OFFICE OF INSURANCE REGULATION

KEVIN M. MCCARTY
COMMISSIONER

IN THE MATTER OF: CASE NO.: 113512-10

LIBERTY NATIONAL LIFE
INSURANCE COMPANY
_____/

FINAL ORDER

THIS CAUSE came on before the undersigned, for consideration and final agency action.

In 2009, the Florida Office of Insurance Regulation (hereinafter "Office") issued a thirty-five (35) Count Order in lieu of an administrative complaint, charging that Liberty National Life Insurance Company's (hereinafter "LNL") certificate of authority should be suspended or revoked for alleged violations of the Florida Insurance Unfair Trade Practices Act, specifically subsections 626.9541(1)(g)(1), 626.9541(1)(x)(1), and 626.9541(1)(dd)(1) and (2), Florida Statutes.

LNL denied the factual allegations and legal conclusions in the order and timely requested a formal administrative hearing pursuant to Section 120.57(1), Florida Statutes. The matter was heard before the Honorable Diane Cleavinger, Administrative Law Judge (ALJ), on June 7 through 11, 2010, in Tallahassee, Florida.

After consideration of the evidence, argument, and testimony presented at the hearing, the ALJ issued her Recommended Order on November 9, 2010. (Attached hereto as Exhibit "A.") The ALJ recommended that a Final Order be entered dismissing Counts 1 through 24 and 29 through 35 of the Office's Order. Further, the ALJ recommended the Office enter a Final Order finding four violations of Section 626.9541(1)(dd), Florida Statutes.

Both LNL and the Office filed exceptions to the Recommended Order. LNL filed a response to the Office's exceptions. Based upon a complete review of the record, the Recommended Order and all exceptions and responses thereto, and the relevant statutes, rules, and case law, I find as follows:

RULINGS ON EXCEPTIONS TO FINDINGS OF FACT

Section 120.57(1)(l), Florida Statutes, sets forth the standard an agency must use when reviewing the Recommended Order of the ALJ. As it relates to exceptions to findings of fact, it provides in pertinent part:

> The agency may adopt the recommended order as the final order of the agency. ... The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

The ALJ is allowed latitude to make factual findings and draw reasonable inferences that flow therefrom. The law is well established that an agency is bound to honor a hearing officer's [now ALJ's] findings of fact unless they are not supported by competent, substantial evidence. McDonald v. Dep't of Banking & Fin., 346 So. 2d 569, 578 (Fla. 1st DCA 1977). It is the hearing officer's function to consider all the evidence, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent, substantial evidence; the agency is not authorized to perform these functions or otherwise interpret the evidence to fit its desired ultimate conclusion. Heifetz v. Dep't of Bus. Reg., 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). Accord Wash & Dry Vending Co. v. Dep't of Bus. Reg., 429 So. 2d 790, 792 (Fla. 3d DCA 1983) (agency may not substitute its judgment for that of the hearing officer by taking a different view of or placing greater weight on the same evidence).

RULINGS ON LIBERTY NATIONAL'S EXCEPTIONS TO FINDINGS OF FACT

1. LNL excepts to the second sentence of Finding of Fact # 2, which erroneously states that LNL's form A-250 is used for all regular and batch life insurance applications. Rather, the evidence shows that application forms other than A-250 and A-251 forms are "batch" processed without individual underwriting review by the LNL underwriting department. (Tr. 565-566.) This exception is accepted and the finding is modified in this regard.

2. Similarly, LNL excepts to the first sentence of Finding of Fact #15, which erroneously states that LNL's form A-250 and A-251 are standard, batch-processed applications that are processed through an automated computer system with no further underwriting review. The evidence shows that application forms other than A-250 and A-251 are "batch" processed without individual underwriting review. (Tr. 565-566.) Consequently, this exception is accepted, and the finding is modified to reflect the foregoing.

RULINGS ON THE OFFICE'S EXCEPTIONS TO FINDINGS OF FACT

3. The Office excepts to Finding of Fact # 2 in three particulars. First, like LNL's exception to this sentence, the Office asserts that form A-250 is used for all regular, or standard life insurance applications, but not for applications that are batch processed. (Tr. 168-169, 565-566.) This exception is accepted and finding is modified in this regard.

4. Second, the Office excepts to the sentence of Finding of Fact # 2 that states "Like the applications, the residency form is used in multiple states and is intended to elicit information that may or may not be relevant or used in the state relevant to any given applicant." The Office maintains that no testimony was presented as to the intent of the form, and therefore this finding is not supported by competent substantial evidence. Given the discretion vested in the judge with

respect to interpreting the evidence, there is competent substantial evidence in the record to support this finding. Accordingly, this exception is rejected.

5. Third, the Office excepts to the second to last sentence of Finding of Fact # 2 stating that there is no competent substantial evidence of LNL's intent in asking applicants travel questions in its application. Given the discretion vested in the judge with respect to interpreting the evidence presented, there is competent substantial evidence in the record to support this finding. Accordingly, this exception is rejected.

6. The Office excepts to Finding of Fact # 3, requesting that the finding be modified to include that that Ms. Saxon was the only underwriter who made entries in the application files to testify at the hearing, and that she made entries in the application file for Count 26. This modification is supported by competent substantial evidence in the record and is therefore accepted. (Jt. Ex. 1 22; Tr. 690.)

7. The Office excepts to Finding of Fact #5 maintaining that Mr. Himmelberg testified that "A," "B," "C," and "D" classifications are "universally applied in reinsurance companies and direct insurance companies in the United States," but not as to what factors contribute to mortality risks in these countries. Given the discretion vested in the judge with respect to interpreting the evidence, there is competent substantial evidence in the record to support this finding. Accordingly, this exception is rejected.

8. The Office further excepts to the final sentence of Finding of Fact # 5 stating that it improperly implies that LNL uses country codes in an accepted manner in the industry. The Office argues that there is no evidence that the manner LNL utilizes country codes is supported by mortality statistics. Given the discretion vested in the judge with respect to interpreting the

evidence, there is competent substantial evidence in the record to support this finding. Accordingly, this exception is rejected.

