CHIEF FINANCIAL OFFICER
JEFF ATWATER
STATE OF FLORIDA

IN THE MATTER OF: Case No. 118324-11-AG

RICHARD EDWARD CARTER
_____/

This cause came on for consideration of and final agency action on the Recommended Order (R. O.) rendered by Administrative Law Judge (ALJ) John D.C. Newton on November 28, 2012, after a formal hearing was concluded on July 17, 2012. A copy of that Recommended Order is attached hereto as Exhibit A. Both the Department of Financial Services (Department) and Richard Edward Carter (Carter) timely filed exceptions to the Recommended Order, although Carter improperly also filed his with the Division of Administrative Hearings which had lost jurisdiction in this case with the rendition of the Recommended Order, rather than filing solely with this Department as instructed in writing by the ALJ. Neither party filed responses to the other's exceptions.

RULINGS ON CARTER'S EXCEPTIONS

1. Carter's first exception takes issue with the Finding of Fact that witness J. K. does not speak or understand English well. (Paragraph 3 of the R.O.) A review of the entire record shows that J. K. cannot write in the English language (Tr. 44- 48, 369) but, as a whole, it does not show that she cannot speak or understand the English language, and there is competent substantial testimony that she did not appear to lack that conversational facility at the hearing. (Tr. 58-59, 430). Accordingly, Carter's first

exception is accepted, and the Finding of Fact that J. K. "does not speak or understand English well." is rejected.

2. Carter's second exception contends that the Finding of Fact that W. K. handled all the financial affairs for the couple prior to his decline in health and death and that J. K. had no interest in such matters and no understanding of in them (Paragraph 5 of the R. O.) is "wholly unsupported by any credible evidence in the case." To the contrary, a review of the record shows competent substantial evidence to support the challenged finding. (Tr. 55-57, 59, 64, 75, 90-92, 94- 96, 104-105). Although J. K. admitted to substantial memory loss following her bouts with gallbladder problems, appendicitis, and breast cancer, for which chemotherapy was administered (Tr. 44, 76, 247-248), her core testimony that she played no part in the business affairs of the couple and left all such decisions to her husband remained unshaken throughout the hearing and was not undercut by impeachment or refutation. It is the function of a hearing officer to consider all the evidence presented and resolve all conflicts therein. *Walker v. Board of Professional Engineers*, 946 So.2d 604 (Fla. 1st DCA 2006); *Heifetz v. Department of Business Regulation, Div. of Alcoholic Beverages and Tobacco,* 475 So.2d 1277 (Fla. 1st DCA 1985). Only if there is **no** competent substantial evidence in the record to support a finding of fact may the agency reject a challenged finding of fact. Section 120.57(1)(l), Fla. Stat. Because the record contains competent substantial evidence to support the challenged finding, this exception is rejected.

3. Carter's third exception agrees with the ALJ's Finding of Fact that J. K. had a significant memory impairment, and that impairment limited the ALJ's ability to determine what representations Carter made to the couple. (Paragraph 6 of the R. O.)

An agreement is not an exception. Therefore, this "exception" is disregarded. However, the entire record shows that J. K.'s husband had died approximately two years before the hearing, and not "several years", as found by the ALJ. (Tr. 47, 248) Therefore, in the absence of any competent substantial evidence to support the "several years" finding, that factual finding is modified to state that J. K.'s husband had died approximately two years prior to the hearing.

4. Carter's fourth exception essentially contends that Carter's inconsistency in stating on the 2006 Allianz Product Suitability Form that the Allianz policy would replace an existing annuity, while stating to the contrary on the actual Allianz application form, was a mere mistake and not an intentional misrepresentation. (Paragraph 10 of the F. O.) Given the significance of those two inquiries and the effect the answers have on the carrier's decision as to how to proceed, and Mr. Carter's long experience in the industry (Tr. 1059, 1391-1396), such an argument lacks credibility, especially when compared to similar misrepresentations made by Mr. Carter on other forms submitted to other carriers on behalf of other witnesses in this case. The evidence of the contrary representations on the Allianz forms is evident from the forms themselves (Dept. Exhs. 118, 123), and needed no testimony from the carrier to supplement their content. In any event, as noted above, it is the function of a hearing officer to consider all the evidence presented and resolve all conflicts therein. *Walker v. Board of Professional Engineers*, 946 So.2d 604, *supra*; *Heifetz v. Department of Business Regulation, Div. of Alcoholic Beverages and Tobacco,supra* .Only if there is **no** competent substantial evidence in the record to support a finding of fact may the agency reject a challenged finding of fact.

Section 120.57(1)(l), Fla. Stat. Because the record contains competent substantial evidence to support the challenged finding, this exception is rejected.

5. Carter's fifth exception, directed to Paragraph 12 of the Recommended Order, is materially the same as his fourth exception, and is rejected for the same reasons as expressed above.

6. Carter's sixth exception contends that the ALJ misstated the commission Carter earned on the Allianz sale, arguing that the figure is not $66,381.73, as found in Paragraph 14 of the Recommended Order, apparently based on Department's Exhibit 11, but $54,312.33. However, Carter fails to show any record support for his figure. Moreover, as the ALJ's finding in that regard played no part in his findings and conclusions that are enunciated as support for his recommended disposition of this matter, it is immaterial to the outcome. Therefore, this exception is rejected.

7. Carter's seventh exception, directed to Paragraph 21 of the Recommended Order, admits that it is not related "...to any alleged bad conduct on the part of Carter..." Exceptions that admit of immateriality need not be addressed. Therefore, this "exception" is rejected.

8. Carter's eighth exception admits to the factual accuracy of Paragraph 25 of the Recommended Order, but objects to an inference Carter draws from that paragraph. Carter is thus objecting to his own inference and not to the Finding of Fact. This is not a proper exception, which requires a stated legal basis for its support, and not a mere inference drawn by the Respondent. Section 120.57(1)(k), Fla. Stat.

9. Carter's ninth exception attacks Paragraph 37 of the Recommended Order on the basis that the only record evidence in support of the Findings of Fact enunciated

therein was J. K.'s testimony. This is an admission that there is competent substantial evidence in the record to support the challenged finding. Only if there is **no** competent substantial evidence in the record to support a challenged finding of fact may the agency modify or reject that finding. Section 120.57(1)(l), Fla. Stat. Moreover, the exception overstates the ALJ's recognition of the extent of the impairment of J. K.'s memory, which he limited to verbal exchanges between J. K. and Carter as to what representations were made by Carter and what information was supplied to Carter by J. K. The ALJ made no finding that J.K's memory impairment extended to all her testimony, thus discrediting it. See, Paragraph 76 of the Recommended Order. Accordingly, this exception is rejected.

10. Carter's tenth exception takes issue with the Findings of Fact enunciated in Paragraph 43 of the Recommended Order on materially the same basis he posits in his ninth exception. For the same reasons expressed in rejecting that exception, this tenth exception is rejected.

11. Carter's eleventh exception is directed to Paragraph 43 of the Recommended Order, and argues that the only evidence that a letter dated April 9th was written and sent at Mr. Carter's request came from J. K.'s testimony, and that the ALJ in Paragraph 6 of the Recommended Order had already found J. K's testimony unreliable. Once again, Carter overstates the qualification the ALJ placed on J. K.'s testimony, and thereby once again admits that there is competent substantial evidence in the record to support the challenged finding. Moreover, the exception points out no impeachment or refutation of J. K's testimony in that regard. Accordingly, this exception is rejected.

12. Carter's twelfth exception is directed to Paragraph 51 of the Recommended Order, wherein the ALJ found that the Equitrust policy replaced the Allianz policy, contrary to representations intentionally made by Carter on the Equitrust policy application form. (Dept's. Exh. 23). The essence of Carter's exception is that because the Allianz surrender proceeds were deposited into J. K.'s checking account and intermixed with other funds already in that account, which intermixed funds were then used to purchase the Equitrust policy, there was no "replacement" of the Allianz policy. However, the record shows that the funds already in J. K.'s checking account prior to the Allianz proceeds deposit were inadequate to purchase the Equitrust policy (Tr. 1370, Dept's Exh. 23), that the Equitrust policy was purchased within several days of the surrender of the Allianz policy (Tr. 1392), and that Carter knew that the Allianz surrender proceeds would be used to purchase the Equitrust annuity. (Tr. 1252, 1255, 1392-1393). Under these circumstances, Carter's non-replacement argument is a mere subterfuge. Thus, there is competent substantial evidence in the record to support the ALJ's Finding of Fact that Carter intentionally misrepresented on the Equitrust application (Dept's Exh. 23) that the Equitrust policy would not replace or likely replace an existing policy. Accordingly, this exception is rejected.

13. Carter's thirteenth exception takes issue with Paragraph 52 of the Recommended Order wherein the ALJ found that Carter misrepresented on an "Annuity Suitability Questionnaire" (Dept's Exh. 24) that J.K's pension funds would be used to purchase the policy when he knew that J. K. had no pension. Carter made that same pension representation to Equitrust on its "Financial Needs Analysis" form (Dept's Exh 25). Those forms need no testimony from Equitrust to establish their content. The

record shows that Carter repeatedly met with W. K. and/or J. K. over a four year period of time after the Allianz purchase and prior to the Equitrust purchase, that he professed to be aware of their financial situation, and considered them to be friends. (Tr. 71-73, 1236-1237). Under those circumstances, it lacks credibility to state that he didn't know that J. K. had no pension when it was clear from her employment history, which as a responsible agent he should have been familiar with, that she had never worked for an employer that could have provided her with a pension. (Tr. 52, 119, 120) There being competent substantial evidence in the record to fully support an inference in favor of the challenged finding, this exception is rejected.

