying proceeding, and the entire record in the instant case, the following Findings of Fact are made:

The Parties

1. The Department is the state agency responsible for regulating and licensing insurance agents and agencies. That responsibility includes disciplining licensed agents and agencies for violations of the statutes and rules governing their industry.

2. At all times relevant to the instant case, Jean-Ann Dorrell was a Florida-licensed insurance agent selling fixed annuities and fixed index annuities. She owns Senior Financial Security, a licensed insurance agency located in The Villages, Florida. Ms. Dorrell is not licensed to conduct securities business.

The Initiation of the Department's Investigation

3. At all times relevant to the instant case, Susan Alexander was the regional administrator for the Department's Jacksonville field office.

4. Prior to becoming a Department employee in 1998, Ms. Alexander had been an insurance agent and financial advisor who held insurance licenses pertaining to life, health, variable annuities, and property and casualty. She also held a Series 6 investment license. At the time of the final hearing in the instant case, she still possessed the aforementioned licenses, but they were "on hold."

5. On July 1, 2014, Ms. Alexander received a complaint forwarded to her from the Department's Division of Insurance Fraud. The complaint was from Laura Wipperman who had recently worked for Ms. Dorrell at Senior Financial Security. Ms. Wipperman's complaint alleged that Ms. Dorrell regularly engaged in the following practices: (a) participating in the sale or delivery of annuities only for new clients, clients

with money to move, or existing clients who insisted on meeting with her; (b) giving investment advice without having the necessary licensure; (c) instructing clients to procure reverse mortgages and use the resulting funds to purchase annuities; (d) instructing clients to surrender annuities and replace them with ones that are less suitable for them; and (e) encouraging clients to engage in financially disadvantageous transactions so that Ms. Dorrell would receive commissions.

6. Ms. Wipperman executed an affidavit on July 29, 2014, alleging that Ms. Dorrell had her acting as an agent for Senior Financial Security clients between July of 2010 and March of 2013 despite the fact that she lacked the required licensure.

7. Diana Johnson, another former employee of Senior Financial Security, also provided the Department with an affidavit on July 29, 2014, stating that:

> I began working for Jean-Ann Dorrell at Senior Financial Security about June of 2010, and I was the receptionist at that time. In the first part of 2013, I was promoted to [] office manager. I do not have and have not been licensed to sell insurance in Florida. . . . When I was promoted to the position of [] office manager, agent Dorrell expanded my duties to include, meeting with clients to review the client's insurance coverage. . . . Agent Dorrell had a motto, "Don't leave any money on the table." If a client had an annuity that had a penalty free withdrawal available, I was instructed to contact the client to have them come in for a review. I would then solicit the sale of either

another annuity or a life insurance policy and tell the client that funds are available and they will not incur a penalty to withdraw the funds from their policy. If the client made the decision to purchase a policy that I recommended, I would complete the application and have the client sign the paperwork along with the forms to have the funds withdrawn from the existing policy. Agent Dorrell instructed me to explain policies and the benefits. When a policy was issued, I would have the client come to the office and I would deliver the contract to them. . . . I would also answer any questions the client may have [had] about the insurance policy. Many times an appointment was made for agent Dorrell to meet with the client and when the client arrived at the scheduled time, agent Dorrell would make an excuse that she was not able to meet with the client and I was instructed to handle the sale of the policy and then complete the application. I am aware of certain situations where a client passed away and agent Dorrell would have me contact the relatives or beneficiaries to complete the paperwork to receive the death benefits. Agent Dorrell told [me] to sell some type of an insurance policy to the beneficiary using the proceeds from the death benefits. Janet Barbuto was a client who passed away that I remember. I sold an annuity policy to each of her two daughters, Elizabeth Barbuto and Maria Erb, using the proceeds from Janet's policy. . . . Agent Dorrell would also have me review any client's brokerage account they may have. Agent Dorrell would have me convince the client to either liquidate their account to cash or transfer the funds to her brokerage house account. . . . Agent Dorrell's ultimate goal is to use funds from the client's brokerage account to sell the client an annuity or life insurance policy. . . . I have prepared several Lady Bird deeds at the instruction of agent Dorrell. . . . I have taken several insurance company product training classes

> online for agent Dorrell. Agent Dorrell would send an email to me instructing me to take a particular product training course online. I would log onto the company's website as agent Dorrell and complete the training course. Agent Dorrell would consistently berate me for not selling life insurance policies because the client would not want to purchase one after I had asked the client if they would be interested in a policy. Agent Dorrell told me that the client does not know what they want and that I needed to learn how to sell policies. Agent Dorrell would say that if I did not learn how to sell, our door would not be open if all the clients said no to my recommendations.

8. Matthew Plunkitt, another former employee of Ms. Dorrell, executed the following affidavit on December 11, 2014:

> During the time that I worked in agent Dorrell's office there were a number of issues and regular business practices which made me decide to find a new job. . . . I sat in on several appointments at agent Dorrell's direction where she would tell the consumer that they should be concerned about the stock market, that a stock market correction was coming, that they were going to lose a lot of money, and that they needed to get out of the market right away. Agent Dorrell was absolutely talking about investments which I knew that she was not licensed to talk to the consumer about. Agent Dorrell would then suggest that if the consumer would transfer their account to Van Guard Capital, the funds could then be turned into cash to purchase annuities, which would make the money safe and the consumer would not lose anything when the market made the correction which was coming. . . . When new clients would come into the office, agent Dorrell would sit

> with them for usually the first two appointments. Afterwards clients would then meet with usually Diana Johnson, the office manager and sometimes myself. Agent Dorrell was not in the office often, so Diana Johnson, as the office manager was required to handle everything in agent Dorrell's absence. . . . I remember that on the appointments that I sat in on, everyone was sold an income rider on their annuity whether it was necessary or not. I do not know what the reasoning was behind the rider. . . . Being employed in agent Dorrell's office was extremely stressful and she was frequently verbally abusive to her staff, threatening to fire them for not following her exact instructions. When objections would be raised about her instructions or office procedure, they would be told that we need to listen to her and not the clients or the insurance companies or the rules. I can't remember the name of the client, but I remember that at one point she instructed me to pretend to be someone's grandson to get the information she needed on a stock account. Her attitude made it impossible to discuss many of the issues in the office with her.

9. Ms. Alexander supervised Ruth Williams, the Department's lead investigator for this matter. Prior to her employment with the Department, Ms. Williams spent 10 years in the insurance industry and had acquired life insurance, health insurance, and variable annuity licenses. She also dealt with indexed annuities. The investigation of Ms. Dorrell was assigned to Ms. Williams, and Ms. Alexander received regular updates on the status of Ms. Williams's investigation.

10. At the close of a typical investigation, Ms. Alexander would review the evidence and the investigator's recommendation. She could then decide that a case should be closed without any disciplinary action or that the case should be forwarded to the Legal Processing Unit in Tallahassee for an assessment of the allegations and evidence. If the Legal Processing Unit did not close the case, then the case would be forwarded to the Department's General Counsel's Office.