9. The Office excepts to the first sentence in Finding of Fact # 7. The Office maintains there was no testimony as to the "goal" of LNL's underwriting guidelines. The Office asserts that the evidence shows LNL began utilizing these guidelines due to concern over travel to certain countries, and objects that LNL did no research to justify their implementation and merely borrowed them from its reinsurer. Given the discretion vested in the judge with respect to interpreting the evidence, there is competent substantial evidence in the record to support this finding. Accordingly, this exception is rejected.

10. The Office further excepts to the phrase "lowers the actuarial risk underwritten by LNL" in the second sentence and to the third sentence of Finding of Fact # 7. The Office states that Mr. Himmelberger testified that in his opinion residents from "A" and "B" countries were in a different actuarial class from residents from "C" and "D" countries, but did not testify that LNL's underwriting guidelines were "actuarially supported." The Office maintains Mr. Himmelberger's testimony that "A," "B," "C," and "D" designations were universally applied and consistent with actuarial standards of practice does not provide competent substantial evidence that LNL's guidelines were "actuarially supported." The Office notes that its examiners testified that they repeatedly requested actuarial support for LNL's underwriting guidelines and LNL did not provide any. Given the discretion vested in the judge with respect to interpreting the evidence, there is competent substantial evidence in the record to support this finding. Accordingly, this exception is rejected.

11. Further, the Office excepts to the second to last sentence of Finding of Fact 7, stating that Ms. Saxon did not testify that LNL's requirement of additional information for

applicants from "C" and "D" countries was aimed to show a "stronger connection to the United States." Though the Office is correct that Ms. Saxon does not testify to this point directly, considering Mr. Himmelberger's expert testimony and the discretion vested in the judge with respect to interpreting the evidence, there is competent substantial evidence in the record to support this finding. (Tr. 832-833.) Accordingly, this exception is rejected.

12. The Office excepts to the first sentence of Finding of Fact # 8. The Office argues that placing additional criteria on applicants based on their national origin and then refusing to insure them when they do not meet the higher standards imposed upon is tantamount to refusing to insure an individual based solely on national origin. Given the evidence and testimony presented at the hearing and the discretion vested in the judge with respect to interpreting that evidence, there is competent substantial evidence in the record to support the ALJ's finding that LNL's proffered reason for not insuring these applicants was not a pretext for refusal to insure based solely on national origin. Accordingly, this exception is rejected.

13. The Office further excepts to the second sentence of this finding, stating that there was no evidence as to what the underwriting rules and guidelines "incorporate," and that LNL stated that the guidelines were developed due to concern over travel to certain countries. Given the discretion vested in the judge with respect to interpreting the evidence, there is competent substantial evidence in the record to support this finding. Accordingly, this exception is rejected.

14. Moreover, the Office excepts to the third sentence of Finding of Fact # 8 and argues that the evidence showed that the guidelines were used to allow LNL to estimate the likelihood of travel to a country. Given the discretion vested in the judge with respect to interpreting the evidence, there is competent substantial evidence in the record to support this finding. Accordingly, this exception is rejected.

15. The Office also excepts to the fourth sentence and maintains that there was no evidence presented as to what the additional information required of "C" and "D" applicants by LNL was "designed to gather." Given the discretion vested in the judge with respect to interpreting the evidence, there is competent substantial evidence in the record to support this finding. Accordingly, this exception is rejected.

16. The Office excepts to the fifth and sixth sentences of this finding. The Office asserts that there is no evidence that the applicants alleged in the Office's Order from "C" or "D" countries had plans to return to their home country, as to warrant the higher risk classification imposed upon them. The Office maintains that many applicants informed LNL that they never intended to return to their home country. Moreover, the Office asserts that Mr. Himmelberger admitted that mortality rates of a country are not the same as the life expectancy of individuals from a country and reiterates its position that there is no evidence that LNL's use of "A," "B," "C," and "D," classifications are consistent with actuarial principles. Given the discretion vested in the judge with respect to interpreting the evidence and the totality of Mr. Himmelberger's expert testimony, there is competent substantial evidence in the record to support this finding. Accordingly, this exception is rejected.

17. The Office excepts to the statement that "Such information is not used for underwriting purposes by LNL on Florida applications" in the fourth sentence of Finding of Fact # 10. The Office notes that information regarding applicants' travel plans was utilized for underwriting purposes by LNL in at least four instances—those policies for Counts 25 through 28 as found by the ALJ. The ALJ and LNL acknowledged that LNL used the travel information for underwriting purposes on Florida applications on at least four occasions. Though Mr. McWhorter and Ms. Saxon testified that LNL's management directed LNL's underwriting

department to comply with Section 626.9541(1)(d), Florida Statutes, competent substantial evidence does not support a finding that the information was "not used." This finding should be modified to read: "LNL directed its underwriting department not to use such information for underwriting purposes on Florida applications, though this information was used for underwriting purposes in violation of 624.9541(1)(dd), Florida Statutes at least four times."

18. The Office further excepts to the last two sentences of Finding of Fact # 10. The Office states that the ALJ's findings are indecipherable and should be striken as not supported by competent substantial evidence. In these sentences, the ALJ is making a finding explaining that multiple definitions of the term "travel" that were used during the hearing. This finding is decipherable and given the discretion vested in the judge with respect to interpreting the evidence, there is competent substantial evidence in the record to support this finding. Accordingly, this exception is rejected.

19. The Office excepts to the first sentence of Finding of Fact # 15, which erroneously states that LNL's form A-250 and A-251 are standard, batch processed applications that are processed through an automated computer system with no further underwriting review. As discussed above, the evidence shows that LNL forms A-250 and A-251 are not batch-processed, nor are batch-processed applications standard applications. (Tr. 168-169, 565-566). Consequently, this exception is accepted, and the finding is modified to reflect the foregoing.