14. Carter's fourteenth exception takes issue with the Finding of Fact in Paragraph 53 of the Recommended Order that Carter misrepresented J.K.'s income needs on the Equitrust Annuity suitability questionnaire. That questionnaire (Dept's Exh. 24) , filled out by Carter, represents that J. K.'s income was sufficient to cover all living expenses including medical needs, anticipated medical needs, that her income was sufficient to cover future out of pocket medical needs prior to the surrender charge period and that she had over $200,000 in her checking account. In contrast, the record shows that Carter was fully aware that J. K. wanted to surrender the Allianz policy because she had nowhere near enough money to continue paying for her and W. K.'s medical expenses (Dept's Exhs. 18, 19; Tr. 102-103, 495, 1237-1240, 1246-1247, 1370-1371). Thus, there is competent substantial evidence in the record to support the challenged finding, and this exception is therefore rejected.

15. Carter's fifteenth exception to the Findings of Fact in Paragraphs 54-58 of the Recommended Order is materially the same as his twelfth exception. In addition to

the grounds for rejection of that exception, the record contains the following competent substantial evidence to support the ALJ's challenged findings: (Tr. 1392-1393; Dept's Exhs. 19, 33). Therefore, this exception is rejected.

16. Carter's sixteenth exception is directed to Paragraph 61 of the Recommended Order on the basis that the ALJ's findings are not specific enough to allow Carter to comprehend and respond to the same. At first blush, the exception appears to have merit, but when Paragraph 61 is considered in context with Paragraphs 61-63, it becomes obvious that Paragraph 61 is but an introduction to those paragraphs in which the ALJ does make specific Findings of Fact regarding whether a replacement policy was involved and the source of the funds for the new policy. Accordingly, this exception is rejected.

17. Carter's seventeenth exception, directed to Paragraph 62 of the Final Order, contends that Carter did not make false representations on the Equitrust financial needs analysis form (Dept's Exh. 25), because that policy was not being funded by an existing annuity contract, and because the Equitrust policy was not replacing the Allianz policy, therefore making it impossible for Carter to be the same agent that sold J. K. the Allianz policy. Both those contentions are disproven by the record, as shown in the rulings in Paragraph 12, above. Accordingly, this exception is rejected.

18. Carter's eighteenth exception, directed to Paragraph 63 of the Final Order, contends that Carter did not misrepresent the source of the funds to be used to pay for the Equitrust policy. However, the record clearly shows that he did make such a misrepresentation. Carter clearly testified that the proceeds from the surrender of the Allianz policy was the source of the funds for the purchase of the Equitrust policy.(Tr.

285-288, 1252, 1255, 1392-1393) This contention was also examined in Paragraph 12, above, and found to be lacking in support and at odds with the probative evidence presented. Accordingly, this exception is rejected.

19. Carter's nineteenth exception, directed to Paragraph 64 of the Final Order, contends that J. K.'s testimony that she did not know a William Pearson (Tr. 80-81, 175), and only signed a letter directed to him (Dept's Exh. 41) because Carter told her it would save her money is insufficient to establish those facts in view of the limitations of her memory acknowledged by the ALJ in Paragraph 6 of the Recommended Order. Once again, Carter overstates the qualification the ALJ placed on J. K.'s testimony, and thereby once again implicitly admits that there is competent substantial evidence in the record to support the challenged finding. Moreover, the exception points out no impeachment or refutation of J. K's testimony in that regard. It is the function of a hearing officer to consider all the evidence presented and resolve all conflicts therein. *Walker v. Board of Professional Engineers*, *supra*; *Heifetz v. Department of Business Regulation, Div. of Alcoholic Beverages and Tobacco, supra.* Only if there is **no** competent substantial evidence in the record to support a finding of fact may the agency reject a challenged finding of fact. Section 120.57(1)(l), Fla. Stat. Moreover, agencies are not allowed to re-weigh the evidence to arrive at different findings than those of the ALJ. *Perdue v. TJ Palm Associates, Ltd.*, 755 So.2d 660 (Fla. 4th DCA 1999); *Heifetz v. Department of Business Regulation, Div. of Alcoholic Beverages and Tobacco*, *supra: Holmes v. Turlington*, 480 So.2d 150 (Fla. 1st DCA 1985); *Prysi v. Department of Health*, 823 So.2d 823, (Fla. 1st DCA 2002); *Rogers v. Dep't. of Health*, 920 So.2d 27 (Fla. 1st DCA 2005); *Richardson v. Florida Parole*

*Com'n*, 924 So.2d 908 (Fla. 1st DCA 2006). Finally, the ALJ's Finding of Fact here played no part in forming the recommended Conclusion, which is founded on other grounds. The challenged Finding of Fact is thus irrelevant to the question of Carter's guilt and the appropriate penalty. Accordingly, this exception is rejected.

20. Carter's twentieth exception is directed to Paragraph 69 of the Recommended Order. Carter contends that the finding that he urged J. K. to send Department's Exhibit 54 to Equitrust is not supported by competent substantial evidence. An examination of the entire record shows that said document was indeed sent to Equitrust, but there is no testimony or other evidence that Carter "urged" J. K. to do so. Accordingly, this exception is accepted and the Finding of Fact is modified to delete the words " at Mr. Carter's urging".

21. Carter's twenty-first exception is directed to paragraph 70 of the Recommended Order and contends that there is no competent substantial evidence to support the finding that J. K. only signed Department's Exhibit 54, page 175 because Mr. Carter asked her to do so. An examination of the complete record shows no testimony or other evidence to support that Finding of Fact. Accordingly, the exception is accepted and the words "only signed the letter because Mr. Carter asked her to" are deleted from the finding.

22. Carter's twenty-second exception takes issue with the Finding of Fact in Paragraph 73 that Joan Hook contacted Mr. Carter. An examination of the entire record shows no testimony or other evidence to support that finding. Accordingly, the exception is accepted and the words " Mr. Carter and" are deleted from the finding.

23. Carter's twenty-third exception is directed to Paragraph 74 of the Recommended Order. The exception contends that there is no evidence to support the finding that from December 2102 forward it was clear to Mr. Carter or anyone else that J. K. was confused and uninformed about financial matters, etc. A review of the entire record shows substantial competent evidence that Mr. Carter had no contact with J. K. after June 2010 when a voluntary guardianship for her was established. (Tr. 389, 472, 474). Accordingly, the exception is accepted and the words "it was clear to Mr. Carter or" are deleted from the finding.

24. Carter's twenty-fourth exception agrees with the ALJ's finding in Paragraph 75 of the Recommended Order that J. K. had certain memory impairments, and then re-attacks the Findings of Fact in Paragraph 74. As the stated exception to Paragraph 74 was accepted, this argument is superfluous. Moreover, as was made clear in the Recommended Order, the ALJ's pertinent Findings of Fact and Conclusions of Law and his recommended disposition of this matter are not based on what J.K. could remember about what J. K. and Carter may have represented to each other in the application process, but on the disparity between the written entries made by Carter on the application forms and the truth of those entries. The record shows those written entries to be false, and that Carter knew they were false when he made them. Accordingly, this exception is rejected. However, Paragraph 75 is modified to state that J. K.'s husband died approximately two years prior to the hearing, and not "several years". (Tr. 47, 248)

25. Carter's twenty-fifth exception provides no legal basis for its support, and constitutes nothing more than an argumentative invitation for the agency to re-weigh the

record evidence. That it cannot do, See, Paragraph 19, above. The written materials at issue speak for themselves, and do not need supplemental testimony from the carriers to establish their content. Accordingly, this exception is rejected.

26. Carter's twenty-sixth exception correctly points out that the ALJ mix-matched G. D. and K. D. as to their respective heath conditions in Paragraph 82 of the Recommended Order. This simple scrivener's error was precipitated, at least in part, by the use of initials rather than full names in this proceeding. Accordingly, this exception is accepted and the Finding of Fact is modified to state that it was K. D. not G. D. that suffered from the maladies described therein. (Deposition of Geraldine Davidson, pgs. 24-25.)

27. Carter's twenty-seventh exception takes issue with Paragraphs 88 and 89 of the Recommended Order as to the ALJ's analysis of policy provisions, but admits that the analysis could be correct. The record provides competent substantial evidence to support the ALJ's analysis. More importantly, however, the exception provides no showing as to how the challenged analysis, if rejected, would alter the outcome of the case. Thus, there is no true legal basis for the exception, and it is rejected.

28. Carter's twenty-eighth exception takes issue with the ALJ's finding, at Paragraph 96 of the Recommended Order, that Carter insistently demanded that G. D. telephone Allianz and ask not to rescind that policy. The exception merely splits hairs over the use of the word " insistently", and asks for the evidence supporting that finding to be re-weighed. There is abundant, substantial competent evidence in the record to support that finding, including the fact that G. D. felt so threatened by Carter's repeated uninvited appearances at her residence that the police were called to the scene.

(Deposition of Geraldine Davidson, 64-75, 174-175, 199, 224-228; Tr. 677-684) Accordingly, this exception is rejected.

29. Carter's twenty-ninth, thirtieth, and thirty-first exceptions similarly take issue with the same factual scenario at issue in his twenty eighth exception, to wit; Carter's behavior regarding Carter's interactions with G. D. (and her daughter) regarding G. D.'s attempt to cancel the Allianz policy and Carter's attempts to dissuade her from that course of action.[Paragraphs 97, 98, and 99 of the Recommended Order.] As aforestated, there is abundant substantial competent evidence in the record to support each of these challenged findings, (Deposition of Geraldine Davidson. 64-75, 173-174, 199, 224-228; Tr. 677-684), and the Department cannot re-weigh the evidence in these regards. Accordingly these exceptions are rejected.

30. Carter's thirty-second exception admittedly is directed to an irrelevancy he finds in Paragraph 101 of the Recommended Order. Irrelevancy is not a legal basis for taking exception to a finding of fact. Therefore, this exception is rejected. Section 120.57(1)(k), Fla. Stat.

31. Carter's thirty-third exception takes issue with Paragraph 103 of the Recommended Order on the basis of hair splitting and silliness, and invites the Department to re-weigh the evidence adduced on the issue of written misrepresentations made by Carter on certain forms. (Dept's Exhs. 134, pg. 373F and 135 pg. 373J.) Hair splitting and silliness are not legal grounds upon which to state an exception, and the Department cannot re-weigh the evidence relied upon by the ALJ. Accordingly, this exception is rejected.