Count I – Frederic Gilpin

11. Frederic Gilpin was born in 1940 and worked in the automobile industry, primarily as a service manager in dealerships, for 44 years before retiring in 2006.

12. Mr. Gilpin purchased a Prudential variable annuity in 2006 through Bryan Harris, an investment advisor in Maryland, for $260,851.14.

13. On December 31, 2008, Mr. Gilpin's Prudential variable annuity was worth only $200,989.32. By March 31, 2009, its value had fallen to $183,217.37. The decrease in the annuity's underlying value coincided with the precipitous declines experienced by the stock market in 2008 and 2009.

14. On May 1, 2009, Mr. Gilpin exercised a rider in the Prudential annuity contract that guaranteed a yearly income of $15,625.00. That annual income would continue for the rest of his life regardless of the stock market's performance.

15. The guaranteed income stream would only be destroyed if Mr. Gilpin withdrew from the annuity's principal.

16. Mr. Gilpin and his wife met with Ms. Dorrell in 2012 to discuss their financial situation. As recommended by Ms. Dorrell, Mr. Gilpin surrendered the Prudential annuity and used the proceeds to purchase a fixed index Security Benefit annuity. The purchase price of approximately $205,000.00 for the Security Benefit annuity was allocated between two accounts whose performance was tied to the Standard and Poor's 500.

17. Ms. Alexander obtained a letter that Mr. Gilpin wrote to Security Benefit on April 22, 2013, asking that the aforementioned purchase be rescinded:

> Please accept this letter as indication that I would like my annuity that was rolled over from Prudential and into Security Benefit on January 4th, 2013 rescinded and put back into the contract that we rolled it over from. . . . My agent, Jean Dorrell misrepresented the facts and did not disclose to me the guarantee that I would be giving up when I moved the money over. . . . I put my trust in Ms. Dorrell, and I believe that she did not do what was in my best interest and was simply looking to get paid by moving my annuity contract over. She listed in a letter to me that I was paying $15,000 per year in fees, as a big reason why I should move the money. I have since discovered that was a gross overstatement of the fees that I was paying in my Prudential contract. Upon closer examination, it looks more like my fees were closer to $7,000 per year, not $15,000 and my Management and Expense fee was set to drop from 1.65% to 0.65% when I hit my 10 year marker in 2016

> (also not disclosed by Jean). I also paid a $13,077 surrender charge when I moved the contract. Jean told me not to worry about it because with the 8% bonus it would offset the fee that I was paying to move the money. While it appears that this is true, she didn't take into consideration that I now am in a new contract with a new 10 year surrender charge both on my contract and the bonus I received with not as much liquidity on my money after the move. Probably the most egregious representation is that she stated to me that the old Prudential contract had no guarantees, and I have since come to understand that I had a very valuable lifetime income guarantee that gave me protected income for life based on a protected income base of $312,513.80, which guaranteed lifetime income of $15,625.69. . . . Now that I have moved the funds over, I have forfeited that guarantee. . . .

18. The Department's April 25, 2017, Administrative Complaint alleged that Ms. Dorrell violated multiple provisions of the Florida Insurance Code and the Florida Administrative Code by using misleading and/or false assertions to induce Mr. Gilpin to purchase an unsuitable annuity.

19. The Findings of Fact from the Recommended Order demonstrate that the Department had valid reasons to question the suitability of the Security Benefit annuity. At the time of the exchange, the Prudential annuity only had four more years of surrender charges, and Mr. Gilpin started a new 10-year period of surrender charges with the Security Benefit annuity. Mr. Gilpin incurred a surrender charge of $13,077.56 for

surrendering the Prudential annuity. While that surrender charge was more than offset by an eight percent bonus (i.e., $16,000.00) he earned by purchasing the Security Benefit annuity, that eight percent bonus was subject to recapture for the first six years. The Security Benefit annuity had a 100-percent participation rate, and a seven percent roll-up rate. In contrast, the Prudential annuity only offered a five percent roll-up rate. Also, Mr. Gilpin and his wife experienced significant health issues during the relevant time period and were fortunate to be well-insured. However, they would have likely incurred substantial penalties if they had been forced to use funds from the relatively illiquid Security Benefit annuity to finance their treatment. In addition, moving Mr. Gilpin's funds from a variable Prudential annuity to the fixed index Security Benefit annuity cost Mr. Gilpin when the stock market rebounded from the lows of the most recent recession.

20. Finally, a significant factor in assessing the suitability of the two annuities was whether Mr. Gilpin destroyed his guaranteed lifetime income stream of $15,625.69 by taking an excess withdrawal from the Prudential annuity. If he had not, then it becomes much easier to argue that the Security Benefit annuity was not a suitable replacement for the Prudential annuity.

21. At the time it issued the Administrative Complaint, the Department possessed statements from Prudential indicating that Mr. Gilpin's guaranteed income stream was intact as late as September 30, 2012. However, Mr. Gilpin's hearing testimony, his 2010 and 2011 income tax returns, and Ms. Dorrell's testimony called that into question.

22. While the totality of the evidence presented at the final hearing did not clearly and convincingly demonstrate that Ms. Dorrell committed the violations alleged in Count I, Mr. Gilpin's letter to Prudential, the Prudential statements, and a comparison of the Prudential and Security Benefit annuities provided the Department with a reasonable basis for pursuing Count I. This analysis is further discussed in paragraphs 81 through 84 in the Conclusions of Law.

Counts II and III – Elizabeth Barbuto and Maria Erb

23. Elizabeth Barbuto executed the following affidavit on November 10, 2014:

> My mom, Janet Barbuto passed away on April 16, 2014. My aunt, Marlene Brisco and my mom were both clients of agent Jean Ann Dorrell and Senior Financial Security. After the funeral, my aunt, Marlene Brisco, set up an appointment for my sister Maria Erb and me to meet with agent Dorrell to review my mom's investments with agent Dorrell. When we got to the appointment, Diana Johnson and Matthew Plunkitt were waiting to meet with us. Agent Dorrell came in for a few moments and then left to meet with other clients. When I went into this

> appointment, I did not realize that I would be making any major decisions that day. I thought that I was going over my mom's things, and that I would have time to make any major decisions afterwards. In the meeting, I was sitting next to Matthew and my sister Maria was sitting next to Diana. Diana did the majority of the talking. If there was something that I didn't understand or needed to read Matthew would help me out, but he did not really explain anything about what we were seeing or signing. I remember filling out a form which appeared to be a new client form, asking about my risk tolerance and things. I thought that I would be signing some paperwork to have Mom's policies placed into my name. Instead I now know that the paperwork, which Diana already had prepared, was paperwork to have new annuity contract[s] issued in my name, not transferring the contracts mom had [set] up into my name. The only thing I remember is that I was told that I would need to keep one for 10 years. I believe that one of the policies was placed with Athene and one was placed with Equitrust. I received a huge packet from Athene, but by the time that I opened it, it was too late to free look the policy. Since that time, I have paid more attention and have spoken to a family friend and financial advisor, David Hodge, who explained to me that I could have made different choices with my inheritance. In looking back on that day, I was still grieving the loss of my mother and cannot believe that paperwork was already prepared to move my financial future without anyone ever having talked with me beforehand to see what I was thinking about doing.

