2013 WL 5297303 (Me.) (Appellate Brief)
Supreme Judicial Court of Maine.

Paul DYER, Plaintiff-Appellant,
v.
SUPERINTENDENT OF INSURANCE, Defendant-Appellee.

No. BCD-12-469.
January 22, 2013.

On Appeal from the Superior Court (Business and Consumer Docket)

Brief of Appellant

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***1 INTRODUCTION**

This is an appeal from a decision of the Superintendent of Insurance revoking Paul Dyer's Resident Insurer Producer License and his Resident Insurance Consultant License.

FACTS

Paul Dyer worked in the insurance industry since 1982. (Record, p. 237 (hereinafter "R.") Appendix ("A") 82). Mr. Dyer lives in Glenburn, Maine. (R. 224). At the time of the events in question, Mr. Dyer held a producer's license and a consultant's license from the State of Maine, (R. 224), and ran a business named Legacy Insurance & **Financial** Advisors, Inc. (R. 236; A.81).

Mr. Dyer met Ms. Van Horn in the fall of 2004 after a speech he gave at the Augusta Civic Center Senior Fair on long term care protection. (R. 237; A. 82; 286). After the speech, Ms. Van Horn approached Mr. Dyer, and told him that she wanted to talk about solving "her long-term care problem". (R. 238; A.83). Ms. Van Horn told Mr. Dyer she was concerned that she had allowed her long term care insurance to lapse, and did not want to spend her estate on long term care. (R. 238; A.83). Ms. Van Horn wanted to pass her estate on to her grandchildren. (R. 238-239; A.83-84).

During his speech, Mr. Dyer had explained that there are three options for **financing** long term care: purchase long term care insurance coverage; be wealthy enough to pay privately for long term care, or poor enough to qualify for Medicaid/MaineCare. (R. 239: A.84). Mr. Dyer and Ms. Van Horn subsequently had several meetings, always in the presence of another person, and Ms. Van Horn decided to apply for long term care insurance. (R. 239; 241; A. 84; 86). In December 2004, Ms. Van Horn's application was ***2** denied for medical reasons. (R. 243-245; 314; A. 86-90; 138). Because Ms. Van Horn was not wealthy enough to self insure, she and Mr. Dyer determined that they would prepare her estate to be able to qualify for Medicaid/ MaineCare. (R. 239; 300-301; A. 84; 134-135).

The Consulting Relationship and Consultant Agreement

Mr. Dyer and Ms. Van Horn met four or five times before they signed the Consultant Agreement. (R. 239-240; A. 84-85). As part of his standard business protocol, Mr. Dyer made sure somebody else was present at every meeting with Ms. Van Horn. (R. 241; A. 86). Mr. Dyer made sure he explained the steps he was recommending that Ms. Van Horn take, and as a precaution had someone else, including on occasion, Ms. Van Horn's granddaughter, Katherine LaPierre, confirm that Ms. Van Horn was making good decisions with full understanding of the plan to accomplish her goals. (R. 302; 328-329; A. 136; 143-144).

Ms. Van Horn signed a Consultant Agreement with Mr. Dyer on January 18, 2005, agreeing to pay for up to ten hours of consulting time ($1,500), less an offset for any commissions Mr. Dyer received. (R. 239; 640; A. 84; 249). The Agreement states that Mr. Dyer was engaged to review Ms. Van Horn's insurance programs, estate and **financial** plans. (R. 640; A.249). The Consultant Agreement contemplates a detailed, final report would be provided to the client after a plan had been made and implemented. (R. 640; A. 249). Mr. Dyer assembles his planning documents, including policy and investment documents, for his clients once all of the components are in place. (R. 314-317; A. 138-141). Ms. Van Horn stopped participating in the planning process before the ***3** report could be compiled; indeed, the specific components of the plan had not yet been selected and put in place. (R. 292; 296-297; 958;; A. 127; 131-132; 788).

Ms. Van Horn was denied long term care coverage in December 2004, which necessitated more complicated planning to make sure her assets were not dissipated by long term care needs and she could pass her estate down to her heirs. (R. 314; 327-329; A. 138; 142-144). Mr. Dyer developed a four-part plan for Ms. Van Horn. (R. 254; 956-960; A. 99; 286-290). Dyer explained and discussed the plan with Ms. Van Horn and gave her brochures from the insurance companies, "what if tax returns, and reviewed her Trust. (R. 301-302; 315; 328; A. 134-136; 139; 143). The first part of the plan was to shore up guaranteed income because Ms. Van Horn would be giving away assets (to satisfy the Medicaid "look-back" period) and she needed to know where her income was going to come from. (R. 327-328; A. 142-143). Ms. Van Horn had decided to transfer a large sum of money

from one of her IRAs to Katherine LaPierre, her granddaughter, and needed to address the tax consequences associated with the withdrawal of the money. (R. 250-251; 255; 327-328; A 95-96; 100). Ms. Van Horn contemplated establishing a special needs trust and the transfer of her remaining assets into the trust. (R. 328; A. 143). The plan also included correcting an over allocation of Ms. Van Horn's net worth that was placed in a company called Modern Woodmen that had neither FDIC protection nor insurance coverage under the Maine State Guaranty fund. (R. 251; 257-258; 293-294; A. 96; 102-103; 128-129).

The 1035 Partial Exchange and Ms. Van Horn's Plans

It was not until Ms. Van Horn and Mr. Dyer had been working together for eight or more months, on May 31, 2005, that Ms. Van Horn and Mr. Dyer submitted an ***4** application for a Single Premium Immediate Annuity ("SPIA") with Fidelity & Guaranty Corporation ("F&G"), now Old Mutual. (R. 246; 260; 641; A. 91; 105; 250). During those eight months, Mr. Dyer and Ms. Van Horn took a number of steps toward preparing Ms. Van Horn's estate to qualify for Medicaid/MaineCare, including preparing to stop the fully taxable income from Modern Woodman, preparing for the gift of the IRA to Ms. LaPierre, and preparing hypothetical tax returns. (R. 246-247; 957-958; A. 91-92; 286-290).

The plan for Ms. Van Horn included guaranteeing her an income stream so that she could safely reinvest assets in other tools, from inside a trust and start the clock running on the State of Maine gift rules. (R. 248; 327-28; A. 93; 142-143). The trust would take title to Ms. Van Horn's assets. (R. 290). In the event Ms. Van Horn ever needed long term care, her assets would not be dissipated by the cost of that care, after the look back period had run. (R. 300; A. 134). In particular, Ms. Van Horn was giving money to Katherine in 2005 to help her build or buy a house. (R. 250; 291-292; 957; A. 95; 126-127; 286-287). Because of the large distributions from her IRA, it was important that Ms. Van Horn reduce her income as much as possible for tax purposes. (R. 250-251; 293; 957-958; A. 95-96; 128; 286-289).

It was also important for Ms. Van Horn to diversify her assets because at that time she had about 90 percent of her assets in tax-deferred Modern Woodmen annuities. (R. 251; 293-294; 956-957; A. 96; 128-129; 286-287). Modern Woodmen had no secondary guarantee, such as FDIC protection or the Maine Guaranty fund, which backs up most insurance products. (R. 251; 293-294; 956-957; A. 96; 128-129; 286-287). Mr. Dyer had many concerns about the suitability of the Modern Woodmen annuity, which he shared ***5** with Ms. Van Horn. (R. 256-258; 956-957; A. 101-103; 286-287). Ms. Van Horn's low tax bracket did not justify a tax-deferred annuity such as the Modern Woodmen annuities, especially when she was avoiding tax through Modern Woodmen on assets she planned to gift to children in higher brackets. (R. 256-258; 336; 956-957; A. 101-103; 151;286-287).

Mr. Dyer was quoted a 2%-3% yield by Personalized Brokerage Service (PBS) for the F&G SPIA and he communicated that quote to Ms. Van Horn. (R. 260; 272; 958; A. 105; 117; 288). The F&G SPIA yield was essentially the same as the others that were illustrated. (R. 348-350; A. 155-156). This was true in November 2004, when Mr. Dyer initially assessed the market, and later when the SPIA order was actually placed. (R. 349). Yield for the SPIA was not important since Ms. Van Horn would be transferring her other assets to qualify for Medicaid. (R. 329-330; A. 144-145).

Mr. Dyer anticipated that the yields on Ms. Van Horn's remaining funds could be improved to compensate for any reductions in yields resulting from the partial 1035 exchange. (R. 958; A. 288). Mr. Dyer and Ms. Van Horn planned to reinvest over time more of the money tied up in Modern Woodmen, through a 1035 exchange, and the expectation was that this reinvesting would be in products that would yield between six and eight percent (with performance riders available at the time). (R. 265-266; 271-272; 462-463; A. 110-111; 116-117; 198-199).

The decision to purchase the F&G SPIA was based on guaranteeing an income stream, diversifying away from having 90% of her assets in a company without a secondary guarantee, allowing Ms. Van Horn to gift her assets, and taking care of her long term care problem. (R. 251; 272; 293; 294; 300-301; 330-332; 956-960; A. 96; 117; ***6** 128; 129; 134-135; 145-147; 286-290). Importantly, the income from the SPIA had a tax savings. (R. 332-333; A. 147-148). Under the SPIA, 64% of the money Ms. Van Horn received would be excluded from taxation. (R. 269; 293; A. 114; 128).

The total amount Ms. Van Horn had invested with Modern Woodmen was between $165,000 and $170,000. (R. 263; A. 108). Prior to making the partial 1035 exchange, Mr. Dyer talked to Modern Woodmen about whether they could do the 1035 exchange internally into a SPIA. (R. 260-261; 298; A. 105-106; 133). If Modern Woodmen had been able to do that, Mr. Dyer would have made no commission. (R. 260-261; A. 105-106). If Modern Woodmen had done the partial 1035 exchange, the plan was to then diversify the remainder of the money Ms. Van Horn had with Modern Woodmen into other products. (R. 338-339; A. 153-154). Mr. Dyer did not attempt a complete exchange of the entire $165,000 - $170,000, even though it would have been more profitable for him, because he was focused on Ms. Van Horn's goal -- to get assets removed from her name. (R. 264; A. 109).