20. The Office excepts to the portion of Finding of Fact # 16 which suggests that the standards of review and interpretation of files by each examiner were not consistent during the examination process. The Office maintains that this finding is not supported by competent substantial evidence because the examiner's interpretation and/or opinions of certain files were ruled inadmissible during the hearing by the ALJ. Notwithstanding the excluded evidence, given

the discretion vested in the judge with respect to interpreting the evidence, there is competent substantial evidence in the record to support this finding. Accordingly, this exception is rejected.

21. The Office further excepts to the sentence of this finding, which states "[s]uch generalizations do not otherwise provide support for the interpretation of data or information in these files by the examiners or the failure to adduce such evidence by going to the human source of the data or information contained in the electronic records of LNL," because the examiner's interpretation of the files were ruled inadmissible by the ALJ, so the ALJ's finding regarding their interpretation of the data is not supported by competent substantial evidence. The Office maintains that the ALJ's assertion that the Office should have provided individuals with personal knowledge of the policies and application files is not supported by competent substantial evidence and is unrealistic, as Ms. Saxon testified that her underwriters review over 1500 files a week. Given the discretion vested in the judge with respect to interpreting the evidence, there is competent substantial evidence in the record to support this finding. Accordingly, this exception is rejected.

22. Moreover, the Office excepts to the final two sentences of Finding of Fact # 16 in which the ALJ notes the absence of an expert in statistical analysis and sampling of data from a universal pool of applicants. The ALJ found that there was no evidence that the applications reviewed by the examiners were a valid sample of all applications processed during the examination period. The Office notes that this testimony was not necessary because there was no statistical analysis done during the exam, nor was there any sampling of a universal pool. Rather, the examiners reviewed all applications of foreign born applicants. It is improper for the ALJ to suggest that a complete review of all applications submitted by foreign born applicants is less accurate than taking a random sample of the same application. The purpose of statistical analysis

is to accurately expand findings of a sample to the larger group if a complete review has not been attempted or is impracticable. Accordingly, this exception is accepted and the last two sentences of Finding of Fact # 16 are stricken.

23. The Office excepts to the second sentence of Finding of Fact # 17. The Office asserts and the evidence supports that the report contained simple mathematical calculations based on the information gathered firsthand by the examiners which were translated to percentages, not "statistics" in the academic sense. This finding is modified to reflect the foregoing.

24. The Office excepts to the third sentence of this finding. The Office disputes the ALJ's finding that none of the conclusions drawn from examiner's report are probative of alleged violations because it does not contain a valid statistical analysis. The Office notes that testimony showed that no statistical analysis was needed, and that the referenced numbers in the report are percentages of all the data reviewed by the examiners. The ALJ is within her discretion to weigh the evidence, but as discussed above, it is incorrect to assert such percentages based on a complete review of applications of foreign-born applicants are invalid. This exception is accepted and this sentence is stricken as not supported by competent substantial evidence.

25. The Office excepts to the fourth sentence of this finding in that the market conduct examination is referred to as a "study" and that the ALJ found that the examination and report provided no credible or substantive evidence that demonstrates that LNL violated any provision of Florida law. The Office states that the market conduct examination identified evidence of violations; for example, the four counts found by the ALJ to be violations of Florida Law. Given the discretion vested in the judge with respect to interpreting the evidence, there is

competent substantial evidence in the record to support this finding. Accordingly, this exception is rejected.

26. The Office excepts to the second sentence of Finding of Fact # 18 and requests that the finding be modified to reflect that no further examination of the files was done by the Office's examiners. The Office points out that there is no competent substantial evidence to support that no Office staff reviewed any of the files after the examination was completed. There is not competent substantial evidence in the record to support that no further review was done by Office employees after the draft report was completed, rather, only that no further examination of the files was done by the Office's examiners. This finding is modified to reflect the foregoing.

27. The Office further excepts to the remainder of Finding of Fact # 18 as a conclusion of law, which should be addressed separately. The Office requests that the finding be stricken and replaced with the following as a conclusion of law:

> "The Office acted pursuant to §6[2]6.319(2), Florida Statutes which states: The department or office or its examiners may at any time testify and offer other proper evidence as to information secured or matters discovered during the course of an examination, whether or not a written report of the examination has been either made, furnished, or filed in the department or office."

The third and fifth sentences of this paragraph are findings of fact on their face and therefore the exception is rejected for these sentences. However, the fifth and sixth sentences are mixed findings of fact and law, which are stricken and replaced with the statutory section above as a conclusion of law. An agency's interpretation of the statute it is charged with enforcing is afforded great deference. Fla. Hosp. v. Ag. for Health Care Admin., 823 So. 2d 844 (Fla. 1st DCA 2002). Section 624.319 requires the Office to publish a report and to offer a company a conference to discuss the report before the report is published. This statute does not impose a timeframe for publication of an examination report not does it preclude the Office from taking

legal action to remedy violations of the insurance code until after an examination report is completed and a company has had an opportunity to be heard on a report of the findings. Such a requirement would be counter to public policy is and is directly refuted in Subsection 626.319(2), Florida Statues. Accordingly, this exception is excepted and sentences five and six are stricken from the record. The remainder of the exception is rejected.

28. The Office excepts to the first three sentences of Finding of Fact # 20, in which the ALJ asserts that it was the burden of the Office to establish the actuarially supportable class at issue. In its exception, the Office contends that no such burden exists, but, in any event, whether such burden does exist is a Conclusion of Law "that should be stricken." However, rather than writing a Conclusion of Law, what the ALJ does in these sentences is assign an evidentiary burden, albeit a mistaken one. The Office is alleging that LNL is treating persons within the same actuarial class differently. The burden is on LNL to establish that the persons treated one way are in a different class than those treated another way. The ALJ's interpretation of the evidence was that they did meet that burden, that persons born in A and B countries are in a different actuarial class than those born in C and D countries. Accordingly, this exception is accepted and the Finding is modified in accord.

