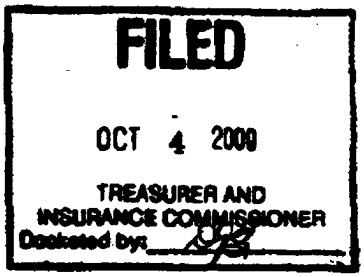
THE TREASURER OF THE STATE OF FLORIDA
DEPARTMENT OF INSURANCE

BILL NELSON



IN THE MATTER OF

CASE NO.: 27506-99-AG

ROBERT WALTER BANDEL

_____/

FINAL ORDER

THIS CAUSE came on before the undersigned, Treasurer of the State of Florida, acting in his capacity as Insurance Commissioner, for consideration and final agency action. On April 2, 1999, the Florida Department of Insurance (hereinafter referred to as the "DEPARTMENT") filed an Administrative Complaint against the Respondent, ROBERT WALTER BANDEL (hereinafter referred to as "RESPONDENT"). Respondent timely disputed the factual allegations contained in the Administrative Complaint and requested a formal proceeding "pursuant to Sections 120.569 and 120.57(1), Florida Statutes." On April 27, 1999, the matter was referred to the Division of Administrative Hearings for the appointment of an Administrative Law Judge.

Pursuant to notice, the grounds set forth in the Administrative Complaint dated April 2, 1999, were heard before the Honorable Stuart M. Lerner, Administrative Law Judge, Division of Administrative Hearings, on December 3 and 21, 1999, by video teleconference, with sites in Tallahassee and West Palm Beach, Florida.

After consideration of the evidence, argument and testimony presented, on July 7, 2000, the Administrative Law Judge (hereinafter referred to as "ALJ") issued his Recommended Order

(attached hereto as Exhibit A). The ALJ recommended that a Final Order be issued dismissing the Administrative Complaint issued against the Respondent. The Department timely filed exceptions to the Recommended Order.

RULINGS ON PETITIONER'S EXCEPTIONS

1. The Petitioner's takes exception to the ALJ's exclusion of the September-December, 1997, issue of the "Intercom." The "Intercom" is a publication for agents and adjusters prepared and distributed by the Department. This particular issue contained Bulletin number 97-007 dated June 16, 1997, addressing the responsibilities of a surplus lines agent. The ALJ excluded the publication on the ground that it would add nothing of probative value to the evidentiary record. Petitioner asserts that the verbiage utilized by the ALJ in excluding the publication amounts to a conclusion of law that is explained in great detail within the exception. (Pet. Exc. No. 1, p. 1-14).

Section 120.569(2)(g), Florida Statutes, provides, in pertinent part: "Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible, whether or not such evidence would be admissible in a trial in the courts of Florida." The ALJ excluded the evidence on the basis that he deemed it to be "irrelevant." (TR. 100). There is an insufficient basis in the record to conclude that the ALJ was incorrect in concluding that the Bulletin was not relevant to a determination as to whether the statutory violations alleged in the Administrative Complaint occurred. Petitioner also asserts in its exception that the Bulletin contained in the publication was introduced on rebuttal to address the motive for and willfulness of Respondent's actions. (Pet. Exc. No.1, p.5). Assuming that the evidence should have admitted on rebuttal as to the issue of willfulness inasmuch as no violation of Section

626.916, Florida Statutes, has been established any error was harmless. Therefore, Petitioner's Exception Number 1 is REJECTED.

2. Petitioner's second exception is that the ALJ was apparently uncertain as to the proper standard of proof to discipline Respondent's license. The paragraph cited by Petitioner states:

> Whether evaluated by the "clear and convincing evidence" standard or the less demanding "preponderance of the evidence" test, the proof submitted at hearing in the instant case is insufficient to establish that Respondent violated any of the statutory or rule provisions referenced in the Administrative Complaint. (Recommended Order at 34-35).

Petitioner asserts that the ALJ was under some "confusion" as to the Petitioner's evidentiary burden to discipline the Respondent's license. However, earlier in his Recommended Order the ALJ succinctly stated that the Department must show the Respondent's guilt by clear and convincing evidence, with appropriate case citations. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So.2d 932 (Fla. 1996). Ferris v. Turlington, 510 So.2d 292 (Fla. 1987)(Recommended Order at 31).

Notwithstanding the asserted "confusion" of the ALJ, the essence of Petitioner's second exception (as well as the third and fourth exceptions) is that the ALJ misread and misapprehended the Florida Surplus Lines Law as applied to Respondent. Sections 626.913-626.937, Florida Statutes. The basis for the Petitioner's exceptions is, essentially, that it is counter-intuitive for the Respondent to claim that the full amount of insurance was not procurable after a diligent search from authorized insurers and place the business with surplus lines carriers when the insurance policy was being currently written by an authorized insurer. However, a violation of the Surplus Lines Law by the producing agent does not necessarily exist

in any and all circumstances when coverage currently placed with an authorized carrier is replaced with coverage with surplus lines carriers, as was the case here.

Respondent was the producing agent in this case. In accordance with the statute, he was responsible for making a diligent effort to determine whether the full amount of insurance required by the condominium association was procurable from among authorized insurers writing the kind and class of insurance in this State. The surplus lines agent, who was not charged, was required to verify the diligent effort of the producing agent and part of the verification process is that "the surplus lines agent's reliance must be reasonable under the particular circumstances surrounding the export of that particular risk." On the facts of this case it appears that the surplus lines agent's reliance may well have not been reasonable given that insurance was already being provided by an authorized insurer. However, as the ALJ determined under these facts, the producing agent fulfilled the statutory requirements of a producing agent.

Further, Sections 626.916(1)(b) and 626.916(1)(c), Florida Statutes, cannot apply under the facts and circumstances of this case. The producing agent's compliance, or non-compliance, with Section 626.916(1)(b), Florida Statutes, that requires a premium rate no lower than that in use by a majority of the authorized insurers for the same coverage on a similar risk to be exportable, cannot be readily ascertained due to the unique coverage requirements of the condominium association. The same problem exists with regard to the requirements of Section 626.916(1)(c), Florida Statutes, requiring the policy to be no more favorable than similar coverages on similar risks than those of a majority of the authorized insurers. Unlike a typical homeowners policy, the premium rates and policies of the majority of authorized insurers for similar coverage were impossible to ascertain in light of the insurance requirements of this condominium association. Therefore, the record reflects that, given all the facts and

circumstances surrounding the placement of the risk in the surplus lines market, Respondent did not violate the statute to warrant disciplinary action. Therefore, in accordance with Section 626.916(1), Florida Statutes, and in light of the particular facts and circumstances of this case, the full amount of insurance was permissible to be exported, as was found by the ALJ. Thus, Petitioner's second, third and fourth exceptions are hereby REJECTED.

After careful consideration of the entire record, the submissions of the parties and being otherwise fully advised in the premised, it is ORDERED:

1. The Findings of Fact of the Administrative Law Judge are adopted in full as the Department's Findings of Fact.

2. The Conclusions of Law of the Administrative Law Judge are adopted in full as the Department's Conclusions of Law.

3. The Administrative Law Judge's recommendation that the Administrative Complaint be dismissed is accepted as the appropriate disposition of this matter.

