

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS  
DEPARTMENT OF BUSINESS REGULATION  
1511 PONTIAC AVENUE, BLDG. 68, 69  
CRANSTON, RHODE ISLAND 02920**

<b>IN THE MATTER OF:</b>	:	
	:	
<b>ANDREW CALCIONE and THOMAS FUOCO</b>	:	<b>DBR No. 14IN003</b>
	:	
<b>RESPONDENT.</b>	:	

**DECISION AND ORDER OF REVOCATION**

Hearing Officer: Ellen Balasco, Esq.

Hearing Held: June 30, 2014

Appearances: *For Respondents:* No appearance by Respondent or counsel.

*For the Dept. of Business Regulation, Insurance Division:* Elizabeth Kelleher Dwyer, Esq.

**I. TRAVEL OF THE CASE**

This matter commenced with an Order to Show Cause, Notice of Hearing, and Appointment of Hearing Officer (“Order”) requiring Andrew Calcione and Thomas Fuoco (“Respondents”) to appear before the Department of Business Regulation (“Department”) and to answer why the Director of the Department should not issue an order suspending or revoking Respondents’ licenses and/or issuing whatever penalty is determined to be appropriate under R.I. Gen. Laws § 42-14-16 and 7-11-602.

The Order was based upon a written complaint received on April 15, 2011, alleging that the Respondents engaged in unlawful insurance producing activities in three transactions with the complainant, resulting in the complainant’s loss of approximately

\$108,767.00. That Order is attached hereto, and incorporated in this Decision and Order by reference.

Prior to the pre-hearing conference, Mr. Fuoco's counsel contacted the Department and indicated that Mr. Fuoco would voluntarily surrender his license. The Department responded that this would only be acceptable if restitution was paid to the consumer identified in the Order. The Department sent an electronic message attaching a Consent Order and reminding counsel of the hearing date. (Department's Exhibit # 2) The Department did not subsequently hear from Mr. Fuoco or his counsel.

At the pre-hearing conference on May 5, 2014, neither Mr. Fuoco nor his counsel appeared.

At the pre-hearing conference, attorney Christopher Millea, acting as counsel on behalf of Respondent Calcione, represented that his client would voluntarily surrender his license. The Department responded that this would only be acceptable if restitution was paid to the consumer identified in the Order. The Department sent an electronic message attaching a Consent Order and reminding counsel of the hearing date. (Department's Exhibit #1) The Department did not subsequently hear from Mr. Calcione or his attorney.

The matter was assigned for full hearing on June 30, 2014. Both Respondents and their respective attorneys failed to appear at the hearing held at the Department on that date. Both parties had been duly served with notice of the hearing in accordance with the provisions of R.I. Gen. Laws § 42-35-9, and as evidenced by verbal and electronic mail communications between counsel for the Respondents and the Department.

## **II. JURISDICTION**

The Department has jurisdiction over insurance producer licenses pursuant the Producer Licensing Act, R.I. Gen. Laws § 27-2.4-1 *et seq.*, and R.I. Gen. Laws § 42-14-16.

## **III. STANDARD OF REVIEW FOR AN ADMINISTRATIVE HEARING**

It is well settled that in formal or informal adjudications modeled on the federal Administrative Procedures Act, the initial burdens of production and persuasion rest with the moving party. 2 Richard J. Pierce, *Administrative Law Treatise* § 10.7 at 759 (2002). In this case, the proponent of this enforcement action is the Department. Unless otherwise specified, a preponderance of the evidence is generally required in order to prevail. *Id.* at 763-766; see also, *Lyons v. Rhode Island Pub. Employees Council 94*, 559 A.2d 130, 134 (R.I. 1989) (preponderance standard is the “normal” standard in civil cases); *Parker v. Parker*, 238 A.2d 57, 60 (R.I. 1968) (“satisfaction by a ‘preponderance of the evidence’ [is] the recognized burden [of proof] in civil actions”). This means that, for each element to be proven, the fact finder must believe that the facts asserted by the proponent are more probably true than false. See *Parker*, 238 A.2d at 60. When there is no direct evidence on a particular issue, a fair preponderance of the evidence may be supported by circumstantial evidence. *Narragansett Electric. Co. v. Carbone*, 898 A.2d 87, 100 (R.I. 2006).

