

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL )  
SERVICES, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 05-1146PL  
 )  
CLINTON MITCHELL ALFORD, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on July 20 and 21, 2005, in Orlando, Florida, before Bram D. E. Canter, Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Greg S. Marr, Esquire  
Department of Financial Services  
200 East Gaines Street  
Tallahassee, Florida 32399-0333

For Respondent: Calvin J. Domenico, Jr., Esquire  
William R. Klein, P.A.  
1900 Main Street, Suite 310  
Sarasota, Florida 34236

STATEMENT OF THE ISSUES

Whether the Respondent committed the offenses alleged in the Amended Administrative Complaint, and, if so, the penalty that should be imposed.

PRELIMINARY STATEMENT

In a thirteen-count Amended Administrative Complaint dated October 1, 2003, the Department of Financial Services ("Department") charged Clinton Mitchell Alford with having violated several state laws regulating insurance agents and involving misrepresentations and forgery related to the sale of variable annuity policies. At the final hearing, the Department stipulated to the dismissal of Counts I, III, and VI of its Amended Administrative Complaint (hereinafter referred to as the "Complaint").

Count II of the Complaint, regarding an annuity sold to Peter Dempsey, alleges that Mr. Alford prepared an annuity application without the knowledge or consent of Mr. Dempsey, made an unauthorized withdrawal from Mr. Dempsey's bank account to fund the annuity, and later forged a request by Mr. Dempsey to cancel the annuity.

Counts IV and V of the Complaint, involving annuities sold to Barbara Kirkland and Richard Wissusik, respectively, allege that Mr. Alford misrepresented a key term of the annuity policies and forged Ms. Kirkland's and Mr. Wissusik's signatures on documents to conceal the misrepresentations.

Counts VII through XIII of the Complaint, involving annuities sold to Beaver Street Foundation, Inc.; Riverside and Associates, Ltd.; the Alfred Frisch Living Trust (three separate

annuities); the Steven M. Frisch Trust; and the Hans Frisch Living Trust, allege that Mr. Alford misrepresented a key term of the annuity policies and fabricated documents to conceal the misrepresentations.

The Department presented the testimony of Samantha Daniels, an investigator with the Department; Emory Mullen, a complaint analyst with Lincoln Beneficial Life Insurance Company; Thomas Vastrick, an expert in forensic document examination; and four persons to whom Mr. Alford is alleged to have made misrepresentations: Barbara Kirkland, Paulette Rocher, Richard Wissusik, and Peter Dempsey. The Department's Exhibits 1 through 6, 8 through 10, 12, 12A through 12G, 17, and 27 through 44 were received into evidence. The Respondent presented no witnesses or exhibits. Mr. Alford did not attend the hearing.

The Department was permitted to conduct a post-hearing deposition of Peter Dempsey and to file the transcript of the deposition with the Division as part of the case record. The Transcript of the Dempsey deposition was filed August 24, 2005.

A three-volume Transcript of the hearing was filed with the Division. The parties timely filed proposed findings of fact and conclusions of law on September 6, 2005, which have been considered in the preparation of this Recommended Order.

## FINDINGS OF FACT

At the final hearing, the Department made allegations in its opening statement and presented evidence regarding wrongful acts of the Respondent that were not specifically alleged in its Complaint. As explained in the Conclusions of Law, below, only the specific factual allegations in the Department's Complaint are properly in dispute in this case. The findings of fact in this Recommended Order must be confined to the proof or lack of proof of those factual allegations. Evidence regarding wrongful acts of the Respondent not specifically alleged in the Department's Complaint will not support a finding of fact or a recommendation for disciplinary action.

Based on the oral and documentary evidence presented at the final hearing and on the entire record of this proceeding, the following findings of fact are made:

### Findings Applicable to All Counts

1. The Department is the state agency charged with administration of the Insurance Code of the State of Florida, including Chapter 626, Florida Statutes (2004).

2. Clinton Mitchell Alford is licensed in Florida as an insurance agent. He holds license number A003524, under which he is authorized to handle several lines of insurance, including variable annuities.

3. Mr. Alford was employed by and maintained an office at Mercantile Bank in Orlando, Florida. Customers of Mercantile Bank were sometimes directed to Mr. Alford by bank employees if the customers had questions about or expressed an interest in investment products that Mr. Alford handled.

4. Mr. Alford was also an employee of UVEST Financial Services ("UVEST"), a financial investment firm that provides investment advisory services.

5. Mr. Alford was not an employee of Lincoln Benefit Life Company ("Lincoln Life") of Lincoln, Nebraska, but he was an authorized agent for Lincoln Life. All of the counts in the Department's Complaint involve annuities handled by Mr. Alford as the agent for Lincoln Life.

6. Lincoln Life paid commissions to UVEST when Mr. Alford acted as agent in the sale of a Lincoln Life annuity policy. How those commissions were then divided between Mr. Alford and UVEST would have been pursuant to an agreement between Mr. Alford and UVEST. No evidence was presented regarding the terms of that agreement.

7. Mr. Alford also received "production bonuses" from Lincoln Life, in the form of cash and a vacation cruise, for the sale of policies for which Mr. Alford acted as the agent.

8. The annuity policies sold by Lincoln Life that are the subject of this case involved the deposit of "initial premiums"

with Lincoln by the purchasers of the annuities, in return for which the purchasers, or "annuitants," would receive a guaranteed rate of interest for a stated time period, the "guarantee period." Upon the death of the annuitant, the policies provide a stream of payments to the annuitant's beneficiaries.

9. Each annuity policy involved in this case included terms to discourage the early withdrawal of funds deposited with Lincoln Life. In general, an annuitant could withdraw his or her money from Lincoln Life after the guarantee period without restriction. If an annuitant withdrew funds before the end of the guarantee period, however, a "surrender charge," also called a "withdrawal charge," would be imposed by Lincoln Life.

