BILL SCHELLER t/a BILL SCHELLER INSURANCE AGENCY, ROBERT BAITINGER INSURANCE MANAGEMENT, INC., THE BERNE CORPORATION: INSURANCE, and SIEGEL AGENCY, INC., Petitioners-Respondents, v. RUTGERS CASUALTY INSURANCE COMPANY, Respondent-Appellant.

DOCKET NO. A-2548-06T2

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

2008 N.J. Super. Unpub. LEXIS 2268

April 14, 2008, Argued
May 20, 2008, Decided

NOTICE: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY RULE 1:36-3 FOR CITATION OF UNPUBLISHED OPINIONS.

PRIOR HISTORY: [*1]
On appeal from a final decision of the Commissioner of the Department of Banking and Insurance, Docket No. UC01-02.

COUNSEL: Thomas P. Weidner argued the cause for appellant (Windels, Marx, Lane & Mittendorf, L.L.P., attorneys; Mr. Weidner, of counsel; Mr. Weidner, David F. Swerdlow, Rocco Luisi and Sandy L. Galacio, on the brief).

Scott B. Gorman argued the cause for respondent (White & Williams, L.L.P., and Gorman & Gorman, L.L.C., and DeCotiis, FitzPatrick, Cole & Wisler, L.L.P., attorneys; Mr. Gorman, Michael R. Cole and Christopher P. Leise, on the brief).

Kristine A. Maurer, Deputy Attorney General, argued the cause for New Jersey Department of Banking and Insurance (Anne Milgram, Attorney General, attorney; Nancy Kaplen, Assistant Attorney General, of counsel; Ms. Maurer, on the brief).

JUDGES: Before Judges Parrillo and Gilroy.

OPINION

PER CURIAM

In their breach of contract action in the Law Division, petitioners, four insurance agencies, alleged that Rutgers Casualty Company (Rutgers) terminated their insurance agency contracts in violation of the "take-all-comers" provision of the Fair Automobile Insurance Reform Act of 1990 (FAIRA), *N.J.S.A. 17:33B-1 to -64*. Upon transfer of the case to the Office of **[*2]** Administrative Law (OAL), and following a plenary hearing, the Administrative Law Judge (ALJ) found that Rutgers' main witness lied and that another key witness was not unavailable to testify as Rutgers claimed. The ALJ determined that petitioners' terminations were in violation of FAIRA, *N.J.S.A. 17:33B-15, -18*.

The Commissioner of the Department of Banking and Insurance (Commissioner) adopted the ruling of the ALJ that Rutgers violated FAIRA, even though he disagreed with the finding that Rutgers' witness had lied. Rutgers appeals from this final agency determination, arguing that the Commissioner erred in not finding that the ALJ's conclusions were erroneous and reversible, and in accepting the ALJ's conclusion that Rutgers' failure to produce a witness permitted an adverse inference as to its reasons not to have her testify. For the following reasons, we affirm.

Some of the facts are disputed. Rutgers was a corporation founded in 1981 to write private passenger automobile (PPA) insurance in New Jersey. Petitioners were four insurance agencies who had broker agreements (or contracts) with Rutgers to sell automobile insurance: Bill Scheller Insurance Agency; Robert Baitinger Insurance **[*3]** Management, Inc.; The Berne Corporation: Insurance; and Siegel Agency. The contracts provided that either party could terminate the agreement, so long as the termination was not a violation of State law.

Rutgers began to experience financial problems in the early 1990's and had been in contact with the Department regarding the need to maintain a premium-to-surplus ratio of no greater than 3:1. Rutgers had always utilized strict underwriting criteria to bring in "good" i.e., low-risk, business. In fact, a market conduct examination by the Department found that Rutgers would not write policies for any applicant who: had more than four points on his or her license; was not employed at least twenty hours per week; was under age twenty-four; or lived in a household with drivers under twenty years of age. Rutgers also declined to insure high performance vehicles, as well as drivers employed in certain professions such as bartenders and police officers. This practice of strict underwriting was known as "cherry-picking," meaning that Rutgers screened for the lowest risk applicants.

