ORDER NO. A03-137

STATE OF NEW JERSEY
DEPARTMENT OF BANKING AND INSURANCE

IN THE MATTER OF THE PETITION OF	)	
DAN CORSARO, HECTOR RODRIQUEZ,	)	
ROLAND MINARD, ARTHUR DEEKS,	)	
ROBERT BAKELAAR, JESSE BRANSON,	)	
CHARLES DiCATALDO, RON CHEREP,	)	
ALEJANDRO MEDINA, EDWARD DOHERTY,	)	DECISION AND ORDER
LARRY E. BRITTON, ROBERT ORTIZ,	)	
BRUCE CALLAHAN, ANTONIO MEDINA,	)	
CLEVELAND FOAT, SR., RAYMOND	)	
HELLER AND RICHARD A. FANUCCI,	)	
MICHAEL TIMMINS,	]	
PETITIONERS V. ALLSTATE NEW JERSEY	)	
INSURANCE COMPANY, INC., RESPONDENT	)	

Executive Summary

In accordance with Gaydos Ins. v. National Cons. Ins. 168 N.J. 255, (2001), the civil action filed by 16 Allstate New Jersey agents ("Petitioners") against Allstate New Jersey ("ANJ") was transferred from the Superior Court to the Department of Banking and Insurance by Order dated October 19, 2001. Pursuant to Gaydos, the Department was required to investigate and render a decision as to whether ANJ had, through its agent compensation policies and other practices, violated the "Take All Comers" provisions of the Fair Automobile Insurance Reform Act ("FAIRA"), N.J.S.A. 17:33B-15, 17:33B-18a.(2) and 17:33B-18b.

After reviewing the information supplied by the parties and internal statistical data, the Department has rejected Petitioners' claims that ANJ's policies and practices violated FAIRA.

The following were the core allegations asserted by the Petitioners:

1. Whether ANJ's payments of bonus commissions and additional office expense reimbursement to agents based upon the profitability of their property and casualty books of business (which include their auto insurance business) had the effect of penalizing agents whose auto insurance business was unprofitable or generated from primarily urban areas, in violation of N.J.S.A. 17:33B-18b. The Department has concluded that such monetary incentives are not proscribed by the plain language of FAIRA and are not inconsistent with the intent of that law.

2. Whether ANJ's relocation of certain agents from offices in close proximity to urban areas to locations further removed from such areas penalized those agents based upon the unprofitability and/or location of their auto insurance business, again in violation of N.J.S.A. 17:33B-18b. The Department concluded that this allegation was not supported by the facts as presented by the parties.

3. Whether ANJ's compensation policies, relocations of agents, and general marketing strategies and practices were an attempt to, or had the effect of "channeling away" from ANJ, eligible persons seeking auto insurance

coverage, in violation of N.J.S.A. 17:33B-18a(2). And further, that these policies and practices resulted in ANJ refusing to insure or renew auto insurance for eligible persons, in violation of N.J.S.A. 17:33B-15b. The Petitioners also alleged that, through these policies and practices, ANJ was “redlining” in urban areas. The Department’s investigation indicated that, during the time period that the policies and practices challenged by the Petitioners were in full force and effect the volume of ANJ’s auto insurance business had actually steadily increased in almost all of the state’s urban-based auto insurance rating territories during 2001 and 2002. This increase followed a decline in volume during the 1999-2000 time period.

4. Lastly, one petitioner was terminated by ANJ subsequent to the Department’s receipt of the case from the Superior Court in 2001. The Petitioners alleged that this action penalized that agent in violation of N.J.S.A. 17:33B-18b. After an extensive investigation and review of the facts and circumstances, including the criteria applied by ANJ to evaluate the job performance of the terminated agent, it was determined that his termination was not based upon the factors specified in N.J.S.A. 17:33B-18b and, consequently, that the termination did not result in the agent being penalized in violation of that law.

Decision

This matter was initially opened at the Department of Banking and Insurance ("the Department") on November 16, 2001, through its receipt of an October 19, 2001 Consent Order signed by Hon. R. Benjamin Cohen, J.S.C., transferring this matter to the Department for determination pursuant to Gaydos v. National Consumer Ins. Co, 168 N.J. 255 (2001), and of Petitioners' "Amended Petition for Declaratory Judgment".[1] Allstate New Jersey Insurance Company, Inc. ("ANJ") filed a response to that Amended Petition with the Department on February 20, 2002.

The Gaydos case held that insurance producers may, as private litigants in a civil action, assert a common law breach of contract claim against an insurer based on a breach of an implied duty of good faith and fair dealing

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[1]In his submissions, counsel for the Petitioners has captioned this matter as a "Petition for a Declaratory Judgment". Such proceedings before New Jersey administrative agencies are governed by NJSA 52:14B-8. That statues provides:

> an agency upon the request of any interested person may in its discretion make a declaratory ruling with respect to the applicability to any person, property or state of facts of any statute or rule enforced or administered by that agency. A declaratory ruling shall bind the agency and all parties to the proceedings on the state of facts alleged. Full opportunity for hearing shall be afforded to the interested parties. Such ruling shall be deemed a final decision or action subject to review in the Appellate Division of the Superior Court. Nothing herein shall affect the right or practice of every agency in its sole discretion to render advisory options. [N.J.S.A. 52:14B-8].

As noted above, this matter was not transmitted to the Department through a request of an interested person, but rather by Order of the Superior Court entered pursuant to the decision of the New Jersey Supreme Court in Gaydos. The terms of that Order transferred the case to the Department "for determination pursuant to (Gaydos)." In its opinion in Gaydos, the Supreme Court directed that "on remand, the Law Division should transfer this matter to the Department of Banking and Insurance for an administrative determination of whether NCIC violated FAIRA." Thus, unlike a "request" for a declaratory ruling (or judgment) under N.J.S.A. 52:14B-8, the Department lacked any discretion to decline to investigate the alleged FAIRA violations upon the issuance of the Order transferring the instant case to the Department. Accordingly, notwithstanding the manner in which the Petitioners captioned the matter, this matter is not a request for a Declaratory Ruling under N.J.S.A. 52:14B-8. The Petitioners where there are underlying violations of the Fair Automobile Insurance Reform Act ("FAIRA"), N.J.S.A. 17:33B-1 et seq., by the insurer with regard to the insurance producer. In Gaydos, the Supreme Court concluded that the Commissioner of Banking and Insurance was the appropriate party to make an administrative determination regarding the underlying violations of FAIRA, given that the Department has the primary responsibility to enforce FAIRA. In this matter, pursuant to Gaydos, I am to decide the limited issue of whether Respondent has violated FAIRA with regard to and as alleged by the Petitioners.

As is set forth at length below, after an exhaustive review of the myriad submissions by the parities, other investigative evidence received through witness interviews, subpoenas and otherwise, and relevant statistical information maintained by the Department, I have concluded that ANJ's agent compensation and evaluation policies and marketing strategies are not proscribed by FAIRA.

PROCEDURAL HISTORY

The Amended Petition alleged that the 16 Petitioners named therein were, contrary to N.J.S.A. 17:33B-18b, penalized by ANJ's marketing practices and policies regarding agent compensation and the location of the agents' offices. It also alleged that the effect of those policies and practices was to circumvent ANJ's obligation to "take all comers" under N.J.S.A. 17:33B-15b.

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entitled subsequent filings as: Second Amended Petition, Third Amended Petition, Fourth Amended Petition, and Fifth Amended Petition.

Subsequent to receipt of ANJ's Response to the Amended Petition in February 2002, wherein ANJ denied that any of its actions or policies contravened FAIRA, the parties submitted correspondence to the Department on the issue of whether it was necessary to transfer this matter to the Office of Administrative Law for a formal hearing. Specifically, the Petitioners requested that the matter be forwarded to the Office of Administrative Law as a contested case under the Administrative Procedure Act ("APA"), N.J.S.A. 52:14B-1 et seq. The Petitioners reiterated this request in their November 25, 2002 letter.

In an April 2002, letter to ANJ and the Petitioners, the Department found that this matter does not constitute a contested case. Under N.J.S.A. 52:14B-2(b), a "contested case" is

> a proceeding, including any licensing proceeding, in which the legal rights, duties, obligations, privileges, benefits or other legal relations of specific parties are required by *constitutional right or by statute* to be determined by an agency by decisions, determinations, or orders, addressed to them or disposing of their interests, after opportunity for an agency hearing. [N.J.S.A. 52:14B-2; and N.J.A.C. 1:1-2.1 (Emphasis supplied)].

The Department's letter further advised the parties that this matter is not a "contested case" because there is no constitutional or statutory right to a hearing prior to the Department making the threshold determination on the FAIRA issues. In Gaydos, supra, the New Jersey Supreme Court held that, prior to pursuit of a common law breach of contract claim against an insurer, the Department must investigate the FAIRA "take all comers" allegations in order to make a threshold determination concerning whether an insurer violated FAIRA when it terminated the agency relationship. Nowhere in Gaydos, however, did the Court grant terminated agents a right to a contested case hearing in connection with this determination. Gaydos held that an agent does not have a private right of action to enforce FAIRA, but the Court required the Department to maintain a "watchful eye" over insurers' actions relative to their agents under FAIRA. FAIRA does not create a statutory right to a hearing in response to an agent's allegation that FAIRA was violated. Moreover, no constitutional rights are implicated by the Petitioners' claims that FAIRA was violated.

Consequently, the matter is not a contested case under the APA, and does not mandate a full plenary hearing regardless of the degree of adversity between the parties. See, New Jersey Practice, Vol. 37 (Stephen L. LeFelt, Administrative Law and Practice, Second Edition), p. 254.

By letter dated March 28, 2002, the Petitioners' submitted their Second Amended Petition that added Richard A. Fanucci, a producer with offices in Vineland, NJ, as a Petitioner. By letter dated April 8, 2002, the Department directed the Petitioners to submit any additional documentation, including all supporting evidence and legal argument, no later than April 19, 2002, and directed ANJ to submit any additional documentation and response by April 29, 2002.

In correspondence dated April 12, 2002, the Petitioners contended that, before being required to submit further arguments and additional supporting evidence to the Department, the parties should be provided with the opportunity to conduct discovery or, in the alternative, the Department should extend the time limit for submission of the Petitioners' additional argument and supporting evidence to 30 days from the date of receipt of the Department's decision on the discovery request, or May 19, 2002, whichever was later. By letter dated April 16, 2002, ANJ objected to Petitioners' request for discovery but did not object to a 30-day extension of the requirement that the Petitioners make their supplemental submission by April 19, 2002, so long as ANJ was also afforded 30 days to submit its response.

By letter dated April 18, 2002, the Department approved extending the timeframes for the Petitioners' submission of supplemental arguments and supporting documentation to May 20, 2002, and for the submission of ANJ's response to June 20, 2002.

By letter of April 29, 2002, Petitioners requested an additional extension of the date for its submission until June 20, 2002, and by letter of the same date ANJ indicated it would not object to a two-week additional extension. By letter of May 3, 2002, the Department approved extending the dates for the supplemental submissions from the Petitioners and ANJ to June 3, 2002, and July 3, 2002, respectively.

On June 3, 2002, Petitioner submitted a Third Amended Petition, along with a brief and exhibits in support of their allegations. The Third Amended Petition added allegations that the agent compensation and relocation policies, and certain business practices of ANJ, including requiring documentation unnecessary to the application process, tying the sale of personal auto insurance to the sale of other lines of insurance, ignoring the postmark on applications filed with the insurer, failing to sufficiently staff offices and requiring inspections to be performed by ANJ agents on homes over 45 years old before binding homeowners coverage, were intended to, or had the effect of channeling away eligible persons from ANJ contrary to N.J.S.A. 17:33B-18a(2).

On June 28, 2002, ANJ requested a 45-day extension of the due date for its responding submission. The Department granted that request by letter dated July 3, 2002.

On July 15, 2002, Petitioners filed a Fourth Amended Petition with the Department. That submission averred that ANJ's termination of Petitioner Charles DiCataldo violated N.J.S.A. 17:33B-18b.

On August 19, 2002, ANJ filed its brief, with supporting certifications, in further response to the amended petitions. Thereafter, by letter dated September 23, 2002, Petitioners provided additional information relevant to the previously filed allegations, and ANJ responded by letter of October 4, 2002.

By letter of November 21, 2002, ANJ forwarded to the Department a fully executed "Dismissal With Prejudice," dismissing the Amended Petition as to Petitioner Cleveland Foat, Sr..

By letter of November 25, 2002, Petitioners notified the Department of additional alleged FAIRA violations by ANJ. These new allegations were based upon ANJ's agent performance requirements. The allegations had not been previously raised in any of the Petitioners' prior submissions. Additional arguments related to the referral of this matter to the OAL and to allegedly improper ex parte communications. Subsequently, additional correspondence relating to these newly raised allegations and to the other issues referred to in the November 25, 2002 letter was received from the parties. The submissions on behalf of ANJ were dated December 10 and 12, 2002, and the further correspondence from the Petitioners was dated December 11, 2002.

On January 13, 2003, the Department responded to the parties' most recent correspondence. In that letter, the Department clarified the status of this matter, and it advised that review of the matter was ongoing due to the need to analyze and investigate all of the information contained in the parties' multiple submissions.

On January 22, 2003, Petitioners responded, addressing the role of ex parte communications in the Department's investigation. Specifically, Petitioners requested to be advised of, and be provided with copies of all communications, information and documents that the Department had obtained or intended to obtain from ANJ. That letter also referred to an "apparently privileged" e-mail from ANJ's in-house counsel to its President that Petitioners' counsel had discovered in his file and returned to counsel for ANJ.[2] ANJ responded in a letter dated January 30, 2003, arguing that the Department should deny the requests contained in Petitioners' January 22, 2003 correspondence. By letter of February 6, 2003, Petitioners responded

[2] In his letter, Petitioners' counsel indicated he "intended to seek a ruling from the Court that the e-mail was discoverable." He further indicated that he was not alerting the Department to this e-mail's existence for the purpose of asking the Department to rely on it "now" and that it "should be disregarded by the Department until it is determined that the e-mail must be provided."

with additional legal arguments supporting their position that an "in camera" review by a court or Administrative Law Judge of the e-mail in question was necessary to determine whether it should remain privileged. ANJ responded in a February 10, 2003 letter asserting that the e-mail was and should remain confidential pursuant to the attorney-client privilege.

By letter of February 11, 2003, the Department requested ANJ to supply additional detailed information, in the format of a spreadsheet, regarding the allegations on the commissions, profit-based bonuses, and OEAs paid to all ANJ agents during the years 1998 through 2001. That letter also contained ten requests for additional factual information from ANJ. On the same date, the Department sent a letter to Petitioners requesting additional information from them.

In a February 26, 2003 letter, ANJ requested additional time to submit the information requested in the Department's February 11, 2003 letter. Thereafter, the Department verbally granted this request. In a letter dated February 27, 2003, Petitioners supplied some, but not all of the information requested in the Department's February 11, 2003 letter.

On February 28, 2003, Petitioners submitted a letter and related materials making additional general and specific allegations against ANJ. The Petitioners generally asserted that ANJ was "redlining" in urban areas, i.e. refusing to provide coverage to and/or channeling away the auto insurance business of eligible persons residing in those areas in violation of FAIRA. The general subject of providing coverage to eligible persons in urban areas is discussed below to the extent it relates to the Petitioners' other substantive allegations. As the specific allegations in the February submission do not relate to the Petitioners, they will not be addressed in this opinion. However, given the nature of the conduct alleged, Petitioners' February submission has been referred to the Departments' Consumer Protection Services Unit to conduct an immediate review, as that conduct appears to be inconsistent with ANJ's UEZ results.

