

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE MINNESOTA DEPARTMENT OF COMMERCE

In the Matter of the Insurance  
Agent's License of Donald L. Johnson.

FINDINGS OF FACT,  
CONCLUSIONS AND  
RECOMMENDATION

The above-entitled matter came on for hearing before Administrative Law Judge Peter C. Erickson on April 15, 16, 22, 23, 24, 25, 26, 29, and 30, and May 1, 6, 7, 8, 9, 10, 20, 21, 29 and 30, 1985. The record on this matter closed on October 16, 1985, the date of receipt of the last post-hearing submission from the Respondent.

Jerome L. Getz, Special Assistant Attorney General, 1100 Bremer Tower, 7th Place and Minnesota Street, St. Paul, Minnesota 55101, appeared on behalf of the Complainant, Minnesota Department of Commerce. Howard I. Malmon, Attorney at Law, 2218 North Central Life Tower, St. Paul, Minnesota 55101, and Stewart T. Williams, from the firm of Henson and Efron, Attorneys at Law, 1200 Title Insurance Building, Minneapolis, Minnesota 55401, appeared on behalf of the Respondent, Donald L. Johnson.

Notice is hereby given that, pursuant to Minn. Stat. 14.61 the final decision of the Commissioner of Commerce shall not be made until this Report has been made available to the parties to the proceeding for at least ten days, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the Commissioner. Exceptions to this Report, if any, shall be filed with Michael A. Hatch, Commissioner, 5th Floor, Metro Square Building, 7th and Robert Streets, St. Paul, Minnesota 55101.

STATEMENT OF ISSUES

The issues to be determined in this proceeding are whether Donald L. Johnson engaged in conduct which violates Minn. Stat. 60A.17, subds. 6b, 6c(a)(2), 6c(a)(5), 6c(a)(6), 6c(a)(9), and 6c(a)(11) (1982); and whether those violations, if proved, constitute grounds for disciplinary action against Respondent's insurance agent's license and/or impositions of a civil penalty. Additionally, Respondent has argued that Minn. Stat. 60A.17, subd. 6b, is unconstitutionally vague.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

## FINDINGS OF FACT

### Background - Donald Johnson and the Insurance Industry

1. Donald Johnson is presently 32 years old and has been licensed by the State of Minnesota to sell all lines of insurance since 1981. Mr. Johnson graduated from college in 1975 and has been employed in the insurance business since that time. He initially worked for the Federated Mutual Insurance Company of Owatonna for approximately two years. After that, he went to work for the Royal Globe Insurance Company in Minneapolis. There, he worked in underwriting and marketing for approximately one year, In November of 1978, Johnson became employed by the Continental Insurance Company as a Special Agent. In February of 1980, he left Continental to go to work for the Heritage Mutual Insurance Company in Chippewa Falls, Wisconsin. In that employment, he worked for the Harris-Barrows Agency, which was owned by Heritage Mutual. He was terminated by Heritage Mutual in the fall of 1980. Then, Mr. Johnson worked for the Bottenhoff Agency for a period of several months. In February of 1981, Johnson joined Corporate Insurance Managers (CIM) in Edina, Minnesota. CIM was owned by Gunnar Carteng, who turned over many of the supervisory duties in the Agency to Mr. Johnson. Johnson's official duties were supervision of marketing and he also was the sales manager for a period of time. In 1981, Mr. Johnson became the President of CIM. Because Mr. Carteng spent a substantial amount of his time in an export-import business, Mr. Johnson performed many of the day-to-day management responsibilities at CIM. However, in March of 1982, Johnson was fired by Mr. Carteng.

2. Mr. Johnson's next employment was with the Hendrickson Agency in Edina, Minnesota as a sales representative or producer. During this employment, Johnson worked with David Clarren and two other life insurance agents (subproducers) which he had met and worked with at CIM. These individuals sold primarily life insurance but brought property and casualty insurance business to Mr. Johnson.