Here, the Department bears the burden for establishing why it is more likely than not that the Respondents conducted activities and business practices that violated the statutes and regulations under which they obtained their insurance producer licenses.

#### **IV. MATERIAL FACTS AND EVIDENCE**

At the hearing, the Department presented a number of documents in support of their case, all nine of which were marked as full exhibits.

Department's counsel submitted a Replacement of Life Insurance of Annuities for ING completed and signed by Mr. Calcione which answered "no" to the question "Are you considering using funds from your existing policies or contracts to pay premiums due on the new policy or contract?" (Department's Exhibit #3) The Department established that that this answer is false because the Prudential annuity was surrendered in order to obtain the ING annuity.

The Department also presented a Customer Identification and Suitability Confirmation Worksheet for the Aviva Life and Annuity Company (Department's Exhibit # 4). Based on information provided by the complainant, the Department learned that the complainant signed the Worksheet when it was blank and that Mr. Calcione filled in the form and that the numbers listed are not correct. The Department argued that, had the correct information been included on the form, Aviva would not have issued the annuity.

Additional documentary evidence included a Replacement of Life Insurance or Annuities form for Aviva signed by Andrew Calcione that answers "no" do the question "Are you considering discontinuing making premium payments, surrendering, forfeiting, assigning to the insurer, or otherwise terminating your existing policy or contract." (Department's Exhibit # 5). Again, based on information and belief, the Department concluded that the form was blank when the complainant signed it and that the information was false because an ING annuity was surrendered in order to obtain the Aviva annuity. The Department submitted a Surrender Request for Annuity Contracts to which a letter of

surrender signed by the complainant is notarized by Respondent Fuoco (Department's Exhibit # 6).

The Department also presented an Annuity Application for American Equities signed by Mr. Fuoco answering "no" to the question "Do you have any reason to believe that applicant has any existing insurance or annuities." (Department's Exhibit # 7). The Department represented that in fact the Aviva annuity was surrendered in order to obtain the American Equities annuity.

Department's Exhibit #8 is a Suitability Acknowledgement for American Equities in which the income and asset numbers listed on the acknowledgment are false. That document, executed by Respondent Fuoco on July 30, 2012, lists the answer "yes" to the question "Does your monthly income exceed your monthly living expenses." This statement is untrue, and that the Respondents knew or should have known that since the complainant was withdrawing money from the Aviva annuity. That document also shows the answer "no" to the question "Are you using funds from an existing life insurance policy or annuity contract to fund this?" This statement is also false, because in fact the Aviva annuity was surrendered in order to obtain the American Equities annuity.

Finally, the Department submitted a copy of a personal check to American Equities from the complainant. (Department's Exhibit # 9). The Respondents had instructed the complainant to have the premiums from the surrendered annuities paid to him personally and then to write personal checks so the transaction would not be viewed as a replacement annuity.

## V. FINDINGS OF FACT

Based on the statements contained in the attached Order to Show Cause, the documentary evidence and argument presented by the Department at a hearing in this matter, the undersigned Hearing Officer makes the following findings of fact:

1. Respondents and their respective attorneys were duly notified of the pendency of these proceedings, and the dates for pre-hearing conference and for full hearing.
2. Neither Mr. Fuoco nor his counsel appeared at the pre-hearing conference.
3. Mr. Calcione's counsel was notified of the date of the hearing at the pre-hearing conference and reminded via electronic message. Mr. Fuoco's counsel was notified of the date of the hearing via electronic mail.
4. Both Respondents and their respective attorneys failed to appear at the Department on the hearing date.
5. The facts set forth in the Order, attached hereto as Exhibit A, are found to be true and uncontradicted.
6. Under the standard set forth in Section III and the statutory framework set forth and analysis set forth in Section VI, the Department established by a preponderance of the evidence that Respondents' insurance producer licenses should be revoked for cause and a failure to properly serve the interests of the public under the license in violation of R.I. Gen. Laws §§ 27-2.4-14(a)(2), (3), (5) and (8), and § 27-29-4(1) and (2).
7. A default judgment against both Respondents is appropriate given their failure to appear and/or defend this action pursuant to Section 21 of *Central Management Regulation 2 – Rules of Procedure for Administrative Hearings*.

