STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

STATE OF FLORIDA,
Petitioner,

v.

Scott David Thomas,

Respondent.
_____/

DOAH Case No. 22-000984PL
DFS Case No. 266618-20-AG

RESPONDENT'S PROPOSED RECOMMENDED FINAL ORDER

Pursuant to notice, a final administrative hearing in the above styled cause was conducted before the Honorable Robert Cohen, Administrative Law Judge with the Division of Administrative Hearings on Aug. 25, 2022 and Oct. 21, 2022 (in-person) in Miami-Dade County.

APPEARANCES

For Respondent, Scott David Thomas,

Matthew E. Ladd, Esq.
Law Offices of Matthew E. Ladd, Esq.
4649 Ponce De Leon Blvd., Suite 301
Coral Gables, FL 33146
305-665-3978
MattLadd@MLLawMiami.com

For Petitioner, Department of Financial Services

Marshawn Michael Griffin, Esq.
Chief Legal Counsel
Florida Dept. of Financial Services
200 E. Gaines St.
Tallahassee, FL 32399-4229
850-413-4141
Marshawn.Griffin@MyFloridaCFO.com

PRELIMINARY STATEMENT

1. On March 22, 2022 the Department issued an Administrative Complaint (Amended on May 22) to the Respondent seeking to revoke the Respondent's public adjuster's license due to violations of Fla. Stat. 626.854(14), (b), and (c) (obstructing insurance carriers from having reasonable access to inspect the losses of insureds); Fla. Stat. 626.621(2) (violating any provision of the code or other law applicable to insurance); Fla. Stat. 626.611(1)(g) (demonstrating a lack of fitness or trustworthiness to engage in the business of insurance), F.A.C. R. 69B-220.201(3)(f), (violating Ethical Requirements to act with dispatch and due diligence in achieving a proper disposition of the claim), Fla. Stat. 626.8698(6) (violating any rule of the department), Fla. Stat. 626.611(1)(h) (demonstrating a lack of adequate knowledge and technical competence), Fla. Stat. 626.8796(2) (using a post office address as the company's permanent business address).
2. The matter proceeded through pre-hearing process and final hearing over two days, Aug. 25, 2022 and Oct. 21, 2022.
3. On Aug. 19, 2022 the parties filed their proposed exhibit lists. All of the exhibits proposed were admitted. Petitioner's 1-36, Respondent's 1-8.
4. At the hearing the Department called Joaquim Medeiros, James Reichle, Jared Hollbrook, Linda Berns, Maria Quintana, Mark Boknect, Glenn Chapter, Ray Wenger, Liron Nicole Stav Roach, and Jason Bambug as witnesses.
5. The Respondent called Warren Diener, Keith Lambdin, and the Respondent also testified.

6. Transcripts were ordered. Due to a delay in the court reporter's office in transcribing the transcripts, the parties stipulated to the entry of the agreed order allowing for the proposed recommended orders to be due on or before Dec. 16, 2022.
7. All cites to the Florida Statutes and the Administrative Rules of DFS are versions in effect at the time of the alleged violations.
8. The following Report and Recommendation for a Final Order concludes that the Department failed to meet its burden of proof on each of the nine counts charged (Count II was abandoned).
9. For the reasons set forth herein, the application of the evidence to the alleged violations of the cited rules and statutes pled do not clearly and convincing establish any violation; cannot support an order of any discipline; and the Department's attempt to make some of the alleged conduct described unlawful would be an invalid exercise of legislative authority, and likely a violation of the constitutional protections of the First Amendment.

FINDINGS OF FACT

10. The Department of Financial Services has jurisdiction over Respondent's public adjuster license as an all-lines public adjuster (3-20).
11. Respondent was licensed as an all-lines public adjuster (3-20).

A. Counts I, IV, (Requiring Proof of Insurance) and Count V (Ending EUO to Reschedule)

12. Count I, IV, and V allege that the Respondent is unfit and caused unreasonable delay by requiring proof of liability and worker's compensation insurance by the insurance adjusters and/or their third-party contractors.

13. Both witnesses who testified on behalf of the Department conceded that the requests for insurance coverage was reasonable and the Department's corporate representative, Ray Wenger, conceded that such a request was reasonable. See Vol. 2 P. 242:5-11.
14. The claim in Count I involved a claim presented by a homeowner, Ms. Vivian Louis, a client of Respondent.
15. The Department alleges that the Respondent prevented the insurance company from accessing the roof during an inspection on June 1, 2019 (paragraph 16 of the Amended Complaint) and on June 29, 2019 (see paragraph 20).
16. The evidence revealed that on June 1, 2019, the Respondent did not prevent the insurance company from accessing the roof. See Vol 2, P. 306:13-18 (Witness Bamburg claimed the Respondent was not even there). The issue on the first inspection was that the there was a tarp on the roof and that the insurance company was not prepared to remove and replace the tarp to conduct its inspection. See Vol 2, P. 306:13-18, P. 305:21-306:9
17. Regarding the June 29, 2019 (the second date alleged in the Amended Complaint), the insurance company failed to provide proof of liability and or worker's compensations insurance for the third-party contractor to access the insured's roof. See Vol. 2, P. 261:5-11.
18. The Respondent, acting at the request of the insured homeowner, advised that the homeowner was requiring the proof of insurance prior to climbing onto the roof.
19. The engineer admitted to not being insured in a deposition related to the claim. See Vol 4, P. 246:5-10.