29. The Office excepts to Finding of Fact # 22, particularly to the phrase the "unrefuted evidence demonstrated that this applicant was declined insurance because she had no income." The Office argues that Ms. Saxon's testimony about the additional requirements placed on applicants from "C" and "D" countries meeting certain criteria refutes the evidence that the rejection was based solely on lack of income. Rather, Ms. Saxon's testimony expounded on LNL's underwriting guidelines and policies that called for further information, such as proof of income for applicants from "C" and "D" countries who had not been in the United States for at

least 10 years. The Office further excepts to the findings regarding a subsequent application filed by this applicant that resulted in the issuance of a policy. The Office states that it is inappropriate to enter a finding based on Ms. Saxon's hearsay testimony without corroborating evidence of the policy. In administrative proceedings, hearsay evidence is admissible only for the purpose of explaining or supplementing other evidence. Under Section 120.57(1)(c), Florida Statutes, hearsay evidence standing alone it is not sufficient to prove a material fact in issue unless it would be admissible over objection in a civil proceeding. Business records not admitted into evidence formed the sole basis for Ms. Saxon's testimony about the subsequently issued policy. Therefore, references to the subsequently issued policy are not supported by competent substantial evidence and the final sentence of Finding of Fact # 22 is stricken. The remainder of the exception is rejected as supported by competent substantial evidence, given the discretion vested in the judge with respect to interpreting the evidence.

30. The Office excepts to Finding of Fact # 23. The Office asserts that this applicant was refused life insurance because she did not meet higher standards that were imposed upon her based solely on her national origin. The Office's position is that imposing higher standards on applicants from "C" and "D" countries is not actuarially supported and that the imposition of these standards constitutes a denial based solely on national origin. Given the evidence and testimony presented at the hearing and the discretion vested in the judge with respect to interpreting that evidence, there is competent substantial evidence in the record to support the ALJ's finding that LNL's proffered reason for not insuring these applicants was not a pretext for refusal to insure based solely on national origin. Accordingly, this exception is rejected.

31. The Office excepts to Finding of Fact # 25. The Office argues that the "missing medical tests" that formed the basis for cancellation of the application could not have been

submitted because LNL would first have to order the tests for the applicant to submit them. The Office asserts that the applicant was denied coverage because he had not been in the United States for at least 10 years. Ms. Saxon stated at the hearing that the tests were required because the applicant had not been in the country for at least 10 years and that the application was declined because the tests were not submitted. The Office equates the imposition of this higher standard as a denial based solely on national origin. Given the evidence and testimony presented at the hearing and the discretion vested in the judge with respect to interpreting that evidence, there is competent substantial evidence in the record to support the ALJ's finding that LNL's proffered reason for not insuring these applicants was not a pretext for refusal to insure based solely on national origin. Accordingly, this exception is rejected.

32. The Office excepts to Finding of Fact # 26 from the sixth sentence through the remainder of the finding. The Office maintains that the sixth sentence is pure speculation on the part of Ms. Saxon and the ALJ and that Ms. Saxon cannot speculate on what the underwriter's notation meant. As discussed above, the Office maintains that the imposition of higher standards on this applicant is equivalent to a denial based solely on national origin and that all competent substantial evidence supports that LNL violated Section 626.9541(1)(x)(1), Florida Statutes. Given the discretion vested in the judge with respect to interpreting the evidence, there is competent substantial evidence in the record to support this finding. Accordingly, this exception is rejected.

33. The Office excepts to Finding of Fact # 27 in three regards. First, the Office argues that issuance of a batch-processed "critical illness policy" to this applicant does not "indicat[e] national origin was not a consideration for LNL," because the evidence established that batch-processed applications did not take national origin into consideration. In accord with

the accepted exceptions regarding batch-processed applications, there is no competent substantial evidence to support the portion of this finding that states "indicating national origin was not a consideration for LNL." The Office further excepts, arguing that it is inappropriate to enter a finding based on Ms. Saxon's hearsay testimony without corroborating evidence of the policy. As discussed above, in administrative proceedings, hearsay evidence is admissible only for the purpose of explaining or supplementing other evidence. Under Section 120.57(1)(c), Florida Statutes, hearsay evidence standing alone it is not sufficient to prove a material fact in issue unless it would be admissible over objection in a civil proceeding. The sole basis for Saxon's testimony about the subsequently issued policy is business records that were not admitted into evidence. Therefore, references to the subsequently issued policy are not supported by competent substantial evidence. Finally, the Office excepts to the implication in this finding of fact that because the policy was underwritten in 2004, it is improper to allege a violation of Section 626.9541(1)(x)(1), Florida Statutes, because there is no statute of limitations on finding violations of this insurance code section. There is no support for the prospect that the Office cannot allege violations of Section 626.9541(1)(x)(1), Florida Statutes dating back to 2004. Accordingly these portions of Finding of Fact # 27 are stricken. However, considering the other evidence in the record and given the discretion vested in the judge with respect to interpreting the evidence, there is competent substantial evidence in the record to support the finding that LNL did not deny this applicant insurance based solely on national origin. Therefore, the remainder of this exception is rejected.

34. The Office excepts to the last three sentences of Finding of Fact # 28. The Office maintains that there is competent substantial evidence in the record that the reasons LNL provided as to why it denied this applicant coverage were a pretense for rejecting the applicant

based solely on national origin. However, given the discretion vested in the judge with respect to interpreting the evidence, there is competent substantial evidence in the record to support this finding. Accordingly, this exception is rejected.

35. The Office excepts to the first sentence of Finding of Fact # 30, which states that the evidence showed that the application was cancelled by LNL because there was no documentation of the applicant's legal residency status in the United States. The Office asserts that the application was coded as "canceled" for "miscellaneous reasons." The Office further excepts to the last two sentences of this finding of fact, because Ms. Saxon's testimony was that the additional proof of income was only required because of the applicant's national origin, which the Office asserts is tantamount to denying the application based solely on national origin. Given the evidence and testimony presented at the hearing and the discretion vested in the judge with respect to interpreting that evidence, there is competent substantial evidence in the record to support the ALJ's finding that LNL's proffered reason for not insuring these applicants was not a pretext for refusal to insure based solely on national origin. Accordingly, this exception is rejected.

