2012 WL 8016311 (Me.) (Appellate Brief)
Supreme Judicial Court of Maine.

BANKERS LIFE & CASUALTY CO., Petitioner-Appellant,
v.
SUPERINTENDENT OF INSURANCE, Respondent-Appellee.

No. BCD-12-110.
May 4, 2012.

On Appeal from Decision of the Business & Consumer Court

Brief of Appellant Bankers Life & Casualty Co.

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*1 INTRODUCTION

This is an appeal from a decision of the Superintendent of Insurance imposing maximum penalties against Bankers Life & Casualty Co. ("Bankers Life") for ten alleged violations of the Insurance Code in selling three annuities.

None of the charges can be sustained. The ruling is a product of guilt by atmospherics and association.

Bankers Life had an agent, Matthew Juliano, who engaged in two forms of contact with his client, Lucianne Belanger: one appropriate and the other decidedly not. In the first, Juliano worked with Belanger to restructure her investments to achieve her financial, service and tax goals. This strategy was undisputedly appropriate and suitable; it ultimately saved her from more than $76,000 in losses that she would have suffered had she not made these changes to her portfolio. Bankers Life was aware of, supervised, and performed due diligence on, this conduct.

After this proper conduct, however, Juliano allowed Belanger, an **elderly** woman, to borrow money to purchase a snowmobile for him. This was extremely inappropriate.

Unsurprisingly, the snowmobile loan made Bureau of Insurance Staff scrutinize the Bankers Life annuities that Juliano had sold to Belanger. Scrutiny, applying relevant regulatory standards, is entirely fair. Prejudgment and Staff's resultant prejudicial misconduct, however, was not.

Three dispositive principles guide a proper, untainted review of the record on appeal:

***2** First, to sustain the Superintendent's decision, Bankers Life must itself have engaged in culpable conduct relating to the annuity sales. The Superintendent did not purport to impose vicarious liability on Bankers Life for Juliano's actions, so the record must support the Superintendent's findings as to the misconduct she found on the part of Bankers Life. It does not.

Second, under the Insurance Code, an insurer's duty is only to act reasonably, based on a customer's articulated objectives. An annuity must simply be a "suitable" investment, and the insurer cannot act dishonestly in inducing its purchase. An insurer is not responsible for unforeseen future events, nor expected to predict the uncommunicated future desires of its customer. The Superintendent did not apply this standard, however, but rather imposed a hindsight, fiduciary test.

Third, in investigating and pursuing penalties against an insurer, Staff can be zealous, but must be fair. Staff cannot, as it did here, identify the party being investigated as "garbage" while questioning a witness; withhold exculpatory evidence; and repeatedly make material misstatements under oath, to the defendant's prejudice.

*3 STATEMENT OF FACTS

The Superintendent1 found that Bankers Life committed ten violations of the Insurance Code and regulations promulgated thereunder. [2] The record reflects the following. [1]

I. Belanger purchased three Bankers Life annuities.

Bankers Life offers individual insurance products, including annuities. (A. 194-206.) Juliano was an independent sales representative for Bankers Life. (A. 193.) His Unit Sales Manager was Timothy Farren, and his Branch Sales manager was Lawrence Gagnon. (A. 6; 83; 130-31; 141.)

A. Bankers Life's comprehensive information-gathering, verification and suitability verification process was identified, without contradictory evidence, as insurer "best practices."

Based on a referral by one of his existing clients, Juliano contacted Belanger in October 2007. (A. 207.) Farren also met with Belanger to answer her questions regarding her stock holdings. (A. 132.) Ultimately, Juliano submitted three annuity applications to Gagnon for review, which Gagnon approved after conducting his own due diligence. (A. 8-9; 143-46.)

At the hearing before the Superintendent, the only testifying expert, Mary Jo Hudson, a former head of the Ohio Department of Insurance, opined that Bankers Life's information-gathering and suitability review process ***4** culminating in these sales, described below, constituted "best practices." (A. 160, 168.) Bureau Staff produced no testimony to the contrary.

1. Initial fact-gathering

After Juliano' initial meeting with Belanger, they met again several times in November 2007. Over the course of these meetings, Juliano interviewed Belanger and filled out "Fact Finders," which, along with the applications Belanger signed for the annuities, is a form used by Bankers Life to assess the suitability of proposed annuity sales. (A. 267, 270-72, 274, 276-77, 280, 282-84.) This form, which Bankers Life required Juliano to complete, includes information regarding customer income, expenses and goals (A. 142-43, 150-51) - the factors identified in the Bureau rules as relevant to suitability. *See* 02-031 C.M.R. ch. 917, § 6(B) (mandating consideration of the consumer's financial and tax status, investment objectives, and other information "considered to be reasonable by the ... producer"). (A. 78.)

F*inancial Status.* Belanger told Juliano that she was a retired teacher with income of approximately $56,000 per year: $46,000 from a pension and $10,000 from social security. (A. 271.) She owned her home in Caribou, mortgage free, and had - in her words - "minimal expenses," consisting of a car loan and an American Express card. (A. 132, 272, 277-78, 284.) She also disclosed approximately $10,000 in a savings account; $5-7,000 in bonds; $37,500 in certificates of deposit; $5,000 in money market funds; approximately $18,000 in an annuity with Jackson National; and approximately $175,000 in stocks, over $150,000 of which was invested in a ***5** single issue of General Electric (GE) stock. (A. 268, 275, 281.) Belanger was able to pay all of her monthly expenses from her monthly income, without invading any of her investments. (A. 149, 151, 155, 160, 162, 178.)

Tax Status. Juliano also obtained information concerning Belanger's tax status, confirmed by written documentation, that she was still paying taxes on her income and that she wished to reduce her annual tax to the extent possible. (A. 268, 275, 278, 281, 284.) The undisputed evidence reflects that: (1) she was advised to seek tax advice before making any changes to her stock portfolio (A. 102, 178); (2) she obtained that tax advice before selling her GE stock to buy a Bankers Life annuity (A. 103, 134, 138); and (3) she told Juliano that she had obtained tax advice, was withholding dollars to pay the anticipated capital gains tax, and had decided to go forward with the sale and subsequent annuity purchase (A. 103, 133-35).

Financial Objectives. Belanger articulated six goals, each met by the three Bankers Life annuities, as follows:

• GOAL: to reduce exposure to stock market risk. (A. 87, 131-33, 137, 140, 143, 160, 175, 272, 278, 284.) GOAL MET: There was no dispute that the annuity transactions reduced Belanger's stock market risk. (A. 133, 169, 173-74, 234-35.)

o GOAL: to reduce present tax obligations. (A. 85, 87, 143, 272, 275, 278, 284.) GOAL MET: The annuities had undisputed tax benefits through deferral. (A. 116, 143-44, 236.)

• GOAL: safe, stable returns on savings. (A. 87, 131-33, 137, 140, 143, 160-61, 175, 272, 278, 284, 286-87.) GOAL MET: Uncontradicted evidence showed that the annuities protected Belanger from the volatility of the CD rate market (A. 144, 161, 177, 286-87) by providing a long-term guaranteed interest rate with the ***6** opportunity to earn a return above the guaranteed minimum (A. 161, 240-42, 245, 252, 266).

• GOAL: simplification of her financial portfolio through consolidation. (A. 92, 95-96, 137, 162, 166-67, 175.) GOAL MET: There is no dispute that the purchase of the Bankers Life annuities consolidated Belanger's financial portfolio.

• GOAL: service from someone who would be responsive, unlike Jackson National. (A. 86, 132-33, 160, 275.) GOAL MET: Uncontradicted evidence showed that Belanger's desire for better service led her to switch from the Jackson National annuity to a Bankers Life annuity. (A. 92, 108, 144, 166, 285.)

• GOAL: accessibility to her money. (A. 85, 150, 162-63, 176, 273.) GOAL MET: Uncontradicted evidence showed the significant availability of penalty-free annuity withdrawals Belanger could take at any time. (A. 85, 162-64, 250, 255, 257, 264-65, 288.)

2. Verification

To confirm the information gathered by Juliano from Belanger showing the suitability of the annuities as described above, Farren followed up with her directly regarding her financial status, including her income, her report of minimal expenses, and her financial holdings, including her stock holdings. (A. 100-02, 104, 132, 184-85.) All the information Farren learned from Belanger directly was consistent with what Juliano had told him. (A. 139.)

Gagnon - a veteran with 39 years of experience - then reviewed all the information presented in Juliano's Fact Finders. (A. 142.) As was his practice, Gagnon walked Juliano through a checklist that he had developed to determine if the sale was suitable. (A. 89.) Using his checklist, Gagnon ensured that Belanger had sufficient liquidity to meet her stated needs and determined that the annuities met her financial goals. (A. 106-07, 143-47.) Gagnon followed ***7** the same process with Farren (A. 145), and confirmed that Farren and Juliano had gathered consistent information (A. 147).