In 1990, FAIRA was enacted to reduce insurance costs for New Jersey drivers. *N.J.S.A. 17:33B-2(d)*. A significant **[*4]** feature of FAIRA, for present purposes, was the "take-all-comers" provision requiring that an insurance agent must write an application for any eligible person who requested coverage and could not "channel away" higher-risk applicants. [1] *N.J.S.A. 17:33B-15, -18*. In addition, an insurer was prohibited from penalizing an agent because of the type of business it submitted or because of its geographical location. *N.J.S.A. 17:33B-18*. FAIRA included an exemption for insurers who were in a financially unsafe situation. *N.J.S.A. 17:33B-19*. Even before the enactment of FAIRA, other statutory protections afforded an insurer the right to non-renew either 2% of its voluntary market PPA policies every year ("the 2% rule") or one old policy for every two new policies it wrote ("two for one"). *N.J.S.A. 17:29C-7.1(b), (c)*. The Legislature granted the insurance industry two years to prepare for FAIRA, and it took effect in April 1992. *N.J.S.A. 17:33B-15(a)*.

1 For purposes of FAIRA, the terms agent and broker are used interchangeably. *N.J.S.A. 17:33B-13(h)*.

On February 25, 1992, the Department made a determination that, based upon Rutgers' financial situation, it qualified for an exemption from the "take-all-comers" **[*5]** provision. This determination was premised upon data from September 30, 1991, which indicated that Rutgers' premium-to-surplus ratio exceeded 7:1, significantly higher than the 3:1 benchmark used by the Department to determine whether an insurer was in a financially unsafe or unsound condition. In addition, the Commissioner deferred Rutgers' obligation to pay assessments and surtaxes that FAIRA imposed for the years 1991 and 1992 because of its financial predicament.

During the period that Rutgers was exempt from the "take-all-comers" requirement, however, Rutgers continued to write new insurance policies using the strict guidelines it had developed in the past. In January 1995, other insurers who were complying with the "take-all-comers" requirement complained to the Department that insurers such as Rutgers were enjoying unfair competitive advantages by being able to "cherry-pick" the best business. Consequently, the Department issued a bulletin stating that after April 1, 1995, any insurer who was exempt under *N.J.S.A. 17:33B-19* would be prohibited from writing new insurance polices unless it voluntarily complied with the "take-all-comers" provision. Rutgers informed the Department **[*6]** that it would voluntarily comply with the "take-all-comers" requirement, but requested and was granted a one-month extension until May 1, 1995.

As May 1, 1995 approached, Rutgers conducted breakfast meetings with its brokers to inform them of the new "take-all-comers" requirements. At these meetings, Rutgers' employees, including Lynn Lannon, head underwriter for automobile insurance; Barry Goldstein, counsel; Florence Gargano, marketing manager; and Helene Gaughan, underwriting manager, expressed concerns about the financial solvency of the company and told the brokers that even though Rutgers would comply with the law, the company preferred business that conformed with the more restrictive criteria that had previously been in effect. Despite the Department's directive, the agents were told to conduct "business as usual" to the extent possible.

According to both Lannon and Goldstein, because the new business was expected to be inferior to what Rutgers had written in the past, the fear was that this would cause the company to become insolvent, i.e. exceed the 3:1 premium-to-surplus ratio. The goal, therefore, was to keep new business to a minimum and to continue to attract the type of **[*7]** business Rutgers had accepted prior to May 1, 1995.

Goldstein confirmed that Rutgers told brokers to direct to other companies new business which did not comply with the old underwriting guidelines. Yet despite Rutgers' stated expression of preference for the older type of business, it is undisputed that Rutgers wrote every PPA policy that was submitted after May 1, 1995, as the statute required.

This much, as noted, appears generally undisputed. The parties differ substantially over the reasons for petitioners' termination in May and November, 1995. According to petitioners, each was told by Rutgers, prior to termination, that its broker contract was in jeopardy because of the large volume of applications it had been submitting after May 1, 1995.

Bill Scheller, owner of the Bill Scheller Insurance Agency, testified that in several May 1995 telephone conversations, Gaughan told him to "slow down" the submission of PPA applications, and in particular to restrict young drivers, inexperienced drivers and drivers over age sixty-five. Gaughan and Lannon both warned Scheller that his contract would be cancelled if he did not slow business and restrict new applicants according to the earlier **[*8]** criteria.