36. The Office excepts to the fifth sentence of Finding of Fact # 31. The Office argues that LNL's classification of an application as "canceled" as opposed to "rejected" does not mean that LNL did not "refuse to insure" that individual. The Office further excepts to the last two sentences of this finding, maintaining its position that LNL's requirement of additional information for applicants from "C" and "D" countries is tantamount to refusing to insure based solely on national origin. Given the evidence and testimony presented at the hearing and the discretion vested in the judge with respect to interpreting that evidence, there is competent substantial evidence in the record to support the ALJ's finding that LNL's proffered reason for

not insuring these applicants was not a pretext for refusal to insure based solely on national origin. Accordingly, this exception is rejected.

37. The Office excepts to the first sentence of Finding of Fact # 33, which states that this applicant's first application was not processed because the applicant did not provide proof of income and other required underwriting information. The Office asserts that because this application was coded as canceled for miscellaneous reasons that there is no competent substantial evidence to support this finding. Given the discretion vested in the judge with respect to interpreting the evidence, there is competent substantial evidence in the record to support this finding. Accordingly, this exception is rejected.

38. The Office excepts to the last two sentences of Finding of Fact # 34. The Office maintains that there is no evidence that the missing information was critical to process the application and excepts the assertion that the cancellation of an application is not a refusal to insure. Given the discretion vested in the judge with respect to interpreting the evidence, there is competent substantial evidence in the record to support this finding. Accordingly, this exception is rejected.

39. The Office excepts to Finding of Fact # 35. The Office maintains that the unsubstantiated hearsay evidence of this applicant's subsequently issued policy cannot be the basis for a finding of fact. Further the office reiterates that this applicant was required to provide more information based solely on national origin, which is tantamount to a denial based solely on national origin. For the reasons discussed more fully in paragraphs 29 and 33, the portions of this finding referencing the subsequently issued policy are stricken. However, given the discretion vested in the judge with respect to interpreting the evidence, there is competent substantial

evidence in the record to support the remainder of this finding. Accordingly, the remainder of the exception is rejected.

40. The Office excepts to the third sentence of Finding of Fact # 39 and requests that the finding be modified to reflect that the application was coded as canceled for miscellaneous reasons and that no notations on the UWFD screen indicated the reason for the cancellation. Given the discretion vested in the judge with respect to interpreting the evidence, there is competent substantial evidence in the record to support this finding. Accordingly, this exception is rejected.

41. The Office excepts to the second sentence Finding of Fact # 40. The Office objects to the ALJ's use of the word "later" and asserts that LNL had already cancelled the application before the referenced blood work was received, so irregular blood work could not serve as a basis for LNL's cancellation of the application. The Office further excepts to the last two sentences of this finding maintaining that competent substantial evidence showed LNL's reasons for denying insurance to this applicant were pretextual. Given the discretion vested in the judge with respect to interpreting the evidence, there is competent substantial evidence in the record to support this finding. Accordingly, this exception is rejected.

42. The Office excepts to the fourth sentence of Finding of Fact # 42 through the remainder of the finding. The Office excepts to the ALJ's assertion that classifying a denial as a cancellation does not violate Section 626.9541(1)(x)(1), Florida Statutes. Given the discretion vested in the judge with respect to interpreting the evidence, there is competent substantial evidence in the record to support this finding. Accordingly, this exception is rejected.

43. The Office excepts to Finding of Fact # 44 from sentence four through the remainder of the finding. The Office asserts that this applicant was informed he was denied life

insurance because of vague "underwriting rules" and not due to his foreign travel plans. The Office points out that Ms. Saxon testified that the file could have documented that the reason for denials was foreign travel plans, but this reason was not indicated. Given the evidence and testimony presented at the hearing and the discretion vested in the judge with respect to interpreting that evidence, there is competent substantial evidence in the record to support the ALJ's finding that LNL's proffered reason for not insuring these applicants was not a pretext for refusal to insure based solely on national origin. Accordingly, this exception is rejected.

44. The Office excepts to the first sentence of Finding of Fact # 46 as not supported by competent substantial evidence because the application was coded as canceled for miscellaneous reasons and there were no notations on the UWFD screen to indicate the reason for the cancellation. Given the evidence and testimony presented at the hearing and the discretion vested in the judge with respect to interpreting that evidence, there is competent substantial evidence in the record to support the finding. Accordingly, this exception is rejected.

45. The Office excepts to Finding of Fact # 47. The Office maintains its argument that missing information was used as a pretext for LNL to cancel applications based on the applicant's national origin. The missing information that resulted in these cancellations was only required because of the applicant's national origin and LNL did not attempt to gather the missing information and in some cases did not identify what information was missing. Given the evidence and testimony presented at the hearing and the discretion vested in the judge with respect to interpreting that evidence, there is competent substantial evidence in the record to support the ALJ's finding that LNL's proffered reason for not insuring these applicants was not a pretext for refusal to insure based solely on national origin. Accordingly, this exception is rejected.

46. The Office excepts to Finding of Fact # 48 maintaining its position that LNL could not avoid violating Section 626.9541(1)(x)(1), Florida Statutes simply by classifying denials as cancellations rather than rejections. The Office asserts that LNL violated Section 626.9541(1)(x)(1), Florida Statues by requiring this additional information due to the applicant's national origin. Given the discretion vested in the judge with respect to interpreting the evidence, there is competent substantial evidence in the record to support this finding. Accordingly, this exception is rejected.