On March 7, 2003, Petitioners' counsel wrote to the Department about an information request made by ANJ to the Petitioners and all other ANJ agents throughout New Jersey. The letter discussed their suspicion that ANJ "in fact was improperly attempting to use a back door to obtain discovery from the Petitioners," and that he had instructed his clients not to forward the requested information.

The Department responded to Petitioners' late February and early March 2003 letters in a March 21, 2003 letter. The Department sought clarification on one statement contained in Petitioners' February 27, 2003 letter, requested that all available previously requested information, and additional information and materials regarding the investigation referenced in Petitioners' letter of February 28, 2003 be provided by March 31, 2003. The Department also confirmed that it had recently issued Order No A03-116 compelling all private passenger auto insurers admitted in New Jersey to provide the information discussed in Petitioners' letter of March 7, 2003.

By letter of March 21, 2003, ANJ supplied all of the information requested in the Department's February 11, 2003 letter. By letter of March 31, 2003, Petitioners submitted certain information in response to the Department's letters of February 11 and March 21, 2003. By letter of April 7, 2003, the Petitioners submitted additional materials in response to the Department's February 11, 2003 request for information.

Thereafter, by letter of April 16, 2003, Petitioners submitted additional materials related to the private investigation mentioned above, and by letter of April 22, 2003, ANJ submitted extensive documentation concerning Petitioner DiCataldo in response to a supplemental request by the Department.

On May 13, 2003, the Department interviewed Petitioner DiCataldo with his counsel present in regard to the termination of his employment with ANJ. On May 16, 2003, the Department conducted a follow-up telephone conference with Petitioner DiCataldo and his counsel. Subsequently, on May 19, 2003, the Department conducted a document review at ANJ's offices in Bridgewater, New Jersey, and interviewed John Leonard, Human Resources Manager for ANJ, in regard to Petitioner DiCataldo's termination.

On June 5, 2003 the Department received Petitioners' "Fifth Amended Petition," that sought to amend paragraph 10 of the Amended Petition by adding Michael Timmins, an EA from Morris County, as a named Petitioner. The Fifth Amended Petition contained no new or additional factual and legal allegations concerning the Petitioners as a group or Mr. Timmins, individually. By letter dated June 6, 2003, ANJ objected to the filing of the Fifth Amended

Petition and urged the Department to reject acceptance of the Fifth Amended Petition. In letters dated June 10 and June 13, 2003, the Petitioners and ANJ, respectively, submitted further argument with regard to the Fifth Amended Petition. The Department accepts the Fifth Amended Petition that adds Timmins as an EA Petitioner because the Petition adds no new or additional factual and legal arguments.

BACKGROUND

Respondent was formed following the withdrawals of Allstate Insurance Company and Allstate Indemnity Insurance Company from the State of New Jersey pursuant to Order No. 97-171, issued on November 10, 1997. ANJ is a wholly-owned subsidiary of Allstate New Jersey Holdings, Inc., a wholly-owned subsidiary of Allstate Insurance Company ("AIC"). It was admitted to transact property and casualty ("P/C") insurance business in New Jersey on or about January 1, 1998, and ANJ only transacts business in New Jersey. As a part of its application to transact business in this State, Respondent submitted comprehensive plans that included plans for compensating its agents. These plans were reviewed on a generic basis and approved in concept by the Commissioner at the time of ANJ's admission in 1997.

In 2000, a group of approximately 300 ANJ agents called "All Agents in the Public Interest (AAPI)"[3] requested that the Department review the ANJ agency programs, including the compensation structures and office expense allowance. Specifically, AAPI asserted that the agency programs implemented by ANJ are directly tied to loss ratio in violation of FAIRA, and that the agency programs would result in ANJ under-servicing of urban populations through either reduced staff in urban offices or the closing of urban offices altogether. During this review, the Department examined the office locations of ANJ's agents and found that there were considerable variations in the paid loss ratios ["PLR") of agents whose offices were in close proximity to each other, and between agents operating from the same locations. ANJ defines paid loss ratio as the relationship of an agent's paid losses as a percentage of an agent's premiums. It is determined by dividing the sum of the paid losses and net charges to reserves over a specified time period by the earned premiums (Ex A, Amended Petition, pg. 39).

Pursuant to the Tier-Rating program, N.J.S.A. 17:29A-46.1 et seq. and N.J.A.C. 11:3-19A.1 et seq., ANJ has established a two-tiered rating system. In Tier 1, the tier with the lowest rates, a driver must possess the following qualifications: maintained continuous liability coverage without a lapse of coverage of 30 days or more in the past three years; accumulated less than 9 motor vehicle points in the past three years or has had a qualifying accident

[3] AAPI was originally formed in 1991 during the period of time when AIC and Allstate Indemnity Company attempted to withdraw from the State of New Jersey.

and has accumulated less than 4 motor vehicle points in the past three years. See, New Jersey Department of Banking and Insurance, Consumer Guide Auto Tier Rating 2002, at 12. ANJ discounts Tier 1 driver rates based on the specific driving record of the operator, prior insurance company, presence of other ANJ property policies, and the presence of inexperienced drivers. Ibid. ANJ's Tier 2 insures all other drivers without a lapse of liability insurance for 30 days or more during the past three years or when a driving record is unavailable. Ibid. No discounts are available in Tier 2. Ibid.

At issue here is the November 2001 First Amended Petition and the subsequent Amended Petitions. These Petitions make allegations against ANJ, and many of the arguments advanced by the Petitioners mirror the allegations made by AAPI in 2000. Specifically, these allegations assert that ANJ has penalized the Petitioners by paying them less than normal compensation or commission due to the loss ratio or the geographic location of their auto business, and that ANJ has instituted these procedures and programs to ultimately "channel away" eligible persons in violation of FAIRA. Here, the Petitioners are seventeen[4] insurance producer licensees affiliated in various ways with ANJ. They perform agency activities for Respondent, selling insurance products. ANJ has four categories of agents, three of which are represented among the Petitioners: Neighborhood Office Agents ("NOAs"),

[4] Originally, there were seventeen Petitioners. The Petition of Cleveland Foat Sr., a former EA with ANJ, was withdrawn and dismissed, thus reducing the number of Petitioners to sixteen. However, the addition of Michael Timmins, an EA with ANJ, in the Fifth Amended Petition again brought the total number of Petitioners to seventeen.

Neighborhood Service Office agents (“NSOs”), and Exclusive Agents (“EAs”). The fourth category is Independent Agents (“IAs”).

Twelve of the Petitioners are NOAs.[5] They are full-time employees of Respondent, and are paid commissions of 10.7% on new auto policies and initial renewals, and 6.5% on subsequent renewals. Although they are employees, NOAs work from offices they own or rent. However, under every NOA agency agreement ANJ must approve the location of their office. NOAs are responsible for paying all of the office expenses associated with running their offices. To offset these expenses, Respondent pays its NOAs an Office Expense Allowance (“OEA”). Since April 1, 1998, the OEA paid by Respondent has been set at a base level of 1% of the agent's new and renewed P/C premiums. NOAs may qualify to receive an additional OEA of up to .8% of those premiums, depending on the PLR on their entire book of P/C business.[6]

Two of Petitioners are NSOs.[7] These agents are fulltime employees of Respondent. They manage offices owned or leased by Respondent. Respondent pays the NSOs’ salary, benefits and commissions, and the salaries and benefits of the individuals who staff the offices from which they operate. Respondent also pays for rent, utilities, insurance, and furnishings for the office. Because Respondent pays all of these office expenses, NSOs do not receive an OEA.

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[5] Petitioners Corsaro, Rodriguez, Minard, Deeks, Bakelaar, Branson, Cherep, Alejandro Medina, Antonio Medina, Britten, Ortiz, and Heller.

[6] NOAs also have the option of using a percentage of their own income to help defray office expenses. When this option is exercised, the amounts contributed by the NOAs are considered part of the total Office Expense Allowance.

[7] Petitioners DiCataldo (now terminated) and Doherty.

Three of the Petitioners are EAs.[8] EAs are not employees of ANJ. Instead they operate as independent contractors writing business exclusively for Respondent. The terms of their contractual relationship with ANJ provide that the EAs own and maintain their own offices, the locations of which are subject to approval by ANJ. The EAs also "own" the renewals in their book of business, which enables them to transfer or sell that business upon retirement. This is a valuable asset to the EAs for estate planning purposes.[9] The EAs freely and voluntarily entered into their retainer agreements, either at the time they initially commenced operations for ANJ as an EA or subsequently upon converting from some other type of agent to EA status. EA's are compensated at a base rate of 6.5% of their total premium on new and renewed P/C business, including their automobile insurance business. In addition, EAs are eligible to receive bonuses of up to an additional 6% of their P/C business based on the performance and growth of their entire book of P/C insurance business. An EA's paid loss ratio for all P/C business is taken into account when evaluating their performance and the PLR affects the amount of the profit-based bonus they receive. EAs own their offices and do not receive an OEA reimbursement from ANJ.

In 1999, ANJ began to utilize the services of another type of agent, Independent Agents ("IAs"). IAs sell the insurance products of other companies

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[8] Petitioners Fanucci, Callahan, and Timmins.

[9] As initially proposed, EAs could not realize this benefit unless they maintained a certain PLR on their P/C book of business. However, that requirement was removed in response to concerns raised in the Department's second review of the ANJ agent compensation scheme in 2000.

in addition to those of ANJ. They are paid a base commission rate of 15% on their ANJ sales, with the opportunity for additional profit-based bonuses. The ANJ policies they sell are offered at the same rates as the ANJ policies offered by all other types of ANJ agents.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Petitioners have made seven primary allegations against ANJ: 1) ANJ's EA bonus program penalizes agents by paying them less than normal commissions or compensation due to their loss ratio in violation of N.J.S.A. 17:33B-18b; 2) ANJ's Office Expense Allowance ("OEA") penalizes NOAs by paying them less than normal compensation due to their loss ratio in violation of N.J.S.A. 17:33B-18b; 3) ANJ's relocations of four Petitioners penalized them based on the geographic location of their auto business also in violation of N.J.S.A. 17:33B-18b, and that the relocations are part of ANJ's strategy to circumvent the "take all comers" environment; 4) ANJ pays lower commissions and OEA to its agents than AIC pays to its agents located throughout the nation; 5) ANJ's cross-line sales requirement penalizes agents who "take all comers" and induces the illegal channeling away of eligible persons; 6) All of ANJ's programs and procedures complained of here are part of a comprehensive strategy to "channel away" unwanted eligible persons in violation of N.J.S.A. 17:33B-18a; and 7) ANJ terminated Petitioner DiCataldo due to his loss ratio in violation of N.J.S.A. 17:33b-18b. The following will discuss my findings of fact and conclusions of law in regard to each of the Petitioners' above allegations.

1) EA Profit Bonus Program

The Petitioners assert that ANJ paid less than "normal commissions or normal compensation" to its EAs in violation of N.J.S.A. 17:33B-18b by basing the criteria to qualify for profit-based bonus commissions on an EA's PLR for all P/C business. Furthermore, the Petitioners assert that this action by ANJ had the effect of circumventing its "take-all-comers" obligation, and of channeling away eligible persons, in violation of N.J.S.A. 17:33B-15b and 17:33B-18a(2), respectively.[10] FAIRA's "take all comers" provision, N.J.S.A. 17:33B-15b, provides:

> No insurer shall refuse to insure, refuse to renew, or limit coverage available for automobile insurance to an eligible person who meets its underwriting rules as filed with and approved by the commissioner in accordance with the provisions of [N.J.S.A.17:29A-46] prior to March 1, 1998 or [N.J.S.A. 17:29A-46.2] on or after March 1, 1998. [N.J.S.A. 17:33B-15b].

Specifically, the Petitioners allege that Respondent has violated N.J.S.A. 17:33B-18b through its EA bonus commission program. That subsection provides:

> With respect to automobile insurance, an insurer shall not penalize an agent by paying less than normal commissions or normal compensation or salary because of the expected or actual experience produced by the agent's automobile insurance business or because of the geographic location of automobile

[10] P.L.2003, c.89, effective June 9, 2003, phases out "take all comers" over the next few years.

> insurance business written by the agent. [N.J.S.A. 17:33B-18b].

The EA bonus commission program is an incentive-based strategy that rewards EAs who are successful in procuring insurance business that proves profitable for the Respondent. The bonuses are of two types: a profit bonus and a growth bonus. To qualify for the growth bonus an EA's P/C sales must reach a certain level and their P/C PLR must be 35% or less. The amount of the growth bonus varies, depending on the volume of new sales, between .5% and 1.5% of written premium on new and renewed policies. While the Petitioners' allegations included the growth bonus program, the majority of the Petitioners' arguments on these claims were made in the context of the profit-based bonus program, not the growth-based bonus program. The analysis and conclusions that follow are applicable to both EA bonus programs because both bonuses were challenged on the basis that an EA's eligibility for the respective bonuses is determined by the agent's PLR.

The amount of the profit bonus is determined by the PLR on an EA's entire book of P/C business. This profit bonus is calculated as follows:

Paid Loss Ratio for All P/C	Profit Bonus Percentages
35% or less	4.5%
35.1% to 50%	4.0%
50.1% to 55.0%	2.0%
55.1% to 60.0%	1.0%

60.1% or more	0.0%

With regard to the three EA petitioners here, the Department's investigation disclosed the following facts. Richard Fanucci converted from NOA to EA status in July 2000. In 2001, Fanucci received gross commissions of $281,906 that included a profit-based bonus of $37,195. In 2000, Fanucci received gross commissions of $248,417, including a profit-based bonus of $14,798.[11] With respect to EA Bruce Callahan, he retired as an ANJ agent effective on December 31, 2001. In 2000, after converting from an NOA to an EA in December of that year, he received gross commissions of $214,060 with no profit-based bonus. With respect to EA Michael Timmins, Petitioners state that no new substantive issues are raised. In 2000, Petitioner Timmins received gross commissions of $252,782, including a profit-based bonus of $90,098. In 2001 he received gross commissions of $274,175, including a profit-based bonus of $110,057.

In order to determine whether the EA bonus programs violate FAIRA, I must first examine the plain language of N.J.S.A. 17:33B-18b. The Supreme Court has repeatedly held that, "[a]s a rule of statutory construction, we look first to the language of the statute. If the statute is clear and unambiguous on its face and admits of only one interpretation, we need delve no deeper than the

[11] Counsel for ANJ and the Petitioners have advised the Department that Petitioner Fanucci and ANJ have agreed in principle upon a settlement of this matter. Nevertheless, the Department will continue to address the issues raised by Petitioner Fanucci regarding the EA bonus compensation program.

act's literal terms to divine the Legislature's intent." State v. Thomas, 166 N.J. 560, 567 (2001) (citing State v. Butler, 89 N.J. 220, 226 (1982)).

My determination on this issue turns on the definitions of "normal compensation" or "normal commissions." Here, N.J.S.A. 17:33B-18b provides that, "[w]ith respect to auto insurance, an insurer shall not penalize an agent by paying *less than normal commissions or normal compensation*....(Emphasis supplied)." FAIRA does not define what constitutes "normal compensation" or "normal commissions." Nevertheless, the Legislature affirmatively qualified the terms "commissions and compensation" by preceding them with the term "normal." The Supreme Court has made clear that "all terms in a statute should be accorded their normal sense and significance." Velasquez v. Jiminez, 172 N.J. 240, 256 (2002)(citing Stryker Corp. v. Director, Div. of Taxation, 168 N.J. 138, 156 (2001)). In this regard, Webster's II New College Dictionary (1999) defines normal as "conforming, adhering to, or constituting a typical or usual standard, pattern, level or type." Applying this definition, normal compensation or normal commissions as used by FAIRA means the typical or usual standard of compensation or commissions.