## VI. CONCLUSIONS OF LAW

1. The Respondents have defaulted within the meaning of Central Management Regulation 2, Section 21, which provides:

“If any Party to a proceeding fails to answer a complaint, plead, appear at a prehearing conference or hearing or otherwise fails to prosecute or defend an action as provided by these Rules, the

Hearing Officer may enter a default judgment against the defaulting Party, take such action based on the pleadings and/or other evidence submitted by the nondefaulting Party as the Hearing Officer deems appropriate in his/her sole discretion or take such other action as the Hearing Officer deems appropriate in his/her sole discretion.

2. The Department has complied with the requirements of R.I. Gen. Laws § 42-35-9 regarding notice in contested cases, and the Respondents were afforded an opportunity for a hearing after reasonable notice.
3. By default and based on the facts presented in the Order and the evidence adduced at hearing, Respondents are found to have each committed the following violations:
  - a. R.I. Gen. Laws § 27-2.4-14(2)(Violating any insurance laws, or violating any regulation, subpoena or order of the insurance commissioner or of another state's insurance commissioner),
  - b. § 27-2.4-14(5)(Intentionally misrepresenting the terms of an actual or proposed insurance contract or application for insurance),
  - c. § 27-2.4-14(7) (Having admitted or been found to have committed any insurance unfair trade practice or fraud),
  - d. § 27-2.4-14(8) (Using fraudulent, coercive, or dishonest practices or demonstrating incompetence, untrustworthiness or financial irresponsibility in this state or in another place), Insurance Regulation 12 (Suitability in Annuity Transactions), Insurance Regulation 29 (Life Insurance and Annuities Replacement).

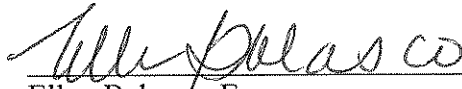
4. Based on the forgoing, it is appropriate for the Director to exercise authority to revoke the Respondents' insurance producer licenses as provided by R.I. Gen. Laws § 42-14-16 and R.I. Gen. Laws § 27-2.4-14.

V. **RECOMMENDATION**

The undersigned Hearing Officer recommends that the Director issue an Order that:

1. The Respondents are defaulted for failure to appear;
2. Respondent Calcione's insurance producer license number 1085851 is revoked;
3. Respondent Fuoco's insurance producer license number 1050698 is revoked;
4. Both Respondents are ordered to immediately cease and desist from engaging in any activity in the state of Rhode Island requiring licensure under the Producer Licensing Act, R.I. Gen. Laws § 27-2.4-1 *et seq.*

DATED: 5 Dec. 2014

  
\_\_\_\_\_  
Ellen Balasco, Esq.  
Hearing Officer

**ORDER**

I have read the Hearing Officer's Recommendation in this matter, and I hereby take the following action with regard to the Recommendation:

ADOPT

REJECT

MODIFY

Dated: 8 Dec 2014

  
\_\_\_\_\_  
Paul McGreevy  
Director

ENTERED as Administrative Order No. 14-67 on the 8<sup>th</sup> day of December, 2014.