ACCORDINGLY, the Administrative Complaint is dismissed.

Any party to these proceedings adversely affected by this Order is entitled to seek review of this Order pursuant to Section 120.68, Florida Statutes, and Rule 9.110, Florida Rules of Appellate Procedure. Review proceedings must be instituted by filing a petition or notice of appeal with the General Counsel, acting as the agency clerk, at 612 Larson Building, Tallahassee, Florida 32399-0333, and a copy of the same with the appropriate District Court of Appeal within thirty (30) days of rendition of this Order.

DONE and ORDERED this 4th day of October, 2000.

Bill Nelson
BILL NELSON
TREASURER AND
INSURANCE COMMISSIONER

Copies furnished to:
Honorable Stuart M. Lerner
Administrative Law Judge
Division of Administrative Hearings
1230 DeSoto Building
Tallahassee, Florida 32399-3060

David J. Busch, Esquire
Division of Legal Services
612 Larson Building
Tallahassee, Florida 32399-0333

Charles P. Randall, Esquire
Royal Palm Towers III, Suite 500
1600 South Dixie Highway
Boca Raton, Florida 33432

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF INSURANCE, Petitioner, vs. ROBERT WALTER BANDEL, Respondent.	)	Case No. 99-1914

RECOMMENDED ORDER

Pursuant to notice, a hearing was held in this case in accordance with Section 120.57(1), Florida Statutes, on December 3 and 21, 1999, by video teleconference at sites in West Palm Beach and Tallahassee, Florida, before Stuart M. Lerner, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: David J. Busch, Esquire
Department of Insurance
Division of Legal Services
645A Larson Building
200 East Gaines Street
Tallahassee, Florida 32399-0307

For Respondent: Charles P. Randall, Esquire
Royal Palm Towers III, Suite 500
1600 South Dixie Highway
Boca Raton, Florida 33432

STATEMENT OF THE ISSUES

Whether Respondent committed the violations alleged in the Administrative Complaint and, if so, what penalties should be imposed.

PRELIMINARY STATEMENT

On April 2, 1999, the Department of Insurance (Department) filed an Administrative Complaint against Respondent, a Florida-licensed insurance agent, alleging that Respondent engaged in the following conduct:

> 6. On or about April 6, 1997, you, ROBERT WALTER BANDEL, met with Dan Miller and other members of the then constituted "Insurance Committee" of the Saxony Condominium Association, Inc., 7000 W. Atlantic Avenue, Delray Beach, Florida.
>
> 7. At the above-described meeting, you, ROBERT WALTER BANDEL, urged the committee members to remove mid-term the Saxony Condominium's admitted insurer, the Fireman's Fund Insurance Company, which had in place a property and liability insurance policy, the term of which extended from December 1, 1996 to December 1, 1997 and to substitute therefor a surplus lines layered insurance program.
>
> 8. On or about May 27, 1997, the Board of Directors of the Saxony Condominium Association, Inc., acting upon your sales advice, changed its insurance coverage to a surplus lines layered program effective May 31, 1997 by executing, at your behest, a finance agreement and check number 001 made payable to Braishfield of Florida dated May 28, 1997, drawn on SunTrust bank in the amount of $26,557.67, representing the down payment for the surplus lines property and liability coverages.
>
> 9. On or about May 29, 1997, you, ROBERT WALTER BANDEL, prepared and forwarded to Elinor Lichten, binders confirming property and liability insurance coverage through non-admitted carriers, Lexington Insurance Company (policy number 8792779), General Star Indemnity Company (policy number IPG351102), and Royal Surplus Lines Insurance Company (policy number KHD308897).
>
> 10. You, ROBERT WALTER BANDEL, signed the above-referenced applications as producing agent for each company.

According to the Administrative Complaint, in engaging in such conduct, Respondent failed to comply with the provisions of Sections 626.913, 626.914(3) and (4), 626.915 and 626.916, Florida Statutes, and Rule 4J-5.003, Florida Administrative Code, and his actions constituted a "[d]emonstrated lack of fitness or trustworthiness to engage in the business of insurance," within the meaning of Section 626.611(7), Florida Statutes; "[d]emonstrated lack of reasonably adequate knowledge and technical competence to engage in the transactions authorized by the license or permit," within the meaning of Section 626.611(8), Florida Statutes; "[f]raudulent or dishonest practices in the conduct of business under the license or permit," within the meaning of Section 626.611(9), Florida Statutes; "[w]illful failure to comply with, or willful violation, of any proper order or rule of the department or willful violation of any provision of this code," within the meaning of Section 626.611(13), Florida Statutes; "[v]iolation of any provision of this code or of any other law applicable to the business of insurance in the course of dealing under the license or permit," within the meaning of Section 626.621(2), Florida Statutes; and "[v]iolation of any lawful order or rule of the Department," within the meaning of Section 626.621(3), Florida Statutes.

Respondent "dispute[d] the Department's factual allegations" (contained in the Administrative Complaint) and request[ed] a formal adversarial hearing pursuant to Section 120.569 and 120.57(1), Florida Statutes." The Department, on April 27, 1999, referred the matter to the Division of Administrative Hearings

(Division) for the assignment of a Division Administrative Law Judge to conduct the hearing Respondent had requested.

As noted above, the hearing was held on December 3 and 21, 1999.[1] At the hearing, six witnesses testified: Elinor Lichten; William McCue, Jr.; Daniel Miller; Respondent; William May; and J. Simione. In addition to the testimony of these six witnesses, 31 exhibits (Petitioner's Exhibits 1 through 31) were offered and received into evidence. The undersigned reserved ruling on Petitioner's Exhibit 32, the "Sept.-Dec. 1997" edition of the "Intercom," a "publication for agents and adjusters from the State of Florida Department of Insurance," which contained the following bulletin (numbered 97-007 and dated June 16, 1997) addressed to all "all surplus lines agents":

> The purpose of this bulletin is to advise surplus lines agents of the requirements for exporting risks to the surplus lines market.
>
> Section 626.916, Florida Statutes, prescribes the requirements that must be met for insurance coverage to be eligible for export to the surplus lines market. One of these requirements is that the coverage must not be procurable from authorized insurers after a "diligent effort" has been made by the producing agent to procure such coverage. It is the responsibility of the surplus lines agent to verify that a diligent effort has been made by the procuring agent to procure such coverage. It is the responsibility of the surplus lines agent to verify that a diligent effort has been made by requiring a properly documented statement of diligent effort from the retail or producing agent. Further Section 626.916, F.S. requires that the surplus agent's reliance on a statement of diligent effort be reasonable in light of the particular circumstances surrounding the export of that particular risk.
>
> It is a prohibited practice for a producing agent to intentionally seek quotes from

authorized insurers which they know are not writing new business or are otherwise not writing the type or amount of coverage required. Such practice fails to satisfy the diligent efforts requirements, and a surplus agent's reliance upon a producing agent's statement of diligent effort under these circumstances would not be reasonable. Surplus lines agents must exercise prudent business judgment when evaluating the reasonableness of the producing agent's statement of diligent effort. Failure to do so may result in disciplinary action, including revocation of the agent's license.

