DEPARTMENT OF INSURANCE, FINANCIAL INSTITUTIONS AND PROFESSIONAL REGISTRATION

P.O. Box 690, Jefferson City, Mo. 65102-0690

In re:	)	
	)	DIFP No. 090325414C
DAREN BARNES.	)	
	)	AHC No. 09-1184 DI

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF DISCIPLINE

Based on the competent and substantial evidence on the whole record, I, John M. Huff, Director of the Missouri Department of Insurance, Financial Institutions and Professional Registration ("Director" of the "Department"), hereby issue the following findings of fact, conclusions of law, and order of discipline:

Findings of Fact

1. John M. Huff is the duly appointed Director ("Director") of the Missouri Department of Insurance, Financial Institutions and Professional Registration ("Department") whose duties, pursuant to Chapters 374 and 375, RSMo, include supervision, regulation and discipline of insurance producers.

2. The Director filed a Complaint with the Administrative Hearing Commission ("Commission") on August 25, 2009, seeking a finding that cause existed for disciplining the

insurance producer license of Respondent Daren Barnes. On October 6, 2009, Barnes answered the Complaint.

3. The Commission held a two-day hearing on June 8 and September 3, 2010. Brad D. Eidson represented Barnes and Elfin L. Noce represented the Director at the hearing. On November 1, 2010, Tamara W. Kopp entered her appearance for the Director, replacing Mr. Noce.

4. On November 18, 2010, the Commission granted the Director's motion to voluntarily dismiss Count I of the Complaint without prejudice.

5. On August 9, 2011, the Commission issued its Decision finding cause to discipline Barnes under § 375.141.1(2) and (8) RSMo (Supp. 2010).[1]

6. In support of its finding of cause for discipline, the Commission found the following facts:

a. The Director first licensed Barnes as an insurance producer on December 14, 2000. His license was current and active at all relevant times until it expired on December 14, 2010.

b. Bankers Life employed Barnes as an insurance agent for approximately five years from 2001 to October 2006. Mutual of Omaha employed Barnes as an agent from October 2006 to July 2007. Beginning in July of 2007, Ozark Financial Group ("Ozark Financial") employed Barnes.

c. Gordon Hecker was a Missouri insurance consumer who purchased two annuities from Bankers Life prior to November 9, 2007. Barnes had known both

1 All references are to RSMo (Supp. 2010) unless otherwise indicated.

Gordon Hecker and his wife Margie since 2002. Barnes had sold a Bankers Life annuity to Hecker when Barnes was an agent for Bankers Life.

d. In the fall of 2007, Barnes visited Gordon and Margie Hecker at their residence. During this visit, Barnes explained he was no longer with Bankers Life and discussed the possibility of replacing the two Bankers Life annuities with a better annuity from one of the companies for which Ozark Financial served as an independent broker.

e. The Heckers expressed interest in this possibility and agreed that Barnes should prepare a comparison between the two Bankers Life annuities and a proposed annuity. Gordon Hecker provided Barnes with the last four digits of his social security number so Barnes could obtain current information on the two annuities from Bankers Life's telephone information service.

f. A few days after the initial visit, Barnes returned to the Heckers' residence to provide them with the result of the comparisons.

g. Barnes followed up again by telephone and was invited back to the Heckers' residence.

h. Barnes returned to the Heckers' residence on November 9, 2007. Gordon and Margie Hecker were both present and decided to replace the Bankers Life annuities. To change the annuities, Gordon Hecker signed the following documents: the Bankers Life and Casualty Service Request Form for policy number 7823976; Bankers Life and Casualty Service Request Form for policy number 7738286; Western Catholic Union Replacement Notice for the State of

Missouri for policy number 7823976; Western Catholic Union Replacement Notice for the State of Missouri for policy number 7738286; and Western Catholic Union Authorization to Transfer Funds.

i. Barnes did not forward the signed Western Catholic Union documents because it was decided that the annuities were to be liquidated first rather than having the funds transferred directly to Western Catholic Union. The funds received after liquidation would be used to purchase a new annuity.