24. At the Department's request, EquiTrust and Athene offered refunds to Ms. Barbuto.

25. Ms. Erb executed an affidavit on October 30, 2014, that mirrored her sister's:

> My mom, Janet Barbuto, passed away in Florida in April, 2014. She was a client of agent Jean Ann Dorrell's. While I was in Florida a few days after my mom's passing, my sister Elizabeth Barbuto and I went to agent Dorrell's office to discuss my mom's estate. We had a meeting with two people, Diana and Matthew. I do not know either of their last names. Diana did most of the talking. Matthew did not say much. She explained to us that Mom had several Roth and IRA accounts. At sometime during that meeting agent Dorrell came into the office, talked for a few minutes, offered her sympathy, and then left. Agent Dorrell did not discuss any of the policies or accounts with us. Shortly after that one meeting, I returned to Oregon and haven't been back to Florida to see agent Dorrell since. I think at that first meeting, I may have signed some papers, but I was still in shock, so I am not sure what I signed. At that point, the office of agent Dorrell emailed me some documents to be signed. I know that Mom's two IRA's needed to have mandatory withdrawals taken from them, before we could proceed with anything else. Most of Mom's annuities were with American Equity and I remember at some point either Diana or Matthew informed me that American Equity did not do inherited IRA annuities for people who lived outside Florida, so it would be necessary for me to place my inheritance with another company. My sister is a Florida resident so this problem did not pertain to her. I am not sure if my sister is doing business with agent Dorrell's office or not. I did receive two packages with contracts from agent Dorrell's office and I signed where I was instructed to sign and returned everything to the office as instructed. The annuity policies which agent Dorrell selected for me were with

> Athene. After thinking about it, I contacted my financial planner in Pennsylvania, and found out that the paperwork I had signed was for a 10 year annuity, which I did not want to keep.

26. A portion of Diana Johnson's July 29, 2014, affidavit corroborated the affidavits from Ms. Barbuto and Ms. Erb:

> I am aware of certain situations where a client passed away and agent Dorrell would have me contact the relatives or beneficiaries to complete the paperwork to receive the death benefits. Agent Dorrell told [me] to sell some type of an insurance policy to the beneficiary using the proceeds from the death benefits. Janet Barbuto was a client who passed away that I remember. I sold an annuity policy to each of her two daughters, Elizabeth Barbuto and Maria Erb, using the proceeds from Janet's policy.

27. Counts II and III of the Department's Administrative Complaint alleged that Ms. Dorrell violated the Florida Insurance Code and the Florida Administrative Code by: (a) directing an unlicensed person, Diana Johnson, to sell annuities to Ms. Barbuto and Ms. Erb; (b) failing to perform any insurance agent services for Ms. Barbuto's transactions; (c) falsely informing Ms. Barbuto that it was necessary to exchange her late mother's IRA contracts for new financial instruments so that Ms. Dorrell could obtain a commission; and (d) falsely stating to Ms. Erb that her non-Florida residency made it necessary for her mother's IRA contracts to be

liquidated with the resulting funds being used to purchase an annuity from Athene.

28. The Department noted in the pre-hearing stipulation submitted prior to the final hearing in the underlying case that it would be dropping Counts II and III. Nevertheless, the affidavits from Ms. Barbuto, Ms. Erb, and Ms. Johnson provided a reasonable basis to support the Department's allegation that Ms. Dorrell utilized unlicensed personnel to sell annuities. Ms. Johnson's affidavit described how she would engage in the unlicensed sale of insurance products, and she specifically named Ms. Barbuto and Ms. Erb as examples of how Ms. Dorrell instructed her to sell products to the beneficiaries of death benefits. As explained in paragraphs 85 and 86, under the Conclusions of Law, the Department's action against Petitioner as set forth in Counts II and III was, at the time that action was taken, substantially justified.

Count IV – Deborah Gartner's Annuities

29. At the time of the final hearing in the underlying case, Deborah Gartner was a 71-year-old widow who met Ms. Dorrell at a Senior Financial Security seminar in 2007. Ms. Gartner filled out a form indicating that her net worth was between $500,000.00 and $1 million.

30. In January of 2008, Ms. Gartner met with Ms. Dorrell in order to seek financial advice. Ms. Gartner had $201,344.14

in a Guardian Trust account and $195,182.44 in a Guardian Trust IRA. In addition, Ms. Gartner owned an $80,000.00 certificate of deposit. On a monthly basis, Ms. Gartner was receiving $1,381.00 from social security, $786.15 from a pension, and $4,500.00 from investment withdrawals. The latter came from depleting principal rather than interest.

31. At the time of the January 2008 meeting, the stock market was declining, and Ms. Gartner was adamant about getting out of equities. Ms. Dorrell told Ms. Gartner that annuities would be appropriate if she was interested in principal protection and guaranteed income. Because she lacked a securities license, Ms. Dorrell could not legally recommend or instruct Ms. Gartner to liquidate her equity investments.

32. On June 24, 2014, Ms. Gartner requested assistance from "Seniors vs. Crime," a special project of the Florida Attorney General. Jon Hartman handled her case, and Mr. Hartman had extensive experience in finance. For example, he previously worked as the director of investments for the K-Mart Corporation's pension savings plan and managed approximately $2 billion in assets. After leaving K-Mart, Mr. Hartman worked as the chief financial officer for a retail telecommunications company. His last position, prior to retiring from full-time employment, involved advising high net worth individuals on their investments. While Mr. Hartman has never sold insurance

or held a brokerage license, he is a chartered financial analyst, and he described that credential as "the gold standard for people who wish to manage money on a professional level." His November 20, 2014, investigative report from "Seniors vs. Crime" states that on December 31, 2007, Ms. Gartner had $394,814 invested in relatively liquid assets such as stock mutual funds, a short term bonds, and one or more money market funds. The report suggests that Ms. Dorrell arranged for the vast majority of the aforementioned money to be transferred into relatively illiquid annuities.

33. The following paragraph from the report questions the wisdom behind transferring Ms. Gartner's funds to annuities and whether subsequent annuity purchases enriched Ms. Dorrell at the expense of excessively limiting Ms. Gartner's liquidity:

> While some investments in annuities may be appropriate, prudent financial management does not recommend that anyone place 90+% of their investable assets in annuities or any other single investment. All investors should maintain a well-diversified portfolio based upon their risk tolerances and liquidity needs. Further, we are troubled by the fact that annuities typically carry high commission rates for agents. Information that we obtained from the insurance company web sites indicates that the commission rates for these types of annuities are 7-9%. . . . Further, we are curious to know the reasoning behind the transfer of the Reliance Standard annuities to different insurance companies [in] 2011. It appears that these transactions were motivated by additional commissions for

> Ms. Dorrell. It is our understanding that the current surrender charge for the two Allianz MasterDex 10 contracts is 7.50%, decreasing by 1.25% per year. The surrender charge will not drop to zero until February, 2019. For the two American Equity contracts, the current surrender charge is 16% and will not drop to zero until February, 2024. However, withdrawals limited to 10% annually from Allianz and American Equity may be taken without incurring a surrender charge on the anniversary date of the policies. Thus, the annuities severely restrict Ms. Gartner's liquidity position.