3. Donald Johnson negotiated his own compensation arrangement with Terry Hendrickson, the owner of the Agency, and also the compensation for Mr. Clarren and the other subproducers for business which was sold through the Hendrickson Agency. Neither Clarren nor the other life insurance agents had any employment relationship with the Agency except for a right to commissions for referrals. Mr. Johnson, however, officed at the Agency and was provided with full office support facilities and staff. Mr. Hendrickson hired two Customer Service Representatives (CSR), Michael McKinley and Bonnie Huber, to work with Mr. Johnson on the day-to-day servicing of his insurance accounts.

4. Mr. Johnson's compensation arrangement with Mr. Hendrickson provided that business which was originated by the subproducers and sold by Mr. Johnson would generate a 40% commission for the subproducer, a 30% commission for Mr. Johnson and a 30% commission to the Hendrickson Agency.

5. Mr. Johnson received a monthly "draw" against his commissions in the amount of \$2,000 plus weekly expenses of \$250. Mr. Johnson's commissions were not credited to his account until after a policy was "booked" (the policy

actually received by the Agency and full payment made by the insured), which usually did not occur until several months after the policy was actually sold. In contrast, the subproducer's commissions were paid when the policy was written or sold. This payment was charged against Don Johnson's account until sufficient money had been collected to cover it. With this arrangement, Mr. Johnson's compensation balance was usually in a state of arrears. In instances where Mr. Johnson generated insurance business directly, he would receive a commission of 50% and the Hendrickson Agency would receive the other 50%.

6. A meeting was scheduled between Mr. Hendrickson, Don Johnson and Mike Clarren on January 30, 1984, because of continual disagreements regarding the payment of commissions. It was Hendrickson's intent to revise the compensation arrangement that had been in effect with Johnson and Clarren. However, neither Johnson or Mr. Clarren came to the meeting. Instead, Mr. Johnson removed all of his files from the Agency and on the following day, February 1, 1984, he commenced business in partnership with David Clarren as Agency Unlimited Insurance, Inc. (AUI). Bonnie Huber and Michael McKinley left the Hendrickson Agency at the same time and became employees of the new Agency. AUI continued to operate through the time of the hearing on this matter.

7. The primary participants in the sale of property and casualty insurance to commercial (business) accounts in Minnesota are the insurance companies, and insurance agent or agency, and the insured. Brokers may also become involved as an intermediary between the agency and insurance companies. Insurance agencies employ agents or producers and servicing persons or customer service representatives. The producers sell insurance to clients and the CSRs assist in marketing, obtaining quotes, filling out insurance applications, checking policies when they arrive at the agency, and obtaining endorsements regarding changes in the policy. A CSR works closely with and under the supervision of the producer.

8. Insurance companies have contractual relationships with specific agencies or agents to represent them for the purpose of selling their product. However, agents may also obtain insurance from insurance companies which they are not authorized to represent by "brokering" insurance through other agents or brokers. These brokers are sometimes referred to as excess and surplus offices, and obtain insurance which is difficult to place from insurance companies which are not licensed in this state. The broker works through an agent rather than dealing with the insured him/herself. Additionally, one broker may go through another to obtain insurance, resulting in "double brokering".

9. An insurance policy consists of a declaration page and the insuring agreement. The declaration page contains the gross premium, the name of the insured, the location of the property and a brief description of the terms and

conditions of the agreement. The gross premium is the cost to the insured for that policy and includes all commissions paid to agents or brokers. If the policy was obtained directly by an agent from an insurance company, the commission on the agent's copy of the declaration page will be the compensation the agent will earn on the policy. If the policy has been obtained through a broker or brokers, then the producer's copy of the

declaration page may show the commission payable to the broker who dealt with the insurance company. This commission will be shared by other brokers and agents in the transaction and is determined by contract or negotiation at each stage in the process.

10. If a brokered policy is sold by an insurance company, the declaration page will contain the gross premium and set forth the commission to be paid to the broker which will be shared by the agent. The broker will deliver the policy to the agent and the agent then delivers the policy to the insured. The declaration page which the insured receives with his/her policy is usually different from the declaration pages retained by brokers and agents because it does not set forth the amount or percent of commission received by the broker or agent.

