

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL)
SERVICES, DIVISION OF INSURANCE)
AGENTS AND AGENCY SERVICES,)
)
Petitioner,)
)
vs.) Case No. 11-5758PL
)
RICHARD EDWARD CARTER,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Administrative Law Judge John D. C. Newton, II, conducted the administrative hearing in this case at sites in Tampa and Tallahassee, Florida, by video teleconference on June 12 through 14, 2012. The hearing was recessed and reconvened on July 16 and 17, 2012, in Tampa, Florida.

APPEARANCES

For Petitioner: David J. Busch, Esquire
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Division of Legal Services
612 Larson Building
200 East Gaines Street
Tallahassee, Florida 32399

For Respondent: M. D. Purcell, Jr., Esquire
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STATEMENT OF THE ISSUES^{1/}

1. Did Mr. Carter violate sections 627.4554(4)(a), 627.4554(4)(c)2., 626.611(5), 626.611(7), 626.611(9), 626.611(13), 626.621(2), 626.621(6), 626.9541(1)(a)1., and 626.9541(1)(e)1., Florida Statutes (2006, 2009, 2010); section 626.9521(2), Florida Statutes (2006, 2010); sections 626.9541(1)(k)2., 626.9541(1)(l), and 626.9521(2), Florida Statutes (2009, 2010); section 626.621(9), Florida Statutes (2010); and Florida Administrative Code Rule 69B-215.210?

2. If so, what discipline should be imposed?

PRELIMINARY STATEMENT

The Petitioner, Department of Financial Services (Department), on October 18, 2011, filed a seven-count Administrative Complaint seeking to revoke the insurance licenses of Petitioner, Richard Edward Carter.

Count I charged that Mr. Carter's sale in 2006 to W.K.^{2/} (then age 72), and his wife, J.K. (then age 69), of an Allianz Life Insurance Company annuity known as the MasterDex 10 violated sections 627.4554(4)(a), 627.4554(4)(c)2., 626.611(5), 626.611(7), 626.611(9), 626.611(13), 626.621(2), 626.621(6), 626.9541(1)(a)1., and 626.9541(1)(e)1., Florida Statutes (2006).

Count II charged that Mr. Carter's liquidation in 2010 of the MasterDex 10 to use the proceeds to purchase the EquiTrust Financial Services annuity 92F for J.K. violated sections

627.4554(4) (a), 627.4554(4) (c)2., 626.611(5), 626.611(7),
626.611(9), 626.611(13), 626.621(2), 626.621(6),
626.9541(1) (a)1., 626.9541(1) (e)1., 626.9541(1) (k)2., and
626.9541(1) (l), Florida Statutes (2010).

Count III charged that Mr. Carter caused J.K. to surrender a
Genworth Life Insurance Company of New York annuity in 2010 to
make an additional premium payment to J.K.'s EquiTrust 92F
annuity and that violated sections 627.4554(4) (a),
627.4554(4) (c)2., 626.611(5), 626.611(7), 626.611(9),
626.611(13), 626.621(2), 626.621(6), 626.9541(1) (a)1.,
626.9541(1) (e)1., 626.9541(1) (k)2., and 626.9541(1) (l), Florida
Statutes (2010).

Count IV charged Mr. Carter with violating sections
627.4554(4) (a), 627.4554(4) (c)2., 626.611(5), 626.611(7),
626.611(9), 626.611(13), 626.621(2), 626.621(6),
626.9541(1) (a)1., 626.9541(1) (e)1., and 626.9541(1) (l), Florida
Statutes (2010), by causing the liquidation of a RiverSource Life
Insurance Company annuity contract of W.K. and J.K.

Count V charged that in 2010 Mr. Carter attempted to gain
control over the Great American annuity policies of W.K and J.K.
by using a power of attorney, given to J.K. by W.K, to change the
agent-of-record for those policies and liquidate the policies.
This, Count V charges, violated sections 627.4554(4) (a),
627.4554(4) (c)2., 626.611(5), 626.611(7), 626.611(9),

626.611(13), 626.621(2), 626.621(6), 626.9541(1)(a)1., 626.9541(1)(e)1., 626.9541(1)(k)2., and 626.9541(1)(l), Florida Statutes (2010).

Count VI charged that in 2010 Mr. Carter violated sections 626.611(5), 626.611(7), 626.611(9), 626.9541(1)(a)1., and 626.9541(1)(e)1., Florida Statutes (2010), by causing K.D. (then age 82) and G.D. (then age 75) to liquidate certificates of deposit worth \$330,000 to purchase two Allianz MasterDex 10 insurance annuities.

Count VII charged that in 2010 Mr. Carter violated sections 627.4554(4)(a), 627.4554(4)(c)2., 626.611(5), 626.611(7), 626.611(9), 626.611(13), 626.621(2), 626.621(6), 626.9541(1)(a)1., and 626.9541(1)(e)1., Florida Statutes (2010), by causing G.B. (age 79 at the time) to liquidate brokerage accounts and use the proceeds to purchase two EquiTrust annuities.

Mr. Carter requested a hearing, and the Department referred the matter to the Division of Administrative Hearings to conduct the requested hearing. The hearing was scheduled for January 10, 2012. After two agreed-upon continuances, the hearing was conducted in Tampa, Florida, during June and July of 2012.