32. Carter's thirty-fourth exception contends that the ALJ is confused as to whether Barry Tallman sent G. B. to Christopher Trombetta or vice-versa. The record clearly shows that G. B. testified without refutation or impeachment that Mr. Tallman recommended that G. B. go to Mr. Trombetta, as the ALJ found in Paragraph 105 of the Recommended Order. (Tr. 798-799) Accordingly, this exception is rejected.

33. Carter's thirty-fifth exception takes issue with the ALJ's finding in Paragraph 106 of the Recommended Order that on June 29, 2010, when she met with Carter and Drew, G. B. was timid and easily confused. Interestingly, many of Carter's numerous other exceptions contend that G.B. *was* easily confused, and therefore an unreliable witness. Here, he contradicts those assertions. Regardless, while the matter of her timidity and confusion is a subjective inference that could be drawn from her testimony (Tr. 809-815), it is not relevant to the ultimate findings and conclusions of the ALJ. Therefore, absent explicit record support, and in an abundance of caution, the exception is accepted and the words "timid and easily confused' are deleted from Paragraph 106 of the Recommended Order.

34. Carter's thirty-sixth exception contends that the finding in Paragraph 112 of the Recommended Order that G. B. would have to wait until she was 95 to realize the full value and benefit of the annuity in question is incorrect, and that 85 is the correct age figure. A review of each the policies (Dept's Exhs. 243, pg 1107 and 253, pg 1195) shows that G. B. was 79 when the policies were written and that each had a 15 year full value period, meaning that G. B. would have to be 94 to realize the full, complete value of each policy without surrender charges. Correcting the 95 age figure to 94, this exception is rejected.

35. Carter's thirty-seventh exception takes issue with the finding that G. B. was surprised by the liquidation of her Schwab assets, but posits no legal basis for the exception. G. B. clearly testified as to her surprise in that regard. (Tr. 806, 807). Whether she should have been surprised, as Carter seems to be arguing, is another matter. Her testimony as to her surprise was not undercut by refutation or impeachment. Therefore, there is competent substantial record evidence to support the challenged finding so the exception is rejected.

36. Carter's thirty-eighth exception, directed to Paragraph 118 of the Recommended Order, once again simply invites the Department to re-weigh the evidence presented to the ALJ, this time about a meeting attended by Carter, his associate Drew, and G.B. Once again, the law is well-settled that is the function of a hearing officer to consider all the evidence presented and resolve all conflicts therein. *Walker v. Board of Professional Engineers*, 946 So.2d 604, *supra*; *Heifetz v. Department of Business Regulation, Div. of Alcoholic Beverages and Tobacco, supra*. Only if there is **no** competent substantial evidence in the record to support a finding of fact may the agency reject a challenged finding of fact. Section 120.57(1)(l), Fla. Stat. Moreover, as stated, agencies are not allowed to re-weigh the evidence to arrive at different findings than those of the ALJ. *Perdue v. TJ Palm Associates, Ltd., supra; Heifetz v. Department of Business Regulation, Div. of Alcoholic Beverages and Tobacco, supra; Holmes v. Turlington, supra*; *Prysi v. Department of Health, supra*; *Rogers v. Dep't. of Health, supra; Richardson v. Florida Parole Com'n., supra*. Accordingly, the exception is rejected.

37. Carter's thirty-ninth exception is directed to Paragraph 119 of the Recommended Order, finding that Carter argued loudly and forcefully with G.B. Carter contends that he did not do so with G. B., but did do so with Mr. Trombetta. The record shows G.B.'s testimony that she and Carter argued (Tr. 830-831) and that Carter argued with Trombetta to the point where Mr. Trombetta advised G. B. to call the police if Carter did not leave. (Tr. 915-916) Mr. Trombetta's testimony further elucidates the force of the argument. (Deposition of Christopher Trombetta pgs. 48-51.) Moreover, Carter does not explain how the distinction of who he got loud with makes any difference to the ALJ's ultimate analysis and conclusions, and merely repeats his groundless accusations of bias. As Ms. Busing was present during the exchanges between Trombetta and Carter, and the argument was about her decision to try to get out of the annuities Carter had sold her, it is not without support in the record to find that she was also the object of those exchanges. Therefore, the exception is rejected.

38. Carter's fortieth exception concedes that it is irrelevant to a determination of Carter's conduct, and takes issue with an inference he draws from the irrelevant finding. Such a concession is not an exception, and posits no legal basis for its support. Accordingly, the exception is rejected. [Section 120.57(1)(k), Fla. Stat.]

39. Carter's forty-first exception is directed to Paragraph 124 of the Recommended Order wherein the ALJ found that Carter's conduct in his unannounced visits to G.B.'s residence, his ensuing argument with her and Mr. Trombetta (G.B.'s accountant) about her desire to liquidate the annuity policies Carter had sold to her demonstrated a lack of fitness to engage in the business of insurance. Engaging in a protracted argument with a client who has clearly stated her desire to the agent, and

then to engage in loud and obscenity-laden argument with the client's accountant, to the point where the agent must be asked to leave the premises lest the police be called, demonstrates a lack of fitness to engage in the business of insurance. An agent's first fiduciary duty is owed to the client. Once the client has clearly expressed his or her desire it is the agent's *duty* to carry out the client's directives, and not to further argue with the client. The record evidence shows that Carter did not carry out that duty, but continued forceful argumentation with the client. (Tr. 828-832, 915-916; Deposition of Christopher Trombetta, pgs 48-51). Accordingly, this exception is rejected.

40. Carter's forty-second exception is directed to Paragraph 135 of the Recommended Order where Carter disputes the ALJ's Conclusion of Law that Carter's deliberate misrepresentations on annuity applications were proved by clear and convincing evidence. However, Carter articulates no legal basis for that exception. Exceptions that do not identify a legal basis need not be considered. Section 120.57(1)(k), Fla. Stat. Moreover, the exception merely asks the Department to re-weigh the evidence, which it cannot do. Therefore, this exception is rejected.

41. Carter's forty-third exception disputes the ALJ's conclusion that there is clear and convincing evidence to prove that he made intentional misrepresentations on certain annuity application forms. [Paragraph 136 of the Recommended Order.] The exception is based on a false premise. As was made clear in the Recommended Order, the ALJ's pertinent Findings of Fact and Conclusions of Law and his recommended disposition of this matter relative to those misrepresentations are not based on what any particular witness and Carter may have said to each other during the application process, but on the written misrepresentations of material fact made by Carter on the

applications and other associated forms he submitted to secure the Allianz and Equitrust policies. Those written misrepresentation were proved at the hearing by competent substantial evidence to be false, and it was also proved at the hearing by competent substantial evidence that Carter know those written misrepresentations to be false when he made them. Thus, as to G. D., J. K., W. K., or any other annuitant, the conflict is not between what those witnesses or Carter may or may not have said to each other during the application process; the conflict is between certain of the entries made by Carter on those forms and the truth of those entries. No testimony from the insurance carriers is material to the truth of the entries made by Carter on those forms; the entries say what they say, and in the instances in question what they say is not true. There is competent substantial evidence in the record in the form of entries Carter made on those applications and associated forms, as contrasted with the truth of those entries, to support the challenged conclusion, (Depts. Exhs. 23, 24; Tr. 1252, 1255, 1370, 1392-1393) and, once again, the exception merely argues for a re-weighing of that evidence. Accordingly, this exception is rejected.

42. Carter's forty-fourth exception is the same as his forty third except that it focuses on the application forms of G. B. and G. D., and not J. K. Once again, the carrier's testimony is immaterial to the truthfulness of certain of the written misrepresentations Carter made on those application forms (Dept. Exhs. 134, 254), and associated documents such as the Allianz Annuity Suitability Questionnaire for G.D. (Dept. Exh. 269) Those representations were not truthful, and the evidence shows that Carter knew that to be the case. There is competent substantial record evidence in the form of those applications and associated forms to support the challenged conclusion,

and the Department is not at liberty to re-weigh that evidence. Accordingly, this exception is rejected.

RULINGS ON THE DEPARTMENT'S EXCEPTIONS

43. Because the appropriate cumulative penalty (78 months) exceeds 24 months and thus amounts to revocation, it is unnecessary to consider the Department's exceptions which, if accepted, would only add to the cumulative penalty without effecting any difference in the result. Accordingly, those exceptions are deemed moot.

WHEREFORE, IT IS HEREBY ORDERED that, except as noted above, the ALJ's Findings of Fact and Conclusions of Law are adopted as the Department's Findings of Fact and Conclusions of Law, and that all insurance licenses held under the Florida Insurance Code by Richard Edward Carter are hereby revoked.

IT IS HEREBY FURTHER ORDERED that during the period of revocation Richard Edward Carter shall not engage or attempt or profess to engage in any transaction or business for which a license or appointment is required under the Florida Insurance Code or directly or indirectly own, control, or be employed in any manner by any insurance agent or agency or adjuster or adjusting firm. [Section 626.641(4), Fla. Stat.]

DONE AND ORDERED this 26 day of February, 2013.


ROBERT C. KNEIP, Chief of Staff

NOTICE OF RIGHTS

Any party to these proceedings adversely affected by this Order is entitled to seek review of this Order pursuant to Section 120.68, Florida Statutes, and Rule 9.110, Fla. R. App. P. Review proceedings must be instituted by filing a petition or notice of appeal with Julie Jones, DFS Agency Clerk, Department of Financial Services, 612 Larson Building, 200 East Gaines Street Tallahassee, Florida, 32399-0390, and a copy of the same with the appropriate district court of appeal, within thirty (30) days of rendition of this Order. Filing may be accomplished via U.S. Mail, express overnight delivery, or hand delivery, facsimile transmission, or electronic mail.

Copies to:
John D.C. Newton, ALJ
David Busch
M.D. Purcell, Jr.