Gagnon further confirmed this information with independently verifiable documentation. In addition to the Fact Finder completed by Juliano, Belanger signed annuity suitability questionnaires which indicated that the representations made in that document as to her income, expenses, assets and goals - which, in turn, mirrored the representations in the Fact Finder - were

correct. (A. 144, 268, 275, 281.) These applications also reflected that she had other liquid assets and that investing in the annuities would not create financial hardship. (A. 148, 254, 261, 263.)

Finally, Gagnon relied on external indicia of suitability, including the fact that Belanger had historically met all her financial obligations through her monthly pension and social security payments, and without accessing her stocks, savings, or CDs. (A. 149, 151, 155, 160, 162, 178.)

B. The three Bankers Life annuities were suitable to meet Belanger's articulated objectives, based on the information given by Belanger and reasonably ascertained by Bankers Life.

With the proceeds from liquidating her existing CDs, Belanger purchased a Bankers Life annuity for a premium of $37,530 (the "CD Proceeds Annuity"). (A. 8; 243-44.) With the proceeds from her Jackson National annuity, she purchased a Bankers Life annuity for a premium of $17,352.06 (the "IRA Rollover Annuity"). (A. 9, 251, 253.) Finally, Belanger sold her GE stock for $150,253 and used some of the proceeds to purchase an annuity for $135,000 (the "Stock Proceeds Annuity"), keeping the remainder for taxes and her own ***8** expenses. (A. 9, 259-60.) In her only interview with the Bureau of Insurance,[3] Belanger stated that she understood all of the terms of the annuities before she decided to purchase them. (A. 231.)

The only testimony in the case was that each of these annuities were suitable. Juliano, Gagnon, and Farren each testified that, in their judgment, the annuity sales were suitable. (A. 87, 90, 109, 111, 136.) Bureau Staff's actuary, Rick Diamond, testified that he had no issue with moving Belanger from CDs to the annuities. (A. 95.) Hudson, the only testifying expert, opined that each of the annuity sales was suitable. (A. 160, 169, 172.) In Hudson's words, she was "confident and comfortable that... the Bankers Life agents and the company here had done the right thing. [I]t was a good deal for [Belanger]... [T]he transactions in this case were suitable." (A. 172; see also 157-58, 161-64, 166, 170) (expert discussing how the annuities provided adequate liquidity and accessibility, helped Belanger avoid volatility in the stock market and CD rates, and met her desire for improved service and tax deferral).

Notably, the largest transfer, the stock transaction, was independently reviewed after-the-fact by Dale Doughty of Doughty Financial Services, who was commissioned to produce a report at the request of the Bureau of Insurance. (A. 127-28.) The Doughty Report concluded that: (1) "a 76-year old retiree should not have a large part of his/her investable assets in equities ***9** (in this case up to two/thirds), certainly not in a single issue of stock," (A. 235); (2) the annuity was "an entirely appropriate investment alternative to equity investments for this client," (id.); and (3) the Stock Proceeds Annuity should not be moved to a different investment because "it would be extremely difficulty [sic] to find an alternative investment which provides the unique combination of essential benefits for this particular investor that is available in annuities." (A. 236.) After noting several "specific advantages offered by annuities," the Doughty Report concluded:

Safety, substantial liquidity and a reasonable rate of return are the qualities that investors of any age should desire. However, for a single, post-retirement-age investor, those qualities are essential. Given this client's current income from other sources and her other liquid assets it is my opinion that all of those qualities are available in her annuity investment.

(A. 237.) At the hearing, Bureau Staff's investigator admitted that the Doughty Report indicated that the Stock Proceeds Annuity was suitable. (A. 123.) As a result of the transfer to this annuity alone, Belanger saved more than $76,000. (A. 235; see 238.)

II. Juliano obtained a loan from Belanger to buy a snowmobile.

After these annuity transactions, Belanger insured and financed a snowmobile on behalf of Juliano in her own name, for approximately $7,100. (A. 219.) Juliano began paying her for the snowmobile in monthly installments. (A. 212.) He paid for the snowmobile in full approximately nine months later, after the relationship between them had deteriorated. (A. 212, 220-21.) Bankers Life first became aware of the snowmobile loan when questioned about it by Bureau Staff. (A. 110.)

***10 III. Staff engaged in an investigation that began by comparing Juliano to "garbage"; proceeded by withholding and failing to consider exculpatory evidence; and ended with an investigator's repeated misstatements under oath before the Superintendent.**

A. At the investigation's inception Staff called Juliano "garbage" - then later denied, under oath, having done so.

In 2008, Belanger's attorney contacted the Bureau of Insurance to complain about the snowmobile transaction. Shortly thereafter, a Bureau Staff investigator, Michael McGonigle, two assistant attorneys general and an investigator from the Maine Office of Securities conducted a formal interview with Belanger. Belanger was accompanied at the interview by her counsel, as well as a friend who prepared her tax returns. (A. 230.)

During this first interview in the investigation - of which neither Juliano nor Bankers Life was notified - McGonigle compared Juliano to "garbage," to accompanying laughter. (A. 112, 114-15, 232.) McGonigle so characterized Juliano while knowing that he was in front of two potential witnesses; before he had spoken with any representative from Bankers Life; and before he had reviewed any of the annuities at issue. (A. 113, 115-18.)

Later, at the hearing before the Superintendent, McGonigle denied having compared Juliano to garbage in this interview. (A. 114.) After being pointedly reminded that he was under oath, McGonigle changed his testimony and admitted that he had in fact done so. (*Id.*) Staff counsel, who had also been present during the 2008 interview, then attempted to argue that McGonigle was really only talking about chores. (A. 124-25.) When it was clear that this characterization lacked credibility, counsel then suggested an ***11** alternative, and contradictory, excuse: that McGonigle was simply trying to bring "levity" to the situation. (*Id.*)

B. Staff prosecuted Farren, Gagnon and Bankers Life; withheld the Doughty Report until compelled to produce it; then, at the hearing, denied having seen the Report until forced to admit receipt.

In the initial "garbage" interview, Belanger explained that she had understood all of the terms of the annuities before she decided to purchase them. (A. 231.) Staff decided not just to file petitions for enforcement against Juliano for the snowmobile loan, but also additional petitions against Juliano and Bankers Life for the three annuity sales and against Farren for his part in the Stock Proceeds Annuity. (A. 49-57, 58-66, 67-69.)

The next piece of information received by Staff was the Doughty Report. As noted above, Staff admitted that this Report showed that the Stock Proceeds Annuity was suitable. (A. 123.) Staff's response to the Report was to expand the charges, filing a fourth petition against Gagnon. (A. 70-75, 123.)

Staff then withheld disclosure of the existence of the Doughty Report from Bankers Life and Juliano and resisted turning over any documents, including the Report, until ordered to do so following Bankers Life's motion to compel. (A. 123, 126.) Bureau Staff did so although McGonigle admitted at the hearing that he would have wanted the Doughty Report disclosed, and its contents considered, if he were the one being investigated. (A. 123.) The former Deputy Superintendent of Insurance and current head of the Office of Securities testified that the withheld and ignored material would have been ***12** important to any investigator interested in conducting a fair, independent and objective investigation. (A. 128.) Staff offered no contrary testimony.

At the hearing, McGonigle then denied under oath having seen the Doughty Report. (A. 120.) Confronted with the evidence of his receipt of the Report during cross-examination, he had to reverse his testimony and admit that he had in fact received the document. *(Id.)* McGonigle also admitted that the Report unequivocally indicated that the Stock Proceeds Annuity was suitable and that the Report should have been - but was not - taken into account in the investigation. (A. 122-23.)

Based on this Staff misconduct, Bankers Life moved to dismiss the action, both at the close of the Staff's evidence and at the close of the hearing. (A. 129, 180-82.) The Superintendent denied the motions. (A. 130, 182.)

C. Bureau Staffs affirmative case provided no evidence of annuity violations.

Bureau Staff's two witnesses were McGonigle and the then-Chief Actuary for the Bureau, Richard Diamond.

As noted above, McGonigle conceded that the Stock Proceeds Annuity was suitable, made incorrect statements under oath, and admitted that the investigation was not conducted as he would have wanted were he its target.

Diamond proffered an exhibit purporting to suggest that the CD Proceeds and IRA Proceeds annuities, not the Stock Proceeds Annuity, were unsuitable. ***13** At the hearing, however, Diamond conceded that his analysis did not reflect reality and could not be relied upon by the Superintendent. [4] (A. 98.)

At the close of Staff's case, Bankers Life moved to dismiss the petitions. (A. 129.) The Superintendent denied the motion, citing the desire to hear from Bankers Life's expert Mary Jo Hudson, former Commissioner of Insurance in Ohio. (A. 130.) In that testimony, Commissioner Hudson opined that each of the three annuities was suitable and that the suitability process and analysis by Bankers Life constituted "best practices." (A. 160, 168.)

