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INFANTINO AND BERMAN

No. 2949 P. 19/22

STATE OF FLORIDA
DEPARTMENT OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL SERVICES,

Petitioner,

v.

ANNA MICHELLE MACK,

Respondent.

Case No. 03-3802PL

CCF

RESPONDENT'S MOTION TO SUPPRESS

Respondent, by her attorney, moves to suppress evidence obtained by petitioner, DEPARTMENT OF FINANCIAL SERVICES, through an unlawful search of respondent's place of work and would show:

1. Petitioner is a state agency and derives its powers from the legislature. Respondent is licensed by petitioner.
2. At all relevant times, respondent has been employed by Beck Insurance Agency in Jacksonville, Florida. During February 2002 petitioner entered the premises of Beck Insurance Agency and inspected its binder book¹. Petitioner then copied approximately 200 customer files of Beck Insurance Agency. Thereafter, petitioner wrote to the 200 customers and requested interviews. Approximately 8 customers consented to the interviews, which resulted in 7 counts of improper conduct against employees of Beck Insurance Agency, including respondent.

¹A binder book is not defined by statute. It is a business record listing each new insurance coverage "bound" by an insurance agent appointed by an insurance company. It identifies the customer/insured, the insurance company, etc.

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3. The following statutes set out petitioner's power to investigate respondent:

\$624.307(3) - The department ... may conduct such investigations of insurance matters, in addition to investigations expressly authorized, as it may deem proper to determine whether any person has violated any provision of the code ...

\$624.317 - **If it has reason to believe** that any person has violated or is violating any provision of this code, **or upon the written complaint signed by any interested person** indicating that any such violation may exist: (1) The department shall conduct such investigation as it deems necessary of the accounts, records, ... pertaining to or affecting the insurance affairs of any general agent, ... **subject to the requirements of s. 626.601.**

\$624.318(1) - The examination or investigation may be conducted by the **accredited examiners or investigators of the department** ...

\$626.601(1) - The department or office may, **upon its own motion or upon a written complaint signed by any interested person and filed with the department or office**, inquire into any alleged improper conduct of any licensed agent ... under this code. The department or office may thereafter initiate an investigation of any such licensee if it has reasonable cause to believe that the licensee has violated any provision of the insurance code.
(e.s.)

4. The evidence developed by respondent during discovery shows that petitioner violated the foregoing statutes as follows:

(a) prior to the entry into Beck Insurance Agency it had no reason to believe that respondent had violated or was violating any provision of the insurance code, (b) prior to the entry into Beck Insurance Agency it had no written complaint signed by an interested person that respondent had violated the insurance

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code, (c) the investigator, Linda Davis, is not accredited by the department, (d) there was no motion by an appropriate department supervisor to investigate respondent, and (e) prior to the entry into Beck Insurance Agency it had no reasonable cause to believe that respondent had violated any provision of the insurance code.

5. At her deposition on December 2, 2003, Linda Davis testified that she is an Analyst 2 (P4, 121), that her duties are the same as an Analyst 1 (P5, 117-19), that an Analyst 1 is an entry level position (P4, 113-15), that she had no specific complaint against respondent prior to the inspection at Beck Insurance Agency (P24, 113-15)², that at Beck Insurance Agency she randomly selected files to be photocopied (P25, 117), and that it was the investigation at Beck Insurance Agency that led to the charges against respondent (P27, 19-11).

6. In Department of Insurance v. Waterhouse, DOAH Case No. 91-5883, in similar circumstances, Judge Stephen F. Dean held that inspections and investigations by the department require some form of written authorization from someone above the level of the investigator/inspector conducting the inspection or investigation. Further, there must be a formal initiation of the inspections or investigations to insure that the action is officially authorized. Only then is the inspector/investigator authorized to enter upon the premises of the insurance agency and

²"Regarding Anna Mack and Jennifer Faloon, I do not have a specific complaint that I was aware of before the inspection."

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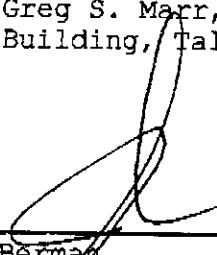
inspect its records, including those that the licensee is required to keep.

7. The pending charges against respondent are the direct consequence of an unauthorized entry into Beck Insurance Agency, which resulted in petitioner identifying and contacting customers to solicit complaints against respondent. This is in clear violation of statutes and illegal, based on prior interpretation of the law by DOAH.

WHEREFORE respondent moves for an order suppressing all evidence obtained by petitioner from its entry into Beck Insurance Agency and all tainted evidence thereafter discovered against respondent.

CERTIFICATE OF SERVICE

I CERTIFY that true copy of the foregoing has been furnished by mail and fax on January 25, 2004 to Greg S. Marr, Esq., Division of Legal Services, 645 Larson Building, Tallahassee, Florida 32399-0333.



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