Scheller had surreptitiously taped telephone conversations with Gaughan on May 15, 1995, and May 26, 1995, and with Gargano on June 15, 1995. [2] In those conversations, Gaughan stated that she did not want risky drivers even though she acknowledged that Rutgers needed to comply with the statute. When Scheller said that he did not have another company that he could send these applicants to, Gaughan replied, "You don't have another company. See that's my problem." When Scheller responded, "I don't want to lose my contract," Gaughan replied:

> I know you don't, that's why we're calling . . . I don't just want to cut you off . . . I'm asking you to underwrite. What did you underwrite when you were giving me the business last month in April? It was certain limits . . . certain quality . . . .

2 Taping one's own conversations with another is not a violation of New Jersey's Wiretap Act, *N.J.S.A. 2A:156A-4*.

In the May 26, 1995 conversation subsequent to his termination, Scheller questioned whether Rutgers was "doing this to everybody." Gaughan replied

> No . . . to the ones that are . . . have been . . . giving me a lot of business all of a sudden and . . . uh . . . you know, walk in business **[*9]** . . . new business . . . business I would not have ordinarily written before . . . . [3]

3 In depositions taken in November 1997, Lannon and Gaughan denied that any threats were made, and said that they were merely expressing a preference for the better quality applicants. At the time of the depositions, however, Gaughan and Lannon were unaware of the audio tapes.

According to Sandor Schneck, who was employed by the Berne Corp., Gaughan telephoned him in May 1995 about an applicant named "Bullard" whom Rutgers did not want because she was unemployed and had four points on her license. Gaughan requested that he withdraw the application. When Schneck responded that doing so would violate the statute, Gaughan retorted, "Well, you do not value your contract." [4]

4 In her deposition, Gaughan denied having that conversation.

Robert Baitinger, owner of Robert Baitinger Insurance Management, Inc., also reported that Gaughan told him in a May 1995 phone call that there would be repercussions to not complying with Rutgers' underwriting requirements. As with Schneck, Gaughan denied this conversation as well.

Edward M. Siegel, owner of the Siegel Agency, testified that Gargano telephoned his office to **[*10]** complain that she was displeased with the applications that Siegel had submitted, that he was submitting too many PPA applications, and that Siegel should cut the number of submissions in half. According to Siegel, Gargano threatened him and his office manager, and he feared his contract would be terminated. [5] Gargano, on the other hand, denied ever threatening anyone at the Siegel Agency. [6]

5 Some of petitioners acknowledged taking notes of these telephone conversations with Rutgers' employees, although none of the contemporaneous notes contained any reference to threats that the contracts would be terminated.

6 Although not a petitioner in this case, Kenneth Heimlich was an insurance broker whose contract with Rutgers was terminated in 1995, and he also testified about the breakfast meetings, corroborating much of petitioners' testimony.

Rutgers' account of petitioners' terminations differed sharply, characterizing the decision as part of a strategic mass reduction in its broker force. In that regard, Rutgers' chief financial officer and chief operating officer, Robert Thomas, acknowledged responsibility for the decision to terminate petitioners. Admitting concern over Rutgers' precarious **[*11]** financial position and the fact that the new PPA policies would, by definition, result in a loss, Thomas decided to terminate a large number of brokers in order to slow business. At first, Rutgers terminated approximately thirty brokers in May and June 1995. In November 1995 Rutgers terminated an additional 100 brokers. [7]

7 Although Thomas opined that the volume of business being produced by petitioners had the potential to "impair" the company, Rutgers' premium-to-surplus ratio never exceeded 3:1 in 1995 or 1996. Nor did Thomas even consult an actuary or accountant prior to petitioners' terminations, acting instead on his "feeling" that a loss would be incurred based on the number of applications that were being submitted.

As to the actual effect on the company's solvency, the experts at the hearing differed. Rutgers' expert, Charles McConnell, opined that the company would have exceeded the 3:1 premium-to-surplus ratio in 1995 or 1996 had it not mass-terminated the brokers. Petitioners' expert, Jane Taylor, disagreed, concluding that there were other options available to Rutgers to stave off financial disaster such as the "two-for-one" rule or "2% non-renewal." Rutgers did not utilize **[*12]** those protections to the extent permitted by law.