10. The surrender charge was a stated percentage of the funds withdrawn. This surrender charge was greatest in the first year of the guarantee period and then decreased in subsequent years so that a withdrawal near the end of the guarantee period had the smallest associated surrender charge. The shorter the guarantee period in which a surrender charge would be imposed, the more advantageous and attractive the annuity would be to a customer.

11. The procedure generally applicable to the sale of annuity policies by Lincoln Life was as follows: an annuity application would be prepared by an agent in a meeting with the

customer; the agent would then send the application to Lincoln Life along with a check for the initial premium to be deposited to the customer's account; Lincoln Life would determine whether the application was sufficient and, if so, print out a policy for the customer; Lincoln Life would then send the policy to the agent for delivery to the customer.

12. When Lincoln Life discovered discrepancies in annuity application and policy documents, as described below, it honored the terms of the policies as represented to the annuitants and allowed the annuitants to elect to terminate the policies without penalty. No damages other than frustration and anxiety were suffered by these annuitants as a result of the alleged unlawful acts of Mr. Alford. They suffered no financial losses.

Count II - Peter Dempsey

13. In November 2002, Lincoln Life received an application for an annuity policy prepared and signed by Mr. Alford that purported to be on behalf of Peter Dempsey and signed by Mr. Dempsey. Following its receipt of the annuity application for Mr. Dempsey and a \$100,000 cashier's check issued by Mercantile Bank for the initial premium payment, Lincoln Life issued annuity policy LBF1111304 to Mr. Dempsey.

14. Peter Dempsey says he has no recollection of ever meeting Mr. Alford.

15. Mr. Dempsey says he had no knowledge of and did not consent to the annuity application that was received by Lincoln Life.

16. Mr. Dempsey says he had no knowledge of and did not consent to the withdrawal of \$100,000 from his Mercantile Bank account and the submittal of a cashier's check in that amount to Lincoln Life for the purchase of an annuity policy.

17. Lincoln Life subsequently received a hand-written letter purported to be from Mr. Dempsey and signed by Mr. Dempsey requesting that his annuity policy be canceled. Mr. Dempsey denies creating or signing the letter. The letter was undated, but refers to a "10 day free look" allowed under the terms of the annuity policy, suggesting that the letter was prepared soon after the issuance of the annuity policy by Lincoln Life. Lincoln Life cancelled Mr. Dempsey's policy and returned his \$100,000 premium payment.

18. Pursuant to the policies and procedures of Lincoln Life, Mr. Alford could have received credit for the sale of a Lincoln Life policy to Mr. Dempsey even though the policy was subsequently cancelled. Although any commission paid to an agent by Lincoln Life would normally have to be repaid when a policy was cancelled, the agent could still receive credit toward a production bonus.



19. The theory behind Count II of the Department's Complaint is that Mr. Alford, in order to get credit from Lincoln Life toward a production bonus, created the bogus application for Mr. Dempsey, managed to withdraw \$100,000 from Mr. Dempsey's bank account to send to Lincoln Life with the application, then quickly cancelled the policy with a forged letter and deposited the \$100,000 back into Mr. Dempsey's bank account. There are some holes in this theory.

20. A deposit of \$101,428 was made to Mr. Dempsey's Mercantile Bank account on January 7, 2003, using a deposit slip pre-printed with Mr. Dempsey's name. The deposit slip indicates that the total amount deposited comprised three checks: \$100,000 (from Lincoln Life), \$950 (a check to Mr. Dempsey's wife) and \$478 (a check to Mr. Dempsey). The use of a personal deposit slip and the deposit of two other checks strongly suggests that Mr. Dempsey or his wife (it was a joint account) made the deposit, not Mr. Alford. The Department did not present evidence to the contrary.

21. Mr. Dempsey says he was not aware of the \$100,000 transaction until it was brought to his attention by the Department in 2004 in the course of its investigation of annuity policies for which Mr. Alford acted as agent. However, if Mr. Dempsey was not involved in the \$100,000 transaction, it is difficult to understand why he was not perplexed and did not

make inquiries to find out why he had received a \$100,000 check from Lincoln Life, a company he supposedly had no dealings with. There is a more credible explanation - Mr. Dempsey purchased the Lincoln Life annuity policy in 2002 and then cancelled it, but he has since forgotten that he did.

22. Mr. Dempsey was 80 years old in 2004 when the Department interviewed him as part of its investigation of Mr. Alford's alleged unlawful acts. He admitted that his memory sometimes fails him. His mental acuity might also be diminished. He stated that it was not his signature on a document that the Department's investigator testified she saw him sign in her presence. Obviously, if Mr. Dempsey does not recognize his own signature, it calls into question his testimony that the signatures on the Lincoln Life annuity application and cancellation letter were not authentic.

23. It appears plausible from the record evidence that when the Department contacted Mr. Dempsey in 2004 to inquire about his dealings with Mr. Alford, Mr. Dempsey denied any knowledge of the Lincoln Life annuity because he had forgotten the transaction. The Department accepted Mr. Dempsey's denial because the Department had other evidence of wrongdoing by Mr. Alford. The Department deduced, therefore, that Mr. Alford had fabricated and forged Mr. Dempsey's annuity documents and

withdrew the \$100,000 from Mr. Dempsey's bank account to fund the annuity.

24. The circumstances surrounding Mr. Dempsey's annuity policy remain uncertain on this record. The Department's evidence was not clear and convincing that Mr. Alford prepared the annuity application without Mr. Dempsey's knowledge or consent, withdrew money from Mr. Dempsey's bank account without Mr. Dempsey's knowledge or consent, or forged a letter requesting that the annuity policy be cancelled.

Count IV - Barbara Kirkland

25. Mr. Alford was the insurance agent who assisted Barbara Kirkland in purchasing an annuity policy from Lincoln Life in January 2004. The policy number was LBF1129343.

26. Mr. Alford told Ms. Kirkland that the guarantee period for the Lincoln Life annuity she purchased, during which she would not be able to withdraw her money without a surrender charge, was two years. That was a misrepresentation because Lincoln Life did not sell an annuity with a guarantee period of only two years. The actual guarantee period for the annuity purchased by Ms. Kirkland was six years.