Mr. Dyer's company was paid $1,376.43 in commissions for the sale of the SPIA. (R. 441; 745; A. 190). Mr. Dyer never tried to collect the balance of his $1,500 consulting fee. (R. 295; A. 130). The planned tax outcome of keeping Ms. Van Horn in a low tax bracket was met when her taxes were filed in 2006. (R. 269; 959; A. 114; 289). This was true even though she had taken a large IRA withdrawal and gifted those funds to her granddaughter, Ms. LaPierre. (R. 250-251; 959-960; A. 95-96; 289-290).

After the SPIA was purchased, but before additional steps were taken to achieve Ms. Van Horn's goals, Ms. Van Horn put the rest of her plan on hold. (R. 291-292; 296-297; A. 126-127; 131-132). She refused to go forward for a number of personal reasons, ***7** including that her granddaughter, Katherine, had become sick with cancer. (R. 292; A. 127).

F&G/Old Mutual's Mistake

Under the SPIA, Ms. Van Horn was to receive $648.23 per month for five years (R. 275, 645; A. 120; 254). At that rate, however, the SPIA was going to pay Ms. Van Horn less than she had put into it. (R. 274-275; A. 119-120). This was a mistake on the part of F&G, but Mr. Dyer candidly admits he did not notice the error until Ms. Van Horn called him two years after the annuity was issued. (R. 274; A. 119). At first, Old Mutual did not respond to Ms. Van Horn or to Mr. Dyer, who made many phone calls and sent letters and e-mails to Old Mutual about the incorrect payment amount. (R.276; A. 121).

After a period of time, around late October 2007, Mr. Dyer received a voicemail message from Karen at Old Mutual indicating that there was a miscalculation of the annuity and that Ms. Van Horn would be getting a refund. (R. 279-280; A. 124-125). Mr. Dyer played the voicemail message for Ms. Van Horn twice. (R. 276-277; A. 121-122). The message, of course, eventually got recorded over. (R. 279-280; A. 124-125). Mr. Dyer told his assistant, Brandie Ramsey, about the call and told her that he needed to find out how much the refund was for and what the total amount was going to be. (R. 308; A. 137). Ms. Ramsey made a note in the company's computer system on November 6, 2007 concerning the information Mr. Dyer needed. (R. 308; 721; A. 137).

Old Mutual had no record of the call, but Mr. Russell Laws of Old Mutual testified that it is possible that the call was not documented in Old Mutual's system. (R. 411; A. 180). While Old Mutual's procedures require service center personnel to ***8** document their calls, Mr. Laws admitted that he could not tell when the company's procedures were not followed. (R. 411, 443; A. 180; 192).

Mr. Dyer followed up on the voicemail message and sent an email to Old Mutual's Legal Department about the answering machine message. (R. 718; A. 284). The e-mail Mr. Dyer sent to Old Mutual's legal counsel got the company's attention. (R. 435-436; 718; A. 184-185; 284). It was Mr. Dyer who suggested to Ms. Van Horn that they should complain about Old Mutual's mistake and unresponsiveness to the Bureau of Insurance. (R. 486; 520; A. 222; 241).

Once the issue was brought to the attention of the proper level of management, by Mr. Dyer, Old Mutual worked with its actuaries to re-calculate Ms. Van Horn's benefit to provide the return they had intended. (R. 364; 384; A. 160; 167). Old Mutual increased Ms. Van Horn's remaining 30 payments to $662.65, so she received, what Old Mutual believed, was a proper return on the SPIA (R. 364; 734; A. 160).

Russell Laws, who testified for Old Mutual, stated that he was “somewhat familiar” with the SPIA product involved in the case, but was “not certain” whether the product was designed or marketed for Medicaid purposes. (R. 363; A. 159). Mr. Laws noted during his testimony that Federal law on Medicaid changed in 2005, and that States were not adopting new regulations concerning the changes to the law until 2006. (R. 441; A. 190).

Prior to the hearing, the Bureau of Insurance asked Old Mutual how a SPIA is used in relation to applying for Medicaid. (R. 739). Mr. Laws, on behalf of Old Mutual, stated

In the course of estate planning, some annuitants elect to purchase SPIAs to reduce their income and assets to a level which could allow them to ***9** qualify for Medicare in the event that they require that medical assistance in the future.

(R. 739).

Old Mutual did not provide the Bureau of Insurance Investigator with all of the information it requested. (R. 521-522; 549-551; A. 242-43). Old Mutual made a request for information to Mr. Dyer, but Mr. Laws could not recall what was provided. (R. 401-402; A. 177-178). Mr. Laws did recall that Dyer provided a letter from his lawyer attaching many documents. (R. 401-402; 978-979; A. 177-178). At least two letters were sent to Old Mutual by Mr. Dyer's lawyer, intending to provide Old Mutual with all the materials that were responsive to the Bureau's requests. (R. 579-580; 978-979). Nothing was withheld by Dyer from the Bureau or Old Mutual. (R. 579).

Joan Van Horn

Ms. Van Horn recalled that she met Paul Dyer at the Augusta Civic Center in 2004 after a speech he gave on **financial** planning. (R. 461; A. 197). She acknowledged that there were subsequent meetings with Mr. Dyer, but she was not sure how many. (R. 462; A. 198). Ms. Van Horn testified that she would not, or did not, qualify for long term care because of her smoking history, and in any event, the cost ($200 per month) was something she could not afford. (R. 464; A. 200).

Ms. Van Horn claimed that Mr. Dyer did not talk to her about estate planning, tax planning, or explain what a 1035 exchange was. (R. 464; A. 200). She stated that Mr. Dyer did not tell her what his commission would be, did not discuss a four-part plan, and did not remember Mr. Dyer ever reading through a contract with her, that he wanted her to sign. (R. 465-466; A. 201-202). Ms. Van Horn stated that she did not remember signing a contract for the F&G SPIA, but acknowledged that she did. (R. 466; A. 202).

***10** Although Ms. Van Horn testified that she heard Paul Dyer's earlier testimony about a voicemail message, she testified that she did not recall hearing the voicemail, “...but that doesn't mean that it didn't happen”. (R. 467; A. 203). Ms. Van Horn testified that she discovered the problem with the annuity in 1995 or 2005, but also thought it could have been 2000. (R. 473; A. 209).

Ms. Van Horn did not recognize the March 6, 2008 complaint she made to Old Mutual concerning the annuity, but recognized her signature on the letter. (R. 477-478; 953-954; A. 213-214). Ms. Van Horn did not recall making a complaint to the Bureau of Insurance and did not recognize the insurance complaint form she signed on April 24, 2008. (R. 473-474; 638-639; A. 209-120). However, Ms. Van Horn recognized her signature on page 2 of the insurance complaint form. (R. 475; A. 211). Ms. Van Horn did not recall receiving a June 9, 2009 letter from the Bureau of Insurance, and indicated “...but that doesn't mean anything anyway”. (R. 484-485; A. 220-221). The letter confirmed the scheduling of a meeting at Ms. Van Horn's home and asked that she review a copy of a November 17, 2008 letter written by Attorney Peter Bickerman, prior to the meeting. (R. 485, 955-960; A. 221; 285-290). Although she did not recall receiving the letter, she recognized her handwriting on the copy of the Bickerman letter. (R. 483-485; 955-960; A. 119-221; 285-290).

When asked if she recalled the name of one of her **financial** advisors, Ms. Van Horn stated:

Are you kidding? I mean, give me a break. I have a hard time to remember my own. No, I don't remember.

(R. 480-481; A. 216-217).

***11** Ms. Van Horn also stated, "I must be senile". (R. 490; A. 226). She acknowledged that she forgets things that have happened over the last six years. (R. 478; A. 214).

Ms. Van Horn testified that the only money to be provided to Katherine, her granddaughter, was for school. (R. 479; A. 215). "Once she got out of school, she was on her own, she did whatever." (R. 479; A. 215). Ms. Van Horn testified, emphatically, that Katherine was never a beneficiary of her State 457 Plan. (R. 491; A. 227). She testified that

"...I've got four kids, everything is to be sold and duh, duh, duh, duh split. Now what you do with your stuff to your kids is your problem, not me. I'm taking care of my own and nobody else's, and I think that's why I kind of wondered here [referring to Respondent's Exhibit 12] what it meant".

(R. 491-492; 956; A. 227-228; 286). After being shown a letter from the Maine State Retirement System showing that Katherine was, in fact, her beneficiary under her retirement account, Ms. Van Horn stated: "I may have done that and not remembered it, but 1 did take out all of my money out, and where did the money go? To Katherine." (R. 492; 961; A. 228; 291).

During the proceeding, Ms. Van Horn thought that Robert Wake, Esq., Bureau of Insurance counsel and a member of the hearing panel, was the representative of Old Mutual who had testified the day before. (R. 486-487; A. 222-223).

When asked by the Superintendent whether she would have remembered if the insurance company did anything that she felt was in her interest, Ms. Van Horn stated: "No". (R. 497; A. 233). When asked again, Ms. Van Horn stated: "Oh, yes, definitely". (R. 497-498; A. 233-234).

***12** Panel Member Robert Wake asked Ms. Van Horn whether Mr. Dyer spent any time talking to her about one of the letters that had been discussed during her testimony, Ms. Van Horn responded:

"Can you remember what you did last week for a couple of hours in the afternoon? You're better than me, because I can't remember".

(R. 500; A. 236). Ms. Van Horn would not be surprised if there were conversations that she had five or six years ago that she could not remember at the time of the hearing. (R. 502; A. 238).

Ms. Van Horn did not remember paying Mr. Dyer for services. (R. 505; A. 239). When asked if she remembered signing an agreement to pay Mr. Dyer for his services, Ms. Van Horn stated: "Never, money never came up other than the investments, no salaries that I can remember...". (R. 505; A. 239).

At the close of the hearing, Ms. Van Horn stated "Thank you, Paul, if I could have done anything to stop this." (R. 506; A. 240).

Investigation Background

Frustrated with Old Mutual's mistake and their unresponsiveness, Mr. Dyer attempted to file a complaint with the Bureau of Insurance. (R. 520; A. 241). Mr. McGonigle, an investigator for the Bureau of Insurance, told Mr. Dyer the complaint had to come from the consumer, so Mr. Dyer assisted Ms. Van Horn with writing a complaint. (R. 485-486; 520; A. 221-222; 241). Ms. Van Horn made the complaint about Old Mutual based on Mr. Dyer's advice. (R. 486; A. 221).