20. The insurance company re-coordinated the inspection, but Citizens Supervisor, Jason Bamburg refused to complete the inspection because he refused to be video recorded. Vol 4, P. 548-5-17. (It is undisputed that there is no prohibition against video recording such inspections).

B. Count II (Abandoned)

21. Count II was abandoned by the Department and is recommended to be dismissed.

C. Count III (Saturday Inspections)

22. Count III alleged that the Respondent refused to coordinate an inspection except to occur on Saturdays and that Respondent was "belligerent and threatening" on the phone (Amended Complaint paragraph 51).
23. The Department conceded that the inspection was completed on a Tuesday, July 9, 2019, within 60 days of the claim being filed (See paragraph 48 of the Amended Complaint).
24. The Respondent conceded that initially Saturday inspections were coordinated at the request of the homeowner due to circumstances involving the homeowner's availability and the availability of tenants required to provide access to the property.
25. The Respondent testified that Saturday inspections are common and the fact was corroborated by Warren Diener's testimony. Vol 3, P.424:13-18, Vol. 4, P. 556:23-557:6.
26. Citizen's supervisor, Jason Bamburg, also testified that Saturday inspections were common. See Vol. 2, P. 320:2-22.

D. Count V (Terminated Examination Under Oath)

27. Count V alleged that Respondent terminated an Examination Under Oath (EUO) after being accused of stealing a document. (Amended Complaint paragraph 88, Transcript Vol. 1, 150:2-16).

28. The evidence revealed that after the Respondent felt he had been accused of stealing documents which had apparently been misplaced by the insurance company's attorney, Ms. Linda Berns, Esq. Respondent sought to avail himself of counsel and advised that upon the advice of counsel that he would reschedule the matter and not provide additional testimony. The EUO, which typically last about an hour, was conducted for over three hours and intended to resume after a lunch break.
29. The insurance company never rescheduled the continuation of the EUO. See Vol 1, P. 150: 17-151:2.
30. It was further alleged that a compact disc (CD) presented by the Respondent to Berns purporting to contain documents requested that related to the claim actually contained the movie Hotel Transylvania.
31. The CD was not presented in evidence and Berns admitted to never requesting a duplicate copy of the requested documents from the Respondent, but that she did receive the documents from the insured's attorney. Vol 1, P. 137:6-129:24.
32. The Respondent denied that the movie was on the CD and denied any ability for the movie to somehow get burned onto the CD. Vol 3, P. 521:12-523:12.
33. Berns had no explanation for not having requested a duplicate file from the Respondent or not rescheduling the EUO if such testimony was necessary to adjust the claim.
34. Incidentally (and extraordinarily), the Respondent testified that he was asked to change his deposition testimony in the matter related to Count 5. Concluding the insured was attempting to commit fraud, he withdrew himself from further participation in the matter and reported the client to the Department. See Vol 3, P. 446:17-447:25

E. Counts VI, IX, X (Actions Outside the Scope of a Public Adjusting License)

35. Counts VI, IX, and X relate to actions outside of the scope of the public adjuster's license.

36. The Department stipulated that the actions alleged in the three counts are not "public adjusting" activities, but nevertheless claim that Respondent's behavior subjects him to discipline under the jurisdiction of the Department regarding his "fitness and trustworthiness". Vol 1, P. 23:6-24:6.

37. The Respondent contests that conduct beyond that which is proscribed can subject the Respondent to discipline or that the Department has jurisdiction over such conduct.

38. The corporate representative for the Department, Ray Wenger, candidly testified that those acting outside of the scope of a public adjuster (such as appraisers and physical damage appraisal experts) were certainly not required to be licensed public adjusters during the periods alleged in the Amended Complaint (at that the law changed in 2021, after the period of the allegations directed towards Respondent, which targeted contractors, but may now include appraisal activity. No formal process has resulted in a conclusion that appraisal activity applies under the new law). Vol. 2, P. 235:10-237:17.

39. Additionally, while Count VI involved Respondent's work as an appraiser rather than an adjuster, the Department also alleged that Respondent was "threatening" to the insurance company's appraiser, Jim Reichle.

40. Video of the encounter was admitted into evidence. (Petitioners Ex. 25).

41. Reichle ended the encounter with cordial salutations and told Respondent to "have a nice day" and followed up to resume the inspection. Vol. 1, P. 92:7-93:21.

42. Respondent denies ever threatening Reichle and explained that the inspection was terminated due to Reichle's failure to comply with the parties' respective attorneys' agreement regarding speaking to the insured (or their agents) without counsel present.
43. Reichle, who the Department claims felt threatened, admitted to later emailing Respondent to resume and conclude the inspection. Vol. 1, P.92:7-10.
44. There is insufficient evidence to find that Respondent threatened any harm to Reichle or acted in violation of any of the stated rules or statutes, even if they were applicable.
45. In Count IX, the Respondent is alleged to have refused to testify during a deposition as a physical damages expert, not as a public adjuster. His scope of service did not require or involve his public adjuster license.
46. There was no evidence presented regarding Count IX other than a request to note another court record which was objected to as hearsay and inadmissible to prove the truth of the assertions therein.
47. Regarding Count X, the Respondent was working as an appraiser, not a public adjuster. The Department alleged that Respondent was "hostile," "verbally aggressive," and "abusive" and refused to allow the appraisal inspection to go forward. (Amended Complaint Paragraph 131.).
48. Video evidence of the matter recorded by the Respondent does not support that Respondent was in any manner abusive or that he engaged in any conduct warranting a finding of a violation of the stated rules or statutes.