IV. The Superintendent found ten Insurance Code violations by Bankers Life and imposed a maximum fine of $100,000.

Prior to the hearing, Staff moved to consolidate its separate petitions against Juliano, Gagnon, Farren and Bankers Life for a single hearing. (A. 290.) Bankers Life opposed, noting the likelihood of prejudice if the snowmobile accusations were mingled with the alleged annuity infractions. (A. 291-94, 295-98.) The Superintendent rejected Bankers Life's position. (A. 299.)

In doing so, she ruled that "if Staff proves misconduct by Mr. Juliano, it will only be held against Bankers Life to the extent and to the degree that Staff demonstrates a factual and legal basis for holding Bankers Life responsible for Mr. Juliano's actions." (*Id.*) Accordingly, while the Superintendent found three ***14** violations by Juliano relating to the snowmobile loan, she did not find violations by Bankers Life relating to the loan. (A. 28-29.)

The Superintendent also concluded, however, that Juliano committed ten Insurance Code violations related to the annuity sales, finding the Stock Proceeds Annuity to be unsuitable and finding nine other process-related violations. The Superintendent found that Bankers Life committed these ten annuity-related violations too, because, according to the Superintendent, Bankers Life had "fail[ed] to conduct adequate supervision and fail[ed] to follow its own suitability review processes in an effective manner." (A. 27-29.)

The Superintendent fined Bankers Life $100,000, the maximum amount allowed (A. 29). *See* 24 M.R.S. § 12-A(1) ($10,000 per violation).

V. While agreeing that the record supported the conclusion that Staffs conduct was "biased," the Superior Court upheld all the penalties against Bankers Life.

The Business Court (Horton, J.) upheld the Superintendent's penalties against Bankers Life applying the following analysis.

As to each of the ten violations, the Superior Court cited the piece of evidence that it concluded constituted substantial evidence to support the Superintendent's finding. (*See, e.g.* A. 40 (noting that while the countervailing evidence "might well have led a different fact finder to reach a different conclusion, ... it does not detract from the sufficiency of the evidence that the Superintendent relied on to support her determination").)

The Court then upheld the Superintendent's finding that Bankers Life committed these violations because: (1) under the Superior Court's statutory ***15** reading, the Superintendent could impose vicarious liability on Bankers Life; (2) there was evidence in the record that Juliano "was not in close contact with the Bangor office of Bankers Life, as evidenced by Mr. Juliano not having a working understanding of the organization structure of that office"; and (3) "the Superintendent also noted that Bankers Life had a prior history of suitability violations and entered into a consent agreement in 2005 regarding its suitability training and compliance procedures." (A. 45-46.)

As to the impropriety of Staff's conduct, the Superior Court did not disagree with Bankers Life's recitation of what occurred, and stated that its "assertion of bias is supported." (A. 46.) It ruled, however, that no relief was warranted because Staff's conduct "did not factor into [the Superintendent's] decision and cannot be imputed to her." (*Id.*)

ISSUES PRESENTED

1. Is there substantial evidence in the record to support the Superintendent's findings that Bankers Life failed to conduct adequate supervision and failed to follow its own suitability review processes in an effective manner?

2. Is there substantial evidence in the record to support the Superintendent's findings of substantive violations of the Insurance Code, or are these findings otherwise produced by error of law in the application of a fiduciary standard not contained in the Code?

3. Were the proceedings infected by prejudicial violation of Bankers Life's right to due process?

*16 ARGUMENT

Summary

First, there is no record support for the supervisory findings upon which the Superintendent imposed liability against Bankers Life.

While the Superior Court construed the Insurance Code to allow for the imposition of vicarious liability, that is not the basis upon which the Superintendent ruled, and thus her decision cannot be sustained on that ground. As to the basis on which the Superintendent did impose liability -that Bankers Life "fail[ed] to conduct adequate supervision and fail[ed] to follow its own suitability review processes in an effective manner" - no evidence sustains these findings. Instead, the record is replete with evidence of Bankers Life's "best practices" supervisory and suitability review processes, which were followed in reviewing the Belanger annuities. Juliano's testimony, four years later, as to the organizational structure of Bankers Life's Bangor office was not only unrefuted, but reveals no material inadequacy in supervision or suitability review. Neither the decision of the Superintendent nor the decision of the Superior Court explain how this could be so. The other basis for the finding Bankers Life's past conduct - is not only irrelevant, but it is prejudicial error to rely upon past conduct to find current liability. This lack of substantive evidence to meet Staff's burden of proof requires reversal of all the violations found against Bankers Life.

Second, there was no substantive violation of Rule 917 or the Insurance Code, properly construed. Given the record, to impose liability, the ***17** Superintendent was forced to apply a hindsight, fiduciary standard unsupported in the law and to rely on immaterial discrepancies with no relationship to statutory objectives. The relief required is the same - reversal in favor of Bankers Life.

Third, the investigation and proceedings before the Superintendent failed to comport with standards of fairness and due process, to the prejudice of Bankers Life. This failure requires a remand to the Bureau for untainted proceedings.

Standard of Review

As to the question whether the record supports the decision, this Court reviews the record without deference to the Superior Court to determine whether substantial evidence supports the Superintendent's findings. *Kane v. Comm'r of Dep't of Health & Human Servs.*, 2008 ME 185, ¶ 12, 960 A.2d 1196, 1200. Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support the resultant conclusion." *Lewiston Daily Sun v. Maine Unemployment Ins. Comm'n*, 1999 ME 90, ¶ 7, 733 A.2d 344, 346.

In assessing whether this standard has been met, the Court takes into account that the burden was on the prosecutor, here Staff, to "sustain all... material allegations by competent proof." *See Gould v. Hutchins*, 10 Me. 145, 149 (1833). Additionally, substantiated allegations of bias require a heightened level of scrutiny when reviewing the Superintendant's inferences and conclusions. *See* ***18** *Gashgai v. Bd. of Registration in Med.*, 390 A.2d 1080, 1084 (Me. 1978) (unsupported allegations paired with inappropriate bias "renders suspect" the ultimate administrative decision); *see also Jacobs v. Jacobs*, 2007 ME 14, ¶ 9, 915 A.2d 409, 411 ("Our assessment of whether an inferred fact is the product of a reasonable inference drawn from evidence, or mere speculation, does not occur in a vacuum.").

As to the proper construction of law upon which the findings are based, Rule 917 and the Insurance Code, this Court reviews issues of law *de novo*. *Allied Res., Inc. v. Dep't of Public Safety*, 2010 ME 64, ¶f 11, 999 A.2d 940, 943. If the plain meaning of the law can be derived from its language and context, then the Court adheres to that language, with the goal of implementing legislative intent. *Id.* ¶ 11, 15, 999 A.2d at 943-44. If statutory or regulatory language is ambiguous, then the Court defers to the Superintendent's interpretation if it is reasonable, looking at, *inter alia*, the subject matter, the purpose of the statute and the consequences of a particular interpretation to assess reasonableness. *Id.* ¶ 21, 999 A.2d at 945. In making this assessment, the Court takes into consideration the penal nature of the law, which requires a strict construction of the statutory and regulatory language. *See infra* at 20-21.

As to the due process violation, the Court employs *de novo* review, with no deference to the Superintendent's conclusions, because the issue is not a question of statutory interpretation within her administrative expertise, *see Town of Eagle Lake v. Comm'r, Dep't of Educ*, 2003 ME 37, ¶, 818 A.2d 1034, 1037 (deference only appropriate when a dispute involves the interpretation of ***19** a statute the agency administers). This Court directly reviews the Superintendent's conclusions and does not defer to the Superior Court's analysis or decision. *Nancy W. Bayley, Inc. v. Maine Employment Sec. Comm'n*, 472 A.2d 1374, 1377 (Me. 1984).

I. Reversal is required as to each violation found against Bankers Life because the Superintendent's basis for imposing liability against Bankers Life is unsupported in the record.

A. Reversal is required if substantial evidence does not support the Superintendent's finding that Bankers Life "fail[ed] to conduct adequate supervision and fail[ed] to follow its own suitability review processes in an effective manner."

Because the Superintendent found Bankers Life liable based on the conclusion that Bankers Life "fail[ed] to conduct adequate supervision and fail[ed] to follow its own suitability review processes in an effective manner" (A. 27), the penalties against Bankers Life can be sustained only if substantial evidence in the record supports these findings.

1. This Court should defer to the Superintendent's statutory interpretation requiring fault-based liability.

As an initial matter, this Court must apply a fault-based standard of liability in reviewing the Superintendent's order because the Superintendent interpreted the statute she applied as imposing this standard in this context. In granting Staff's motion to consolidate, the Superintendent ruled that she would not hold Bankers Life liable for Juliano'S conduct absent a factual and legal

basis for doing so (A. 299), and Bankers Life relied on this ruling in the hearing. Consistent with her ruling, the Superintendent did not impose liability on Bankers Life for Juliano'S snowmobile loan conduct given a lack of ***20** culpability by Bankers Life. She did impose liability on Bankers Life for the annuity transactions, based on her findings of culpable failures on its part.