After receiving Ms. Van Horn's complaint, which Mr. Dyer was instrumental in preparing and filing, Bureau Staff also began an inquiry into Mr. Dyer's conduct with respect to Ms. Van Horn. (R. 572). In July 2008, Mr. Dyer, through counsel, provided ***13** the Bureau with all of the documents in Mr. Dyer's possession relating to Ms. Van Horn. (R. 573-574; 974). His attorney, Peter Bickerman, attempted to discuss the matter with Investigator Michael McGonigle, but McGonigle said he felt uncomfortable speaking to Attorney Bickerman, because he couldn't prove his identity as counsel for Mr. Dyer. (R. 572-573). It was Mr. Dyer's intent to provide all of the requested information to Old Mutual and to the Bureau of Insurance. (R. 579).

At Attorney Bickerman's request, a meeting was held on October 23, 2008 with Attorney Bickerman, Mr. Dyer, Attorney Stutch, and several members of the Bureau of Insurance staff, to discuss the Van Horn matter. (R. 581). After the meeting, Attorney Stutch asked Attorney Bickerman to put the substance of their discussions in writing, which he did in a letter dated November 17,2008. (R. 581-582; 956-960; A. 286-290).

In an email from Attorney Stutch to Mr. McGonigle and other employees of the Bureau of Insurance, dated November 18,2008, Attorney Stutch stated that the October meeting eliminated any need for Mr. Dyer to respond to additional questions, and with the letter she received, she determined that Mr. Dyer had demonstrated that he had a plan "...to achieve a specific goal commensurate with Ms. Van Horn's gifting ideals. (R. 963; A. 292). Attorney Stutch further stated:

"In other words, I think he had demonstrated to some degree that this is not a case of simple churning. I don't think we have a clear case of producer incompetence either. It could very well be that this plan could have achieved her goals."

(R. 963; A. 292).

Mr. McGonigle disagreed with Attorney Stutch and sent Mr. Dyer a list of questions in a letter of his own, after conferring with his supervisor. (R. 526; 549). Attorney Stutch was ready to let the investigation go, but Mr. McGonigle did not agree. ***14** (R. 529). The letter was almost identical to the letter Mr. Dyer received in September from Pam Stutch. (R. 589-590). Attorney Bickerman believed that the letter had already been responded to, but responded again. (R. 589-592; 976).

A few months before the hearing, Attorney General James Bowie sent information concerning the Russell matter, including a transcript of the hearing, to a reporter for the *Wall Street Journal.* (R. 532; 968-969). Attorney General James Bowie had previously sent other information about Mr. Dyer to the *Wall Street Journal* reporter. (R. 533-534).

PROCEDURAL HISTORY

On or about December 16, 2009, a Petition for Enforcement was filed against Paul Dyer with the Superintendent of Insurance in connection with the issues surrounding the Van Horn matter. (A. 36-49). As a result of the Petition for Enforcement, the Superintendent of Insurance initiated an adjudicatory proceeding to consider the allegations. (R. 16). A hearing was held on December 2 and December 3, 2010 before the Superintendent of Insurance. The hearing panel consisted of Mila Kofman, the Superintendent of Insurance, Robert Wake, Esq. and Mark Randlett, Assistant Attorney General.

On March 7, 2011, the Superintendent issued a Decision and Order finding that Mr. Dyer had committed serious violations of the insurance code which demonstrates "incompetence and untrustworthiness". (A. 65-74). The Superintendent found 11 specified acts committed by Mr. Dyer that violated numerous specified statutes. The Superintendent revoked Mr. Dyer's privileges to act as an insurance producer and an insurance consultant, ordered Dyer to pay a civil penalty of $5,500, and as restitution, ***15** ordered Dyer to pay to the Treasurer of State, for the benefit of Joan Van Horn, the full amount of commissions and fees he received from any funding source from all transactions involving Joan Van Horn, plus pre-judgment interest at the statutory rate. (A. 73).

Pursuant to M.R.Civ.P. 80C, Mr. Dyer filed an appeal to the Superior Court. By Order dated January 18, 2012, the Superior Court vacated a portion of the Superintendent's Decision concerning findings and rulings under 24-A M.R.S.A. § 2152 (relating

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to unfair or deceptive acts), and remanded for further findings of fact and conclusions of law regarding what constitutes a "deceptive" or "unfair" act under the statute and, to specify how Dyer's acts qualify as "deceptive" or "unfair", or both. (A. 21-22). The Court ordered the Superintendent to review and utilize the current record only. (A. 21). The Superior Court also vacated a portion of the Superintendent's Decision concerning a finding under 24-A M.R.S.A. § 1447(relating to recordkeeping), and ruled that since the findings under § 2152 were an element of 8 of the violations found, and because the § 1447 violation was the basis for a 9th, "... the entire question of penalties will have to be revisited on remand". (A. 22). The court vacated the license revocation, the civil fines, and the restitution imposed with instructions for the Superintendent to reconsider "... appropriate penalties in light of this decision and in light of any further findings and conclusion made by the Superintendent on remand." (A. 22). The Court ruled that any penalty imposed could not be more onerous than the original penalty. (A. 22).

By Order dated January 24, 2012, Superintendent Eric Cioppa (Mila Kofman's successor) appointed Bureau of Insurance counsel Robert Alan Wake to preside over the ***16** matter on remand. (R. 1002). On February 2, 2012, Wake, acting as the designated hearing officer, issued a Decision and Order on Remand striking references to § 2152 from the earlier Decision and Order and the references to § 2152 and § 1447 from the list of statutes Mr. Dyer's conduct was originally found to violate. (A. 75-80). Mr. Wake reaffirmed the decision with respect to the eleven acts and the remaining statutory violations as set forth below:

1. Breaching his Consultant Agreement with J.V., by failing to make a proper evaluation of her plans and needs, in violation of 24-A M.R.S. §§ 1420-K(1)(H), and 1467;

2. Selling J.V. an annuity product that caused her unnecessary loss, in violation of 24-A M.R.S. §§ 1420-K(1)(H), and 1467;

3. Representing to J.V. that she would receive 6 to 7 percent interest on her SPIA, in violation of 24-A M.R.S. §§ 1420-K(1)(H), 1467, 2153,and 2155.

4. Selling J.V. an annuity product without having reasonable grounds to believe it was suitable for her and without conducting an adequate investigation to determine its suitability, in violation of 24-A M.R.S. §§ 1420-K(1)(H), and 1467;

5. Failing to provide J.V. with an adequate explanation of the SPIA, in violation of 24-A M.R.S. §§ 1420-K(1)(H), 1467, and 2155;

6. Failing to obtain assurance from J.V. that she understood her SPIA, in violation of 24-A M.R.S. §§ 1420-K(1)(H) and 1467;

7. Failing to make sure that the SPIA was properly issued and would provide appropriate earnings, in violation of 24-A M.R.S. §§ 1420-K(1)(H) and 1467;

8. Failing to keep adequate records of his alleged four-part plan, in violation of 24-A M.R.S. §§ 1420-K(1)(H);

9. Failing to cooperate with Old Mutual in its response to a regulatory investigation, in violation of 24-A M.R.S. §§ 1420-K(1)(H);

***17** 10. Falsely representing to Old Mutual that it had left him an answering machine message promising J.V. a refund of her SPIA premium payment, in violation of 24-A M.R.S. §§ 1420-K(1)(H); and

11. Falsely representing to the Bureau of Insurance that Old Mutual had left him an answering machine message promising J.V. a refund of her SPIA premium payment, in violation of 24-A M.R.S. §§ 1420-K(1)(H).

(A. 75-76).

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The Superintendent stated that the penalties and restitution that are warranted depends on "...the nature, extent, and variety of the wrongful acts, their cumulative impact on the victim, and the consistency and duration of the pattern of misconduct, not on the number of different provisions of the Insurance Code that could be cited as prohibiting each of the wrongful acts in questions." (A. 78). The Superintendent then imposed the exact same penalties on Mr. Dyer as in the original Decision including the revocation of his privileges to act as an insurance producer and insurance consultant, civil penalty of $5,500, and an Order to pay restitution in the amount of $1,350, plus interest. (A. 79). Mr. Dyer filed a timely Notice of Appeal.

***18 STATEMENT OF ISSUES**

I. WHETHER OR NOT THERE WAS SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT THE SUPERINTENDENT'S FACTUAL FINDINGS.

II. WHETHER OR NOT THE SUPERINTENDENT'S REINSTATMENT OF THE SAME REMEDIES AFTER REMAND WAS LEGAL ERROR.

III. WHETHER OR NOT THE SUPERINTENDENT'S DECISION AND REMEDIES WERE ARBITRARY AND CAPRICIOUS, AN ABUSE OF DISCRETION, AND/OR UNREASONABLE AND UNJUST.

***19 SUMMARY OF ARGUMENT**

This is an appeal of a decision of the Superintendent of Insurance. In an appeal of an administrative agency decision, this Court reviews the agency's decision directly. *Kroeger v. Dep't of Envtl. Prot.,* 2005 ME 50, ¶ 7, 870 A.2d 566, 569. Pursuant to 5 M.R.S.A. § 11007, this Court may reverse or modified the Superintendent's decision and order if the findings, inferences, conclusions or decision: 1) violate the constitution or statues: 2) exceeds the agency's authority; 3) is procedurally unlawful; 4) is arbitrary and capricious; 5) constitutes an abuse of discretion; 6) is affected by bias or an error of law; or 7) is unsupported by substantial evidence in the whole record. *See also Kroeger,* 2005 ME 50,¶7, 870 A.2d 566, 569.

The vast majority of the Superintendent's factual findings are unsupported by substantial evidence. The Superintendent misconstrued certain evidence and improperly relied on the testimony of Joan Van Horn, who repeatedly admitted that she could not remember, and questioned her own memory.