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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

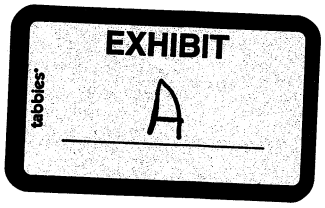
RECOMMENDED ORDER

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
Department of Financial Services
Division of Legal Services
612 Larson Building
200 East Gaines Street
Tallahassee, Florida 32399

For Respondent: M. D. Purcell, Jr., Esquire
Law Offices of M. D. Purcell, Jr.
1110 North Florida Avenue
Tampa, Florida 33558



## 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.

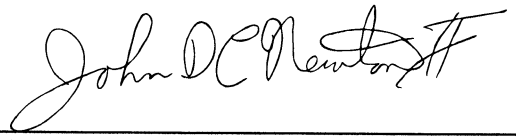
148. The total of the penalties to be imposed because of Mr. Carter's violations is 78 months, applying the provision of Rule 69B-231.040(1)(a) that states a single act of misconduct may be grounds for multiple disciplinary actions. This is the "total penalty" as defined in rule 69B-231.040(2), which 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
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

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:

Julie Jones, CP, FRP, Agency Clerk
Department of Financial Services
Division of Legal Services
612 Larson Building
200 East Gaines Street
Tallahassee, Florida 32399-0390

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

M. D. Purcell, Jr., Esquire
Law Offices of M. D. Purcell, Jr.
1110 North Florida Avenue
Tampa, Florida 33558

## 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.

**STATE OF FLORIDA**
**DEPARTMENT OF FINANCIAL SERVICES**

IN RE:

DOAH Case No.11-5758PL
DFS Case No. 118324-11-AG

RICHARD EDWARD CARTER
_____/

**PETITIONER'S EXCEPTION TO THE RECOMMENDED ORDER**

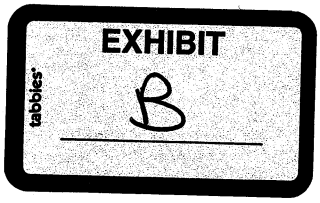
The Department of Financial Services (Department), pursuant to Rule 28-106.217, *Fla. Admin. Code*, files the following exception to the Recommended Order (RO) issued by the Administrative Law Judge (ALJ) in this matter.[1]

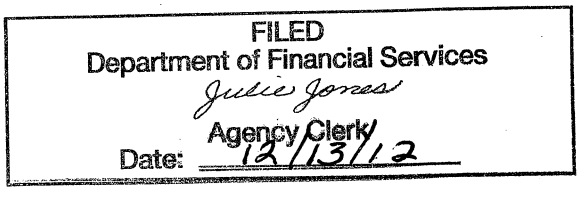
**EXCEPTION TO A CONCLUSION OF LAW RELATING TO TWISTING**

1. The Department takes exception to the conclusion of law (¶143) following the ALJ's recitation of the twisting statute as follows:

> 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 omission of or with respect to any insurance policies or insurers **for the purpose of inducing**, or

[1] All statutory references are to the 2010 edition of the *Florida Statues* unless otherwise indicated. References to the record will be made by use of the symbols "Tr." for the hearing transcript and "PE" or "RE" for the Petitioner's (the Department's) or the Respondent's (Carter's) exhibits. The names of the consumers will be represented by initials in keeping with the ALJ's format.



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.**[2]

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

**THE STATUTORY SCHEME FOR DETERMINING TWISTING**

2. This exception to the Recommended Order is directed only to the issue of whether the facts found by the ALJ require a conclusion that Carter twisted two insurance annuities as alleged in two counts of the Administrative Complaint (or AC).

3. Section 626.9541, *Florida Statutes* is found in part IX of Chapter 626, known as the Unfair Trade Practices Act. Section 626.9511 defines "person" and "insurance policy" as follows:

**626.9511 Definitions.** - When used in this part:

(1) "Person" means **any individual, corporation,** association, partnership, reciprocal exchange, interinsurer, Lloyds insurer, fraternal benefit society, or business trust **or any entity involved in the business of insurance.**

(2) "Insurance policy" or "insurance contract" means a written contract of, or a written agreement for or effecting, insurance, or the certificate thereof, by whatever name called, and **includes all** clauses, riders, endorsements, and **papers which are a part thereof.** (e.a.)

Thus, twisting includes the affected insurance companies, as well as the insurance consumers, and it specifically includes

[2] The emphasis shown was added by the undersigned.

**any papers** that are submitted by the agent in conjunction with the subject insurance transactions.[3]

4. As applied to the facts established in this case, the relevant elements of the twisting statute are as follows:

a. Knowingly making any misleading representation or incomplete or fraudulent comparison or omission that

b. tends to induce any person to surrender, terminate or convert any insurance policy or

c. to take out an insurance policy with another insurer.

**FACTS AS FOUND BY THE ALJ ESTABLISH COUNT II TWISTING**

5. In paragraph 2 of the RO (pp. 2-3), the ALJ characterized Count II of the Administrative Complaint as alleging that in 2010 Carter liquidated 2010 the Allianz MasterDex 10 [or MD-10] annuity in order to effect the J.K. purchase of the EquiTrust 92F policy and that such was in violation of the twisting statutory prohibition.[4]

---

[3] The parties either agreed to the admission of all such documents or the ALJ allowed them in evidence over objection. PE 1, 6, 9, 11-13, 19-20, 23-31, 33-35, 39, 41-44, 47-54, 56-61, 63-73, 75(p. 215 only), 76-77, 79-80, 87-91, 93-96, 98, 102, 104-109, 117-122, 127-129, 130-147 (incl. Davidson exs.; Tr. 1458), 148, 150-169, 171-273, 276, 278-283 were admitted into evidence. (Tr. 1455)

[4] The second count of the AC does not employ the term "liquidation" because it is not an expression used in §626.9541(1)(l), *Fla. Stat.* Rather, the AC alleges that Carter had J.K surrender the Allianz MasterDex 10 annuity contract in order to effect the purchase of the EquiTrust 92F contract.

6. As to the events occurring in 2010[5], the ALJ found numerous misleading misrepresentations that were designed to surrender the Allianz MD-10 in order to fund the subject EquiTrust policy. His relevant findings may be summarized as follows:

a. On April 23rd, Carter wrote to Allianz seeking to fully surrender the Allianz MD-10 policy. RO, ¶44.

b. Allianz responded by letter on April 29th (copy to Carter) seeking to conserve J.K.'s MD-10 contract. RO, ¶46.

c. Carter telephoned Allianz on April 30th insisting that the MD-10 surrender be processed swiftly. RO, ¶49.

d. Allianz completed the surrender on April 30th and wired the proceeds to J.K.'s bank the same day. RO, ¶50.

e. On the very same day (April 30th) J.K. signed a check for $475,000 to purchase the EquiTrust annuity. RO, ¶51.

f. The ALJ found the following Carter misrepresentations on forms Carter filled out in conjunction with these transactions:

i. An application form falsely indicating that the EquiTrust policy is not replacing an existing annuity. RO, ¶51.

---

[5] Given the facts established by the ALJ, the undersigned is forced to concede that such facts will not support a legal conclusion that Carter made unsuitable recommendations to the senior consumers as to each of the counts in violation of section 627.4554, *Fla. Stat.* *See* RO, ¶¶ 6, 75, 76, 102, 123, pp. 6-7, 20-21, 26, 30.

ii. A suitability form falsely indicating that J.K. had a pension income. RO, ¶52.

iii. The same form falsely representing that J.K.'s income was sufficient to cover all expenses, including medical expenses. RO, ¶53.

iv. The ALJ concluded that the forms, as completed by Carter, were misleading in those several respects. RO, ¶¶54-56.

7. Therefore, the factual bases for concluding that Carter twisted the Allianz MD-10 were established by the ALJ.

**FACTS AS FOUND BY THE ALJ ESTABLISH COUNT III TWISTING**

8. As noted by the ALJ in paragraph 2 of the RO (p. 3), Count III of the Administrative Complaint alleged that Carter's 2010 liquidation (surrender) of a Genworth annuity, to further fund the EquiTrust 92F annuity, was in violation of the twisting statutory prohibition.

9. As to these 2010 events, the ALJ found that J.K. signed a letter, composed by Carter, asking William Pearson to be her new financial advisor. Carter then sent the letter to Genworth. RO, ¶ 58.

10. The Genworth annuity had previously been purchased by W.K. and J.K. for $86,084.89 and had a contract date of October 31, 2008. (PE 188, p. 586)

11. On May 23, 2010, Pearson submitted a form, signed by J.K., asking Genworth to liquidate the annuity. RO, ¶66; PE 43, pp. 143-144.

12. The net proceeds from the liquidation of the Genworth annuity, approximately $90,000 (PE 44, p. 151), were added to the Equitrust 92F annuity on June 29, 2010. RO, ¶71.

13. Since this additional EquiTrust premium payment derived entirely from the Genworth surrender, it served to compound Carter's misrepresentation that the EquiTrust 92F was not being funded by another annuity. RO, ¶¶62-63.

14. As to these transactions[6], the ALJ concluded his findings of fact by stating: "Mr. Carter willfully misrepresented information with regard to the applications for the Allianz and EquiTrust annuities. This was dishonest. … These willful misrepresentations were false material statements knowingly delivered to Allianz and EquiTrust." RO, ¶77, p. 21.

15. These willful misrepresentations purposely served to effect the surrender of both the Allianz and Genworth annuities

---

[6] The Department did not charge twisting in Counts I, VI and VII of the Administrative Complaint. As to Counts IV and V, the Department maintains that the evidence (and possibly the facts found by the ALJ) established twisting as to the subject RiverSource and Great American annuities. However, the undersigned has decided not to present argument in support of that conclusion and focus solely on the ALJ's findings of facts as to Counts II and III where the twisting appears to be indisputable.

in order to fund the EquiTrust annuity. That is classic twisting.

16. Furthermore, the ALJ's finding that W.K.'s death and J.K.'s memory impairment "make 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" (RO, ¶75, pp. 20-21) does not foreclose the issue of twisting as it applies to the insurance company "persons." As noted above, the ALJ cited document after document as admissible evidence supporting twisting as to those entities. The hearsay evidence he found to be objectionable as to Counts I through V must have been testimonial in character and must have primarily applied to the unsuitability charges. The ALJ stated:

> 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.** (e.a., RO, ¶76)

17. The emphasized portion of the ALJ's statement above, which only applies to the twisting alleged in Count II (involving the MD-10), is inconsistent with his several findings as to Carter's misrepresentations outlined in paragraph 6, above. The ALJ's findings of fact, presumably based upon competent and substantial evidence, are more than adequate for determining twisting as to both Counts II and III.