The Superintendent's reading of this language is not unreasonable. Nothing in Section 1445 nor any other section of the Insurance Code explicitly provides that an insurer must be held vicariously or strictly liable for agent misconduct. [5] Looking at the Code as a whole, it penalizes culpable conduct, e.g. dishonest practices." 24-A M.R.S. § 1420-K(1)(H). the Superintendent imposed maximum civil penalties against Bankers Life, with no indication that they had a remedial objective. Rather, the purpose was to penalize. (*See* A. 29.) While the construction to be given to statutes and regulations that have both remedial aspects (*e.g.* license revocations) and penal aspects is murky, *compare Cobb v. Bd. of Counseling Prof'ls Licensure,* 2006 ME 48, ¶ 36, 896 A.2d 271, 280 (Clifford, J. concurring) *with id.* ¶ 55, 896 A.2d at 286 (Dana, J. and Alexander, J., dissenting), to the extent civil penalties are imposed, precedent supports a strict construction of the statutes upon which the penalties are based. *See id.* ¶ 57, 896 A.2d at 286-287 (Dana, J. and Alexander, J., dissenting) (citing, *inter alia*, *Maine Real Estate Comm'n v. Kelby,* 360 A.2d 528, 532 (Me. 1976) ("Although the void-for-vagueness doctrine receives its commonest application in the criminal law context, '[T]he doctrine has [also] been applied in instances where one must conform his conduct to a civil regulation." (quoting, with alterations, *Shapiro Bros. Shoe Co. v. Lewiston-* ***21** *Auburn Shoeworkers Protective Ass'n* 320 A.2d 247, 253 (Me. 1974)). The Superintendent was entitled to interpret the statute, viewed in context of the Insurance Code as a whole and applied as a penalty, as requiring culpability.

Because the Superintendent's view that culpability was required under the Code in this context is a rational interpretation, the Court should defer to that view. *See Allied Res.,* 2010 ME 64, ¶ 21, 999 A.2d at 945.

2. The Superintendent's decision can only be sustained on the basis invoked by the Superintendent.

In any event, whatever the Superintendent's interpretation of Section 1445(1)(D), and whether or not vicarious liability could hypothetically be imposed under this statute, the relevant point is that in this case, the Superintendent in fact imposed liability based on her factual finding that Bankers Life "fail[ed] to conduct adequate supervision and fail[ed] to follow its own suitability review processes in an effective manner." Whether her ruling can be sustained or not must live and die on the basis she articulated and upon which she ruled. *In re Maine Motor Rate Bureau,* 357 A.2d 518, 527 (Me. 1976) (in reviewing agency action, the Court must judge the propriety of such action solely by the grounds invoked by the agency") (quoting *SEC v. Chenery Corp.,* 332 U.S. 194, 196 (1947)). *See also* 2 Am. Jur. 2d *Administrative Law* § 568 (current through February 2012 update) ("It is a fundamental rule of administrative law that a reviewing court, in dealing with a[n agency] determination... must judge the propriety of such action solely by the grounds invoked by the agency as disclosed by the record.").

***22** This conclusion resonates especially here, when, as the Superior Court recognized, the evidence did not inexorably lead to the conclusion that violations occurred. *(See e.g.,* A. 39-40.) The Superintendent could easily have found no liability for Bankers Life as to the annuity violations on this record. Hence, for the Court to affirm the imposition of maximum penal violations based on a ground not relied upon by the Superintendent herself would be particularly inconsistent with the black letter rule limiting the scope and nature of judicial review of administrative appeals.

In sum, whether or not vicarious liability **could** be imposed under Section 1445(1)(D) as the Superior Court opined (A. 45-46), is not relevant to this appeal. If the record does not support the Superintendent's factual findings of failures on Bankers Life's part, the decision cannot be sustained.

B. Substantial evidence does not support the Superintendent's finding that Bankers Life "fail[ed] to conduct adequate supervision and fail[ed] to follow its own suitability review processes in an effective manner."

Nowhere in her decision does the Superintendent explain her factual conclusion that Bankers Life "fail[ed] to conduct adequate supervision and fail[ed] to follow its own suitability review processes in an effective manner." Nor does she identify the evidence upon which her finding is based. The Superintendent did not cite any evidence to support her finding because there is none.

1. Bankers Life used best practices.

The protocols followed by Bankers Life to ensure that annuities are suitable and that accurate information has been exchanged are described ***23** above. They consisted of completion of initial Fact Finders; follow up interviews with the customer by Farren; signed suitability questionnaires and applications from the customer; and review by Gagnon, the branch manager. There was no evidence that the forms did not seek the right information, or that this process was inappropriate. To the contrary, the only testimony on this point was that Bankers Life followed "best practices." (A. 160, 168.)

Not only is the record devoid of any evidence upon which to conclude that Bankers Life's processes did not comport with the best standards of the industry, but Belanger herself confirmed that she understood all the terms of the annuities she was purchasing. (A. 231.) Further, there was no evidence presented to suggest that there was any reason for Bankers Life to suspect from the information shared by Belanger that any of these annuities were not suitable or that its best practices processes were not being followed.

2. There was no evidence to the contrary.

The only evidence that the Superior Court could wrest from the record to attempt to sustain the Superintendent's factual findings against Bankers Life was: (1) Juliano's lack of "a working understanding of the organization structure of [Bankers Life's] Bangor office" and (2) previous penalties imposed upon Bankers Life. (A. 45.) The first fact is immaterial. The second is not only irrelevant, but underscores how legal error fatally infected this proceeding.

The Superior Court cites R. 446-47 as the source of the finding regarding Juliano's understanding. (A. 45; *see* A. 6-7.) This is a citation to the Superintendent's decision. In that portion of the Superintendent's decision, ***24** the Superintendent states that "[d]ue to the distance," Juliano was not "in close contact" with the office.[6] (A. 6.) The Superintendent then states that Juliano "did not have a clear picture of the office's organizational structure," because he testified that Farren was a manager, but he could not recall whether Farren was the manager of his particular unit. (A. 7.)[7]

Nothing in the record indicates that Juliano's recollection was incorrect. Farren testified that there were three managers under him, and Juliano would have been in one of those units. (A. 99.) There was no other evidence whether Juliano was in Kennison's unit or not. Thus, Juliano's recollection that he was in Kennison's unit would have been entirely correct. Any opacity in the record on this point is due to the questions asked, not a gap in Juliano's understanding.

In any event, Juliano was not asked about organizational structure, and if he had been, an inability to recite that structure would have been immaterial ***25** to purported violations. That an independent agent might not recall –nearly four years after the fact – the precise organizational structure of Banker Life's Bangor office (had he actually been asked that question) sheds no light on whether Bankers Life adequately supervised Juliano and adhered to its own suitability review processes. *See Hannum v. Bd. of Envtl. Prot.*, 2003 ME 123, ¶ 15 n.6, 832 A.2d 765, 770 ("Fact-finders must rely on evidence, not speculation, in fact-finding, and we must vacate decisions where fact-finding was unsupported by evidence.").

There must also be a logical nexus between Bankers Life's alleged misconduct and the substantive violation – some indication that Juliano's alleged lack of knowledge of the organizational structure of the Bangor office (assuming there were any) somehow contributed to substantive violations of the Insurance Code. The record is completely lacking in this regard. Juliano's memory of the Bangor office's organizational structure could not have reflected any flaw in the processes by which the suitability of

Belanger's annuities were determined by Bankers Life. Neither the Superintendent's nor the Superior Court's opinions explain how this could be so.

In short, the citation of this alleged failure of recollection only shows the straws the Superior Court was forced to grasp to find any evidence in the record to support the Superintendent's findings as to Bankers Life. That this is all the Superior Court could mine from the record highlights that no substantive evidence exists to sustain the penalties against Bankers Life.

***26** This conclusion is confirmed by the other piece of "evidence" cited by the Superior Court to support the Superintendent's findings against Bankers Life that penalties were previously imposed against Bankers Life.

It is black letter law that while a past violation may inform the size of a penalty against someone **after** a current violation is found, it is **not** and **cannot be** deemed relevant evidence as to whether a violation has **in fact** occurred. M.R. Evid. 404(b); *State v. Jackson*, 1997 ME 174, 1 8, 697 A.2d 1328, 1331 ("Evidence of prior bad acts is not admissible to prove that a person acted on a particular occasion in conformity with his past behavior."). While the rules of evidence are not directly applicable to administrative proceedings, the agency must nevertheless rely on competent evidence, and this Court has previously recognized that prior bad act evidence is not competent evidence. *Bolduc v. Androscoggin County Comm'rs*, 485 A.2d 655, 659 (Me. 1984) (only overlooking admission of evidence of prior misconduct because the agency "did not rely on this ... evidence in reaching their decision").