When reviewing an agency's factual findings, the "substantial evidence" standard is identical to the "clear error" standard used to review the factual findings of a trial court. *Gulick v. Bd. of Envtl. Prot.,* 452 A.2d 1202, 1207 (Me. 1982). "Substantial evidence exists when a reasonable mind would rely on that evidence as sufficient support for a conclusion." *Thacker v. Konover Dev. Corp.,* 2003 ME 30, ¶8, 818 A.2d 1013, 1017. An agency's findings are unsupported by the evidence if the record compels a contrary finding. *Kroeger,* 2005 ME 50,¶8, 870 A.2d 566, 569. Similarly, an agency's credibility determination may be disregarded when testimony compels disbelief. *Merrow v. Maine Unemployment Ins. Comm'n,* 495 A.2d 1197, 1201 (Me. 1985); ***20** W.S. Libbey Co., v. Maine Employment Security Comm'n., 446 A.2d 42, 42 (Me. 1982). This Court must examine the entire record to determine whether on the basis of all the testimony and exhibits before the agency it could fairly and reasonably find the facts as it did. *Clarke v. Maine Unemployment Ins. Comm'n,* 491 A.2d 549, 552 (Me. 1985) (quoting *Seven Islands Land Co. v. Maine Land Use Regulation Comm 'n,* 450 A.2d 475, 479 (Me. 1982)). Since the Superintendent's findings are unsupported by substantial evidence, the decision should be vacated.

After remand from the Superior Court, the Superintendent failed to follow the Superior Court's instructions, eliminated eight findings that Mr. Dyer's conduct was unfair or deceptive, but nevertheless, imposed the exact same penalties on Mr. Dyer. The Superintendent's reinstatement of the same penalty is based on an erroneous interpretation of the relevant statutes, and is legal error.

Questions of statutory interpretation are reviewed for errors of law. *E.g. Kane v. Comm'r of Dept. of Health & Human Services,* 2008 ME 185, ¶ 12, 960 A.2d 1196, 1200; *Botting v. Dep't of Behavioral & Developmental Services,* 2003 ME 152, ¶ 9, 838 A.2d 1168, 1171. When interpreting a statute, this Court first examines the plain language of a statute. *Id.* Although an agency is entitled to deference with regard to its interpretation of an ambiguous statute administered by that agency, that interpretation may be set aside when it is unreasonable. *E.g. Cobb v. Bd. of Counseling Professionals Licensure,* 2006 ME 48,¶13 896 A.2d 271,275.

On this record, and under all the facts and circumstances, revoking Mr. Dyer's license was unduly harsh, arbitrary and capricious. An agency's decision is arbitrary and capricious if it is "willful and unreasoning and without consideration of facts or ***21** circumstances." Kroeger, supra. An agency's decision is arbitrary or capricious if it is "wilful and unreasoning and without consideration of facts or circumstances." *Kroeger,* 2005 ME 501 8, 870 A.2d 566, 569 (internal citations omitted). Although the Court may not "attempt to second-guess the agency on matters falling within its realm of expertise," the Court reviews the Superintendent's order to determine whether it is "unreasonable, unjust, or unlawful in light of the record." *Imagineering, Inc. v. Superintendent of Ins.,* 593 A.2d 1050, 1053 (Me. 1991); *see also Middlesex Mutual Assurance Co. v. Maine Superintendent of Ins.,* 2003 WL 22309109 (Me. Super. Sept. 26, 2003). In addition, the Superintendent's Order on Remand, imposing an identical penalty as the Original Order despite striking eight findings that Mr. Dyer's conduct was unfair or deceptive, demands a thorough review. *See Greyhound Corp. v. I.C.C.* 668 F.2d 1354, 1358 (D.C. Cir. 1981).[1] Although the standard of review remains the same, "[a] reviewing court... will accord a somewhat greater degree of scrutiny to an [administrative] order that arrives at substantially the same conclusion as an order previously remanded by the same court." *Id.* This is because of "the danger that an agency, having reached a particular result, may become so committed to that result as to resist engaging in any genuine reconsideration of the issue." *Id.*

ARGUMENT

I. The Superintendent's Factual Findings Lack Substantial Evidence in the Record

The Superintendent found that Mr. Dyer had committed eleven acts that each ***22** violated one or more sections of the Insurance Code. (A. 73). He found that Mr. Dyer: 1) failed to make a proper evaluation of Ms. Van Horn's plans and needs; 2) sold Ms. Van . Horn an annuity product that caused her unnecessary loss; 3) represented to Ms. Van Horn that she would receive six to seven percent interest on the SPIA; 4) sold Ms. Van Horn an annuity product without having reasonable grounds to believe it was suitable for her and without conducting an adequate investigation to determine its suitability; 5) failed to provide Ms. Van Horn with an adequate explanation of the SPIA; 6) failed to obtain assurances from Ms. Van Horn that she understood the SPIA; 7) failed to make sure that the SPIA was properly issued and would provide appropriate earnings; 8) failed to keep adequate records of the four-part plan; 9) failed to cooperate with Old Mutual in its response to a regulatory investigation; 10) falsely represented to Old Mutual that it had left him a voicemail message promising to refund Ms. Van Horn her SPIA payment; 11) falsely representing to the Bureau of Insurance that Old Mutual had left him a voicemail promising to refund Ms. Van Horn her SPIA payment. (A. 73). With the exception of finding eight, regarding Mr. Dyer's record-keeping, the Superintendent's findings lack substantial evidence in the record.

A. Ms. Van Horn's Testimony was Inherently Unreliable and Could not Reasonably be Credited

The credibility of Joan Van Horn is at the core of the Superintendent's decision and effects virtually all of her findings particularly findings one, two, three, four, five, six, and seven. (A. 69). Ms. Van Horn, 78 years old at the time of the hearing in this matter, repeatedly demonstrated and admitted that her memory is unreliable. She also appeared to be confused by some questions. In light of this, not only does the record compel the conclusion that Ms. Van Horn's testimony was unreliable, but the factual ***23** findings and decision dependent on that testimony must also be vacated.

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On numerous occasions during the December 2010 hearing in this matter Ms. Van Horn openly admitted to having a poor memory. For instance, when asked whether she could remember speaking with Mr. Dyer about a letter he assisted her in drafting, Ms. Van Horn responded "[c]an you remember what you did last week for a couple of hours in the afternoon? You're better than me, because I can't remember." (R. 500; A. 236). In response to the question of whether there were conversations that she had five or six years ago that she did not remember, Ms. Van Horn responded that "I wouldn't be a bit surprised." (R. 502; A. 238). Ms. Van Horn, acknowledging that she could not remember the name of a prior **financial** advisor, and stated that "I mean, give me a break. I have a hard time to remember my own." (R. 481; A. 217). In response to a question regarding whether there were things within the preceding six years that she may not remember, Ms. Van Horn acknowledged that "[w]ell, when you get old, you do forget." (R. 478; A. 215).

Ms. Van Horn's forgetfulness was demonstrated on multiple occasions. When presented with a letter dated March 6, 2008 bearing her signature, Ms. Van Horn stated "[i]sn't that funny" and went on to explain that "it doesn't look familiar to me at all." (R. 477-478; A. 213-214). Ms. Van Horn did not recall making a complaint to the Bureau of Insurance on April 24, 2008, but recognized her signature on the complaint form. (R. 473-474; 638-639; A. 213-214). Ms. Van Horn did not recall a June 9, 2009 letter to her from the Bureau of Insurance and stated "but that doesn't mean anything anyway". (R. 484-485; A. 220-221). When asked whether she remembered signing an agreement with Mr. Dyer for his services, Ms. Van Horn testified "[n]ever, money never came up other ***24** than investments..." even though she had, in fact, signed a consultant's agreement which set forth Mr. Dyer's compensation. (R. 505; 640; A. 239;249). Ms. Van Horn also testified that she saves all her papers, but then testified she did not have a copy of a complaint that she signed and sent to the Bureau of Insurance. (R. 466; 474; A. 202; 210).

Most tellingly, Ms. Van Horn, after reviewing a letter discussing liquidation of her state retirement benefits, stated, emphatically, that "I had never no(sic) intentions to give it to Katherine [LaPierre]. I have four kids of my own....'" (R. 491; A. 227). But when presented with a letter unequivocally showing that she had named Katherine LaPierre the primary beneficiary of her state retirement account, (R. 961; A. 291), Ms. Van Horn stated that "I may have done that and not remembered it," and then acknowledged that she had withdrawn the entirety of her retirement account and given it to Ms. LaPierre. (R. 492; 228).

Even more troubling were the clear signs of confusion exhibited by Ms. Van Horn. When asked whether she remembered hearing testimony the previous day regarding Mr. Dyer playing her a voicemail from F&G, Ms. Van Horn twice asked who the call would have come from and began criticizing F&G/Old Mutual. (R. 467-470; A. 203-206). Although she did not remember the phone call, Ms. Van Horn stated "...I don't remember, but that doesn't mean that it didn't happen." (R. 467; A. 203). When asked why Ms. LaPierre had been present at one of her meetings with Mr. Dye, Ms. Van Horn answered "[w]ell, I don't know whether it had something to do with schooling, but I don't think so because she graduated in '93, Katherine," answering further that Ms. LaPierre "works for the U.S. Government, Social Security department, and their office is ***25** on the Winthrop Road in Lewiston, and she bought a trailer." (R. 470-471; A. 206-207). When asked again later why Ms. LaPierre had attended a meeting between her and Mr. Dyer, Ms. Van Horn answered "I just really don't remember about a home, but I knew **financially** I could never afford to build her a home. I just didn't have that kind of money or wouldn't take it out of my account." (R. 482-483; A. 218-219).

In addition, Ms. Van Horn also confused Robert Alan Wake, a Bureau of Insurance staff member, for a representative of Old Mutual that had attended the hearing the previous day even though the two sat in different seats during the hearing. (R. 486-488; A. 222-224). Ms. Van Horn also displayed confusion regarding the dates of certain key events, (R. 473; A. 209), the difference between Medicare and Medicaid, (R. 466; A. 202), and believed that the representatives of the Bureau of Insurance were, in fact, her attorneys. (R. 476; A. 212). On more than one occasion Ms. Van Horn also indicated that she wanted only to return to her home. (R. 460, 475; A. 196; 211).

The Superintendent ignored these various red flags when she found that "when [Ms. Van Horn] lacked memory of prior events, she readily acknowledged it" and that Ms. Van Horn's testimony "on the most important points clear and consistent." (A. 69). It was simply unreasonable for the Superintendent to find that Ms. Van Horn's testimony credible, let alone "highly credible." (A. 69). Credibility determinations may be disregarded when the testimony compels disbelief. *Merrow,* 495 A.2d. at 1201. Ms. Van

Horn's testimony is rife with admissions and statements showing that her memory cannot be relied upon and compels disbelief. Based on the foregoing, the record compels the conclusion that Ms. Van Horn's testimony lacked credibility.