Thus, FAIRA prohibits insurers from penalizing their agents by paying them less than the typical or usual standard of compensation or commissions. FAIRA does not prohibit insurers from distinguishing between base commission rates paid to agents (normal compensation or commissions) and other reward-based forms of compensation, such as the profit and growth bonuses offered by ANJ to its EA's and the profit-based supplemental Office

Expense Allowance offered to its NOAs discussed infra. Ultimately, the Legislature's use of the word "normal" implies that such distinctions are expected under FAIRA.

The EA bonus programs are not the typical or usual standard of compensation or commissions used by ANJ to compensate its EAs. The Respondent pays all of its EAs the base commission rate of 6.5% on their new and renewed P/C business, including their auto insurance business. All EAs, including the Petitioner EAs, entered into agency agreements with ANJ that explicitly provided for this compensation structure. This is the normal commission or compensation for EAs. The profit bonus and the growth bonus are not normal commissions or compensation for the EA's. Rather, the bonuses are exactly what they are entitled, a "bonus", over and above the EAs' normal commissions, that is aimed at rewarding EAs who generate profitable books of P/C business. Moreover, N.J.S.A. 17:33-18b only prohibits insurers from penalizing agents by paying them less than normal commissions or compensation. It contains no text that makes reference to, let alone proscribes carriers from paying some agents more than normal compensation. Thus, while the imposition of penalties is barred, the payment of bonuses is not. If the Legislature had intended to prohibit the payment of bonuses it could easily have done so. The fact that the statute in question is completely silent in this regard is a clear indication that it did not intend to do so.

In addition, ANJ's standard Exclusive Agency Agreement provides that all bonuses paid by ANJ to its EAs are to be offered by the company "in its sole discretion." See, Amended Petition, Ex. C at 6. In contrast, the Agreement provides that the EA "will be entitled to the commissions set forth in the supplement..." This separate and distinct treatment of the bonus programs and the commission structure in the agency agreements signed by all EAs further underscores the fact that the bonus programs are not "normal commissions or compensation" under FAIRA's "take all comers" provisions.

Moreover, the information supplied by ANJ to the Department in the course of its investigation demonstrates that the geographic location of an agent's auto business does not predict or preclude an agent's ability to earn the EA profit bonus. Specifically, the data shows that urban-area agents are able to achieve results that qualify them for the EA profit bonus. First, it should be noted that 83% of all EAs received a profit-based bonus in 2001. These included EAs operating from offices in the major urban centers of Trenton and Bayonne, and in Willingboro and Burlington, two towns that contain areas of high population density. The amounts of those agents' total commissions ranged from $324,405 to $545,689, and the amounts of their profit-based bonuses ranged from $37,195 to $81,899. In 2000, five out of eight EAs operating from these four municipalities qualified for a profit-based bonus, three did not. In 1999, both ANJ agents who operated as EAs during that year from these locations qualified for a profit-based bonus.

Conversely, in 2001, seventeen EAs operating from suburban locations such as Roseland, Lawrenceville, Cherry Hill, Watchung, Somerville, Glendora, Northfield, and Morris Plains failed to qualify for the profit-based bonus. In

2000, 51% of all EAs failed to qualify for a profit-based bonus, including agents operating from suburban locations such as Colts Neck, Westwood, Medford, Springfield, Raritan, Fairlawn, Randolph, Berkeley Heights, Manalapan, Scotch Plains, Succasunna, and Denville. This data contradicts the Petitioners' contention that the proximity of an agent's office location to an urban area significantly hinders the agent's ability to qualify for the profit-based bonus. Rather, these numbers indicate that some EAs operating from urban locations were able to maintain sufficiently low PLR's to qualify for the profit-based bonus.

In addition, as is discussed in greater detail below, since September 2002, ANJ has fulfilled and even surpassed its obligations under the Urban Enterprise Zone Program, N.J.S.A. 17:33C-1, et seq., and has in recent years steadily increased the volume of its auto insurance business in virtually every urban-based auto insurance rating territory in the state. Ultimately, the Department's investigation produced no evidence indicating that ANJ has instituted the EA profit bonus program to penalize EAs due to their compliance with the "take all comers" law, the expected or actual experience produced by their auto business, or the geographic location of the auto business written by them. Instead, the evidence demonstrates that the EA bonus program is a legitimate business method used by ANJ to motivate EAs to seek out and retain profitable business.

Although highly regulated, companies offering auto insurance in New Jersey still operate in our market-based economic system, and they are permitted to secure profitable business within the regulated legal boundaries. In addition, the "take all comers" law, N.J.S.A. 17:33B-15b, precludes New Jersey auto insurers from declining the auto insurance business of any eligible person. In order for insurers to remain economically viable, they must secure profitable accounts to offset the effect of unprofitable auto business on their financial condition. In other words, for insurance companies to survive, an appropriate balance between high and low risk drivers must be maintained in their book of business. The Legislature implicitly recognized this imperative when it enacted N.J.S.A. 17:33B-19, which authorizes the Commissioner to suspend a carrier's obligation to "take all comers" under N.J.S.A. 17:33B-15b if, in his discretion, the Commissioner determines that the insurer is in an "unsafe or unsound financial condition."

In addition, the Legislature has enacted numerous other statutory provisions that are directed at and emphasize the significance of ensuring the financial solvency of insurance companies admitted in New Jersey. See, N.J.S.A. 17:7-8 (Examination upon Formation); N.J.S.A. 17:30A-1 et seq. (Property and Liability Insurance Guaranty Association); N.J.S.A. 17:30C-1 et seq. (Rehabilitation and Liquidation); N.J.S.A. 17:37B-1 et seq. (Property-Casualty Examination); N.J.S.A. 17:51A-7 et seq. (Administrative Supervision); and, N.J.S.A. 17:51B-1 et seq. (Reinsurance Requirements). Most recently, P.L. 2003, c.89, effective June 9, 2003, recognized the current auto insurance availability problems in New Jersey resulting from past mistakes in the regulation of private passenger automobile insurance. FAIRA's prohibitions on insurer’s penalizing agents based upon the actual or expected experience of the agent’s auto insurance business, or the geographic location of that business, must be read *in pari materia* with these laws, and with a recognition of the profound public policy considerations on which they are based.

To interpret N.J.S.A. 17:33B-18b as prohibiting carriers from using monetary incentives to motivate agents to seek out and procure profitable business would deny carriers an effective means by which they may avoid devolving into an unsafe and unsound financial condition, and thus qualify for the exemption that would relieve them of their “take all comers” obligation entirely. In my view, such a construction would be contrary to the overriding legislative intent of FAIRA, which was to ensure adequate access to auto insurance to persons whose business might prove unprofitable. It is my interpretation of FAIRA that the Legislature did not intend to undercut auto insurers’ ability to pursue a reasonable profit on their private enterprise or to limit the entrepreneurial nature of an EA’s business in enacting N.J.S.A. 17:33B-18b.

Rather, there is a legitimate and reasonable distinction to be made between the imposition of penalties on agents for procuring unprofitable auto insurance business as is proscribed by FAIRA, and the rewarding of agents for the procurement of profitable accounts. For example, the Petitioners allege that ANJ's 2002 Winter Olympics Promotion violated FAIRA because those who had lower percentages of "preferred auto business" could not enter. ANJ utilized a "2002 Winter Olympic Games Promotion,” that offered its agents a trip to the 2002 Olympic Games as a prize. This promotional offering included tickets, travel for two, and accommodations at the Winter Olympics of 2002. In order to be eligible to enter this promotion, agents had to maintain a minimum of 65% "preferred auto business." For purposes of the contest, "preferred auto business" was defined as new business with proof of prior insurance for three consecutive years and no accidents or violations on their driving record.

Petitioners argue that the use of these criteria was intended to encourage agents to turn away customers who were not "preferred auto business," because taking them would lower their chances of qualifying for the contest. Petitioners allege that the contest criteria violated the "take all comers" requirement of FAIRA. The Petitioners further allege that agents servicing primarily urban areas could not qualify under the "65% preferred auto business" criteria. They also aver that the contest "encouraged discriminatory practices in the solicitation of new business," in violation of the prohibition set forth in N.J.S.A. 17:33B-18a(2) upon channeling away eligible persons. [Amended Petition, ¶49] This section provides:

> a. A licensed insurance agent shall, as a condition of licensure: . . . (2) Not attempt to channel an eligible person away from an insurer or insurance coverage with the purpose or effect of avoiding an agent's obligation to submit an application or an insurer's obligation to accept an eligible person. [N.J.S.A. 17:33B-18a(2)].

Notwithstanding the Petitioners' assertions, clearly many prospective insureds from suburban areas also do not meet their definition of "preferred auto business" used for purposes of the Olympic promotion. Furthermore, it is significant that the focus of this program was on “the solicitation of new business.” It is essential to recognize the substantial difference that exists between a “penalty” as defined under FAIRA, and a business “incentive” as used by insurers throughout the State. The selective expenditure of a company’s marketing resources and the utilization of programs, such as the Olympic promotion, that encourage agents to focus their marketing and solicitation efforts on risks likely to generate profitable business, in the absence of proof indicating a company’s failure to provide services or coverage to eligible persons whose business is known or anticipated to be unprofitable, do not constitute evidence of violations of N.J.S.A. 17:33B-15b or 17:33B-18a(2).

Similarly, with regard to the EA profit bonuses, no evidence adduced indicates that any EA has been paid less than the 6.5% base commission rate, or had that base rate reduced, due to the PLR of their auto business or their entire P/C book of business. The Petitioners aver that the "flip-side" of ANJ’s offering of incentives for procuring profitable business is that there is a corresponding disincentive to accept or pursue unprofitable business. The Petitioners have steadfastly affirmed, however, that none of them have ever failed to submit an application from an “eligible person” as required by FAIRA.

Despite the Petitioners’ arguments, I conclude that the “take-all-comers” law, N.J.S.A. 17:33B-15b, initially intended to depopulate the residual market, does not require insurers to actively solicit unprofitable business.

In its Gaydos opinion, the Supreme Court noted: “[t]he legislative history does not suggest that the Legislature adopted FAIRA to benefit insurance agents and insulate them from potential termination. Accordingly, we agree that the primary purpose of the 'take all comers' provision is to assure that all eligible drivers have access to auto liability insurance. It was not adopted to confer job protection on producers." Gaydos, supra, 168 N.J. at 280. Based upon this declaration, it is abundantly clear that FAIRA was enacted to protect New Jersey policyholders, not to preserve or protect the incomes of individual producers. Moreover, FAIRA does not proscribe the utilization of bonus programs by insurers that reward the procurement of profitable business and that are implemented to ensure the continued economic viability of the carrier. Such programs are not in violation of FAIRA as long as the programs do not serve to penalize agents by reducing the normal amount of compensation or commission payable on business that is proven to be, or anticipated to be, unprofitable.

Based upon the foregoing, I find that ANJ's EA bonus programs do not violate N.J.S.A. 17:33B-15b or 17:33B-18b. I will address the allegations that this program results in the "channeling away" of eligible persons, in violation of N.J.S.A. 17:33B-18a(2), in detail below.

2) Office Expense Allowance for NOAs

The Petitioners assert that ANJ reduced the NOA's "normal compensation" by conditioning receipt of a supplemental OEA reimbursement upon an agent's PLR, and that this policy penalized the affected agents in violation of N.J.S.A. 17:33B-18b. The Petitioners also assert that this action by

ANJ had the effects of circumventing its “take all comers” obligation by channeling away eligible persons, in violation of N.J.S.A. 17:33B-15b and 17:33B-18a(2). Petitioners' arguments on these issues parallel their arguments on the EAs’ profit-based bonus commissions discussed above.

Respondent pays its NOAs an Office Expense Allowance (“OEA”) to help defer the costs of running their offices. The OEA is determined by a formula containing a flat rate (1% of new and renewal P/C premiums), plus an additional amount of up to .8% that can be earned depending upon the NOA's PLR on his total book of P/C business. The profit component OEA is calculated in the following manner:

Paid Loss Ratio for All P/C	Base OEA	Profit Component	Total OEA
30% or less	1.0%	.8%	1.8%
30.1% to 35.0%	1.0%	.7%	1.7%
35.1% to 50%	1.0%	.6%	1.6%
50.1% to 55.0%	1.0%	.4%	1.4%
55.1% to 60%	1.0%	.2%	1.2%
60.1% or more	1.0%	.0%	1.0%

Therefore, NOAs with a PLR above 60% do not qualify to receive any additional OEA beyond the standard 1%. Petitioners contend that ANJ’s use of total P/C loss ratios to determine whether an NOA will qualify to receive the additional OEA disproportionately impacts NOAs with books of business that are primarily comprised of urban-based insureds. Thus, the Petitioners argue that the profit component of the OEA encourages and rewards FAIRA violations, while penalizing NOAs who comply with the law.

The OEA is a reimbursement of certain expenses incurred by NOAs. NOAs may not exceed the OEA provided by ANJ for office lease and support staff compensation expenses. (Exhibit R, Amended Petition) Thus, for the reasons discussed in section 1) above, I find that the OEA is not "normal compensation or commissions" as those terms are used in N.J.S.A. 17:33B-18b.

Nevertheless, even assuming for the sake of argument that the profit-based OEA is "normal commission or compensation" under FAIRA, the results of the Department's investigation demonstrate that the OEA program and its profit component do not penalize NOAs based on their automobile loss ratio or the geographic location of their automobile business. For the following reasons, I conclude that the OEA program did not operate to penalize the Petitioner NOAs in violation of FAIRA.

As discussed above, the profit component of the OEA is determined by the NOA's PLR for their entire P/C book of business and not solely on the loss ratio of the automobile insurance business, as is referenced by FAIRA, N.J.S.A. 17:33B-18b. Therefore, the profit component does not penalize an NOA based on the actual or expected loss experience solely of their automobile business.

In addition, the profit component of the OEA is not based on the geographic location of the NOA's automobile insurance business. The evidence obtained during the course of the Department's investigation confirmed that there is no strong correlation between an agent's office location and their ability to qualify for the profit-based supplemental OEA. In clear contradiction to the Petitioners assertions, many agents operating from locations far removed from urban areas failed to achieve PLRs that qualify them for the OEA profit component.

Information provided by ANJ indicated that in 2001, 33% of all NOAs received a profit-based supplemental OEA. Some of the 67% who did not receive the profit component of the OEA operated from suburban locations such as Saddlebrook, Cherry Hill, Midland Park, East Hanover, Lakewood, Ramsey, Lindenwold, Matawan and Paramus. Similarly, in 2000, 21% of all NOAs received a profit-based OEA. Among the 79% who did not receive the OEA profit component, and excluding all of the Petitioners, some had suburban offices located in Pennington, Ridgewood, Cherry Hill, East Brunswick, Lindenwold, Turnersville, and Matawan.