Thus, this justification for the Superintendent's finding not only does not constitute substantial evidence, but reliance upon it constituted legal error. Just as Staff concluded that Juliano must have violated the law as to the annuities because of his snowmobile loan, the Superintendent concluded that Bankers Life must have engaged in misconduct because of previous conduct. Both perspectives are legally prohibited, resulted in prejudice, and require reversal on this record.

***27 II. The record lacks substantial evidence of any substantive violation of the Insurance Code as to the annuity sales.**

Because there was no basis for the Superintendent to impose liability on Bankers Life as to any of the ten violations for supervisory failure, we need go no further. Each violation found against Bankers Life must be reversed on this ground. But, even if there were some evidence in the record to sustain the Superintendent's finding of supervisory failures on the part of Bankers Life, her rulings would still require reversal because there was no evidence of a substantive violation of the law by anyone as to the annuity sales.

The evidence relating to each of the ten purported violations is discussed below, Sections II.A-F. In assessing this evidence, it is important to note that, as a legal matter, neither Rule 917[8] itself nor the statutes cited as authority for that Rule, 24-A M.R.S. §§ 212 and 2517,[9] impose fiduciary obligations.

***28** Rather, the Rule requires only "reasonable" efforts by an insurer to discern whether an annuity is **a** "suitable" investment for the customer. The Rule provides that the reasonableness of the insurer's conduct must be measured based on "the facts disclosed by the consumer," with the insurer having made "reasonable efforts" to obtain information regarding the consumer's financial status, tax status, investment objectives, and such other information "used or considered to be reasonable" by the insurer, to provide a suitable investment.

It would therefore violate a common sense reading of that Rule and deprive insurers of a predictable guideline of conduct to read Rule 917 as imposing a requirement that the insurer must scorch the earth to investigate a customer's situation, achieve the best possible investment strategy for her, and be held liable if unforeseen circumstances or uncommunicated information could, in hindsight, have supported a different investment strategy were the insurer acting as the customer's fiduciary instead of selling a reasonably suitable financial product.

Applying this proper legal standard to the record, no violation occurred.

***29 A. Violation #1 - "an unsuitable annuity sales recommendation that failed to reserve sufficient stock proceeds to meet [Belanger's] stated liquidity needs, in violation of Rule 917, § 6(A)."**

As noted above, the three Bankers Life annuities sold to Belanger were all suitable for her. There was no evidence to the contrary. Staff even admitted that the Stock Proceeds Annuity was suitable. (A. 123.)

The Superintendent nevertheless found the Stock Proceeds Annuity unsuitable because, while Belanger indicated a desire to have $20,000, "the entire CD proceeds and all but $15,000 of the stock proceeds were invested in annuities, and [Belanger] had to use approximately $9,000 of that amount to pay... taxes." (A. 22-23.) Thus, the Superintendent imposed a maximum penalty on Bankers Life for providing an annuity that saved Belanger over $76,000 because Belanger retained $6,000 from the stock proceeds rather than $20,000.

1. The record demonstrates adequate liquidity, and that Belanger chose how much liquidity to retain.

It is indisputable that Belanger in fact had far more than $20,000 left after she bought the Stock Proceeds Annuity. The uncontradicted record evidence established that Belanger had the following after the Stock Proceeds Annuity transaction:
• $6,000 from the GE stock sale after taxes (A. 22-23);

• $10,000 in a savings account (A. 268, 275, 281); [10]

***30** • $5-$7,000 in bonds (A. 281);
• $5,000 in mutual funds (A. 275);

• $20,000 remaining in the stock market (A. 235, 278);

• approximately $19,000 on a penalty-free basis every year, at any time, from her annuities (A. 250, 258, 262, 288); [11] and

• approximately $5,000 per month from her pension and social security. (A. 268, 275, 281.)

Accordingly, the only way to find a disconnect between an articulated desire from Belanger and what she ended up with is if she indicated that she wanted to retain $20,000 **(1) in cash, and (2) solely** from the sale of her GE stock. While this was in fact a post hoc rationale created by opposing counsel, and is therefore not a proper grounds for affirmance, *In re Maine Motor Rate Bureau*, 357 A.2d at 527, it is apparently basis for the Superior Court's sustaining the violation finding. (See A. 38.) There is, however, no evidentiary support for such a finding.

The only page of the record cited by the Superior Court to support this finding that Belanger wished to retain $20,000 in cash from the sale of her GE stock is a page from the first Fact Finder that Juliano filled out. One question on the form asks "How much of your savings to you believe needs to be totally ***31** liquid and accessible for your use?" Juliano filled in: "20K." (A. 272.) [12] (See A. 37-38.)

Thus, the finding for this violation hangs on the following unsupported leaps: the phrase "totally liquid" on Bankers' Life's Fact Finder form means "cash," and "saving" means not the customer's overall portfolio as communicated to the insurer, but rather proceeds from the stock sale alone. These conclusions, unsupported in themselves, are affirmatively belied by the actual facts.

The customer herself carried out the stock transaction, after receiving tax advice, and she alone chose the amount to invest in the annuity. (See A. 103, 105, 133-35, 138.) Belanger was the master of what amount she chose to retain from her stock sale, not Bankers Life. After Belanger sold her GE stock for $150,000, she requested an annuity from Bankers Life for $135,000, specifically acknowledging that she wanted to keep $15,000 of the stock proceeds for taxes and other expenses, which she did. (A. 229.)

In sum, Belanger did exactly what she wanted to do, in retaining over $65,000 in liquidity in her overall portfolio and holding back only $15,000 from the stock sale, and neither Juliano nor Bankers Life committed any violation of the Insurance Code.

***32 2. A finding of inadequate liquidity necessarily misconstrues Rule 917 and relies on an improper hindsight inquiry.**

Apparently, according to the Superintendent, when Belanger sold her stock and chose to invest $135,000 in the Stock Proceeds Annuity, Juliano should have refused to do so because this would not leave her $20,000 in cash from the stock proceeds sale alone after taxes, and his failure to refuse somehow rendered the $135,000 annuity "unsuitable." No reasonable reading of the law or this record supports this view.

Again, the Superior Court's analysis in its decision is useful for confirming the lack of evidence under the law, properly construed. The Superior Court sustained the Superintendent's finding because, regardless of whether one viewed a requirement for liquid assets as only cash, in hindsight, it turned out that Belanger had insufficient liquidity, as shown by the fact that she needed a loan to fix her roof and withdrew money from the annuities. (A. 38.) The Superior Court ruled that liability could be imposed because Juliano "knew" that Belanger was investing $135,000 in the annuity "but never raised with her the effect of doing so on her cash position." (*Id.*) These statements confirm that the Superintendent's findings are based on hindsight and application of a fiduciary duty found nowhere in either the Rule or statute.

The fact that in hindsight it turned out that Belanger required more cash based on needs communicated neither to Juliano nor anyone else at Bankers Life, is **not** the test. Rule 917 only requires "reasonable grounds" for concluding, at the time, and "on the basis of the facts disclosed by the ***33** consumer," that the annuity sale was suitable. 02-031 C.M.R. ch. 917, § 6(A). Nor, moreover, was there any reason for Bankers Life even to suspect that the purchase of the Stock Proceeds Annuity would leave Belanger with inadequate liquidity to meet her financial needs. Belanger called her expenses "very limited" (A. 151) and "minimal" (A. 132), and characterized her debts as "small" (*Id.*). She also signed statements that the annuity would not cause her financial hardship. (A. 148, 254, 261, 263.) She had also for years paid her monthly expenses using her pension and social security, without invading her investments. Not only did Belanger never touch her stock holdings, she never even used her annual $4,000 in stock dividends, which was reinvested each year. (A. 149, 151, 155, 160, 162, 169, 178.)

In sum, to impose a maximum civil penalty on Bankers Life for providing an unsuitable annuity on this record is untenable. Nothing in Rule 917 even suggests that an insurer will be deemed to have violated the Rule and suffer civil penalties if it offers an annuity that is in fact suitable for the customer, if the customer in the future experiences unprecedented and unforeseen expenses. Bankers Life could not have anticipated penal liability under the Insurance Code for the conduct for which it is being held liable here.

***34 B. Violation #2 – a "misleading comparison of [the]... Jackson National annuity with the IRA Rollover Annuity, in violation of 24-A M.R.S.A. § 2155."**

The Superintendent found that Juliano violated Section 2155[13] because he provided a "misleading" comparison by not highlighting to the extent she deemed appropriate the fact that the Bankers Life 3% bonus rate was guaranteed only for the first year, and that this added benefit would be reduced by the amount of the Jackson National surrender charge. (A. 25.)[14] The

mere fact that Juliano did not provide the specific information that the Superintendent thought could be useful at the specific time that she thought he should have does not make his communications misleading.