It has also been brought to the Department's attention that, after soliciting Agent of Record Letters from condominium associations and other commercial risks written in the admitted market, some producing agents are mid-term canceling insurance coverage for the purpose of replacing it with coverage written through the surplus lines market. Such a practice constitutes a violation of the Florida Insurance Code, as the policy to be replaced was obviously procurable and, in fact, had been procured from an authorized insurer. Any and all reports of such activity will be thoroughly investigated by the Department.

If you have any questions regarding this bulletin, please contact, Carolyn Daniels, Administrator, Surplus Lines Section, Bureau of Industry, Coordination, at (850) 413-2636.

Having carefully considered the arguments advanced by the parties, the undersigned has determined that this document (which was distributed subsequent to the events described in the instant Administrative Complaint and contains an interpretation of the Florida Insurance Code concerning "producing agent" misconduct that has not been adopted and codified in the Florida Administrative Code pursuant to the rulemaking procedures set forth in Chapter 120, Florida Statutes) should not be received into evidence over Respondent's objection inasmuch as it would

add nothing of material probative value to the evidentiary record.

At the close of the evidentiary portion of the hearing on December 21, 1999, the undersigned, on the record, advised that proposed recommended orders had to be filed with the Division no later than 30 days from the date of the filing with the Division of the complete transcript of the hearing.

The hearing Transcript consists of two volumes. The first volume was filed with Division on January 10, 2000. The second volume was filed with the Division on March 31, 2000. Following the filing of the second volume of the hearing Transcript, the deadline for the filing of proposed recommended orders was extended twice. Petitioner and Respondent filed their Proposed Recommended Orders on June 9, 2000, and June 14, 2000, respectively. These post-hearing submittals have carefully considered by the undersigned.

FINDINGS OF FACT

Based upon the evidence adduced at hearing and the record as a whole, the following findings of fact are made:

Respondent's Licensure and Work History

1. Respondent is now, and has been at all times material to the instant case, licensed by Petitioner as a general lines (property and casualty) insurance agent. At no time material to the instant case has he been licensed as a surplus lines agent.

2. In the 30 plus years that he has been in the insurance business, no licensing agency has taken any disciplinary action against him.

3. From January of 1997 until July of 1997 (which includes the entire period during which the events described in the Administrative Complaint took place), Respondent worked as an insurance agent for Braishfield of Florida, Inc. (Braishfield), an insurance agency/brokerage firm. (In July of 1997, he started his own insurance agency/brokerage firm, Bandel and Associates, which he still operates.)

The Saxony Condominium Association

4. The Saxony Condominium Association (Association) consists of the owners of the 672 units (located in 14 buildings) in the "Saxony" section of the Kings Point condominium development in Delray Beach. The development is approximately seven to ten miles from the Atlantic Ocean.

5. For the past six years, Elinor Lichten has been the president of the Association.

The Association's Insurance Committee

6. In August of 1992, before Ms. Lichten became president of the Association, Hurricane Andrew made landfall in the South Florida area and caused extensive property damage.

7. In the years that followed, the premiums that the Association paid for insurance increased dramatically.

8. In February of 1996, in an effort to contain these escalating insurance costs, the Association formed an insurance committee.

9. Ms. Lichten named Dan Miller to serve as the chairman of the committee.

10. Mr. Miller appointed the remaining members on the committee.

11. Ed Greenbaum was among those Mr. Miller appointed to the committee.

12. Ms. Lichten was not a voting member of the committee, although she did attend some (but not all) of the committee's meetings.

The Association's Fireman's Fund Policies

13. At the time the insurance committee was formed, the Association was insured by Fireman's Fund.

14. It obtained this insurance coverage through Sedgwick James of Florida, Inc. (Sedgwick).

15. The insurance agent who represented Sedgwick in its dealings with the Association was J. Simione.

16. In October of 1996, the Association received a notice that the Fireman's Fund policies would not be renewed.

17. Upon receiving the notice, Ms. Lichten telephoned Mr. Simione, who advised her that he was "negotiating to reinstate that policy and that in all probability it would be reinstated."

18. Mr. Simione subsequently contacted Ms. Lichten and advised her that the negotiations had been successful.

19. The Fireman's Fund policies were thereafter renewed. The renewed policies had an effective date of December 1, 1996, and an expiration date of December 1, 1997.

20. The Association agreed to the renewal notwithstanding the renewed policies' high premiums and deductibles.

21. Members of the insurance committee, who had met with Mr. Simione "between three to five times" prior to the renewal of the policies, had advised the committee members that there were no better options available and that they should "be absolutely delighted [to] have the coverage [they] had since insurance companies were not renewing policies." When they asked Mr. Simione to "find [a] layered program [for the Association, like those other condominium associations in the area had] where the [risk] is divided so that the premiums are reduced," Mr. Simione told them that it "wasn't possible," explaining that "all of the layering programs [they] had referred to had since fallen apart."

The Insurance Committee's Discussions with Respondent

22. Following the renewal of the Fireman's Fund policies, members of insurance committee, at the direction Mr. Miller, "start[ed] to interview" other insurance agents "to see whether or not Mr. Simione's comment to [them concerning the unavailability of a layered program for the Association] had any validity."

23. Respondent was the second agent to be "interview[ed]." He was initially contacted by Ed Greenbaum, who told him that the insurance committee "was very upset by the current coverage package they had" and wanted to see if "there was something better."

24. Respondent spoke subsequently with both Mr. Greenbaum and Mr. Miller. Following this conversation, he sent Mr. Greenbaum the following letter, dated February 23, 1997:

> It was pleasure talking to you and Dan Miller and I appreciate your candor.

> Based on the information you provided on the phone, it appears the premiums and deductibles that are currently in force are excessive. My comment is based on what is available in the marketplace today.
>
> It appears that the earliest I can sit down and discuss this with the board is in May. My recommendation is that we move our meeting up to March or April. This will enable us to obtain the best possible terms and conditions as we will have ample time prior to the beginning of the hurricane season.
>
> The association has nothing to lose and potentially a lot to gain. My evaluation requires a minimum amount of time. After our meeting and a review of the current program and losses, I will be in a position to confirm in writing what improvements can be made.
>
> I look forward to hearing from you.

25. Respondent provided the "marketing person" at Braishfield with the information he had been provided by Mr. Greenbaum and Mr. Miller concerning the Association's insurance needs and loss history.

26. The "marketing person" thereupon canvassed the market to determine if there were any alternatives to the Fireman's Fund policies.

27. Such canvassing revealed that there did exist an alternative to the Fireman's Fund policies, in the form of a layered program in which three of the participating insurers were not "authorized insurers," as that term is used in Florida's "Surplus Lines Law."

28. The "marketing person" prepared the following "Statement of Diligent Effort" for Respondent's signature as the "producing agent":

Pursuant to [sic] Section 626.914(4), Florida Statutes, requires producing agents to document that a diligent effort has been made to place a risk with at least three (3) authorized insurers prior to contacting a surplus lines agent to export the risk in the surplus lines market. The following form, prescribed by the Department, must be completed IN FULL for each risk. Name of person contacted and telephone number are MANDATORY.