11. An agent's compensation for selling an insurance policy is the commission, which has been set by the insurance company or negotiated with a broker. If the agent works for an employer-agency, the actual compensation the agent receives is contingent upon his or her employment contract. In addition to a commission, an agent may charge a fee to the insured for any services which are not customarily provided in writing an insurance policy. Since 1981, written disclosure and consent to charge a fee has been mandated by statute in Minnesota. See, Minn. Stat. 60A.17, subd. 6b (1984).

12. Selling a liability or casualty insurance policy is a process which involves several steps which are generally uniform through the insurance industry. The producer (agent) meets with a potential client (the insured) to discuss the client's insurance needs. The producer then obtains quotes on coverage for the insured. Quotes may come from companies with which the producer's agency has contracts or, the agency may contact a broker who has contracts with a number of insurance companies if the insurance is difficult to place. The broker will then contact various companies or perhaps other brokers to obtain quotes on the proposed insurance. These quotes are based on applications which the agent submits to the broker. These applications may be on "generic" forms or on forms individualized for each company. The insurance company will then make a quote to the broker based upon the information contained in the application. The quote itself consists of a gross premium for the coverage requested as well as a commission. The premium is the amount which is paid by the insured and the commission is the amount which is divided between the agent and broker.

13. If a policy is brokered, the broker transmits a quote to the agent which will include the gross premium set by the insurance company as well as the commission which the broker will pay the agent. The agent will then inform the insured of the gross premium established by the company. The commission which the insurance company pays the broker and the commission which the broker pays the agent may be fixed by a contract or may be

negotiated during the process. It is, however, a percentage of the gross premium. The amount of the commission is not normally communicated to the insured unless the insured makes a specific request for that information.

14. If an insured accepts the agent's proposal (quote), the agent obtains a down-payment, which is usually 20% of the gross premium. The insured is then informed that the balance of the gross premium can be paid when the policy arrives and is delivered or the balance can be financed. Insurance agencies will usually arrange for financing with a company that specializes in

financing insurance premiums. The finance company pays the amount of the gross premium less the down payment to the agency. The agency retains this amount until invoiced by the broker. The insured pays the financed amount, including finance charges, in installment payments to the finance company.

At

the time the down payment is made, the producer issues a binder to the insured

if the agency has authority to bind the insurance company. This binder means

that an insurance contract has been entered into and sets forth the essential

terms and conditions as agreed to between the agent and the insured.

15. If a broker is involved in the insuring process, the broker must inform the insurance company that a quote has been accepted and the broker binds coverage for the insured. An insurance policy will not be issued by the insurance company for several weeks to several months after the contract is made. This policy includes a declaration page and is sent to the broker who transmits the policy to the agent who delivers it to the insured. There are usually several copies of the declaration page, one for the broker, one for the agent, and one for the insured. Each declaration page will show the gross premium, however, the insureds "original" will usually not show the amount of any commissions.

16. If the declaration page contains any mistakes, those are usually corrected by requesting an endorsement from the insurance company.

17. When the broker transmits the insurance policy to the agent, an invoice to the insurance agency is also usually submitted for the amount of the gross premium on the declaration page and the surplus lines tax (this is an amount which must be paid for coverage secured from insurance companies not licensed to do business in Minnesota) less the commission to be retained by the agent. The producer then delivers the original declaration page and policy to the client and bills the client for the amount of the gross premium. The broker pays the insurance company the gross premium less the commissions.

Background - the Jacobs Companies, Independent Construction Truck Owners Association (ICTO), Butwin Sportswear

18. Irwin Jacobs is a business person who owns or has an interest in several different corporations. In June of 1983, these corporations include Watkins, Brown-Minneapolis Tank, Federated Financial Corporation, FFC Realty, and Jacobs Management Corporation. Insty-Prints and C.O.M.B. Company were added later that year. Jacobs Management Corporation is a holding company which provides administrative services to a variety of the operating companies including accounting, insurance, data processing and tax services. Robert Wold was general manager of Jacobs Management Corporation in June of 1983 and

at all times relevant to this proceeding.

