THE TREASURER OF THE STATE OF FLORIDA
DEPARTMENT OF INSURANCE

TOM GALLAGHER

IN THE MATTER OF:

NEUMA, INC. d/b/a NEUMA, INC. OF ILLINOIS CASE NO: 61064-02-CO

_____/

FINAL ORDER

THIS CAUSE came on for consideration and final agency action. On March 28, 2002, a letter of denial was issued by the Department of Insurance against the Petitioner, Neuma, Inc. d/b/a Neuma, Inc. of Illinois (hereinafter referred to as "Neuma" or "Petitioner"), denying its application as a viatical settlement provider because it made material misrepresentations and omissions on its application, did not demonstrate that it was competent and trustworthy to engage in the business authorized by the license applied for and it had committed unfair trade practice violations.

Petitioner timely filed a request for a proceeding pursuant to Section 120.57(1), Florida Statutes. Pursuant to notice, the matter was heard before Don W. Davis, Administrative Law Judge, Division of Administrative Hearings, on September 9 through 11, 2002.

After consideration of the record and argument presented at hearing, the Administrative Law Judge issued his Recommended Order on November 13, 2002. (Attached as Exhibit A). The Administrative Law Judge recommended that a final order be entered by the Florida Department of Insurance denying Petitioner's application for licensure as a viatical settlement provider.

On December 2, 2002, the Petitioner timely filed exceptions to the Recommended Order. The Petitioner excepted to several Findings of Fact, Conclusions of Law, and the Recommendation. On December 9, 2002, the Department filed a Response to Petitioner's exceptions. The Exceptions and Response will be addressed below.

RULINGS ON PETITIONER'S EXCEPTIONS

1. Petitioner excepts to Findings of Fact #7 of the Recommended Order and argues that there was no competent substantial evidence to support the finding that the actions filed by the states of Kansas and Illinois needed to be disclosed by the applicant because no temporary or permanent injunction had been entered by either of these states against AMG. The Petitioner does concede that at the time the application was being completed, Kansas had issued a Notice of Intent and Illinois had issued a Notice of Hearing against AMG.

The Petitioner's characterization of the facts in this exception is somewhat disingenuous. A Notice of Intent to Issue Permanent Cease & Desist Order had been issued by the State of Kansas, indicating that AMG, Inc. was transacting business in Kansas as a broker-dealer or agent without registration and/or offering or selling securities that were not registered. This matter was settled on or about September 18, 1998, by AMG, Inc. agreeing to in the future fully comply with the provisions of the Kansas Securities Act and the regulations adopted thereunder. (Petitioner's Exhibit Notebook 2, tab 7). The Notice of Hearing issued in Illinois against AMG Inc. was handled in a similar fashion by that State. (Petitioner's Exhibit Notebook 2, tab 8). It is clear that an injunction had been entered by the State of Alabama against AMG, Inc. (Petitioner's Exhibit Notebook 2, tab 9). The Administrative Law Judge's Finding of Fact only indicates that the existence of these actions was not disclosed. The weight given to the evidence is the province of the Administrative Law Judge and cannot be disturbed by the agency unless

the findings are not supported by competent substantial evidence. Brogan v. Carter, 671 So.2d 822 (Fla. 1st DCA 1996). There is competent substantial evidence in the record to support this Finding of Fact by the Administrative Law Judge and accordingly, this exception is rejected.

2. Petitioner excepts to Finding of Fact #9 of the Recommended Order and argues that this Finding of Fact is an erroneous Conclusion of Law because Florida had no jurisdiction over the Petitioner's website. Merely because the Finding of Fact references a statutory citation does not automatically make the Finding a Conclusion of Law. As the Court stated in Feldman v. Department of Transportation, 389 So.2d 692 (Fla. 4th DCA 1980), "A conclusion of law is one arrived at by the application of fixed rules of law. Ultimate facts are those found in that vaguely defined area lying between evidentiary facts on the one side and conclusions of law on the other and are the final resulting effects which are reached by the process of logical reasoning from the evidentiary facts." In Pillsbury v. Dep't. of Health and Rehabilitative Services, 744 So.2d 1040 (Fla. 2nd DCA 1999), the Court noted, "... the obligation of the agency to honor the hearing officer's findings of fact cannot be avoided by categorizing a contrary finding as a conclusion of law." Without any additional argument from the Petitioner, it would be inappropriate to reject the Administrative Law Judge's Finding of Fact merely because the Petitioner considers it to be a Conclusion of Law. Accordingly, this exception is rejected.

3. Petitioner excepts to Finding of Fact #11 of the Recommended Order and again argues that it is an erroneous Conclusion of Law. For the reasons set forth in paragraph #2 above, this exception is rejected.

4. Petitioner excepts to Finding of Fact #12 of the Recommended Order and again argues that it is an erroneous Conclusion of Law. For the reasons set forth in paragraph #2 above, this exception is rejected.

5. The Petitioner excepts to numerous Findings of Fact in the Recommended Order in exception #5 on the basis that the Administrative Law Judge did not rule on or address issues raised by the Petitioner in either its petition, evidence or proposed recommended order. This exception is nothing more than a re-argument of points already made by the Petitioner and addressed in the Recommended Order by the Administrative Law Judge. The Administrative Law Judge recited in his Preliminary Statement to the Recommended Order that "Both parties filed Proposed Recommended Orders which have been reviewed and utilized, when possible, in the preparation of this Recommended Order." Petitioner's argument that the Administrative Law Judge did not consider Petitioner's issues is without merit. Accordingly, this exception is rejected.