COUNTY OF RISK: Palm Beach County

NAME OF INSURED: Saxony A-N Condominium Association

TYPE OF COVERAGE: Property

AUTHORIZED INSURER #1
NAME- Hartford Insurance
TELEPHONE NUMBER- 800-824-1732
PERSON CONTACTED- Ben Wilson
DATE OF CONTACT- March 21, 1997
REASON FOR DECLINATION- Type of Risk/Property Location

AUTHORIZED INSURER #2
NAME- General Accident Ins.
TELEPHONE NUMBER- 407-660-1985
PERSON CONTACTED- Bob Rayser
DATE OF CONTACT- March 21, 1997
REASON FOR DECLINATION- Type of Risk/Property Location

AUTHORIZED INSURER #2
NAME- RISCORP
TELEPHONE NUMBER- 800-226-7472
PERSON CONTACTED- Bryan Flowers
DATE OF CONTACT- March 21, 1997
REASON FOR DECLINATION- Risk does not qualify for program

Respondent signed this "Statement of Diligent Effort" on the line provided for the "[s]ignature of [p]roducing [a]gent." He did so in good faith based upon the representations made to him by the "marketing person."

29. In April of 1997, Respondent met with members of the insurance committee and Ms. Lichten at Mr. Miller's residence to

discuss the possibility of the Association obtaining, through Braishfield, the layered program of insurance described above to replace the Fireman's Fund policies that were then in effect.

30. Respondent, on behalf of Braishfield, made a "conceptual" proposal at the meeting.

31. After the meeting, Respondent sent the following letter, dated April 16, 1997, to Dan Miller:

> It was a pleasure meeting with you and the committee and again I want to apologize for arriving late.
>
> Per our discussions, we will provide our final proposal after receiving written confirmation regarding the three year loss history for property and liability. Our proposal will be effective June 1, however we will use whatever date is acceptable to the committee. We anticipate, it will take us approximately two weeks from the time we go into the marketplace until everything is finalized.
>
> It appears, there is minimal exposure for equipment, such as heating, cooling and electrical systems. Consequently, we will not include machinery and equipment breakdown in our final proposal.
>
> I strongly recommend that you obtain an updated appraisal on your buildings as it is extremely important that your replacement cost reflect today's cost. This will eliminate any potential coinsurance or under insurance problem in the event of a loss.
>
> I look forward to working with you and the committee and being appointed as your broker to assist you in all your insurance needs.

32. In May of 1997, Respondent, on behalf of Braishfield, presented a detailed formal written proposal (Braishfield's Written Proposal) to the Association.

33. Braishfield's Written Proposal contained an "Executive Summary" which read as follows:

> Executive Summary
>
> Per our conceptual proposal and correspondence of April 16, we are pleased to present our final program including terms and conditions.
>
> Our proposal is based on information provided by the Insurance Committee on policies that are currently in force. Our comparison of coverages incorporates this information. The differences are what we believe to be the key or salient features of each program.
>
> The bottom line is, we are offering a substantial premium savings, significantly lower deductibles with comparable coverage.
>
> Our recommendation is to appoint Braishfield of Florida as your broker to place all coverage in effect as soon as possible.

34. The "final program" referenced in the "Executive Summary" was a layered program. The "[p]articipating [c]arriers" in the program and their "Best's Ratings" were listed as follows in Braishfield's Written Proposal:

PARTICIPATING CARRIERS

Property Insurance

Carriers	Best's Rating
Lexington Insurance	A++15
General Star Insurance	A++7
Royal Surplus Lines	A-7

General Liability/Crime

New Hampshire Insurance	A++15

Directors & Officers Liability

Chubb Insurance Group	A++15

Umbrella Liability

Great American Insurance A+11

The three "carriers" providing "property insurance" coverage were not "authorized insurers," within the meaning of the "Surplus Lines Law."

35. The "[b]enefits of the Braishfield [p]roposed [p]rogram [o]ver [c]urrent [p]rogram" were described in Braishfield's Written Proposal as follows:

- A Premium Savings of $42,529 Annually.*

- No Coinsurance Penalty.

- A 2% Deductible per building as respect to the perils of wind and hail.

- A $5,000,000 limit for Excess Liability

- A $5,000 AOP Deductible

* Our premium savings is based on the following:

Company	Coverage	Premiums
Fireman's Fund	Package	$144,071
Fireman's Fund	Umbrella	$2,168
	TOTAL	$146,239
	$ 12,966	(Agent's Fee)
	TOTAL	$159,205

Proposal Cancellation Date June 1, 1997

Pro Rata Return Premium- $79,761

Short Rate Return Premium- $71,801

NOTE: A $1,000,000 Umbrella would produce a further savings of $3,395

36. Braishfield's Written Proposal also contained a "Program Comparison," which provided as follows:

Coverage	Current Program	Proposed Program
$20,454,000 Limit on Real and Personal Property	Blanket	As Per Schedule
Coinsurance	Yes	No
Demolition Cost	$250,000	
Law & Ordinance	$5,000,000	$500,000
Deductible -Wind	3% of $20,454,00	2% Per Building
-AOP	$10,000	$5,000
Valuation	Replacement Cost	Re-Placement Cost
Unnamed Storm Deductible	Yes	See Note
Umbrella Limit	$1,000,00	$5,000,000

NOTE: Our comparison does not include unnamed storm wind coverage. This will be discussed during the presentation.

37. Respondent met with the committee members and Ms. Lichten for about eight hours on or about May 6, 1997. At the meeting, he explained Braishfield's Written Proposal in detail and answered questions.

38. On or about May 9, 1997, Respondent sent the following letter to Mr. Miller for the insurance committee's consideration:

> The benefits to the association under Braishfield's proposal are:

- A $5,000 AOP deductible
- Significantly lower premium
- No.co-insurance penalty
- A superior wind deductible in the event of a catastrophe such a hurricane.
- The elimination of any rate increase in 1997 even if this is a bad year for the insurance industry.
- Outstanding insurance service will include a renewal strategy meeting 120 days prior to expiration. This meeting will disclose options, market conditions and pricing projections. This will allow the committee to act proactively instead of reactively in the best interest of the association.
-$5,000,000 Umbrella.

One other point to consider involves the payment of premium. If you cancel the Fireman's Fund Package policy on June 1, the earned premium is estimated to be $72,035. If you include a short rate penalty this increases to $79,239.

Including the May installment the association has paid $96,165. The difference or the return premium due the association is $24,130 which should be refunded within 60 days.

Since you have paid more premium than is earned no payment should be made for June. This enables the association to apply June's payment of $12,015 toward the down payment under Braishfield's program of $26,557.16. The net amount the association has to come up with is $14,542.16.

I trust this will be helpful to the committee.