Following complaints by disgruntled terminated brokers, on June 20, 1995, the Department requested detailed information from Rutgers. The Department's concern was twofold: whether Rutgers' strategy of mass termination amounted to a constructive (*de facto*) withdrawal from the PPA insurance market, and whether it was violating FAIRA by penalizing brokers for either their "expected loss ratios" or geographical territory, *N.J.S.A. 17:33B-18(b)*. Consequently, the Department requested a listing of all terminated brokers with the volume of business they produced in the last ninety days and the loss ratios of each broker's PPA book of business for 1994 and the first half of 1995.

Rutgers replied by letters of June 15, 1995, and August 15, 1995, assuring the Department that it was not withdrawing and, on the contrary, was actually seeking to expand operations in the State by entering into contracts with new producers. Rutgers further assured that none of the terminations were based upon actual or expected loss ratios, i.e. bringing in large amounts of PPA business after May 1, 1995, and that none were located in an urban area, but rather in territories **[*13]** served by other producers. Instead, explained Rutgers, the terminated brokers had been under-producing and generating very little new business in 1993 and 1994. In correspondence of September 14, 1995, Rutgers represented to the Department that the brokers selected for the contemplated mass termination were those with a perceived inability to market the new product lines being introduced by the company.

On September 22, 1995, the Department again requested information regarding the amount of new business produced in 1993, 1994 and 1995 by each terminated broker, the number of agency contracts Rutgers had terminated, and the basis for each termination as well as the new product lines that Rutgers intended to introduce. The Department's preliminary review in 1995 did not focus on the individual circumstances of any particular broker proposed for termination to ascertain whether the agent was being terminated for an impermissible reason. Therefore, the Department made no determination of any FAIRA violation at that time. However, on November 15, 1995, the Department concluded that Rutgers did not intend to withdraw from the insurance industry in the State.

As noted, petitioners filed a **[*14]** breach of contract action against Rutgers in the Law Division, alleging their broker contracts were terminated in violation of *N.J.S.A. 17:33B-15*. Upon remand at our direction, the Law Division transferred the matter to the Department for a threshold FAIRA determination, and in accordance with *R.J. Gaydos Ins. Agency, Inc. v. Nat'l Consumer Ins. Co., 168 N.J. 255, 281-83, 773 A.2d 1132 (2001)*, the agency commenced its administrative investigation. To aid in its investigation, the Department transmitted the matter to the OAL as an uncontested case for investigative proceedings. *N.J.A.C. 1:1-21.5*.

At the conclusion of a thirteen-day hearing, the ALJ found that Rutgers violated the "take-all-comers" provision of FAIRA by terminating petitioners' broker agreements. In reaching this conclusion, the ALJ found Rutgers' main witness Thomas lacked credibility, citing the numerous and contradictory reasons he gave throughout his testimony for terminating petitioners' broker agreements. The ALJ also found that another critical witness within Rutgers' control, Gaughan, was not unavailable to testify, and that it was in Rutgers' interest for her not to testify, having been contradicted by the surreptitiously taped **[*15]** telephone conversations produced by Scheller.

Thus, the ALJ found:

> Rutgers' efforts to bury its FAIR Act violations with regard to the four [plaintiffs] by trying to intertwine such actions with a so-called broad self-help initiative simply did not work. The fact is that [plaintiffs] proved that they were terminated because they started writing take-all-comers PPA business after the exemption was lifted and that the volume and quality of that PPA business were not acceptable to Rutgers. Furthermore, [plaintiffs] proved that the PPA business submitted after the lifting of the exemption was not of an acceptable quality to Rutgers because [plaintiffs] were not submitting the "cherry-picked" PPA business that Rutgers wanted. That translated into a determination by Rutgers that this new business would be unprofitable, or, stated another way, the expected experience of the post-exemption submitted PPA business would be unprofitable.

Upon review of the extensive record, including Rutgers' exceptions and petitioners' reply, the Commissioner adopted the findings of the ALJ, save for that Thomas had lied that his fear of insolvency motivated the mass terminations; that Rutgers never communicated **[*16]** this concern to the Department in 1995; and that Rutgers' sole remedy, if it truly feared financial impairment, was to seek an exemption from the Department.

These errors notwithstanding, the Commissioner concluded:

> The investigatory record here clearly establishes that, subsequent to the company's choice to "take all comers," Rutgers terminated the [plaintiffs] due to the expected experience of their PPA insurance business in light of the [plaintiffs'] refusals to adhere to the exemption period underwriting standards.