34. One of the conclusions in Mr. Hartman's report stated that:

> It is our opinion that Ms. Dorrell "churned" Ms. Gartner's investment portfolio for her benefit to earn commission income. As evidenced by the Guardian Trust statements as of December 31, 2007, Ms. Gartner had two different accounts totaling $394,814 that were invested approximately two-thirds in different equity mutual funds and the remaining one-third in short bond funds and money market funds. As stated on page 2 of this report, it is our opinion that no reputable financial advisor would place 90% or more of any client's assets in any single investment vehicle.

35. Ms. Gartner executed an affidavit on October 7, 2014, indicating that she completely relied on Ms. Dorrell to manage her finances after her husband's death:

> To the best of my knowledge, everything that my husband had set up was in the stock market. Most of the funds were in IRA's in his name. Nothing was in my name until he passed away. After Agent Dorrell had my portfolio transferred, everything was placed

> into Van Guard Capital Account number 5XG-153754. . . . When I did meet with Agent Dorrell in the beginning when the accounts were fresh, Agent Dorrell would get out her chalkboard and explain and [] I didn't understand what she was talking about, but it sounded good. So I would do what Agent Dorrell suggested. I trusted her like she was my sister, and so whatever Agent Dorrell suggested, I would go along with. I had no reason to question what was happening with my accounts. I was getting a monthly allowance of $2500.00 and I thought everything was fine. . . . Pretty soon, after I had some questions, and I would make an appointment with Agent Dorrell, and in would walk Goldie and she would take over. This went on for about two years. It was always Goldie. I'm not sure where the money was coming from. I am assuming that the money came from one of my annuities or my other accounts. I trusted Agent Dorrell to take care of everything and Goldie and Diana worked for her. They were getting instructions from Agent Dorrell on my behalf.

36. In Count IV of the Administrative Complaint, the Department alleged that Ms. Dorrell: (a) operated without a brokerage registration and gave investment advice that led to the depletion of Ms. Gartner's funds via the conversion of liquid brokerage assets into illiquid annuities; (b) recommended the liquidation of an annuity that caused Ms. Gartner to incur a substantial loss due to surrender charges; and (c) falsified information on annuity application forms. Thus, the Department accused Ms. Dorrell of violating the Florida Insurance Code and the Florida Administrative Code by disseminating false

information and by demonstrating a lack of trustworthiness and expertise.

37. Ms. Gartner's assertions about how she relied on Ms. Dorrell to manage her money corroborated the portion of Mr. Plunkitt's affidavit in which he stated that Ms. Dorrell gave investment advice without having the proper licensure. While the Recommended Order from the underlying proceeding indicates that the allegation that Ms. Dorrell gave investment advice turned on a credibility determination, the affidavits from Ms. Gartner and Mr. Plunkitt provided a reasonable basis for Count IV. Also, the report from "Seniors vs. Crime" presented a solid basis for concluding that Ms. Dorrell had mishandled Ms. Gartner's funds. The substantial justification for pursuing Count IV is discussed further in paragraphs 87 through 89, under the Conclusions of Law.

Count V – Deborah Gartner's Real Estate Transactions

38. Ms. Gartner and Ms. Dorrell became friends, and Ms. Gartner sought Ms. Dorrell's advice in 2012 about selling her home in Summerfield, Florida. At that time, Ms. Gartner wanted to acquire a smaller home in The Villages, Florida. However, Ms. Gartner was having difficulty selling the Summerfield home.

39. Along with referring Ms. Gartner to a real estate agent, Ms. Dorrell allegedly advised her to stop paying the mortgage on her Summerfield home and to do a short sale.

40. Ms. Gartner and Ms. Dorrell informally agreed that Ms. Gartner would select a house in The Villages, Ms. Dorrell would purchase it, and Ms. Gartner would then buy the house from her. Ms. Dorrell made the initial purchase because Ms. Gartner lacked funds and/or a good credit rating following the short sale.

41. Ms. Gartner and Ms. Dorrell discussed Ms. Gartner purchasing the villa from Ms. Dorrell, but they never reached a formal agreement on terms.

42. Because a short sale would have a negative impact on her credit rating, Ms. Dorrell allegedly advised Ms. Gartner to buy a new car prior to executing the short sale.

43. Ms. Gartner sold her 2003 Mazda Tribute to Ms. Dorrell for $10,000.00, and Ms. Gartner purchased a new car.

44. Ms. Gartner selected a villa in The Villages, and Ms. Dorrell purchased it for $229,310.78 on November 1, 2012. Of the aforementioned amount, Ms. Gartner paid $10,000.00 and Ms. Dorrell paid the remaining $219,310.78. At this point in time, Ms. Dorrell was the legal owner of the villa.

45. Ms. Gartner could not move into the villa immediately after the sale because it was being rented, and the tenants' lease extended through April of 2013.

46. Ms. Dorrell received the rental payments of $1,800.00 per month and paid the expenses associated with the villa between November of 2012 and April of 2013. Those expenses included items such as home insurance, cable television, lawn maintenance, and utilities.

47. By May of 2013, Ms. Gartner had completed a short sale of her Summerfield home. She received a short sale benefit of $36,775.00 and a seller assistance payment of $3,000.00.

48. Ms. Gartner moved into the villa in May of 2013. At that point in time, there was no formal agreement between Ms. Gartner and Ms. Dorrell about when Ms. Dorrell would sell the villa to Ms. Gartner or how Ms. Gartner would pay Ms. Dorrell for it.

49. Ms. Gartner paid no rent to Ms. Dorrell from May of 2013 through April of 2014.

50. In November of 2014, Ms. Dorrell sold the villa to Ms. Gartner for approximately $219,000.00, the same price that Ms. Dorrell had paid for it.

51. In order to finance the sale, Ms. Gartner executed a promissory note that would pay Ms. Dorrell $100,000.00 with

four percent interest. Ms. Dorrell did not record that promissory note. In order to finance the remainder of the purchase price, Ms. Gartner obtained a reverse mortgage.

52. Ms. Gartner stated in her October 7, 2014, affidavit that "all of a sudden I received paperwork from Agent Dorrell stating that I owed her all kinds of money and if I did not pay up she could take my home." Mr. Hartman's report also covered the aforementioned transactions and reached the following conclusions:

> It is our opinion that Ms. Dorrell gave Ms. Gartner very poor investment advice in that she convinced Ms. Gartner to enter into a short sale without investigating other alternatives. Second, Ms. Dorrell either kept very poor records or deliberately kept Ms. Gartner "in the dark" regarding her financial obligations. Third, Ms. Dorrell did not formulate a reasonable exit strategy for Ms. Gartner to pay off her obligations to Ms. Dorrell. Apparently, her strategy was to force Ms. Gartner into applying for a reverse mortgage, using those proceeds to pay off the promissory note, and then get the rest of her money from Ms. Gartner's IRA account [when] Ms. Gartner turned 70 and ½. That strategy would have a negative impact on Ms. Gartner's income tax situation as it would increase her adjusted gross income, making her social security payments 85% taxable.
>
> It is our opinion that Ms. Dorrell has willfully and deliberately overstated her claims for monies due from Ms. Gartner. Further, we documented that Ms. Dorrell was not being truthful with us regarding her relationship with Ms. Gartner during our meeting on August 14, 2014.