The Department presented the testimony of G.B., Mercedes Bujamas, G.D. (transcript and exhibits), J.K., Karen Ortega, Paula Rego, Christopher Trombetta (transcript and exhibits), and

Brenda Troup. Department Exhibits 1, 6, 9, 11 through 13, 19, 20, 23 through 31, 33 through 35, 39, 41 through 44, 47 through 54, 56 through 61, 63 through 73, 75 (page 215) through 77, 79, 80, 87 through 91, 93 through 96, 98, 102, 104, 107 through 109, 117 through 122, 127 through 129, 131, 148, 150 through 169, 171 through 273, 276, and 278 through 283 were admitted into evidence. Department Exhibits A and B were also admitted.

Mr. Carter testified and presented the testimony of Christopher Drew and Robert Leone.

A Transcript of nine volumes was filed, and the time for filing proposed recommended orders was extended. The parties timely filed proposed recommended orders. Mr. Carter also submitted timelines as attachments to his proposed recommended order. The parties' proposals have been considered in the preparation of this recommended order.

FINDINGS OF FACT

1. At all times material to this proceeding, the Legislature has vested the Department with the authority to administer the disciplinary provisions of Chapter 626, Florida Statutes. § 20.121(2)(g) and (h)1.d., Fla. Stat. (2011).

2. At all times material to his proceeding, Mr. Carter was licensed by the Department as a Florida life (including variable annuity) agent (2-14), life including variable annuity and health agent (2-15), life insurance agent (2-16) and life and health

agent (2-18). He has been appointed as an agent for several different life insurance companies, including Allianz, EquiTrust and Great American, but not RiverSource.

Counts I through V--W.K. and J.K.

2006, J.K. and W.K., and the MasterDex 10

3. J.K. was born in 1937 in Madrid Spain, where she finished high school. Spanish is J.K.'s native tongue. She cannot write in English and does not speak or understand English well. When J.K. was 17, she met W.K., a member of the United States' armed services. They married in Spain.

4. Six months after the marriage, the newlyweds moved to Brooklyn, New York, W.K.'s home. They later relocated to Florida. W. K. constructed a mall in New Port Richey containing 18 stores that included a restaurant and a frame shop. J.K. ran the frame shop. Wal-Mart eventually bought the mall. By 2006, J.K. and W.K. had accumulated approximately two million dollars in brokerage investments.

5. Until the decline of his health and mental faculties in 2008, W.K. handled all financial matters for the couple. J.K. did not understand them or have any interest in them.

6. In 2006, J.K. and W.K. met Mr. Carter, who began marketing annuities to them. J.K.'s testimony demonstrated that her memory was significantly impaired. That fact, combined with the fact that W.K. had died several years before the hearing,

limit the ability to determine what representations Mr. Carter made to J.K. and W.K. or what information or instructions they gave him.

7. On July 25, 2006, W.K. applied for a MasterDex 10 annuity policy from Allianz Life Insurance Company of North America. He paid an initial premium of \$603,470.34 for the policy. W.K. was 73 years old at the time.

8. W.K. obtained the money to fund the policy from the couple's Merrill Lynch brokerage account. Mr. Carter knew this.

9. As part of the annuity application process, Mr. Carter submitted an Allianz "Product Suitability Form" for W.K. Completion of the form is a prerequisite to processing the application and issuing the policy. The stated purpose of the form is "to confirm that your [the applicant's] annuity purchase suits your current financial situation and long-term goals."

10. The form, signed by W.K. and Mr. Carter, stated that an annuity was the source of the funds for payment of the annuity's premium. This statement was not accurate. Mr. Carter knew that it was not accurate.

11. Signing and submitting the application with the suitability form containing this known incorrect statement was a willful deception by Mr. Carter with regard to the policy.

12. Signing and submitting the application with the suitability form containing this known incorrect statement was a dishonest practice in his conduct of the business of insurance.

13. The suitability form also indicated that W.K. expected the annuity to provide him a steady stream of income in six to nine years.

14. Allianz accepted the application and issued the policy. Mr. Carter received a commission of \$66,381.73.

15. The MasterDex 10 is a complex financial product with many difficult to understand restrictions, conditions, interest options, bonuses, penalties, and limitations. The MasterDex 10 that W.K. and J.K. purchased paid interest linked to the performance of the Standard and Poors 500 stock market index. It also guaranteed interest of at least one percent.

16. A "Nursing Home Benefit" was one of the options the MasterDex 10 provided. The "benefit" permitted the policy holder to receive payments of the full "annuitization" value of the policy over a period of five years or more if the holder was confined to a nursing home for 30 out of 35 consecutive days.

17. The "annuitization value" is the maximum value that the policy can reach. It is the total of all payments that would be made to the holder if he either (1) let the premium and interest earned accumulate for a minimum of five contract years and then took ten years of interest only payments, followed by a lump sum

payment of the annuitization value or (2) equal payments of principal and interest over ten or more years.

18. Policy holders could make additional premium payments to increase the policy value. The policy also permitted limited withdrawals without penalty. After holding the policy for 12 months after the most recent premium payment, a holder could, without penalty, withdraw up to ten percent of the premium paid once a year until a maximum of 50 percent of the premium had been withdrawn. This meant that after one year passed, W.K. could make five annual withdrawals of \$60,347.03.

19. The policy also provided for loans on the annuity.

20. In the years following this transaction, Mr. Carter maintained contact with W.K. and J.K. by periodically asking them to join him at a restaurant for lunch.

Decline of W.K.'s Health

21. While visiting his mother in Greece in 2008, W.K. fell and hit his head. Afterwards his health declined. On June 3, 2008, W.K. was diagnosed with Alzheimer's disease and determined to be unable to make sound financial and medical decisions. From June 2008, forward, J.K. was very worried about W.K.'s health, caring for him, and making him as comfortable as possible.

22. On November 5, 2008, W.K., at Mr. Carter's suggestion, executed a Durable Power of Attorney, prepared for her by a

lawyer, giving J.K. broad authority to act on his behalf in financial matters.