39. It has not been shown that that Respondent at any time knowingly provided the Association (through its officers and representatives) with any false or misleading information or that he knowingly, with the intent to deceive, hid any information from the Association. He disclosed, among other things, that Braishfield's proposed layered program, unlike the Fireman's Fund policies, included "unauthorized insurers" and explained the

differences between "unauthorized" and "authorized" insurers. In explaining these differences, he talked about the Florida Insurance Guaranty Act, which protects those insured by "authorized insurers" in the event of insurer insolvency, but does not offer similar protection to those insured by "unauthorized insurers." Respondent also advised that the mid-term cancellation of the Fireman's Fund policies would result in a "short rate" penalty and, in addition, he discussed how Braishfield's proposed layered program would be financed and the interest rates that would be charged.

The Association's Acceptance of Braishfield's Written Proposal

40. The insurance committee brought Braishfield's Written Proposal before the Association's board of directors, which voted 15 to 14 in favor of accepting the proposal and replacing the Fireman's Fund policies with the layered program proposed by Braishfield.

Post-Acceptance Activities

41. After learning of the results of the vote, Respondent sent the following letter, dated May 27, 1997, to Mr. Miller:

> I was delighted to hear that the board has made their decision in favor of Braishfield.
>
> If we are looking at a May 31, 1997, effective date it is essential that the following matters be addressed immediately:
>
> - The original finance agreement signed in the appropriate places indicated by "x."
>
> A check in the amount of $26,557.67 should be made payable to Braishfield of Florida for the down payment.

- Both the finance agreement and the check must be available to be picked up by me prior to May 31, 1997.

- A broker of record letter naming Braishfield on the Director's and Officer's liability policy must be executed and signed. The specific policy number should be included in the caption. A sample letter was included in our final proposal.

We will be sending you a completed statement of values form which will require signature of a board or insurance committee member.

I have taken the liberty of drafting a letter advising the agent to cancel all coverages effective May 31, 1997. Included is a request to confirm the return premium due the association as well as any unearned fee that will be returned. This letter should be written on Saxony letterhead and signed by you or the President of the association.

42. In accordance with Respondent's suggestion, Ms. Lichten sent the following letter, dated May 28, 1997, to Mr. Simione:

Re: Fireman's Commercial Insurance Pkg.
Policy #S15MZX80662013

Fireman's Umbrella Insurance
Policy #XSC 00074217738

Dear Mr. Simione:

Effective May 31, 1997, please cancel above captioned policies.

The Saxony Board of Directors at a Special Meeting held on May 27, 1997 voted to appoint a new agent.

Please acknowledge the above cancellation in writing and also confirm the return premium due under each policy, including any penalty. Confirmation of any unearned brokerage fee should also be included. All calculations should be based on a May 31, 1997 cancellation date.

Thank you for your cooperation and consideration you have given Saxony over the past few years.

43. The following day, May 29, 1997, Ms. Lichten sent the following letter, with the described enclosures, to Respondent:

> Enclosed herewith please find the following:
>
> 1. Duly signed Finance Agreement for our Insurance as agreed upon.
>
> 2. Check #001 payable to Braishfield of Florida date May 28, 1997 drawn on Sun Trust in the amount of $26,557.67, which represents our down payment.
>
> Please send us [a] letter acknowledging receipt of the above together with [a] letter indicating that we will indeed have insurance as we agreed to commencing May 31, 1997.
>
> Looking forward to working with you.

44. That same day, May 29, 1997, Respondent sent Ms. Lichten "copies of binders confirming coverage effective May 31, 1997 as per [Braishfield's] May 6th proposal."

45. On June 5, 1997, Ms. Lichten sent Mr. Simione a signed (by Ms. Lichten) and dated (May 29, 1997) "Cancellation Request/Policy Release" form formally requesting cancellation of the Fireman's Fund policies, effective May 31, 1997.

46. On or about June 20, 1997, Ms. Lichten was sent a Certificate of Insurance "certify[ing] that the policies listed [which had been described in Braishfield's Written Proposal] ha[d] been issued to the [Association] for the policy period indicated [May 31, 1997, to May 31, 1998]."

47. On or about June 30, 1997, the appraiser that the Association had hired (Allied Appraisal Service) completed the "updated appraisal on [the Association's] buildings" that Respondent had recommended.

48. Respondent reviewed the appraisal report and prepared a written analysis of the report, which he subsequently discussed with the members of the insurance committee and Ms. Lichten. In his written analysis, Respondent stated, among other things, the following:

> This proposal analyzes the appraisal made by Allied Appraisal Service on June 30, covering the building and surrounding improvements at Saxony "E," Delray Beach, Florida 33446.
>
> The purpose is two fold. To ascertain if the values being reported to the insurance companies reflect as closely as possible the exposure at risk. This includes the impact on coverages such as limits and deductibles. The other area is the premium which includes various options.
>
> The property coverage is underwritten in a layered program using three companies. The total limit of coverage is $20,454,000, which is subject to a sublimit per building of $1,461,000.
>
> Based on the updated appraisal, the 100% replacement cost on buildings and improvements is $24,561,978 which breaks down to $1,754,427 per building. These amounts were arrived at by eliminating and or reducing those items that were not the responsibility of the association. Other adjustments were made regarding contingencies and contractor's profit which should be discussed. The breakdown is provided on Exhibit I attached.
>
> The difference or the amount of increase required to comply with the appraisal is $4,107,978.
>
> The change in values increases the wind deductible from $29,220 to $35,088 per building.

49. On or about July 18, 1997, Respondent (who, by this time, had left the employ of Braishfield and had started his own

insurance agency/brokerage firm) sent Ms. Lichten a letter, which read as follows:

> Per our meeting with the insurance committee on Wednesday, July 16, it was recommended the building values be amended based on the property appraisal made by Allied Appraisal Service[] on June 30, 1997.
>
> The 100% replacement value including improvements is $24,561,978. The total amount of insurance in force is $20,454,000. The net result is a[n] increase of $4,107,978.
>
> Also included in the appraisal is the cost to change certain items revised by current building codes. This is known as law or ordinance coverage. We recommend an increase in the limit by $850,000 to $1,350,000 to cover the additional exposure.
>
> Both of the above increases place the property insurance in compliance with the appraisal.
>
> The underwriter has agreed to provide blanket coverage using 90% coinsurance. The blanket amount excluding law or ordinance coverage is $22,105,760. This is an improvement over the existing program as the blanket amount would apply to any one loss and the basis for determining the premium would be significantly less.
>
> Using an effective date of July 31, the additional premium including taxes and fees is $8,446.20.
>
> In addition to the improvement in coverage and key deductibles, our program provides a net savings in excess of $34,000 a year over the Fireman's Fund policy.

50. The changes that Respondent had recommended based upon the "updated Appraisal" were "bound," as Respondent advised Ms. Lichten by the following letter dated August 12, 1997:

> This will confirm that effective July 31, the following changes have been bound:

- The total insurable value increased to $22,105,780.

- The Law or Ordinance coverage increased to $1,350,000.

- Coverage is on a blanket basis.

- The coinsurance clause has been amended to 90%.

- The 2% wind deductible per building is increased to $31,580.

All of these changes were based on the property appraisal made by Allied Appraisal Service on June 30, with some exceptions, such as Misc. & Contingencies and Overhead/Profits. It was agreed by the insurance committee not to include these items.

Attached is our invoice amount of $8,446.20 representing the additional premium due hereunder.