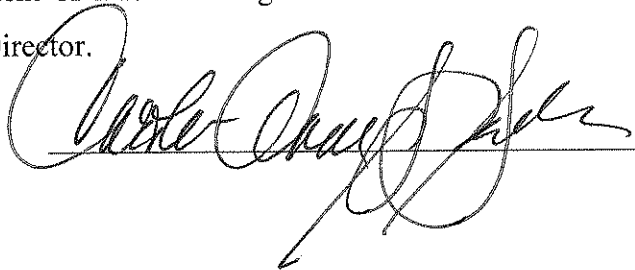


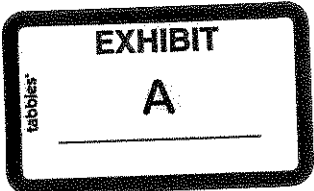
NOTICE OF APPELLATE RIGHTS

THIS DECISION AND ORDER CONSTITUTES A FINAL ORDER OF THE DEPARTMENT OF BUSINESS REGULATION PURSUANT TO R.I. GEN. LAWS § 42-35-12. PURSUANT TO R.I. GEN. LAWS § 42-35-15, THIS ORDER MAY BE APPEALED TO THE SUPERIOR COURT SITTING IN AND FOR THE COUNTY OF PROVIDENCE WITHIN THIRTY (30) DAYS OF THE MAILING DATE OF THIS DECISION. SUCH APPEAL, IF TAKEN, MUST BE COMPLETED BY FILING A PETITION FOR REVIEW IN SUPERIOR COURT. THE FILING OF THE COMPLAINT DOES NOT ITSELF STAY ENFORCEMENT OF THIS ORDER. THE AGENCY MAY GRANT, OR THE REVIEWING COURT MAY ORDER, A STAY UPON THE APPROPRIATE TERMS.

CERTIFICATION

I hereby certify that on the <sup>8<sup>th</sup></sup> day of December, 2014, a true copy of this Decision and Final Order was sent by first class mail, postage prepaid to Christopher Millea, Esq. at 127 Dorrance St - Penthouse Ste. Providence, RI 02903, Walter J. Manning, Esq. at 875 Centerville Rd. - Unit 4A2, Warwick, RI 02886-4366, and by electronic mail to the following parties at the Department of Business Regulation: Elizabeth Kelleher Dwyer, Esq., and Joseph Torti, Deputy Director.

A handwritten signature in black ink, appearing to read "Christopher Millea", is written over a horizontal line. The signature is cursive and somewhat stylized.



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**IN THE MATTER OF:** :  
 :  
**ANDREW CALCIONE and** : **DBR No. 14IN003**  
**THOMAS FUOCO** :  
 :  
**RESPONDENTS.** :  
 :

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**ORDER TO SHOW CAUSE, NOTICE OF HEARING AND APPOINTMENT OF HEARING OFFICER**

Pursuant to R.I. Gen. Laws §§ 42-14-16, 42-35-9, 27-2.4-14 and 7-11-602, the Director of the Department of Business Regulation (“Department”) hereby issues this Order to Show Cause, Notice of Hearing and Appointment of Hearing Officer (“Order”) to Andrew Calcione and Thomas Fuoco (“Respondent”) requiring Respondents to appear before the Department and to answer why the Director of the Department should not issue an order suspending or revoking Respondents’ licenses and/or issuing whatever penalty is determined to be appropriate pursuant to R.I. Gen. Laws § 42-14-16 and 7-11-602.

The Director issues this Order for the following reasons:

1. Respondent Calcione was the holder of insurance producer license number 1085851 with life, accident & health or sickness and variable life and annuity lines of authority. This license was issued on September 6, 2011 and expired on March 31, 2013. On October 23, 2013 Respondent Calcione applied to reinstate the license. This request to reinstate has been denied for the reasons set forth in this Order.

2. Respondent Calcione was first licensed in Rhode Island on January 1, 1991, however, his license expired on March 31, 2010. He was, therefore, not licensed between March 31, 2010 and September 6, 2011.

3. Respondent Calcione was also a registered securities representative licensed in this state from June 21, 2000 through January 31, 2011.

4. Respondent Fuoco was the holder of insurance producer license number 1050698 with life, accident & health or sickness and credit lines of authority. This license was issued on January 4, 2012 and expired on November 30, 2013.

5. In response to the complaint described in this Order, Respondent Fuoco informed the Department that he had "retired." He thereafter attempted to renew his insurance producer license. When the Department inquired as to why he was attempting to renew he stated that he had "retired" from his tax business but still intended to sell insurance. The Department has denied the renewal of his license for the reasons set forth in this order.

6. On April 15, 2011, the Department received a written complaint alleging that from June 2007 to August 2012 Respondents recommended that a consumer purchase and surrender three variable annuity contracts and one fixed annuity contract. These transactions resulted in surrender charges of approximately \$108,767.00.