Moreover, none of the twelve NOA Petitioners remaining in this matter have offices located in municipalities that contain urban enterprise zones. The Petitioner NOAs have their offices situated in the following areas:

> Petitioner Roland Minard is located in Montgomery,Mercer County – Rating Territory 15: Trenton Suburban;
> Petitioner Ron Cherep is located in Ridgewood, Bergen County – Rating Territory 11: Southern Bergen;
> Petitioners Arthur Deeks and Bruce Callahan are located in Parsippany, Morris County – Rating Territory 25: Morristown;

> Petitioner Raymond Heller is located in Cinnaminson, Burlington County – Rating Territory 14: Salem County and Burlington County;
> Petitioner Robert Ortiz is located in Oakland, Bergen County – Rating Territory 10: Northern Bergen County;
>
> Petitioner Hector Rodriquez is located in Robbinsville, Mercer County – Rating Territory 15: Trenton Suburban;
> Petitioner Robert Bakelaar is located in Wayne, Passaic County – Rating Territory 10: Northern Bergen County;
> Petitioner Alejandro Medina is located in Allendale, Bergen County – Rating Territory 10: Northern Bergen County;
> Petitioner Jesse Branson is located in West Caldwell, Essex County – Rating Territory 24: Essex County (Balance);
> Petitioner Dan Corsaro is located in Fort Lee, Bergen County – Rating Territory 11: Southern Bergen County;
> Petitioner Larry Britton is located in North Brunswick, Middlesex County – Rating Territory 40: New Brunswick; and
> Petitioner Antonio Medina is located in Tenafly, Bergen County – Rating Territory 10: Northern Bergen County.

Of these twelve NOAs, only three received the OEA profit component in 2001. Petitioner Britton in North Brunswick received $6,087 in profit-based OEA, despite his close proximity to urban New Brunswick. Petitioner Heller in Cinnaminson received $10,896 in profit-based OEA, and Petitioner Branson in West Caldwell received $44,159 in profit-based OEA. Despite the suburban location of some of the other NOAs, like Petitioners Rodriguez, Minard and Deeks, nine of the twelve Petitioner NOAs did not qualify for the profit component. Similarly, in 2000, none of the twelve Petitioner NOAs received the OEA profit component, despite the suburban locations of many of their offices.

The Petitioner NOAs repeatedly assert that they resisted the inducement to avoid their "take all comers" obligation and channel away eligible persons from their urban-based customer pools that they allege was created by the profit-based OEA. They aver that they failed to qualify for the additional OEA as a result of their ability to resist this alleged inducement. However, the substantial numbers of NOAs operating in areas far removed from any urban centers who did not qualify to receive the profit-component OEA indicates that the OEA program as applied does not adversely impact agents with an urban-based book of auto insurance business in a purposeful, targeted manner.

Rather, the data demonstrates that there is no appreciable correlation between an NOA's location and their qualifying for the OEA profit component. Therefore, I FIND that the OEA profit component does not penalize NOAs based on the geographic location of their automobile insurance business.

Lastly, it is important to note that, absent any such correlation, the OEA profit component is not an attempt by ANJ to penalize its agents. As was discussed above with regard to the EA profit bonus, the OEA profit component is the result of ANJ's freedom to incentivize the procuring of profitable business through means that do not reduce the standard commissions paid for unprofitable business and that do not direct or result in the refusal to insure, or the channeling away of eligible persons. Therefore, I FIND that ANJ's OEA program as applied did not improperly penalize NOAs servicing urban auto insurance customers in violation of N.J.S.A. 17:33B-18b or result in ANJ's refusal to "take-all-comers" in violation of N.J.S.A. 17:33B-15b.

I will address the allegation that the profit-based supplemental OEA had the effect of channeling away eligible persons from ANJ below.

3) ANJ Agent Relocations

Petitioners assert that ANJ forced Petitioners Deeks, Callahan, Minard and DiCataldo to relocate their offices away from urban areas "to reduce new and renewal business from eligible persons who reside in 'unmarketable' urban areas," as a part of ANJ's strategy to intentionally "circumvent the 'take all comers' environment". For the purposes of this Petition, the Petitioners have defined "urban areas" to include: (a) densely populated areas; and (b) areas with substantial minority populations. The Petitioners also assert that AIC (ANJ's predecessor corporation) "expressed concern" over relocation of Petitioner Bakelaar's business to Wayne because Wayne was too close to Paterson and that this behavior is another example of strategies employed by AIC/ANJ. In total, the Petitioners assert that the relocations penalized the affected Petitioners based upon the geographic location of the auto business they had written, in violation of <u>N.J.S.A.</u> 17:33B-18b. The following will discuss the factual circumstances surrounding the relative relocations.

Petitioners Deeks and Callahan are NOAs whose common office was relocated from Clifton to Parsippany in 1997. According to a Memorandum dated April 28, 1997, from Dennis Buckley, Territorial Agency Manager to the Petitioners, the relocation was motivated by the "mounting losses and trends in your location … your combined total casualty incurred losses to include reserves, reflect a combined $25,164,183. That figure is being incredibly driven by the Indemnity Auto results which accounts for $22,896,336 of the total incurred losses … [s]o it's obvious that considering those numbers as well as your individual loss ratios and loss ratio trends, I want you to redeploy from the Clifton location for good, sound, business reasons."

Petitioner Minard is also an NOA whose office was relocated from Edison to Montgomery Township in 2001. Petitioner Minard argues that the move was prompted by his deteriorating loss ratios. Moreover, he asserts that ANJ vetoed five sites other than the Montgomery Township location due to characteristics of the business from each location, such as the location's high Hispanic population or high percentage of Tier II auto customers. Petitioner Minard asserts that, as a result of the relocation, he lost between $250,000 to $500,000 in compensation for the year following the move.

Petitioner DiCataldo was an NSO employed by ANJ since 1969, and his office was relocated four times: 1) in 1985 from "Willowbrook" (Wayne) to Randolph; 2) in 1989 from Randolph to Mt. Olive; 3) in 1992 from Mt. Olive to Wayne; and 4) in 1997 from Wayne to East Hanover.[12] Petitioner DiCataldo asserts that these moves have caused his income to decrease substantially in the last five years due to corresponding decreases in his book of business. Specifically, with regard to the 1997 relocation from Wayne to East Hanover, Petitioner DiCataldo asserts that he lost nearly half (1,200) of all of the

[12] Please note that the four relocations complained of by Petitioner DiCataldo occurred prior to the withdrawal of AIC and incorporation of ANJ in 1997. Upon the retirement of additional NSOs in early 2002, DiCataldo was relocated a fifth time, in July 2002, from the East Hanover

accounts he serviced from the Wayne office because his clients preferred doing business in person.

Initially, it is essential to note that the Department traditionally does not intervene in private contractual disputes between agents and insurers. Moreover, N.J.S.A. 17:22A-15, as superceded by N.J.S.A. 17:22A-42, provides that "[n]othing contained in this subsection shall be construed as granting the [C]ommissioner the authority to determine contractual disputes between an appointing insurer and an appointed agent." The geographic placement and relocation of agencies by insurers usually fall within the parameters of private contractual issues. Generally, insurers are free to allocate or reallocate company resources, including the geographic location of the insurer's agencies, in whatever manner the insurer deems fit to maximize the profitability of its agencies. This freedom helps ensure and promote free competition in the insurance market, and it allows insurers to better balance their books of business in order to remain solvent.

Here, the Employment Agreement between ANJ and all of its NOAs, including Petitioners Deeks, Callahan and Minard, explicitly empowers ANJ to relocate the office location of the NOA. These contracts make it clear that the NOA Petitioners have no contractual right to question such relocations, or to operate from or remain in any particular location. Additionally, Petitioner DiCataldo, as a NSO, was an employee agent of ANJ, and thus ANJ pays for all of his office expenses. Moreover, the numbers of NSOs have decreased

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office to the Cranford NSO office.

significantly over the years as other types of agency relationships have evolved. As a result of this decrease in NSOs, AIC/ANJ have consolidated NSO office locations.

Despite the inherently contractual nature of agent relocations, the Petitioners allege that their relocations constituted attempts by ANJ to "channel away" unprofitable business and ultimately penalized the Petitioners by reducing their normal compensation or commissions. The following will discuss my findings on these allegations.

For the reasons set forth below, I FIND that the relocations of the Petitioners were not violations of FAIRA's "take all comers" provisions, N.J.S.A. 17:33B-15 and 18b. As discussed at length above, N.J.S.A. 17:33B-15 provides that "no insurer shall refuse to insure, refuse to renew, or limit coverage available for automobile insurance to an eligible person who meets its underwriting rules." Additionally, N.J.S.A. 17:33B-18b provides that insurers "shall not penalize an agent by paying less than normal commissions or normal compensation or salary because of the expected or actual experience produced by the agent's automobile insurance business or because of the geographic location of automobile insurance business written by the agent." FAIRA does not bar insurers from seeking out profitable customers wherever those customers are located.

Here, Petitioners Deeks, Callahan, DiCataldo and Minard were not penalized by AIC or ANJ by being paid less than normal commissions or compensation because of their actual or expected automobile loss experience or the geographic location of their automobile business. Petitioners assert that ANJ relocated their offices, and that these relocations caused the agencies to lose customers. Petitioners further assert that the loss of customers ultimately penalized the Petitioners by reducing their income. Petitioners are not asserting that ANJ paid them less than normal commissions or compensation due to the geographic location of their automobile insurance business. Even accepting that the Petitioners earned less money after their offices were relocated, the relocations do not constitute violations of FAIRA.

As expressed by the Supreme Court in Gaydos, FAIRA was not adopted to confer job protection on producers. Gaydos, supra, 168 N.J. at 280. Rather, FAIRA is the implementation of a "strong legislative expression obligating agents to provide automobile insurance coverage to all eligible persons, and prohibiting diminution of their compensation because their policies prove to be unprofitable." Id. at 282. In light of these considerations, I FIND the Petitioners' arguments regarding the relocations to be too tenuous to support a violation of FAIRA. The relocations of the Petitioners' offices may have caused the Petitioners to lose customers, resulting in less compensation being paid to them. Moreover, the Petitioners may have lost customers or income due to a multitude of other reasons, such as poor customer service. Nevertheless, the evidence does not demonstrate that ANJ relocated the Petitioners' offices to penalize the Petitioners for their compliance with FAIRA's "take all comers" provisions. Moreover, any reductions in the Petitioners' incomes that they attribute to the relocations were not directly imposed by AIC or ANJ. For these reasons, the relocations of Petitioners Deeks, Callahan, Minard and DiCataldo and any resulting diminution in income are not violations of N.J.S.A. 17:33B-18b.

The Petitioners also assert that the relocations were part of a strategy to intentionally circumvent the "take all comers" environment by relocating offices away from urban areas "to reduce new and renewal business from eligible persons who reside in 'unmarketable' urban areas." The Department's investigation has uncovered no evidence that tends to establish that ANJ's actions had this effect. To the contrary, there is much evidence that demonstrates ANJ is servicing the urban marketplace and that there were legitimate business reasons for the relocations of the Petitioners' offices. As the following will detail, I FIND this argument to be without merit.

At the outset, I note that the statistics received from ANJ as part of the Department's investigation indicate that there is no direct correlation between office location and PLR on auto insurance business. In 2001, EAs operating from offices in densely populated Trenton and Willingboro had lower PLRs on their auto business than EAs operating from the suburban areas of Watchung, Cranford, Somerville, Morris Plains, and Roseland. Similarly, in 2000, EAs operating from urban Trenton and Bayonne had lower auto PLRs than EAs operating from suburban Springfield, Westfield, Nutley, Westwood and Absecon. The PLRs of agents operating within the same municipalities also showed substantial variations. In 2000, two EAs operating from Westwood had auto PLRs of 72.2 and 110.3 and two operating from Nutley had auto PLRs of

43.3 and 98.4. In 2001, the auto PLRs of eight NSOs operating from the same office in Cranford (including Petitioner DiCataldo) varied from a high of 118.6 to a low of 56.9.

Additionally, as mentioned above, subsequent to the enactment of FAIRA, the Legislature enacted the UEZ Act and companion amendments to FAIRA. Those amendments to FAIRA and the UEZ Act do not place any express limitations on the locations where insurers can place their agency offices. Instead, there is only one implicit limitation placed on an insurer's ability to locate its agencies, the requirement that insurers continue to write their fair share of UEZ business. As was noted above, the Respondent has surpassed its 2002 quota for UEZ business. More specifically, the number of exposures written by ANJ in the five UEZ zip codes in Clifton and Passaic (after declining during 1999 and 2000 for the reasons discussed below) has steadily increased since June 30, 2001. In addition, the total number of exposures written by ANJ in those five zip codes as of December 31, 2002, increased by 986, or about 14.6%, above the total number of exposures written in those areas as of June 30, 2001. With regard to the fourteen UEZ zip codes in Paterson, the pattern was the same. The total number of exposures written by ANJ in those areas as of December 31, 2002, increased by 1198, or 14%, above the total exposures written there as of June 30, 2001. With regard to the two UEZ zip codes in Perth Amboy (the city from which Petitioner Minard had written a substantial amount of private passenger automobile business), the total number of ANJ exposures as of December 31, 2002, decreased by 230, or about 9%, from the number of exposures it wrote in those areas as of June 31, 2001. Overall, however, ANJ has written its fair share of UEZ business by surpassing its quota for UEZ business. These statistics clearly indicate that ANJ does not fail to provide insurance to the State's most highly urbanized areas.

As discussed briefly above, P.L. 2003, c.89, enacted on June 9, 2003, implements a phase-out of the "take all comers" obligations of automobile insurers because those obligations have contributed to the poor financial condition of several carriers by forcing them to insure a disproportionate number of high-risk drivers. In addition, P.L. 2003, c.89, provides new options to those who previously found car insurance unattainable. For example,

- Drivers with more than six points – equal to three speeding tickets – will pay more.
- Drivers with four points or fewer will pay less.
- A Dollar a Day policy will accommodate low-income drivers with an affordable, minimum level of coverage as an alternative to driving uninsured. Those eligible for Medicaid will receive a medical coverage-only policy at a cost of $365 a year.
- Uninsured motorists will face the certainty of having their cars impounded

Ultimately, P.L. 2003, c.89 strives to create a regulatory structure that facilitates insurers' providing coverage for good drivers at the best possible rates.

Furthermore, pursuant to N.J.A.C. 11:3-3A.3, all private passenger automobile insurers are required to file a Consolidated Report on a semiannual basis. This report includes 12-month data on an insurer's in-force exposures within New Jersey's 29 rating territories. According to this data, ANJ's agency relocations have not resulted in its under-serving urban areas. For example, in Perth Amboy, the number of exposures written by ANJ increased between December 31, 2001, and December 31, 2002, after having declined during the three previous years. In Paterson, the number of ANJ's auto exposures has increased each of the two years since December 31, 2000, after having declined during 1999 and 2000. In Plainfield and Jersey City, the numbers also increased in 2001 and in 2002, after declines during the prior two years. In fact, in 12 of the 14 rating territories that include a major urban area in the State, ANJ's exposures increased between December 31, 2001, and December 31, 2002. A decrease of 54, or about 2%, occurred in Bayonne, and a decrease of 107, or about 4.5%, occurred in the "Hudson County Balance" territory that excludes Jersey City and Bayonne. In contrast, ANJ's exposures increased by 2,854, or 17%, in Jersey City, by 2,964, or 31%, in Newark, and by 668, or 17%, in Camden. Overall, ANJ's exposures in those 14 rating territories increased by 5013, or some 2.5%, during 2001, and by 17,575, or some 8.5% during 2002.

Lastly, ANJ has provided sound business reasons for the office relocations. Information provided by ANJ indicated that the former Clifton office of Deeks and Callahan was the site of a substantial insurance fraud that resulted in criminal convictions of the perpetrators, including a sales solicitor who worked in the office. Petitioner Minard's former location in Edison was also the site of an insurance fraud that resulted in the criminal conviction of a member of the office staff. Petitioner DiCataldo was an NSO who, unlike the NOA's, worked from company owned, operated, and funded offices. Information supplied by ANJ indicated that at least two of his moves were attributable to the company's desire to consolidate its resources following the closing of the Wayne and East Hanover NSO offices in response to NSO retirements and many conversions to EA status. These factors constitute legitimate business reasons for the Petitioners' relocations.