19. In April of 1983, Ralph Klein, an executive with the J.Y.J. Corporation, one of the Jacobs companies, introduced Wold to David Clarren and

Donald Johnson.' Mr. Klein and Mr. Clarren were personal friends. As a result of this introduction and meeting, Mr. Wold invited Mr. Johnson to look at the Jacobs insurance accounts and submit bids on behalf of the Hendrickson Agency. As a result of the bidding, the Hendrickson Agency provided insurance for the Jacobs companies from July 1, 1983 through March, 1984.

20. The Independent Construction Truck Owners Association (ICTO) is an organization of truckers. Mr. Johnson negotiated a group insurance policy covering members of ICTO with the Great American Insurance Company in the fall of 1983.

21. Butwin Sportswear Company is located in St. Paul and is run, in part, by Lefty Butwin, a friend of David Clarren. Butwin was introduced to Don Johnson by Mr. Clarren in the spring of 1981 while Mr. Johnson was employed by CIM. Mr. Johnson subsequently provided workers' compensation insurance for Butwin Sportswear.

#### Concurrent Civil Actions

22. At the time this matter was investigated by the Department of Commerce and up to the present, Mr. Johnson has been a party to several civil actions arising, in part, out of the allegations herein. One of the actions involves Mr. Johnson and the Hendrickson Agency and is grounded on the amount of compensation owed to Johnson by the Agency. Terry Hendrickson has taken an active role in the investigation of this administrative matter. Although many of the allegations of wrong-doing involve other insurance agents or agencies, the state has taken no disciplinary action against anyone except Donald Johnson.

#### Count One - Alleged Undisclosed Fees

23. In early 1983, the Jacobs companies were paying in excess of \$750,000 for various insurance coverages through the Alexander and Alexander Agency. Alexander and Alexander had charged the insured a fee for providing the insurance coverage which was disclosed on the policies. In the spring of 1983, Robert Wold became General Manager of Jacobs Management Corporation, a subsidiary of Jacobs Industries, Inc., which was responsible for obtaining

'For the purposes of this report, "Jacobs companies" refers to the following distinct corporate entities:

Jacobs Management Corp., Jacobs Industries, Inc., J.Y.J.

Corp., C.O.M.B. Co., Federal Financial Corporation, FFC Realty, Watkins, Inc., Northwestern Bag Corporation, Nationwide Collection Service, Inc., I. Jacobs Enterprises, Kodacor, Inc., Brown-Minneapolis Tank and Fabricating Co., Regional Accounts Corporation, Nationwide Accounts Corporation, Jacobs Bag Corporation, Lawndale Industries, Inc., EQC of Indiana, Inc., Touch Corporation, JMSL Acquiring Corporation, S.J. Industries, Inc., JII Air Service, Inc., P.S.T. Acquiring Corporation.

insurance coverage for all of the Jacobs companies. Mr. Wold sought competitive bids for insurance from several agencies, one of which was from Mr. Johnson on behalf of the Hendrickson Agency.

24. In May of 1983, Donald Johnson met Lenore Schleif, an employee of London Brokers, when she delivered several insurance policies to the Hendrickson Agency. London Brokers was in the excess and surplus coverage brokerage business. Ms. Schleif had been working in the insurance industry since 1975, having been a sales representative for Liberty Mutual Insurance Company in Minneapolis and a commercial underwriter with Interstate National Corporation. After Mr. Johnson was given the opportunity to bid on the Jacobs companies' insurance, he contacted Ms. Schleif regarding placing the insurance. Ms. Schleif agreed that she would attempt to secure quotes on the coverage and told Mr. Johnson to send her the applications.