18. Part of the difficulty may lie with the ALJ's use of the term "liquidation" which in this context means to convert an asset into cash. *Webster's New Collegiate Dictionary* (1973 ed.), p. 671. There is no dispute that the subject Allianz MasterDex 10 was turned into cash. RO, ¶¶ 44 & 45. The gravamen of the Administrative Complaint is not that Carter liquidated the Allianz annuity. That action, standing alone, would have left J.K. with the cash which, according to Carter, she sorely needed. (PE 19). Such agent action does not constitute any alleged violation of the Florida Insurance Code. The charge is that Carter, by misleading representations, surrendered the Allianz annuity in order to take out a policy in another insurer, EquiTrust. According to the ALJ, Carter "insist[ed] that Allianz process the surrender swiftly" (RO, ¶49) so that he could then sell J.K. an annuity with EquiTrust. RO, ¶51. The ALJ's established facts beg for a conclusion that Carter twisted the Allianz MD-10 as a matter of law.

19. In conclusion, a correct interpretation of the twisting statute, applied to the facts found by the ALJ, compels a conclusion that Carter committed twisting as to the above-referenced transactions, in addition to the other offenses found by the ALJ in his Recommended Order.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was sent by U.S. Mail to Chip Purcell, 1110 N. Florida Avenue, Tampa, FL 33602 and an electronic copy was filed with the Division of Administrative Hearings this 13 day of December, 2012.

David J. Busch
Fla. Bar No. 140945

Department of Financial Services
Division of Legal Services
200 East Gaines Street
Tallahassee, Florida 32399-0333

Tel.: (850) 413-4146
Email: david.busch@myfloridacfo.com

**STATE OF FLORIDA**
**DIVISION OF ADMINISTRATIVE HEARINGS**

DEPARTMENT OF FINANCIAL SERVICES,
DIVISION OF INSURANCE AGENTS
AND AGENCY SERVICES,

Petitioner,

vs. DOAH CASE NO. 11-5758PL

RICHARD EDWARD CARTER,

Respondent.

_____/

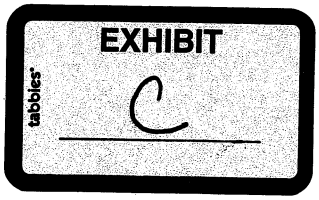
**RESPONDENT'S WRITTEN EXCEPTIONS TO RECOMMENDED ORDER**

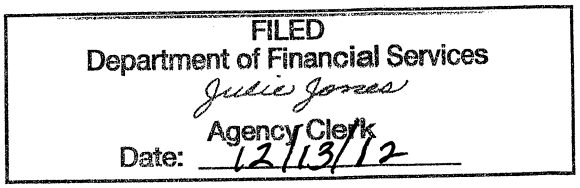
COMES NOW the Respondent, Richard Edward Carter, by and through the undersigned counsel, and hereby files his exceptions to the recommended order dated November 28, 2012. Respondent files these written exceptions pursuant to Florida Statute 120.57(1)(k).

PRELIMINARY STATEMENT

Respondent asserts that the administrative law judge (ALJ) misunderstood the duties and responsibilities of an insurance agent in the context of this proceeding. Furthermore, the ALJ misapplied the standard of review to Carter in this case. That misunderstanding tainted his entire review of the case and resulted in a misunderstanding of the analysis required.

It is not up to the ALJ to determine whether or not a client fully understood all of the terms and conditions of an annuity. That is a contention which no insurance agent could ever effectively refute. The basic issue is whether there is clear and convincing evidence that the agent failed to fully disclose the terms and conditions of an annuity,



not whether the client/beneficiary actually understood all of the terms and conditions of an annuity. It is this global misunderstanding that has caused the ALJ to reach an erroneous conclusion.

Carter cannot refute testimony that is not in the record. The ALJ often reviewed hearsay or documentary evidence and imputed his subjective belief on what the clarifying testimony MIGHT be. The ALJ subjectively determined of the state of mind of purchasers going back two or six years previous to their decision, and apparently projected his conclusion of their states of mind into improper behavior on the part of Carter. The ALJ further completely failed to consider that all of the clients involved in the case, the K's, the D's, and the B's, were all content and satisfied with Carter and with their purchases **until other people with their own financial interests in the clients' money interjected themselves into the process**. The ALJ failed to consider the fact that those who interjected themselves actually all benefitted financially and certainly had an interest in voiding the annuity sold by Carter. The essential issue for the ALJ should have been whether the Department proved by clear and convincing evidence Carter actually materially misled either J.K., G.B., or G.D. The issue is not whether or not the clients actually understood all of the terms and conditions of the annuity. "Actual understanding" is a standard or burden that no insurance agent could ever carry.

Furthermore, it is clear the ALJ does not understand the annuities at issue in this case. In his factual findings, ALJ appears to be biased against Carter and agents who lawfully work in the field. The Department had the burden of proof to educate the ALJ on the complex issues of these annuities. By reading the order, it is obvious the

Department failed to educate the ALJ on the nuances of the annuities, what representations are material, what representations are not material, and specifically how Carter violated any statutes, rules, or regulations.

EXCEPTIONS TO FINDINGS OF FACT

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

(Beginning numbers reference the paragraphs in the Recommended Order)

3. The ALJ concluded J.K. does not speak or understand English well. That conclusion is not supported by the evidence. J.K. moved to this country over 50 years ago. J.K testified without the assistance of an interpreter throughout the entire proceeding. J.K. clearly had no problem during the two years these issues were pending, communicating in English with Investigator Ortega, Guardian Rego, Attorney Hook, Carter on their lunch outings, Counsel for the Petitioner, the ALJ, or the cross examination of Counsel for the Respondent. Even the Department did not contend, at trial or in their Complaint, J.K. couldn't speak English well. Furthermore, J.K. consented to a voluntary guardianship issued by a circuit court judge, all in English. The conclusion that J.K. does not speak or understand English is wholly unsupported by any evidence in the case. This finding of fact is so wholly contrary to the evidence Carter assumes the ALJ must have some bias against him.

5. The ALJ concluded that W.K. handled all the financial affairs for the couple and J.K. did not understand the financial affairs nor have any interest in them. That conclusion is wholly unsupported by any credible evidence in the case. The ALJ correctly pointed out as a finding of fact in paragraph 6, "J.K.'s testimony demonstrated that her memory was significantly impaired". J.K.'s recollection at the time of the trial of events past was

extremely unreliable. W.K. had died and J.K. was the only witness presented at trial who could have possibly testified to anything that may have occurred in that time frame. First, her testimony was contradicted by the other competent witnesses in the case. Second, the ALJ completely failed to point out all of the other financial affairs and matters that J.K. handled prior to Mr. Carter's reappearance in the process in February 2010.

The ALJ had no reliable evidence to determine what J.K. had interest in or what she may have understood with regard to finances. No reliable testimony was offered consistent with that conclusion. However, the only testimony that could possibly have been offered on that fact was J.K.'s and the ALJ correctly pointed out in paragraph 6 that the ability to determine what may have happened was limited by J.K.'s significant mental impairment. From an evidentiary standpoint, the two findings are opposite.

6. The ALJ correctly found that, "J.K.'s testimony demonstrated that her memory was significantly impaired." Also, the fact that W.K. had died "several years" before the hearing (actually just over a year and a half) limited the court's "ability to determine what representations Mr. Carter made to J.K. and W.K. or what information or instructions they gave him."

10. The ALJ concludes that the Product Suitability Form submitted on the 2006 Allianz life insurance policy was not accurate and that Carter was materially dishonest. First of all, the Department never inquired of Carter or any other witness to clarify this issue. Allianz did not testify they thought the answer either material or dishonest. Second, the Application for Annuity Form page 3, paragraph section numbered 3, clearly states there were no existing annuity contracts and that the policy applied for will not replace

or change any existing contract. While there may have been a mistake on boxchecking in the Product Suitability Form, on the far more important and material form Carter correctly stated the facts. Carter wasn't asked about it and certainly would not have testified incorrectly about such an immaterial matter even if he was asked. Also, the Department never inquired of Allianz to see if they thought this representation was material or intentionally false. It is not logical to conclude Carter made an intentionally dishonest representation regarding the source of funds on the Product Suitability Form and then in the very next document, the Application for Annuity, correctly state there are no existing annuities. Not to mention the ACAT form that directly states the source of funds. There would be no reason for Carter to intentionally check the wrong box and then complete all the other documents correctly. This also illustrates the danger in the ALJ making factual findings on documents without any testimonial clarification.

12. The ALJ concluded that submitting the application with the suitability form containing this known incorrect statement was a dishonest practice. It was immaterial and corrected on all the other forms in this file. It was not material to anything and no witness testified that it was material. Allianz did not come to testify it was either material or dishonest. The ALJ can't possibly correctly conclude by clear and convincing evidence that Carter was dishonest in this regard.

14. The ALJ concluded that Carter received a commission of $66,381.73. This is inaccurate. It is unsupported by the evidence in the case. There was no reliable evidence presented in the case that the commission was $66,381.73. The ALJ apparently reviewed documents independent of corroborative and explanatory testimony and made findings independent of any explanatory testimony. The ALJ

extrapolated a conclusion based apparently on otherwise inadmissible hearsay evidence that was not corroborated at trial by any other evidence. The commission Carter received on this transaction was slightly in excess $54,312.33. This is further evidence that the ALJ does not understand the inner workings of the payment process on these annuities and that the Department has failed to educate the court and to assist the court to come to the correct conclusion. There was no corroborative testimony offered that the commission received in the case was $66,381.73. The ALJ could not have come to that conclusion if it had indeed read and understood the paperwork formed and filed with regard to this transaction.