F. Counts VII and VIII, (Permanent Business Address is a P.O. Box)

49. Counts VII and VIII allege that the Respondent's contract contains Respondent's "permanent business address" as a post office box and that a post office box address cannot be "a permanent business address".

50. Respondent admitted that the post office box is listed on the contract and that it was placed on the contract after contacting the Department's inquiry line to confirm that a post office box would satisfy the requirement as his "permanent business address".

51. Respondent further testified that he considered the post office box his permanent business address and was never advised by the Department that the post office box could not be his permanent business address or that such use of a post office box was considered a violation until he was served with the Administrative Complaint.

52. The Respondent testified that he has worked in the insurance field for twenty-four years; has handled tens of thousands of claims; and over the last five years worked as a public adjuster. Vol. 3, 330:12-331:25.

53. The Respondent also testified that also served on active duty as a Lance Corporal in the United States Marine Corps Vol 3, P. 335:1-18, P. 337:18- P. 338:2.

CONCLUSIONS OF LAW

54. DOAH has jurisdiction over the parties and the subject matter of this case pursuant to sections 120.569 and 120.57(1), F.S. (2022). This proceeding is de novo pursuant to s. 120.57(1)(k).

55. DFS seeks a finding of nine violations and seeks to revoke the Respondent's public adjuster's license.

56. In order to impose such discipline on Respondent's license, the Department must prove there exists clear and convincing evidence to impose the requested sanctions against Respondent due to the allegations contained in the Amended Administrative Complaint.

57. Petitioner, as the party asserting the affirmative of the issue in this proceeding has the burden of proof. See Cooke v. DCF, 704 So.2d 726, (5th DCA, 1998); Balino v. DHS, 348 So.2d 349 (1st DCA, 1977); Dept. of Agric. and Consumer Svcs. v. Strickland, 262 So. 2d 893, (1st DCA, 1972).

58. Pursuant to Florida law, "[f]indings of fact shall be based on a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statutes and shall be based exclusively on the evidence of record and on matters officially recognized." Fla. Stat. 120.57(1)(j).

59. Petitioner has the burden to establish by clear and convincing evidence that the allegations contained in the Amended Administrative Complaint support the charged violation, imposition of a fine, and revocation of Respondent's license. Dept. of Banking and Fin. v. Osborne Stern and Co., 670 So.2d 932 (Fla. 1996). The clear and convincing standard of evidence has been described by the Florida Supreme Court as follows:

> [C]lear and convincing evidence requires that 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 allegation sought to be established**.

In re Davey, 645 So. 2d 398, 404 (Fla., 1994) (quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (4th DCA, 1983); see also S. Fla. Water Mgmt. Dist. V. RLI Live Oak, LLC, 139 So.3d 869, 872-73 (Fla., 2014). "Although this standard of proof may be met where the evidence is

in conflict… it seems preclude evidence that is ambiguous." Westinghouse Electric Corp. v. Shuler Bros., 590 So. 2d 986, 988 (Fla., 1991).

60. DFS is required to establish a uniform system of procedures to impose disciplinary sanctions pursuant to Fla. Stat. 626.8698. The uniform system of procedures must provide for the consistent application of disciplinary actions across districts and a progressively increasing level of penalties including application of Fla. Stat. 120.695 regarding notice of compliance warnings for minor violations.
61. The rules provided in Fla. Admin. Code Rule 626.878 are standards which all licensees must follow. DFS is authorized to cite licensees for violations of the Rule.
62. It should be noted that there is no statute or rule which was presented which prohibits a public adjuster from requesting (on behalf of a homeowner) the insurance coverage of adjusters, contractors, or subcontractors that are assigned to enter or climb onto a homeowner's property.
63. Also, the subject of video recording insurance adjusters has been determined to be lawful. See Gesten v. American Strategic Ins. Corp., 339 So. 3d 1008, 1012 (4th DCA, 2022) and Silversmith v. State Farm, 324 So. 3d 517, 518 (4th DCA, 2021).
64. There is also no statue or rule which prohibits coordinating inspections on Saturdays or any specific day of the week (or any evidence of a prohibition in any policy).
65. There is no prohibition against emailing any insurance company representatives (and such conduct is likely protected under the First Amendment).
66. The Department cannot prohibit a licensee from insisting on Saturday inspections and requests for insurance coverage (or sending emails) without proper notice to the licensees of such a prohibition.

67. Justice Oliver Wendell Holmes, Jr. described the specificity required to provide sufficient notice of a prohibition in his well-articulated holding in Boyle v. United States, 283 U.S. 25, 28 (1931) where he stated for the United States Supreme Court:

> "Although it is not likely that a [an accused] will carefully consider the text of the law before he [commits an offense], it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear…" citing United States v. Bhagat Sing Thind, 261 U. S. 204, 209, 43 S. Ct. 338, 67 L. Ed. 616.