On appeal, Rutgers raises the following issues:

> I. THE ALJ'S ERRONEOUS FINDINGS WERE NOT "HARMLESS ERROR" AS THEY IRREMEDIABLY TAINTED HIS FACTFINDING.
>
> II. THE ALJ IMPROPERLY DREW AN ADVERSE INFERENCE AGAINST RUTGERS BASED ON HELENE GAUGHAN'S ABSENCE FROM THE HEARING; MS. GAUGHAN WAS UNAVAILABLE TO TESTIFY.

We address each issue in the order raised.

(i)

Rutgers first contends that the ALJ's mistaken findings somehow rendered the Commissioner's threshold decision of a FAIRA violation arbitrary and unreasonable. We disagree. The Commissioner's determination of a FAIRA "take-all-comers" violation is supported by substantial credible evidence in the record.

In this regard, our role **[*17]** in reviewing administrative action of the executive branch is limited. *In re Musick*, *143 N.J. 206, 216, 670 A.2d 11 (1996)*. "Ordinarily, an appellate court will reverse the decision of the administrative agency only if it is arbitrary, capricious or unreasonable, or it is not supported by substantial credible evidence in the record as a whole." *Henry v. Rahway State Prison, 81 N.J. 571, 579-80, 410 A.2d 686 (1980)*. In conducting this limited review, "there is a presumption that an agency's actions are reasonable and the burden is placed on the challenging party to show otherwise." *DiMattia v. New Jersey Merit Sys. Bd., 325 N.J. Super. 368, 375, 739 A.2d 450 (App. Div. 1999)*; *Bergen Pines County Hosp. v. New Jersey Dep't of Human Servs., 96 N.J. 456, 477, 476 A.2d 784 (1984)*. And where, as here, agency actions call for application of its inherent expertise, an even stronger presumption of reasonableness attaches. *See Nanavati v. Burdette Tomlin Mem'l Hosp., 107 N.J. 240, 251, 526 A.2d 697 (1987)*; *see also IFA Ins. Co. v. New Jersey Dep't of Ins., 195 N.J. Super. 200, 208, 478 A.2d 1203 (App. Div.), certif. denied*, *99 N.J. 218, 491 A.2d 712 (1984)*.

Here, the Commissioner found that the petitioners were terminated because they refused to capitulate to Rutgers' coercion to channel away **[*18]** unwanted eligible persons in violation of FAIRA's "take-all-comers" provisions, *N.J.S.A. 17:33B-15* and *-18*. To understand the impact of this finding, some background is in order.

FAIRA was enacted in early 1990 as a means of reducing insurance costs for most New Jersey drivers, by depopulating the Joint Underwriting Association (JUA), by switching high risk insureds to the voluntary market, and by paying off the JUA debt. *N.J.S.A. 17:33B-2(d),(f)*; *State Farm Mut. Auto. Ins. Co. v. State, 124 N.J. 32, 42, 590 A.2d 191 (1991)*. The goal was to have at least 90% of New Jersey drivers insured by the "voluntary market." *State Farm*, *supra*, *124 N.J. at 42-43*.

The key to accomplishing this was the "take-all-comers" provision, which required insurers to accept all eligible automobile insurance applications submitted after April 1, 1992. *N.J.S.A. 17:33B-15*. Under FAIRA, a producer was prohibited from "channeling away" an eligible person in order to avoid submitting an insurance application for such a person. *N.J.S.A. 17:33B-18(a)(2)*. The Legislature recognized that this was a radical change, and gave the insurance industry two years to prepare for FAIRA to take effect. *N.J.S.A. 17:33B-15(a)*.

Because there was **[*19]** a recognition that accepting higher risk drivers could have a negative financial impact on insurers, the Legislature enacted a number of protections. *Assembly Appropriations Committee, Statement No. 1, L.* 1990, *c.* 8. Thus, the Legislature provided for exemptions from the "take-all-comers" rule for insurers who were in an "unsafe or unsound" financial condition. *N.J.S.A. 17:33B-19*, *-20*, *-23*, *-24*, *-28*. In addition, after a determination that the insurer was in an unsafe or unsound financial condition, the insurer could obtain a deferral or exemption from surtaxes and assessments. *N.J.S.A. 17:33B-52*, *-53*, *-55*, *-56*. A major consideration in determining whether the insurer was in an unsafe or unsound financial condition was the insurer's premium-to-surplus ratio. *N.J.S.A. 17:33B-20*, *-24*. Statutory provisions in effect before the enactment of FAIRA such as the "2% rule" and "two for one" allowed insurers to not renew a certain number of policies. *N.J.S.A. 17:29C-7.1(b)*, *(c)*.