47. The Office excepts to the last three sentences of Finding of Fact # 50. The Office asserts that there is no competent substantial evidence to support the statements related to a policy subsequently issued to this applicant and that it is inappropriate for a finding of fact to be based on the unsubstantiated testimony of Ms. Saxon regarding this policy. Moreover, the Office asserts that LNL violated Section 626.9541(1)(x)(1), Florida Statues by requiring this additional information due to the applicant's national origin. For the reasons discussed more fully in paragraphs 29 and 33, the portions of this finding referencing the subsequently issued policy are stricken. Given the discretion vested in the judge with respect to interpreting the evidence, there is competent substantial evidence in the record to support this finding. Accordingly, the remainder of this exception is rejected.

48. The Office excepts to Finding of Fact # 53 because the interview was only required of this applicant due to his national origin. The Office again asserts classifying a rejection as a cancellation does not immune it from violating Section 626.9541(1)(x)(1), Florida Statues. Given the discretion vested in the judge with respect to interpreting the evidence, there is competent substantial evidence in the record to support this finding. Accordingly, the exception is rejected.

49. The Office excepts to portions Finding of Fact # 54 stating the intent of a note placed on the file and Ms. Saxon's unsubstantiated hearsay testimony regarding a reinstated prior policy, which resulted from a batch-application that did not include the applicant's national origin at the time it was approved. The Office asserts that once LNL was aware of the applicant's national origin he was not deemed acceptable for coverage. For the reasons discussed more fully in paragraphs 29 and 33, the portions of this finding referencing the subsequently reinstated policy are stricken. Given the discretion vested in the judge with respect to interpreting the evidence, there is competent substantial evidence in the record to support this finding. Accordingly, the remainder of this exception is rejected.

50. The Office excepts to the last two sentences of Finding of Fact # 59. The Office asserts Ms. Saxon testified that LNL does not insure students and that the only reason this applicant was denied coverage was because she was from a "C" or "D" country. Given the discretion vested in the judge with respect to interpreting the evidence, there is competent substantial evidence in the record to support this finding. Accordingly, the exception is rejected.

51. The Office excepts to the second to last sentence of Finding of Fact # 63 because the telephone interview was required due to the applicant's national origin. Given the discretion vested in the judge with respect to interpreting the evidence, there is competent substantial evidence in the record to support this finding. Accordingly, the exception is rejected.

52. The Office excepts to the first sentence of Finding of Fact # 64 because the file reflects that the application was rejected due to underwriting rules and not canceled due to missing information. Given the discretion vested in the judge with respect to interpreting the evidence, there is competent substantial evidence in the record to support this finding. Accordingly, the exception is rejected.

53. The Office further excepts to the remainder of this finding. The Office asserts that the Office was prohibited from entering additional evidence on LNL's treatment of applicants from "C" and "D" countries, but the Office's examiner's testified that they only observed vague reasons for cancellation on application files for "C" and "D" applicants. Further, the Office reiterates that Ms. Saxon's testimony was that the missing information was only required because of the applicant's national origin. Given the discretion vested in the judge with respect to interpreting the evidence, there is competent substantial evidence in the record to support this finding. Accordingly, the exception is rejected.

54. The Office excepts to the second sentence of Finding of Fact # 72 and asserts that there is no competent substantial evidence that LNL's reinsurers required the foreign travel exclusion, only that reinsurers required an additional rating (fee). Given the discretion vested in the judge with respect to interpreting the evidence, there is competent substantial evidence in the record to support this finding. Accordingly, the exception is rejected.

55. The Office further excepts to the third sentence of this finding as not supported by competent substantial evidence, asserting that testimony regarding whether or not the action was a mistake is pure speculation. Given the discretion vested in the judge with respect to interpreting the evidence, there is competent substantial evidence in the record to support this finding. Accordingly, the exception is rejected.

56. The Office excepts to the fourth through sixth sentences of this finding, stating that the evidence only established that LNL's reinsurer required the additional rating, not the foreign travel exclusion. The Office further asserts that the evidence established that LNL was aware of the passage of the act months before its effective date, but only issued a memo directing compliance with the new Florida law, instead of instituting additional precautions to assure the

law was followed. Given the discretion vested in the judge with respect to interpreting the evidence, there is competent substantial evidence in the record to support this finding. Accordingly, the exception is rejected.

57. The Office excepts to the fourth sentence of Finding of Fact # 74 as a mixed statement of fact and law. The Office asserts that the standard is not whether Ms. Saxon's actions were willful, but rather if LNL knew or should have known that they were in violation of the Florida Freedom to Travel Act. The Office reiterates that LNL was aware of this law, but did not institute measures to insure compliance with the new Florida law. Given the discretion vested in the judge with respect to interpreting the evidence, there is competent substantial evidence in the record to support this finding. Accordingly, the exception is rejected.

58. The Office excepts to the last two sentences of Finding of Fact # 80, 83, 86, 95, and 98, which state: "There was no competent evidence that this reduction was related to the applicant's future travel plans. Based on these facts, the evidence did not establish that LNL violated Subsection 626.9541(1)(dd)1 or 2, Florida Statues and the Count should be dismissed." . Given the discretion vested in the judge with respect to interpreting the evidence, there is competent substantial evidence in the record to support this finding. Accordingly, the exception is rejected.

59. The Office excepts to sentences in Findings of Fact # 89 and 92, which state that "There was no competent substantial evidence that this reduction [in policy limits] was related to the applicant's past travel or future travel plans," and the final sentence of these findings. Given the discretion vested in the judge with respect to interpreting the evidence, there is competent substantial evidence in the record to support this finding. Accordingly, the exception is rejected.

RULINGS ON EXCEPTIONS TO CONCLUSIONS OF LAW

60. LNL and the Office except to several of the ALJ's conclusions of law. Section 120.57(1)(l), Florida Statutes, sets forth the standard an agency must use when reviewing the legal conclusions in a Recommended Order:

> The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact.