6. The Petitioner excepts to Conclusion of Law #23 and argues that this Conclusion is irrelevant because the Administrative Law Judge made no determination that a particular unfair insurance trade practice provision had been violated. The Petitioner also argues that the Administrative Law Judge's analysis of the Unfair Insurance Trade Practices Act is incorrect regarding the Viatical Settlement Act.

By reference in Section 626.9927, Florida Statutes, the 1999 Legislature declared that violations of the Viatical Settlement Act would also constitute violations of the Unfair Trade Practices Act, Sections 626.9521 and 626.9541, Florida Statutes of Chapter 626, Florida Statutes. It then went on to state that Part X of Chapter 626, Florida Statutes, the Viatical Settlement Act, applied to licensees and transactions under the Viatical Settlement Act as if viatical settlement contracts and viatical settlement purchase agreements were insurance policies, which is essentially what the immediately preceding statement regarding Sections 626.9541 and 626.9521, Florida Statutes, also accomplished.

In 1998 and previous years, Part X of Chapter 626, Florida Statutes, was the Unfair Trade Practices Act. However, the 1999 Legislature re-numbered Part X to constitute the Viatical Settlement Act and the Unfair Trade Practices Act became Part IX of Chapter 626, Florida Statutes.

It only later became apparent that the Legislature meant what it said, that violations of the Viatical Settlement Act would also constitute unfair trade practices and that Part X would apply to viatical transactions and viatical licensees as if to an insurance policy. Thus, the 1999 re-numbering in question made the Viatical Settlement Act Part X, and the Unfair Trade Practices Act became Part IX of Chapter 626, Florida Statutes. There were no subsequent changes by the 2002 Legislature as mistakenly noted by the Administrative Law Judge.

All that, however, is inconsequential to the central point that violations of the Viatical Settlement Act are also violations of Sections 626.9521 and 626.9541, Florida Statutes. That is the basis for the violation found, and whether Part X was properly denominated as such or was really Part IX has nothing to do with those violations. Accordingly, Petitioner's exception is rejected.

7. The Petitioner excepts to Conclusion of Law #24 of the Recommended Order and states that the Conclusion failed to place on DOI the burden of presenting evidence as to the alleged statutory violation". The Petitioner then cites to Department of Banking and Finance v. Osborne Stern and Co., 670 So.2d 932 (Fla. 1996) as authority for its exception. The Petitioner's reliance on Osborne is misplaced. The Osborne case stands for the principle that in an application dispute proceeding, the burden of persuasion remains upon the applicant to prove entitlement to the license. The Administrative Law Judge properly recited the standard for the

burden of proof in Conclusion of Law #24 in license application proceedings and consequently this exception is rejected.

8. The Petitioner excepts to Conclusions of Law #25- #27 of the Recommended Order and states that the Administrative Law Judge "concludes that Neuma is either incompetent or untrustworthy, without deciding which is applicable". Petitioner argues that its actions relate to the filling out of the application, and not to the viatical settlement business. Petitioner's arguments in this exception are without merit. The Administrative Law Judge in these Conclusions of Law is simply summarizing the statutory basis for upholding the denial of the Petitioner's license application. There are no grounds for reversal of these Conclusions of Law because the Administrative Law Judge phrased his conclusion that the Petitioner was either incompetent or untrustworthy. All of these Conclusions of Law were based on competent substantial evidence contained in the record in this matter. Accordingly, Petitioner's exception is rejected.

9. The Petitioner excepts to the Recommended Order, generally because it did not adopt each of the Petitioner's proposed findings of fact and conclusions of law as set forth in its proposed recommended order. There is no longer any requirement in Sections 120.569 or 120.57(1), Florida Statutes for the Administrative Law Judge file an appendix to the Recommended Order, accepting or rejecting each finding of fact and/or conclusion of law from the parties' proposed recommended orders. That requirement was removed some years ago when major amendments were made to Chapter 120, Florida Statutes. It is clear from the record in the present case that the Administrative Law Judge did consider the parties' proposed recommended orders. In his Preliminary Statement, the Administrative Law Judge states, "Both parties filed Proposed Recommended Orders which have been reviewed and utilized, when

possible, in the preparation of this Recommended Order." Petitioner's exception #9 is without merit and is therefore rejected.

Upon careful consideration of the record, the submissions of the parties, and being otherwise fully advised in the premises, 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 Department enter a Final Order denying Petitioner's application for licensure as a viatical settlement provider is approved and accepted as being the appropriate disposition of this matter.

ACCORDINGLY, it is ORDERED, as follows:

Petitioner's, NEUMA, INC., d/b/a NEUMA, INC. of ILLINOIS', application for licensure as a viatical settlement provider is hereby DENIED.

NOTICE OF RIGHTS

Any party to these proceedings adversely affected by this Order is entitled to seek review of the Order pursuant to Section 120.68, Florida Statutes, and Rule 9.110, Fla.R.App.P. Review proceedings must be instituted by filing a petition or Notice of Appeal with the General Counsel, acting as the agency clerk, at 200 East Gaines Street, 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 the rendition of this Order.

DONE and ORDERED this 14th day of January, 2003.

KEVIN MCCARTY
Deputy Insurance Commissioner

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