The law also provided certain protections to insurance producers who would be submitting large quantities of PPA applications. An insurer could not penalize a producer based on the agent's geographic location, or "because **[*20]** of the expected or actual experience produced by the agent's automobile insurance business. . . ." *N.J.S.A. 17:33B-18(b)*. "Penalizing a producer" meant paying less than normal commissions or salary. *N.J.S.A. 17:33B-18(b)*. Eventually this definition was expanded to include terminating an agent's contract. *Gaydos*, *supra*, *168 N.J. at 281-82*.

In *Gaydos*, the Supreme Court held that there is no private right of action under which an agent may sue an insurer for violations of FAIRA. *Id. at 279, 773 A.2d 1132*. Agents are not members of the class protected by FAIRA. *Ibid.* Nevertheless, the Court found that the insurer had violated the implied covenant of good faith and fair dealing by terminating agents because they complied with FAIRA. *Id. at 281, 773 A.2d 1132*. The Court held that the Legislature intended the Department to keep a close watch on agent terminations in light of the statutory requirements. *Id. at 282*. Thus, terminating an agent based on its poor loss experience, i.e. submitting too many PPA applications, unrelated to administrative incompetence or poor business practices, was considered "penalizing an agent" under *N.J.S.A. 17:33B-18* and therefore a violation of FAIRA. *Ibid.*

The *Gaydos* Court held that in every **[*21]** action against an insurer where there is an allegation of a FAIRA violation, the Department must make a threshold finding as to whether FAIRA was violated. *Ibid.* If the Department found a violation of FAIRA, the terminated producer could maintain a common law claim for breach of the implied covenant of good faith and fair dealing. *Id. at 284*. If, however, FAIRA was not violated, according to *Gaydos*, there was no cause of action. *Ibid.*

Here, pursuant to *Gaydos*, the matter was referred to the Department for investigation. During thirteen days of hearing, each petitioner as well as two additional fact witnesses appearing on petitioners' behalf, testified as to their specific, individual and repeated interactions with Rutgers' personnel, all of whom were found credible by the ALJ. [8] On the other hand, CFO Thomas, who testified that the company's motivation for the mass terminations was concern over financial solvency, was discredited by the ALJ because of inconsistencies, implausibilities and contradictions in his testimony. Specifically, the ALJ found that on September 14, 1995, Rutgers informed the Department that it was terminating brokers who could not market new products or who had **[*22]** been under-producing, although, as Thomas admitted, no study or investigation was performed to determine whether the terminated brokers could in fact market the new products. Also, no investigation was undertaken to determine whether petitioners' minimal production in 1992 and 1993 was related to the strict underwriting guidelines in effect in those years, or the fact that Rutgers had made a commitment to the Department to reduce writing new policies during that time. Thomas also conceded that Rutgers had not been aggressively seeking new business in 1993 and 1994. Moreover, in all of the written communications between Rutgers and the Department in 1995, no mention was made of any fear of financial insolvency as the reason for terminating petitioners.

8 The ALJ rejected all of the expert testimony, finding Rutgers' expert opinion not based on a valid foundation and petitioner's expert opinion irrelevant. As to the latter, the ALJ stated that it was understandable that Rutgers did not use the 2% rule or "two for one" because to do so would have been to substitute new, riskier business for better older clients.

The ALJ found other contradictions. For instance, Thomas wrote to the Department **[*23]** in 1995, representing that the terminations were due to Rutgers' desire to expand into new markets. However, following the disclosure of the taped telephone conversations, Thomas admitted that the reason for the terminations was the submission of too much PPA business after May 1, 1995, as compared with before. In addition, Rutgers did not expand into new markets for another two years. Also, Thomas originally stated that the terminations were based on lack of business in 1993, 1994 and the first nine months of 1995. He later changed this to a lack of new business in 1993 and 1994, but too much after May 1, 1995, despite his assertion that Rutgers was not seeking new business in 1993 and 1994. [9]

9 The ALJ did not disregard Thomas' testimony in its entirety and in fact accepted some of the witness' statements as true. Nevertheless, the ALJ found it troubling that Rutgers changed its reason for terminating the producers according to what was advantageous at the moment.