27. In Ms. Kirkland's presence, Mr. Alford filled out a Lincoln Life annuity application form for Ms. Kirkland that contained, along with other information, the two-year guarantee

period he had misrepresented to her. Ms. Kirkland signed the application form.

28. Based on Mr. Alford's misrepresentation that the guarantee period was two years, Ms. Kirkland purchased an annuity policy from Lincoln Life and deposited an initial premium of \$100,000.

29. Ms. Kirkland would not have purchased the Lincoln Life annuity but for Mr. Alford's misrepresentation that the guarantee period was only two years.

30. Lincoln Life did not receive the annuity application Mr. Alford prepared in the presence of Ms. Kirkland and that Ms. Kirkland signed. Lincoln Life received a different application that indicated the correct six-year guarantee period offered by Lincoln Life under the particular annuity policy purchased by Ms. Kirkland.

31. Ms. Kirkland had no knowledge of and did not consent to the altered annuity application that was received by Lincoln Life.

32. Thomas Vastrick, an expert forensic document examiner, compared the hand printing on Ms. Kirkland's altered application with samples of Mr. Alford's hand printing and concluded that the hand printing had "common authorship." Therefore, it was proven that Mr. Alford prepared the altered Kirkland application.

33. Mr. Alford's preparation of the altered application proves that his statement to Ms. Kirkland that the guarantee period was two years was not merely a mistake, but was a willful misrepresentation and a willful deception.

34. However, Mr. Alford's alteration of the annuity application will not support a finding that he lacked fitness or trustworthiness, or that he engaged in a fraudulent or dishonest practice, because the Department did not allege in its Complaint that Mr. Alford altered Ms. Kirkland's annuity application.

35. Similarly, evidence presented by the Department that Mr. Alford altered the annuity policy issued by Lincoln Life before delivering it to Ms. Kirkland in order to conceal the six-year guarantee period in the policy, will not support a finding of fact because the Department did not allege in its Complaint that Mr. Alford altered the annuity policy.

36. The Department alleged in its Complaint that Mr. Alford forged Ms. Kirkland's signature on a "related document." The Respondent stipulated that the signature on the altered application was a forgery. The Department presented no evidence, however, regarding the identity of the person who forged Ms. Kirkland's signature. The circumstantial evidence in the record is not sufficient in this disciplinary case to prove that Mr. Alford was the person who forged Ms. Kirkland's signature on the Benefits Summary.

Count V - Richard Wissusik

37. Mr. Alford was the insurance agent that assisted Richard Wissusik in purchasing an annuity policy from Lincoln Life in March 2003. The policy number was LBF1118978.

38. Mr. Alford told Mr. Wissusik that the guarantee period for the annuity he purchased from Lincoln Life, during which he would not be able to withdraw his money without a surrender charge, was two years. That was a misrepresentation because Lincoln Life did not sell an annuity with a guarantee period of only two years. The actual guarantee period for the annuity purchased by Mr. Wissusik was five years.

39. In Mr. Wissusik's presence, Mr. Alford filled out a Lincoln Life annuity application form for Mr. Wissusik that contained, along with other information, the two-year guarantee period he had misrepresented to Mr. Wissusik. Mr. Wissusik signed the application form.

40. Based on Mr. Alford's misrepresentation that the guarantee period was two years, Mr. Wissusik purchased an annuity policy from Lincoln Life with an initial premium deposit of \$30,016.73.

41. Mr. Wissusik would not have purchased the Lincoln Life annuity but for Mr. Alford's misrepresentation that the guarantee period was only two years.

42. Mr. Alford did not send the annuity application he prepared in the presence of Mr. Wissusik and that was signed by Mr. Wissusik to Lincoln Life. Lincoln Life received a different application that indicated the correct five-year guarantee period offered by Lincoln Life under the particular annuity policy purchased by Mr. Wissusik.

43. Mr. Wissusik had no knowledge of and did not consent to the altered annuity application that was received by Lincoln Life.

44. Thomas Vastrick, an expert forensic document examiner, compared the hand printing on Mr. Wissusik's altered application with samples of Mr. Alford's hand printing and concluded that the hand printing had "common authorship." Therefore, it was proven that Mr. Alford prepared the altered Wissusik application.

45. Mr. Alford's preparation of the altered application proves that his statement to Mr. Wissusik that the guarantee period was two years was not merely a mistake, but was a willful misrepresentation and a willful deception.

46. However, Mr. Alford's alteration of the annuity application to indicate a five-year guarantee period will not support a finding that he lacked fitness or trustworthiness, or that he engaged in a fraudulent or dishonest practice, because

the Department did not allege in its Complaint that Mr. Alford altered the guarantee period stated in the application.

47. Similarly, evidence presented by the Department that Mr. Alford altered the annuity policy issued by Lincoln Life before delivering it to Mr. Wissusik in order to conceal the five-year guarantee period in the policy, will not support a finding of fact because the Department did not allege in its Complaint that Mr. Alford altered the annuity policy.

48. The Department alleged in its Complaint that Mr. Alford forged Mr. Wissusik's signature on the altered annuity application. The Respondent stipulated that the signature on the altered application was a forgery. The Department presented no evidence, however, regarding the identity of the person who forged Mr. Wissusik's signature. The circumstantial evidence in the record is not sufficient in this disciplinary case to prove that Mr. Alford was the person who forged Mr. Wissusik's signature on the altered annuity application.

Count VII - Beaver Street Foundation, Inc.

49. Mr. Alford was the insurance agent that assisted Beaver Street Foundation, Inc. ("the Foundation"), in purchasing an annuity policy from Lincoln Life in January 2003. The policy number was LBF1114198.



50. Paulette Rocher is an employee of Beaver Street Fisheries and was the administrative assistant to Hans Frisch and Alfred Frisch, the owners of Beaver Street Fisheries. Hans Frisch and Alfred Frisch are directors of the Foundation. Ms. Rocher worked directly with Mr. Alford in discussing by telephone the terms of the Lincoln Life annuity policy purchased by the Foundation.

