STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PROJECT MEDICARE, INC.,

Petitioner,

vs. Case No. 20-3993

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

Respondent.
_____/

RECOMMENDED ORDER

This case was heard on November 3, 2020, by Zoom Conference before E. Gary Early, an Administrative Law Judge assigned by the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner: Dwight Oneal Slater, Esquire
Cohn Slater, P.A.
3689 Coolidge Court, Unit 3
Tallahassee, Florida 32311

For Respondent: Danijela Janjic, Esquire
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399

STATEMENT OF THE ISSUE

Whether Petitioner demonstrated entitlement to a nonresident agency license under the name Project Medicare, Inc.

PRELIMINARY STATEMENT

On April 20, 2020, Respondent, Department of Financial Services, Division of Insurance Agent and Agency Services, Bureau of Licensing (Department), entered a Notice of Agency Denial informing Petitioner, Project Medicare, Inc. (Project Medicare or Petitioner), that the name of the agency contains one or more words that may mislead the public regarding the purpose of the agency, and denying the application for a nonresident agency license on the grounds set forth in sections 626.602 and 626.6115(1), Florida Statutes.

On May 15, 2020, Respondent filed its Petition for Formal Administrative Hearing by which it requested a formal hearing.

On September 3, 2020, this case was referred to DOAH for a formal administrative hearing. The final hearing was noticed for November 3, 2020.

On October 30, 2020, the parties filed their Joint Prehearing Stipulation ("JPS"). The JPS contained 11 stipulations of fact, each of which are adopted and incorporated herein. The JPS also identified disputed issues of fact and law remaining for disposition. The final hearing was, thereafter, held as scheduled.

At the final hearing, official recognition was taken of all statutes, rules, judicial opinions, and agency final orders. Petitioner offered the testimony of Michael Krantz, its owner. Petitioner's Exhibit 1 was received in evidence. Respondent offered the testimony of Gregory Thomas, Director of the Division of Insurance Agent and Agency Services and the Division of Consumer Services; and Matthew Tamplin, Assistant Director of the Division of Insurance Agent and Agency Services. Respondent's Exhibits 1 through 11 were received in evidence.

A one-volume Transcript of the proceedings was filed on November 30, 2020. On December 8, 2020, the parties filed a Joint Motion for Extension of Time to File Proposed Recommended Orders, by which they requested that the time for filing post-hearing submittals be extended to December 21, 2020. The motion was granted. Both parties thereafter timely filed Proposed Recommended Orders, which have been duly considered by the undersigned in the preparation of this Recommended Order.

Petitioner's application for licensure is governed by the law in effect at the time the final licensure decision is made. *See Lavernia v. Dep't of Prof'l Reg.*, 616 So. 2d 53, 54 (Fla. 1st DCA 1993). Therefore, all statutory references shall be to Florida Statutes (2020), unless otherwise indicated.

FINDINGS OF FACT

Stipulated Facts

1. On or about January 8, 2020, Petitioner submitted an Application to the Department for a nonresident agency license.

2. On the Application, Mr. Krantz listed the agency's name as Project Medicare, Inc.

3. On or about January 13, 2020, the Department issued an official notification informing Petitioner that the name of the agency contains one or more words that may mislead the public regarding the purpose of the agency and requiring that the agency name be changed in accordance with the Florida Insurance Code.

4. Petitioner failed to comply with the request and change the name of the agency.

5. Based on Petitioner's failure to change its name in accordance with the Florida Insurance Code, the Department denied Petitioner's Application.

6. The Notice of Agency Denial cites sections 626.602 and 626.6115 as legal grounds for the denial of Petitioner's nonresident agency license.

7. Section 626.602 sets forth the statutory criteria at issue in these proceedings. The parties agree that the subparagraph (1) of that section is either not applicable or not at issue to consideration of the application.

8. Under section 626.602(2), the Department may disapprove the use of any true or fictitious name, other than the bona fide natural name of an individual, by any insurance agency if the use of the name may mislead the public in any respect.

9. Under section 626.602(3), the Department may disapprove the use of any true or fictitious name, other than the bona fide natural name of an individual, by any insurance agency if "the name states or implies that the agency is an insurer, motor club, hospital service plan, state or federal agency, charitable organization, or entity that primarily provides advice and counsel rather than sells or solicits insurance, or is entitled to engage in insurance activities not permitted under licenses held or applied for. ..."