23. At some point, W.K. was admitted to the Bear Creek Skilled Nursing Center and resided there for a period of time. On April 4, 2010, he was discharged from Bear Creek. W.K. resided in Bear Creek for a period of time. Although there is some hearsay evidence about when W.K. entered Bear Creek, the evidence does not corroborate direct evidence or hearsay evidence that would be admissible over objection in circuit court, sufficient to prove when W.K. entered Bear Creek. Consequently, the evidence does not establish the length of time that W.K. spent in the facility and does not establish that W.K. would have been eligible for the "Nursing Home Benefit" described in paragraph 16.

24. After W.K. returned home in April, J.K. engaged an enterprise called "Granny Nannies" to provide caretakers at home. The services cost approximately \$12,000 per month.

25. During this period J.K.'s health also declined markedly. Among other things, she had appendicitis and breast cancer. Treatment of the cancer required chemotherapy, which left her in pain and exhausted. During this time Mr. Carter obtained a copy of the power of attorney executed by W.K. in favor of J.K.

26. On June 18, 2010, the court appointed Paula Rego as guardian for W.K and J.K. with authority to act on their behalf in all matters affecting property rights.

27. On November 26, 2010, W.K. died in hospice care after a short hospital stay.

The Events of 2010

28. In December 2009, J.K. met with insurance sales agents and sisters Kimberly Trotter and Chandra Valdez. J.K. had responded to a mail solicitation by them. During the meeting, J.K. and Mss. Trotter and Valdez realized that J.K. knew them because J.K. and W.K. had rented space to the sisters' parents.

29. Capitalizing on the connection and J.K.'s concerns about paying the monthly costs of care for W.K., Ms. Trotter and Ms. Valdez began providing financial advice and marketing annuity products that they sold. They advocated liquidating W.K.'s and J.K.'s existing annuities, including the MasterDex 10.

30. In December 2009, Ms. Trotter and Ms. Valdez sold W.K. and J.K. two annuities with Great American for approximately \$661,098.

31. On January 28, 2010, W.K. authorized J.K. and Ms. Trotter to access policy information.

32. In January 2010, Ms. Trotter attempted to liquidate the MasterDex 10 policy and transfer the funds to Great American.

33. Allianz notified Mr. Carter of this in February 2010. He intervened to stop the transfer.

34. On March 3, 2010, Allianz received another request to liquidate the MasterDex 10 from J.K. Allianz sent her what it calls a "conservation letter." The purpose of the letter is to "conserve" the business with the company. The letter also identified needed information, including a copy of J.K.'s power of attorney for W.K.

35. On March 4, 2010, Allianz notified Mr. Carter of the liquidation request. He contacted J.K. and began a successful effort to obtain a letter asking to reverse the liquidation.

36. On March 17, 2010, Ms. Trotter or Ms. Valdez again convinced J.K. to liquidate the MasterDex 10 funds and transfer them to Great American. Again Mr. Carter acted to stop the liquidation.

37. On March 23, 2010, J.K. signed a letter written by Mr. Carter asking for William Pearson to be her new financial advisor. Mr. Carter sent the letter to RiverSource, a company that issued another annuity policy of J.K.'s. J.K. did not know who Mr. Pearson was. She only signed the letter because Mr. Carter told her that it would help her save money.

38. On March 26, 2010, J.K. submitted a liquidation request form for the MasterDex 10 signing it on behalf of herself

and W.K. J.K. submitted the request at the urging of Ms. Trotter and/or Ms. Valdez.

39. Allianz received the request on March 31, 2010. It began processing the full liquidation of the annuity policy.

40. On April 1, 2010, Mr. Carter sent Allianz a letter saying that J.K. did not want to liquidate W.K.'s MasterDex 10 policy. The letter claimed that this was the second time that competing agents had tried to cancel the policy. Allianz reinstated the policy.

41. On April 1, 2010, Mr. Carter sent a handwritten letter to Great American stating that J.K. did not want the MasterDex 10 policy canceled. The letter refers to having previously provided the power of attorney. Mr. Carter signed the letter. J.K. signed the letter on behalf of W.K. and herself.

42. On April 7, 2010, Great American received a typewritten letter addressed to "To Whom It May Concern" stating that J.K. and W.K. wanted to transfer their funds to Great American since "December and January" and that J.K. did not see Mr. Carter on April 1 and did not sign a letter that he sent.

43. On April 9, 2010, Mr. Carter wrote and sent a letter, signed by J.K. at his request, asking Great American to cancel the policies sold by Ms. Trotter and Ms. Valdez and waive all surrender charges. The letter states that J.K. is fighting cancer and that the agents forced her to sign the policy

documents. Mr. Carter included with the letter a Withdrawal/Surrender Request Form completed by him and signed by J.K.

44. On April 23, 2010, Mr. Carter wrote a letter to Allianz stating that J.K. needed more than ten percent of the value of the MasterDex 10 policy (the penalty-free withdrawal permitted) to provide the funds needed to take care of W.K. The letter states that W.K. and J.K. wished to change ownership of the policy to J.K. only and then to fully surrender the policy.

45. Mr. Carter's letter is signed by J.K. on her behalf and on behalf of W.K. Mr. Carter enclosed forms with the same date, which he prepared for J.K.'s signature, requesting the change of ownership and liquidation.

46. Allianz sent J.K. a letter, with a copy to Mr. Carter, on April 29, 2010, identifying alternatives to liquidating MasterDex 10 for getting the money needed to care for W.K. The Allianz letter also disclosed that liquidating the policy would result in a substantial loss of money.