51. Mr. Alford told Ms. Rocher that the guarantee period for the annuity purchased by the Foundation, during which it would not be able to withdraw its money from Lincoln Life without a surrender charge, was two years. That was a misrepresentation because Lincoln Life did not sell an annuity with a guarantee period of only two years. The actual guarantee period for the annuity purchased by the Foundation was five years.

52. Based on Mr. Alford's misrepresentation that the guarantee period was two years, the Foundation purchased an annuity policy with Lincoln Life with an initial premium deposit of \$560,000.

53. The Foundation would not have purchased the Lincoln Life annuity but for Mr. Alford's misrepresentation that the guarantee period was only two years.

54. Based on her discussions with Mr. Alford, and using a Lincoln Life annuity application form, Ms. Rocher typed in the

information for the Foundation, including the two-year guarantee period. Hans Frisch signed the application on behalf of the Foundation.

55. Mr. Alford did not send the annuity application typed by Ms. Rocher and signed by Hans Frisch to Lincoln Life. Lincoln Life received a hand-written application that indicated the correct five-year guarantee period offered by Lincoln Life under the particular annuity policy purchased by the Foundation.

56. The Foundation had no knowledge of and did not consent to the altered annuity application that was received by Lincoln Life.

57. Thomas Vastrick, an expert forensic document examiner, compared the hand printing on six altered annuity applications with samples of Mr. Alford's hand printing and concluded that Mr. Alford had prepared the six altered applications. However, Mr. Vastrick apparently was not provided the Foundation's altered annuity application to include in his analysis. Nevertheless, I find that Mr. Alford prepared the altered Foundation annuity application based on 1) the obvious similarity of the hand printing, 2) the pattern established by Mr. Alford's fabrication of annuity applications for six other annuitants under almost identical circumstances, and 3) Mr. Alford's submittal of the Foundation's altered application to Lincoln Life.

58. Mr. Alford's preparation of the altered application proves that his statement to Ms. Rocher regarding the two-year guarantee period was a willful misrepresentation and a willful deception.

59. However, Mr. Alford's alteration of the annuity application to indicate a five-year guarantee period will not support a finding that he lacked fitness or trustworthiness, or that he engaged in a fraudulent or dishonest practice, because the Department did not allege in its Complaint that Mr. Alford altered the annuity application.

60. There was some evidence presented by the Department regarding the forgery of Hans Frisch's signature on the altered annuity application. The Department, however, did not allege in its Complaint that Mr. Alford forged Han Frisch's signature. Therefore, no finding is made as to forgery.

61. The Department alleged in Count VII of its Complaint that Mr. Alford "fabricated an Annuity Data document" for the Foundation. The Annuity Data document was admitted into evidence as part of Petitioner's Exhibit 27, but there was no testimony elicited from any witness to explain who created the document, its purpose, how it was used, or who received it. The evidence in the record is insufficient to prove Mr. Alford fabricated the document.

Count VIII - Riverside and Associates, Ltd.

62. Mr. Alford was the insurance agent that assisted Riverside and Associates, Ltd. ("Riverside"), in purchasing an annuity policy from Lincoln Life in January 2003. The policy number was LBF1115101.

63. Paulette Rocher was the administrative assistant to Hans Frisch and Alfred Frisch who were officers of Riverside. Ms. Rocher worked directly with Mr. Alford by telephone in discussing the terms of the Lincoln Life annuity policy purchased by Riverside.

64. Mr. Alford told Ms. Rocher that the guarantee period for the annuity purchased by Riverside, during which it would not be able to withdraw its money from Lincoln Life without a surrender charge, was two years. That was a misrepresentation because Lincoln Life did not sell an annuity with a guarantee period of only two years. The actual guarantee period for the annuity purchased by Riverside was five years.

65. Based on her discussions with Mr. Alford, and using a Lincoln Life annuity application form, Ms. Rocher typed in the information for Riverside, including the two-year guarantee period. Alfred Frisch signed the application on behalf of the Riverside.

66. Based on Mr. Alford's misrepresentation that the guarantee period was two years, Riverside purchased an annuity policy with Lincoln Life with an initial deposit of \$900,000.

67. Riverside would not have purchased the Lincoln Life annuity but for Mr. Alford's misrepresentation that the guarantee period was only two years.

68. Mr. Alford did not send the annuity application typed by Ms. Rocher and signed by Alfred Frisch to Lincoln Life. Lincoln Life received a hand-written application that indicated the correct five-year guarantee period offered by Lincoln Life under the particular annuity policy purchased by Riverside.

69. Riverside had no knowledge of and did not consent to the altered annuity application that was received by Lincoln Life.

70. Thomas Vastrick, an expert forensic document examiner, compared the hand printing on six altered annuity applications with samples of Mr. Alford's hand printing and concluded that Mr. Alford had prepared the six altered applications. However, Mr. Vastrick apparently was not provided Riverside's altered annuity application to include in his analysis. Nevertheless, I find that Mr. Alford prepared the altered Riverside annuity application based on 1) the obvious similarity of the hand printing, 2) the pattern established by Mr. Alford's fabrication of annuity applications for six other annuitants under almost

identical circumstances, and 3) Mr. Alford's submittal of Riverside's altered application to Lincoln Life.

71. Mr. Alford's preparation of the altered application proves that his statement to Riverside regarding the two-year guarantee period was a willful misrepresentation.

72. However, Mr. Alford's alteration of the annuity application to indicate a five-year guarantee period will not support a finding that he lacked fitness or trustworthiness, or that he engaged in a fraudulent or dishonest practice, because the Department did not allege in its Complaint that Mr. Alford altered the annuity application.

73. There was some evidence presented by the Department regarding the forgery of Alfred Frisch's signature. The Complaint, however, did not allege that Mr. Alford had forged Alfred Frisch's signature. Therefore, no finding is made as to forgery.