***26 B. The Superintendent's Findings With Regard to Mr. Dyer's Communication with Ms. Van Horn and Diligence in Assuring the SPIA was Properly Issued Lack Substantial Evidence in the Record**

With regard to findings three, five, six, and seven of the Decision and Order on Remand, the only credible evidence in the record weighed in Mr. Dyer's favor. The Superintendent relied on Ms. Van Horn's inherently unreliable testimony, crediting it over Mr. Dyer's. The Superintendent's findings on these issues, therefore, lack substantial evidence in the record.

The record is replete with testimony that Ms. Van Horn and Mr. Dyer discussed Mr. Dyer providing Ms. Van Horn long term care protection planning services. Mr. Dyer and Ms. Van Horn agree that they first met after a speech Mr. Dyer gave discussing long term care protections, that they discussed Ms. Van Horn's long term care concerns and that they initially attempted to secure Ms. Van Horn long term care coverage. (R. 237-239; 461,463-464; 494; A. 82-84; 197; 199-200; 230). Mr. Dyer's presentation on long term care protection covered three mechanisms for coverage: (1) long term care insurance; (2) being wealthy enough to pay privately; or (3) preparing your estate to qualify for Medicaid/MaineCare. (R. 239). The record is clear that Mr. Dyer and Ms. Van Horn met multiple times to discuss her options. (R. 302; 328-329; 462; A. 136; 143-144; 198).

Ms. Van Horn's memory of the parties' discussions may diverge from Mr. Dyer's, but, as was discussed supra in Section 1(A), she exhibited significant memory failings when testifying, repeatedly admitted those memory deficits, and consequently, her testimony may not be credited. A careful review of the portion of Ms. Van Horn's testimony relied on by the Superintendent reveals that she, in fact, had no memory of ***27** what was discussed at those early meetings. (R. 501; A. 237). When asked whether she discussed with Mr. Dyer the advantages and disadvantages of gifting assets to her children before she died versus leaving it to them in will, Ms. Van Horn stated "[i]f he did, you know what my answer would have been? N-O." (R. 501; A. 237). (emphasis added). This statement makes plain that Ms. Van Horn did not, in fact, remember whether Mr. Dyer had raised this issues and expressed only her present view on this issue. (R. 501; A. 237). Furthermore, in later testimony Ms. Van Horn noted that just because she does not remember talking to Mr. Dyer about Medicaid or Medicare does not mean it did not happen. (R. 494).

Similarly, the Superintendent's finding that Mr. Dyer did not review the SPIA application with Ms. Van Horn prior to submitting the application to Old Mutual on May 31,2005, but that he mailed it to her with "sign here" stickers, is unsupported by the substantial evidence on the whole record. (R. 200; A. 67). In so finding, the Superintendent relied on Mr. Dyer'S testimony that "the application was [ ] done by my administrative staff, and it was sent to Ms. Van Horn by mail with 'sign here' stickers and so on, and signed by her and sent back by mail." (R. 273; A. 118). Mr. Dyer went on to testify, however, in response to the question of whether there was anyone to explain the application to Ms. Van Horn: "It had been previously discussed numerous times as part of the plan." (R. 274; A. 119). Ms. Van Horn herself testified that Mr. Dyer "probably felt [she] understood it." (R. 466-467; A. 202-203). Therefore, the substantial evidence on the record does not support the Superintendent's findings that Mr. Dyer did not adequately explain the SPIA or the SPIA application to Ms. Van Horn, findings five and six respectively.

***28** With regard to Mr. Dyer's ensuring that the SPIA was issued properly and provided appropriate earnings, finding seven, the record indicated that it was Old Mutual's mistake that caused Ms. Van Horn to receive less than the intended yield. (R. 364; 384; A. 160; 167). The difference between what Ms. Van Horn was supposed to receive and what she initially received, approximately fifteen dollars per month, was small enough to make Old Mutual's mistake non-obvious. When Old Mutual's error was revealed, Mr. Dyer worked diligently with Ms. Van Horn to correct the problem. (R. 276; A. 121). Finding seven, therefore, lacks substantial evidence in the record.

Finally, with regard to finding three, that Mr. Dyer allegedly representing to Ms. Van Horn that she would receive six to seven percent yield from the SPIA, the Superintendent relied solely on Ms. Van Horn's inherently unreliable testimony. (A. 68). As

that evidence cannot reasonably be relied upon, as discussed supra in Section 1(A) finding three lacks substantial evidence in the record.

C. The Superintendent's Findings with Regard to Mr. Dyer's Evaluation of Ms. Van Horn's Needs and the Overall Suitability of the SPIA Lack Substantial Evidence in the Record

In findings one, two and four, the Superintendent found that Mr. Dyer failed to make a proper evaluation of Ms. Van Horn's needs, sold her a product that caused her unnecessary loss, and sold Ms. Van Horn a product without having reasonable grounds to believe it was suitable to her. (A. 73). The substantial evidence in the record does not support these findings.

The record is clear that the SPIA satisfied a number of Ms. Van Horn's goals. As Mr. Dyer indicated in his testimony, Ms. Van Horn approached him with concerns regarding protecting herself in the event of needing long term care services. (R. 238; ***29** 463; A. 83; 199). Ms. Van Horn hired Mr.Dyer in connection with her insurance and **financial** needs. (R. 640; A. 249). Unable to secure long term care coverage, and not **financially** able to self-insure, Ms. Van Horn's only other option for long-term care protection was to qualify for Medicaid/MaineCare.

In addition, Ms. Van Horn faced a significant increase in her tax burden in 2005. This was due to her decision to cash out her state retirement account and give that money to Ms. LaPierre. (R. 250-251; A. 95-96). This withdrawal presented the potential to significantly increase Ms. Van Horn's tax liability. (R. 250-251; A. 95-96).

In addition, Ms. Van Horn had approximately 90% of her assets invested in the Modern Woodman annuities. (R. 257; A. 102). In Mr. Dyer's view, having 90% of a client's funds in a single asset was inappropriate on its face, (R. 257-258; A. 102-103). Modern Woodman was also heavily invested in real estate mortgages and was not included in the Maine State Guaranty Fund. (R. 251; A. 96). This meant that should Modern Woodman falter, Ms. Van Horn could lose the vast majority of her assets and be left without recourse. (R. 251; A. 96).

The SPIA addressed all three of these concerns. The SPIA transferred some of Ms. Van Horn's assets out of Modem Woodman, lacking a secondary guarantee, and into a guaranteed income stream, thereby diversifying her assets. (R. 293-294; A. 128-129). The SPIA also had a sixty-four percent exclusion ration, meaning that sixty-four percent of the SPIA payments were non-taxable as income. (R. 269-70, 293; A. 114-115; 128). This helped to keep Ms. Van Horn's taxable income below the threshold that would put her in a higher tax bracket, which would have significantly increased her overall tax liability. (R. 269-70, 293; A. 114-115; 128).

***30** Finally, the SPIA also was part of Mr. Dyer's plan to prepare Ms. Van Horn's estate for MaineCare eligibility. As Mr. Dyer testified, to qualify for MaineCare individuals must "give away their estate while they're healthy and before they know whether or not they're going to truly need long-term care or not." (R. 247; A. 92). Old Mutual acknowledged that some annuitants purchase SPIAs to reduce their income and assets to a level to allow them to qualify for Medicare. (R. 739). Mr. Dyer's plan was to guarantee an income-stream for Ms. Van Horn so that she could safely reinvest her assets in other tools that had a higher yield and then do so inside a special needs trust. (R. 248; A. 93). The goal of this plan was to make sure that "if [Ms. Van Horn] ever did end up needing long-term care, that she would essentially not have any assets at that point other than her home." (R. 248; A. 93).

In making her determination as to the suitability of the SPIA, the Superintendent unduly focused on the yield of the SPIA. (A. 68). The Superintendent's fixation on the yield of the SPIA ignores the fact that, as was true here, an insurance product can serve more than one purpose. Although a product may not be the best product in any one area, it may still be the most suitable product overall. Here, the SPIA provided benefits to Ms. Van Horn on three different levels.

The Superintendent also relied on a number of baseless statements regarding the suitability of the SPIA when formulating findings one, two and four. (A. 68). The Superintendent stated that "all of the other strategies that Mr. Dyer cited could have

been pursued even if the funds used to purchase the SPIA had been left in the Modern Woodman annuity...". (A. 68). The Superintendent also stated that the tax benefits provided by the SPIA would not make up for the loss in income due to the lower yield. ***31** (a. 68). The Superintendent cites to no evidence in the record to support either of these opinions regarding the suitability of the SPIA for Ms. Van Horn. [2] (A. 68).

The Superintendent also incorrectly stated that the tax-savings that Mr. Dyer wanted to achieve for Ms. Van Horn "was inconsistent with his professed rationale that [Ms. Van Horn] had no need for tax benefits...." (A. 68). This mis-states Mr. Dyer's testimony. Although Ms. Van Horn normally was in a very low tax bracket, and therefore did not normally need tax benefits, her withdrawal from her state retirement plan in 2005 caused a significant increase in her tax burden for that one year. (R. 251; A. 96). Thus, Ms. Van Horn did, in fact, need tax-benefits in the year that she purchased the SPIA due to her substantial IRA distribution. (R. 250-51; 293; 957-958; A. 95-96; 128; 287-288). The SPIA, with its high exclusion ratio that counted less towards her taxable income, provided that. (R. 293, 333-335; A. 128; 148-149).

The Superintendent also incorrectly stated that the yield on the SPIA was negative. (A. 69). As acknowledged by Mr. Laws, Old Mutual's representative, the SPIA's intended yield was not what Ms. Van Horn originally received. (R. 364; 384; A. 160; 167). Old Mutual eventually corrected this problem to ensure that Ms. Van Horn received the yield that Old Mutual had intended to provide. (R. 364; A. 160). The corrected income stream was enough to provide Ms. Van Horn a positive return on her investment with Old Mutual. (R. 364; 734; A. 160). Thus, any "negative yield" was the fault of Old Mutual and cannot be attributed to Mr. Dyer.