47. In part, the letter stated:

We understand you wish to surrender your annuity policy. As we review your request, we want to be certain you are aware of all the alternatives that are available to you. This information can help you make an informed decision based on your best financial interests.

It is possible for you to access a portion of your policy's value while your policy remains in deferral. This would allow its value to continue to grow tax-deferred, and still provide the cash you need. Your annuity may permit you to take a free withdrawal, policy loan, or partial surrender.

Finally, it's important to realize exactly how much you will be giving up should you decide to fully surrender your policy. Your policy's current Accumulation Value is \$751,566.07 and its Surrender Value is \$585,014.49. By surrendering your policy now, you are giving up the difference between these two values [\$166,551.58].

Any one of these options could provide you with needed cash while allowing you to receive your full accumulation value in cash after your policy's 10-year surrender charge period.

48. The letter provided a ten-day period, called a conservation period, during which J.K. could withdraw her request to liquidate the policy.

49. Mr. Carter called Allianz on April 30, 2010, and spoke to Amber Hendrickson. In the recording of the conversation, Mr. Carter sounds agitated and speaks forcefully. J.K. participated in the telephone call. She is quiet and deferential. In the call, J.K. waives the ten-day "conservation" period. Mr. Carter insists that Allianz process the surrender swiftly.

50. Allianz processed the liquidation of the MasterDex 10 on April 30, 2010. It wired funds from the liquidated annuity to J.K.'s Regions Bank account the same day.

51. On April 30, 2010, J.K. signed a check for \$475,000 to EquiTrust Life Insurance Company to purchase an annuity. Mr. Carter wrote the check. Also on April 30, 2010, J.K. signed an EquiTrust annuity application completed by Mr. Carter. The form indicates that the policy is not replacing an existing annuity contract. This is not an accurate representation.

52. On April 30, 2010, Mr. Carter also completed an Annuity Suitability Questionnaire for J.K. to sign and submit with the EquiTrust application. He indicated that J.K. had income from a pension. Mr. Carter knew that this was not accurate.

53. Mr. Carter also indicated that J.K.'s income was adequate to cover all expenses, including medical. He knew this was not accurate because he was fully aware of the cost of W.K.'s caregivers and J.K.'s concern about them.

54. The form, as completed by Mr. Carter, is misleading about the source of the funds for purchase of the annuity. He made the technically correct representation that the funds come from a checking account. But the funds were from the liquidation of the MasterDex 10 and were placed in the checking account the same day the application was completed. The funds were actually from the liquidation of the MasterDex 10 annuity.

55. The form also stated that the proposed annuity would not replace any product. Mr. Carter knew this was not accurate also. He knew that the EquiTrust annuity was replacing the MasterDex 10, albeit in a lower amount, because J.K. kept some cash and lost a good deal of money in surrender costs.

56. A letter Mr. Carter sent to EquiTrust on August 16, 2010, when it was investigating complaints about J.K.'s purchase of the annuity, demonstrates that he knew the EquiTrust annuity was replacing the MasterDex 10.

57. Mr. Carter's letter described the surrender and purchase this way: "An amount of \$475,000 was placed into the EquiTrust Annuity (Market Power Bonus Index's Fixed account), the remaining balance of \$110,038.75 was sent to her checking account, plus two other accounts valued at \$50,000 that were closed, and a Jefferson National check that wasn't cashed for \$3,500."

58. Also, on April 23, 2010, J.K. signed, on behalf of herself and W.K., a Surrender/Withdrawal Request to RiverSource asking for the full withdrawal of the net accumulation value of their annuity contract with RiverSource. RiverSource sent J.K. a check for \$26,430.07. It deducted \$2,158.32 for a withdrawal charge and \$295.98 for a "rider charge" from the full value of \$28,884.37.

59. On May 5, 2010, EquiTrust received J.K.'s policy application documents and check. EquiTrust required additional documents including a financial needs analysis form.

60. Mr. Carter sought an exception to the requirement for a financial needs analysis form. He did not receive the exception.

61. On May 6, 2010, Mr. Carter sent EquiTrust the required financial needs analysis form. He completed the form for J.K., who was 72 at the time. J.K. also signed this form. The form repeats some of the incorrect statements of the previous forms. It is also includes additional incorrect statements.

62. The instructions for the section about "Replacements" states, "complete if an existing life insurance policy or annuity contract will be used to fund this product." Mr. Carter checked "no" as the response to the question: "Is the agent assisting you with this annuity purchase the same agent on the life insurance policy or annuity contract being replaced?" This indicates he is aware that the policy replaces the MasterDex 10. The response was also a representation that he knew to be false, because he was the agent on the policy being replaced.

63. Mr. Carter also indicated on the needs analysis form that the source of funds for the EquiTrust annuity purchase was "Stocks/Bonds/Mutual Funds." Mr. Carter knew that this representation was not correct. It was also inconsistent with

the statement on the suitability questionnaire that the funds came from a checking account.

64. On May 18, 2010, J.K. signed a letter, written by Mr. Carter, asking for William Pearson to be her new financial advisor. Mr. Carter sent the letter to Genworth, a company holding another annuity policy of J.K.'s. J.K. did not know who Mr. Pearson was and only signed the letter because Mr. Carter told her that it would help her save money.

65. J.K. signed a letter, dated May 20, 2010, instructing EquiTrust to cancel the annuity she had with it.

66. On May 23, 2010, Mr. Pearson submitted a form, signed by J.K., using the power of attorney, asking Genworth to liquidate an annuity held for W.K.