68. The Florida Supreme Court in Gaulden v. State, 195 So. 3d 1123, 1125-1126 (Fla., 2016) articulated that, "The cardinal rule of statutory construction is 'that a statute should be construed so as to ascertain and give effect to the intention of the Legislature as expressed in the statute.'" City of Tampa v. Thatcher Glass Corp., 445 So.2d 578, 579 (Fla., 1984) (quoting Deltona Corp. v. Fla. Pub. Serv. Comm'n, 220 So.2d 905, 907 (Fla.1969)). Thus, "[w]hen the statute is clear and unambiguous, courts will not look behind the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain intent." Borden v. East–Eur. Ins. Co., 921 So.2d 587, 595 (Fla., 2006) (quoting Daniels v. Fla. Dep't of Health, 898 So.2d 61, 64 (Fla., 2005)). But "if the statute is ambiguous on its face, the Court can only then rely upon the rules of statutory construction in order to discern legislative intent." Koile v. State, 934 So.2d 1226, 1233 (Fla., 2006). Id., at 1126.

69. "To the degree that this alteration of the statute creates ambiguity as to the statute's applicability, [Courts] [are] required under the rule of lenity to construe it in favor of the accused." Id., at 1126. (Fla. 2016).

70. Additionally, the Department is reminded of the legal maxim: “Nulla poena sine lege” (Latin for no punishment without a law” or the more contemporary English Law iteration of the concept, “Everything which is not forbidden is allowed.”

71. Absent an unambiguous explicit prohibition in a lawful statute or rule prohibiting a homeowner (or public adjuster on the homeowner’s behalf) from requiring proof of insurance coverages of the insurance company’s representatives; identifying a post-office box as the permanent business address; requiring inspections to occur only on weekdays; or suspending inspections to resume at a later time; such conduct is not prohibited and is therefore permitted.

72. The issues presented are if the requests for insurance coverage or the suspending of inspections or requests for Saturday inspections were unreasonable or caused unreasonable delay in adjusting the claims.

73. It is found that the requests for insurance coverage were reasonable, and that the suspending of inspections (including the EUO) were not unreasonable.

74. There is insufficient evidence, certainly not enough evidence to clearly and convincing support that any of the alleged conduct resulted in any meaningful or unreasonable delay in adjusting or paying the claims.

75. Finally, to the extent the emails or testimony alleged that Respondent maintained a harsh or a less-than-amicable tone, such a tone does not relate to the Respondent’s fitness or trustworthiness. It was well presented at the hearing that certainly judges and litigants can be abrasive and something less than amicable or even unpleasant, and nevertheless, such a disposition does not render them necessarily ineffective, unfit, or incompetent.

76. The record, which includes the video conduct which the Department seeks to sanction does not clearly and convincing support a finding that the Respondent is unfit or untrustworthy.

77. The analysis of the nine charged violations of the Department's Amended Complaint are as follows:

A. <u>Fla. Stat. 626.854(14), Property Available for Inspection and Insurer Allowed to Obtain Necessary Information</u>

78. Fla. Stat. 626.854(14), which provides that a public adjuster, "must ensure that prompt notice is given of the claim to the insurer, the public adjuster's contract is provided to the insurer, the property is available for inspection of the loss or damage by the insurer, and the insurer is given an opportunity to inter the insured directly about the loss and claim. The insurer must be allowed to obtain necessary information to investigate and respond to the claim".

79. The violation is alleged to apply to Counts I, III, IV, V, and VI of the Amended Compliant. In Count I, the matter of Vivian Louis, the testimony presented was that the insurance inspection did not occur on the listed dates because of rain, because there was a tarp on the roof, and because the insurance company (or it's third-party contractors) did not have proof of workers' compensation insurance or liability insurance as requested by the homeowner through the Respondent. See Vol. 2, P.306:13-18 and P. 305:21-306:9 and Vol. 4, P. 548:4-17.

80. The testimony was that the property was made available for inspection on three separate occasions until the claim was denied for the reasons cited in Petitioner's Exhibit 7 which included that the property was not made available for inspection.

81. Additionally, it was the decision of the homeowner, through her attorney, Warren Diener who testified that it was Citizens's representatives refused to perform the inspection after having finally coordinated an engineer with insurance coverage to climb the room. Diener testified

that it was Citizens's supervisor, Bamburg who refused to perform the inspection because they refused to be video recorded. Vol 4, P. 548:4-17.

82. Regarding Count III, the allegation is that only Saturday inspections were coordinated until the inspection occurred on July 9 (a Tuesday) when the inspection was completed. It would seem that the fact that the inspection was performed on a Tuesday that there was not an unreasonable insistence on scheduling the matter on any specific day.

83. The testimony was that the homeowner had requested the Saturday inspection and that Saturday inspections were common.

84. Regarding Count IV, the Respondent testified that the homeowner conveyed that proof of liability and worker's compensation insurance was required prior to any third-parties climbing onto the roof.

85. It was revealed that the Citizen's insurance sub-contractor did not only not have proof of the required insurance, but did not even have a policy in effect at the time of the inspection. Vol 4, P. 546:1-16.