25. Mr. Johnson personally prepared applications which were submitted to London Brokers. The applications covered property, umbrella liability, installation/builders' risk and general liability for "Irwin Jacobs, et. al." and were dated May 5, 1983. The Hendrickson Agency also provided a copy of the previous director's and officer's liability policy for Kodacor, Inc., one of the Jacobs companies, which Ms. Schleif used in lieu of an application to obtain a quote from L.W. Biegler. This request was dated May 10, 1983.

26. Ms. Schleif obtained the following quotes for Mr. Johnson:

a. A property quotation from the Nutmeg Insurance Company for a premium of \$42,038 plus a Minnesota surplus lines tax of 3% and a commission to the Hendrickson Agency of 10%. This quote was communicated to Don Johnson in writing on May 31, 1983.

b. A quote for umbrella coverage from Interstate Insurance Company with a premium of \$47,000 and a commission to the Hendrickson Agency of 15%. This was communicated to Don Johnson in writing on May 31, 1983.

c. A quote for general liability from Stewart Smith Mid-America for Admiral Insurance Company which consisted of a \$40,000 premium with a 12-1/2% commission payable from Stewart Smith to London Brokers. Ms. Schleif quoted Mr. Johnson a commission of 7-1/2% on this policy. This quotation was conveyed orally to Mr. Johnson on approximately June 2, 1983.

d. A quote for director's and officer's liability from International Surplus Lines with a premium of \$18,460 for three years based upon 25 million dollars of coverage and a commission to the Hendrickson Agency of 10%. This

quotation was submitted to the Hendrickson Agency in written form and is dated May 31, 1983. The insureds listed on this quotation are Kodacor, Inc. and subsidiaries, Jacobs Industries, Inc., and J.Y.J. Corporation.

27. All of the quotations above, except for the director's and officer's liability coverage, listed only Jacobs Industries, Inc. and J.Y.J. Corporation as the insureds. Mr. Johnson had been provided access to the Jacobs companies' insurance files for the purpose of submitting his bids.

28. On June 3, 1983, Donald Johnson and David Clarren presented an insurance proposal to Robert Wold, Ralph Klein, Phil LeBrasseur and Irwin Jacobs, all Jacobs companies executives. This proposal included quotations for director's and officer's liability insurance, property insurance, general liability insurance, umbrella insurance and inland installation floaters, all of which were based on individual quotations from London Brokers. Mr. Johnson quoted Jacobs an aggregate annual premium of \$206,679 for these coverages. However, the specific coverages were not itemized with separate premiums as part of this written proposal. Additionally, Mr. Johnson provided a quotation for workers' compensation coverage and an excess umbrella liability policy. The total package price for all coverages was \$443,098.

29. After a comparison of other bids received for insurance coverage, Robert Wold accepted the Hendrickson Agency proposal on or about June 15, 1983. Mr. Johnson had not provided to Mr. Wold information concerning the separate premium charges for specific coverages other than workers' compensation and excess umbrella liability. Mr. Johnson did not inform Mr. Wold that he intended to charge the Jacobs companies any fees or compensation for providing insurance beyond the gross premium charge established by the insurance companies. Based on his knowledge of the insurance industry, Wold assumed that the Hendrickson Agency would earn commissions on the policies as part of the gross premium paid.

30. After Mr. Johnson was notified that the Jacobs companies had accepted his insurance proposal, he communicated that decision to Lenore Schleif at London Brokers. Schleif and Johnson met in late June at which time she told him that due to financial difficulties at London Brokers, she and Jan Smith were going to form their own brokerage office, S & S Insurance Brokers. Ms. Schleif told Mr. Johnson that she wanted to take the Jacobs' insurance business with her to S & S Brokers and Mr. Johnson responded that that would be done. Johnson informed Schleif that Alexander and Alexandar had charged consulting fees for policies sold the previous year and that he was intending to charge a consulting or servicing fee for providing insurance to the Jacobs companies. At that time, Mr. Johnson was involved in a bitter disagreement with Mr. Hendrickson concerning the level and timing of his compensation from

the Hendrickson Agency. Consequently, Johnson told Schleif that he wanted her to pay him his compensation for selling the Jacobs companies' insurance directly, an arrangement which Ms. Schleif agreed to. These compensation payments were set up to be made in installments as the policies were sold, however, nothing about this arrangement was communicated to Robert Wold or anyone at the Hendrickson Agency.