Please make your check payable to Braishfield of Florida and send it to me.

51. In October of 1997, Respondent submitted a renewal proposal to the Association. The proposal was accepted and renewed coverage was bound, effective December 1, 1997, for a period of three years.

CONCLUSIONS OF LAW

52. "Chapters 624 through 632, 634, 635, 641, 642, 648, and 651 constitute the 'Florida Insurance Code.'" Section 624.01, Florida Statutes. It is the Department's responsibility to "enforce the provisions of this code." Section 624.307, Florida Statutes.

53. Among the provisions in the "Florida Insurance Code" is Section 624.401(1), Florida Statutes, which, "[g]enerally speaking, . . . requires that an insurer be 'authorized' by the

Department . . . to transact business in this state. One of the exceptions to that general requirement is found in [S]ection 626.915, Florida Statutes . . . , which provides that if certain coverages cannot be obtained in this state [from] an authorized insurer, then coverage may be obtained from 'unauthorized insurers' subject to certain conditions . . . ." L.B. Bryan and Company v. School Board of Broward County, 746 So. 2d 1194, 1196 (Fla. 1st DCA 1999).

54. Section 626.915, Florida Statutes, is in a part of the "Florida Insurance Code" that is referred to as the "Surplus Lines Law."

55. The "Surplus Lines Law" provides, in pertinent part, as follows:

> 626.913. Surplus Lines Law; short title; purposes
>
> (1) Sections 626.913-626.937 constitute and may be referred to as the "Surplus Lines Law."
>
> (2) It is declared that the purposes of the Surplus Lines Law are to provide orderly access for the insuring public of this state to insurers not authorized to transact insurance in this state, through only qualified, licensed, and supervised surplus lines agents resident in this state, for insurance coverages and to the extent thereof not procurable from authorized insurers; to protect such authorized insurers, who under the laws of this state must meet certain standards as to policy forms and rates, from unwarranted competition by unauthorized insurers who, in the absence of this law, would not be subject to similar requirements; and for other purposes as set forth in this Surplus Lines Law. . . .
>
> 626.914. Definitions
>
> As used in this Surplus Lines Law, the term:

(1) "Surplus lines agent" means an individual licensed as provided in this part to handle the placement of insurance coverages with unauthorized insurers and to place such coverages with authorized insurers as to which the licensee is not licensed as an agent.

(2) "Eligible surplus lines insurer" means an unauthorized insurer which has been made eligible by the department to issue insurance coverage under this Surplus Lines Law.

(3) "To export" means to place, in an unauthorized insurer under this Surplus Lines Law, insurance covering a subject of insurance resident, located, or to be performed in this state.

4) "Diligent effort" means seeking coverage from and having been rejected by at least three authorized insurers currently writing this type of coverage and documenting these rejections.

626.915. Surplus lines insurance authorized

If certain insurance coverages of subjects resident, located, or to be performed in this state cannot be procured from authorized insurers, such coverages, hereinafter designated "surplus lines," may be procured from unauthorized insurers, subject to the following conditions:

(1) The insurance must be eligible for export under s. 626.916 or s. 626.917;[2]

(2) The insurer must be an eligible surplus lines insurer under s. 626.917 or s. 626.918;

(3) The insurance must be so placed through a licensed Florida surplus lines agent; and

(4) The other applicable provisions of this Surplus Lines Law must be met.

626.916. Eligibility for export

(1) No insurance coverage shall be eligible for export unless it meets all of the following conditions:

(a) The full amount of insurance required must not be procurable, after a diligent effort has been made by the producing agent to do so, from among the insurers authorized to transact and actually writing that kind and class of insurance in this state, and the amount of insurance exported shall be only the excess over the amount so procurable from authorized insurers. Surplus lines agents must verify that a diligent effort has been made by requiring a properly documented statement of diligent effort from the retail or producing agent. However, to be in compliance with the diligent effort requirement, the surplus lines agent's reliance must be reasonable under the particular circumstances surrounding the export of that particular risk. Reasonableness shall be assessed by taking into account factors which include, but are not limited to, a regularly conducted program of verification of the information provided by the retail or producing agent. Declinations must be documented on a risk-by-risk basis. If it is not possible to obtain the full amount of insurance required by layering the risk, it is permissible to export the full amount.

(b) The premium rate at which the coverage is exported shall not be lower than that rate applicable, if any, in actual and current use by a majority of the authorized insurers for the same coverage on a similar risk.

(c) The policy or contract form under which the insurance is exported shall not be more favorable to the insured as to the coverage or rate than under similar contracts on file and in actual current use in this state by the majority of authorized insurers actually writing similar coverages on similar risks; except that a coverage may be exported under a unique form of policy designed for use with respect to a particular subject of insurance if a copy of such form is filed with the department by the surplus lines agent desiring to use the same and is subject to the disapproval of the department within 10 days of filing such form exclusive of Saturdays, Sundays, and legal holidays if it finds that the use of such special form is not reasonably necessary for the principal purposes of the coverage or that its use

would be contrary to the purposes of this Surplus Lines Law with respect to the reasonable protection of authorized insurers from unwarranted competition by unauthorized insurers.

(d) Except as to extended coverage in connection with fire insurance policies and except as to windstorm insurance, the policy or contract under which the insurance is exported shall not provide for deductible amounts, in determining the existence or extent of the insurer's liability, other than those available under similar policies or contracts in actual and current use by one or more authorized insurers. . . .

626.918. Eligible surplus lines insurers

(1) No surplus lines agent shall place any coverage with any unauthorized insurer which is not then an eligible surplus lines insurer . . . .

626.924. Information required on contract

Each surplus lines agent through whom a surplus lines coverage is procured shall write or print on the outside of the policy and on any certificate, cover note, or other confirmation of the insurance his or her name, address, and identification number and the name and address of the producing agent through whom the business originated and shall have stamped or written upon the first page of the policy or the certificate, cover note, or confirmation of insurance the words: THIS INSURANCE IS ISSUED PURSUANT TO THE FLORIDA SURPLUS LINES LAW. PERSONS INSURED BY SURPLUS LINES CARRIERS DO NOT HAVE THE PROTECTION OF THE FLORIDA INSURANCE GUARANTY ACT TO THE EXTENT OF ANY RIGHT OF RECOVERY FOR THE OBLIGATION OF AN INSOLVENT UNLICENSED INSURER. . . .

626.927. Licensing of surplus lines agent

(1) Any individual while licensed and appointed as a resident general lines agent as to property, casualty, and surety insurances, and who is deemed by the department to have had sufficient experience in the insurance business to be competent for the purpose, and who has a minimum of 1

year's experience working for a licensed surplus lines agent or who has successfully completed 60 class hours in surplus and excess lines in a course approved by the department, may be licensed as a surplus lines agent, upon taking and successfully passing a written examination as to surplus lines, as given by the department.