The foregoing facts demonstrate that ANJ is not under-serving urban areas, and has not implemented a policy of relocating its agents away from urban areas. In fact, the substantial majority of relocations (50 out of 75) undertaken by ANJ from 1997 to 2002 were relocations from non-UEZ areas to other non-UEZ areas. Moreover, the Department's UEZ and territory statistics clearly demonstrate that ANJ has not underserved urban areas, including the Petitioners' former locations. For all of the foregoing reasons, I FIND that ANJ did not violate FAIRA on this issue.

4) ANJ Agents' Commissions and OEA v. AIC Nationwide Agents' Commissions and OEA

Petitioners assert that ANJ paid its agents lower commissions and office expense allowances than the other Allstate companies paid to their agents operating in other jurisdictions throughout the nation.

The portions of Respondent's commission structure in this State that are relevant to this allegation are described above. Specifically, the Petitioners presented evidence that Respondent's parent company, AIC, and other affiliated insurance companies pay higher commissions to their agents in other states than ANJ pays its agents in this State. The Petitioners claim that this violates FAIRA, particularly the prohibition in N.J.S.A. 17:33B-18b against paying agents less because of PLR or geography.

Petitioners' argument is unpersuasive. ANJ is a separate corporate entity from AIC, its parent company, and from other Allstate affiliates doing business in other jurisdictions. Moreover, they are separate legal entities with separate legal rights and responsibilities. AIC has no immediate and direct responsibility for the actions of Respondent in New Jersey. Most importantly, ANJ compensates all of its agents according to the same formula that is applicable to the type of agency agreement, i.e. NOA, NSO, or EA.[13] All NOAs, all NSOs and all EAs are compensated according to the identical agency compensation and commission structures established for each type of agency. Moreover, all ANJ agents affirmatively entered into these agency agreements with ANJ.

Ultimately, the manner in which ANJ compensates its employees and agents is not comparable to the manner in which AIC compensates its employees and agents because ANJ is a separate and distinct corporate entity that was established upon the withdrawals of AIC and Allstate Indemnity from the New Jersey marketplace in 1997. Furthermore, as was referenced above,

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[13] The Petitioners' emphasize that Allstate Insurance Company agents in other jurisdictions are paid at higher rates than Respondent's EAs in New Jersey. However, I note that comparatively

the Department does not regulate the compensation rates negotiated between carriers and their agents unless insurers discriminate in the commission rates they pay to New Jersey agents on grounds prohibited by FAIRA or other New Jersey laws. In addition, because New Jersey's insurance rates are generally higher than those in many other states, there are legitimate business reasons why carriers may offer commission rates to their New Jersey agents that are lower than those typically offered to agents operating in other states. Thus, I FIND the Petitioners' allegations on this issue to be totally without merit.

5) Cross-line Sales Requirements

Petitioners assert ANJ's requirement that agents have a certain percentage of their business in cross-line sales, including auto and some other line of insurance products, violates FAIRA's "take all comers" provisions by illegally penalizing agents and inducing agents to channel away eligible persons. Respondent has instituted a performance criterion that requires agents to either have at least 34% of their business in cross-line sales (*i.e.*, at least 34% of their insureds must hold a combination of any two lines of coverage), or to show an increase of 2% over their prior year's cross-line sales production. In 2000 and 2001, ANJ utilized a total of five criteria to evaluate the performance of their agents, including cross-line sales. To receive a favorable evaluation, an agent had to meet or show improvement in three of these criteria. Beginning in 2002, the total number of criteria was reduced to

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high insurance rates in New Jersey have the effect of generating higher incomes for New Jersey three, with the cross-line sales requirement remaining as one of the three. Under the revised criteria, agents had to meet or show improvement in 2 of the 3 criteria. Agents who fail to do so risk termination.

Petitioners aver most urban-based consumers only have auto insurance, and that, through this performance standard, ANJ is attempting to accomplish indirectly that which it cannot achieve directly, i.e. to tie the purchase of a homeowners or other type of policy to the purchase of an auto policy. Petitioners further contend that customers in urban areas are less likely to purchase multiple insurance products than customers living elsewhere. They also assert that urban residents "do not require or desire homeowners, renters or condominium insurance." [Third Amended Petition, page 56]. Therefore, Petitioners argue that ANJ's cross-line sales criterion makes agents reluctant to sell stand-alone automobile policies, and that it has the effect of channeling away eligible persons located in urban areas, in violation of FAIRA.

Petitioners further contend this requirement contravenes FAIRA's proscription on channeling away certain eligible persons because it requires agents to "focus their business" in non-urban areas that do not experience high loss ratios. They also assert that the cross-line sales requirement violates N.J.S.A. 17:33B-18b by penalizing agents with primarily urban books of business because it subjects them to termination if they are unable to meet the requirement. In addition to asserting that residents of urban areas do not need or want insurance on their dwellings, Petitioners also averred that the "cross-

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agents compared to agents in other states if we hold constant the number of policies sold.

line sales requirements are simply unattainable." See, Brief in support of Third Amended Petition at page 28. Statistical information reviewed in the course of the Department's investigation, however, refutes this contention and the other sweeping generalizations posited by the Petitioners in support of these particular allegations.

The information reviewed by the Department confirmed that the books of business of some twenty-seven agents, including thirteen of the Petitioners, contained Tier II, i.e. likely to be unprofitable, auto customers who were also multi-line insureds. The total number of such multi-line policies was 1,768. The percentages of the Tier II multi-line sales of these agents vis-a-vis their total volume of Tier II auto business ranged from 6.2% to 33.03%. NSO Timothy Leuzardes achieved the 33.03%. He operates in the same office as did Petitioner DiCataldo, and Mr. DiCataldo only achieved a 14.29% rate of multi-line Tier II business. Similarly, Petitioner Corsaro had a 6.7% rate of cross-line sales, while Peter Arcuri, Sr., an agent that worked in the same market as Petitioner Corsaro, had a 17.24% rate of Tier II cross-line sales. Both agents wrote a substantial number of UEZ policies. This demonstrates that the cross-line sales requirement was not impossible to achieve. Taking as true the Petitioners' premise that unprofitable (i.e. Tier II) auto business is generated predominately from urban areas, these statistics rebut their somewhat patronizing assertion that urban residents "do not require or desire homeowners, renters, or condominium insurance." Furthermore, it is also undeniable that a substantial percentage of Tier II auto business is written in suburban areas of the State. That fact, combined with the potential for cross-line sales to Tier I auto customers and the performance levels achieved in Tier II multi-line sales described above, all serve to refute Petitioners' assertion that "the cross-line sales requirements are simply unattainable."

Moreover, I conclude that ANJ's cross-line sales criterion, as described above, is not a "tying arrangement" prohibited by N.J.A.C. 11:3-35.3(c)6 and Bulletin 92-10. The cross-line sales requirement used by ANJ does not provide that an agent is required to also sell homeowners, renters, condominium or any other type of policy in order to sell an auto policy. The agents are merely required to have a certain percentage of such cross-line sales.

As has been discussed above, marketing strategies that induce agents to "focus their business" in areas and on products likely to produce profitable business are not proscribed by FAIRA as long as the marketing strategies do not direct agents to refuse to provide coverage to, or to channel away the business of eligible persons from untargeted areas. The proscriptions in N.J.S.A. 17:33B-15b (refusing to take all comers) and 17:33B-18a(2) (channeling away eligible persons) are not violated simply because companies that write auto insurance in New Jersey attempt to simultaneously secure profitable business through sales of the other insurance lines that they write.

Based upon the foregoing, I FIND that Respondent's use of its cross-line sales criterion for the evaluation of an agent's performance is not proscribed by FAIRA.

6) Meeting Eligible Persons Requirements

The Petitioners assert that ANJ's agent compensation policies, marketing practices and relocations of NOAs all had the effect of channeling eligible persons away from the Respondent, in violation of N.J.S.A. 17:33B-18a(2). The Department's investigation produced no evidence indicating that ANJ has ever limited coverage to, or refused to insure or renew any eligible person who met its underwriting rules, including those from urban areas, or that ANJ directed any of its agents to do so. In addition, in the course of this investigation, the Petitioners confirmed to the Department that they never: 1) denied coverage or insurance services to any eligible person in violation of N.J.S.A. 17:33B-15b; or, 2) channeled away business in violation of N.J.S.A. 17:33B-18a(2). However, Petitioners aver that the policies and actions of ANJ constitute an attempt to channel away the business of urban-based eligible persons. Specifically, the Petitioners assert that ANJ's policies and actions that create incentives for the procurement of profitable business and that instruct agents to target their marketing and solicitation activities in "preferred areas" result in agents refusing to insure or renew coverage for such persons.

The analysis of these allegations must begin with a discussion of the regulatory environment within which the allegedly illegal conduct occurred. Effective on January 1, 1998, the Legislature simultaneously enacted N.J.S.A. 17:33C-1, et seq., the "Automobile Urban Enterprise Zone Act" (the "UEZ Act"), and amendments to FAIRA related to the UEZ Act. In its opinion in the Gaydos case, the Appellate Division noted that those legislative actions were "designed to cure the many problems with which we are confronted here." Gaydos, 331

N.J. Super. 458, 477 n.7 (App. Div. 2000). I agree that the UEZ Act was intended to accomplish directly that which FAIRA attempted to accomplish indirectly.

FAIRA attempted to ensure adequate access to auto insurance products for all eligible persons, including those residing in urban areas that generated a high volume of unprofitable business. It did so by proscribing practices and by subjecting carriers and agents to sanctions. Most notably here, FAIRA prohibits carriers from penalizing agents based upon the actual or anticipated loss experience of the agent's auto business or the geographic location of their auto business. Furthermore, FAIRA prohibits agents from channeling eligible persons away from the insurer so as to avoid its "take all comers" obligations.

In contrast, through a proactive approach, the UEZ Act and its implementing regulations mandated that all qualified auto insurers write a certain number of auto insurance exposures in designated UEZs, which may be written through UEZ agents appointed by the insurer to represent it in the UEZs. Under the UEZ Act, the insurer is required to pay its UEZ agents at the same rate of compensation that it pays to its other agents. The volume of exposures required to be written is determined by a formula that essentially requires insurers to write a percentage of the total number of eligible persons residing in the State's most densely populated urban areas that is roughly equivalent to the insurer's statewide share of the voluntary private passenger auto market. See, N.J.A.C. 11:3-46.3.

If an insurer fails to write its share of exposures directly through its UEZ agents and its other standard sales operations, the insurer may be assigned a sufficient number of urban exposures through the Personal Automobile Insurance Plan ("PAIP") so as to fulfill the insurer's UEZ quota. These UEZ risks are submitted to the PAIP for assignment to an insurer that has not written its proportionate share by producers with no formal affiliation with the assigned insurer. Thus when an insurer is compelled to accept risks assigned from the PAIP, the insurer does not use its own sales force to verify the information collected on the insured and cannot attempt to sell another type of insurance or product to the applicant concurrent with completion and submission of the auto insurance application. The insurer is also forced to accept business written by PAIP agents that does not conform to that insurer's application process. This mismatch can result in the insurer having to obtain additional information from the insured subsequent to assignment of that specific UEZ risk. Given the unprofitable nature of PAIP-assigned exposures and the business inefficiencies that result from the assignment of such risks, it is clearly not in an insurer's best interests to be assigned a high volume of risks from the PAIP due to the insurer's failure to fulfill its UEZ quota. Thus, a company that is not meeting its UEZ quota would have no incentive to channel away urban insureds attempting to secure coverage through its traditional sales operations because, to the extent the company was successful in doing so, it would simply be assigned from the PAIP risks sufficient to meet its UEZ obligation.

This analysis is consistent with the Appellate Division's review of FAIRA in its Gaydos opinion. There the Appellate Division noted that:

> [i]mplementation of the "take all comers" centerpiece of FAIRA requires that there be an effective conduit between the voluntary market and those insureds to whom the voluntary market was historically inaccessible 'for an obvious panoply of demographic reasons.' . . . N.J.S.A. 17:33B-15 and N.J.S.A. 17:33B-18a were intended to remediate this problem [and] it bears emphasis that insurers have strong motivation to evade their obligation to "take all comers" and to diminish, if not terminate, their presence in geographic areas that have been historically unserved or underserved. Excluding the high risks historically associated with urban areas permits insurers to avoid losses and saves them from remitting commissions due to their agents." [Gaydos, supra, 331 N.J. Super. at 476].

The Appellate Division recognized that FAIRA was enacted to ensure an adequate means by which urban consumers would have access to the voluntary market, and that, at the time of its enactment, insurers had a strong financial motivation to avoid servicing those consumers.

On the next page of that opinion, however, the Appellate Division included its observation, referred to above, that "the Legislature adopted the Automobile Urban Enterprise Zone Act and correlative amendments to FAIRA designed to cure the many problems with which we are confronted here." Id. at 477. Clearly, one of the problems that the UEZ program was designed to cure was the existence of a financial incentive for companies to avoid writing urban-based auto insurance business.

As the Appellate Division also noted, the "take all comers" provision of FAIRA, N.J.S.A. 17:33B-15, was amended upon creation of the UEZ program. Subsection (c) of the amended provision reads, in pertinent part, "[n]othing in this subsection shall be construed to relieve a qualified insurer from its obligation under subsection a. and b. of this section to write all eligible persons residing within an automobile insurance urban enterprise zone through its non-UEZ agent points of access." Thus, it is clear that the legislation implementing the UEZ program was not intended to repeal the prohibition set forth in FAIRA upon auto insurers admitted in New Jersey refusing or limiting coverage to eligible persons residing in a UEZ.

However, FAIRA was never intended to require that eligible persons from urban areas be able to obtain auto insurance services from particular agents. As was noted above, the Supreme Court affirmed in its Gaydos opinion, "… insurance agents are not members of the class for whose special benefit FAIRA was enacted. The legislative history is clear that the goal of FAIRA was to benefit New Jersey auto insureds, not insurance agents." Gaydos, supra, 168 N.J. at 279. While some of the Petitioners may have experienced a reduction in the demand for their services from urban customers as a result of ANJ's relocations of their offices and marketing strategies, ANJ's fulfillment of its obligations under the UEZ program and its in-force exposures in urban territories are compelling proof that the results of its business plan and marketing approaches are not inconsistent with the objectives of FAIRA.

Rather than addressing the means of how auto insurers provide coverage in urban areas and proscribing certain practices as FAIRA does, the UEZ program focuses on results. Department statistics show that after the UEZ program was implemented, the number of insured urban risks increased faster than the general Statewide numbers, indicating that the UEZ program increased urban access to more companies and resulted in increased availability of coverage. Thus, it seems clear that when a company is meeting or surpassing its UEZ quota, it is not utilizing general policies that effectively channel away urban business. The in-force exposure by territory statistics mentioned above are also significant indicators of the extent to which an admitted insurer is servicing the auto insurance needs of New Jersey's urban residents.

In this regard, ANJ advised that, as of February 2003, it was insuring a total of 79,035 UEZ exposures, which was 1,560 above its statewide proportionate share as prescribed by N.J.A.C. 11:3-46.3. A review of UEZ data on file with the Department indicated that, as of December 1999, ANJ insured 74,688 UEZ exposures. As of December 2000, it had insured 64,111 UEZ exposures; as of December 2001, it had insured 73,059 UEZ exposures; and, as of December 2002, it had insured 78,282 UEZ exposures.

With the exception of Perth Amboy, since June 30, 2001, ANJ's UEZ numbers have risen steadily in virtually all of the UEZs in close proximity to the current and former office locations of the Petitioners. In fact, as was noted above, as of September 2002, ANJ had surpassed its Statewide quota for insured UEZ exposures by approximately 2,500.