j. During November and December of 2007, Barnes contacted Bankers Life several times by telephone to check on the progress of the liquidation. Once, Barnes provided Hecker with an update on the status of the liquidation based upon the information he received from a call to Bankers Life.

k. During the telephone calls, Barnes represented to Bankers Life that he was Gordon Hecker so Bankers Life would provide him with the information. Gordon Hecker had not authorized Barnes to call Bankers Life posing as him, but Barnes knew that Bankers Life would refuse to provide such account information to anyone other than Hecker.

l. Before the Bankers Life annuities were liquidated, Gordon Hecker changed his mind. Hecker informed Barnes he did not want the annuities changed. In response, Barnes visited the Heckers in their residence and stated that it was unlikely the liquidation could be stopped at this time. Barnes recommended the liquidation be allowed to proceed because Hecker could always

take the proceeds from the liquidation and purchase annuities from Bankers Life on the same terms. Barnes made no effort to stop the liquidation.

m. Hecker subsequently received two checks with the proceeds from the liquidation of the Bankers Life annuities. Hecker no longer spoke to Barnes after receiving the liquidation checks.

n. On December 19, 2007, Gordon and Margie Hecker went to the Bankers Life office in Springfield to get the annuities back. A representative of Bankers Life prepared a letter for Gordon Hecker to sign. The letter was dated December 19, 2007, addressed "to whom it may concern," and failed to include any other addressee information. Bankers Life subsequently forwarded this letter to the Director as a complaint against Barnes. The Director opened an investigation of Barnes based upon the letter. Gordon Hecker subsequently would not affirm by affidavit that he had signed the letter.

o. Barnes cooperated with the Director's investigation by providing all requested documents and attending two subpoena conferences. The first conference was held on April 17, 2008; the second conference was held on February 3, 2009.

7. The Commission concluded that Barnes violated § 375.144(2) and (4), and was therefore subject to discipline under § 375.141.1(2), when he posed as Gordon Hecker on telephone calls to Bankers Life which indirectly related to the underlying insurance transaction.

8. After evaluating the evidence and testimony, the Commission rejected the Director's allegation in the Complaint that Barnes violated § 373.210.1(1) as Barnes either made

a false statement at the first subpoena conference and at the Commission's hearing when he denied signing Hecker's name to documents or he made a false statement when Barnes admitted during the second subpoena conference to signing Hecker's name to documents.

9. The Commission concluded that Barnes engaged in a dishonest practice and was not trustworthy, and was therefore subject to discipline under § 375.141.1(8), because Barnes used Hecker's confidential information to pose as Hecker to get confidential information from Bankers Life when Barnes knew that the insurer would not otherwise provide the information. The Commission specifically found no consent for the calls by Barnes, rejecting Barnes's argument that he was authorized to make the calls and that they were for Hecker's benefit.

10. On September 9, 2011, the Commission certified the record of its proceeding to the Director pursuant to § 621.110.

11. Thereafter, the Director served the Notice of Hearing upon Barnes, through counsel and by certified mail, which set the disciplinary hearing for October 18, 2011 at 9:30 a.m., at the Department, 301 West High Street, Room 530, Jefferson City, Missouri. The certified mail receipt was signed and returned to the Director.

12. Barnes and his attorney, Brad D. Eidson, appeared at the disciplinary hearing on October 18, 2011. Tamara Kopp appeared as counsel for the Department's Consumer Affairs Division ("Division").

13. The hearing officer, Mary S. Erickson, admitted Exhibit 1, the Notice of Hearing and Exhibit 2, the Commission's record of proceedings. *Disciplinary Hearing Transcript, ("Tr.")* pages *6-7.*

14. The Division's evidence consisted of Exhibits 1 and 2 and the testimony of

Dennis Fitzpatrick, Special Investigator with the Division. *Tr. 6-15.* Fitzpatrick testified regarding documentation from Bankers Life showing that the insurer received a total of four (4) calls requesting surrender information for Hecker's annuities, and each time, the person calling claimed to be the annuity's owner. *Tr. 10; see Commission Hearing Exhibit 2A.* Fitzpatrick testified that Barnes admitted making the calls. *Tr. 10; Barnes's Answer to Complaint before the Commission,* ¶ 13.