21. The ALJ concluded that, "On June 3, 2008, W.K. was diagnosed with Alzheimer's disease and determined to be unable to make his own medical and financial decisions." Nowhere in the facts was it ever established that W.K. was unable to make sound medical and financial decisions going back to June 3, 2008. No one testified to that. No doctor or medical professional testified to that. The only piece of evidence in that regard was a back dated doctor's note which concluded that in the past they now believe as of or about June 3, 2008 W.K. suffered from Alzheimer's disease. There was no evidence presented that W.K.'s condition made him incompetent going back to 2008 or at what point between 2008 and his death he lost the ability to make sound financial and medical decisions. While essentially this fact does not really relate to any alleged bad conduct on the part of Carter, it does illustrate that the ALJ is creating and extrapolating its own facts to cast Carter in a bad light.

25. The ALJ concluded that during this time Mr. Carter "obtained" a copy of the power of attorney executed by W.K. in favor of J.K. While factually correct, Carter objects to

the implication that somehow he inappropriately obtained a copy of the power of attorney. The power of attorney was unequivocally executed in 2008 with the assistance of a lawyer and in no way controlled by Carter. Carter would have had no way to have "obtained" a copy of the power of attorney unless J.K. had willingly given it to him. The ALJ's implication is that somehow Mr. Carter improperly obtained the power of attorney executed by J.K. That is not true and is not supported by any credible evidence.

37. The ALJ factually concluded J.K. did not know who Mr. Pearson was and that she only signed the letter because Mr. Carter told her that it would help her save money. The only person the ALJ could have possibly relied on for that conclusion is J.K. No other witness in the case ever made that statement or drew that conclusion. In fact, Mr. Carter stated that J.K. did in fact know who Mr. Pearson was and that he had personally traveled to her residence. The Department failed to call Pearson as a witness and it is incumbent upon them to bring competent evidence of whatever fact they want the court to rely upon in sanctioning Carter. As the ALJ has previously correctly pointed out in paragraph 6, J.K.'s memory of the events is highly questionable and cannot be relied upon by the ALJ to establish that she either did not know who Mr. Pearson was or that she only signed the letter because Mr. Carter told her that it would help her save money. (*Furthermore, the Department is currently in possession of information in case number 12-003218 in which it specifically knows that J.K. did know who Mr. Pearson was and that Mr. Pearson had personal contact with J.K. As officers of the court and as a matter of integrity, the Department has an obligation to supplement this record to*

*assist the court in avoiding a factual conclusion of which it is in possession of evidence it knows refutes the factual finding.)*

43. The ALJ concludes that Mr. Carter "wrote and sent a letter signed by J.K. at his request." The only credible evidence offered at trial was that the letter was sent at J.K.'s request. The only witness who could have possibly testified that this letter of April 9 was sent at Mr. Carter's request was J.K. The ALJ has properly pointed out in paragraph 6 that J.K.'s testimony cannot be relied upon to establish by any burden of proof evidence in this case.

51. The ALJ concluded that the EquiTrust policy form Carter submitted states it is not replacing an existing annuity contract and it is not an accurate representation. The evidence in the case is wholly and completely contrary to that factual conclusion. As the ALJ correctly pointed out, the ownership of the annuity was changed from W.K. to J.K and the funds came directly from Regions Bank. Also as the ALJ correctly pointed out in paragraph 51, only part of the proceeds of the 2006 Allianz annuity's funds were used to purchase the EquiTrust annuity. It was uncontroverted by the parties that other funds were also included from other sources to purchase the EquiTrust annuity. The fact that the funds used to purchase the EquiTrust life insurance policy did not **replace** an existing annuity contract was uncontroverted by the evidence. The ALJ's conclusion that this is not an accurate representation, is not factually correct, and is not supported by any of the other evidence in the case. It also is not consistent with the ALJ's other finding of fact specifically made about the source of the EquiTrust funds.

52. The ALJ stated that Mr. Carter made an inaccurate representation on the annuity suitability questionnaire for J.K. The form states J.K. had income from a pension and

the ALJ contends that Carter knew J.K. did not have a pension. That is not supported by the factual evidence in the case. Carter was never asked about this issue. Only W.K. and J.K. would have knowledge of this issue. W.K. was deceased and J.K. could not remember much of anything at trial. There was no credible evidence J.K. did not benefit from a pension. TR 120 W.K. had a pension and J.K. was a beneficiary of that pension. No clarifying testimony or evidence was presented by the Department on this issue. The ALJ assumes, without clarifying testimony, that the information on the form is not EXACTLY what EquiTrust wants to know. The Department did not call any witness from EquiTrust and it is not fair for the ALJ to extrapolate a conclusion not specifically presented by the Department.

It is not fair to conclude on the evidence presented, that Carter did not fill out the EquiTrust forms exactly as EquiTrust expected. If the information presented to EquiTrust is not what EquiTrust wants or expects, the Department must call a witness from EquiTrust to so state. The only person who could have possibly testified to the contrary was J.K. As stated time and again and as the ALJ accurately pointed out in Paragraph 6, J.K.'s memory on this issue cannot be relied upon for the court to make any factual conclusions based on her testimony.

53. The ALJ concluded Carter inaccurately stated J.K.'s income was adequate to cover all expenses, including medical. The facts on this were not disputed. There was a large amount of cash in her checking account set aside for the purpose of and sufficient to cover W.K.'s medical expenses. J.K. had insurance. Their other income was spinning off ample income to cover her minimal expenses. At the time Carter submitted the annuity suitability questionnaire for the EquiTrust application, there was unequivocally

sufficient income to cover all expenses including medical. At the point in time in which the questionnaire was submitted the evidence is uncontroverted, there was substantial cash set aside for W.K.'s medical expenses and there was adequate income to cover all other expenses, including medical. There simply was no evidence presented by the Department to the contrary. The ALJ ignores the substantial amount of cash in the checking account put there for the sole purpose of W.K.'s medical care.

54 through 58. The ALJ concludes that Carter was misleading about the source of the funds for the purchase of the annuity. The ALJ does make the correct observation that Carter "made the technically correct representation that the funds come from a checking account." The ALJ then makes opposing conclusions of fact. First, that Carter made the correct representation that the funds came from the checking account. Then that he was dishonest in stating that the funds did not "replace" another annuity. The funds clearly did not replace another annuity. As the ALJ stated, the annuity was placed in a different name and in different amounts and the funds used to purchase the EquiTrust annuity came from different sources.

Frankly, it is inconceivable how the ALJ could conclude from these facts that Carter is somehow **intentionally** misleading about the source of funds. The ALJ accurately states the facts and then reaches an inapposite conclusion. The ALJ recognizes that the EquiTrust annuity was purchased in a lower amount, that it was purchased in a different name, and that additional funds, not Allianz funds, were used to complete the purchase of the EquiTrust annuity. The ALJ correctly points out that part of the money came from the Regions bank account. Inexplicably, the ALJ somehow concludes that Carter was intentionally misleading by making a correct representation.

61. The ALJ concludes that an EquiTrust form submitted on May 6, 2010 repeats some incorrect statements of the previous form and includes additional incorrect statements. Carter incorporates by reference his previous responses. The ALJ fails to point out what those additional incorrect statements are or what the incorrect statements on the previous forms are. Carter is unable to respond to whatever the ALJ deems to have been incorrect statements and objects to that conclusion. The conclusions in this paragraph should be struck.

62. The ALJ concludes that Carter's response was also a representation that he knew to be false because he was the agent on the policy being replaced. As previously stated, there was not a replacement of this policy for the aforestated reasons. Hence, the ALJ could not reasonably conclude that Carter made a false statement regarding the replacement issue. At a minimum this issue is very convoluted. The ALJ could not correctly find any misrepresentation proved by clear and convincing evidence.

63. The ALJ concluded that Carter made a misrepresentation regarding the needs analysis form in that the source of funds was stocks, bonds, and mutual funds. The evidence in the case is unequivocal that the sources of funds used to purchase the EquiTrust annuity included stocks/bonds/mutual funds. The cash disclosure was made in other portions of the forms.

The ALJ further concludes that it was inconsistent with the statement on the suitability questionnaire that the funds came from a checking account. Those two documents ask different questions. The ALJ's failure to address the fact that different questions are asked by the forms does not make Carter's answers on the forms

factually inaccurate. At a bare minimum, it cannot possibly establish that Carter was intentionally misleading.

64. The ALJ factually concluded that J.K. did not know who Mr. Pearson was and only signed the letter because Carter told her that it would help her save money. The only person who could have possibly offered evidence on this fact was J.K. Carter testified she did in fact know Pearson. It has been repeatedly stated and correctly pointed out by the ALJ that J.K.'s testimony cannot be relied upon to establish any fact in the case much less any fact that cannot be independently verified by other evidence. *(Furthermore, the Department is specifically in possession of information in case number 12-003218 that this fact believed by the ALJ is not true and has an obligation as an officer of the court to supplement the record to correct that factual inaccuracy.)*

69. The ALJ concludes that the June 2, 2010 letter sent by J.K. to EquiTrust was "at Mr. Carter's urging". There was no evidence presented by any credible person in the trial that the letter was sent at Mr. Carter's "urging". First, J.K. made no such representation. Second, had she intimated some belief that Mr. Carter had urged her to do it, that testimony would be unreliable as the ALJ has previously noted in paragraph 6 that her testimony is unreliable. The ALJ's characterization that Carter "urged" J.K. to sign the letter is not based on evidence and exposes an unfair bias against Carter.

70. Again the ALJ concludes that J.K. did not know Peter Gotsis and only signed the letter because Mr. Carter asked her to. There was no credible testimony in the trial offered on that fact whatsoever. The Department did not call Peter Gotsis. To whatever extent the ALJ may believe that J.K. intimated that she didn't know Peter Gotsis or that

the letter was signed because Carter asked her to would have come from J.K. and as previously stated, her testimony is unreliable.

Furthermore, this document is not even relevant to any material issue in this case. It is a superfluous and unused document and there was no evidence in the case pertinent to it. It is not material to anything at issue in this case. It is not relevant to any issue in the case and is illustrative of the ALJ reaching for reasons to cast Carter in a negative light.