86. Regarding Count V, the evidence revealed that the Respondent sat for a lengthy examination under oath until being accused of a crime. He sought to avail himself of counsel and reschedule the balance of the examination. The insurance company's attorney conceded that she never sought to reschedule the examination and never requested a duplicate of the documents requested. Additionally, the materiality of the documents which were never re-requested was never explained nor was the need for such a lengthy examination under oath of the Respondent. The Respondent indicated that the documents were all documents that the insurance company

certainly already had and the insurance company's attorney was able to obtain the documents from the insured's counsel, see Vol 1, P. 137:6-129:24.

87. Regarding Count VI, the Respondent was not working as a public adjuster, but rather as an appraiser. Nevertheless, the Respondent's termination of the inspection due to the insurance company's violation of the agreed-to terms of the inspection allowed for the inspection to be rescheduled after the parties' attorneys resolved the issue of the insurance company's appraiser.

88. An analysis of the non-public adjuster matters will be analyzed infra.

89. In each of the listed counts, the evidence does not clearly and convincing indicate that the Respondent prevented the insurer was from obtaining necessary information to investigate and respond to the claim.

90. The evidence showed regarding Count I, that the insurance company was provided access on the two occasions alleged in the Amended Complaint and on at least one other occasion. Further, the insurance company's inability to access the roof was due to no fault of the Respondent who merely conveyed the homeowner's reasonable request to require proof of worker's compensation and liability insurance prior to climbing on to the roof (something that one would think would be easily provided unless the contractor does not have such a policy which was the case). The request for such proof of insurance is certainly diligent and not unreasonable.

91. Such a request was not a denial of access to the inspect the property or prevent the insurance company from obtaining necessary information.

92. The same analysis applies to Counts III, regarding coordinating inspections at the homeowners request for Saturday. The fact that the inspection occurred during a weekday within sixty-days is evidence that Respondent did not deny access or prevent the insurance company from obtaining necessary information.

93. Regarding Count IV, the Respondent's request (at the homeowner's request) that third-party contractors are insured and thereby insulating the homeowner from exposure to claims by the third-party is not unreasonable and such a reasonable request and diligence cannot be said to deny access or prevent the insurance from obtaining necessary information.

94. Regarding Count V, the Respondents request to reschedule the balance of the EUO after being accused of a crime and seeking to avail himself of his Sixth Amendment Constitutional Right is insufficient evidence to support the insurance company was prevented from obtaining necessary information. There is no evidence that the insurance company ever attemptted to reschedule the EUO, nor did they request a duplicate CD regarding the documents that they claim to have not received. Absent such a follow-up request and the Respondent's unreasonable failure to comply resulting in a delay and preventing the adjustment of the claim, there is insufficient evidence to clearly and convincing conclude a violation.

95. Finally, regarding Count VI, the Respondent's cancellation of the inspection related to matters beyond public adjusting would not support discipline even if appraisal work was within the jurisdiction of the department.

96. The Respondent never refused to re-coordinate the inspection after the parties' attorneys resolved the alleged violation of the parties' agreement. The conduct alleged in Count VI does

not support that respondent prevented the insurance company from obtaining information or denied access, or any violation of Fla. Stat. 626.854(14).

97. There is insufficient evidence to clearly and convincingly conclude that Respondent obstructed or otherwise did not make the property available for inspection or prevented the insurance company from obtaining necessary information.

B. Fla. Stat. 626.854(14)(b): Reasonable Access at Reasonable Times

98. The second listed violation charged under Fla. Stat. 626.854(14)(b) which states, "A public adjuster may not restrict or prevent an insurer, company employee adjuster, independent adjuster, attorney, investigator, or other person acting on behalf of the insurer from having **reasonable access at reasonable times** to any insured or claimant or to the insured property that is the subject of a claim."

99. The alleged violation relates to Counts I, III, IV, V, and VI.

100. Regarding Counts I and IV, the Department has failed to prove clearly and convincingly that access conditioned on proof of insurance was unreasonable, especially since the Department's own witnesses agreed that such proof was a reasonable request.

101. Regarding Counts III, coordinating inspections on Saturdays at the request of the client is not a denial of reasonable access.

102. Regarding Count V, there was no evidence that reasonable access was denied regarding access to the insured or the property.

103. Regarding Count VI, as discussed supra, even if the Department had jurisdiction over the Respondent's conduct as an appraiser, terminating (to re-schedule) the inspection to allow the

parties' attorneys to discuss the insurance company's appraiser's alleged violation was not an unreasonable denial of access.

104. The evidence shows that the properties were made available for inspection, that inspections occurred timely, and that requests made prior to the inspections were not unreasonable.

105. Therefore, there is insufficient evidence to conclude that the Respondent clearly and convincing denied access to the stated properties at reasonable times.

C. Fla. Stat. 626.854(14)(c): Reasonably Act to Allow Inspection

106. Fla. Stat. 626.854(14)(c): "A public adjuster may not act or fail to **reasonably act** in any manner that *obstructs or prevents an insurer or insurer's adjuster from timely conducting an inspection* of any part of the insured property for which there is a claim for loss or damage. The public adjuster representing the insureds may be present for the insurer's inspection, but if the unavailability of the public adjuster otherwise delays the insurer's timely inspection of the property, the public adjuster or the insureds must allow the insurer to have access to the property without the participation or presence of the public adjuster or insureds in order to facilitate the insurer's prompt inspection of the loss or damage."