15. Fitzpatrick testified that "[f]or a producer to pose as a consumer and make repeated calls with personal data to gain access from an insurance company is not acceptable." *Tr. 11:12-14.*

16. Barnes presented no exhibits, but testified on his own behalf. *Tr. 19-36.*

17. Barnes testified that he first met Hecker, who already had two annuity contracts with Bankers Life, in 2001 or 2002. *Tr. 21.* Barnes considered Gordon Hecker and his wife to be friends and would drop by their home to visit. *Tr. 22.*

18. In fall of 2007, Barnes was then employed by Ozarks Financial Group when he visited the Heckers again socially, but the discussion turned to the Hecker's annuities. Barnes offered to compare the annuities because he was no longer a captive agent with Banker Life, but "more of a brokerage" with many companies. *Tr. 22-24.*

19. Barnes testified that after he provided the comparison, Hecker chose to change his annuity through a liquidation process. *Tr. 28.* Barnes told Hecker he would check on the status of the liquidation: "I told Mr. Hecker that I would have to call as if I were he, because Bankers will not talk to Daren Barnes. They won't talk to any agent. . . . And he said, Fine." Barnes testified that Hecker had knowledge of and gave Barnes permission to track the liquidation

process. *Tr. 29.*

20. Barnes testified that he called Bankers Life and identified himself as Hecker and said that "I'm calling to see if you've honored my request." *Tr. 30.* Barnes claimed that "without exception" he has a "very, very, very good memory," and that he did not recall more than that one phone call to Bankers Life. *Id.*

21. Barnes testified that he spent the first 20 years of his career as a school teacher and basketball coach. *Tr. 20.* Barnes also explained that he has been unemployed since the case was filed and that his income is limited to helping family. Further, Barnes and his wife are in the process of a bankruptcy proceeding. *Tr. 31-32.*

22. When asked what he believed would be an appropriate level of discipline, Barnes stated that he did not know "to what degree of wrongness the Department is attaching to a single phone call." *Tr. 33-34.* "I cannot understand this being interpreted as anything other than me trying to do something for a friend, with his knowledge and permission." *Tr. 34.* Barnes understood there must be some discipline and that he hoped it would be a fine. *Tr. 35.*

23. In his closing, Barnes's counsel, Mr. Eidson, also asked for a fine and explained that Barnes has "de facto, been suspended for over two years . . . so a suspension of even six months is simply added on to what has already had a huge affect on his life." *Tr. 41-2.*

24. The Division recommended that Barnes's insurance producer license be revoked. *Tr. 11, 37.*

25. The Director hereby adopts and incorporates the August 9, 2011 Decision of the Administrative Hearing Commission referenced herein and does hereby find in accordance with the same. *Director of Dep't of Ins., Fin. Insts. & Prof'l Reg'n v. Daren Barnes,* No. 09-1184 DI

(Mo. Admin. Hrg. Comm'n Aug. 9, 2011).

26. After the disciplinary hearing, both parties submitted proposed Findings of Fact, Conclusions of Law and Order of Discipline.

27. On November 18, 2011, the hearing officer issued an order requesting written briefs from each party on whether the Director may issue Findings of Fact, Conclusions of Law and Order in this matter in light of the Chapter 7 Voluntary Bankruptcy of Respondent Daren Barnes, Bankr. W.D.Mo., No. 11-62339-abf7 (filed on October 31, 2011) and the bankruptcy automatic stay.

28. The Division filed a brief regarding the bankruptcy issues on November 23, 2011, and Barnes's counsel concurred with the Division's brief.