***32** The Superintendent's unsupported opinions regarding the tax benefits and whether the SPIA was an appropriate tool to use for MaineCare planning purposes also involve questions that lie outside of the Superintendent's expertise or authority. Pursuant to 24-A M.R.S.A. § 211, the Superintendent's authority lies in the enforcement of the provisions of, and exercise the duties imposed by, the Maine Insurance Code. The Superintendent's independent, and unsupported, determination that the SPIA failed to provide sufficient tax benefits and that the Modern Woodman annuity accomplished Ms. Van Horn's goal of MaineCare eligibility are questions more properly answered by Maine Revenue Service and the Department of Health and Human Services, respectively. Her rejection of Mr. Dyer's explanation of the suitability of the SPIA on these grounds lacks substantial evidence in the record and is inappropriate,

For these reasons, findings one, two and four lack substantial evidence in the record.

D. The Superintendent's Finding of Deceptive or Fraudulent Conduct by Mr. Dyer, or Suggestions of the Same, Lack Substantial Evidence in the Record

The Superintendent made two findings suggesting that Mr. Dyer acted with deceptive intent with regard to the investigation of the circumstances surrounding this matter. (A. 73). The Superintendent at times also made suggestions that Mr. Dyer had engaged various forms of fraudulent conduct. (A. 68; 70; 72). Neither of these findings and/or suggestions are supported by substantial evidence in the record.

i. Mr. Dyer did not engage in a "pattern of deception"

Findings ten and eleven of the Original Order indicate that Mr. Dyer falsely told Old Mutual and Bureau staff that he received a voicemail from Old Mutual promising to ***33** refund Ms. Van Horn her SPIA premium. (A. 73). The Superintendent added to this by characterizing Mr. Dyer as having engaged in "a pattern of deception designed to persuade Old Mutual to compensate [Ms. Van Horn] so that Mr. Dyer would not be responsible for her losses" (A. 70).

Findings ten and eleven rely heavily on Ms. Van Horn's inherently unreliable testimony. (A. 70). The Superintendent concluded that Mr. Dyer never received the voicemail message from Old Mutual saying that it would correct its mistake, finding that

Ms. Van Horn had no memory of hearing the message, "that this would have been a very important event for her" and that she "would remember if they had said it." (A. 69). In reality, although Ms. Van Horn testified generally that she would have "definitely" remembered if the insurance company did something that was in her interest, when asked if she remembers listening to a voicemail message from Old Mutual played by Mr. Dyer, Ms. Van Horn stated: "I don't remember, but that doesn't mean that it didn't happen." (R. 467; A. 112). Not only this, but, as discussed supra in Section 1(A), Ms. Van Horn's testimony is simply not credible.

In addition, a review of Mr. Laws' testimony, also relied on by the Superintendent with regard to these findings, indicates that it fails to support the Superintendent's interpretation of it. When asked whether Old Mutual representatives always log their phone calls, Mr. Laws answered "[n]ot every time, no." (R. 411; A. 180). Mr. Laws also explained that although representatives are trained to record any phone calls they make, he had no way of verifying when the procedure was not followed. (R. 427, 443; A. 2181; 192).

The Superintendent's finding that Mr. Dyer engaged in a "pattern of deception" ***34** designed to shift blame to Old Mutual also makes little sense when considering in context. Old Mutual acknowledges that it made a mistake with regard to Ms. Van Horn's annuity, (R. 364, 365, 371, 422, 443-444;; A. 160-161; 192), and acknowledges that approximately 135 other SPIAs issued by Old Mutual had similar problems. (R. 393). The Superintendent also failed to acknowledge that Mr. Dyer never attempted to conceal his involvement with Ms. Van Horn, and, in fact, assisted Ms. Van Horn in filing the very complaint that triggered the present disciplinary proceedings. (R. 485-486; A. 221-222).

Even assuming that Mr. Dyer indicated to Old Mutual and to Bureau staff that he received a voicemail when he did not, it goes too far to call such behavior a "pattern" of deception. A pattern is defined as a "mode of behavior or series of acts that are recognizably consistent." *Black's Law Dictionary,* 1242 (9th ed. 2009). It stretches the word past is limits to call two incidents a "pattern" of anything. See id. Accordingly, findings ten and eleven, as well as the Superintendent's finding that Mr. Dyer engaged in a pattern of deception, lack substantial evidence in the record.

ii. The Superintendent's Suggestions that Mr. Dyer Defrauded Ms. Van Horn Lack Substantial Evidence in the Record

At various points, the Superintendent hyperbolically, and without making any actual findings, suggests that Mr. Dyer engaged in either fraudulent or intentionally misleading conduct. (A. 68; 70; 72). Based upon the Superintendent's exhaustive cataloging and parsing of Mr. Dyer's conduct, Appellant presumes that the Superintendent would have clearly and unequivocally set forth any findings and conclusions regarding any fraudulent conduct on Mr. Dyer's part had there been evidence supporting such findings. Instead, the Superintendent found that Mr. Dyer had "committed serious violations of the Insurance Code, which demonstrate *incompetence* ***35** *and untrustworthiness* and warrant the revocation of this producer and consultant licenses." (A. 72). (emphasis added). The Superintendent's disjunctive description of Mr. Dyer's conduct is inappropriate because it permits the Superintendent to suggest a finding of fraudulent conduct without making the requisite findings.

A review of the specific instances in which the Superintendent uses these disjunctive descriptions underscores the hyperbolic nature of the Superintendent's suggestions. For example, the Superintendent gratuitously found that Mr. Dyer's description of the math necessary to determine the total return Ms. Van Horn would receive from the SPIA (i.e. totaling the payments received and the total remaining payments) was either "incompetent or intentionally misleading." (A. 70). She says instead that it was only necessary to multiply the monthly payment by the number of months payments were to be made. (A. 70). This is a distinction without a difference, and the Superintendent's mis-characterization of Mr. Dyer's testimony is nothing more than hyperbole. See Webster's Dictionary, http://www.merriam-webster.com/dictionary/multiplication (defining multiplication as a "mathematical operation that at its simplest is an abbreviated process of adding an integer to itself a specified number of times").

E. The Superintendent's Finding that Mr. Dyer Failed to Cooperate with Old Mutual in its Response to a Regulatory Investigation Lacks Substantial Evidence in the Record and Does not Violate § 1420-K(1)(H)

Finding nine, that Mr. Dyer failed to cooperate with Old Mutual in a regulatory investigation, is contrary to the clear evidence in the record. Mr. Laws testified that Mr. Dyer responded to Old Mutual's request for information by providing "a letter from his counsel with a bunch of attachments." (R. 402; A. 176). Mr. Laws testified that there ***36** were "a lot" of attachments, but could not remember what they were. (R. 402). Mr. Laws based his opinion that Mr. Dyer did not cooperate with Old Mutual on the fact that "we did not get very specific response" to Old Mutual's specific questions. (R. 405). But the testimony was undisputed that Mr. Dyer did, in fact, respond to Old Mutual's request and provided supporting documentation. (R. 402; A. 178). The Superintendent's finding that Mr. Dyer failed to cooperate lacks substantial evidence.

Furthermore, finding nine, even if supported by substantial evidence, would not violate § 1420-K(1)(H). (R. 206). § 1420-K(1)(H) prohibits using "fraudulent, coercive or dishonest practices, or demonstrating incompetence, untrustworthiness or **financial** irresponsibility in the conduct of business in this State or elsewhere." 24-A M.R.S.A. § 1420-K(1)(H). There is simply no basis in the statute on which to find that providing a written response with numerous attached documents, but not providing a sufficient level of specificity to suit the insurer (who could not even remember what was provided), constitutes either a fraudulent, coercive or dishonest practice or demonstrates incompetence, untrustworthiness or **financial** irresponsibility under the plain meaning of those various terms. See id. The Superintendent failed to provide any definition of § 1420-K(1)(H) that would encompass Mr. Dyer's alleged lack of cooperation. (R. 202, 206).

As is set forth above, Ms. Van Horn's testimony was inherently unreliable and could not reasonably be credited. A closer review of Ms. Van Horn's testimony, as well as that provided by Mr. Laws, indicates that it, in fact, supports Mr. Dyer's account and the Superintendent's mis-characterizations of it lack substantial evidence in the record. Finally, the record makes plain that the Superintendent simply had no basis in the ***37** evidence to find that Mr. Dyer engaged in any "pattern of deception" or otherwise fraudulent conduct. Accordingly, findings one, two, three, four, five, six, seven, nine, ten, eleven and twelve lack substantial evidence and must be vacated.

II. The Superintendent's Reinstatement of the Same Remedies on Remand is Based on Legal Error, is Arbitrary and Capricious, Amounts to an Abuse of Discretion and is Unreasonable and Unjust

The Superintendent's [3] Decision on Remand, reinstating the identical penalties imposed in the Original Order, was based on an implausible interpretation of the Insurance Code, is disproportionately harsh compared to the approach taken by the current and prior Superintendents, and, when considered in context with all of the other evidence, is arbitrary, capricious and constitutes an abuse of discretion.

A. The Superintendent's Reinstatement of the Same Remedies Was Affected by Legal Error

The Superintendent reinstated the identical penalty imposed in the earlier order, despite eliminating eight findings that Mr. Dyer's conduct was unfair or deceptive pursuant to § 2152, based upon an unreasonable interpretation of § 2152. (A. 78-79). The Superintendent reasoned that "[t]he violations of the law were just as serious, shed the same light on Mr. Dyer's character, and caused the same harm, regardless of whether the list of statutes cited for those violations includes 24-A M.R.S.A. §§ 1447 and 2152." (A. 79) Contrary to the Superintendent's assertion, § 2152's text indicates that the elimination of the eight violations of that section fundamentally changes the nature and character of Mr. Dyer's conduct for purposes of determining what penalty to impose.

***38** The distinction between unfair or deceptive conduct and mere incompetence and untrustworthiness is evident from their dictionary definitions. *See e.g. Searle,* 2010 ME 89, ¶¶ 10, 3 A.3d at 394 (using on dictionary definitions to define statutory term). "Unfair" is defined as "marked by injustice, partiality or deception" while "deceptive is defined as "tending to deceive" and

"having power to mislead." Merriam-Webster Third International Dictionary 585, 2494 (2002). In contrast, "incompetence" is defined as "a lack of physical, intellectual or moral ability" whereas "untrustworthy" is defined as not "worthy of confidence" or not dependable. *Id.* at 1144, 2457, 2514. A finding of unfair or deceptive conduct implies a level dishonesty and/or maliciousness that is not present in merely incompetent or untrustworthy conduct. *See id.* at 585, 1114, 2457, 2494, 2514.