74. The Department alleged in Count VIII of its Complaint that Mr. Alford "fabricated an Annuity Data document" for the Riverside. The Annuity Data document was admitted into evidence as part of Petitioner's Exhibit 29, but there was no testimony elicited from any witness to explain who created the document, its purpose, how it was used, or who received it. The evidence in the record is insufficient to prove Mr. Alford fabricated the document.

Counts IX, XII, and XIII - Alfred Frisch Living Trust

75. Three separate Lincoln Life annuity policies were purchased by the Alfred Frisch Living Trust in February, May, and June 2003. Mr. Alford was the insurance agent for all three annuities. The policy numbers for the three annuity policies were LBF1116531 (issued February 26, 2003), LBF1121912 (issued May 29, 2003), and LBF1121839 (issued June 16, 2003).

76. Paulette Rocher was the administrative assistant to Hans Frisch and Alfred Frisch. Alfred Frisch died in December 2004. Ms. Rocher worked directly with Mr. Alford by telephone in discussing the terms of the three Lincoln Life annuity policies purchased by the Alfred Frisch Living Trust. Mr. Alford told Ms. Rocher that the guarantee period for the annuity policies purchased by the Alfred Frisch Living Trust, during which the Trust would not be able to withdraw its money from Lincoln Life without a surrender charge, was two years. That was a misrepresentation because Lincoln Life did not sell an annuity with a guarantee period of only two years. The actual guarantee period for the three annuity policies purchased by the Alfred Frisch Living Trust was five years.

77. Based on her discussions with Mr. Alford, and using a Lincoln Life annuity application form, Ms. Rocher typed in the information on the annuity application for the Alfred Frisch

Living Trust, including the two-year guarantee period. Alfred Frisch signed all three applications on behalf of the Trust.

78. Based on the misrepresentations by Mr. Alford that the guarantee period was two years, the Alfred Frisch Living Trust purchased the three annuity policies with Lincoln Life with initial premium deposits of \$375,000 for policy LBF1116531; \$330,000 for policy LBF1121912; and \$290,000 for policy LBF1121839.

79. The Alfred Frisch Living Trust would not have purchased the Lincoln Life annuity policies but for the misrepresentations of Mr. Alford that the guarantee period was only two years.

80. Mr. Alford did not send the three annuity applications typed by Ms. Rocher for the Alfred Frisch Living Trust to Lincoln Life. Lincoln Life received different hand-written applications that contained the correct five-year guarantee period offered by Lincoln Life under the particular annuity policies purchased by the Alfred Frisch Living Trust.

81. The Alfred Frisch Living Trust had no knowledge of and did not consent to the altered annuity applications that were received by Lincoln Life.

82. Thomas Vastrick, an expert forensic document examiner, compared the hand printing on the altered annuity applications dated January 31, 2003, and May 27, 2003, for the Alfred Frisch



Living Trust with samples of Mr. Alford's hand printing and concluded that they were of "common authorship." Therefore, it was proven that Mr. Alford prepared these two altered applications for the Alfred Frisch Living Trust.

83. Mr. Vastrick apparently was not provided the altered annuity application for the third annuity policy purchased by the Alfred Frisch Living Trust (LBF1121839) to include in his hand printing analysis. Nevertheless, I find that Mr. Alford prepared the third altered annuity application based on 1) the obvious similarity of the hand printing, 2) the pattern established by Mr. Alford's fabrication of annuity applications for six other annuitants under almost identical circumstances, and 3) Mr. Alford's submittal of the third altered application for the Alfred Frisch Living Trust to Lincoln Life.

84. Mr. Alford's preparation of the altered application proves that he knew his statements to Ms. Rocher regarding the two-year guarantee period in the three annuity policies were willful misrepresentations and willful deceptions.

85. However, Mr. Alford's alteration of the annuity applications to indicate a five-year guarantee period will not support findings that he lacked fitness or trustworthiness, or that he engaged in a fraudulent or dishonest practice, because the Department did not allege in its Complaint that Mr. Alford altered the annuity application.

86. There was some evidence presented by the Department regarding the forgery of Alfred Frisch's signature on the altered annuity application for the Alfred Frisch Living Trust. The Complaint, however, did not allege that Mr. Alford had forged Alfred Frisch's signature. Therefore, no finding is made as to forgery.

87. The Department alleged in Counts IX, XII, and XIII of its Complaint that Mr. Alford had "fabricated an Annuity Data document" for each of the three Alfred Frisch Living Trust annuities. The Annuity Data documents were admitted into evidence as part of Petitioner's Exhibits 31, 37, and 39, respectively, but there was no testimony elicited from any witness to explain who created the documents, their purpose, how they were used, or who received them. The evidence in the record is insufficient to prove Mr. Alford fabricated the documents.

Count X - Steven M. Frisch Trust

88. Stephen M. Frisch is the grandson of Hans Frisch. Mr. Alford was the insurance agent that assisted the Steven M. Frisch Trust in purchasing an annuity policy from Lincoln Life in May 2003. The policy number was F0187626.

89. Paulette Rocher was the administrative assistant to Alfred Frisch and Hans Frisch. Ms. Rocher worked directly with Mr. Alford in discussing by telephone the terms of the Lincoln

Life annuity policy purchased by the Steven M. Frisch Trust. Mr. Alford told Ms. Rocher that the guarantee period for the annuity purchased by the Steven M. Frisch Trust, during which it would not be able to withdraw its money from Lincoln Life without a surrender charge, was two years. That was a misrepresentation because Lincoln Life did not sell an annuity with a guarantee period of only two years. The actual guarantee period for the annuity purchased by the Steven M. Frisch Trust was five years.

90. Based on her discussions with Mr. Alford, and using a Lincoln Life annuity application form, Ms. Rocher typed in the information for the Steven M. Frisch Trust, including the two-year guarantee period. Eldad Frisch and Benjamin Frisch (the father and uncle of Steven Frisch) signed the annuity application on behalf of the Steven M. Frisch Trust.