ANJ's numbers for the UEZs in Perth Amboy have decreased since 1999, from 3,983 in August 1999 to 2,847 in December 2002. Despite this steady decline in UEZ numbers, ANJ's total in-force exposures for Perth Amboy, Rating Territory 8, have climbed slightly from 10,238 in December 2001 to 10,264 in December 2002. These statistics demonstrate that ANJ still has a substantial presence in Perth Amboy. Moreover, there is no evidence that ANJ is channeling away eligible persons from Perth Amboy.

Data on file with the Department also indicates that in essentially all of the UEZ's in the State, the total exposures insured by ANJ has risen over the 18 month period between June 30, 2001 and December 31, 2002, following a steady decline between March 31, 1999 and June 30, 2001. The decline in that time period may be largely attributed to the fact that the number of UEZ exposures insured by ANJ at the outset of the UEZ program far exceeded its proportionate share. Shortly after the implementation of the UEZ Act on January 1, 1998, the Department implemented the Tier Rating program for private passenger auto insurance pursuant to N.J.S.A. 17:29A-46.1 et seq. and N.J.A.C. 11:3-19A.1 et seq. Due in part to the high volume of exposures ANJ was insuring in the UEZ's during 1998 and 1999, ANJ was granted approval to raise its rates for coverage for persons rated as "Tier II" under the tiered rating rubric. Doing so rendered ANJ's policies less attractive than lower-priced policies offered by other carriers who were seeking to increase the number of their UEZ exposures so as to meet their quota. Thus, through the operation of market forces, ANJ's UEZ numbers declined in 1999 and 2000.

This utilization of rate adjustments to offset the effect of an imbalance in an insurer's book of auto business, where the number of non-performing policies is not adequately offset by a sufficient number of profitable policies, was alluded to by the Appellate Division in its opinion in the Gaydos case. There, the Appellate Division noted that: "[i]nsurers are entitled to earn a reasonable rate of return on their New Jersey automobile insurance business. . . It is one thing to compel insurers to provide insurance to those they would rather not insure, but it is altogether unfair and unconstitutional to coerce insurers to take on business they do not want at inadequate rates." Gaydos, supra, 331 N.J. Super. at 477. Thus, the history of ANJ's UEZ exposures and rating practices is consistent with the Appellate Division's view that the proper approach for a company experiencing an imbalance in its book of auto insurance business due to insuring a disproportionate number of unprofitable accounts as a result, at least in part, of its compliance with FAIRA, is to seek rate relief from the Department. Such rate relief will allow the insurer to avoid the possibility of falling into an unsafe or unsound financial condition.

The documentation simply does not support the Petitioners' allegation that ANJ's agent compensation, relocation and performance evaluation policies had a chilling effect on the writing of auto business in urban areas. Between June 30, 2001 and December 31, 2002, the number of exposures written by ANJ in all but 18 of the 84 UEZ zip codes in the state increased. The total of all exposures written by ANJ in UEZ's as of December 31, 2002, was 13,806 more than it had written in all UEZ's as of June 30, 2001. As is discussed below, ANJ's territorial numbers also reflect its significant and expanding participation in all of the State's major urban areas. This empirical data undermines the Petitioners' arguments and clearly bolsters the position of ANJ that its policies, as applied, do not result in the denial of coverage or the channeling away of urban-based eligible persons from ANJ.

The growth in ANJ's UEZ numbers is not the only indicator of its willingness to insure urban-based eligible persons, as many of those numbers reflect risks assigned to ANJ prior to September 30, 2002, the date by which it had fulfilled its UEZ quota. The statistics on ANJ's in-force exposures in territories constitute additional compelling evidence that its policies do not result in a failure to insure eligible persons from urban areas, or in the channeling away of such individuals.

ANJ's territorial numbers reflect its significant and expanding participation in all of the State's major urban areas. A comparison of ANJ's total risks in the fourteen rating territories that include UEZs as of December 31, 2002 revealed that in eight of those territories, ANJ was insuring thousands of urban risks that were not part of the UEZ program. For example, in the Jersey City territory ANJ was insuring 17,097 risks of which 12,345 were UEZ accounts. In the Elizabeth territory, the numbers were 16,597 and 5,907, respectively. In the Newark semi-suburban territory, that includes the UEZ zip codes in Belleville and Irvington, the numbers were 14,796 and 4,684, respectively. In the Paterson territory, that includes the four UEZ zip codes in Clifton and numerous others in Passaic and Paterson, the numbers were 22,441 and 18,616, respectively. In the Perth Amboy territory, the numbers were 10,264 and 2,847, respectively. In the Trenton territory they were 14,765 and 7,105 and in the Plainfield territory they were 16,675 and 2,344, respectively. While not demonstrating differences as substantial as the foregoing, ANJ's numbers in the other six territories that contain UEZ zip codes indicate that ANJ's participation in the auto insurance market in the highly urbanized areas of the State is substantial. ANJ's participation in urban areas results in ANJ not being assigned a great number of risks through the UEZ program. Instead, a large portion of ANJ's UEZ risks come from its own business activity. These results do not indicate that ANJ's policies have the effects of refusing or limiting coverage to urban-based eligible persons, or of inducing its agency force to channel away such persons.

Thus, I am not persuaded by the Petitioners' argument. There is no evidence that ANJ turned away any eligible applicant seeking automobile insurance. Also, as was noted above, the Respondent met its UEZ quota in 2002 for urban business and increased its volume of business in 13 of the 14 urban-centered territories throughout the State. Absent any credible data that corroborates their position, I cannot conclude that the challenged policies affected urban-based eligible persons, for whose benefit FAIRA was enacted, in the manner averred by the Petitioners.

Already explained above is that the relocations of the offices of Petitioners Deeks, Callahan, Minard and DiCataldo were not directed by ANJ to channel away urban-based eligible persons from ANJ in violation of FAIRA. Therefore, these allegations will not be addressed again here.

Petitioners also contend that the bonus program for EAs and the profit-based supplemental OEA for NOAs created incentives for ANJ agents to stop soliciting new and renewal business in urban areas so as to keep their PLRs low and thereby qualify for the bonus commissions or additional OEA. The Petitioners aver that the pressure to do so is particularly acute upon those agents whose books of business included many insureds living in urban areas with "capped" rates. Pursuant to N.J.S.A. 17:29A-36, base rates for auto insurance in the higher risk territories in the State cannot be more than 35% higher than the statewide average base rate. However, the Petitioners contend that ANJ's bonus and OEA policies have a disproportionate impact upon agents servicing the capped (i.e. urban) areas because the higher risk territories contain urban centers and because the actual loss experience generated by policies written in those "capped" areas is so high as to warrant higher base rates than the cap allows.

Like all other admitted carriers and their agency forces, ANJ and its agents must operate within the regulatory structure established by law. The EA bonus and profit-based OEA programs reward the acquisition of profitable business that is essential to the continued financial stability of ANJ. I cannot conclude that such programs violate FAIRA merely because they were not devised in such a way as to ensure that all agents servicing all areas of the State would have the same likelihood of fulfilling the criteria established to qualify for the offered incentives.

Petitioner DiCataldo indicated in an affidavit [Amended Petition, Ex. N] that many of the urban-based customers he served prior to his 1997 relocation from Wayne to East Hanover "preferred doing business in person." While that may be true and while the relocation of his office may have inconvenienced some of his existing clients, it is also clear that in 2002 ANJ began to offer its services through an 800 number and the internet, in addition to its network of agents. The effectiveness of this expansion of the means by which urban residents might obtain auto insurance from ANJ is reflected in their increased numbers of UEZ insureds and in-force exposures in urban-based territories since 2001.

Once again, FAIRA does not require that companies over expose themselves to potentially unprofitable new business. If a former insured found it too inconvenient to continue to do business with a relocated agent by mail, phone, the internet, or by driving to the new office location, the insured's choice not to do so <u>is</u> <u>not</u> compelling evidence that he/she was channeled away from ANJ as a result of its relocation of that agent's office. This is especially true when the statistical data convincingly demonstrates that hundreds or thousands of other insureds residing in the same municipality or zip code were able to and did secure coverage from ANJ.

Again, this analysis is consistent with the view of FAIRA expressed by the Appellate Division in its opinion in the Gaydos case. As mentioned above, there the court stated that, "[i]mplementation of the 'take all comers' centerpiece of FAIRA requires that there be an effective conduit between the voluntary market and those insureds to whom the voluntary market was inaccessible . . ." Gaydos, supra, 331 N.J. Super. at 476. The extent of ANJ's presence in the urban auto insurance market, as evidenced by its UEZ and territory numbers, indicates that its sales and marketing policies created the "effective conduit" emphasized by the Appellate Division.

Petitioners also specifically allege that ANJ's 1999 deployment of Independent Agents ("IAs") was a subterfuge intended "to give the appearance of offering products for sale in urban areas while actually reducing sales there" because IAs, in addition to selling ANJ policies, sell the insurance products of other companies that the Petitioners allege "are priced more competitively than ANJ's products." Furthermore, the Petitioners complained that ANJ's retention of IAs was instituted to undercut NOA business in urban areas, and thus circumvent the "take all comers" requirement and channel away the business of urban-based eligible persons from ANJ. [Amended Petition, ¶48].

The Independent Agents retained by ANJ are paid a base commission rate of 15% on their ANJ sales with the opportunity for additional profit-based bonuses. The ANJ policies they sell are offered at the same rates as the ANJ policies offered by all other types of ANJ agents. Again, Allstate's UEZ and territory numbers reveal the speciousness of the Petitioners' assertions.

Whether due to its network of independent agents, its 800 number, its website or the effectiveness of its NOAs and EAs, the auto insurance exposures written by ANJ in essentially all of the State's urban areas have increased in recent years.

Thus, I find the Petitioners' assertion that the deployment of Independent Agents by ANJ "undercuts existing NOA business in these urban communities" quite telling. The Petitioners appear to be contending that FAIRA was violated because they lost some accounts as a result of ANJ's decision to provide new points of access to its products for urban-based eligible persons. However, as was noted above, the Supreme Court confirmed in its Gaydos opinion that the intent of FAIRA was not to benefit insurance agents. I do not construe FAIRA's intent to include protecting or guaranteeing the income levels of particular agents. Moreover, it would be illogical to find that the Legislature intended a violation of FAIRA would occur where an agent's compensation level fell because his former urban-based insureds were provided access to and secured coverage from another company at a lower cost.

The Petitioners also assert that a short-lived policy requiring new insurance applicants to disclose the terms of private party sales was in violation of FAIRA. From approximately October 1, 2001, until November 5, 2001, ANJ had in effect a policy that required a copy of the front of the motor vehicle title and a written statement from the seller outlining the terms of the sale of automobiles purchased between two private parties in order to bind new Tier II automobile insurance coverage. This practice was discontinued shortly after it was instituted, in that it did not comply with the provisions at N.J.A.C. 11:3-44. Because the policy was short-lived and applicable statewide, I cannot find that it supports these Petitioners' claims.

Petitioners further allege that ANJ violated FAIRA because its promotional programs and agent performance evaluation criteria were "not aimed at take all comers" and were designed "to offset the take all comers environment." In other words, the Petitioners assert that these programs were intended to induce agents to channel away eligible persons in violation of N.J.S.A. 17:33B-18a(2).

As was noted above, I do not construe FAIRA as proscribing incentive programs like the Olympic Trip contest and performance requirements such as the cross-line sales targets. Absent any evidence of directives by ANJ to its agents to turn away eligible persons whose business is or may be unprofitable, and absent any evidence indicating that the Petitioners actually turned away such persons, the company's incentivizing and encouraging the procurement of profitable business does not form the basis of a FAIRA violation.

I view the marketing strategies of ANJ in a similar way. The Petitioners allege that visual aids and verbal statements presented to agents by the company contained explicit or implicit directions to violate the "take all comers" requirement and to channel away urban-based business. Petitioners also presented evidence in the form of a certification by Petitioner Minard (Brief to Third Amended Petition, Exhibit CC) that asserted the Respondent utilized maps to identify "preferred" and undesirable areas for the writing of new business. For the reasons discussed above regarding the imperative to maintain the financial health of the company, and given ANJ's recent UEZ and territory numbers, I cannot conclude that use of these items by ANJ was contrary to FAIRA. The business programs were described in visual slides as designed to "maximize the opportunities to offset the take all comers environment." [Amended Petition, Ex. D].. As another slide [Amended Petition, Ex. J] indicates, the thrust of ANJ's communications to its agents was not that they were to reject applications made by eligible persons, or to channel away such persons from coverage with ANJ. Rather, the essence of the message was to identify and target "areas where marketing efforts should be focused."

It is also significant that during the time period when these communications were being made ANJ frequently reminded its agents of their obligations to comply with the "take all comers" law. For example, ANJ provided to its agents a "Take All Comers Compliance Job Aid" in an effort to ensure their appropriate responses to frequently asked questions; a memo dated May 2000 from ANJ's President emphasizing the importance of complying with FAIRA; and "ANJ Company Standards" which addressed access to insurance and compliance with "all applicable laws designed to give eligible persons access to insurance including, but not limited to… 'take all comers' laws." In addition, at a compliance meeting held in April 2001 for all agents, "Take All Comers – Completed Written Application" was the first substantive item on the agenda. ANJ also provided additional supplemental written materials to the agents in May 2002 and March 2003.

The evidence has established that ANJ has repeatedly reminded its agency force of their obligations to comply with the requirements of FAIRA, and has not utilized policies designed to, or which caused the channeling away of the auto insurance business of urban-based eligible persons. Therefore, I conclude that ANJ's instructions to direct agent marketing efforts in areas more likely to produce profitable business are not an adequate basis on which to find that ANJ's messages were, or were intended to be, directives to not comply with "take all comers." The evidence demonstrates that ANJ directed its agents to provide quotes or offer coverage to all eligible persons, even eligible persons from geographic areas likely to produce unprofitable business.

In support of their contention that ANJ channeled away eligible persons through the policies and practices at issue, the Petitioners made several references to DOBI Bulletin 96-04 that was issued on May 20, 1996. The Petitioners urge that text therein supports their allegations. Bulletin 96-04 provides that:

> [p]ractices that might lessen or diminish the opportunity of eligible persons to secure automobile insurance should be avoided, [and] it is the obligation of the insurer and producer to properly staff the office with licensed individuals authorized to write automobile insurance on a regular and routine basis without extensive delays for appointments to complete applications… [Bulletin 96-04].

Initially, it must be noted that this Bulletin was issued before enactment and implementation of the UEZ Act. Given the affirmative obligation to insure risks from urban areas under the UEZ Act, the first statement quoted above must be considered within the context of the changed auto insurance regulatory scheme as it exists today in New Jersey. Accordingly, in today's market, I do not construe this statement as a blanket directive to avoid all practices that "might lessen or diminish the opportunity of eligible persons to secure auto insurance" where the net effect of the company's practices is to maintain or increase the volume of auto exposures, particularly urban-based exposures. Given ANJ's performance in this regard, I conclude that its actions and policies challenged by the Petitioners have not had an overall effect of reducing the opportunity of eligible persons to secure coverage from ANJ.

With respect to staffing levels, Petitioners aver that one of the effects of the inability of the NOA Petitioners to qualify for the profit-based OEA was that they were forced to reduce the staffs of their offices, which rendered them less able to adequately serve their customers. Moreover, the Petitioners allege that the staff reductions could result in their inability to "take all comers" and the channeling away of eligible persons seeking auto insurance services or coverage. Nevertheless, the Petitioners steadfastly aver that they have never failed to comply with "take all comers."