73. The ALJ somehow concluded that attorney Joan Hook contacted Mr. Carter. That conclusion is wholly unsupported by any evidence in the case. There is no evidence that Joan Hook ever contacted Mr. Carter and there was no evidence ever presented in the case that Joan Hook ever contacted Mr. Carter. Joan Hook never contacted Mr. Carter and Carter never contacted her. There is no evidence in the record to support that conclusion. Again, the ALJ made a finding of fact that is without any evidence.

74. The ALJ concludes that "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 decision." There is no possible way the ALJ could come to that conclusion based on the evidence presented in the hearing. First, the evidence was clear and unequivocal from Ms. Rego and Mr. Carter that Carter has had no contact with J.K. since June 2010. There was no evidence presented as to any fact, material or otherwise, that occurred after December 2010. Whatever anyone knows about J.K.'s mental condition from December 2010 is irrelevant.

Furthermore, the only witnesses who could have possibly testified to J.K.'s mental condition from December 2009 to the appointment of the guardian in June 2010 were Carter and J.K. There simply were no other witnesses presented. The ALJ could not have relied on any other testimony other than J.K. and Carter. No witness was presented who had any information as to J.K.'s abilities between 2009 and June of 2010 other than Carter and J.K. Carter certainly did not testify that J.K., during that period of time, was "confused, uninformed about financial matters, compliant, reasoning poorly, and not capable of making sound decisions." Furthermore, J.K. did not testify that she was "confused, uninformed about financial matters, compliant, reasoning poorly, and not capable of making sound decisions" between December 2009 and June 2010. To whatever extent she may have intimated at the trial that she was any of those things, as the ALJ correctly pointed out her testimony at trial was wholly unreliable.

Even further, it was established at the proceeding that the guardianship for J.K. created in June 2010 is a **voluntary** guardianship and that the circuit court judge determined that she is in fact competent to acquiesce to a voluntary guardianship.

The ALJ's finding in paragraph 74 is especially disturbing. The ALJ could not possibly have come to this conclusion based on the evidence presented in the trial. The ALJ has extrapolated its opinion and belief to intentionally and unfairly characterize Mr. Carter in a bad light. There simply was no evidence whatsoever that Carter had any dealing with J.K. after December 2010. There was no credible evidence presented in the record of this case that between December 2009 and June 2010 J.K. was in any way confused, uninformed about financial matters, compliant, reasoning poorly, and not

capable of making sound decisions. It is an unfair factual conclusion without any factual basis whatsoever in the record.

75. Curiously, the ALJ points out that her testimony at trial demonstrated that her memory was significantly impaired. Consequently, how can the ALJ possibly conclude in paragraph 74 that the evidence at trial established that J.K. was confused, uninformed about financial matters, compliant, reasoning poorly, and not capable of making sound decisions between December 2009 and June 2010 if the only two people that testified about that time frame were J.K. and Carter? Carter certainly didn't testify that J.K. was any of those things. The ALJ correctly pointed out in paragraph 6 and paragraph 75 that J.K.'s testimony demonstrated that her memory was significantly impaired. Consequently, there could not have been any credible, reliable testimony that J.K. was confused, uninformed about financial matters, compliant, reasoning poorly, and not capable of making sound decisions at that time. For the ALJ to conclude that it was "clear to Mr. Carter" when the record is wholly devoid of credible evidence to that effect shows an obvious unfair bias by the ALJ against Mr. Carter. Furthermore, as the ALJ pointed out in paragraph 75, it is impossible to determine what representations Mr. Carter made to W.K. and J.K. and to determine what information or instructions they gave him. If it is impossible to determine what representations Mr. Carter made to W.K. and J.K., how can the ALJ rationally and reasonably conclude by clear and convincing evidence that Mr. Carter willfully misled them or that Mr. Carter took advantage of a "confused, uninformed, compliant, and poorly reasoning" client?

77. The ALJ essentially concludes that Carter willfully misrepresented information with regard to the applications for the Allianz and the EquiTrust annuities and that this was

dishonest. The ALJ further concludes that these willful misrepresentations were false material statements knowingly delivered to Allianz and EquiTrust. The ALJ does not specifically state which representations he believes were dishonest, so Carter assumes only those representations the ALJ specifically stated were dishonest are the only ones. No representative of Allianz or EquiTrust was ever called to testify in the trial that any of the statements delivered to them were false or willful misrepresentations or false material statements made by Mr. Carter. There was no testimony from EquiTrust or Allianz that Carter had ever misrepresented anything to them or that Carter had not filled out their forms in accordance with their instructions. The ALJ cannot reasonably conclude that false representations were made to Allianz or EquiTrust without first establishing that Carter did not follow their instructions or fill out their forms as they expected him to fill them out.

The Department could have called representatives from Allianz or EquiTrust but chose not to do so. Allianz and EquiTrust would not support the Department's position. No representative of Allianz or EquiTrust was ever called to testify that they did not in fact understand completely and fully the entire transaction and the entire process of the transaction between J.K. W.K. and Mr. Carter. No witness was called from Allianz or EquiTrust to state that Carter had filled out any of **their** paperwork, or specifically their applications, in a dishonest manner or in a manner in which they instructed him not to. No representative of Allianz or EquiTrust testified in the proceedings that Mr. Carter misrepresented any information to them or that Mr. Carter incorrectly filled out any application to them. The trial court cannot conclude that Mr. Carter was dishonest with Allianz and EquiTrust without testimony from Allianz or EquiTrust establishing; 1) that

any misrepresentation or false statement was made to them, and 2) that those statements were material statements or statements that were material to either Allianz or EquiTrust. There was simply no evidence presented that any of the statements made by Carter to Allianz or EquiTrust were material to Allianz or EquiTrust; or were dishonest to Allianz or EquiTrust; or that Allianz or EquiTrust didn't fully comprehend the transaction between J.K. and Carter.

COUNT VI- G.D and K.D.

82. The ALJ found that "G.D. was and is in bad health due to having suffered four strokes. She had difficulty speaking to Mr. Carter during his sales presentation." This factual finding is completely wrong and nowhere in the evidence. G.D. was not in bad health and never testified as such. G.D. did not have any strokes and did not testify to that. Neither did anyone else. The ALJ is wrong and confused.

88 and 89. The ALJ makes an analysis of the provisions of the policy that omit an important fact and consequently the conclusion is inherently misleading. The only way the factual scenario happens as articulated in paragraphs 88 and 89 is if G.D. completely and totally cancels the policy in full before the policy period. While under this scenario, paragraphs 88 and 89 are correct, it is correct only if one specific event occurs, i.e. a complete cancellation of the policy prior to the end of the term. In all other possible factual scenarios, this conclusion would be inaccurate. Hence, the ALJ's factual conclusion in 88 and 89 is misleading.

96. The ALJ factually concluded that Carter "insistently" demanded that G.D. telephone Allianz and cancel her attempt to rescind the contract. There was no evidence presented at the hearing that Carter insistently demanded that G.D. telephone Allianz.

The testimony at trial both from G.D. and Carter is not disputed. While Carter did make several attempts to talk to G.D., he was unsuccessful in talking with her about the surrender issue. Common sense dictates that for one to "insist and demand" one must logically be in meaningful contact with the person you are "insistently demanding". Hence, Carter could not have "insistently demanded" that G.D. telephone Allianz and cancel her attempt to rescind the contract. The ALJ's conclusion is false and misleading. Carter did make several trips to G.D.'s home to converse with her. However, he was unable to communicate with G.D. about the effects of the surrender and the trial testimony was clear that no one had told him to stop attempting to contact her until Carter talked to the police. That truth was clear and unequivocal. It is misleading because the ALJ implies that Carter continuously demanded that G.D. telephone Allianz. The factual evidence was clear and uncontroverted that Carter was unable to talk to G.D. about the effects of the surrender, there was no evidence presented that he did, and hence could not have insistently demanded that she telephone Allianz.

97. The ALJ again is misleading in its factual conclusion. The ALJ concludes that Carter repeatedly telephoned G.D. and returned uninvited to the house several times making the same demand. Carter did not make the same demand and there is no evidence that he made any demands on G.D. The evidence is clear and uncontroverted that he was unable to talk with G.D. The ALJ correctly points out in the end of paragraph 97 that G.D. refused to answer her door. It is inconsistent and misleading for the ALJ to conclude that Carter repeatedly made "the same demand" and at the same time recognized that G.D. refused to answer her door. Carter did, in fact,

make several attempts to talk to G.D. about the effects of a surrender but was unsuccessful. Hence, there could not have been insistent demands that G.D. telephone Allianz or anything else. ALJ's conclusion in paragraph 96 and 97 is unfair, misleading, and not supported by the evidence.

98. The ALJ is further misleading in its conclusion that Carter "revealed her mother's financial matters to her". The testimony at trial was clear and uncontroverted. Mr. Carter gave G.D.'s daughter a one page letter stating clearly the loss of principle that would occur if G.D. surrendered the policy (Exhibit 131, Bates number 367). No evidence was presented of any other disclosed "financial information". It is also uncontroverted that, at the time, Carter's representations were completely accurate. It is misleading for the ALJ to state that Carter revealed her mother's financial matters to her when that one page document was a simple summary of the loss the mother would incur and was the only information that was ever given to the daughter. Carter requested the daughter give the information to G.D. He did not sit down and discuss G.D.'s financial information.

99. The ALJ further mischaracterizes the evidence that Mr. Carter "demanded" that the daughter deliver a letter to her mother and that Mr. Carter made "harassing telephone calls" to her and her mother. The testimony was again clear and unequivocal that Mr. Carter could not have demanded anything of the daughter nor could any of his phone calls possibly have been harassing because the evidence was clear and uncontroverted that the telephone calls went unanswered.

101. The ALJ interjects a fact that is, frankly, irrelevant to the proceeding. The fact that Allianz made a business decision to return funds to G.D. is wholly irrelevant to the

conduct alleged in the Complaint and any allegations of wrongdoing against Mr. Carter. The implication is that because Allianz returned funds that they somehow must have agreed Carter acted inappropriately. There was no evidence of that. At the time of the conduct in question, Allianz was not going to return all her money and there was no evidence they were going to return all the money. In fact, the evidence was that Allianz determined that Carter did not act inappropriately. Allianz made a business decision to appease the Department and it is unfair to consider that information and to use it in a negative light against Carter.