7. On July 6, 2007, based on the recommendation of Respondent Calcione, the consumer purchased Prudential Variable Annuity, contract number E0594243 (the "Prudential Annuity"), with an initial premium of \$80,000.00. On July 12, 2007, the consumer added additional premium to the Prudential Annuity of \$227,700.49 increasing the total amount invested in the Prudential Annuity to \$307,700.49.

8. On July 31, 2008, based on the recommendation of Respondent Calcione, the Complainant agreed to a full surrender of the Prudential Annuity for the total value of the annuity - \$301,950.86. The charges incurred by the consumer as a result of the surrender were \$33,394. The net amount paid to the Complainant after these charges were assessed was \$274,222.82.

9. On August 14, 2008, based on the recommendation of Respondent Calcione, the Complainant purchased ING Variable Annuity, contract number C261688-OW (the "ING Annuity"), with an initial premium of \$274,222.82. Respondents represented to ING that the ING Annuity was not a replacement for the Prudential Annuity. The consumer was instructed by Respondents to sign partially completed forms related to this purchase. The information provided to the insurer by Respondent was, in many respects, false and not authorized by the consumer. The check from Prudential was sent to the consumer who endorsed it over to ING. Commission of \$16,453.35 was paid by ING to Respondents' designated broker dealer as compensation for this sale.

10. The consumer made three withdrawals during the time he held the annuity totaling \$25,000.

11. On November 5, 2010, based on the recommendation of Respondent Calcione, the consumer surrendered the total value in the ING Annuity. Respondent instructed the consumer to have the check sent to him rather than to the replacing insurer. The charges incurred by the consumer as a result of the surrender were \$22,383.41. The net amount paid to the consumer was \$220,523.01.

12. On November 15, 2010, based on the recommendation of Respondents, the Complainant purchased an AVIVA Annuity, contract number 100830 (the "AVIVA

Annuity”), with an initial premium of \$220,523.00. Respondents represented to AVIVA that this was not a replacement and instructed the consumer to have the check from ING sent to the consumer rather than the replacing insurer. The consumer was instructed by Respondents to sign partially completed forms related to this purchase. The information provided to the insurer by Respondent was, in many respects, false and not authorized by the consumer. The consumer deposited the funds in his account and wrote a personal check to AVIVA. Respondent Calcione was paid a commission of \$16,535.85 as a result of this sale. Respondent Calcione was not licensed as an insurance producer in the State of Rhode Island at the time of this purchase.

13. The consumer made monthly withdrawals during the time he held the AVIVA annuity of between \$1,200 and \$1,800.

14. On August 7, 2012, based on the recommendation of Respondents the Complainant agreed to a full surrender of the AVIVA Annuity. The charges incurred by the consumer as a result of the surrender were \$52,990.03. The net amount paid to the consumer was \$174,325.51. At the instruction of Respondents, the consumer requested that the funds be sent to him and he thereafter deposited the funds in his account and wrote a personal check to the next insurer.

15. On July 31, 2012 Respondent purchased an American Equities fixed annuity with a premium of \$174,325.51. Respondent Fuoco was paid a commission of \$13,074.42 for this sale. Notwithstanding the fact that Respondent Fuoco had notarized the consumers signature on documents related to the AVIVA surrender, Respondent Fuoco represented to American Equities that the transaction was not a replacement. The consumer was instructed by Respondents to sign partially completed forms related to this

purchase. The information provided to the insurer by Respondent was, in many respects, false and not authorized by the consumer.

16. After being contacted by the Department, American Equities returned the policy premium to the consumer without the imposition of any surrender charges or other penalties.

17. Respondents were at all times aware that each of the replacements was unsuitable for the consumer. In making applications for these replacements Respondents grossly exaggerated the consumers net worth and holdings and falsely stated on each occasion that the annuity was not a replacement for another annuity.

18. The Division contends that in taking these actions Respondent violated R.I. Gen. Laws § 27-2.4-14(2), (3), (5), (7) and (8) and 27-29-4(1) and (2) Insurance Regulations 12 and 29.