(2) Any individual while licensed and appointed as a managing general agent as defined in s. 626.091, or service representative as defined in s. 626.081, and who otherwise possesses all of the other qualifications of a general lines agent under this code, and who has a minimum of 1 year's experience working for a licensed surplus lines agent or who has successfully completed 60 class hours in surplus and excess lines in a course approved by the department, may, upon taking and successfully passing a written examination as to surplus lines, as given by the department, be licensed as a surplus lines agent solely for the purpose of placing with surplus lines insurers property, marine, casualty, or surety coverages originated by general lines agents; except that no examination as for a general lines agent's license shall be required of any managing general agent or service representative who held a Florida surplus lines agent's license as of January 1, 1959.

. . .

626.929. Origination, acceptance, placement of surplus lines business

(1) A resident general lines agent while licensed and appointed as a surplus lines agent under this part may originate surplus lines business and may accept surplus lines business from any other originating Florida-licensed general lines agent appointed and licensed as to the kinds of insurance involved and may compensate such agent therefor.

(2) A managing general agent while licensed and appointed as a surplus lines agent under this part may accept and place solely such surplus lines business as is originated by a Florida-licensed general lines agent appointed and licensed as to the kinds of

insurance involved and may compensate such agent therefor.

(3) No such general lines agent shall knowingly misrepresent to the surplus lines agent any material fact involved in any such insurance or in the eligibility thereof for placement with a surplus lines insurer.

56. Section 624.308, Florida Statutes, which provides as follows, authorizes the Department to adopt rules to implement the provisions of the "Florida Insurance Code":

(1) The department has authority to adopt rules pursuant to ss. 120.536(1) and 120.54 to implement provisions of law conferring duties upon it.

(2) In addition to any other penalty provided, willful violation of any such rule shall subject the violator to such suspension or revocation of certificate of authority or license as may be applicable under this code as for violation of the provision as to which such rule relates.

57. Among the rules that the Department has adopted is Rule 4J-5.003, Florida Administrative Code, which provides as follows:

4J-5.003 Statement of Diligent Effort.

(1) When placing coverage with an eligible surplus lines insurer, the surplus lines agent must verify that a diligent effort has been made by requiring from the retail or producing agent a properly documented statement of diligent effort on form DI4-1153 (7/94), "Statement of Diligent Effort," which is hereby adopted and incorporated by reference. Copies of form DI-1153 may be obtained from the Bureau of Property and Casualty Insurer Solvency, 200 East Gaines Street, Tallahassee, Florida 32399-0329.

(2) Declinations must be documented on a risk-by-risk basis.

58. Pursuant to the "Florida Insurance Code," no person may lawfully transact business as a general lines insurance agent in

this state unless currently licensed to do so by the Department. Sections 626.041(2) and 626.112, Florida Statutes.

59. Once issued, a license to act as a general lines insurance agent must be suspended or revoked by Petitioner if it is determined that the licensee has committed any of the offenses described in Section 626.611, Florida Statutes. Among these offenses are the following:

* * *

> (7) Demonstrated lack of fitness or trustworthiness to engage in the business of insurance.
>
> (8) Demonstrated lack of reasonably adequate knowledge and technical competence to engage in the transactions authorized by the license or appointment.
>
> (9) Fraudulent or dishonest practices in the conduct of business under the license or appointment. . . .
>
> (13) Willful failure to comply with, or willful violation of, any proper order or rule of the department or willful violation of any provision of this code. . . .

60. In its discretion, the Department may suspend or revoke the license of a general lines insurance agent for the commission of any of the offenses enumerated in Section 626.621, Florida Statutes. These offenses include the following:

* * *

> (2) Violation of any provision of this code or of any other law applicable to the business of insurance in the course of dealing under the license or appointment.
>
> (3) Violation of any lawful order or rule of the department. . . .

61. Pursuant to Section 626.681, Florida Statutes, in lieu of license suspension or revocation ("except on a second offense or when suspension [or] revocation . . . is mandatory"), or in addition to license suspension or revocation, the Department, as punishment for the commission of the offenses set forth above, may impose an administrative fine. The maximum fine that may be imposed per offense is $500.00 or, "if the [D]epartment has found willful misconduct or willful violation on the part of the licensee," $3,500; however, "[t]he administrative penalty may, in the discretion of the department, be augmented by an amount equal to any commissions received by or accruing to the credit of the licensee . . . in connection with any transaction as to which the grounds for suspension [or] revocation . . . related."

62. Pursuant to Section 626.691(1), Florida Statutes, which provides as follows, the Department may also, under certain circumstances, place an offending licensee on probation:

> (1) If the department finds that one or more grounds exist for the suspension, revocation, or refusal to renew or continue any license or appointment issued under this part, the department may, in its discretion, except when an administrative fine is not permissible under s. 626.681 or when such suspension, revocation, or refusal is mandatory, in lieu of or in addition to such suspension or revocation, or in lieu of such refusal, or in connection with any administrative monetary penalty imposed under s. 626.681, place the offending licensee or appointee on probation for a period, not to exceed 2 years, as specified by the department in its order.
>
> (2) As a condition to such probation or in connection therewith, the department may specify in its order reasonable terms and conditions to be fulfilled by the probationer during the probation period. If during the

> probation period the department has good cause to believe that the probationer has violated a term or condition, it shall suspend, revoke, or refuse to issue, renew, or continue the license or appointment of the probationer, as upon the original grounds referred to in subsection (1).

63. "No revocation [or] suspension . . . of any [general lines insurance agent's] license is lawful unless, prior to the entry of a final order, the [Department] has served, by personal service or certified mail, an administrative complaint which affords reasonable notice to the licensee of facts or conduct which warrant the intended action and unless the licensee has been given an adequate opportunity to request a proceeding pursuant to ss. 120.569 and 120.57." Section 120.60(5), Florida Statutes.

64. The licensee must be afforded an evidentiary hearing, if, upon receiving such written notice, he disputes the alleged facts upon which the Department has indicated it intends to act. Sections 120.569(1) and 120.57, Florida. Statutes.

65. At the hearing, the Department bears the burden of proving that the licensee engaged in the conduct, and thereby committed the violations, alleged in the administrative complaint. Proof greater than a mere preponderance of the evidence must be presented. Clear and convincing evidence of the licensee's guilt is required. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932, 935 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); Pou v. Department of Insurance and Treasurer, 707 So. 2d 941 (Fla. 3d

DCA 1998); Werner v. Department of Insurance and Treasurer, 689 So. 2d 1211 (Fla. 1st DCA 1997); Pascale v. Department of Insurance, 525 So. 2d 922 (Fla. 3d DCA 1988); Section 120.57(1)(j), Florida Statutes ("Findings 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 . . . .").

66. Clear and convincing evidence "requires more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" In re Inquiry Concerning a Judge re Graziano, 696 So. 2d 744, 753 (Fla. 1997). It is an "intermediate standard." Id. For proof to be considered "'clear and convincing' . . . the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.'" In re Davey, 645 So. 2d 398, 404 (Fla. 1994), quoting, with approval, from Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

67. In determining whether the Department has met its burden of proof, it is necessary to evaluate the Department's evidentiary presentation in light of the specific factual allegations made in the administrative complaint. Due process prohibits an agency from taking disciplinary action against a

licensee based upon conduct not specifically alleged in the agency's administrative complaint or other charging instrument. See Lusskin v. Agency for Health Care Administration, 731 So. 2d 67, 69 (Fla. 4th DCA 1999); Cottrill v. Department of Insurance, 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996); Klein v. Department of Business and Professional Regulation, 625 So. 2d 1237, 1238-39 (Fla. 2d DCA 1993); Delk v. Department of Professional Regulation, 595 So. 2d 966, 967 (Fla. 5th DCA 1992); Willner v. Department of Professional Regulation, Board of Medicine, 563 So. 2d 805, 806 (Fla. 1st DCA 1992).