61. LNL excepts to the portion of Conclusion # 109 that states "However, given these minimal violations, it is appropriate that LNL's certificate of authority be disciplined for these four violations." LNL excepts to this conclusion because the ALJ found it was not furnished an examination report or given an opportunity to be heard about that examination report pursuant to Section 624.319, Florida Statutes. As discussed in paragraph 27 above, Section 624.319 requires the Office to publish a report and to afford a company a conference to discuss the report before the report is published. This statute does not impose a timeframe for publication of an examination report not does it preclude the Office from taking legal action to remedy violations of the insurance code until after an examination report is completed and a company has had an opportunity to be heard on a report of the findings. Such a requirement would be counter to public policy is and is directly refuted in Subsection 626.319(2), Florida Statues. Subsection 626.319(2) expressly allows the Office to present testimony about an examination, regardless of whether the report has been "made, furnished, or filed." As to LNL's argument regarding Section 624.310(5)(a), Florida Statutes, this action of the Office did not proceed under this code section

and 624.310(7), Florida Statues explicitly states that this code section does not supersede other laws. Accordingly, this exception is rejected.

62. LNL excepts to the portion of Conclusion # 113 that asserts that there is a basis for imposing the statutory fine provided for non-willful violations of Section 626.9541, Florida Statutes for the same reasons articulated in paragraph 61. For the reasons explained above, this exception is rejected.

63. LNL excepts to the portion of Conclusion # 114 that states it is reasonable to fine LNL $1,000 per violation of Section 626.9541, Florida Statutes for the same reasons articulated in paragraph 61. For the reasons explained above, this exception is rejected.

RULINGS ON THE OFFICE'S EXCEPTIONS TO CONCLUSIONS OF LAW

64. The Office excepts to Conclusion # 101 to the extent that an insurer cannot simply categorize an action as a cancellation as opposed to a refusal to avoid the prohibitions of Section 626.9541(1)(x)(1), Florida Statues. The Office argues that the plain meaning of "refusal" is akin to "denying" regardless of how a company may classify or code the action internally. An agency is entitled to great deference to its interpretation of a statue that it administers. BellSouth Telecomm. Inc. v. Johnson, 708 So. 2d 594 (Fla. 1998). The agency is also entitled to define such terms as are found within these statutes. Pershing Indus., Inc. v. Dep't of Banking and Fin., 591 So. 2d 991, 993 (Fla. 1st DCA 1991). "It is axiomatic that an agency's construction of its governing statutes and rules will be upheld unless clearly erroneous....If an agency's interpretation is one of several permissible interpretations, it must be upheld despite the existence of reasonable alternatives. Id. The undersigned concurs that an insurer may not pretextually categorize a denial as a cancellation to avoid the prohibitions of Section 626.9541(1)(x)(1). This conclusion is modified to include the foregoing.

65. The Office excepts to the first sentence of Conclusion # 102 as a misstatement of fact. The Office maintains that the underwriting files for Counts 2, 3, 5 and 22 clearly state that the applicant's were "rejected" for coverage and were not canceled or issued coverage equal to the applicant's annual income. Given the discretion vested in the judge with respect to interpreting the evidence, there is competent substantial evidence in the record to support that processing of these applications was cancelled, so that portion of the exception is rejected. However, the evidence supports that none of the counts listed in this finding resulted in a policy being written, so the portion of Conclusion # 102 that states that LNL "issue[d] coverage equal to the amount of the applicant's annual income in the most recent year" should be stricken. Accordingly, this exception is accepted in part and the conclusion is modified to reflect the foregoing.

66. The Office excepts to the second sentence of Conclusion #102 and asserts that LNL's actions of rejecting or canceling applications do constitute a refusal to insure in violation of Section 626.9541(1)(x)(1), Florida Statutes. As noted above, the undersigned maintains that an insurer may not avoid the prohibitions of Section 626.9541(1)(x)(1), Florida Statutes by pretextually categorizing a denial as a cancellation. However, given the factual determinations made by the ALJ in this case, this exception is rejected.

67. The Office excepts to Conclusion # 103. The Office maintains that it presented clear and convincing evidence that LNL refused to insure applicants based solely on national origin. The Office reasserts its position that LNL refused to insure these applicants based solely on national origin; LNL does so by placing additional underwriting criteria on individuals based solely on their national origin and then refuses to insure these individuals when they do not meet these higher standards. Therefore, the Office asserts, as the requirements are only imposed on

these applicants due to national origin, LNL is refusing to insure based solely on national origin when applicants cannot or do not meet the additional criteria. However, given the factual determinations made by the ALJ that the cancellations, rejections, and reduction of policy limits below those applied for were not pretextual in this case, this exception is rejected.

68. The Office excepts to Conclusion # 104. The Office asserts that the evidence did not demonstrate that LNL's guidelines had an actuarial basis. The Office maintains that the evidence established that LNL applied underwriting requirements to individuals based solely on their national origin and that LNL had no actuarial basis or guidance in developing those guidelines. However, given the factual determinations made by the ALJ in this case, this exception is rejected.

69. The Office excepts to the first sentence of Conclusion # 106. The Office asserts that it does not bear the burden of identifying the "actuarially supportable class" referenced in Section 626.9541(1)(g)(1), Florida Statutes. This exception is rejected.

70. The Office excepts to Conclusion # 107. The Office asserts that the underwriting files for Counts 24 and 29 through 35 clearly state that the applicants informed LNL that they had travel plans. Ms. Saxon testified that the amount of coverage was limited in each of these cases due to LNL's underwriting guidelines, which require that the amount of coverage be limited to the applicant's annual income if those applicants are from "C" or "D" countries and do not meet certain criteria. The Office asserts that LNL created these guidelines over concern about travel and their continued use of them after Florida's Freedom to Travel Act's effective date violates Section 626.9541(1)(dd), Florida Statutes. However, given the factual determinations made by the ALJ in this case, this exception is rejected.

71. The Office excepts to Conclusion # 109. The Office notes that these violations did not occur because of a processing error of a computer or automated system, but rather that LNL's underwriters failed to follow Florida law in these instances. The Office further excepts to the characterization of these violations as "minimal" in the third sentence. The undersigned concurs with the Office that violations of Section 626.9541(1)(dd), Florida Statutes are not minimal and are not excusable simply because they may happen infrequently. The Office accepts the exception that the first two sentences be rejected and stricken and that the word "minimal" be rejected from the third sentence.