10. Petitioner requested a hearing pursuant to section 120.57(1), Florida Statutes, challenging the Department's denial.

11. There are currently 89 agencies licensed in the state of Florida with the word "Medicare" in their name.

Facts Adduced at Hearing

12. Michael Krantz is a licensed insurance agent, and owns the Project Medicare agency. Project Medicare offers advice on Medicare plans and policies, and is licensed under that name in New York, New Jersey, Connecticut, and Pennsylvania. Petitioner testified to a financial commitment and an established website under the Project Medicare name.

13. Prior to 2006, insurance agencies were not required to be separately licensed in Florida, though the agents were.

14. In 2005, the Florida Insurance Code was amended to require that insurance agencies be separately licensed, with applications for licensure required no later than October 1, 2006. Ch. 2005-257, §§ 7 and 9, Laws of Fla. The 2005 legislation also created section 626.602, and the restriction against

licensing agencies with names that "mislead the public in any respect," or imply that "the agency is [a] state or federal agency." Ch. 2005-257, § 21, Laws of Fla.

15. Mr. Thomas testified that when the licensing requirement became effective in 2006, "all of the agencies that existed were pretty much grandfathered and brought in as is. So whatever name they had is what they became. There were too many of them for the Department to vet them based on staffing, so they just massed licensed a bunch of them." Some of the 89 Florida insurance agencies that currently have the term Medicare in their name were part of that initial group of agency licenses.

16. Neither Chapter 2005-257, Laws of Florida, nor chapter 626, contain authorization for grandfathering otherwise non-compliant agency names.

17. The Department has not adopted rules to govern its decision-making process regarding insurance agency names.

18. After 2006, and continuing for a period of 13 years, the Department approved licenses for insurance agencies using the word Medicare in their names. The last license for an insurance agency with Medicare as part of its name was issued on September 16, 2019.

19. With regard to the decision to deny Petitioner's license, Mr. Thomas testified that the Department "refined" its position. He further testified that "the name [Project Medicare] clearly to me could be misleading to a senior consumer."

20. The Department claimed to have reached its decision to deny Petitioner's Application because customers were misled by the use of Medicare in the name of the agency. There was no competent, substantial evidence introduced that any customer has been misled by any of the 89 insurance agencies that currently have Medicare in their names.

21. Despite hearsay testimony that the Department had received complaints from consumers, the Department produced no copies of any such complaints, and did not quantify the number of complaints. The Department

could not state whether the alleged complaints were the result of the name of the agency or of advertising by the agency. Though the Department offered no evidence of the alleged complaints, the following was elicited during Mr. Thomas's testimony: "Q. Now is it possible that any of those complaints, the confusion was the result of something done by the agency, not necessarily by the name? A. Sure." (Tr. 32:9-12).

22. Mr. Thomas testified that use of the term Medicare in Petitioner's name "could lead a consumer to the opinion" that the insurance agency is affiliated with a state or federal agency. However, the Department introduced no evidence of any consumer having drawn the opinion that having the word Medicare in a name implies that the insurance agency is affiliated with a state or federal agency, despite 13 years of the Department having approved such names.

23. Among the 89 approved "Medicare" insurance agencies are: Florida Medicare Advisors, Inc.; Medicare Advantage Plan Services, LLC; Medicare Benefits Plus, LLC; Medicare Health Benefits, Inc.; Medicare Insurance Plans; Medicare Insurance Services, LLC; Medicare Plus, Inc.; Medicare Solutions, LLC; Plan Medicare, LLC; Senior Saving Strategies, LLC, d/b/a Medicare Review Agency; USA Medicare Advisors Insurance Agency; and YourMedicare.com, LLC. These companies serve as examples of the agencies that the Department licensed as being compliant with the Florida Insurance Code prior to the "refinement" of its non-rule decision-making policy. There was no evidence that any of these "Medicare" companies, or any of the other companies among the 89 approved "Medicare" insurance agencies, were the subject of any complaint of a consumer having been misled by the name of the agency, or any complaint of a consumer having been led to believe, by implication, that the agency was a state or federal agency.

24. Between October 14, 2019, and October 15, 2020, 45 prospective agencies with Medicare as part of the agency name have applied for

licensure. The Department asserted that since none of them had received licenses, its new "no Medicare" policy was firmly established.

25. Insurance agency license applications must include fingerprints and background checks of any number of persons involved in the ownership, management, and control of the agency, and "[s]uch additional information as the department requires by rule to ascertain the trustworthiness and competence of persons required to be listed on the application and to ascertain that such persons meet the requirements of this code." § 626.172(2)(a), (f), and (g), Fla. Stat. The Department also checks for prior administrative actions.