Rutgers now ascribes three errors to the ALJ's reasoning: (1) that fear of financial impairment did not motivate Rutgers' 1995 mass terminations; (2) that Rutgers never communicated its financial concerns to the Department; **[*24]** and (3) that Rutgers' sole remedy, if it truly feared financial impairment, was to seek a "take-all-comers" exemption from the Department. These so-called mistakes, however, were properly recognized by the Commissioner and therefore played no role in his ultimate determination.

The Commissioner modified the ALJ's findings and concluded that fear of financial impairment was the over-arching reason for the mass terminations in 1995, and further that Rutgers orally discussed with the Department its plan to reduce its broker force though mass terminations aimed at maintaining the financial health of the company. [10]

10 Although the Commissioner found Thomas

was truthful in that one instance, i.e. that he feared financial insolvency, he agreed with the ALJ that Thomas lacked credibility in general. Indeed, as noted, the ALJ found many contradictions in Thomas' testimony.

Nevertheless, the Commissioner found compelling evidence of FAIRA violations with respect to petitioners individually, properly differentiating between, on the one hand, the broad motivation for Rutgers' 1995 mass terminations and, on the other, the specific reasons and particularized selection criteria for terminating petitioners.

Specifically, **[*25]** the Commissioner found, as did the ALJ, that Rutgers vacillated on the termination selection criteria actually employed with respect to petitioners. For instance, in 1995, Rutgers told the Department that agents were included in the mass termination plan based on two criteria: low volume of submissions during its exemption from "take-all-comers;" and, a perceived inability to market anticipated new lines of insurance business. Importantly, however, Rutgers contradicted itself by admitting during the Department's investigation that petitioners were terminated based on the volume of their 1995 post-"take-all-comers" submissions. [11] Moreover, Rutgers further obscured the actual reasons and criteria for termination by asserting during the investigation that these facts demonstrated a "lack of loyalty" requiring the petitioners' terminations. Based on these inconsistencies and contradictions, the Commissioner found that "Rutgers 'intentionally elected to avoid disclosure of the true [criteria]" used to select the four petitioners for termination.

11 CFO Thomas testified that the petitioning agents "were terminated solely because they produced too much PPA business after Rutgers lost its ['take-all-comers'] **[*26]** exemption."

Apart from these contradictions, the Commissioner found direct evidence of FAIRA violations in the audio-taped statements of Rutgers' underwriting manager Helene Gaughan, which demonstrated that Rutgers' personnel repeatedly threatened and attempted to coerce petitioners to channel away unwanted eligible persons by applying its then-defunct and restrictive exemption-period underwriting guidelines. These tapes further reveal that Rutgers' personnel also threatened that petitioners' failure to utilize those guidelines would result in cancellation of their agency contracts. In fact, the evidence indicates that petitioners were indeed terminated following their refusal to capitulate to this pressure and to apply the restrictive guidelines to channel away unwanted eligible persons from Rutgers. Accordingly, the Commissioner found that "the numerous threatening and coercive interactions between the [p]etitioners and Rutgers' personnel demonstrate that the permissible termination selection criteria [originally] proffered by Rutgers was not the selection criteria used [to select these four [p]etitioners for termination]."

We are satisfied that the Commissioner's factual findings **[*27]** are supported by substantial credible evidence. We also concur with his view that these findings establish a FAIRA violation as a matter of law. While, as the Commissioner properly recognized, "FAIRA does not preclude a company from engaging in strategies aimed at maintaining the insurer's financial integrity," such efforts must be done in compliance with FAIRA. The statute, as noted, prohibits agents from "channeling away" eligible persons from an insurer in order to enable the insurer to avoid its obligation to accept all eligible persons, *N.J.S.A. 17:33B-18(a)(2)*, and insurers are prohibited from penalizing agents based upon the actual or expected loss experience on account of their compliance with this prohibition, *N.J.S.A. 17:33B-18(b)*. Certainly termination of an agency's contract based on such impermissible considerations is a proscribed practice under FAIRA. Thus, the evidence establishes that Rutgers "penalized" petitioners based upon the expected loss experience of their "take-all-comers" auto insurance business, and its terminations of them for refusing to channel away unwanted eligible persons violated FAIRA. In light of this substantial credible evidence, any mistake by **[*28]** the ALJ in ascribing a motivation for the 1995 mass termination was harmless as pertains to petitioners.