Belanger knew of and accepted Bankers Life's marginally lower rate, as Belanger stated that she was willing to accept the decrease of "about half a percent as long as I have someone I can talk to and someone that calls me ***35** back" to provide service. (A. 86, 179.) It is also undisputed that Bankers Life provided Belanger with a statement at the time the applications were filled out, stating: "You will receive an interest rate bonus of at least 2% in the first year. This bonus is for the first Policy Year only." (A. 246, 248-49.) The statements further disclosed that "[t]he initial interest rate is guaranteed for the first Policy year. Renewal interest rates ... are guaranteed to never be less than 2.5%." (*Id.*) No one ever contended that this statement was in any way incomplete or misleading.

Nor is there any evidence that anything Juliano said to Belanger with respect to the Jackson National Annuity or the IRA Rollover rate was false; that he tried to trick or conceal anything from her; or that Belanger somehow relied upon his initial purportedly incomplete initial comparison. There was no evidence of intent to mislead, no actual misleading, and Bankers Life's processes ensured that Belanger was given accurate and complete information when she switched to a Bankers Life annuity that conformed to her articulated objectives.

Nevertheless, the Superior Court upheld this violation finding by concluding that, while a different factfinder might well "have reached[ed] a different conclusion," Juliano's first oral description of the two annuities was incomplete, and, as such, sufficient to impose a maximum penalty. (A. 40.)

Again, this reasoning applies an incorrect legal standard and underscores the insurmountable burden being imposed on Bankers Life to avoid liability. Given that no one was in fact misled, there was no intent to ***36** mislead, and Bankers Life provided admittedly accurate information, with no reason to believe that Belanger was being induced to switch to the (suitable) IRA Rollover Annuity based on any incomplete or misleading comparisons, an insurer in Bankers Life's situation would not anticipate its actions here could be deemed in violation of Section 2155 and result in penalties against it.

C. Violation #3 - "dishonest practices in using the first-year bonus to make a misleading comparison of the yields of the IRA Rollover Annuity and the CD Proceeds Annuity with yields of [Belanger's] existing investments, in violation of 24-A M.R.S.A. § 1420-K(1)(H)."

Again, while not finding the CD Proceeds Annuity unsuitable, the Superintendent apparently found that Juliano violated Section 1420-K(1)(H) [15] by not sufficiently highlighting that the CD Proceeds Annuity was subject to a 2% premium tax, reducing the 3% first-year bonus to 1%, further reduced by early withdrawal penalties for the CDs. (A. 25.)

As with Violation #2, the record is devoid of any evidence of fraud, dishonesty or coercion by anyone, and certainly not by Bankers Life.

The Superintendent's explanation of her finding also reflects her application of an incorrect test. [16] She does not support her finding with citation of evidence for the proposition that Juliano intended fraudulently to induce or coerce Belanger to purchase the Bankers Life annuities, or that ***37** Belanger was in fact induced or coerced to purchase any Bankers Life annuity by virtue of how Juliano orally described the 3% bonus.

Instead, the Superintendent speculated that that there might have been an even better way to structure the transfer to the CD Proceeds Annuity. (A. 25 n.15: "One way to achieve those benefits... would have been to purchase a single annuity with the stock and CD proceeds after the highest yielding CD ... matured in early 2008."). [17]

That the Superintendent believed that better financial planning would have included a different timing on the annuity purchases is not the test, however, for whether an insurer has engaged in "fraudulent, dishonest or coercive practices ... in the conduct of its business." A reasonable insurer in the shoes of Bankers Life, which indisputably provided complete and honest information in the sale of a suitable annuity, would not anticipate liability here.

D. Violation #4 – "dishonest practices in submitting unsigned Fact Finders with the first two annuity purchases and misrepresenting that the client refused to sign, in violation of 24-A M.R.S.A. § 1420-K(1)(H)."

The Superintendent found that Juliano had engaged in a dishonest practice in explaining why Belanger had not signed the first Fact Finder. ***38** (A. 28.) In his submission of the first Fact Finder to Bankers Life, Juliano had written "Client did not feel the need to sign file," (A. 10) - an assertion which the Superintendent found "not plausible." (A. 24.) Thus, the Superintendent imposed a maximum civil penalty on Bankers Life because she concluded that Juliano had lied to Bankers Life when he told the company that Belanger did not feel she needed to sign the form.

1. There was no basis to find a misrepresentation.

There is no evidentiary basis to support the conclusion that Juliano lied. He did not say he lied, and Belanger never said he lied. There was also no reason why he would lie. Belanger was not required to sign the Fact Finder. Testimony was undisputed that it is not unusual for a client to decline to sign a Fact Finder, given that it is not required. (A. 148; see also A. 23-24 (Superintendent acknowledging that Belanger would be "within her rights" not to sign the Fact Finder, as the consumer "has no obligation to participate in the suitability analysis").) Juliano had no motive to lie, and the Superintendent never explains why she thinks he would do so.

Two days later, moreover, Belanger signed a Fact Finder submitted with the Stock Proceeds Annuity that contained the same information. (A. 10, 278.) Hence, there was no reason for Bankers Life to suspect from the fact that the first Fact Finder was unsigned that there was anything improper occurring, and there was never any evidence or finding that anything improper did in fact occur - the information on all the Fact Finders was correct. Not only did Belanger independently confirm to Farren that the information on the Fact ***39** Finders was accurate (A. 139), but Belanger signed several documents confirming the material assertions contained in the unsigned Fact Finders. (A. 148, 268, 275, 281.)

This lack of supporting evidence is particularly glaring given that Staff had the burden of proving a "dishonest practice" to prove a violation. The suggestion that Juliano, for no reason, would gratuitously tell Bankers Life a lie that Belanger declined to sign one of many documents, when she had no reason to sign and in fact signed similar documents shortly thereafter, does not meet this burden.

The Superior Court upheld the Superintendent's violation finding because Belanger signed 22 other documents the same day that Juliano indicated that she chose not to sign the initial Fact Finder. Because the Superintendent as fact finder was entitled to make credibility determinations, the Superior Court reasoned that the fact that Belanger signed the other documents was sufficient to sustain the Superintendent's ruling. (A. 42.) But the fact that Belanger signed various other documents the same day she declined to sign the first Fact Finder cannot be sufficient substantive evidence to support a penal finding of a lie when there is no logical motive to lie, no witness claimed there was a lie, and the alleged lie had no nexus to any harm or potential harm to anyone under the Insurance Code. Rather, it is sheer unsupported speculation. *See Connolly v. Bd. of Soc. Work Licensure*, 2002 ME 37, ¶ 9, 791 A.2d 125, 127-28 (reversing board's decision that social worker violated confidentiality rule because finding that confidentiality was breached ***40** based simply on the length of a meeting was "speculative": "The Board's finding that Connolly disclosed confidential client information is not supported by any evidence, let alone substantial evidence.")

In short, there are no facts supporting the Superintendent's finding on this record. Nor is there even a rational basis to speculate that Juliano would want to lie about Belanger's willingness to sign the first Fact Finder. Substantial evidence is such relevant

evidence as a **reasonable** mind might accept as adequate to support the resulting conclusion. *Lewiston Daily Sun*, 1999 ME 90, ¶ 7, 733 A.2d at 346.

2. There was no basis for holding Bankers Life liable for being told a lie.

Even if there were some plausible evidentiary basis to conclude that Juliano felt like lying and in fact lied, there is no basis to find Bankers Life liable for a dishonest practice. The alleged lie was to it, Bankers Life. There is no allegation, let alone evidence, that anyone lied to a customer or engaged in any other dishonest practice with a customer vis-a-vis an unsigned Fact Finder. Nor was there any reason for Bankers Life to suspect Juliano was lying, and no evidentiary basis to conclude that Juliano's alleged lie was a product of bad supervision on the part of Bankers Life - the only basis cited by the Superintendent for imposing penalties against Bankers Life.

In sum, this violation finding only provides additional cogent proof that, because the Superintendent thought Juliano was a bad actor by virtue of the snowmobile loan, she assumed, without evidence and ignoring the statutory burden of proof, that he must have lied about other things - even if there was ***41** no point in lying, the lie would be immaterial and gratuitous, and would not, in any event, constitute a dishonest insurance practice. A general assumption that an agent is an overall bad actor and a desire to impose civil penalties based on that assumption is not a reasoned legal basis for imposing maximum civil penalties on Bankers Life.

E. Violations 5-7 - "failure to make reasonable inquiries to gather suitability information in connection with each of the three annuity applications, constituting three separate violations of Rule 917, § 6(A)."

The Superintendent found that Bankers Life's comprehensive, best practices process used by Juliano, Farren and Gagnon to gather the information identified as relevant in Rule 917 violated that Rule because they did not excavate more information regarding Belanger's expenses and the penalties she would incur in terminating her CDs. (A. 23.) The Superior Court upheld the Superintendent's finding because Juliano did not ask Belanger how much she owed on her AMEX card or the extent of her charitable donations. (A. 43.) [18]

***42** The standard applied by the Superintendent and Court is unsupported by law. Rule 917 only requires that insurers exercise "reasonable efforts" to gather relevant information, 02-031 C.M.R. ch. 917, § 6(B), and that the transaction must be "suitable for the consumer **on the basis of the facts disclosed by the consumer** as to his or her investments and other insurance products and as to his or her financial situation and needs." 02-031 C.M.R. ch. 917, § 6(A) (emphasis supplied).