107. The alleged violation relates to Counts, I, III, IV, V, VI, and X.

108. As set forth supra, Respondent's request, at the behest of the insured homeowner, to obtain proof of insurance from the insurance company's third-party contractors was not unreasonable. Regarding Count I, requesting the insurance prior to climbing on a roof was not unreasonable and did not prevent or obstruct the insurance company from conducting any of its several inspections. In fact, it was the insured's attorney, not the Respondent who advised the insurance company that they would not be allowed to conduct any further inspections.

109. Regarding Count III, coordinating inspections on Saturdays, at the request of the insured, was not unreasonable and did not prevent or obstruct a timely inspection which in Count III occurred within 60 days.

110. Regarding Count IV, it was revealed during the hearing that the insurance company's contractor did not have the required insurance evidencing the need for the request.

111. Regarding Count V, Respondent's availing himself of a Constitutional Right to counsel after the attorney for the insurance company accused him of a crime was not unreasonable and there was no evidence that resetting the balance of the EUO obstructed the investigation.

112. The insurance company never sought to reschedule the EUO and there is insufficient evidence to support that it was prevented from conducting its investigation.

113. Count VI and Count X involved Respondent's conduct unrelated to public adjusting. In Count VI, Respondent served as an appraiser, which as set forth supra, the department does not have jurisdiction over the Respondent. Regarding Count X, the Respondent's conduct related to serving as an appraiser. In neither case was he adjusting claims as defined within the scope of Fla. St. 626.854(1) and as conceded by the DFS corporate representative, Mr. Wenger.

114. Regardless, in Count VI, the Respondent's conduct was not unreasonable nor did it prevent the insurance company from timely investigating the claim. The insurance company never sought to reschedule the inspection after the insurance company's appraiser's violation of the terms of the inspection was resolved by the parties' attorneys.

115. Regarding Count X, the insurance company had already performed its inspection and the Respondent was hired post-denial and after litigation between the homeowner and insurance company had started.

116. The Department has failed to meet its burden to clearly and convincing show that the Respondent's conduct prevented the insurance companies from reasonably acting to allow inspections.

D. <u>Fla. Stat. 626.611(1)(g) Lack of Trustworthiness and Fitness to Engage in the Business of Insurance (Counts I, III, IV, V, VI, VII, VIII, IX, X)</u>

117. 626.611(1)(g) Grounds for compulsory refusal, suspension, or revocation of agent's, title agency's, adjuster's, customer representative's, service representative's, or managing general agent's license or appointment.— (1) The department shall deny an application for, suspend, revoke, or refuse to renew or continue the license or appointment of any applicant, agent, title agency, adjuster, customer representative, service representative, or managing general agent, and it shall suspend or revoke the eligibility to hold a license or appointment of any such person, if it finds that as to the applicant, licensee, or appointee any one or more of the following applicable grounds exist:

(g) Demonstrated lack of fitness or trustworthiness to engage in the business of insurance.

118. The alleged violation relates to all the counts in the Amended Complaint.

119. While "fitness and trustworthiness" is not defined, the evidence presented does not rise to the level that Respondent is unfit or lacks trustworthiness to work as a public adjuster. As set forth, the conduct in counts VI, IX, and X are not related to the Respondent's work as a public adjuster and are beyond the jurisdiction of the Department to sanction. However, even if such conduct were within the Department's jurisdiction, the conduct and evidence presented does

not meet the Department's burden to find that the Respondent was not fit or trustworthy. It was revealed that the claim in Count VI was resolved to the homeowner's satisfaction after the Respondent's involvement and that a non-disclosure agreement was executed. The claim referenced in Count IX is still in litigation. The claim alleged in Count X resolved for over $160,000 more than the insurance company initially offered, after the Respondent's involvement. The evidence does not support that the Respondent is not "fit" to perform the work he undertakes.

120. With respect to Counts I and IV, requiring the proof of insurance of the third-party contractors at the request of the insured is not a demonstration of a lack of fitness or evidence of untrustworthiness. To the contrary, the request demonstrates sound due diligence. It was revealed that the contractor which was the subject of Count IV did not only not have proof of insurance, but that he did not have insurance which would have potentially exposed the homeowner to the perils described in Calin v. Cohen, 883 F. Supp 1182, (Fla. M.D., 2012).

121. With respect to Count III, requesting Saturday appointments at the request of the homeowner and tenants and allowing for the inspection to occur on a Tuesday within sixty days of the claim filing is not evidence of a lack of fitness or evidence of untrustworthiness.

122. With respect to Count V, terminating an examination under oath to allow for the exercise of Respondent's right to counsel after an extensive inquiry was permitted does not demonstrate a lack of fitness or untrustworthiness.

123. With regarding to Counts VII and VIII, use of a post office box while also maintaining a physical office location is not sufficient evidence of a lack of fitness or untrustworthiness.

124. To the extent that the Department seeks to allege that Respondent's direct manner in which he expresses himself in emails or in-person to other individuals is prohibited, such conduct is not subject to sanction nor is it a violation of any rule or statute. Additionally, it is likely protected by the First Amendment of the Constitution of the United States and Article I, Section 4 of the Florida Constitution.

125. Finally, testimony that the Respondent participated in successfully recovering awards to clients refutes the allegations that he is unfit to engage in public adjusting. His demeanor as viewed in the videos and testimony described by the witnesses does not rise to the level of sanctionable conduct.