Furthermore, the evidence is also that Allianz did not even require return of the commission payment from Carter. Allianz must not believe Carter did anything wrong.

103. The ALJ states that Carter willfully misrepresented information with regard to the applications for the MasterDex 10 Plus Annuity and that he was dishonest. There was no representative of Allianz to testify whether or not they were deceived or whether Carter inaccurately filled out their forms. Presumably, the ALJ concludes that because Carter checked "no" on a form box referencing the absence of an existing annuity on the Application (Exhibit 134, Bates 373F) but then on a subsequent Annuity Suitability Questionnaire clearly identifies the existence of $540,000 in annuities (Exhibit 135, Bates 373j) , that somehow that is a willful misrepresentation and dishonest. **This is truly splitting hairs.** One logically would not willfully misrepresent the absence of annuities on a checked box and then specifically disclose $540,000 in annuities on the questionnaire. **The conclusion that this is a material and willful misrepresentation is silly.**

The ALJ's own findings of fact dispute that conclusion. It is inconceivable that Carter would **intentionally** misrepresent the existence of a prior annuity on one form and then disclose the existence and accurately reflect that annuities' face amount on another form. To conclude that Carter made an intentional misrepresentation and was intentionally dishonest on these facts is a huge stretch. Carter has nothing to gain from this and the existence of the other annuity is unequivocally disclosed to Allianz. The ALJ's conclusion is illogical. Again, no representative from Allianz ever testified that anything was misrepresented to them or that those misrepresentations were false or material to them.

The ALJ could not possibly conclude that Allianz thought the representations were false and material. No representative of Allianz testified. There are only two possibilities; 1) that the forms were correctly filled out as per Allianz instructions, or 2) Carter made a simple mistake that is absolutely clarified on the next form. Willful misrepresentation is not a logical possibility on these facts. No Allianz witness testified to clear it up. The uncontroverted evidence was that the existence of a prior annuity was not only disclosed to Allianz but the amount was accurately disclosed to Allianz. The factual conclusions couldn't possibly result in a willful misrepresentation. The ALJ does not specifically articulate what it was that it believes was willfully misrepresented, however, in referencing the prior facts we would assume that it is referencing how a box is checked on the application.

Furthermore, the ALJ stated "Mr. Carter's repeated, persistent, and overbearing efforts to require G.D. to speak with him about the cancellation and withdraw it demonstrate a lack of fitness to engage in the business of insurance." There was

evidence that Carter was persistent and repeated in his efforts, there was no evidence that Carter ever got to talk to G.D. about her cancellation of the policy. The ALJ's characterization that his efforts were "overbearing" bely the ALJ's unfair bias and prejudice against Carter. There was no evidence he was overbearing because there was no evidence he actually talked to her about the surrender issue.

COUNT VII- G.B.

105. The ALJ factually concludes that Barry Talman recommended that she seek financial advice from Christopher Trombetta. That is not consistent with the testimony in the case. Christopher Trombetta prepared her taxes and specifically stated that he did not give her financial advice. Presumably, the ALJ is confused and has those people backwards. Christopher Trombetta recommended G.B. seek financial advice from Barry Talman.

106. The ALJ factually concluded that on June 29, 2010 G.B. was "timid and easily confused". There was no evidence presented at the trial that G.B. was timid and confused on June 29, 2010. This is obviously a conclusion based on the ALJ's bias against Carter and a conclusion that is not supported by the evidence.

112. Once again the ALJ does not understand the policy. Under his assumption, if G.B. were 70 years old (paragraph 106) and she wanted to receive the full value and benefit of the annuity she would have to wait until she was 85 not 95.

114. The ALJ concluded that Barry Talman notified G.B. that her Schwab accounts had been liquidated and she was "surprised". Mr. Talman did not testify at the proceedings and the ALJ correctly noted in Paragraph 108, G.B. was confused and did not remember facts precisely or explicitly. The ALJ failed to address all of the documents

G.B. executed that clearly show her authorization to use the Schwab funds to purchase the annuity.

118. The ALJ concluded that Carter and Mr. Drew went to G.B.'s home "uninvited and unannounced" and that he "insisted on entering and speaking to G.B." The only testimony offered in this regard was by Carter, Drew, and G.B. As previously stated, G.B.'s memory was not distinct and she was confused. The only credible testimony about the meeting was offered by Carter and Drew and they did not state that they were uninvited, unannounced or that they insisted on entering and speaking to G.B. It is an unfair characterization and extrapolation of the facts and not based on credible testimony.

119. The ALJ stated that Mr. Carter began loudly and forcefully arguing with G.B. There was no such testimony that Mr. Carter ever argued loudly and forcefully with G.B. Once again the ALJ is confused. Carter did, however, argue loudly and forcefully with Mr. Trombetta but there were no facts offered that Mr. Carter argued loudly and forcefully with G.B. Again, another example of the court's unfair and misleading extrapolation of the facts to cast Carter in a negative light.

122. This fact is not relevant to a determination of the conduct of Carter. The implication is that because EquiTrust returned money to G.B. that somehow they agreed that Carter acted inappropriately. In fact, EquiTrust did not penalize Carter for his conduct with regard to G.B. and there was no evidence that they did. Hence, it is an unfair implication that somehow because EquiTrust made a business decision to return funds to G.B. that equates to bad conduct on Carter's part. That implication is not supported by any other fact of the case.

124. The ALJ made a factual finding that Carter demonstrated a lack of fitness to engage in the business of insurance because he; a) appeared unannounced to G.B.'s house; b) tried to persuade her to change her plans to liquidate the annuity; and c) had a conversation with Mr. Trombetta where they argued over whether Mr. Trombetta knew what he was doing. Frankly, none of those three things establishes a demonstration of a lack of fitness to engage in the business of insurance. One is not unfit to engage in the business of insurance if he appears at a client's house unannounced. It is not a lack of fitness to engage in the business of insurance to try to persuade a client to change her plans to liquidate an annuity when it would indeed cost her a substantial amount of money to do so. **NOT** attempting to try to persuade the client might demonstrate a lack of fitness but certainly not the converse. It does not demonstrate a lack of fitness to engage in the business of insurance to argue with another professional over a course of action, especially when that other professional admits under oath that he doesn't understand annuities, had not read the annuity, and essentially was uninformed about the product in question. Those three things cannot possibly demonstrate a lack of fitness to engage in the business of insurance by clear and convincing evidence.

## CONCLUSION

Carter agrees with the ALJ's statement of the applicable law. Carter vehemently disagrees with the ALJ in its conclusions. At best, the negative factual findings of the ALJ were not strictly construed and did not have the ambiguities resolved in favor of Mr. Carter. The evidence was either not there or replete with ambiguities. The evidence presented by the Department with regard to the factual conclusions of the ALJ was not established by clear and convincing evidence. The ALJ concluded evidence that was

ambiguous at best and usually contradictory to somehow be bootstrapped to a level of "clear and convincing".

135. The ALJ contends that there were deliberate misrepresentations in the applications of J.K., W.K., and G.D. The deliberate representations as articulated in the proposed order do not constitute clear and convincing evidence that Carter demonstrated a lack of trustworthiness.

The ALJ further goes on to conclude there was clear and convincing evidencing that in trying to stop G.D. and G.B. from liquidating their annuities he demonstrated a lack of fitness to engage in the business of insurance. The evidence at trial is clear and unequivocal. He tried to stop G.D. and G.B. from liquidating their annuities because, at the time of their intent to liquidate their annuities, G.D. and G.B. were going to incur a substantial loss of money by liquidating those annuities. The Department never tried to refute that. G.D. and G.B. were outside the grace period and outside the look back period. Trying to convince G.D. and G.B. from liquidating their annuities and suffering a substantial amount of monetary loss in the process cannot possibly demonstrate a lack of fitness to engage in the insurance business and even more positively it can't establish by clear and convincing evidence that he is unfit to engage in the business of insurance.

136. The ALJ concluded there was clear and convincing evidence to prove Carter made willful misrepresentations in the annuity application of J..K., W.K., and G.D. As to J.K., the ALJ correctly pointed out that J.K. couldn't testify what representations were made to her on the annuity application. With regard to G.D. there cannot be clear and convincing evidence that any misrepresentation was willful because he clearly

articulated the existence of the annuities and in the correct amount in a more suitable form. There was no Testimony from either Allianz or EquiTrust to say either was misinformed or deceived in any manner. There was no clear and convincing evidence that Carter violated this statute.

141. The ALJ factually found that Carter made false statements in the applications of G.D. and G.B. and delivered the statements to Allianz and EquiTrust. There was no testimony from any witness from Allianz or EquiTrust to state that Carter incorrectly filled out any of their applications or forms, or that Carter made any false statements to them, or that Carter failed to accurately convey all of the information that they required on their form. Neither Allianz nor EquiTrust ever claimed to have been deceived. There simply was no testimony from Allianz or EquiTrust and since there was no evidence, the ALJ cannot conclude that there was clear and convincing evidence that Carter made material false statements to Allianz or EquiTrust.

## PENALTY

Because of the aforementioned stated reasons, the ALJ incorrectly calculated the potential penalty that Carter is subjected to and should have found no applicable penalty.

## RECOMMENDATION

Respondent moves the Department of Financial Services to enter a final order dismissing all allegations of Complaint against Carter as not being sufficiently proved by clear and convincing evidence.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing notice was mailed to David J. Busch, Division of Legal Services, 612 Larson Building, 200 East Gaines Street, Tallahassee, Florida 32399-0333, this notice was filed electronically with the Division of Administrative Hearings this 13th day of December, 2012.

Respectfully submitted,

M. D. Purcell,Jr.
**Law Office of M. D. Purcell, Jr.**
1110 N. Florida Ave.
Tampa, Florida 33558
(813) 960-7887
Fla. Bar No. 0831590