91. Based on Mr. Alford's misrepresentation that the guarantee period was two years, the Steven M. Frisch Trust purchased a Lincoln Life annuity policy with an initial premium deposit of \$50,000.

92. The Steven M. Frisch Trust would not have purchased the Lincoln Life annuity but for Mr. Alford's misrepresentation that the guarantee period was only two years.

93. Mr. Alford did not send the annuity application typed by Ms. Rocher and signed by Eldad Frisch and Benjamin Frisch to

Lincoln Life. Lincoln Life received a different application that contained the correct five-year guarantee period offered by Lincoln Life under the particular annuity policy purchased by the Steven M. Frisch Trust.

94. The Steven M. Frisch Trust had no knowledge of and did not consent to the altered annuity application that was received by Lincoln Life.

95. Thomas Vastrick, an expert forensic document examiner, compared the hand printing on the altered application for the Steven M. Frisch Trust with samples of Mr. Alford's hand printing and concluded that the hand printing had "common authorship." Therefore, it was proven that Mr. Alford prepared the altered application for the Steven M. Frisch Trust.

96. Mr. Alford's preparation of the altered application proves that his statement to Ms. Rocher regarding the two-year guarantee period was a willful misrepresentation and a willful deception.

97. However, Mr. Alford's alteration of the annuity application to indicate a five-year guarantee period will not support a finding that he lacked fitness or trustworthiness, or that he engaged in a fraudulent or dishonest practice, because the Department did not allege in its Complaint that Mr. Alford altered the annuity application.

98. There was some evidence presented by the Department regarding the forgery of Steven Frisch's signature. The Complaint, however, did not allege that Mr. Alford had forged Steven Frisch's signature. Therefore, no finding is made as to forgery.

99. The Department alleged in Count X of its Complaint that Mr. Alford had "fabricated an Annuity Data document" for the Steven M. Frisch Trust. The Annuity Data document was admitted into evidence as part of Petitioner's Exhibit 33, but there was no testimony elicited from any witness to explain who created the document, its purpose, how it was used, or who received it. There is insufficient evidence in the record to prove Mr. Alford fabricated the document.

Count XI - Hans Frisch Living Trust

100. Mr. Alford was the insurance agent that assisted the Hans Frisch Living Trust in purchasing an annuity policy from Lincoln Life in May 2003. The policy number was F0187627.

101. Paulette Rocher is the administrative assistant to Hans Frisch and Alfred Frisch. Ms. Rocher who worked directly with Mr. Alford in discussing the terms of the annuity policy purchased by the Hans Frisch Living Trust. Mr. Alford told Ms. Rocher that the guarantee period for the annuity purchased by the Hans Frisch Living Trust, during which it would not be able to withdraw its money from Lincoln Life without a surrender

charge, was two years. That was a misrepresentation because Lincoln Life did not sell an annuity with a guarantee period of only two years. The actual guarantee period for the annuity purchased by the Hans Frisch Living Trust was five years.

102. Based on her discussions with Mr. Alford, and using a Lincoln Life annuity application form, Ms. Rocher typed in the information for the Hans Frisch Living Trust, including the two-year guarantee period. Hans Frisch signed the annuity application on behalf of the Trust.

103. Based on Mr. Alford's misrepresentations that the guarantee period was two years, the Hans Frisch Living Trust purchased an Lincoln Life annuity policy with an initial deposit of \$80,000.

104. The Hans Frisch Living Trust would not have purchased the Lincoln Life annuity but for Mr. Alford's misrepresentation that the surrender period was only two years.

105. Mr. Alford did not send the annuity application typed by Ms. Rocher and signed by Hans Frisch to Lincoln Life. Lincoln Life received a different application that indicated the correct five-year guarantee period offered by Lincoln Life under the particular annuity policy purchased by the Hans Frisch Living Trust.

106. The Hans Frisch Living Trust had no knowledge of and did not consent to the altered annuity application that was received by Lincoln Life.

107. Thomas Vastrick, an expert forensic document examiner, compared the hand printing on the altered application for the Hans Frisch Living Trust with samples of Mr. Alford's hand printing and concluded that the hand printing had "common authorship." Therefore, it was proven that Mr. Alford prepared the altered application for the Hans Frisch Living Trust.

108. Mr. Alford's preparation of the altered application proves that his statement to the Hans Frisch Living Trust regarding the two-year guarantee period was a willful misrepresentation and a willful deception.

109. However, Mr. Alford's alteration of the annuity application to indicate a five-year guarantee period will not support a finding that he lacked fitness or trustworthiness, or that he engaged in a fraudulent or dishonest practice, because the Department did not allege in its Complaint that Mr. Alford altered the annuity application.

110. There was some evidence presented by the Department regarding the forgery of Hans Frisch's signature on the altered annuity application. The Complaint, however, did not allege that Mr. Alford had forged Han Frisch's signature. Therefore, no finding is made as to forgery.

111. The Department alleged in Count XI of its Complaint that Mr. Alford "fabricated an Annuity Data document" for the Hans Frisch Living Trust. The Annuity Data document was admitted into evidence as part of Petitioner's Exhibit 35, but there was no testimony elicited from any witness to explain who created the document, its purpose, how it was used, or who received it. There is insufficient evidence in the record to prove Mr. Alford fabricated the document.

#### CONCLUSIONS OF LAW

112. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Section 120.569 and Subsection 120.57(1), Florida Statutes (2004).

113. An administrative complaint seeking disciplinary action must allege the specific acts or omissions that form the grounds for the violations charged in the administrative complaint. An agency cannot find a licensee guilty of a charged violation based on evidence of acts or omissions not alleged in the administrative complaint. Ghani v. Department of Health, 714 So. 2d 1113 (Fla. 1st DCA 1998); Cottrill v. Department of Insurance, 685 So. 2d 1371 (Fla. 1st DCA 1996).