> The true amount of the financial obligation that Ms. Gartner has to Ms. Dorrell is unknown. Ms. Gartner had signed a promissory note for $100,000. Beyond that, some amount is due Ms. Dorrell. However, we do not have sufficient information to make an accurate determination of the additional amount due.

53. The Department's Administrative Complaint alleged that Ms. Dorrell committed several wrongful acts such as: (a) advising Ms. Gartner to stop making mortgage payments on the Summerfield home; (b) arranging for the purchase of the villa and accepting a $10,000.00 deposit from Ms. Gartner without giving her credit for that payment; (c) failing to record the promissory note; and (d) pressuring Ms. Gartner to apply for a reverse mortgage and arranging to obtain the balance from Ms. Gartner's IRA account in order to pay off the promissory note. According to the Department, the aforementioned allegations amounted to a violation of Florida Administrative Code Rule 69B-215.210 which declares that all life insurance agents must always place the policyholder's interests first. The Department also concluded that the aforementioned allegations demonstrated a lack of trustworthiness to engage in the business of selling insurance.

54. Ms. Gartner's affidavit along with the report from "Seniors vs. Crime" provided a reasonable basis for the Department to pursue the allegations under Count V. The

substantial justification for pursuing Count V is discussed further in paragraphs 90 and 91 under the Conclusions of Law.

Count VI – Earl Doughman

55. Earl Doughman was born in 1934 and was a client of Ms. Dorrell's. He wrote the following letter to the Security Benefit Life Insurance Company on April 14, 2014:

> This letter is to file a formal complaint concerning the Total Value Annuity dated 9/30/2013. Jean A. Dorrell is the listed agent on my annuity.
>
> After a recent phone call to [acquire] information regarding my annuity, I discovered that I was extremely misled and all the important details of this contract were never disclosed to me. This links to Elder Financial Abuse.
>
> Jean A. Dorrell was never present during the presentation and sale of my annuity. Jean A. Dorrell was not present during the delivery of my annuity. Jean A. Dorrell never witnessed any process involved with my annuity. Diane Johnson did everything involved with the sale, presentation and delivery of my annuity. Why is Jean A. Dorrell the listed agent on my contract? Why did Jean A. Dorrell sign as agent on 8/28/2013? I never saw Jean A. Dorrell on 8/28/2013. I thought Diane Johnson was my agent.
>
> During the presentation, I asked Diane Johnson, "Why should I move from Midland National? Midland is paying me 3% guaranteed fixed interest." Diane told me, "You are going from 3% to 4%." Diane NEVER disclosed to me that this is a Rider with an ANNUAL initial charge of 0.95% and [a] maximum charge of 1.80%. Diane

> presented the 4% interest as fixed guaranteed. This makes me very upset!
>
> The initial current interest rate is 1.5% with the Security Benefit Total Value Annuity. As I mentioned before, my Midland National annuity was earning 3% guaranteed. Also, the cap on my index with Midland was 5.25%. The cap with the Total Value Annuity is only 3.25%. This is not a good replacement from an annuity to annuity.
>
> Selling the Total Value Annuity to me was never suitable. This appears to be illegal and is definitely Elder Financial Abuse.
>
> It is my hope that this contract be terminated and my initial Purchase Payment of $29,492.30 be paid out immediately, with no penalties, because I was misled into purchasing this contract under false details regarding the Total Value Annuity.

56. Security Benefit responded to Mr. Doughman's letter on May 13, 2014, by notifying him that it would cancel the contract and refund the purchase price.

57. The Department's Administrative Complaint alleged that Ms. Dorrell violated numerous provisions governing insurance agents by having an unlicensed employee sell an unsuitable annuity to Mr. Doughman.

58. Mr. Doughman's letter describing how an unlicensed employee, Diana Johnson, sold him an annuity corroborated the affidavits of former employees of Senior Financial Security as to how Ms. Dorrell facilitated unlicensed activities. The aforementioned documents were a reasonable basis for

pursuing Count VI, and the substantial justification for pursuing Count VI is discussed further in paragraph 92 under the Conclusions of Law.

Count VII – Margaret Dial

59. Margaret Dial was born in 1950. Ms. Dial met Ms. Dorrell in July of 2007 and purchased multiple annuities from her. One of those annuities was an Old Mutual annuity that she purchased on November 11, 2007.

60. In 2013, Ms. Dorrell advised Ms. Dial to surrender the Old Mutual annuity and use the proceeds to purchase a Security Benefit annuity. After incurring $16,560.39 in surrender charges, Ms. Dial received $129,901.21 in the form of a check mailed to her home.

61. On March 12, 2013, Ms. Dial signed an application to purchase the Security Benefit annuity recommended by Ms. Dorrell for $130,000.00.

62. The application associated with the Security Benefit annuity was incorrect because it did not show that it was a replacement for the Old Mutual annuity.

63. Ms. Dial's surrender of the Old Mutual annuity and purchase of the Security Benefit annuity was problematic for multiple reasons. For instance, Ms. Dorrell sold the Old Mutual annuity to Ms. Dial and then encouraged her to surrender it and use the proceeds to acquire the Security Benefit annuity. In

effect, Ms. Dorrell earned two commissions on the same money. Also, the manner in which the Security Benefit annuity was purchased could have potentially prevented Old Mutual from engaging in conservation efforts. "Conservation" is the term used to describe an insurance company's effort to retain existing business.

64. Ms. Dial filed a complaint with Security Benefit in April of 2016 stating that "Jean Dorrell had me CLOSE the account to transfer my monies with a great LOSS to Security Benefit." Security Benefit responded with a June 8, 2016, letter offering to cancel the Security Benefit annuity and return Ms. Dial's purchase payment.

65. Security Benefit then issued the following letter to Ms. Dorrell on June 20, 2016:

> Security Benefit Life Insurance Company ("Security Benefit") recently received and addressed a complaint from Margaret Dial, to whom you presented a Secure Income Annuity for sale in 2013. As part of our investigation, Security Benefit directed that you provide a statement addressing the complaint, which you furnished through your attorney.
>
> In the course of investigating Ms. Dial's complaint, Security Benefit learned that despite the application and Annuity Suitability form for the Contract indicating otherwise, Ms. Dial's purchase of the Contract had in fact involved the replacement of an existing annuity contract she owned (said contract was issued by Fidelity & Guaranty Life Insurance Company).