72. The Office excepts to the final sentence of Conclusion # 111. The Office excepts to the imposition of a fine in this case because the Order issued by the Office asked for LNL's certificate of authority to be suspended or revoked, not fined. The Office notes that 624.4211(2), Florida Statutes provides for a fine of $5,000 for nonwillful violations of the Unfair Insurance Trade Practices Act, and Section 626.9541(1)(dd)(5), Florida Statutes specifically provides that fines for violations of the Freedom to Travel Act are to be *trebled*, which the Office states would require a fine of $15,000 per non-willful violation. This Conclusion does not impose a fine, so in that regard, the exception is denied. However, the Conclusion is not complete, in that it fails to point out that 626.9541(1)(dd)(5) requires the fine to be trebled. It must be further clarified to point out that the fine is imposed *in lieu of* suspension or revocation. In this regard, the exception is granted.

73. The Office excepts to Conclusion # 112 and states that LNL knew of the changing Florida law well before its effective date, but continued to use travel as an underwriting criteria. The Office excepts to the ALJ's implication that the high volume of applications LNL's underwriters review per week excuses compliance with Florida law. The undersigned concurs

with the Office's position that reviewing a high volume of applications each week is not an excuse for failing to meet the requirements of this state. A licensed entity is required to comply with the law of each state it does business in, regardless of the number of states. Nor are violations of the Florida Freedom to Travel Act "minor." In light of the foregoing, but considering the factual determinations made by the ALJ in this case, the last sentence of this finding is stricken and the remainder of the exception is rejected.

74. The Office excepts to Conclusion # 113 and maintains that these violations are not "minor," and that LNL should be found in violation of all 35 Counts in the Order and that their actions were willful. The undersigned concurs that these violations are not "minor" and that word is stricken from the first sentence. Given the factual determinations made by the ALJ in this case, this exception is rejected.

75. The Office excepts to the first sentence of Conclusion # 114 as irrelevant and inaccurate, because no provision of Section 626.9541, Florida Statutes requires a history of violations in order to discipline a Certificate of Authority for violations of the Unfair Trade Practices Act. Though there is no such requirement under Florida law, whether or not an insurer has a history of violations is relevant in determining whether the violation should be deemed willful and in assessing a fine. This exception is rejected.

76. The Office further excepts to the second sentence as inaccurate because LNL denied these violations in their Response, Petition for Hearing, and in their Unilateral PreHearing Stipulation. This exception is rejected because LNL admitted these violations at the hearing.

77. The Office further excepts that the third sentence is irrelevant and inaccurate because LNL has control over its own policies and could have voluntarily fixed these violations at any time. Furthermore, the Office did not deny LNL the "informal review and discussion

opportunity provided," as discussed more fully in Findings of Fact # 27 and 67. This exception is accepted and the third sentence of this conclusion is stricken.

78. Finally, the Office excepts to the final sentence of this conclusion and requests that LNL's license be suspended or revoked. This exception is dealt with in Paragraph 81.

EXCEPTIONS TO THE RECOMMENDATION

79. LNL excepts to the portion of the Recommendation imposing an administrative fine of $1,000 per violation. This exception is rejected.

80. LNL further excepts to the Recommendation that the Office issue a cease and desist order to LNL regarding violations of Section 626.9541, Florida Statutes. LNL asserts that because LNL was only found to be in violation of Subsection 626.9541(1)(dd), Florida Statutes, the cease and desist order should be limited to this subsection. This exception is accepted.

81. The Office excepts to the Recommendation based on their exceptions to the Findings of Fact and Conclusions of law above and requests the Recommendation be rejected. The Office asserts that the Order it issued provided that LNL's certificate of authority be either suspended or revoked and did not provide for the imposition of a fine. It is the province of the Office to impose a lawful penalty for violations of the insurance code. Section 624.418(2)(a), Florida Statutes, grants the Office the authority to suspend or revoke the certificate of authority of an insurer if it finds that the insurer has violated any provision of the insurance code. The ALJ found four violations of Section 626.9541(1)(dd), Florida Statutes. Moreover, Section 624.4211, Florida Statutes allows the Office to impose an administrative fine in lieu of suspension or revocation. Subsection 624.4211(2), Florida Statutes, provides for a fine of $5,000 for nonwillful violations of the Unfair Insurance Trade Practices Act. However, Section 626.9541(1)(dd)(5), Florida Statutes, specifically provides that fines for violations of the Freedom to Travel Act are

to be *trebled*, which requires a fine of up to $15,000 per non-willful violation. I impose the maximum fine of $5,000 per violation, which is trebled according to statute, to $15,000 per violation, for a total of $60,000. The remaining exceptions are rejected.

IT IS THEREFORE ORDERED:

1. The Findings of Fact of the ALJ, except as modified herein, are adopted in full as the Office's Findings of Fact.

2. The Conclusions of Law of the ALJ, except as modified herein, are adopted in full as the Office's Conclusions of Law.

3. The Recommendation of the ALJ is accepted as modified in accord with this Order.

ACCORDINGLY, the Office finds four violations of Section 626.9541(1)(dd), Florida Statutes and imposes a fine of $15,000 per violation, for a total of $60,000. Further, the Office orders LNL to cease and desist from violating Section 626.9541(1)(dd), Florida Statutes.

DONE and ORDERED this 9th day of February, 2011.

KEVIN M. McCARTY, Commissioner
Office of Insurance Regulation

NOTICE OF RIGHTS

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 Notice of Appeal with the General Counsel, acting as Agency Clerk, 200 East Gaines Street, 612 Larson Building, Tallahassee, FL 32399-0333 and a copy of the same and filing fee, with the appropriate District Court of Appeal within thirty (30) days of rendition of this Order.

Copies furnished to:

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