114. The Cottrill case involved an administrative complaint that identified certain statutes that the agency alleged had been violated, but did not allege the facts that



constituted violations of the statutes. The court reversed and explained:

Predicating disciplinary action against a licensee on conduct never alleged in an administrative complaint . . . violates the Administrative Procedure Act. To countenance such a procedure would render nugatory the right to a formal administrative proceeding to contest the allegations of an administrative complaint.

Cottrill, 685 So. 2d at 1372.

115. In Ghani, the administrative complaint charged a physician with violating Section 458.331 by failing to practice medicine with the requisite standard of care. As grounds for the charged violation, the administrative complaint alleged that the physician attempted to treat a patient's serious medical condition in the physician's office before transporting the patient to the hospital. The final order also found the physician had violated the requisite standard of care by having his wife transport the patient to the hospital instead of arranging for ambulance transport.

116. The court reversed the agency's action with regard to the physician's failure to call for an ambulance because that allegation did not appear in the administrative complaint. The court rejected the agency's argument that the physician's private-transport decision was included in the general charge of substandard care in the administrative complaint. Ghani, 714

So. 2d at 1114. See also Sternberg v. Department of Professional Regulation, Board of Medical Examiners, 465 So. 2d 1324 (Fla. 1st DCA 1985)(Agency cannot find the licensee guilty of performing four unnecessary tests when the administrative complaint alleged three unnecessary tests were performed); Hunter v. Department of Professional Regulation, 458 So. 2d 842 (Fla. 2d DCA 1984)(Agency cannot charge the licensee with abandoning one construction project but later find licensee abandoned a second project not alleged in the administrative complaint); Wray v. Department of Professional Regulation, Board of Medical Examiners, 435 So. 2d 312 (Fla. 1st DCA 1983)(Agency cannot charge the licensee with professional misconduct based on prescribing excessive and improper medications and later find the licensee also guilty of misconduct for an un-alleged failure to refer a patient).

117. In its Complaint, the Department seeks, inter alia, to suspend or revoke Mr. Alford's license as an insurance agent. Accordingly, the Department has the burden of proving the allegations in the Complaint by clear and convincing evidence. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996). The clear and convincing evidence standard has been described as follows:

The evidence must be of such weight that it produces in the mind of the trier of fact the firm belief of conviction, without hesitancy, as to the truth of the allegations sought to be established.

Evans Packing Co. v. Department of Agriculture and Consumer Services, 550 So. 2d 112, 116 (Fla. 1st DCA 1989).

118. The Department failed to prove the allegations of Count II of the Complaint, dealing with Mr. Dempsey, by clear and convincing evidence. The paragraphs that follow address the other nine surviving counts of the Complaint.

119. The Department alleges in Counts IV, V, and VII through XIII of the Complaint that Mr. Alford violated Subsection 624.11(1), Florida Statutes (2003):

No person shall transact insurance in this state, or relevant to the subject of insurance resident, located, or to performed in this state, without complying with the applicable provisions of this code.

The Department proved by clear and convincing evidence that Mr. Alford violated certain subsections of Section 626.611, Florida Statutes (2003), which is a part of the Florida Insurance Code. Therefore, the Department met its burden to prove a violation of Subsection 624.11(1), Florida Statutes (2003), for all nine counts.

120. The Department alleges in Counts IV, V, and VII through XIII of the Complaint that Mr. Alford violated

Subsections 626.611(4),(5),(7),(9) and (13), Florida Statutes

(2003):

The department or office shall deny an application for, suspend, revoke, or refuse to renew or continue the license or appointment of any applicant, agent, title agency, adjuster, customer representative, service representative, or managing general agent, and it shall suspend or revoke the eligibility to hold a license or appointment of any such person, if it finds that as to the applicant, licensee, or appointee any one or more of the following applicable grounds exist:

\* \* \*

(4) If the license or appointment is willfully used, or to be used, to circumvent any of the requirements or prohibitions of this code.

(5) Willful misrepresentation of any insurance policy or annuity contract or willful deception with regard to any such policy or contract, done either in person or by any form of dissemination of information or advertising.

\* \* \*

(7) Demonstrated lack of fitness or trustworthiness to engage in the business of insurance.

\* \* \*

(9) Fraudulent or dishonest practices in the conduct of business under the license or appointment.

\* \* \*

(13) Willful failure to comply with, or willful violation of any proper order or

rule of the department, commission, or office or willful violation of any provision of this code.

121. The Department did not explain in its Complaint, at the hearing, or in its proposed recommended order how Mr. Alford used his license to circumvent any of the requirements or prohibitions of the Insurance Code, a violation of Subsection 626.611(4), Florida Statutes (2003). It is assumed that this subsection is intended to address some specific wrongful act, since it is placed in a list of specific wrongful acts. Otherwise, any wrongful act of a licensee would be a violation of this subsection. Because doubt exists as to whether Mr. Alford used his license to circumvent the requirements of the Insurance Code, the Department failed to meet its burden of proof as to this charge.

122. The Department met its burden to prove by clear and convincing evidence that, with regard to Counts IV, V, and VII through XIII of the Complaint, Mr. Alford misrepresented the guarantee period of the annuity policy, constituting a willful misrepresentation, a willful deception, and a fraudulent or dishonest practice under Subsections 626.611(5) and (9), Florida Statutes (2003).

123. The number and pattern of Mr. Alford's misrepresentations and deceptions demonstrate his lack of

fitness and trustworthiness to engage in the business of insurance under Subsection 626.611(7), Florida Statutes (2003).

124. The Department did not explain in its Complaint, at the hearing, or in its proposed recommended order how Mr. Alford willfully violated a proper order or rule of the Department, a violation of Subsection 626.611(13), Florida Statutes (2003). If, by this charge, the Department intended to incorporate its allegation that Mr. Alford violated Florida Administrative Rule 69B-215.230(2), the charge must fail because, as explained below, the evidence is not sufficient to prove a violation of that Rule. The Department did not meet its burden to prove by clear and convincing evidence that Mr. Alford violated Subsection 626.611(13), Florida Statutes (2003).