> Your statement indicated that the transaction was not disclosed to Security Benefit as a replacement due to clerical error on the part of your office staff.
>
> As you should know, the proper handling of proposed annuity replacements is a continuing focus of insurance regulators, including the Florida Office of Insurance Regulation. As such, the failure to disclose that a replacement will occur is a very serious matter and one that Security Benefit does not take lightly whether due to clerical error or otherwise.
>
> By this letter, Security Benefit is notifying you that any further failure to disclose replacement activity will result in the termination of your appointment and the enforcement of any other remedies available to Security Benefit under the terms of your Producer Agreement. (emphasis added)

66. The Department's Administrative Complaint generally alleged that Ms. Dorrell violated several governing statutes by transmitting false information and displaying a lack of trustworthiness.

67. In addition to the fact that Ms. Dorrell had admitted to Security Benefit that she had failed to disclose the source of the funds that would be used to purchase the annuity, the Department knew that Ms. Wipperman had specifically named Ms. Dial as a client who had been misinformed about the amount of their surrender charges. That information provided a reasonable basis for pursuing Count VII against Ms. Dorrell. The substantial justification for pursuing Count VII is

discussed further in paragraphs 93 and 94 under the Conclusions of Law.

Count VIII – Unlicensed Activities

68. The Department alleged under Count VIII of the Administrative Complaint that Ms. Dorrell and/or her employees performed work without having the proper licensure. Specifically, the Department alleged that Ms. Dorrell's employees wrote Lady Bird deeds[3/] and wills without being licensed attorneys. The Department also alleged that Ms. Dorrell and/or her employees encouraged clients to liquidate security holdings without being licensed investment professionals.

69. The affidavits from Laura Wipperman, Diana Johnson, and Matthew Plunkitt provided a reasonable basis for the Department to pursue Count VIII. The substantial justification for pursuing Count VIII is discussed further in paragraphs 95 through 100 under the Conclusions of Law.

Count IX – Performance of Unlicensed Insurance Activities

70. The Department alleged in Count IX that Ms. Dorrell had Ms. Wipperman and Ms. Johnson perform acts that could only be performed by a licensed insurance agent. Those allegations were reasonably supported by the affidavits of Ms. Wipperman, Ms. Johnson, and Mr. Plunkitt. The substantial justification

for pursuing Count IX is discussed further in paragraph 101 under the Conclusions of Law.

Count X – Failure to Report Administrative Actions

71. The Department dismissed Count X, but alleged in the Administrative Complaint that Ms. Dorrell violated Florida Law by failing to report to the Department two administrative actions taken against her by the states of Nevada and Wisconsin. This allegation was supported by a March 14, 2008, letter from Ms. Dorrell to Reliance Standard Life Insurance Company. That letter provided a reasonable basis for pursuing Count X, and the substantial justification for pursuing Count X is discussed further in paragraphs 102 and 103 under the Conclusions of Law.

CONCLUSIONS OF LAW

72. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to sections 57.111(4), 120.569, and 120.57(1), Florida Statutes. The Administrative Law Judge has final order authority in this matter. § 57.111(4)(d), Fla. Stat.

73. The Florida Legislature has found that small business parties "may be deterred from . . . defending against, unreasonable governmental action because of the expense of . . . administrative proceedings. Because of the greater resources of the state, the standard for an award of attorney's fees and costs against the state should be different from the standard

for an award against a private litigant." § 57.111(2), Fla. Stat.

74. Accordingly, the Florida Legislature enacted section 57.111 to "diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in certain situations an award of attorney's fees and costs against the state." § 57.111(2), Fla. Stat.

75. Section 57.111 directs that unless otherwise provided by law, a reasonable sum for "attorney's fees and costs" shall be awarded to a private litigant when all five of the following predicate findings are made:

> 1. An adversarial proceeding was "initiated by a state agency."
>
> 2. The private litigant against whom such proceeding was brought was a "small business party."
>
> 3. The small business party "prevail[ed]" in a proceeding initiated by a state agency.
>
> 5. The agency's actions were not substantially justified.
>
> 4. No special circumstances exist that would make an award of fees unjust.

76. In the instant case, the only issues to be resolved are the following: (a) was the Department's decision to prosecute substantially justified and (b) do any special circumstances exist that would make an award of attorney's fees and costs unjust. Each of those issues will be separately

addressed below. Section 57.111(4)(a) provides that a party seeking an award of fees and costs is not entitled to an award if the agency can demonstrate that its actions were "substantially justified."

Description of the Substantial Justification Standard

77. In order to be "substantially justified," the agency's action must have "had a reasonable basis in law and fact at the time it was initiated by a state agency." § 57.111(3)(e), Fla. Stat.

78. The agency has the burden of proving by a preponderance of the evidence that its actions were "substantially justified." See Dep't of HRS v. South Beach Pharmacy, 635 So. 2d 117, 121 (Fla. 1st DCA 1994)(noting that "once a prevailing small business party proves that it qualifies as such under section 57.111, the agency that initiated the main or underlying proceeding has the burden to show substantial justification or special circumstances."); § 120.57(1)(j), Fla. Stat. (providing that "[f]indings of fact shall be based upon a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute, and shall be based exclusively on the evidence of record and on matters officially recognized.").

79. The First District Court of Appeal has described the "substantial justification" standard as follows:

> An action is "substantially justified" if the state agency had a "reasonable basis in law and fact" to initiate it. § 57.111(3)(e), Fla. Stat. (2010). This Court has found an agency cannot satisfy the "substantial justification" standard simply by showing an action was "not frivolous." This is because "while governmental action may not be so unfounded as to be frivolous, it may nonetheless be based on such an unsteady foundation factually and legally as not to be substantially justified." Dep't of Health & Rehab. Servs. v. S.G., 613 So. 2d 1380, 1386 (Fla. 1st DCA 1993). On the other hand, the standard is not so strict as to require the agency to demonstrate that its action was correct. Id., quoting McDonald v. Schweiker, 726 F.2d 311, 316 (7th Cr. 1983)(stating the government need not have a "necessarily correct basis [] for the position that it took"). The "substantial justification" standard lies between these two extremes. The closest approximation is that if a state agency can present an argument for its action "'that could satisfy a reasonable person[,]'" then that action should be considered "substantially justified." Helmy, 797 So. 2d at 368, quoting Pierce v. Underwood, 487 U.S. 552, 565, 108 S. Ct. 2541, 101 L. Ed. 2d 490 (1998).

Ag. for Health Care Admin. v. MVP Health, Inc., 74 So. 3d 1141, 1143, 1144 (Fla. 1st DCA 2011); see also Helmy v. Dep't of Bus. & Prof'l Reg., 707 So. 2d 366, 368 (Fla. 1st DCA 1998)(noting that "in terms of Florida law, the 'substantially justified' standard falls somewhere between the no justiciable issue standard of section 57.105, Florida Statutes (1991), and an automatic award of fees to a prevailing party."); Fish v. Dep't of Health, Bd. of Dentistry, 825 So. 2d 421, 423 (Fla. 4th DCA

2002)(noting that "[t]o sustain a probable cause determination there must be some evidence considered by the panel that would reasonably indicate that the violation had indeed occurred. See Kibler, 418 So. 2d at 1084. The evidence, however, need not be as compelling as that which must be presented at the formal administrative hearing on the charges to support a finding of guilt and the imposition of sanctions.").