31. A decision was made that the Jacobs' insurance would be bound effective July 1, 1983. Prior to June 30, the Jacobs companies paid the Hendrickson Agency a 20% down payment on their insurance policies. The remaining amounts were financed through AICCO. Under that finance arrangement, AICCO financed the amount stated on the applications for financing prepared by the Hendrickson Agency and remitted that amount of money to the Agency. AICCO then billed the Jacobs companies on a monthly basis to pay off the financed amounts. Although the quotes from London Brokers had

been for coverage by type of insurance for all of the Jacobs companies, the financing applications were prepared on a company by company basis, including all the various types of insurance for each company. No separate premiums for the various policies were shown. All of the information necessary to prepare the applications for financing came from Mr. Johnson and his signature appears on the applications themselves.

32. On June 30, 1983, Mr. Johnson met with Ms. Schleif in his office to arrange for the first invoice to be sent by S & S Brokers to the Hendrickson Agency regarding the Jacobs account. At that time, Ms. Schleif was in the process of leaving London Brokers as S & S was scheduled to open for business the following day. Schleif brought a form invoice to the Hendrickson Agency which had S & S Brokers, Inc. typed at the top. The invoice was prepared showing a balance due from the Hendrickson Agency of \$19,357. This invoice was presented to Ms. Blumenthal, the bookkeeper at the Hendrickson Agency, on July 1, 1983 and a check was prepared which was picked up by Schleif on the same day. The following day, Ms. Schleif delivered a cashiers check in the amount of \$11,050 to Mr. Johnson's office for him. Mr. Johnson received this check and negotiated it, but told no one at the Hendrickson Agency that he received any compensation directly from S & S Brokers with respect to the Jacobs' insurance accounts.

33. When the property and umbrella policies arrived at S & S, Ms. Smith prepared invoices to the Hendrickson Agency. However, these initial invoices were not sent out because Mr. Johnson told her that the figures had to be redone. On September 6, 1983, Ms. Schleif, Ms. Smith and Mr. Johnson met to discuss the invoicing of the property, general liability, and umbrella policies to the Hendrickson Agency. At this meeting, Johnson instructed S & S how to invoice the Hendrickson Agency and requested that he receive a check, payable to him in the amount of \$17,599. A check in this amount was given to Mr. Johnson at that time which he deposited in his bank account on September 15, 1983. On September 7, 1983, S & S Brokers submitted an invoice to the Hendrickson Agency in the amount of \$41,420 for Jacobs Industries, Inc. et. al., which states that it is for a fire policy. In addition to this invoice, Ms. Smith prepared a dummy invoice which she maintained in her office file which shows the form and amounts she intended to use prior to the "recalculation" done at Mr. Johnson's instruction.

34. In the fall of 1983, Insty-Prints became a Jacobs company and insurance was secured through the Hendrickson Agency and S & S Brokers. Johnson, Schleif and Smith met on November 2, 1983, to discuss the billing for Insty-Prints as well as a builders risk policy for Brown-Minneapolis Tank. Mr. Johnson instructed Ms. Smith on how to complete the invoice, which was

delivered to the Hendrickson Agency. On November 2, 1983, S & S Brokers gave Mr. Johnson a check for \$14,468 as compensation for these transactions. Mr. Johnson cashed the check and deposited it in his personal account on November 2, 1983. This compensation was not disclosed to the Hendrickson Agency.

