



FILED

MAR 26 2007

DECLARATION OF MAILING

I declare under penalty of perjury under the laws of the State of Washington that on the date listed below, I mailed or caused delivery of a true copy of this document to parties listed below
DATED this 27th day of March 2007 at Tumwater, Washington.

Signed: Wendy Galloway

**OFFICE OF
INSURANCE COMMISSIONER**

HEARINGS UNIT
Fax: (360) 664-2782

Hearings Unit, OIC
Patricia D. Petersen
Chief Hearing Officer

Patricia D. Petersen
Chief Hearing Officer
(360) 725-7105

Wendy Galloway
Paralegal
WendyG@OIC.wa.gov.
(360) 725-7002

STATE OF WASHINGTON
OFFICE OF INSURANCE COMMISSIONER

In the Matter of:

FRAN E. AUSTIN,

Licensee.

NO. D06-246

FINDINGS OF FACT
CONCLUSIONS OF LAW,
AND FINAL ORDER ON
HEARING

TO: Fran E. Austin
5431 S. Quail Ridge Circle
Spokane, Washington 99223

COPY TO: Mike Kreidler, Insurance Commissioner
Michael G. Watson, Chief Deputy Insurance Commissioner
John F. Hamje, Deputy Commissioner, Consumer Protection Division
Carol Sureau, Deputy Commissioner, Legal Affairs Division
Charles Brown, Senior Staff Attorney, Legal Affairs Division
Office of the Insurance Commissioner
PO Box 40255
Olympia, WA 98504-0255

Pursuant to RCW 34.04.090, 34.04.120, 48.04.010 and WAC 10-08-210, and after notice to all interested parties and persons, the above-entitled matter came on regularly for hearing before the Insurance Commissioner for the state of Washington (OIC) on December 18, 2006, in Tumwater, Washington. All persons to be affected by the above-entitled matter were given the right to be present at such hearing during the giving of testimony, and had reasonable opportunity to inspect all documentary evidence. The OIC appeared pro se, by and through Charles Brown, OIC Senior Staff Attorney. Fran E. Austin (Licensee) appeared pro se.



NATURE OF PROCEEDING

The purpose of the hearing was to take testimony and evidence and hear argument as to whether the Insurance Commissioner's (Commissioner) Order Revoking License, No. D06-246, entered by the Commissioner on September 12, 2006, should be confirmed, set aside or modified. Said Order Revoking License revokes the insurance agent's license of Fran E. Austin (Licensee) based upon the facts alleged therein. The Licensee, by letter dated October 18, 2006, and filed October 20, 2006, requested this hearing to contest this Order Revoking License.

FINDINGS OF FACTS

Having considered the evidence and arguments presented at the hearing, and the documents on file herein, the undersigned presiding officer designated to hear and determine this matter finds as follows:

1. The hearing was duly and properly convened and all substantive and procedural requirements under the laws of the state of Washington have been satisfied, and, pursuant to good cause shown, this Order is entered on the date specified below.
2. On September 12, 2006, the OIC, by and through John F. Hamje, Deputy Insurance Commissioner for his Consumer Protection Division, entered an Order Revoking License, No. D06-246, revoking the insurance agent's license of the Licensee. On October 20, 2006, the Licensee filed his Demand for Hearing to contest the subject Order Revoking License. Accordingly, after prehearing conference held November 6, 2006, the undersigned entered a Notice of Hearing scheduling the hearing in this matter to commence on December 18, 2006.
3. The Licensee is a 61 year old individual who has held his resident insurance agent's license in the state of Washington since on about 1969. Said insurance agent's license authorizes the Licensee to transact life and health insurance in the state of Washington.
4. In 2003, the Licensee sold a fixed annuity policy, issued by AmerUs AnnuityGroup, to Irene A. Minaker. At all times pertinent hereto, Ms. Minaker was a resident of Spokane, Washington. She was 85 years old, and was an unsophisticated investor. The annuity which the Licensee sold to Ms. Minaker had a nominal contract value of approximately \$67,000 and comprised the bulk of her estate and life savings. [Ex. 9; Testimony of Roger Minaker.]
5. In 2004, when she was 86 years old, the Licensee induced Ms. Minaker to surrender the annuity he sold to her in 2003 and to entrust the proceeds to him, pursuant to an agreement between himself and Ms. Minaker under which the Licensee falsely represented and guaranteed that Ms. Minaker would earn a minimum return of ten percent per year and the right to return of her principal at the end of one year. [Exs. 6, 7, 8, 9.]

6. In reliance upon the Licensee's advice and representations, Ms. Minaker surrendered the 2003 annuity, receiving approximately \$65,300.27, and incurring surrender charges of approximately \$4,297.83. She entrusted the net proceeds of approximately \$61,002.44 to the Licensee in March 2004. [Ex. 9.]