26. Of the 45 applications filed between October 14, 2019, and October 15, 2020 (the 45 applications), 18 have an application status of "application only - application - in process - deficient." No evidence was provided as to the nature of any such deficiencies, or whether the deficiency related to the proposed use of the term Medicare in the agency name.

27. Of the 45 applications, 17 have an application status of "application only - application - closed - deficient." No evidence was provided as to the nature of any such deficiencies, or whether the deficiency related to the proposed use of the term Medicare in the agency name.

28. Of the 45 applications, 8 have an application status of "application only - application - closed - withdrawn." No evidence was provided as to the reason for any application withdrawal, or whether the reason related to the proposed use of the term Medicare in the agency name.

29. Open applications currently subject to unidentified deficiencies; applications closed for unidentified deficiencies; and applications withdrawn for unidentified reasons, which account for 43 of the 45 applications, none of which have been subject to proposed agency action on those applications, provide no evidence that the proposed use of Medicare in their names was misleading to consumers, or even that the proposed use of Medicare in their names was the basis of any deficiency notice or withdrawal. Since the

Department took no agency action on them, the 43 applications do not amount to evidence of any "refinement" of a Medicare non-rule application policy.

30. The remaining two applications among the 45 applications were denied by the Department. One, Medicare Insurance Consultants of Texas[1], chose not to challenge, and neither the basis for the denial nor the reason for declining to challenge the denial were disclosed. The other is that of Petitioner in this case.

31. Department witnesses indicated that, even though the Department had purportedly come to the conclusion that the use of the term Medicare in an agency license is misleading to consumers, the Department could not, or would not, take any action to require the removal of Medicare from the agency names. Rather, Mr. Thomas indicated that "our attorneys" advised against the Department taking action to protect the citizens of the state of Florida from the allegedly misleading effects of the term Medicare.

32. The Department based its denial of the application at issue in part on section 626.6115, entitled "Grounds for compulsory refusal, suspension, *or revocation* of insurance agency license," (emphasis added) which directs that the Department "*shall* deny, suspend, revoke, or refuse to continue" the license of any insurance agency that does not meet the qualifications for the license specified in the Florida Insurance Code (emphasis added). Section 626.602, also cited as a basis for the denial of the application at issue, provides that the Department "may disapprove the use of any true or fictitious name, by any insurance agency [if] (2) The use of the name may mislead the public in any respect [, or] (3) The name states or implies that the agency is [a] state or federal agency."

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[1] It is not inconsequential that the Department has licensed an agency with the *same* name, Medicare Insurance Consultants, LLC (though not "of Texas"), in addition to similarly named agencies including Medicare Insurance Advisors; Medicare Insurance Associates, LLC; Medicare Insurance Plans; Medicare Insurance Services, LLC; and Medicare Insurance Solutions, Inc., all seemingly without concern that those very similar names might be misleading or causing confusion among consumers.

33. If, in fact, the Department has evidence that using Medicare in the names of insurance agencies is misleading, and the Department has determined that consumers are being misled, there is no legitimate reason for the Department's attorneys to recommend against the enforcement of a mandatory statutory directive. That, along with 13 years of licensing "Medicare" insurance agencies, and lack of evidence that any member of the public has been misled by any of the 89 existing "Medicare" insurance agencies, compels a conclusion that the name Medicare in an agency name is not a valid basis for denial of the application in this case.

34. Mr. Thomas also testified to a 2020 legislative proposal (2020 Senate Bill 1492, 2020 House Bill 1137) that would have prohibited the use of the term "Medicare" in an insurance agency's name. That bill failed, and has no persuasive effect on the issues in this case.

CONCLUSIONS OF LAW

A. Jurisdiction.

35. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto. §§ 120.569 and 120.57(1), Fla. Stat.

36. The Department is the state agency responsible for licensure of insurance agents and agencies in the state of Florida. § 626.112, Fla. Stat.

B. Burden of Proof

37. As the party seeking issuance of a nonresident agency license, Petitioner has the burden of proving by a preponderance of the evidence that it satisfies the applicable standards and requirements. *Dep't of Banking & Fin. v. Osborne Stern & Co.*, 670 So. 2d 932 (Fla. 1996).

38. Petitioner's ultimate burden notwithstanding, Respondent has the burden of presenting evidence of any statutory or regulatory violations that warrant denial of the application. *Osborne Stern & Co.*, 670 So. 2d at 934; *Comp. Med. Access, Inc. v. Off. of Ins. Reg.*, 983 So. 2d 45 (Fla. 1st DCA 2008).