126. The Department has failed to clearly and convincingly prove that the Respondent is unfit or untrustworthy.

E. Fla. Admin. Code R. 69B-220.201(3)(f), (Adjuster to Act with Dispatch and Due Diligence) (Counts I, III, IV, V, VI)

127. Fla. Admin. Code R. 69B-220.201(3)(f), "An adjuster, upon undertaking the handling of a claim, shall act with dispatch and due diligence in achieving a proper disposition of the claim."

128. The alleged violation relates to Counts I, III, IV, V, and VI.

129. Regarding Counts I and IV, asking for proof of insurance is consistent that Respondent was acting with "dispatch and due diligence".

130. Regarding Count III, coordinating Saturday inspections at the request of the homeowner and allowing for the inspection to occur on a Tuesday within sixty days of the claim being filed is not clear and convincing evidence that the Respondent was not acting with dispatch or due diligence.

131. Regarding Count V, terminating the EUO to obtain counsel after the insurance attorney accused Respondent of taking documents is not evidence that Respondent was not acting with dispatch or due diligence.

132. There was no evidence that Respondent refused to reschedule the EUO or provide duplicate copies of whatever documents were requested if such documents were not really included on the missing compact disc that was never presented into evidence which allegedly contained a movie.

133. Regarding VI, while Respondent was not acting as a public adjuster and the Department does not have jurisdiction over the conduct alleged, there was no evidence that the Respondent refused to reschedule the inspection. In fact, it was prudent (and diligent) to resolve the alleged violation (by the insurance inspector) of the terms set forth for the conduct of the inspection by the parties' attorneys before concluding or further proceeding.

134. The evidence does not clearly and convincing show that Respondent was not acting with dispatch and due diligence.

F. Fla. Stat. 626.8698(6), (Dept. may deny, suspend, revoke and fine up to $5,000. (Counts I, III, IV, V, VI for a violation of any ethical rule Administrative Code R. 69B-220.201)

135. As discussed supra, no violations are found with respect to requesting proof of insurance from third-party contractors, requesting Saturday appointments, or exchanging directly worded emails to whomever absent a violation of statute.

136. Also, there are no violations of R.69B-220.201 for seeking to terminate and reschedule the EUO referenced in Count V, or even if true, by somehow mixing up the CD with a movie. No request was ever made to send a duplicate copy of the documents which the insurance company's attorney likely already had.

137. Regarding Count VI, the evidence does not support that the Respondent is in violation of any ethical rules.

138. The evidence does not clearly and convincing support a violation has occurred or that a fine of or any sanction is warranted.

G. Fla. Stat. 626.611(1)(h), Demonstrated Lack of Reasonably Adequate Knowledge and Technical Competence to Engage in the Transactions Authorized by the License or Appointment (Counts V and IX)

139. Regarding Counts V, there is no evidence to support that the Respondent did not have adequate knowledge and technical competence to engage in the transactions authorized by the license.

140. Regarding Count IX, as stated supra, the conduct alleged is outside the scope of Respondent's public adjuster license. The Department does not have jurisdiction over the conduct and additionally, the evidence does not demonstrate that the Respondent lacked adequate knowledge and technical competence to engage in the handling of the claim as an physical damage appraiser.

141. There is insufficient evidence to clearly and convincingly conclude that Respondent Lacked Reasonably Adequate Knowledge and Technical Competence.

H. Fla. Stat. 8796(2), P.O. Box is listed as the "Permanent Business Address".

142. Regarding Counts VII and Count VIII, the Respondent listed his post office box as his "permanent business address". "Permanent Business Address" is not a defined term. The Respondent testified that prior to listing the post office box address that he contacted the Department's inquiry line and asked if a post-office box was permissible. He testified that he was told that it was permissible. He further testified that at no point in the five years that he

has been in business had anyone ever advised him that the post office box address could not serve as his "permanent business address".

143. The rule does not specify that a permanent business address must be a physical "street address" or "office location". There does not appear to be a prohibition against using a virtual office or office-share address either as a "permanent business address".

144. To find that the Respondent is in violation and deserving of any sanction for using a post office box address as his permanent business address would be sanctioning conduct which Respondent was not placed on notice of its prohibition and would therefore be a violation of his Constitutional Right to Due Process.

145. Such an application would also be an undelegated application of legislative authority. If the Department wants to define permanent business address as a physical street address where an office is maintained, it is within its right to do that. But in did not.

146. The legislature addressed that public adjusters may even work out of their homes and that such a home office would apparently qualify as a "a place of business in the state which is accessible to the public" satisfying the requirements of Fla. Stat. 626.875(1).

147. The legislature's use of "permanent business address" in Fla. Stat. 626.8796(2) and 626.8796(2)(a) as distinguished from its use of the term "a place of business" in Fla. Stat. 626.875(1) can certainly be read to conclude that the legislature distinguished one's physical office space (which may include a virtual office as described in Fla. Stat. 48.031(6)(a) and (b)) from a more permanent address such as a post office box which is less likely subject to office relocations, pandemic shut downs and shut-outs, etc.

148. The Respondent's use of the post office box as a "permanent business address" cannot be a violation of Fla. Stat. 626.8796(2) because Respondent was never noticed that use of such an address was prohibited.