67. On May 26, 2010, EquiTrust received the request to cancel J.K.'s policy and advised Mr. Carter.

68. On May 31, 2010, Mr. Carter sent EquiTrust a letter saying that J.K. did not want to cancel and enclosed a letter he prepared, dated May 26, 2010, and signed by J.K. asking EquiTrust to withdraw the cancelation request. The letter also stated that an agent who provided her untruthful information initiated the request.

69. On June 2, 2010, at Mr. Carter's urging, J.K. sent EquiTrust a letter saying she wanted to keep the EquiTrust policy.

70. On June 2, 2010, Mr. Carter sent, by facsimile, a letter written by him and signed by J.K. asking Great American to make Peter Gotsis her annuity agent. J.K. did not know Peter Gotsis and only signed the letter because Mr. Carter asked her to.

71. On June 29, 2010, EquiTrust received a check for an additional \$90,302.19 premium for J.K.'s policy.

72. In July 2010, with the assistance of employees at her bank and others, J.K. contacted an attorney.

73. The attorney, Joan Hook, contacted Mr. Carter and the various companies with annuities. Due to the efforts of Ms. Hook, J.K.'s guardian, Ms. Rego, Ms. Karen Ortega of the Department, and others, the series of transactions were undone and J.K. returned to her position before the liquidation of the MasterDex 10 annuity.

74. From December 2010 forward, it was clear to Mr. Carter or anyone else having regular dealings with J.K. that she is confused, uninformed about financial matters, compliant, reasoning poorly, and not capable of making sound decisions.

75. J.K.'s testimony demonstrated that her memory was significantly impaired. That fact combined with the fact that W.K. died several years before the hearing, makes it impossible to determine what representations Mr. Carter made to W.K. and

J.K. and to determine what information or instructions they gave him.

76. Much of the evidence related to Counts I through V is hearsay evidence that would not be admissible over objection in a civil action. In addition, there is no expert testimony evaluating the facts of record and analyzing the suitability of the investments advocated by Mr. Carter. Also, there is no evidence of the life expectancy of W.K. and J.K., which is an important factor in evaluating suitability of annuity products. Consequently, the record is inadequate for determining the reasonableness or suitability of the various products promoted by Mr. Carter or of the liquidation of the MasterDex 10.

77. Mr. Carter willfully misrepresented information with regard to the applications for the Allianz and the EquiTrust annuities. This was dishonest. In the process, Mr. Carter also demonstrated a lack of trustworthiness to engage in the business of insurance. These willful misrepresentations were false material statements knowingly delivered to Allianz and EquiTrust.

Count VI--G.D. and K.D.

78. G.D. lives in New Port Richey, Florida, where she moved from New York about 40 years ago. She was born on January 17, 1935, and has a ninth-grade education.

79. G.D. had worked as a courier. Her investment experience consists of funding certificates of deposit (CDs),

placing money in a mutual fund, and purchasing a Transamerica annuity. She is frugal and a conservative investor.

80. G.D. is married to K.D. who was born April 12, 1927. Both are retired.

81. G.D. met Mr. Carter in January 2010, when she responded to a postcard that he sent suggesting that he could save her money on taxes on social security payments. At that time, G.D. was 75 years old and K.D. was 83.

82. G.D. was and is in bad health due to having suffered four strokes. She had difficulty speaking to Mr. Carter during his sales presentations.

83. G.D. and K.D. disclosed to Mr. Carter that their total monthly family income, including social security and K.D.'s pension income, was approximately \$2,400.00. They also disclosed that their assets included approximately \$325,000.00 in CDs held with Suncoast Schools Federal Credit Union. G.D. and K.D. each owned an annuity, one with Hartford and one with Transamerica, which they told Mr. Carter about. Together, the annuities had a value of approximately \$85,000. G.D. and K.D. also had approximately \$66,000 in a money market account.

84. Mr. Carter convinced G.D. and K.D. to liquidate their CDs to purchase two Allianz annuities called a MasterDex 10 Plus. One required payment of a \$38,219.39 premium. The other required payment of a \$287,365.00 premium. The couple applied for the

annuities for G.D., with K.D. as the beneficiary, because he was the older of the two. Mr. Carter completed the applications, which they signed.

85. Part six of the applications is titled: "Replacement (this section must be completed)." It asks two questions. The first is: "Do you have existing life insurance or annuity contracts?" Mr. Carter checked "no" as an answer. This was not correct, and he knew it.

86. The second question asks: "Will the annuity contract applied for replace or change existing contract or policies?" This Mr. Carter correctly answered "no." Section six also asks for the amount of coverage in force. Mr. Carter did not provide this information.

87. Mr. Carter also completed the Florida Senior Consumer Suitability Form Questionnaire for G.D. and K.D., which they signed. The form accurately reflects the couple's net worth, liquid assets, and income. It reports correctly that they owned or had owned CDs, fixed annuities, and variable annuities. The completed form also accurately reflects the couple's desire for guaranteed income. The form discloses that the annuity must be owned a minimum of 15 years to receive its maximum value.

88. The MasterDex 10 Plus annuity is a complicated financial product with a ten percent "bonus" that the buyer does not receive unless she holds the policy for 15 years. In fact,

holding the policy for 15 years is the only way to get the full benefit of the policy. While money may be withdrawn earlier, that results in losses of the benefits and in some cases penalties. For instance, if a policy holder chooses to liquidate the policy, the value she receives is only 87.5 percent of the premium paid with one percent interest for the period held.

89. These provisions have a substantial financial effect on the benefits of the annuity. For example, in the fifth year, the cash surrender value of the \$38,219.49 premium policy is \$36,027.00.