C. Analysis

39. The criteria for a nonresident agency license that are applicable in this proceeding are established in sections 626.602 and 626.6115. Except for the name of the agency, there has been no allegation that Petitioner does not meet other basic requirements for licensure.

40. Section 626.602, entitled "Insurance agency names; disapproval," provides, in pertinent part, that:

> The department may disapprove the use of any true or fictitious name, other than the bona fide natural name of an individual, by any insurance agency on any of the following grounds:
>
> * * *
>
> (2) The use of the name may mislead the public in any respect.
>
> (3) The name states or implies that the agency is an insurer, motor club, hospital service plan, state or federal agency, charitable organization, or entity that primarily provides advice and counsel rather than sells or solicits insurance, or is entitled to engage in insurance activities not permitted under licenses held or applied for. This provision does not prohibit the use of the word "state" or "states" in the name of the agency. The use of the word "state" or "states" in the name of an agency does not in and of itself imply that the agency is a state agency.

41. Section 626.6115, entitled "Grounds for compulsory refusal, suspension, or revocation of insurance agency license," provides, in pertinent part, that:

> The department shall deny, suspend, revoke, or refuse to continue the license of any insurance agency if it finds, as to any insurance agency or as to any majority owner, partner, manager, director, officer, or other person who manages or controls such agency, that any of the following applicable grounds exist:

> (1) Lack by the agency of one or more of the qualifications for the license as specified in this code.

42. Section 120.57(1)(e) provides, in pertinent part, that:

> (e)1. An agency or an administrative law judge may not base agency action that determines the substantial interests of a party on an unadopted rule or a rule that is an invalid exercise of delegated legislative authority. This subparagraph does not preclude application of valid adopted rules and applicable provisions of law to the facts.
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> * * *
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> 4. The recommended and final orders in any proceeding shall be governed by paragraphs (k) and (l), except that the administrative law judge's determination regarding an unadopted rule under subparagraph 1. or subparagraph 2. shall not be rejected by the agency unless the agency first determines from a review of the complete record, and states with particularity in the order, that such determination is clearly erroneous or does not comply with essential requirements of law.

43. The evidence established that the Department licensed agencies with the word Medicare in their names for at least 13 years. It then changed its position, citing concerns with consumer protection, though no competent substantial evidence was offered to substantiate specific instances of such.

44. The Department's newly created and implemented policy to deny all insurance agency applications if the proposed name includes the term "Medicare" is, according to Mr. Thomas and Mr. Tamplin, to be applied uniformly after September 16, 2019, to all applications, without deviation.

45. The Department's newly created policy of determining that the term "Medicare," without more, "may mislead the public in any respect," has been

applied without any competent, substantial evidence to establish that any person was, in fact, misled by its use.

46. The Department's newly created policy of determining that the term "Medicare," without more, implies that the insurance agency is a state or federal agency, has been applied without any competent, substantial evidence to substantiate that implication.

47. The Department's newly created policy, which the Department intends to apply uniformly across-the-board, replaces a decision-making process that had been applied no fewer than 89 times over a period of 13 years to allow the use of the term Medicare in insurance agencies names. This new policy is a statement of general applicability designed to prohibit that which was previously allowed, without a factual basis for doing so.

48. An "unadopted rule" is "an agency statement that meets the definition of the term 'rule,' but that has not been adopted pursuant to the requirements of s. 120.54." § 120.52(20), Fla. Stat. The term "rule" means,

> each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule. The term also includes the amendment or repeal of a rule.

§ 120.52(16), Fla. Stat.

49. To be a rule,

> a statement of general applicability must operate in the manner of a law. Thus, if the statement's effect is to create stability and predictability within its field of operation; if it treats all those with like cases equally; if it requires affected persons to conform their behavior to a common standard; or if it creates or extinguishes rights, privileges, or entitlements, then the statement is a rule.

Fla. Quarter Horse Racing Ass'n, Inc. v. Dep't of Bus. & Prof'l Reg., Case No. 11-5796RU (Fla. DOAH May 6, 2013), *aff'd, Fla. Quarter Horse Track Ass'n v. Dep't of Bus. & Prof'l Reg.*, 133 So. 3d 1118 (Fla. 1st DCA 2014).