The Superintendent felt that further inquiries should have been made regarding Belanger's expenses, particularly her donations to the Caribou Pet Rescue. (A. 23.) But reasonableness must be viewed objectively. It cannot be whatever an individual Superintendent subjectively would prefer, imposing a hindsight and fiduciary standard. Apparently, according to the Superintendent, Juliano and Bankers Life were to ignore what Belanger told them about her "minimal expenses" and the lack of financial hardship from purchase of the annuities; ignore the specific financial information provided by Belanger on her signed questionnaire and communicated to Juliano and Farren; and ignore her past actual history of expenses. Instead, they violated the law by not pressing her and probing more deeply regarding her future, voluntary desires to fund Caribou Pet Rescue. (*Id.*)

***43** Again, this is not the proper legal standard, and underscores how prejudgment infected these proceedings. Bureau Staff never introduced any evidence at the hearing that controverted the evidence gathered by Bankers Life' processes regarding Belanger' minimal monthly expenses and healthy income to meet those expenses. (A. 271, 277-78, 283-84.) Applying the proper standard, and stripped of presupposition of guilt, Bankers Life used more than reasonable efforts to gather sufficient information to evaluate Belanger's financial situation, with initial Fact Finders, annuity suitability questionnaires, Farren follow-up, and Gagnon review and checklists.

F. Violations 8-10 - "demonstrating incompetence or untrustworthiness in the submission of materially inaccurate information about [Belanger's] financial situation in each of the three annuity applications, constituting three separate violations of 24-A M.R.S.A. § 1420-K(1)(H)."

These violations are based on the conclusion that the Fact Finders contained two inaccuracies: (1) the first Fact Finder listed Belanger's stock assets as $5-7000, when she still held the $150,000 of GE Stock; and (2) the second Fact Finder and suitability questionnaire listed Belanger's assets to include $37,000 in CDs and $18,000 in annuities, although those assets had been liquidated. (A. 24.)

As a threshold matter, there were no inaccuracies. The agent's obligation is to record information provided by the customer, which Juliano did. There is no violation when the customer gives partial information initially, and then a correction is made after further due diligence discloses the correct information. With respect to the second Fact Finder, at the time that the annuity suitability ***44** questionnaires were signed, no assets had yet been put into Bankers Life annuities. (A. 91.)

The Superior Court upheld the violations because while the "dates of all these transactions are fairly close," the Court "must conclude that there is competent record evidence" to support them. (A. 44.)

As noted, there is no such evidence. But even if one could conclude that as of the dates of the Fact Finders the ongoing transactions had been consummated, there is no support for the Superintendant's conclusion that such a scenario constitutes "materially inaccurate information." Nowhere does the Superintendent (or the Superior Court) explain how the purported failure to precisely align the dates of the transactions to the information in the Fact Finders had any material consequence. No decision-making occurred or even purportedly occurred based on these alleged failures to identify the precise dates of consummation. To the contrary, Gagnon understood Belanger's financial status when he reviewed and approved the transactions. (A. 144, 268, 275, 281.)

Again, the nature of these findings, correlated to the evidence on which they rely, leads to one, inexorable conclusion: maximum penalties were imposed on Bankers Life not based upon a dispassionate assessment of the record evidence, but due to prejudgment that tainted every phase of the investigation, the hearing and the Superintendent's resultant findings.

***45 III. A remand is alternatively required because the proceedings did not comport with due process and fairness requirements.**

The Superior Court concluded that Bankers Life's "assertion of bias is supported." (A. 46.) The Court did not, however, grant any relief because it concluded, without further explanation, that the misconduct "did not factor into [the Superintendent's] decision ...." (*Id.*) The Superior Court's finding of bias is accurate, but its conclusion that it did not infect the Superintendent's decision or otherwise warrant relief constitutes legal error.

A. The administrative process created an intolerable risk of taint.

"Administrative agencies are constitutionally required to adhere to the 'fundamentals of fair play."' *In re Maine Clean Fuels, Inc.*, 310 A.2d 736, 746 (1973) (citation omitted). These fundamentals are necessarily assessed on a case-by-case basis, *see id.*, although 5 M.R.S. § 11007(4)(C)(4) provides for relief when an agency decision is "[a]ffected" by bias or error of law, and the Administrative Procedure Act requires that hearings must be carried out "in an impartial manner." 5 M.R.S. § 9063(1).

In determining whether a decision has been "affected" by bias or error, the Court looks not just at actual prejudice, but whether the circumstances presented a "risk" of a decision not based on the merits. *Zegel v. Bd. of Social Worker Licensure*, 2004 ME 31, ¶ 16, 843 A.2d 18, 22 ("An administrative process may be infirm if it creates an intolerable risk of bias or unfair advantage.") (citing *Gashgai*, 390 A.2d at 1082 n.1); *see also Senator Corp. v. State of Maine Dep't of Transp.*, 1982 Me. Super. LEXIS

138, *5 (May 24, 1982) ***46** (Alexander, J.) (acknowledging the "appearance of prejudice" standard but holding the issue of bias had been waived).

There can be no question that the Staff's conduct created such an intolerable risk. As a threshold matter, the atmospherics were incendiary - an **elderly** woman assisting an agent with a personal loan and for a snowmobile, no less. Hence, it was more important than usual that the investigation be dispassionate and steps taken to avoid a decision based on emotion as opposed to facts, and guilt by association.

Instead, the opposite occurred. Staff not only was swept up in its own prejudgment, but it engaged in misconduct based on that prejudgment. Its active misconduct was acknowledged by the Superior Court, as inexorably reflected in the record. Staff engaged in prejudicial name calling, prejudgment, and withholding of evidence. (A. 112, 114-15, 123, 232.) The lead prosecutor acknowledged that Staff ignored exculpatory evidence that would have been important to any investigator interested in conducting a fair, unbiased and impartial investigation. (A. 123.) This sentiment was echoed by the former Deputy Superintendent and current Securities Administrator for the State of Maine. (A. 128.) Most shockingly, Staff made statements under oath that they knew not to be true, with the support of its counsel. (A. 114, 120, 125.)

Staff similarly took all the steps it could to infect the Superintendent with its guilt-by-association-not-facts approach. Staff not only successfully sought the melding of all the violations into one scrum, over the objection of ***47** Bankers Life, but it filled the record - again over Bankers Life's objection - with improper and irrelevant evidence of past conduct. (A. 81.)

Finally, the risks of taint from the misconduct of investigators and prosecutors is heightened when, as here, regulator, prosecution panel, hearing officer and decision-making panel are all part of the same agency.

We need go no further; relief is warranted based on the intolerable risks presented by Staff's misconduct.

B. The misconduct was not harmless.

Misconduct might not require relief when harmless. *See Zegel*, 2004 ME 31, ¶ 17, 843 A.2d at 22-23; *Gleichman & Co. v. Town of Dixfield*, 1986 Me. Super. LEXIS 157, *3 (July 18, 1986) (Clifford, C.J.). There is, however, no such evidence here; to the contrary, all signs point toward prejudicial taint.

First, the Superior Court not only cited nothing to support its conclusion that the Superintendent's decision was not infected by Staff's misconduct, but the Court's own reasoning confirms that prejudicial error in fact occurred. The Superior Court acknowledged that the Superintendent's findings as to Bankers Life's guilt are based on Bankers Life's previous conduct. (A. 45.) This is palpable, clear, prejudicial error.

Second, this is not a case in which the evidence overwhelmingly supports the findings of violations by Bankers Life. *See Gleichman*, 1986 Me. Super. LEXIS 157, *3 (noting that error may be harmless in rejecting an application if the application was "obviously" insufficient, and remanding for new proceedings because this standard was not met); *see also Mutton Hill Estates,* ***48** *Inc. v. Town of Oakland*, 468 A.2d 989, 992 (Me. 1983) (remanding for new proceedings because it could not be determined from the record whether the decision-maker was unduly influenced by opponent bias).

Here, as noted above, there is **no** evidence to support the annuity violation findings, and reversal is required. But to the extent **any** relevant evidence exists to support the violation findings it is at best sparse, as the Superior Court's acknowledgment that the factfinder could have found the other way attests. The paucity of evidence supporting the Superintendent's findings - her need to search out trivial and immaterial discrepancies and impose insurmountable fiduciary standards not contained in the Insurance Code - provides additional cogent proof that the Superintendent's findings were influenced by Staff's misbehavior. *See Gashgai*, 390 A.2d at 1084 (unsupported allegations paired with inappropriate bias "renders suspect" the ultimate administrative

decision); *see also Jacobs,* 2007 ME 14, ¶ 9, 915 A.2d at 411 ("Our assessment of whether an inferred fact is the product of a reasonable inference drawn from evidence, or mere speculation, does not occur in a vacuum.").