90. About ten months after purchasing the annuities, G.D. and K.D. began having second thoughts about the purchase of the annuities. G.D. consulted with the financial advisor "Wayne" at her bank.

91. G.D. later concluded that she had also misunderstood the interest rate. Mr. Carter had shown her sales material with the ten percent "bonus," which generated a high interest rate of 13.3 percent for one year. But G.D. did not understand that the interest rate only applied in one year, and the money was not immediately available.

92. On November 17, 2010, G.D., with Wayne's help, composed a complaint letter to Allianz that summarized her complaints and requested that her premium payments be returned without fees.

93. On November 28, 2010, Carter responded with a letter to Allianz defending his annuity sales.

94. On December 17, 2010, Allianz's employee, Mary Lou Fleischacker, advised G.D. by letter that the "free look" period for cancelling the contracts had passed. But Fleischacker did request further information about the sales.

95. By two letters dated January 10, 2011, Allianz advised G.D. that she would suffer over \$80,000 in penalties if she canceled the contracts.

96. G.D.'s efforts to terminate the annuities prompted Carter to come uninvited into G.D.'s home and insistently demand that G.D. telephone Allianz and cancel her attempt to rescind the contracts. He also asked her, without explanation, to wait one week before liquidating the policies.

97. G.D. refused. Carter repeatedly telephoned G.D. and returned uninvited to the house several times making the same demand. G.D. refused to answer her door.

98. Mr. Carter came to G.D.'s daughter's house uninvited one evening, told her that her mother was going to lose a lot of money, and revealed her mother's financial matters to her.

99. Mr. Carter demanded that G.D.'s daughter deliver to her mother for signature a letter he wrote rescinding the liquidation requests. G.D.'s daughter agreed to get Carter to leave. G.D.'s daughter feared for her mother's safety because of Mr. Carter's

harassing telephone calls to her and her mother. She urged her mother to call the police.

100. G.D. called the police and a New Port Richey officer told Mr. Carter to cease the harassment, and then filed a report on January 13, 2011. Mr. Carter did not contact G.D. or her daughter after that.

101. Eventually, with the assistance of Department Investigator Ortega, G.D. was able to obtain the return of her funds from Allianz.

102. There is no expert testimony evaluating the facts of record and analyzing the suitability of the investments advocated by Mr. Carter. Also, there is no evidence of the life expectancy of G.D. and K.D., which is an important factor in evaluating suitability of annuity products. Consequently, the record is inadequate for determining the reasonableness or suitability of the liquidation of the CDs and purchase of the MasterDex 10 Plus annuities as promoted and sold by Mr. Carter.

103. Mr. Carter willfully misrepresented information with regard to the applications for the MasterDex 10 Plus annuity. This was dishonest. In the process, Mr. Carter also demonstrated a lack of trustworthiness to engage in the business of insurance. These willful misrepresentations were false material statements knowingly delivered to Allianz. Mr. Carter's repeated, persistent, and overbearing efforts to require G.D. to speak with

him about the cancelation and withdraw it demonstrate a lack of fitness to engage in the business of insurance.

Count VII--G.B.

104. G.B. was born on January 14, 1930. She has a high school education. G.B. worked at and retired from Lucent Technology wiring telephone boards. She receives a small pension. Her husband, K.B., managed their financial affairs before he died ten years ago.

105. Before K.B.'s death, the couple maintained investment accounts with Schwab. After K.B.'s death, Schwab employee, Barry Tallman, recommended that G.B. seek financial advice from Christopher Trombetta, CPA. She did so.

106. Mr. Carter and a colleague, Christopher Drew, met with G.B. on June 29, 2010. She was 70 years old, timid, and easily confused.

107. G.B. had responded to a promotional postcard she received from them purporting that the law governing taxes on social security income had changed and that they could lower her taxes. Mr. Carter was the person who presented G.B. information and persuaded her to purchase an annuity in the course of a meeting that lasted one to two hours.

108. The evidence does not permit a determination of what representations and information Mr. Carter presented in his sales meeting with G.B. Her memory of the meeting was not distinct.

She was confused about the meeting and did not remember facts precisely or explicitly.

109. Mr. Carter completed applications for EquiTrust annuity products. G.B. signed the applications. Mr. Carter also completed financial needs analyses. G.B. signed them also. A box that asks if the applicant is aware that the annuity may be "a long-term contract with substantial penalties for early withdrawal" was checked "yes." The form also accurately represented that the source of funds for the annuity premium was stocks, bonds, or mutual funds. The other representations in the form were accurate.

110. Mr. Carter persuaded G.B. to purchase two EquiTrust Market Power Plus annuities. G.B. signed two EquiTrust annuity contracts ending with 29F (E-29F) and 30F (E-30F). The initial premium for E-29F was \$458,832.71. The initial premium for E-30F was \$118,870.34. Both annuities were designed to provide G.B. with income in 2036.

111. The funds for the premium came from the liquidation of her stock brokerage account.

112. Both contracts had 20 percent surrender charges for the first two years of ownership. G.B. could not have surrendered the contract with its full financial benefits without a penalty until she was 95 years old.

113. Mr. Carter delivered the annuity contracts to G.B. on August 6, 2010. The contracts provided G.B. the right to cancel the annuity by returning it within 15 days of the date she received it.

114. Soon afterwards, Barry Tallman notified G.B. that her Schwab accounts had been liquidated. Transamerica Agent William Pearson had liquidated the accounts to transfer the money for purchase of the EquiTrust annuities. She was surprised.