149. The Respondent testified that he maintained the post office box and a physical "place of business" where he kept his office.

150. There is no prohibition and there is insufficient evidence to clearly and convincing conclude that the post office box could not serve as the more permanent address of the two.

151. Even if the legislature intended for the "place of business" to be synonymous with the permanent business address, such a violation is de minimis and immaterial, and not deserving of any sanction.

I. Fla. Stat. 626.621(2), Discretionary Suspension or Revocation Violation of Insurance Code or Law Applicable to Insurance

152. Fla. Stat. 626.621(2), "Grounds for *discretionary* refusal, suspension, or revocation of agent's, adjuster's, customer representative's, service representative's, or managing general agent's license or appointment.—The department may, in its discretion, deny an application for, suspend, revoke, or refuse to renew or continue the license or appointment of any applicant, agent, adjuster, customer representative, service representative, or managing general agent, and it may suspend or revoke the eligibility to hold a license or appointment of any such person, if it finds that as to the applicant, licensee, or appointee any one or more of the following applicable grounds exist under circumstances for which such denial, suspension, revocation, or refusal is not mandatory under… (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."

153. The Department has failed to establish that Respondent violated any provision of the code or "other law applicable to the business of insurance".

154. The analysis herein supports the finding that Respondent has not clearly or convincing violated any of the alleged provisions of Fla. Law.

J. Counts VI, IX, and X, Conduct Beyond the Scope of Adjusting a Claim

155. With respect to Counts VI, IX, and X, Conduct Beyond the Scope of Adjusting a Claim, the scope of a public adjuster is described in Fla. Stat. 626.854 which provides:

> (1) A "public adjuster" is any person, except a duly licensed attorney at law as exempted under s. 626.860, who, for money, commission, or any other thing of value, directly or indirectly prepares, completes, or files an insurance claim for an insured or third-party claimant or who, for money, commission, or any other thing of value, **acts on behalf of, or aids an insured or third-party claimant in negotiating for or effecting the settlement of a claim or claims for loss or damage covered by an insurance contract** or who advertises for employment as an adjuster of such claims. The term also includes any person who, for money, commission, or any other thing of value, directly or indirectly solicits, investigates, or adjusts such claims on behalf of a public adjuster, an insured, or a third-party claimant. **The term does not include a person who photographs or inventories damaged personal property or business personal property or a person performing duties under another professional license, if such person does not otherwise solicit, adjust, investigate, or negotiate for or attempt to effect the settlement of a claim.**
>
> (19) Except as otherwise provided in this chapter, no person, except an attorney at law or a licensed public adjuster, may for money, commission, or any other thing of value, directly or indirectly:
>
> > (a) Prepare, complete, or file an insurance claim for an insured or a third-party claimant;
> > (b) Act on behalf of or aid an insured or a third-party claimant in negotiating for or effecting the settlement of a claim for loss or damage covered by an insurance contract;
> > (c) Offer to initiate or negotiate a claim on behalf of an insured;
> > (d) Advertise services that require a license as a public adjuster; or
> > (e) Solicit, investigate, or adjust a claim on behalf of a public adjuster, an insured, or a third-party claimant.

> (20) The department may take administrative actions and impose fines against any persons performing claims adjusting, soliciting, or any other services described in this section without the licensure required under this section or s. 626.112.

156. The Respondent testified that his conduct described in Counts VI (appraiser), IX (physical damages expert), and X (appraiser) was not public adjusting. The Respondent testified that he was hired by the insured's attorney to value the loss and/or explain the nature of the loss. The Respondent was not contracted to secure a commission, did not represent the insured, and technically worked under the auspices of the homeowner's attorney's license that hired him.

157. The Respondent's conduct as an appraiser and physical damage expert, hired by the homeowner's attorney (not the homeowner) is specifically excluded from the definition of conduct described as "public adjusting". See Fla. Stat. 626.854(1) and the Department's corporate representative, Mr. Wenger conceded that the Department does not regulate appraisers.

158. Finally, while a Florida Bar licensed lawyer remains subject to discipline while performing non-legal services under Fla. Bar R. 4-5.7 (Responsibilities Regarding Nonlegal Services), no such rule exists as it relates to public adjusters.

159. In contrast, a public adjuster is only subject to discipline pursuant to Fla. Stat. 626.8698 regarding violations as prescribed within the scope of the Licensing Procedures Law described in Fla. Stat. 626.022 related to insurance adjusters and related occupations.

RECOMMENDATION

160. Based on the foregoing Findings of Fact and Conclusions of Law, it recommended that the Department of Financial Services enter a final order dismissing the Amended Complaint and not issue any sanction to the Respondent.

Respectfully submitted this __ day of _____

_____
Robert Cohen
Administrative Law Judge
Division of Administrative Hearings

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing served pursuant to e-service on this December 16, 2022 to: Department of Financial Services by E-mail to Marshawn.Griffin@myfloridacfo.com.

Respectfully submitted,

/s/Matthew E. Ladd
Matthew E. Ladd, Esq.,
MattLadd@MLLawMiami.com
4649 Ponce De Leon Blvd., Suite 301
Coral Gables, FL 33146
Ph: 305-665-3978/ C: 305-984-4649
Fla. Bar. # 668151
MattLadd@MLLawMiami.com
Attorney for Respondent