80. In evaluating whether an agency's prosecution was substantially justified, the inquiry is limited to whether the agency had "a reasonable basis in law and fact at the time it was initiated by a state agency." § 57.111(3)(e), Fla. Stat. "The reviewing body – whether DOAH or a court – may not consider any new evidence which arose at a fees hearing, but must focus exclusively upon the information available to the agency at the time that it acted." MVP Health, Inc., 74 So. 3d at 1144. "Substantial justification must exist at the time the agency initiates the action as subsequent discoveries do not vitiate the reasonableness of the actions of the agency at the time they made their probable cause determinations." McCloskey v. Dep't of Fin. Servs., 172 So. 3d 973, 976 (Fla. 5th DCA 2015).

Count I – Frederic Gilpin

81. Petitioner argues that the Department should have retained an expert to evaluate the suitability of the annuity Ms. Dorrell sold to Mr. Gilpin prior to issuing the Administrative Complaint. By doing so, Petitioner advocates for a requirement that the Florida Legislature has not chosen to impose on the Department.

82. Despite the lack of a retained expert, the facts suggest that people experienced with annuities evaluated the facts before them and concluded that a charge was justified. As discussed above, Ms. Alexander and Ms. Williams were licensed to sell annuities prior to their employment with the Department. Because Ms. Alexander elected not to exercise her discretion and close the Department's case file upon the completion of Ms. Williams's investigation, it is reasonable to infer that she concluded Ms. Dorrell should be prosecuted based on her dealings with Mr. Gilpin.

83. Petitioner also argues that information on a Prudential statement covering the period from January 1, 2012, through March 31, 2012, should have alerted the Department that there was a need to verify, via Mr. Gilpin's income tax returns or direct communication with Prudential, that Mr. Gilpin had not destroyed his guaranteed income by taking an excess withdrawal.

84. The Prudential statements were enough to lead a reasonable person to conclude that Mr. Gilpin had not destroyed his guaranteed income by taking an excess withdrawal. Florida law did not require the Department to verify the Prudential information via another source prior to issuing the Administrative Complaint. Rather, it is only necessary that there is evidence considered in the development of the Administrative Complaint that would reasonably support the alleged violation. Fish, 825 So. 2d at 423 (2002).

Counts II and III – Elizabeth Barbuto and Maria Erb

85. Petitioner's defense to Counts II and III is set forth in the following paragraphs from its Proposed Final Order:

> 33. Neither Barbuto nor Erb testified. Alexander did not know when they notified the Department that they would not appear nor the reason for their non-appearance.
>
> 34. There was no apparent investigation or evidence whether the decedent's annuities were transferable upon her death to Barbuto or Erb. The affidavits alone, without any evidence as to the suitability of the transaction, in addition to the failure of the parties to have their experts review the transaction due to the Department's dismissal of these counts, are not sufficient to prove that these counts were substantially justified.

86. This criticism overlooks that Counts II and III of the Department's Administrative Complaint alleged, in part, that Ms. Dorrell violated the Florida Insurance Code and the

Florida Administrative Code by: (a) directing an unlicensed person, Diana Johnson, to sell annuities to Ms. Barbuto and Ms. Erb and (b) failing to perform any insurance agent services for Ms. Barbuto's transactions. In light of the fact that Ms. Barbuto and Ms. Erb's affidavits corroborated Ms. Johnson's assertions regarding unlicensed activity and the targeting of those receiving death benefits, the Department had substantial justification for pursuing Counts II and III.

Count IV – Deborah Gartner's Annuities

87. Petitioner argues in its Proposed Final Order that the Department's decision to proceed with Count IV was not substantially justified because Ms. Gartner was supposedly not a credible witness:

> 36. Williams interviewed Gartner who signed a typed affidavit on October 7, 2014. In her affidavit [], she averred with respect to her house in Summerfield, Florida that "I was still making my payments and was not having money issues." Alexander testified that the Department relied on Gartner's statement that "I was current on the payments." . . . However, as Mr. Sanchez testified regarding investigative techniques, if the Department had made an online search of forfeiture actions in Marion County, Florida it would have discovered that a foreclosure action had been filed against Gartner on April 16, 2013 and was still pending on October 7, 2014. That information alone should or would have caused the Department to question Gartner's credibility and memory, especially as to events 6 and 9 years in the past.

Petitioner also argues that the Department should have been aware of pending circuit court litigation between Ms. Gartner and Ms. Dorrell and implies such knowledge would have also caused the Department to question Ms. Gartner's credibility.

88. These arguments are not persuasive. Moreover, doubts about a witness's credibility do not necessarily undermine a decision to prosecute. See generally Temp Tech Indus., Inc. v. NLRB, 756 F.2d 586 (7th Cir 1985)(noting that a decision to litigate an issue that turned on a credibility assessment was not itself unreasonable.).

89. As for the Department's allegation that Ms. Dorrell induced Ms. Gartner to purchase unsuitable annuities, Petitioner asserts that the Department failed to account for the fact that as of March 11, 2014, Ms. Gartner continued to own all of the annuities at issue. However, given the testimony during the final hearing from the underlying proceeding regarding the significant surrender charges associated with annuities, it is not surprising that Ms. Gartner would still own annuities that may not have been suitable for her.

Count V – Deborah Gartner's Real Estate Transactions

90. Petitioner argues that the Department was not substantially justified in bringing Count V because Ms. Gartner lived rent-free in the villa for a year before it was transferred to her and this supposedly undermines any allegation

that Ms. Dorrell was attempting to take advantage of Ms. Gartner. Petitioner also points out that Ms. Gartner supposedly admitted in her affidavit that she owes Ms. Dorrell $229,000.00.

91. The greater weight of the evidence demonstrates that the Department had substantial justification for pursuing Count V. The unusual dealings described in Ms. Gartner's affidavit and the "Seniors vs. Crime" report (especially the encouragement for Ms. Gartner to go into default on the mortgage) were more than sufficient to cause the Department to question Ms. Dorrell's trustworthiness.

Count VI – Earl Doughman

92. Petitioner uses its Proposed Final Order to point out evidence contrary to the Department's. However, the existence of contrary evidence does not equate to no substantial justification. See generally Fish, 825 So. 2d at 423 (noting that "[t]he evidence, however, need not be as compelling as that which must be presented at the formal administrative hearing on the charges to support a finding of guilt and the imposition of sanctions."). The greater weight of the evidence demonstrates that the Department was substantially justified in pursuing Count VI.

Count VII – Margaret Dial

93. Petitioner argues in its Proposed Final Order that "[i]n a situation where a licensee has acknowledged an error to the Department, but the Department does not pursue inquiry of the licensee, the Department cannot be substantially justified in filing an administrative complaint accusing the licensee of such misconduct." In making this argument, Petitioner attempts to add a requirement to pursuing charges that is not currently in Florida Law.