To find otherwise, as the Superintendent did, requires an interpretation of § 2152 as having no independent meaning or value. Such an interpretation is contrary to established rules of statutory interpretation and is unreasonable. *See Cobb,* 2006 ME 48, ¶11, 896 A.2d at 275 (stating that "[a]ll words in a statute are to be given meaning and none are to be treated as surplusage if they can be reasonably construed").

The elimination of these eight findings of unfair or deceptive conduct necessarily affects the nature and character of Mr. Dyer's conduct by removing any indication that Mr. Dyer acted with dishonest, fraudulent or malicious intent. See id. The Superintendent's conclusion that the elimination of eight findings that Mr. Dyer's conduct was unfair or deceptive had no effect on the nature and character of Mr. Dyer's conduct is unreasonable on its face and is legal error. *See Kroeger,* 2005 ME 50, ¶ 8, 870 A.2d at 569; Imagineering, Inc., 593 A.2d at 1053. As this conclusion forms the basis on which the Superintendent justifies reinstating the same penalties as those imposed in the ***39** Original Order, the reinstatement of those penalties is also unreasonable, unjust, arbitrary, capricious, and an abuse of discretion. *See id.*

B. Revoking Mr. Dyer's License Based Upon the Evidence Presented was a Disproportionately Harsh Approach Compared to Prior Bureau of Insurance Cases

The Superintendent's revocation of Mr. Dyer's licenses, based on findings demonstrating that Mr. Dyer's conduct demonstrated incompetence and untrustworthiness, is dramatically out-of-step with the approach taken in prior matters and is arbitrary and capricious. *See Kroeger,* 2005 ME 50, ¶ 8, 870 A.2d at 569; *Imagineering, Inc.,* 593 A.2d at 1053. With regard to the nature of violations, the Superintendent stated that:

[T]he cumulative impact of the acts in question continues to demonstrate Mr. Dyer's unfitness to act as an insurance professional. The Superintendent concluded that "Mr. Dyer has committed serious violations of the Insurance Code, *which demonstrate incompetence and untrustworthiness* and warrant the revocation of his producer and consultant licenses." The violations of the law were just as serious, shed the same light on Mr. Dyer's character, and caused the same harm, regardless of whether the list of statutes cited for those violations includes 24-A M.R.S. §§ 1447 and 2152. The license revocations are therefore reaffirmed.

(R. 1007). (emphasis added). [4]

In the words of the Superintendent, the determination of what penalty to impose ***40** on Mr. Dyer "depend[s] on the nature, extent, and variety of the wrongful acts, their cumulative impact on the victim, and the consistency and duration of the pattern of misconduct." [5] (A. 78); *see also Watts,* INS 08-303 [6] (2009) (stating that in determining the appropriate remedy, the Superintendent "consider[s] the violation, extent of the wrongdoing, and the circumstances surrounding the conduct to assure that the remedy is reasonable in relation to the violations that were committed. That consideration includes factors such as harm to others, acceptance of responsibility by the actor, and the nature of the violation").

Putting aside the fact that, as discussed *supra* in Section I, the Superintendent lacks a sufficient factual basis for most of the findings, the eleven findings, minus the eight violations of § 2152 and the one violation of § 1447, paint a picture of Mr. Dyer as being, at points, sloppy and/or careless, not malicious or fraudulent in his dealings with Ms. Van Horn. Mr. Dyer's potential commission, $1,500 in total, and his decision to not pursue the remaining balance after only having received $1,376, make it clear that Ms. ***41** Van Horn was not a lucrative client for Mr. Dyer. (R. 295; 441-442). Mr. Dyer was also never found to have acted deceptively towards his client, Ms. Van Horn. Mr. Dyer's insistence that he received a voicemail from Old Mutual promising a refund, a contention the Superintendent found to be untrue, is a far cry from fraud, did not induce his client to

purchase any product, was in regard to a purely collateral matter, and Old Mutual ultimately acknowledged that it had made a mistake and corrected the problem. (R. 364; 384). This is in distinction to the *Costa* matter where the licensed individual lied to Bureau of Insurance staff members with regard to the identity of a purported former client used in the licensed individual's misleading marketing materials. *Costa, Conroy and CostaConroy, LLC,* INS 08-302 (2008). The dishonest statement in *Costa* was directly related to the alleged violations levied against the licensed individual whereas here Dyer's statements regarding the voicemail from Old Mutual is a purely collateral issue. *Id.* Hyperbole removed, the Superintendent's findings paint a picture of a producer/consultant who was, at worst, negligent in selecting, explaining and purchasing one annuity product for one customer, causing less than $8,000 in harm. (R. 202, 206; A. 65-73).

Applying the Superintendent's own standard shows the arbitrary and unreasonableness of the decision. The "nature, extent, and variety of the wrongful acts" is limited and arises out of the sale of one annuity to one client. The cumulative impact to the victim, at worst, is $8,000. And there is no "consistency and duration of the pattern of misconduct." One annuity sold to one client.

The Superintendent's revocation of Mr. Dyer's licenses, without a finding of fraudulent or malicious conduct, is conspicuously out of step with the Superintendent's ***42** approach in prior disciplinary decisions.[7] (A. 79). The Superintendent has most often sought revocation of a producers' license when there is evidence that the licensee engaged in fraudulent or deceptive conduct directed towards customers or potential customers.[8] For example, in *Hancock,* INS 00-3041 (2000), the Superintendent sought revocation of a producer's license when the evidence established that he had misrepresented the terms of annuities to ten different customer, causing them to incur penalties, while earning significant commissions on the sales. There, the producer also misappropriated the money of some of his customers. *Hancock,* INS 00-3041 (2000).

Similarly, the Superintendent has sought revocation of producers' licenses when there is evidence that they have engaged in clearly fraudulent conduct even if not directed at their customers. *See Stiles,* INS 09-210 (2009) (revoking the license of an insurance provider who, as an insured, submitted fraudulent insurance claims); *Richard,* INS 08-305 (2008) (revoking the license of a producer who induced a chronically ill, totally disabled customer to exchange a life insurance policy for an annuity worth 12% of the value of the insurance policy and engaged in multiple deceptive acts to conceal the producer's activities); *Black,* INS 06-502 (2006) (revoking the license of an adjuster ***43** found to engaged in dishonest and coercive practices by entering incorrect or fictitious data for twenty-six claims, incorrectly calculating benefits for six claims and filing ten claims beyond the statutory deadline).[9]

The Superintendent has also sought revocation of producers' licenses when there is evidence that the producer has taken advantage of his or her relationship with the customer. *See Juliano,* INS 09-213 (revoking the license of an insurance producer who misused a customer's information for personal gain by inducing the customer to purchase a snowmobile for the producer as well as causing the customer to purchase an unsuitable annuity and engage in various other practices demonstrating dishonesty and incompetence); *Watts,* INS 08-303 (2008) (revoking the license of an insurance producer who borrowed significant amounts from his client, failed to pay back the amount owed, and caused over $75,000 in damages).

Where, as here, a producer's conduct merely demonstrates incompetence, the Superintendent has previously found it sufficient to impose suspensions and monetary penalties in conjunction with requiring completion of continuing education programs. For instance, in *McNally,* INS 10-200 (2010), the producer caused the insured's application for supplemental Medicare coverage to be denied by failing to properly fill out the application. Having cancelled the prior policy, and with the application for the new policy denied, the insured incurred medical expenses that would have been covered when he was hospitalized for nine weeks, ultimately passing away.[10] McNally, INS 10- ***44** 200 (2010). The producer's failure to understand a certain provision of Maine law governing continuity of coverage provisions demonstrated incompetence and warranted action against the producer's license. *Id.* The Superintendent and producer entered into a Consent Agreement in which they agreed to a fourteen day suspension of the producer's license, payment of $1,500 in civil penalties, and that the producer would complete certain continuing education training within six months. *Id.*

Similarly, Superintendent Kofman declined to pursue revocation of a producer's license in *Witham,* INS 08-224 (2004), when the producer displayed multiple instances of incompetence. The producer, based upon unverified statements from the customer's husband, mistakenly enrolled the customer in a plan that disqualified her from receiving benefits under a separate plan. *Witham,* INS 08-224 (2004). The producer also mistakenly precluded a separate customer from receiving benefits under a state retiree health plan by enrolling the customer in another plan. *Id.* In addition, the producer, based on unverified statements from the customer's husband that the customer lacked capacity, allowed the husband to sign the customer's name to an insurance application in violation of plan requirements. *Id.* The Superintendent and producer entered into a Consent Agreement where the parties agreed to a two year license suspension with an additional one year probation period and a $500 civil penalty. *Id.*

Superintendent Cioppa has recently declined to pursue revocation of a producer's license even though there was evidence of false or dishonest conduct in the performance of the producer's duties. In Harris, INS 11-235 (2011), Superintendent Cioppa entered into a Consent Agreement with a producer whereby the parties agreed to, among other things, a suspension of the producer's license for only seven days, payment of a civil ***45** penalty of $1,500, and the producer's completion of certain continuing education requirements within six months. Harris, INS 11-235(2011). There, evidence indicated that the producer had issued a certificate of insurance even though no such policy was in force. Id. The producer also photocopied a Cancellation Request/Policy Release form signed by the customer, changed the company name and policy and sent the copied form to another insurer to cancel a different policy of the customer. Id. In addition to this, the producer failed to timely remit premium payments to the customer's insurer, nearly causing the cancellation of the insured's policy, while also retaining some of the customer's money well past the statutorily deadline to remit it back to the customer. Id.

Mr. Dyer's wrongful conduct, consisting largely of carelessness in connection with the sale of one annuity, is more in line with the conduct see in *McNally,* INS 10-200 (2010), Witham, INS 08-224 (2004), and *Harris,* INS 11-235 (2011) than with those decisions where the Superintendent has pursued revocation. The Superintendent's insistence now on seeking the revocation of Mr. Dyer's licenses is conspicuously out of step with the approach taken in previous cases and is arbitrary, capricious and an abuse of discretion. *See Kroeger,* 2005 ME 50, ¶ 8, 870 A.2d at 569; *Imagineering, Inc.,* 593 A.2d at 1053.