29. On January 6, 2012, the hearing officer issued an order holding the disciplinary proceeding in abeyance pending the resolution of Barnes's bankruptcy proceeding. The order further directed Barnes to notify the hearing officer upon the resolution of the bankruptcy.

30. On March 16, 2012, Mr. Eidson forwarded to the hearing officer a copy of the Discharge of Debtor in *In re: Daren Wendell Barnes,* Bankr. W.D.Mo., No. 11-62339-abf7.

Conclusions of Law

31. Section 621.110 outlines the procedure after the Commission finds cause to discipline a license. That statute provides, in relevant part:

> Upon a finding in any cause charged by the complaint for which the license may be suspended or revoked as provided in the statutes and regulations relating to the profession or vocation of the licensee . . ., the commission shall deliver or transmit by mail to the agency which issued the license the record and a transcript of the proceedings before the commission together with the commission's findings of fact and conclusions of law. The commission may make recommendations as to appropriate disciplinary action but any such recommendations shall not be

> binding upon the agency. . . . Within thirty days after receipt of the record of the proceedings before the commission and the findings of fact, conclusions of law, and recommendations, if any, of the commission, the agency shall set the matter for hearing upon the issue of appropriate disciplinary action and shall notify the licensee of the time and place of the hearing[.] . . . The licensee may appear at said hearing and be represented by counsel. The agency may receive evidence relevant to said issue from the licensee or any other source. After such hearing the agency may order any disciplinary measure it deems appropriate and which is authorized by law. . . .

32. Where an agency seeks to discipline a license, the Commission "finds the predicate facts as whether cause exists" for the discipline, and then the agency "exercises final decisionmaking authority concerning the discipline to be imposed." *Tendai v. Board of Reg'n for the Healing Arts,* 161 S.W.3d 358, 364-65 (Mo. banc 2005), *overruled on other grounds, Albanna v. Board of Reg'n for the Healing Arts,* 293 S.W.3d 423, 428 n.2 (Mo. banc 2009).

33. Section 374.051.2, relating to a proceeding to revoke or suspend a license, states, in relevant part:

> 2. If a proceeding is instituted to revoke or suspend a license of any person under sections 374.755, 374.787, and 375.141, the director shall refer the matter to the administrative hearing commission by directing the filing of a complaint. The administrative hearing commission shall conduct hearings and make findings of fact and conclusions of law in such cases. The director shall have the burden of proving cause for discipline. If cause is found, the administrative hearing commission shall submit its findings of fact and conclusions of law to the director, who may determine appropriate discipline.

34. Section 375.141.1 states, in pertinent part:

> 1. The director may suspend, revoke, refuse to issue or refuse to renew an insurance producer license for any one or more of the following causes:

* * *

> (2) Violating any insurance laws, or violating any regulation, subpoena or order of the director or of another insurance commissioner in any other state;
>
> * * *
>
> (8) Using fraudulent, coercive, or dishonest practices, or demonstrating incompetence, untrustworthiness or financial irresponsibility in the conduct of business in this state or elsewhere[.]

35. Section 375.141.4 allows the Director to revoke or suspend a license where the licensee has failed to renew his license.

36. Section 375.144 provides, in relevant part:

> It is unlawful for any person, in connection with the offer, sale, solicitation or negotiation of insurance, directly or indirectly, to:
>
> * * *
>
> (2) As to any material fact, make or use any misrepresentation, concealment, or suppression;
>
> * * *
>
> (4) Engage in any act, practice, or course of business which operates as a fraud or deceit upon any person.

37. In his proposed Findings of Fact, Barnes asserts that the Commission's factual findings regarding the telephone calls by Barnes to Bankers Life contradict the Commission's conclusion. Specifically, Barnes emphasizes the following quote from the Decision: "These misrepresentations to Bankers Life were not in connection with the offer, sale, solicitation, or negotiation of insurance, but indirectly related to the underlying transaction to which Barnes was going to be paid." *Commission's Decision,* p. 7. Barnes argues that based on the Commission's specific finding, Barnes did not act unlawfully under § 375.144(2) and (4).