50. As established by the First District Court of Appeal:

> ... if an agency changes a non-rule-based policy, it must either explain its reasons for its discretionary action based upon expert testimony, documentary opinions, or other appropriate evidence, *Health Care and Retirement Corp. of America, Inc. v. Department of Health and Rehabilitative Services*, 559 So. 2d 665, 667–68 (Fla. 1st DCA 1990), or it must implement its changed policy or interpretation by formal rule making. [*Cleveland Clinic Florida Hospital v. Agency for Health Care Administration*, 679 So. 2d 1237, 1242 (Fla. 1st DCA 1996)].
>
> We believe that our holdings in *Cleveland Clinic* and [*Brookwood–Walton County Convalescent Center v. Agency for Health Care Administration*, 845 So. 2d 223, 229 (Fla. 1st DCA 2003)], are consistent with the legislature's limitation on agency flexibility and discretion and enhancement of agency accountability and regulatory certainty underlying the 1996 amendments to chapter 120. § 120.54(1)(a), Fla. Stat. (2005)(requiring rule making whenever it is "feasible and practical"); *see Dep't of Highway Safety & Motor Vehicles v. Schluter*, 705 So. 2d 81, 86 (Fla. 1st DCA 1998); see generally W. Hopping, L. Sellers & K. Wetherall, *Rule Making Reforms and Non–Rule Policies: A Catch 22 for State Agencies?*, 71 Fla. Bar. J. 20, 24–26 (1997). In short, under chapter 120 "an agency cannot change its standards at the personal whim of a bureaucrat." James P. Rhea & Patrick L. Imhof, *An Overview of the 1996 Administrative Procedure Act*, 48 U. Fla. L.Rev. 1, 4 (1996).
>
> As appellant argues, there is nothing in the record here which indicates that either the Medicaid law or regulations have changed with regard to the definition of companion care. ... It is clear that AHCA's decision in 2005 to deny the appellant's

> benefits, when it had approved those same benefits since 2002, was simply a change in its established policy. Further, it is undisputed in this record that this policy change was made without rule-making or explication in the record. *See Cleveland Clinic*, 679 So. 2d at 1241–42 (absent a "good reason why the agency's abrupt change of established policy, practice and procedure should be sanctioned," the agency must implement changed interpretations through rule-making) (citation omitted); *Exclusive Inv. Mgm't & Consultants, Inc. v. Agency for Health Care Admin.*, 699 So. 2d 311 (Fla. 1st DCA 1997)(refusing to uphold AHCA's requirement that Medicaid providers contract with the Alcohol, Drug Abuse and Mental Health (ADM) program because, among other grounds, such construction was an unpromulgated change from AHCA's prior policy). AHCA's failure to explicate its unpromulgated policy at the hearing is even more egregious when AHCA changes the application of its policy in a particular case. *Brookwood–Walton County*, 845 So. 2d at 229.

Courts v. Ag. for Health Care Admin., 965 So. 2d 154, 159-60 (Fla. 1st DCA 2007).

51. This case is remarkably similar to the scenario presented in *Courts*. To paraphrase *Courts*, there is nothing in the record here which indicates that either the Florida Insurance Code or regulations have changed with regard to insurance agency names. ... It is clear that the Department's decision in 2020 to deny Petitioner's choice of a name, when it had approved similar names since 2006, was simply a change in its established policy. Further, it is undisputed in this record that this policy change was made without rulemaking or explication in the record.

52. As such, the policy is an agency statement of general applicability that implements, interprets, or prescribes law or policy that has not been adopted by rule. It meets the definition of an unadopted rule and, pursuant to section 120.57(1)(e), cannot be applied in this proceeding.

D. Conclusion

53. But for the proposed name of Petitioner's insurance agency, Petitioner met all of the requirements for a nonresident agency license.

54. The denial of Petitioner's insurance agency application was based solely on the Department's determination that Petitioner's name is misleading or that it implies that Petitioner is a state or federal agency.

55. The denial of Petitioner's insurance agency application was the result of the unlawful application of an unadopted rule formulated sometime after September 16, 2019.

56. Given the lack of any evidence to establish a factual basis upon which to find Petitioner's name to be misleading or to imply that Petitioner is a state or federal agency, the application for a nonresident agency license does not fall within the limitations established in sections 626.602(2) and (3) and 626.6115.

57. For the reasons set forth herein, Petitioner has proven its entitlement to issuance of a nonresident agency license in the name of Project Medicare, Inc.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Financial Services enter a final order granting Petitioner, Project Medicare, Inc.'s, application for a nonresident agency license.

DONE AND ENTERED this 22nd day of December, 2020, in Tallahassee, Leon County, Florida.

E. GARY EARLY
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of December, 2020.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.