68. Furthermore, "the conduct proved must legally fall within the statute or rule claimed [in the administrative complaint] to have been violated." Delk v. Department of Professional Regulation, 595 So. 2d 966, 967 (Fla. 5th DCA 1992). In deciding whether "the statute or rule claimed to have been violated" was in fact violated, as alleged by the Department, if there is any reasonable doubt, that doubt must be resolved in favor of the licensee. See Whitaker v. Department of Insurance and Treasurer, 680 So. 2d 528, 531 (Fla. 1st DCA 1996); Elmariah v. Department of Professional Regulation, Board of Medicine, 574 So. 2d 164, 165 (Fla. 1st DCA 1990); Lester v. Department of Professional and Occupational Regulations, 348 So. 2d 923, 925 (Fla. 1st DCA 1977).

69. In the instant case, the Department has served on Respondent an Administrative Complaint in which it alleges that Respondent engaged in conduct constituting grounds for the suspension or revocation of Respondent's general lines insurance

agent license. According to the Administrative Complaint, Respondent's actions in connection with the Association's "change[] [in] its insurance coverage to a surplus lines layered program effective May 31, 1997," violated Sections 626.913, 626.914(3) and (4), 626.915 and 626.916, Florida Statutes, and Rule 4J-5.003, Florida Administrative Code, and constituted a "[d]emonstrated lack of fitness or trustworthiness to engage in the business of insurance," within the meaning of Section 626.611(7), Florida Statutes; a "[d]emonstrated lack of reasonably adequate knowledge and technical competence to engage in the transactions authorized by the license or permit," within the meaning of Section 626.611(8), Florida Statutes; "[f]raudulent or dishonest practices in the conduct of business under the license or permit," within the meaning of Section 626.611(9), Florida Statutes; "[w]illful failure to comply with, or willful violation, of any proper order or rule of the department or willful violation of any provision of this code," within the meaning of Section 626.611(13), Florida Statutes; "[v]iolation of any provision of this code or of any other law applicable to the business of insurance in the course of dealing under the license or permit," within the meaning of Section 626.621(2), Florida Statutes; and "[v]iolation of any lawful order or rule of the Department," within the meaning of Section 626.621(3), Florida Statutes.

70. Whether evaluated by the "clear and convincing evidence" standard or the less demanding "preponderance of the evidence" test, the proof submitted at hearing in the instant

case is insufficient to establish that Respondent violated any of the statutory or rule provisions referenced in the Administrative Complaint.

71. As the Department acknowledges in its Proposed Recommended Order, Respondent's role in connection with the Association's "change[] [in] its insurance coverage to a surplus lines layered program effective May 31, 1997," was that of "producing agent," as that term is used in the "Surplus Lines Law"; that is, Respondent was the general lines agent who had direct contact with the Association and produced or originated for Braishfield and the surplus lines insurers it represented the surplus lines coverage that the Association purchased. He was not the surplus lines agent that placed the coverage.

72. Under the "Surplus Lines Law" (strictly construed, as it must be in this disciplinary proceeding), Respondent, as the "producing agent," was responsible for making a "diligent effort," as that term is defined in Section 626.914(4), Florida Statutes (that is, "seeking coverage from and having been rejected by at least three authorized insurers currently writing this type of coverage and documenting these rejections"). In addition, pursuant to the "Surplus Lines Law," he was required to not "knowingly misrepresent to the surplus lines agent any material fact involved in such insurance or in the eligibility thereof for placement with a surplus lines insurer." The record evidence reveals that Respondent, with the assistance of the "marketing person" at Braishfield, made a "diligent effort," within the meaning of Section 626.914(4), Florida Statutes.

Furthermore, there has been no showing that Respondent made any misrepresentations to the surplus lines agent who placed the surplus lines coverage. By all appearances, he acted honestly and in good faith, not only in providing information to the surplus lines agent (in the form of the "Statement of Diligent Effort" he signed), but in his dealings with the Association as well. In short, there is no indication in the record that, in connection with the Association's "change[] [in] its insurance coverage to a surplus lines layered program effective May 31, 1997," Respondent engaged in any conduct that violated any provision of the "Surplus Lines Law" (or any implementing rule adopted by the Department) regulating the activities of "producing agents" or committed a violation of either Section 626.611(7), (8), (9) or (13), Florida Statutes, or Section 626.621(2) or (3), Florida Statutes.

73. In its Proposed Recommended Order, the Department concedes that "Respondent, as producing agent, . . . contacted three [insurance] companies on March 21, 1997 and received a declination from each." It contends, however, that this was "some superficial effort to demonstrate technical compliance with the statute [Section 626.916(1)(a), Florida Statutes] and the Department's Rule 4J-5.003," Florida Administrative Code, and that, in so doing, Respondent failed to "act[] reasonably" as required by the "Surplus Lines Law" inasmuch as "there was never a question as to whether the risk could be procured from an authorized insurer [as] the Association was barely into its

renewal policy period with Fireman's Fund, an authorized insurer."

74. Although his effort may have been "superficial," as the Department contends, Respondent did all that the "Surplus Lines Law" requires a "producing agent" to do. It was not his responsibility, as the "producing agent," to determine whether, under the particular circumstances of the instant case, the surplus lines layered program that was placed for the Association was authorized and eligible for export. Rather, it was the obligation of the surplus lines agent who placed this surplus lines coverage to make such a determination.[3] A "producing agent," like Respondent, who has made a "diligent effort," as defined in Section 626.914(4), Florida Statutes, and not misrepresented any facts to the surplus lines agent, cannot be held responsible and disciplined for an erroneous eligibility determination made by the surplus lines agent.[4]

75. Inasmuch as the Department has failed to prove that Respondent committed the violations alleged in the Administrative Complaint, the Administrative Complaint must be dismissed.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Department issue a final order dismissing the Administrative Complaint issued against Respondent.

DONE AND ENTERED this 7th day of July, 2000, in Tallahassee, Leon County, Florida.

STUART M. LERNER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
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(850) 488-9675 SUNCOM 278-9675
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www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of July, 2000.

ENDNOTES

1/ The hearing was originally scheduled to commence on September 7, 1999, but was continued at Respondent's request and rescheduled to commence on December 3, 1999.

2/ Section 626.917, Florida Statutes, addresses "insurance coverage of wet marine and transportation risks."

3/ Surplus lines agents must hold a license issued by the Department authorizing them to place surplus lines coverage. The license signifies that that they have the special knowledge and expertise needed to competently engage in the surplus lines transactions authorized by their licenses.

4/ It is unnecessary to, and therefore the undersigned has not, determined whether such an erroneous determination was made by the surplus lines agent in the instant case.

COPIES FURNISHED:

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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.