First, it must also be noted that the obligation to adequately staff offices falls on producers who, like the Petitioner NOAs, own and maintain their offices, as well as on insurers with company-owned offices. That being said, a review of information supplied by the Petitioners on the staffing levels in their offices does not support their underlying assertion that the profit-based component of the OEA significantly reduced the staffing levels in their offices. Of the eight Petitioner NOAs on whom information was supplied, five had the same or a higher number of licensed producers in their offices as of July 1, 2002, than they had as of July 1, 1999. Of the remaining three NOAs on whom such information was provided, each NOA had one fewer licensed producer as of July 2002 than he had in July 1999.

In addition, the alleged reductions in business volume and OEA amounts which precipitated reductions in some of the Petitioners' staffing levels occurred during the years 1998, 1999, and 2000. In this regard, the Petitioners failed to consider the impact of the market forces that were generated upon implementation of Tiered Rating in March 1998. Again, ANJ's rates for its Tier II business caused a price differential between ANJ's auto policies and those of its competitors. This cannot be discounted as significantly contributing to ANJ's decrease in business volume during 1998 through 2000. Based upon this data and the probative value of ANJ's UEZ and territory statistics, I conclude that the profit-based OEA component did not have a significant impact on producer staffing levels in the offices of the Petitioner NOAs. Thus, the OEA profit component did not result in a failure by ANJ to meet its "take all comers" obligation or in the channeling away of eligible persons by ANJ's agents.

The Petitioners have also alleged that ANJ's policies and practices at issue in this matter and the various verbal statements and visual presentations made by ANJ to its agency force instructed or coerced its agents to "redline", or resulted in their doing so. They point to the decline in ANJ's UEZ numbers between 1998 and 2000 as evidence of the success of this policy. I construe the term "redlining" to mean an explicit policy espoused by an insurer requiring agents to decline to do business in, or with persons from, a certain geographic area. In this context, the documentation adduced in this investigation demonstrates that ANJ did not "redline."

The empirical evidence reflected in ANJ's UEZ and territory numbers clearly demonstrates that ANJ has continued to write auto insurance business in all urban areas of the State, and that in recent years it has substantially increased the volume of auto business it is writing in those areas. The decline in ANJ's UEZ exposures after 1998 is attributable to the effects of tiered rating and the operation of market forces subsequent to implementation of ANJ's tier rating system. To reiterate, the proscriptions against insurers refusing to "take all comers" and channeling away the prospective business of any eligible person do not mean that auto insurers have an affirmative obligation to expend their marketing efforts and resources in a qualitatively and quantitatively equal manner amongst geographic areas differing in potential profitability.

The evidence shows that ANJ did urge and direct its agents to focus their marketing efforts on the acquisition of profitable business, did utilize bonus and expense reimbursement policies that rewarded agents who were successful in doing so, and did evaluate agent performance based upon criteria that gauged the extent to which they succeeded in doing so. No credible evidence presented by the Petitioners or obtained through the Department's investigation established that ANJ has directly or through these policies refused to write any auto insurance policy for an eligible person, diverted or "channeled" away any eligible person from coverage, or explicitly or implicitly directed its agents to do so. Therefore, I have concluded that ANJ has not engaged in "redlining" in violation of N.J.S.A. 17:33B-15b or 17:33B-18a(2).

7) Termination of Petitioner DiCataldo

The Petitioners assert that ANJ terminated Petitioner DiCataldo due to his poor loss ratio in violation of FAIRA, N.J.S.A. 17:33B-18b. Specifically, the Petitioners assert that the agent review processes used by ANJ to evaluate DiCataldo and that ultimately resulted in the termination of his agency agreement were impermissibly based on his PLR in violation of N.J.S.A. 17:33B-18b. As discussed above, N.J.S.A. 17:33B-18b provides that, "an insurer shall not penalize an agent by paying less than normal commissions or normal compensation or salary because of the expected or actual experience produced by the agent's automobile insurance business or because of the geographic location of automobile insurance business written by the agent." In Gaydos, the Supreme Court determined that,

> In view of the strong legislative expression obligating agents to provide automobile insurance coverage to all eligible persons, and prohibiting diminution of their compensation because their policies prove to be unprofitable, to permit agents to be subject to termination because of their compliance with FAIRA would be contrary to the Legislature's intent. [Gaydos, supra, 168 N.J. at 282.]

Therefore, my review of Petitioner DiCataldo's termination is limited to whether ANJ terminated him due to the loss experience generated by his automobile business or the geographic location of that automobile business.

First, it is essential to note that I have previously investigated the use of agent reviews that resulted in the termination of an agent due to poor performance. In I/M/O East Camden Ins. Ag. ("East Camden"), Order No. A02-127, East Camden also asserted that an insurer, the National Consumer Insurance Company ("NCIC") terminated its agency agreement with the East Camden agency due to the agency's poor loss ratio and the agency's urban location in violation of FAIRA's "take all comers" provisions. NCIC asserted that the East Camden agency was terminated because the agency was one of the 40 worst-scoring producers in a review of NCIC's entire agency force. NCIC had completed two separate reviews of its agency force. The first review scored the producers on various categories including total P/C loss ratio. Upon completion of this first review, the East Camden agency was not one of the 40 worst-scoring producers, even taking into account its poor loss ratio. The second review eliminated total P/C loss ratio as a review category based on advice of NCIC's legal counsel and concerns regarding FAIRA. Upon completion of this second review, the East Camden agency was determined to be one of the 40 worst-scoring producers. NCIC then terminated the East Camden agency and the other 39 worst-scoring producers. Therefore, I concluded that NCIC had terminated the East Camden agency without regard to loss ratio, and that the termination was not a violation of N.J.S.A. 17:33B-

18b. However, the decision in East Camden did not address the question of whether it was ever permissible to use total P/C PLR's to evaluate an agency force because NCIC had eliminated PLR as a review category in the evaluation that resulted in the termination of East Camden.

In this matter, the issue is directly before me. The question presented is whether an insurer can ever use any type of PLR to evaluate an agency force when that evaluation may result in termination. Based upon my reading of N.J.S.A. 17:33B-18b, I have determined that insurers are prohibited from using auto PLR's and, if the agent's P/C book of business is primarily comprised of auto lines, total P/C PLR's to evaluate whether to terminate one of its agency force. However, insurers may use PLR's, both total P/C PLRs and auto PLRs, to evaluate an agency force as long as the agents are not penalized based on those PLRs. For the purposes of this determination, penalizing includes diminution of normal commissions or compensation or termination of the agency relationship as a result or consequence of the agent's PLR. As discussed at length above, penalizing does not include incentive programs, marketing programs or relocations that encourage and reward agents to seek and obtain profitable business. The following will discuss this determination.

Based on a plain reading of N.J.S.A. 17:33B-18b, insurers are solely prohibited from penalizing an agent based on his auto PLR or the geographic location of the agent's automobile insurance business. N.J.S.A. 17:33B-18b does not prohibit penalizing an agent based on the agent's total P/C PLR. However, if an agent sells automobile insurance as a primary line of business, the agent's total P/C loss ratio is primarily comprised of, or greatly influenced by, the agent's auto PLR. Due to this interrelation between total P/C PLRs and auto PLRs, it would be a superficial construct to allow insurers to penalize agents based upon either total P/C PLR or auto PLR. Therefore, I FIND that N.J.S.A. 17:33B-18b prohibits insurers from penalizing agents based on auto PLRs and, if the agent's book of business is primarily comprised of auto lines, total P/C PLRs.

However, this does not resolve the entire issue. Further plain reading of N.J.S.A. 17:33B-18b reveals that FAIRA does not prohibit insurers from evaluating agents based on PLRs. Specifically, N.J.S.A. 17:33B-18b does not prohibit insurers from including total P/C PLR or auto PLR as review categories when evaluating an agency or from setting PLR goals for an agency, as long as the agencies are not penalized based on those PLR's. Moreover, it would be illogical to ask insurers to ignore an agent's total P/C PLR or auto PLR because such statistical information is a direct, if not the best, indicator of an agency's profitability. The insurance laws of this State require insurers to evaluate the profitability and financial condition of their companies. See, N.J.S.A. 17:7-8 (Examination Upon Formation); N.J.S.A. 17:30C-1 et seq. (Rehabilitation and Liquidation); N.J.S.A. 17:37B-1 et seq. (Property-Casualty Examination); N.J.S.A. 17:51A-7 et seq. (Administrative Supervision); and, N.J.S.A. 17:51B-1 et seq. (Reinsurance Requirements). Therefore, I FIND that N.J.S.A. 17:33B-18b allows insurers to use PLR's, both total P/C PLR's and auto PLR's, to evaluate an agency force as long as the agents are not penalized based on those PLR's.

I now turn to the specific facts presented here. Petitioner DiCataldo asserts that he was evaluated and ultimately terminated due to his loss ratio in violation of N.J.S.A. 17:33B-18b. ANJ asserts that the agency review process evaluated Petitioner DiCataldo on various criteria, including his total P/C PLR, however Petitioner DiCataldo was not terminated due to his loss ratio.

My review of the parties' submissions and the investigative interviews conducted with Petitioner DiCataldo and John Leonard, Human Resources Manager for ANJ, reveals the following facts. Upon formation of ANJ in 1998, the company implemented an agency goal-setting and review process known as "Performance Management." This "Performance Management" program was phased in over a period of approximately three years to allow the agents to adjust to the new process. According to ANJ's Human Resource Policy Guide, the "Performance Management" program has three phases: Phase I: Goal Setting Phase; Phase II: Checkpoint Meetings; and, Phase III: Performance Review. In Phase I, the employee agent and manager create a plan that establishes goals and performance measures for the agent. In Phase II, checkpoint meetings are held. These checkpoint meetings consist of conversations between the employee agent and manager to assess current performance and development needs. A minimum of one checkpoint meeting is to be held per review cycle. In Phase III, a performance review is completed wherein the employee agent and manager assess, discuss and document overall performance results, demonstration of Critical Success Factors, and progress made on the Employee Development Plan.

In 2000, the Agent Performance Summaries used by ANJ to evaluate their agents had four broad categories:

1) Build and Maintain: This category examines whether the agent has implemented various prospecting processes promoted by ANJ, whether the agent meets the following sales goals: Multi-line customer goal, Growth-Total policy growth goal, life premium goal, and commercial premium goal.
2) Within Our System: This category examines whether the agent has an approved business plan, whether the agent provides customers emergency access, whether the agent accepts and remits premium payments as required by ANJ, whether the agent adheres to company advertising and customer communication processes, and whether the agent performs in a manner consistent with ANJ's ethical standards and agency standards.
3) A Profitable Book of Business: This category examines whether the agent understands and complies with company underwriting and administrative guidelines, whether the agent adheres to proper risk classification and premium development, whether the agent meets the total casualty loss ratio goal, and whether the agent has all recommended processes in place to improve/maintain profitability.
4) By Servicing the Customer: This category examines whether the agent follows-up on all customer complaints, whether the agent meets the total casualty retention goal established, and whether the agent meets other State-Market objectives.

The agent receives an overall rating of "Meets" or "Does Not Meets (sic)" for each of the above-described four categories. Furthermore, the Performance Summary evaluates whether agent Assistance Plans are "Suggested" or "Required" for each of the four broad categories. Generally, an Assistance Plan is required when the agent receives a "Does Not Meets" rating for an individual category. Then, the agent is given an Overall Performance Rating of "Meets," "Meets, but Requires Assistance" or "Does Not Meet."

Moreover, ANJ has an additional agent review process called "Job in Jeopardy ("JIJ") Notification" for situations that are sufficiently serious where the employee must be warned that failure to meet the established requirements within the stated time period will result in termination of employment. This JIJ process supplants use of the Agent Performance Summaries discussed above. In addition, failure to make a reasonable effort to meet the requirements established by the JIJ Notification could result in termination prior to the stated time period, while the time period for compliance may remain open indefinitely, with the result that any future failure to comply could result in immediate termination.

According to John Leonard, Human Resources Manager for ANJ, an agent is only placed on JIJ if they fail to achieve the required number of the quantitative goals, colloquially known as "Expected Results," established in the Agent Performance Summaries, and if the agent fails the same substantive Expected Results categories for two consecutive years. Beginning in 1998, the quantitative review categories included: Multi-Line Customer Goal, Growth-Total Policy Growth Goal, Life Premium Goal, Commercial Premium Goal, and the Total Casualty Loss Ratio Goal. Until 2002, agents had to fail three out of five of the same goal categories for two consecutive years to be placed on JIJ. In 2002, the Expected Results categories were reduced from five to three:

Multi-Line Customer Goal, Growth-Total Policy Goal, and Total Casualty Loss Ratio Goal. Since 2002, agents have had to fail to meet two out of three Expected Results in the same substantive goals for two consecutive years to be placed on JIJ. Additionally, HR Manager Leonard asserted that an agent would not be placed on JIJ as long as the agent showed "sustained improvement" in at least some of the review categories failed by the agent, and that JIJ is reserved for the agents that missed multiple categories in multiple years with little to no improvement, essentially the worst producing agents.

The evidence supports these facts. ANJ first placed agents on JIJ in February of 2002 due to the agents' failures to meet Expected Results in 2000 and 2001. At that time, ANJ decided to place fourteen agents on JIJ, including Petitioner DiCataldo. The fourteen agents had the following Expected Results: a) in 2000, three agents failed to achieve all five Expected Results, seven agents failed to achieve four out of five Expected Results, and four agents failed to achieve three out of five Expected Results; b) in 2001, four agents failed to achieve all five Expected Results, ten agents failed to achieve four out of five Expected Results. Of those fourteen agents, ANJ did not administer JIJs to five agents who retired in 2002. The remaining nine agents were given JIJ Notifications in February 2002.

On the 2000 Agent Performance Summary for DiCataldo, his Overall Ratings for the "Build and Maintain" and "A Profitable Book of Business" categories were "Does Not Meet." Therefore, Assistance Plans were required in those categories. The Assistance Plan for "Build and Maintain" indicated that

DiCataldo and his Market Sales Manager ("MSM") would develop a marketing plan in the upcoming weeks and that the MSM would share with DiCataldo the tools that are designed to assist him in the categories where he was experiencing difficulties. The Assistance Plan for "A Profitable Book of Business" indicated that the MSM would help DiCataldo to understand and comply with all ANJ underwriting and administrative guidelines by reviewing the materials and following-up to measure and record his understanding.

In March 2001, MSM Ruth Taylor attempted to conduct an Employee Agent Checkpoint Summary with Petitioner DiCataldo. This checkpoint meeting was an opportunity to provide DiCataldo with a clear understanding of ANJ's expectations, to offer open and honest feedback and to discuss assistance and training with him. As of this Checkpoint Summary, DiCataldo was still not on track to obtain his Expected Results, and an assistance plan in the "Build and Maintain" category was again required. Petitioner DiCataldo, however, refused to participate in this Checkpoint Summary.

On April 13, 2001, MSM Ruth Taylor performed an Assistance Plan follow-up Summary wherein she attempted to discuss the Assistance Plan in place for DiCataldo. The Assistance Plan called for DiCataldo's participation in the following training, assistance or development: Campaigns in Growth, Financial Services, Commercial New Business Production and Multi-line. Once again, Petitioner DiCataldo refused to sign or be a part of this follow-up.

On August 3, 2001, MSM Ruth Taylor conducted a second Employee Agent Checkpoint Summary and an Assistance Plan follow-up Summary with

Petitioner DiCataldo. As of this second Checkpoint Summary, DiCataldo again failed to show progress towards the Expected Results goals. Consequently, the Checkpoint Summary required an Assistance Plan in the "Build and Maintain" category. MSM Taylor commented that, "[t]o meet expected results, [DiCataldo] will need to actively participate in the growth of his Book of Business in the areas including but not limited to Life and Commercial." Furthermore, MSM Taylor noted that, "[b]y growing his Auto and Homeowners Book with High Life Time Value Clients [DiCataldo] will have an opportunity to impact this aspect of expected results." The Checkpoint Summary continued by providing specific programs and marketing objectives that could be utilized to help him achieve his Expected Results. Petitioner DiCataldo participated in and signed this Checkpoint Summary.