115. G.B. grew concerned about the annuities and consulted Mr. Trombetta and a financial advisor named Judith Gregory on September 20, 2010. With their assistance, G.B. wrote a complaint letter to EquiTrust asserting that Mr. Carter had assured her, among other things, that the annuities would protect her money should she enter a nursing home. G.B. wanted to cancel the annuities and have her full premium returned.

116. G.B.'s letter to EquiTrust said, "I do not want any calls or visits from the agent or the agent's office."

117. Mr. Carter learned of the effort to cancel the annuities.

118. On November 15, 2010, at Mr. Carter's suggestion, he and Mr. Drew returned to G.B.'s home uninvited and unannounced. Mr. Carter insisted on entering and speaking to G.B.

119. Mr. Carter began loudly and forcefully arguing with G.B. She telephoned Mr. Trombetta and asked that he speak to

Mr. Carter. Mr. Carter yelled at Mr. Trombetta. Mr. Trombetta credibly describes part of the conversation as follows:

And before I could barely get that out, Rick exploded on me. He snapped and he started cursing up and down. F'n me up one side and down the other. And "you don't f'n know what you are talking about. You don't care about this person. You don't f'n know what you are doing;" and this and that.

120. When G.B. returned to the telephone to speak with Mr. Trombetta, he advised her to call the police if Mr. Carter did not leave her house within five minutes.

121. Mr. Carter and Mr. Drew left.

122. EquiTrust eventually returned over \$600,000 to G.B.

123. There is no expert testimony evaluating and analyzing the suitability of the investments advocated by Mr. Carter. Also, there is no evidence of G.B.'s life expectancy which is an important factor in evaluating suitability of annuity products. Consequently, the record is inadequate for determining the reasonableness or suitability of the two annuities Mr. Carter sold G.B.

124. Mr. Carter's conduct, in his unannounced visit to G.B. to try to persuade her to change her plans to liquidate the annuities and his conversation with Mr. Trombetta, demonstrated a lack of fitness to engage in the business of insurance.

CONCLUSIONS OF LAW

Burden and Standard of Proof

125. The Department seeks to impose penalties upon Mr. Carter. Therefore, the statutes and rules the Department charges that Mr. Carter violated must be strictly construed, with ambiguities resolved in favor of Mr. Carter. Lester v. Dep't of Prof'l & Occ. Reg., 348 So. 2d 923, 925 (Fla. 1st DCA 1977). The Department must prove the charges specifically alleged in the Administrative Complaint by clear and convincing evidence. Ferris v. Turlington, 510 So. 2d 292, 294 (Fla. 1987); McKinney v. Castor, 667 So. 2d 387, 388 (Fla. 1st DCA 1995); Kinney v. Dep't of State, 501 So. 2d 129, 133 (Fla. 5th DCA 1987).

126. Clear and convincing evidence is an "intermediate standard," "requir[ing] more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" In re Graziano, 696 So. 2d 744, 753 (Fla. 1997). For proof to be considered

"[C]lear and convincing" . . . the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In re Davey, 645 So. 2d 398, 404 (Fla. 1994), quoting, with approval, from Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983); see also In re Adoption of Baby E. A. W., 658 So. 2d 961, 967 (Fla. 1995) ("The evidence [in order to be clear and convincing] must be sufficient to convince the trier of fact without hesitancy."). "Although this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous." Westinghouse Electric Corp. v. Shuler Bros., Inc., 590 So. 2d 986, 989 (Fla. 1st DCA 1991).

Violations Charged

127. The alleged violations occurred in various years. The statutes involved are the same for all of the years during which violations are alleged to have occurred, with two exceptions. The first is that section 627.4554(4) is the same for the years 2006, 2009, and 2010, except that the 2010 version mysteriously includes "objectively" before reasonable basis. Chapter 2010-175, Laws of Florida, is the only law amending section 627.4554 in 2010. It does not make any changes to section 627.4554(4). Nonetheless, the addition of "objectively," however it occurred, is not material since it is redundant to interpretation of this statute. The stated purpose of the statute is convincing enough authority that "reasonable" should be construed as meaning objectively reasonable, not reasonable in the eyes of the person selling the annuity. The second exception

is variations in the penalty provisions of section 626.9521(2). Because the statutes are for the most part identical, they are cited without reference to the year of the statute unless there are differences between the statutes for different years.

128. Section 627.4554, titled "Annuity investments by seniors," imposes specific obligations upon individuals marketing annuities to seniors. It defines "senior consumer" as "a person 65 years of age or older." If the purchase is a joint purchase, the purchasers are considered seniors if any of them are age 65 or older. § 627.4554(3)(c). All of the consumers to whom Mr. Carter sold annuities were seniors.

129. The declared purpose of the section is: "to set forth standards and procedures for making recommendations to senior consumers which result in a transaction involving annuity products to appropriately address the insurance needs and financial objectives of senior consumers at the time of the transaction." § 627.4554(1).

130. Rule 69B-215.210 declares:

The Business of Life Insurance is hereby declared to be a public trust in which service all agents of all companies have a common obligation to work together in serving the best interests of the insuring public, by understanding and observing the laws governing Life Insurance in letter and in spirit by presenting accurately and completely every fact essential to a client's decision, and by being fair in all relations with colleagues and competitors

always placing the policyholder's interests first.

131. Section 627.4554(4) (a) imposes a duty towards senior consumers on insurers and insurance agents. It provides:

In recommending to a senior consumer the purchase or exchange of an annuity that results in another insurance transaction or series of insurance transactions, an insurance agent, or an insurer if no insurance agent is involved, must have an objectively reasonable basis for believing that the recommendation is suitable for the senior consumer based on the facts disclosed by the senior consumer as to his or her investments and other insurance products and as to his or her financial situation and needs.