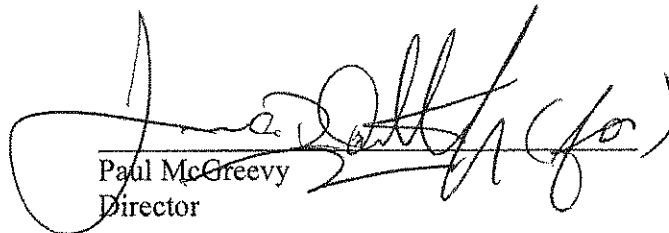
19. The Division contends that in taking these actions the Respondent knowingly, willfully and unlawfully violated the RIUSA, specifically §7-11-212(b)(2) – Willful Violation of the RIUSA and Rules, specifically RIUSA §7-11-212(b)(8) – Unethical or Dishonest Practices and § 7-11-501 – Fraudulent and Other Prohibited Practices and Rule 212(a)-1B.9 – Sales Representative Violation of rules deemed unethical or dishonest on the part of a broker-dealer, specifically Rule 212(a)-1A.2. – Churning, Rule 212(a)-1A.3 – Suitability and Rule 212(a)-1A.17 – Violating any Material Rule of any Securities Exchange or National Securities Association.

Therefore, the Director orders Respondent to appear before a Hearing Officer at the Department on **Monday, April 7, 2014 at 10:00 A.M.** at the Department's offices located at 1511 Pontiac Avenue, Cranston, Rhode Island 02920 for a hearing pursuant to

as to why the Director should not issue an order permanently revoking Respondents' licenses as insurance producers pursuant to R.I. Gen. Laws § 27-2.4-14 and/or issuing whatever penalty is determined to be appropriate pursuant to R.I. Gen. Laws § 42-14-16 and barring them from the securities industry pursuant to R.I. Gen. Laws § 7-1-602.

The Director hereby appoints Ellen R. Balasco, Esq. as Hearing Officer for the purpose of conducting the hearing and rendering a decision in his matter. The proceedings shall be conducted in conformity with R.I. Gen. Laws §§ 42-35-1 *et seq.*

Dated this 21<sup>st</sup> day of March 2014

  
Paul McGreevy  
Director

If you have any questions regarding the subject matter of this Order, please contact Elizabeth Kelleher Dwyer at (401) 462-9615 or [elizabeth.dwyer@dbr.ri.gov](mailto:elizabeth.dwyer@dbr.ri.gov) and reference the case name and number.

All are welcome at the Rhode Island Department of Business Regulation ("DBR"). If any reasonable accommodation is needed to ensure equal access, service or participation, please contact DBR at 401-462-9551, RI Relay at 7-1-1, or email [directorofficeinquiry@dbr.ri.gov](mailto:directorofficeinquiry@dbr.ri.gov) at least three (3) business days prior to the meeting.

CERTIFICATION

I hereby certify that on this 21<sup>st</sup> day of March 2014 a copy of this Order to Show Cause, Notice of Hearing and Appointment of Hearing Officer was sent by first class mail postage prepaid, certified mail and email to

Andrew Calcione  
370 Atwood Avenue  
Cranston, RI 02920

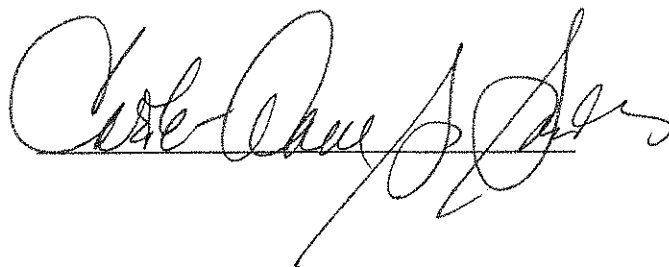
Andyc109@yahoo.com

and by first class mail and certified mail to

Thomas Fuoco  
2356 Division Road  
East Greenwich, RI 02818

Fuoco  
370 Atwood Avenue  
Cranston, RI 02920

Thomas Fuoco  
4200 Smoke Signal  
Sebring, FL 33872

A handwritten signature in black ink, appearing to read "Carl Andrew J. DeLuca", written over a horizontal line.