7. Upon receipt of the approximately \$61,002.44 from Ms. Minaker's 2003 annuity, the Licensee commingled these funds with his own. Specifically, the Licensee and his wife used approximately \$10,000 of Ms. Minaker's money for their own personal expenditures, and the Licensee transferred the rest, some \$50,000, to a brokerage account in his own name to conduct highly risky and speculative options trades online. [Exs. 3, 4, 5.] By June 2004, the Licensee had lost or spent all of Ms. Minaker's money which she had entrusted to him. [Exs. 3, 4, 5; Testimony of Licensee.]

8. In September 2004, some six months after she entrusted her life savings to the Licensee, Ms. Minaker died. The Licensee has also failed to make restitution to Ms. Minaker's estate.

9. In July 2004, the Licensee approached Mr. Gordon Westford, an 82 year old legally blind resident of Spokane, Washington. Mr. Westford, who had been a client of the Licensee's former insurance firm, was at the time living in an assisted living facility. The Licensee induced Mr. Westford to invest \$5,000 with him by falsely promising and guaranteeing Mr. Westford an annual return of 8.75% and return of his principal within one year. [Exs. 13.] The Licensee even filled out the Payee (himself), the date and the amount on the check and indicated thereon that it was for an "investment." [Ex. 14; Testimony of Licensee.]

10. Upon receipt of Mr. Westford's approximately \$5,000, the Licensee deposited this money into his personal account, used them for his personal expenses, and depleted these funds within one month of their receipt.

11. Approximately two months after Mr. Westford gave the Licensee the \$5,000 to invest for him, he died. Only a portion of those funds have been repaid to Mr. Westford's child(ren). [Testimony of Licensee.]

12. In the 1990's, the Licensee sold an annuity to Ms. Margaret M. Mathers, who at all pertinent times was a resident of Spokane, Washington. In August 2004, the Licensee met with Ms. Mathers, who was by then 84 years old and a widow with stage 4 colon cancer, living alone. Ms. Mathers had limited assets, was a very inexperienced investor and intended that her funds only be invested in safe investments. [Testimony of Ms. Mathers.]

13. During his meeting with Ms. Mathers in August 2004, the Licensee induced Ms. Mathers to invest approximately \$31,000 with him, \$6,000 of which were the funds withdrawn from the annuity he had previously sold her in the 1990's. The Licensee induced Ms. Mathers to withdraw the \$6,000 and to give him some \$25,000 more of her savings by falsely representing and guaranteeing that she would earn 11.25% annual return

on her investment with him and receive her principal back after two years. [Exs. 15, 16, 17.]

14. The Licensee commingled Ms. Mathers' funds with his own. The Licensee and his wife used approximately \$11,000 for personal expenses, and the Licensee invested the remaining \$20,000 in highly speculative and risky online options trades. The Licensee spent or lost all of Ms. Mathers' money that had been entrusted to him by September 2004 and has not made any restitution to her. [Testimony of Ms. Mathers; Testimony of Licensee.]

15. None of the contracts into which the Licensee induced his above former insurance clients to enter with him were authorized or in any way registered with the Washington State Department of Financial Institutions, Securities Division, or with any other securities authorities. [Testimony of Licensee; Testimony of Angela Vogel.]

16. By Final Order No. S-06-0221-06-FO01, the State of Washington Department of Financial Institutions Securities Division determined that the abovereferenced investment contracts are securities and that the Licensee committed multiple violations of the Washington's Securities Act.

17. The Licensee's conduct and misrepresentations in the Minaker and Mathers' matters detailed above in inducing these individuals to surrender or convert annuities constitute twisting.

18. The Licensee's conduct and misrepresentations in the Minaker, Westford and Mathers' matters detailed above constitute fraud and conversion of funds held in a fiduciary capacity.

19. The Licensee's conduct in the Minaker, Westford and Mathers' matters detailed above demonstrates that he is untrustworthy and a source of injury and loss to the public.

20. By reason of his conduct, the Licensee, Fran E. Austin, has shown himself to be, and is hereby so deemed to be, untrustworthy and a source of injury and loss to the public and not qualified to be an insurance agent in the State of Washington.

21. Based upon the facts found above, the Insurance Commissioner's Order No. D06-246, to the effect that the insurance agent's license of Fran E. Austin is revoked, is reasonable under the circumstances and should be upheld. Further, based upon the facts found above, it is recommended that Fran E. Austin not be considered to be licensed as an insurance agent, or other related capacity involving financial matters, in the future.

22. Angela Vogel, an Enforcement Attorney with the Washington State Department of Financial Institutions, Securities Division, and who was involved in investigating the Minaker, Westford and Mathers' matters for the Securities Division and facilitated entry of the abovereferenced Final Order No. S-06-0221-06-F001, appeared as a witness for the OIC. She presented her testimony in a detailed, clear and credible manner, and exhibited no apparent biases.

23. Roger Minaker, son of Irene Minaker, deceased, appeared as a witness for the OIC. Mr. Minaker, who appeared by telephone from out of state, presented his testimony in a detailed, clear and credible manner, and exhibited no apparent biases.