132. The Department did not prove by clear and convincing evidence that Mr. Carter violated this statute.

133. Section 627.4554(4) (c)2. provides that: "[a]n insurer or insurance agent's recommendation subject to subparagraph 1 shall be objectively reasonable under all the circumstances actually known to the insurer or insurance agent at the time of the recommendation." The Department did not prove by clear and convincing evidence that Mr. Carter violated this statute.

134. Section 626.611(5) provides for disciplinary action for "[w]illful 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." The Department did

not prove by clear and convincing evidence that Mr. Carter violated this statute.

135. Section 626.611(7) provides for disciplinary action for a: "Demonstrated lack of fitness or trustworthiness to engage in the business of insurance." The clear and convincing evidence established that Mr. Carter demonstrated a lack of trustworthiness to engage in the business of insurance by the deliberate misrepresentations in the applications of J.K., W.K., and G.D. The clear and convincing evidence proved that Mr. Carter's conduct, when trying to stop G.D. and G.B. from liquidating their annuities, demonstrated a lack of fitness to engage in the business of insurance.

136. Section 626.611(9) authorizes discipline for: "Fraudulent or dishonest practices in the conduct of business under the license or appointment." Clear and convincing evidence proved that Mr. Carter's willful misrepresentations in the annuity applications of J.K., W.K., and G.D. violated this statute.

137. Section 626.611(13) permits discipline for: "Willful failure to comply with, or willful violation of, any proper order or rule of the department or willfully violation of any provision of this code." Clear and convincing evidence demonstrated that Mr. Carter violated several provisions of the code as established

in this Recommended Order. The Department did not prove a violation of any order or rule of the Department.

138. Similarly to section 626.611(13), section 626.621 establishes discretionary grounds for suspension or revocation of a license. Section 626.621(2) permits disciplinary action for: "Violation of any provision of this code or of any other law applicable to the business of insurance in the course of dealing under the license or appointment." Clear and convincing evidence demonstrated that Mr. Carter violated several provisions of the code as established in this Recommended Order.

139. Section 626.621(6) permits disciplinary action for: "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 or herself to be a source of injury or loss to the public." Part IX includes section 626.9541, which defines various unfair methods and unfair or deceptive acts or practices. Those charged here are listed in section 626.9541(1)(a)1. and 626.9541(1)(e)1.

140. Section 626.9541(1)(a)1. includes among the prohibited practices: "Knowingly making, issuing, circulating, or causing to be made, issued, or circulated, any estimate, illustration, circular, statement, sales presentation, omission, or comparison which . . . [m]isrepresents the benefits, advantages, conditions,

or terms of any insurance policy." The Department did not prove violation of this statute by clear and convincing evidence.

141. Section 626.9541(1)(e)1. includes among the prohibited practices making, publishing, disseminating, circulating, or delivering any false material statement. Clear and convincing evidence established that Mr. Carter made false statements in the applications of G.D and G.B. and delivered the statements to Allianz and EquiTrust.

142. Section 626.9541(1)(k)2 prohibits:

Knowingly making a material omission in the comparison of a life, health, or Medicare supplement insurance replacement policy with the policy it replaces for the purpose of obtaining a fee, commission, money, or other benefit from any insurer, agent, broker, or individual. For the purposes of this subparagraph, a material omission includes the failure to advise the insured of the existence and operation of a preexisting condition clause in the replacement policy.

The Department did not prove a violation of this statute by clear and convincing evidence.

143. Section 626.9541(1)(l) provides for discipline for "twisting." It defines "twisting" as follows:

Knowingly making any misleading representations or incomplete or fraudulent comparisons or fraudulent material omissions of or with respect to any insurance policies or insurers for the purpose of inducing, or tending to induce, any person to lapse, forfeit, surrender, terminate, retain, pledge, assign, borrow on, or convert any

insurance policy or to take out a policy of insurance in another insurer.

The Department did not prove a violation of this statute by clear and convincing evidence.

Penalty

144. Violation of section 626.611(5)--Rule 69B-231.080(5) establishes a nine-month suspension as the penalty for a violation of section 626.611(5). Mr. Carter violated this section twice.

145. Violation of section 626.611(7)--Rule 69B-231.080(7) establishes a six-month suspension as the penalty for violation of section 626.611(7). Mr. Carter violated this section twice.

146. Violation of section 626.611(9)--Rule 69B-231.080(9) establishes a 12-month suspension as the penalty for a violation of section 626.611(9). Mr. Carter violated this section twice.

147. Violation of section 626.9541(1)(e)1.--Rule 69B-231.100(12) establishes a 12-month suspension as the penalty for a violation of this section. Mr. Carter violated this statute twice.


148. The total of the penalties to be imposed because of Mr. Carter's violations is 78 months, applying the provision of Rule 69B-231.040(1)(a) that states a single act of misconduct may be grounds for multiple disciplinary actions. This is the "total penalty" as defined in rule 69B-231.040(2), which establishes the

procedure for aggregating penalties. The evidence does not prove the aggravating factors advanced by the Department. It also does not prove any mitigating factors. Therefore the "total penalty" is also the "final penalty." Rule 69B-231.040(3)(d) requires: "In the event that the final penalty would exceed a suspension of twenty-four (24) months, the final penalty shall be revocation.

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 revoking the licenses of Richard Edward Carter.

DONE AND ENTERED this 28th day of November, 2012, in Tallahassee, Leon County, Florida.



JOHN D. C. NEWTON, II
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of November, 2012.

ENDNOTES

1/ The issues are stated as stipulated by the parties.

2/ The consumers involved in this matter are referred to by their initials.

COPIES FURNISHED:

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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.