(ii)

Rutgers next claims error in finding Gaughan to be an available witness and therefore improperly drawing an adverse inference from its failure to have Gaughan testify at the hearing. We disagree.

By way of background, during the course of the hearing, Rutgers informed the ALJ that Gaughan, who was seventy years old, on blood pressure medication and nine other prescriptions, and was anxious about the trial, would not testify because of concern that stress could exacerbate her condition, even though she was still employed by Rutgers and working four days per week in the underwriting department. When questioned further by the ALJ, Rutgers produced a certification from Dr. Graziano-Wilcox, which stated that:

> I cannot predict with certainty precisely what will happen to Ms. Gaughan in the event that she does testify. The possible events are . . . stroke . . . and/or heart attack. Although I cannot say that these events are likely to occur if Ms. Gaughan testifies, it is my opinion that it would be unreasonable to require Ms. Gaughan to testify given her medical condition, age and the **[*29]** potential adverse health effects that could occur if she does testify.

Finding this insufficient to establish Gaughan's "unavailability," and that the witness' testimony would be unfavorable to Rutgers and superior to that actually produced, the ALJ proceeded to draw an adverse inference from Rutgers' failure to produce Gaughan as a witness. We discern no error here.

First, the administrative hearing was not governed by our rules of evidence. *N.J.A.C. 1:1-21.4*. Second, the negative inference drawn by the ALJ added little, if anything, to the compelling proof of Gaughan's threats evidenced on the audiotapes. Third, even under our rules of evidence, the decision to draw a negative inference was proper. *N.J.R.E. 601* provides that failure to produce a witness supports an adverse inference that the witness' testimony would have been unfavorable to the party who failed to produce him or her. *State v. Wilson, 128 N.J. 233, 243-45, 607 A.2d 1289 (1992)*. In *State v. Clawans, 38 N.J. 162, 171, 183 A.2d 77 (1962)*, the Court held that an adverse inference may be drawn when the party had the power to produce the witness, and the witness' testimony would have been far superior to the testimony which was actually produced. If, **[*30]** however, the party proves that the witness is beyond his or her power to produce, there is no negative inference. *Witter by Witter v. Leo, 269 N.J. Super. 380, 391-92, 635 A.2d 580 (App. Div.), certif. denied, 135 N.J. 469, 640 A.2d 851 (1994)*.

N.J.R.E. 804(a)(4) provides the standard for determining when a witness cannot be produced because he or she is unavailable:

> [A] declarant is "unavailable" as a witness if declarant is absent from the hearing because of physical or mental illness or infirmity, or other cause. . . .

In order to show unavailability for medical purposes, it must be shown that in light of the emotional stress associated with testifying there is a reasonable probability that the witness' health will be seriously compromised if called to testify. *United States v. Faison, 564 F. Supp. 514, 524 (D.N.J.), aff'd, 725 F.2d 667 (3rd Cir. 1983)*.

Here, the ALJ found that Gaughan was still employed by Rutgers in a high-pressure position and that her doctor did not state that it was "likely" her health would be compromised by testifying. Further, she was a critical witness whose testimony would likely be adverse to Rutgers and therefore in Rutgers' best interest that she not testify. Moreover, the testimony **[*31]** that Rutgers actually produced to rebut the taped conversations was Lannon's statement that she never heard Gaughan making threatening statements to producers. Obviously, Gaughan's testimony would have been far superior to Lannon's. Thus, all the conditions having been satisfied, it was proper for the ALJ to draw an adverse inference from Gaughan's absence at trial.

(iii)

Lastly, in its reply brief, Rutgers raises an issue concerning documents supposedly relied on by the Department, but undisclosed to Rutgers, in its 1995 mass termination decision. Rutgers references a December 6, 2007 order and requests a remand. This order, however, was not included in the record and this issue was never raised below, nor in Rutgers' main brief. We ordinarily do not address issues raised for the first time in a reply brief, *In re Bell Atl.-New Jersey, Inc., 342 N.J. Super. 439, 442-43, 776 A.2d 926 (App. Div. 2001)*, and decline to do so here.

Affirmed.