125. The Department alleges in Counts IV, V, and VII through XIII of the Complaint that Mr. Alford violated Subsections 626.621(2), (3), (6), and (9), Florida Statutes (2003):

The department or office may, in its discretion, deny an application for, suspend, revoke, or refuse to renew or continue the license or appointment of any applicant, agent, title agency, adjuster, customer representative, service representative, or managing general agent, and it may suspend or revoke the eligibility to hold a license or appointment of any such person, if it finds that as to the applicant, licensee, or appointee any one or more of the following applicable grounds exist under circumstances for which such

denial, suspension, or refusal is not mandatory under s. 626.11:

\* \* \*

(2) Violation of any provision of this code or any other law applicable to the business of insurance in the course of dealing under the license or appointment.

(3) Violation of any lawful order or rule of the department, commission, or office.

\* \* \*

(6) In the conduct of business under the license or appointment, engaging in unfair methods of competition or in unfair or deceptive acts or practices, as prohibited under Part IX of this chapter, or having otherwise shown himself to be a source of injury or loss to the public or detrimental to the public interest.

\* \* \*

(9) If a life agent, violation of the code of ethics.

The Department met its burden to prove by clear and convincing evidence that Mr. Alford violated Subsections 626.621(2), (6), and (9), Florida Statutes (2003). For the reasons stated previously, the Department did not meet its burden of proof with regard to Subsection 626.621(3), Florida Statutes (2003).

126. The Department alleges in Counts IV, V, and VII through XIII of its Complaint that Mr. Alford violated Florida Administrative Code Rule 69B-215.230(2):

No person shall make, publish, disseminate, circulate, or place before the public, or

cause, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in a newspaper, magazine, or other publication, or in the form of a notice, circular, pamphlet, letter or poster, or over any radio or television station, or in any other way, any advertisement, announcement or statement containing any assertion, representation or statement with respect to the business of insurance or with respect to any person in the conduct of his insurance business, which is untrue, deceptive or misleading.

127. Florida Administrative Code Rule 69B-215.230 is entitled "Misrepresentations." Section (2) of the Rule appears to apply exclusively to misrepresentations that are communicated to the general public, as opposed to misrepresentations made to an individual. All of the described acts involve false statements "placed before the public" and examples of public communication media are listed, such as newspaper, magazine, television and radio. In contrast, Section (1) of the Rule does not use the words "placed before the public," and does not refer to public media. Section (1) of the Rule would have been the appropriate citation for the wrongful acts by Mr. Alford proved in this case. The Department failed to prove by clear and convincing evidence that Mr. Alford violated Florida Administrative Code Rule 69B-215.230(2).

128. Florida Administrative Code Rule 69B-231.080, sets forth the penalties to be assessed for violations of Section 626.611, Florida Statutes (2003). The penalty for a



violation of Subsection 626.611(5), Florida Statutes (2003), is suspension of the agent's license for a period of six months. The penalty for a violation of Subsection 626.611(7), Florida Statutes (2003), is a six-month license suspension. The penalty for a violation of Subsection 626.611(9), Florida Statutes (2003), is a nine-month license suspension. The penalty for a violation of Subsection 626.611(13), Florida Statutes (2003), is a six-month license suspension.

129. Florida Administrative Code Rule 69B-231.040(1)(a) provides that the penalty for each count in an administrative complaint is to be calculated based on the violation carrying the highest penalty. In this case, the violation of Subsection 626.611(9), Florida Statutes (2003), carries the highest penalty, suspension of the license for nine months.

130. Florida Administrative Code Rule 69B-231.040(2) provides that the penalties for each count are to be added together to arrive at the total penalty to be assessed. In this case, the Department has proven that Mr. Alford violated Subsection 616.611(9), Florida Statutes (2003), with respect to nine counts in the Complaint. Consequently, the total period of suspension under the rule guidelines would be 81 months.

131. Section 626.641, Florida Statutes (2003), however, prohibits the Department from suspending a license for more than two years. Three instances of a fraudulent or dishonest

practice would warrant a total suspension longer than the two-year limitation. Mr. Alford engaged in nine separate fraudulent and dishonest acts. Therefore, the appropriate penalty for Mr. Alford, one that is within the permissible range of penalties under the law, is revocation of his license. See Fla. Real Estate Comm. v. Webb, 367 So. 2d 201 (Fla. 1978).

132. Mr. Alford's nine separate acts of misrepresentation constitute deceptive acts or practices as defined in Subsection 626.9541(1)(a)1., Florida Statutes (2003):

(1) UNFAIR METHODS OF COMPETITION AND UNFAIR OR DECEPTIVE ACTS.--The following are defined as unfair methods of competition and unfair or deceptive acts or practices:

(a) *Misrepresentation and false advertising of insurance policies.*--Knowingly making, issuing, circulating, or causing to be made, issued, or circulated, any estimate, illustration, circular, statement, sales presentation, omission, or comparison which:

1. Misrepresents the benefits, advantages, conditions, or terms of any insurance policy.

133. Section 626.9521, Florida Statutes (2003), provides that any person who engages in a deceptive act or practice shall be subject to a fine not greater than \$20,000 for each willful violation, up to an aggregate amount of \$100,000 for all willful violations arising out of the same action.

134. A fine of \$10,000 for each of the nine misrepresentations made by Mr. Alford is fair and reasonable under the circumstances, for a total fine of \$90,000.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Department of Financial Services enter a final order that:

1. finds Clinton Mitchell Alford violated Subsections 624.11(1); 626.611(5), (7), (9), and (13); 626.621(2), (6), and (9); and 626.9541(1)(a)1., Florida Statutes (2003), and
2. revokes Mr. Alford's license, and
3. imposes a fine against Mr. Alford of \$90,000.

DONE AND ENTERED this 14th day of September, 2005, in Tallahassee, Leon County, Florida.



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BRAM D. E. CANTER  
Administrative Law Judge  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 14th day of September, 2005.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.