38. No contradiction exists between the Commission's factual findings and its

conclusion: Barnes's material misrepresentations and acts, which operated as a fraud or a deceit, were "indirectly related" to the underlying insurance transaction. Section 375.144 unambiguously provides that it is unlawful for any person to engage in the conduct as enumerated in subsections (1) through (4) either directly **or indirectly** in connection with the offer, sale, solicitation or negotiation of insurance.

39. Pursuant to §§ 375.141 and 621.110, the Director has the discretion to discipline Barnes's insurance producer license, including the discretion to suspend or revoke such license.

40. Barnes's attorney asserted that the Director has authority to issue a fine against Barnes pursuant to § 374.049 as the discipline against Barnes. *Tr. 42.* However, § 375.141.1 limits the Director's authority: "The director may suspend, revoke, refuse to issue or refuse to renew an insurance producer license for any one or more of the following causes[.]" Imposition of a fine is not authorized by § 375.141.1.

41. Barnes maintained that he only made one call to Bankers Life to obtain information for the comparison and one call regarding the liquidation status. However, contrary to Barnes's testimony, the Commission specifically found that Barnes, during November and December of 2007, Barnes contacted Bankers Life several times by telephone to check on the progress of the liquidation. *Commission's Decision,* p. 4. The records provided by Bankers Life clearly demonstrate multiple calls by Barnes. *Commission Hearing Exhibit 2A.*

42. Barnes admitted under oath to the hearing officer that he called an insurance company and posed as a consumer. As the Commission concluded, the motivation of the calls is irrelevant: Barnes made misrepresentations to Bankers Life indirectly related to the underlying insurance transaction for which Barnes would have been paid.

43. The Director specifically adopts from the Commission's Decision the conclusions of law that: Barnes violated § 375.144(2) and (4), and was therefore subject to discipline under § 375.141.1(2), when he posed as Gordon Hecker on telephone calls to Bankers Life which indirectly related to the underlying insurance transaction; and Barnes demonstrated untrustworthiness and engaged in dishonest practices and is therefore subject to discipline under § 375.141.1(8).

44. The purpose of § 375.141 is not to punish licensees, but to protect the public from just the type of abuse of trust that the Commission found Barnes to have committed. *See Ballew v. Ainsworth,* 670 S.W.2d 94, 98 (Mo. App. 1984).

45. Therefore, in light of the facts found by the Commission and the evidence presented to the Director at the disciplinary hearing, sufficient grounds exist for suspending Barnes's insurance producer license.

46. This Order is in the public interest.

ORDER

Based on the foregoing findings and conclusions, the insurance producer license of Daren Barnes (License No. 0122419) is hereby SUSPENDED from December 14, 2010 through and including the date this Order is issued.

SO ORDERED, SIGNED AND OFFICIAL SEAL AFFIXED THIS 6TH DAY OF JUNE, 2012.

John M. Huff, Director
Missouri Department of Insurance,
Financial Institutions and
Professional Registration

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of June, 2012, a copy of the foregoing Findings of Fact, Conclusions of Law and Order of Discipline, was served by regular mail and certified mail, No. 7009 3410 0001 8931 3285, to the following:

Daren Barnes
3324 Valley Vista Court
Springfield, MO 65810

And by U.S. Mail to:

Brad D. Eidson, Esq.
1112 East Main
Houston, MO 65483

Counsel for Daren Barnes

And by hand-delivery to:

Tamara Kopp, Esq.
Senior Counsel
Consumer Affairs Division
Department of Insurance, Financial Institutions
and Professional Registration

Kathryn Randolph, Paralegal
Missouri Department of Insurance, Financial
Institutions and Professional Registration
301 W. High Street, Room 530
Jefferson City, MO 65101
Telephone: 573.751.2619
Facsimile: 573.526.5492
Kathryn.Randolph@insurance.mo.gov