94. While Ms. Dorrell stated that the false statement on the annuity application was a mistake or clerical error, the circumstances of the Security Benefit purchase and the affidavits from Ms. Dorrell's former employees provided the Department with substantial justification for pursuing Count VII.

Count VIII – Unlicensed Activities

95. Petitioner argues, in part, that the Department had no substantial justification for pursuing Count VIII by asserting that:

> Wipperman's affidavit is suspicious in its wording compared to the wording of Williams' questions and notes. Whether these were Wipperman's words, or the words of other affiants, is questionable in view of Alexander's testimony that affidavits are a combination of consumers telling the Department what happened and then the Department asking questions. Afterward,

> Williams types up an affidavit for review and signature. Affidavits are also questionable because the Department never takes recorded statements.

96. This argument is unpersuasive. While an affidavit is not word-for-word testimony, the Department had no reason to doubt that the sworn affidavits of Ms. Wipperman, Ms. Johnson, and Mr. Plunkitt were not accurate recitations of what they reported.

97. Petitioner also argues that if the Department had investigated the backgrounds of the affiants, then it would have discovered that they were biased against Ms. Dorrell. For example, Petitioner argues that the Department could have learned that Ms. Dorrell fired Ms. Wipperman and Ms. Johnson, and that the Department should have then inquired of Ms. Dorrell about the circumstances associated with those firings. Petitioner also argues that the Department should have discovered that Ms. Johnson had been unsuccessful in an unemployment compensation claim against Ms. Dorrell.

98. Petitioner's arguments pertain to the credibility of the three affiants. Even if the Department had been aware of the biases noted above, it could have reasonably pursued Count VIII. See generally Natchez Coca-Cola Bottling Co. v. NLRB, 750 F.2d 1350 (5th Cir. 1985)(noting that any lack of

credibility of witness testimony was not so clear that no reasonable general counsel would have prosecuted the claim).

99. In addition to the affidavits, the Department received from Ms. Wipperman countless e-mails authored by Ms. Dorrell. Taken together, the affidavits and the e-mails demonstrate that Ms. Dorrell is hard on her employees. Therefore, any biases against Ms. Dorrell by Ms. Wipperman, Ms. Johnson, and Mr. Plunkitt would not have been a surprise.

100. Petitioner also takes the Department to task for not obtaining any Lady Bird deeds indicating that they were not prepared by an attorney and for not contacting any person for whom a will was allegedly prepared by Ms. Dorrell's employees. These arguments are unpersuasive, and the greater weight of the evidence demonstrates that the Department had substantial justification for pursuing Count VIII.

Count IX – Performance of Unlicensed Insurance Activities

101. Petitioner raises the same argument in response to Count IX as it did to Count VIII. As noted above, these arguments are unpersuasive, and the greater weight of the evidence demonstrates that the Department had substantial justification for pursuing Count IX.

Count X – Failure to Report Administrative Actions

102. Petitioner's argument in relation to Count X is limited to the following from its Proposed Final Order:

> 59. The Department presented minimal evidence with respect to this count. Petitioner's main argument against this count is its timeliness or lack thereof. The allegations go back to 2004, 13 years prior to filing the administrative complaint. At the hearing, Alexander was questioned regarding Department's Exhibit R 55, Dorrell's application for appointment by Reliance Standard. It appears from the exhibit that Dorrell acknowledged that she had been fined or had other administrative action imposed on her by a licensing authority.
>
> 60. Alexander further testified that a licensee would notify the Department of administrative action, and the Department would keep communication logs. (TR131/19). However, she did not personally at any time in this case review the communication logs, and they were not offered into evidence. (TR132/1). There can be no finding that the Department was substantially justified in filing Count X.

103. Petitioner's argument neglects to mention that, regardless of the reasoning behind the Department's decision to dismiss Count X subsequent to the filing of the Administrative Complaint, Ms. Williams confirmed that the administrative actions at issue were not reported to the Department. Thus, Petitioner's argument does not dissuade the undersigned from concluding that the greater weight of the evidence demonstrates that the Department had substantial justification for pursuing Count X.

Do Special Circumstances Make an Award of Fees Unjust?

104. In addition to demonstrating that its actions were "substantially justified," a state agency can avoid paying fees and costs under section 57.111 if it can demonstrate that there are special circumstances that would make an award of fees and costs unjust. See § 57.111(4)(a), Fla. Stat.

105. Section 57.111 does not define the term "special circumstances." However, "the use of the word 'special' connotes something unusual or unique." Brown v. Bd. of Psychological Exam'r, Case No. 92-6307F, 1993 Fla. Div. Admin. Hear. LEXIS 5362 (Fla. DOAH Aug. 24, 1993)(concluding that "none of these circumstances rises to a level of being so special or unique as to excuse respondent's actions.").

106. As noted above, the FEAJA is modeled after the Federal Equal Access to Justice Act, and federal case law provides some guidance regarding the proper interpretation of "special circumstances" in the state statute. For instance, federal case law states that "[t]he EAJA's 'special circumstances' exception is a 'safety valve' that gives 'the court discretion to deny awards where equitable considerations dictate an award should not be made.'" Vincent v. Comm'r of Soc. Sec., 651 F.3d 299, 303 (2d Cir. 2011). However, what amounts to a "safety valve" is indistinct because federal case law also states that "if the 'special circumstances' exception is to function as an equitable

'safety valve,' its contours can emerge only on a case-by-case basis." Vincent, 651 F.3d at 303.

107. The Department made no argument in its Proposed Final Order that special circumstances exist that would make an award to Petitioner unjust. Given that its decision to issue the Administrative Complaint was substantially justified, the failure to argue special circumstances is of no consequence.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Senior Financial Security, Inc.'s "Verified Application for Award of Attorney's Fees and Costs" is DENIED.

DONE AND ORDERED this 20th day of November, 2019, in Tallahassee, Leon County, Florida.

Garnett Chisenhall

G. W. CHISENHALL
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of November, 2019.

ENDNOTES

[1/] At the outset of the final hearing, the attorney for Jean-Ann Dorrell and Senior Financial Security stated that "the testimony will be that Senior Financial Security is the only qualified Petitioner in this case and is also the party that actually paid the fees and costs." The Pre-hearing Stipulation identifies Petitioner as "a corporation with not more than 25 full-time employees and a net worth of not more than $2,000,000.00." In addition, Respondent stipulated that Petitioner was the prevailing party in the underlying proceeding and a small business party within the meaning of section 57.111(3), Florida Statutes. Therefore, the term "Petitioner" in this Final Order refers to Senior Financial Security, Inc.

[2/] Section 57.111, the statute pursuant to which Petitioner is seeking attorneys' fees and costs, has not been amended since 2011. Accordingly, all statutory references will be to the 2019 version of the Florida Statutes.

[3]/ A Lady Bird deed enables a person to designate a child or some other beneficiary as the person who will take possession of the designator's property after death.

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(eServed)

NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.