24. Margaret M. Mathers appeared as a witness for the OIC. Margaret M. Mathers appeared in a video deposition taken by the State of Washington Department of Financial Institutions, Securities Division, on July 6, 2006, and the video deposition was played in its entirety during the adjudicative proceeding, which included the undersigned throughout said deposition and during the entire proceeding. Margaret M. Mathers presented her testimony in a detailed, clear and credible manner, with clear recollection of the activities to which she was testifying, and exhibited no apparent biases.

25. Fran E. Austin appeared as a witness for the OIC. Fran E. Austin presented his testimony in a manner which was clear but contained substantial excuses and reasons why his activities were somehow justifiable and in accordance with the consumers' wishes, virtually entirely unwilling to recognize his legal fiduciary duties to those consumers whose funds he handled. He exhibited a striking lack of recognition of concepts of right and wrong, together with a striking ability to justify his every action.

26. Based upon the facts found above, it is here found that the Insurance Commissioner's Order Revoking License, No. D06-246, properly entered on September 12, 2006, is reasonable under the circumstances and should be upheld.

27. The undersigned recognizes recent case law which draws into question the proper standard of proof to be applied in administrative cases involving some types of professional licenses, and recognizes that such cases involving insurance agents' licenses have not been addressed. In recognition of the question that this recent case law raises, however, the undersigned has applied both the "clear, cogent and convincing" standard of proof and the "preponderance of the evidence" standard of proof, and finds the above facts under application of either the lower or the higher standard of proof.

CONCLUSIONS OF LAW

1. The adjudicative proceeding herein was duly and properly convened and all substantive and procedural requirements under the laws of the state of Washington have been satisfied. Further, the undersigned was properly delegated the authority to conduct this proceeding and to enter the final decision herein. Pursuant to RCW 34.05.461(8), for good cause shown, the Final Order is entered on the date specified below.

2. In his conduct and misrepresentations in inducing Ms. Minaker and Ms. Mathers to surrender or convert their annuities, the Licensee committed twisting and thereby violated RCW 48.30.180.

3. In his conduct in the Minaker, Westford and Mathers' matters, the Licensee committed fraud and conversion of funds held in a fiduciary capacity and thereby violated RCW 48.17.530(1)(d) and (e).

4. In his conduct in the Minaker, Westford and Mathers' matters, the Licensee has clearly demonstrated that he is untrustworthy and a source of injury and loss to the public as contemplated by RCW 48.17.530(1)(h).

5. By reason of his conduct, and his violations of the Insurance Code, Fran E. Austin has shown himself to be, and is so deemed by the Insurance Commissioner to be, untrustworthy and a source of injury and loss to the public and not qualified to be an insurance agent in the State of Washington. Accordingly, the Insurance Commissioner's Order, No. D06-246, revoking the insurance agent's license of Fran E. Austin, is upheld. It is highly recommended that no consideration be given to issuing an insurance agent's license, or other related license, to Fran E. Austin in the future.

ORDER

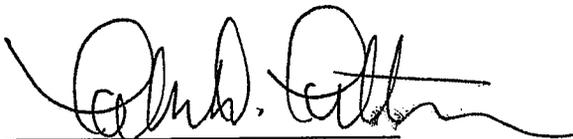
On the basis of the foregoing Findings of Facts and Conclusions of Law, to the effect that the Licensee has violated RCW 48.30.180, various provisions of RCW 48.17.530 and by his conduct has demonstrated himself to be, and has been so deemed to be, untrustworthy and a source of injury and loss to the public and not qualified to be an insurance agent in the state of Washington as contemplated by RCW 48.17.530(1)(h),

IT IS HEREBY ORDERED that the OIC's Order Revoking License, No. D06-246 entered on September 12, 2006, is upheld.

IT IS FURTHER ORDERED that the Licensee's insurance agent's license shall be surrendered to the Office of the Insurance Commissioner, P.O. Box 40255, Olympia, Washington 98504-0255 by close of business on April 4, 2007.

This Order is entered pursuant to RCW 34.05, WAC 10-08-210 and RCW 48.04.010.

This Order is entered at Tumwater, Washington, this 26th day of March, 2007.



PATRICIA D. PETERSEN
PRESIDING OFFICER

Pursuant to RCW 34.05.461(3), the parties are advised that they may seek reconsideration of this order by filing a request for reconsideration under RCW 34.05.470 with the

undersigned within 10 days of the date of service (date of mailing) of this order. Further, the parties are advised that, pursuant to RCW 34.05.514 and 34.05.542, this order may be appealed to Superior Court by, within 30 days after date of service (date of mailing) of this order, 1) filing a petition in the Superior Court, at the petitioner's option, for (a) Thurston County or (b) the county of the petitioner's residence or principal place of business; and 2) delivery of a copy of the petition to the Office of the Insurance Commissioner; and 3) depositing copies of the petition upon all other parties of record and the Office of the Attorney General in the United States mail. If a party chooses to file a petition in the Superior Court, he or she may, but is not required to, first file a request for reconsideration. For further information or to obtain copies of the applicable statutes, the parties may contact the paralegal to the undersigned.