Finally, the most graphic evidence of prejudice is what ultimately occurred. Bankers Life was fined $100,000 - maximum civil penalties for ten separate Insurance Code violations. Branch Manager Gagnon's previously unblemished 39-year career was damaged as this case dragged on for more than two years. (A. 141.) Farren was forced out of his career as a financial advisor because Staff failed to disclose the Doughty Report and/or modify the ***49** petition against Farren to remove the allegation that the Stock Proceeds Annuity was unsuitable once they had that report in hand. (A. 136-37.)

At a minimum, if these charges are not dismissed, a new, untainted proceeding before the new Superintendent is required.

CONCLUSION

For the reasons set forth above, the Superintendent's decision imposing the maximum civil penalties against Bankers Life should be vacated. Because the record evidence does not support the Superintendent's findings, the violation findings should be reversed. Alternately, the matter should be remanded for new, untainted proceedings.

Footnotes

1 Superintendent Mila Kofman issued the decision on this matter on May 12, 2011. On May 16 2011 she announced her resignation effective June 1 2011.

2 The relevant statutes, 24-A M.R.S. §§ 1420-K(1)(H) and 2155, are attached hereto as Addendum 1. The relevant regulation, 02-031 C.M.R. ch. 917 (2007), is located in the Appendix (A.) at A. 76-80. The Superintendent's decision is located in the Appendix at A. 5-30, and the Superior Court's decision rejecting the Petition at A. 31-48.

3 Ms. Belanger died before the hearing and before the accused had opportunity to question her. (A. 6.)

4 Diamond did so because he had to concede, among other things, that his analysis did not: (1) take into account the lower interest rates that would have been available when the CDs matured (A. 96-97, 167); (2) take into account the tax savings Belanger received as a result of the annuities (A. 97, 167); or (3) reflect the annuities' penalty-free withdrawal provisions (A. 94-95, 166-67). The Superintendent did not impose any penalties based on a finding of unsuitability of either of these two annuities.

5 Section 1445 (1)(D) provides that an insurer "[i]s accountable and may be penalized by the superintendent, as provided for in this Title, for the actions of its producers."

6 To support this statement, she cites Gagnon's testimony explaining how Juliano would come to the Bangor office once a month if weather permitted; that if there were a meeting, Gagnon would review the contents on the phone with Juliano; and that written materials would be sent to him. (A. 6-7.)

7 The Superintendent cites to page 43 of the hearing transcript which reads:
Q: Is [Farren] a manager of yours?
A: Not now.
Q: Oh, not now?
A: No.
Q: Was he a manager of yours?
A: He was a manager, but I don't know if he was my manager. I don't know whose unit I was in. I think I was in Jamie Kennison's unit.
Q: And who is Jamie Kennison?
A: Jamie Kennison is another manager at that branch.
(A. 84.)

8 Rule 917 provides, in pertinent part:
A. In recommending to a consumer the purchase of an annuity..., the insurance producer, or the insurer where no producer is involved, must have ***reasonable*** grounds for believing that the recommendation is suitable for the consumer ***on the basis of the facts disclosed by the consumer*** as to his or her investments and other insurance products and as to his or her financial situation and needs.
B. Prior to the execution of a purchase or exchange of an annuity resulting from a recommendation, an insurance producer, or an insurer where no producer is involved, must make ***reasonable efforts*** to obtain information concerning:
(1) The consumer's financial status;

(2) The consumer's tax status;

(3) The consumer's investment objectives; and

(4) Such other information used or considered to be ***reasonable by the*** insurance producer, or the ***insurer*** where no producer is involved, in making recommendations to the consumer.

02-031 C.M.R. ch. 917, § 6 (A) and (B) (emphasis added.)

9 Indeed, nothing in the enabling statutes or related provisions even suggests that insurers are required to recommend only "suitable" annuities in the first place. Given Maine's strict separation of powers framework as reflected in the Constitution, *Maine Ass'n of Health Plans v. Superintendent of Ins.*, 2007 ME 69, ¶ 73, 923 A.2d 918, 937 (Alexander, J., dissenting), and the black letter rule that an agency regulation cannot exceed the authority given to it by statute, *Conservation Law Found., Inc. v. Dep't of Envtl Prot.*, 2003 ME 62, ¶ 21, 823 A.2d 551, 559, the Superintendent's ability even to promulgate and apply Rule 917 **at all** to require "suitability" is at best dubious.

10 Though the Superintendent stated that "[t]hat figure ought to be questioned carefully when she reported ongoing credit card debts at the same time" (A. 23), the Superintendent cited no evidence for that "question," and failed to acknowledge that Belanger herself attested to the existence of the savings (A. 268, 275, 281). In any event, even without that sum, the evidence still establishes liquidity in excess of $20,000.

11 If Belanger did not withdraw funds in the first year, she could withdraw twenty percent (approximately $38,000) on the second year, penalty-free. (A. 250, 258, 262, 288.) The annuities also provided access to greater amounts in case of emergency convalescent care needs ($38,000 aggregate) or terminal illness needs ($148,000 aggregate). (A. 250, 255, 257, 264, 265, 288.)

12 Other portions of the record are cited, *e.g.* R. 526, but they are duplicates of the same document.

13 Section 2155 provides that no person shall make any statement "misrepresenting or making incomplete comparisons as to the terms, conditions, or benefits contained in any policy for the purpose of inducing or attempting or tending to induce the policyholder to lapse, forfeit, borrow against, surrender, retain, exchange, modify, convert, or otherwise affect or dispose of any insurance policy." 24-A M.R.S. § 2155. (Add. 1.)

14 The Jackson National annuity had a base interest rate of 3.45% at the time of issue and a guaranteed rate of 3.00%. The Bankers Life IRA Rollover Annuity had a base interest rate of 3.25% at the time of issue, with a 3.00% one-time bonus payment increasing the first-year rate to 6.25%, and a guaranteed interest rate of 2.5%. (A. 20.) The difference in the base rates of the two annuities was 0.2%. (A. 25.) While the Superintendent implied that it was inappropriate for Belanger to replace the Jackson National annuity with a Bankers Life annuity because of this difference, Bureau Staff's own expert testified that on some years the Bankers Life annuity would have a value greater than that of the Jackson National annuity. (A. 94.) Even when the Jackson National annuity had a higher value, the differential was only between $80 and $250 on a principal basis of over $20,000. (A. 93-94.) On the whole, the financial result was a wash, while the transaction addressed Belanger's concerns articulated to Bankers Life about lack of service and desire to consolidate with one advisor. (A. 162.) Notably, the Superintendent never actually found the transaction unsuitable.

15 Section 1420-K(1)(H) prohibits use of "fraudulent, coercive or dishonest practices ... in the conduct of business in this State or elsewhere." 24-A M.R.S. § 1420-K(1)(H). (Add. 1.)

16 The Superior Court's decision is not illuminating. It upheld violation #3 because it stated that since it upheld violation #2, the evidence sustaining violation #2 *ipso facto* sustained violation #3. (A. 41.)

17 The Superintendent never explained how one can assure that the annuity rates offered to Belanger in November 2007 would have been available to her if she waited to purchase separate, additional annuities as her CDs matured. In fact, Belanger signed a statement indicating she understood the following caution provided by Bankers Life: "Due to the volatility of the financial markets and other factors that are used by Bankers Life] to set the [annuity interest] rates, it is possible that the rates could increase or decrease substantially from the date You sign the application. You should read Your policy carefully and check rates on the policy Schedule when it is issued." (A. 269.)

18 That the Superior Court is silent as to the Superintendent's articulated reliance on an alleged failure to inquire into CD penalties (A. 43, 23) is not surprising, and the Superintendent's reliance on this basis for penalizing Bankers Life alone requires reversal of this violation, while further underscoring the witch-hunt mentality pursuant to which this matter was pursued.

The Superintendent found that Juliano gathered incorrect information because one suitability questionnaire stated that the penalty would be "$250±" and another stated that it would be "$400±," while Belanger ultimately paid $574.92 in penalties. (A. 23.) As an initial matter, it is questionable whether there was any error at all. The surrender charge at The County Federal Credit Union for one CD was $226.51, while the charge at TD Banknorth for two CDs was $348.41. (A. 190-92.) These numbers are very close to the numbers reflected in the Fact Finders ($250 and $400), and certainly within the margin of error noted with the "±" symbol. Even if the proper comparison were between the $400 penalty reflected in the Fact Finder and the total of $574.92, the resulting difference ($174) - approximately .09% of the total value of the annuities - would not render the annuities unsuitable, with the difference immaterial.

It was undisputed, moreover, that it was Belanger herself who called the banks and gathered the information regarding the penalty amounts. (A. 91.)

Nonetheless, based on this record, the Superintendent found three failures to make reasonable suitability inquiries, and imposed three sets of maximum civil penalties on Bankers Life.

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