C. Revoking Mr. Dyer's License on the Evidence in the Whole Record is Unreasonable and Unjust and an Abuse of Discretion

A review of the whole record reveals that the penalty imposed on Mr. Dyer is disproportionately harsh compared to the alleged harm. Despite the Superintendent's careful parsing of Mr. Dyer's conduct into a multitude of alleged violations, the transaction giving rise to the disciplinary proceeding here involved a single annuity sold to a single client. As counsel for the Staff Advocacy Panel argued in his opening ***46** statement, "... all the allegations, all the offenses charged came out of the same nucleus of facts, and to sum up really, it's possible to say that this case comes down to the sale of an annuity...". (R. 221-222). Old Mutual admitted that it made mistakes in calculating Ms. Van Horn's payments, and later corrected them. (R. 364; 384; A. 160; 167). Mr. Dyer made an exceedingly small commission on the transaction and even declined to collect the balance of what he was owed under the Commission Agreement. (R. 295; A. 130). The total harm to Ms. Van Horn was less than $8,000. (A. 69).

Moreover, Mr. Dyer offered completely plausible reasons for the purchase of the SPIA, including diversification of Ms. Van Horn's portfolio, amelionation of the tax consequences of Van Horn's gift to Katherine, and Medicaid planning. All of these reasons for purchasing thespian, have unrebutted objective support in the record. Ms. Van Horn did have an unusually disproportionate allocation of her assets in the Modern Woodman accounts. She did create a tax issue by liquidating her retirement plan and giving the money to Katherine. She clearly sought Mr. Dyer's advice to address her insurance and **financial** concerns.

Rather than rely on any of the objective evidence, the core of the Superintendent's findings rely on the testimony of Ms. Van Horn who, as was discussed supra in Section 1(A), was, at best, an exceedingly unreliable witness. Van Horn repeatedly questioned her own recollection, and failed to recall ever seeing document after document that was presented to her during her testimony,

many of which she signed. Furthermore, as was discussed supra in Section 1(B), the Superintendent used needlessly hyperbolic, and unsupported, rhetoric to give the impression of much more significant wrongdoing on Mr. Dyer's part.

***47** As discussed supra in Section 1(F), the Superintendent also excluded highly probative evidence that corroborated Mr. Dyer's account despite rules that "favor[ing] the liberal admission of all relevant evidence." [11] *See Hale-Rice v. Me. State Retirement Sys.,* 1997 ME 64, ¶ 13, 691 A.2d 1232, 1236. *Citing to Ingerson v. Maine,* 448 A.2d 879 (Me. 1982), the Superintendent here refused to admit the Mr. Consigli's testimony, which would have indicated that Mr. Dyer was truthful in his account of what happened, which went to all eleven of the findings and the related violations. [12] Unlike in Ingerson, Mr. Dyer provided a proper foundation to admit Mr. Consigli's testimony. Other jurisdictions have admitted polygraph testimony in administrative proceedings. *See e.g. Evans v. DeRidder Municipal Fire,* 815 So.2d 61 (La. 2002) (holding that polygraph evidence was competent evidence in administrative proceeding); *Motell v. Napolitano,* 588 N.Y.S.2d 452 (N.Y. App. Div. 1992) (holding that the hearing officer did not err in admitting the results of polygraph evidence into the record). The Superintendent also excluded the affidavit of Ms. LaPierre, which also generally corroborated Mr. Dyer's recollection of his meetings with Ms. Van Horn.

Taken all together, the record as a whole simply does not warrant a revocation of Mr. Dyer's license. (R. 237; A. 84). There is no evidence that Mr. Dyer acted with any ***48** intent to deceive Ms. Van. Horn or that he engaged in any fraudulent acts, nor any evidence suggesting any motive to do so. Ms. Van Horn has stated that she continues to trust Mr. Dyer and wished she could have stopped the proceedings in this matter. (R. 477; 488;506; A. 213; 224; 240). Taken as a whole, the Superintendent's decision to revoke Mr. Dyer's licenses goes too far and is arbitrary and capricious and an abuse of discretion.

CONCLUSION

For all of the reasons set forth above, the appellant requests that the Superintendent's Decision be vacated.

Footnotes

1 Case law interpreting the Federal Administrative Procedures Act provides "useful guidance" in cases arising under the Maine Administrative Procedures Act, as is the case here. *See Maine Sch. Admin. Dist. No. 27 v. Maine Pub. Employees Ret. Sys.,* 2009 ME 108, ¶ 13, 983 A.2d 391, 395.

2 Furthermore, the Superintendent's dismissal of Mr. Dyer's concerns about Ms. Van Horn's almost exclusive investment in Modern Woodman is similarly without a basis in the record. (R. 202). Mr. Dyer first approached Modem Woodman in an attempt to save Ms. Van Horn money, testifying that if Modern Woodman had been able to do a partial 1035 exchange he would not have earned a commission. (R. 260-261). The Superintendent's discounting of Mr. Dyer's concerns regarding Ms. Van Horn's over-concentration of her funds in a single asset has no basis in the facts.

3 On remand, the Superintendent appointed Robert Alan Wake, Esq. as presiding officer to act on the Superintendent's behalf. (R. 1002). Mr. Wake was granted "full authority to take final agency action on [the Superintendent's] behalf." (R. 1002). In light of this, and in the interest of simplicity, Appellant will refer to the Superintendent with regard to the Order on Remand.

4 Appellant notes that, as discussed supra in Section II(d), the Superintendent's suggestions that Mr. Dyer engaged in fraudulent or purposefully deceptive or malicious conduct have no basis in the record. In addition, as is stated above, the Superintendent acknowledged that the earlier findings were limited to incompetence and untrustworthiness. (A. 79).

The Superintendent's findings that Mr. Dyer's conduct violated 24-A M.R.S. §§ 2153 and 2155 do not change this conclusion. Had such violations been intentional, the Superintendent would have presumably found a violation of 24-A M.R.S. §1420-K(1)(E) which permits disciplinary action for "[i]ntentionally misrepresenting the terms of an actual or proposed insurance contract or application for insurance." The lack of such allegations or findings indicates that the Superintendent found Mr. Dyer's violations of 24-A M.R.S. §§ 2153 and 2155 to be unwitting and, thus, consistent with the findings that Mr. Dyer's conduct demonstrated incompetence and untrustworthiness.

5 Maine courts seemingly have not had an opportunity to expressly acknowledge that this type of proportionality analysis is necessary in the context of a professional discipline matter such as the one now before the Court. Case law from other jurisdictions, however, make clear that this principle applies in a variety of professional disciplinary contexts. *See e.g. Attorney AAA v. The Mississippi Bar,*

735 So. 2d 294, 305-06 (Miss. 1999) (holding that "the sanction should be proportionate to the violations of the rules of professional conduct involved," and modifying the penalty imposed for attorney misconduct on the grounds that it was too harsh in light of the invalidation of some of the violations on which the original penalty was based); *Blinder Robinson & Co. v. Bruton,* 552 A.2d 466, 475 (Del. 1989) (noting, in the course of vacating sanctions imposed against a securities broker-dealer as being disproportionate to the conduct, that the form of sanction to be imposed depends "on the nature and circumstances of the violation and the offender"). As discussed above, the Superintendent acknowledged that this type of analysis applies to the present situation. (R. 1006). Thus, the apparent lack of Maine case law on this point seems more likely to be a reflection of the fact that Maine courts have not had occasion to express an opinion on this point rather than a rejection of this analysis. (R. 1006); *see also Attorney AAA,* 735 So. 2d at 305-06; *Blinder Robinson & Co.,* 552 A.2d at 475.

6 The prior Bureau of Insurance decisions cited herein can all be accessed electronically at http://www.maine.gov/pfr/insurance. Appellant will also provide paper copies of these decisions for the convenience of the Court pursuant to M.R.App.P. 8(1).

7 In referring to disciplinary decisions, Petitioner is referring to substantive disciplinary decisions adjudicating claims of producer or consultant misconduct. This is in contrast to reciprocal disciplinary decisions, where the primary violation is a failure to report disciplinary or criminal proceedings occurring in other states to the Bureau, or administrative discipline, such as when the wrongful conduct involved a failure to respond to Bureau inquiries, failure to pay the required fees, or similar conduct.

8 *See Costa, Conroy and CostaConroy, LLC,* INS 08-302 (2008) (revoking the license of a producer who used a multitude of false or misleading advertising designed to attract customers to his business); Merritt, INS 04-504 (2004) (revoking the license of a producer who filled out an application for life insurance, and forged the applicant's signature, knowing that the purported applicant had passed away earlier that day); *Lillybridge,* INS 04-503 (2004) (revoking the license of a producer who entered inaccurate information on a customer's insurance application, forged the customer's signature which later caused the denial of a claim); *Rulman,* INS 04-502 (2004) (revoking the license of a producer holding an expired license, who accepted premium payment from client but retained the money and failed to remit it to the insurer).

9 *See also St. Hilaire,* INS 06-500 (2006) (revoking license of producer convicted of theft); *Gagnon,* INS 02-783 (2002) (revoking the license of a producer convicted of burglary and theft); *Walls,* INS 02-782 (2002) (revoking the license of a producer convicted of fraud and deception in the sale of securities, sale of unregistered securities, and unlicensed sale of securities).

10 Claims for the uninsured expenses were not brought against the insured's estate however. *McNally,* INS 10-200 (2010).

11 5 M.R.S.A. § 9057, governing the admissibility of evidence in administrative proceedings, states that "[e]vidence shall be admitted if it is the kind of evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs."

12 The cases cited by the Superintendent to support her decision to exclude Mr. Consigli's testimony, Maine v. Lavoie, 2010 ME 76, 1 A.3d 408 and Heselton v. Wilder, 496 A.2d 1063 (Me. 1985), are distinguishable on the grounds that they both involving matters where the rules of evidence apply, unlike here. Furthermore, Lavoie involved the question of whether the defendant's confession, not polygraph results, were admissible in a criminal matter, involving different concerns than present in this enforcement matter before the Bureau of Insurance. *See* 2010 ME 76,¶16, 1 A.3d at 412-13. Heselton involved whether a plaintiff's willingness to take a polygraph test was admissible. 496 A.2d at 1064. As such, neither Lavoie or Heselton control here. *See* 2010 ME 76,¶16, 1 A.3d at 412-13; id.

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