On October 17, 2001, MSM Taylor conducted another Assistance Plan follow-up Summary with Petitioner DiCataldo. In this summary, MSM Taylor noted that DiCataldo was experiencing personal difficulties and has had trouble focusing on work. As of the date of the follow-up, Petitioner DiCataldo had not undertaken any of the Assistance Plans previously provided by MSM Taylor. Once again, MSM Taylor noted specific marketing and training objectives for Petitioner DiCataldo.

As the Agent Performance Summaries indicate, DiCataldo's performance on the Expected Results was substandard. DiCataldo failed to achieve four out of five goal categories in 2000 and five out of five goal categories in 2001, as is detailed in the chart below.

Year	Goal Category	Expected Results	DiCataldo's Results
2000	Loss Ratio	65% or less	102.96%
	Policy Growth	50 policies	-22
	Multi-Line Sales (sales of auto and another product, i.e. homeowners, renters & life including term life.)	40%	26.4%
	Sales of Allstate Financial Products ("AFS")	$8,458	$1,913
	Commercial Lines Sales	$12,600	$13,659
2001	Loss Ratio	65% or less	103.08%
	Policy Growth	50 policies	-60
	Multi-Line Sales (sales of auto and another product, i.e. homeowners, renters & life including term life.)	37% or 2pt. Improvement on CSRP or 6 pt. Improvement on List 60X	26.7%
	Sales of Allstate Financial Products ("AFS")	$12,000	$0
	Commercial Lines Sales	$12,000	$0

Consequently, on February 14, 2002, ANJ provided Petitioner DiCataldo with a JIJ Notification. This JIJ Notification detailed that, "[a]gent DiCataldo has consistently failed to meet expected results, both in the year 2000 and 2001. Agent DiCataldo's results are unacceptable. He had not met the expected results in Loss Ratio, Policy Growth, Multi-Line, and AFS for 2 consecutive years. Therefore, he is placed on a Job in Jeopardy." The JIJ Notification also established the following incremental requirements to be met by Petitioner DiCataldo in March, April and May of 2002, as detailed in the chart below:

	January	February	March	April	May
Loss Ratio	65%	65%	65%	65%	65%
Allstate Financial	$2,500 in production	$5,000 in production	$7,500 in production	$10,000 in production	$12,500 in production

Sales ("AFS")	credit or $22,917 in premium & deposits	credit or $45,834 in premium & deposits	credit or $68,751 in premium & deposits	credit or $91,688 in premium & deposits	credit or $114,585 in premium & deposits
Multi-line Point Improvement	.16	.33	.5	.66	.83

The JIJ Notification further asserted that, "[i]f Agent DiCataldo fails to have met the expected results through May . . . employment with Allstate New Jersey will be terminated." Also, the JIJ Notification provided that, "Agent DiCataldo is required to meet the expected results for year-end 2002. Failure to do so will result in termination of employment with Allstate New Jersey." The year-end Expected Results were listed as: Loss Ratio – 65% or less; AFS - $30,000 Production Credit or $275,000 in Premium & Deposits; and, Multi-line Sales – 34.0% or 2 point improvement on CSRP.

ANJ completed four subsequent JIJ Follow-ups to track Petitioner DiCataldo's progress with regard to achievement of the incremental Expected Results goals. On April 3, 2002, MSM Taylor conducted a JIJ Follow-up with Petitioner DiCataldo. The JIJ Follow-up detailed that DiCataldo met one out of three Expected Results for February 2002, as detailed in the chart below:

Expected Results	Goal	DiCataldo's Results
Loss Ratio	65%	97.14%
AFS	$5,000/$45,834	$0
Multi-line point improvement	34%/.33	27.85%/1.35

For February 2002, Petitioner DiCataldo met the incremental goal for Multi-line point improvement by improving his multi-line sales by 1.35. However, DiCataldo did not meet his goals for loss ratio and AFS. In fact, DiCataldo did not sell a single Allstate financial product during February. The JIJ follow-up stated that DiCataldo failed to attend an AFS training session on March 7, 2002, and he also failed to attend a make-up session with MSM Taylor held on March 12, 2002. The follow-up also detailed a two-day meeting on March 25 and 26, 2002, at which MSM Taylor reviewed the Assistance Plans for DiCataldo that included a Fixed Annuity and Life mailing process and an Exclusive Financial Sales representative ("EFS") supported lead process. MSM Taylor also facilitated training on ALSTAR audits and mail merge options to DiCataldo.

On May 3, 2002, MSM Taylor conducted a second JIJ Follow-up with Petitioner DiCataldo. The JIJ Follow-up detailed that DiCataldo once again met only one of the three interim Expected Results goals for March 2002, as detailed in the chart below:

Expected Results	Goal	DiCataldo's Results
Loss Ratio	65%	96.10%
AFS	$7,500/$68,751	$0
Multi-line point improvement	34%/.5	27.8%/1.3

For March 2002, Petitioner DiCataldo again met the incremental goal for Multi-line point improvement. However, DiCataldo failed to achieve the Expected

Results goals for loss ratio and AFS. During this period, MSM Taylor met with DiCataldo on three separate occasions during which they continued to work on achieving the established financial goals, including the Annuity mailing and the Mortgage mailing processes. Furthermore, they fine-tuned the audits and merging of the letters whereby DiCataldo was to actively prospect for sales. MSM Taylor offered to assist DiCataldo in these undertakings, but DiCataldo declined. MSM Taylor also introduced DiCataldo to the "Hot-List" designed to allow him to introduce his clients to an EFS. DiCataldo also participated in a fixed Life training program. Despite these efforts, DiCataldo's production remained limited.

On June 5, 2002, MSM Taylor conducted a third JIJ Follow-up with Petitioner DiCataldo. This JIJ Follow-up detailed that DiCataldo again met only one of the three Expected Results goals for April 2002, as is detailed in the chart below:

Expected Results	Goal	DiCataldo's Results
Loss Ratio	65%	104.3%
AFS	$10,000/$91,688	$0/$37
Multi-line point improvement	34%/.66	27.28%/.85

In April 2002, Petitioner DiCataldo again met the Expected Results goal for Multi-line point improvement. DiCataldo achieved the goal of .66 improvement in Multi-line sales. However, the comparison with February and March 2002 revealed that DiCataldo's margin of improvement was steadily declining from

1.35 in February to 1.3 in March to .85 in April. Furthermore, in April 2002, DiCataldo failed to achieve the Expected Results goals for loss ratio and AFS. Additionally, DiCataldo declined the assistance of MSM Taylor on three separate occasions, May 3, 8, and 21, 2002. Petitioner DiCataldo also failed to execute the Annuity, Mortgage and "Hot lead" processes properly and DiCataldo was unable to affect his AFS results. Lastly, the JIJ Follow-up noted that DiCataldo verbally acknowledged his inability to achieve the Expected Results and requested no further assistance from MSM Taylor.

On June 28, 2002, MSM Taylor conducted a fourth JIJ Follow-up with Petitioner DiCataldo. This JIJ Follow-up detailed that DiCataldo failed to achieve all three Expected Results goals for May 2002, as is detailed in the chart below:

Expected Results	Goal	DiCataldo's Results
Loss Ratio	65%	97.14%
AFS	$12,500/$114,585	$0/$37
Multi-line point improvement	34%/.83	27.2%/.7

In May 2002, DiCataldo failed to achieve the Expected Results goals for all categories. Moreover, DiCataldo's Multi-line point improvement fell again to .7. Since DiCataldo did not meet the requirements of the JIJ Notification, the JIJ follow-up stated that, "a request for termination will be submitted."

Consequently, HR Manager John Leonard submitted a Termination Request for Petitioner DiCataldo to Karleen Zuzich, AVP. This Termination Request detailed the above facts and noted that "Agent DiCataldo's results did not show any signs of improvement during the 90 day period," following administration of the JIJ Notification. Therefore, the termination request was submitted due to "Agent DiCataldo's failure to meet the clearly established requirements of his JIJ and as a result of his apparent inability to perform the requirements of his position." Ultimately, the Termination Request found that "Agent DiCataldo has refused help and has failed to make a reasonable effort to meet the requirements of the Job in Jeopardy." Petitioner DiCataldo's termination was approved, and he was terminated on or about January 20, 2003. DiCataldo is currently pursuing an internal appeals process.

As was mentioned above, Petitioner DiCataldo asserts that the Expected Results goal that evaluates an agent's total P/C loss ratio and the JIJ process that utilized total P/C loss ratio as a review category resulted in termination of his employment by ANJ in violation of N.J.S.A. 17:33B-18b. Furthermore, Petitioner DiCataldo asserts that he was told that he had to meet 100% of the Expected Results goals, including loss ratio, in order to be removed from JIJ. Thus, DiCataldo argues that he did not attempt to achieve any of the incremental or overall Expected Results goals because it would be impossible to reduce his loss ratio to 65% in the 90-day JIJ period from approximately 100% and based on an existing book of business.

ANJ counters that ANJ managers and executives have repeatedly informed all agents, including DiCataldo, that they cannot be terminated due to their loss ratio. Furthermore, ANJ argues that the Expected Results goal of loss ratio could never be used to terminate an agent, and that loss ratio could only help an agent to be removed from or avoid placement on JIJ. Overall, ANJ asserts that agents only had to meet or show improvement in the AFS and Multi-line point improvement goals in order to be removed from JIJ. However, if an agent falls short in one of those categories, a low loss ratio may be used in lieu of meeting one of the other requirements. Thus, ANJ asserts that an agent's loss ratio may only be used to help them, not to discipline them.

As the above discussion demonstrates, application of the JIJ Notification process in general and as specifically applied to Petitioner DiCataldo has been investigated at length. The facts demonstrate that ANJ did not terminate Petitioner DiCataldo due to his poor loss ratio in violation of N.J.S.A. 17:33B-18b. Although loss ratio was listed as an Expected Result on the Agent Performance Summaries, the JIJ Notification and the JIJ Follow-ups, loss ratio was not the reason for Petitioner DiCataldo's termination.

First, ANJ only terminated one of the nine agents placed on JIJ in February 2002, Petitioner DiCataldo. The other agents have shown sufficient progress or attained the Expected Results in AFS and multi-line point improvement to justify removal from JIJ, even without attaining the Expected Results for loss ratio. Furthermore, ANJ has placed agents on JIJ without regard to their loss ratios, and agents with loss ratios worse than 65% have not been placed on JIJ because they meet or show progress toward meeting the other Expected Results. Additionally, ANJ asserts that the Expected Results goal for loss ratio of 65% is an overall goal for agents to attempt to achieve. I find that the facts support this position because ANJ did not establish incremental loss ratio goals on the JIJ Notification whereas such incremental goals were established for AFS and multi-line sales. This is also demonstrated by the Employee Agent Checkpoint Summaries for DiCataldo conducted in March and August 2001, which did not require an Assistance Plan for the category, "A Profitable Book of Business," even though the category includes loss ratio and even though Petitioner DiCataldo did not achieve the 65% loss ratio goal.

While I acknowledge that loss ratio is a prominent Expected Results category on all review materials, I FIND that ANJ did not use loss ratio to penalize their agents, particularly Petitioner DiCataldo. The facts demonstrate that Petitioner DiCataldo did not attempt to achieve the sales goals established for him. He repeatedly missed meetings and training seminars designed to help him achieve the goals. He refused the help of MSM Taylor, and refused to implement the assistance plans and to utilize the marketing tools demonstrated to him by ANJ. Ultimately, Petitioner DiCataldo was an uncooperative and unresponsive employee with regard to the Expected Results and JIJ process, and it was these characteristics, in combination with his failures to achieve the AFS and multi-line sales Expected Results, that caused ANJ to terminate DiCataldo.

Petitioner DiCataldo asserts that he did not know that achievement of or progress toward the AFS and multi-line sales goals would have removed him from JIJ. It is difficult to believe that Petitioner DiCataldo was unaware of this in light of the fact that a reference to achievement for improvement on the goals was contained in the handbook provided by ANJ to all agents. Furthermore, Petitioner DiCataldo's assertion is also difficult to believe when viewed in context with his other assertion that he attended all available training offered by ANJ. The facts discussed above clearly belie this assertion. Ultimately, while I acknowledge that Petitioner DiCataldo may have misunderstood the role of loss ratio in the JIJ process, any misunderstandings by Petitioner DiCataldo do not result in a violation of FAIRA.

Petitioner DiCataldo also points to a memorandum dated November 20, 2002, which was e-mailed from Richard Crist, President of ANJ, to EAs, in support of his assertion that ANJ terminates agents for loss ratio. Petitioner DiCataldo points to the following,

> Generally speaking, an agency's relationship with the company will not be at risk from an Expected Results standpoint unless it fails to achieve Expected Results in one or more categories for two consecutive years <u>and</u> it is among the very worst performing agencies in the state. [Crist Memorandum, dated November 20, 2002 (Emphasis in original)].

As the Petitioner indicates, this memorandum does not specifically exclude loss ratio as an Expected Results category that could result in termination. The memorandum does further assert, however, that an agent must be one of the "very worst performing agencies" in order for the agent to be put at risk for termination. Plus, the Petitioners take this statement out of context with the entire memorandum that explains,

> Expected Results are benchmarks all agencies can use to gauge their progress toward achieving higher levels of customer service while profitably growing their business. Although we want all agents to achieve or

> surpass Expected Results, they are not quotas or minimum requirements. They are NOT intended to "get rid of" agencies. Just the opposite is true. [Ibid. (Emphasis in original)].

This statement better reflects the manner in which ANJ has implemented the Expected Results and JIJ processes. It acknowledges the flexibility in the Expected Results and JIJ processes whereby agents who show improvement or progress toward attaining the Expected Results are removed from JIJ. Overall, I FIND that this memorandum lends little support to the Petitioner's assertion that ANJ terminates agents based on loss ratio. Moreover, in light of all the facts discussed above, I FIND that this memorandum lends no support to Petitioner DiCataldo's assertion that he was terminated due to his high loss ratio.

For all the foregoing reasons, I FIND that ANJ did not terminate Petitioner DiCataldo due to his high loss ratio in violation of N.J.S.A. 17:33B-18b. However, in light of Petitioner DiCataldo's alleged misunderstanding of the application of the loss ratio Expected Result, I recommend that ANJ clarify the role of loss ratio in the Expected Results goals and clarify the JIJ process to its agents.

CONCLUSION

In Gaydos, the Supreme Court determined that, "the [Department of Banking and Insurance] is the appropriate entity to enforce FAIRA's provisions and determine how they should operate in the context of other statutory schemes regulating the automobile insurance industry." Gaydos, supra, 168 N.J. at 282-283. In reviewing the allegations of the Petitioners, the voluminous materials submitted by the parties on their own initiative and in response to the Department's requests, and the detailed statistical data maintained by the Department, I have continually maintained that FAIRA does not exist, and cannot be construed, in a vacuum. It must be interpreted and applied based on common sense and with a recognition of the intent and effect of the "other statutory schemes" administered by the Department, including the UEZ Act and the numerous authorities that relate to the goals of protecting policyholders and assuring the continued financial solvency of insurers admitted to operate in New Jersey. It is within this context that the rulings specified above have been reached.

IT IS SO ORDERED this 2nd day of July, 2003.

/s/ Holly C. Bakke
Holly C. Bakke
Commissioner

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