35. In December of 1983, Don Johnson met with Jan Smith to discuss a compensation payment to him by S & S for a general liability insurance policy covering C.O.M.B. Company. The policy had not been prepared at that time but Mr. Johnson wanted S & S to bill the Hendrickson Agency so he could be paid. Ms. Smith prepared an invoice, dated December 27, 1983, which was delivered to the Hendrickson Agency. S & S Brokers then gave Mr. Johnson a check for

\$7,392 which he deposited in his personal account on December 29, 1983.  
On

February 15, 1984, Ms. Smith sent out a revised invoice for the general liability policy for C.O.M.B. Company showing a balance due of \$29,299.

36. The payments made to Don Johnson by S & S Brokers were initially entered on their books as commissions. Later, some of these entries were amended by S & S to describe the payments as fees.

37. The Hendrickson Agency retained the commission it was entitled to on each of the policies sold to the Jacobs companies which were brokered by S & S. Mr. Johnson was entitled to be compensated from the Hendrickson Agency by receiving part of those commissions. The amounts billed to the Hendrickson Agency, however, included the compensation paid by S & S to Mr. Johnson. This amount was paid by the Jacobs companies as part of the gross premium which was financed through AICCO. S & S paid the net amount due to the insurance companies who wrote the policies and Mr. Johnson received the remainder, as his compensation.

38. Because the commissions retained by the Hendrickson Agency were based upon a percentage of gross premiums, which included Mr. Johnson's additional compensation, the commission kept by the Agency was greater than it would have been had Johnson not been compensated by S & S. In addition, Mr. Johnson instructed S & S to retain an additional \$2,000 for the good work they had done on the Jacobs accounts. Johnson had received payments in the total amount of \$50,514 from S & S.

39. Mr. Johnson provided no notice to the Jacobs companies or Robert Wold that he would be retaining compensation in addition to the regular commission paid to him from the Hendrickson Agency. Mr. Johnson never informed the Hendrickson Agency that he was being paid by S & S for providing insurance to the Jacobs companies. During the time relevant herein, the Jacobs companies were not aware that Mr. Johnson was receiving compensation in addition to the commissions retained by the Hendrickson Agency.

#### Count Two - Alleged Alteration of Policies

40. Pursuant to the quotes obtained by S & S Brokers for insurance coverage for the Jacobs companies, and the insureds decision to accept those quotes, policies were issued by the insurance companies. These policies were

initially sent to S & S; an original declaration page with a copy of the insurance agreement was intended to go to the insured. A second copy with a photocopied declaration page was for the Hendrickson Agency. A third copy was for S & S Brokers. The declaration page on each copy showed the gross premium established by the insurance company for that policy. S & S Brokers sent the original and agent's copies of the declaration pages and policies to the Hendrickson Agency. S & S had a practice of whitening out entries on declaration pages they sent out which disclosed the commissions paid so the insurance agency and insured would not know the commission that the brokerage received.

41. Before Mr. Johnson delivered copies of the policies and declaration pages to Mr. Wold at the Jacobs companies, he directed Ms. Huber to white out the gross premium on the original declaration page for each policy and type in

the word "included" in place of the premium. These originals with the white  
outs were then photocopied by Mr. Johnson and provided to Robert Wold.  
Specifically, the following policy premiums were changed to the word  
included:

- a. The premium of \$44,538 on the Nutmeg Insurance Company umbrella policy;
- b. The premium of \$52,800 on the Admiral Insurance Company comprehensive general liability insurance policy; and
- c. The premium amounts of \$7,811 and \$1,163 on the Chicago Insurance Company policy covering Jacobs Management Corporation and Brown-Minneapolis Tank.

42. In addition to whiting out premium amounts on Jacobs companies' policies, Ms. Huber also made other changes on the declaration pages on her own initiative. These changes were made to correct the names of insureds, the addresses of property, and other clerical amendments. Specifically, Ms. Huber made the following policy alterations:

- a. On the Nutmeg umbrella policy, the insureds were expanded to include the names of 20 additional insureds, and the address of the insured was changed;
- b. On the Admiral policy, the address of the insured was changed and the name and address of the producer were obliterated.

Ms. Huber had requested that Ms. Schleif obtain endorsements from the insurance companies to correct mistakes on the policies by way of memos written on September 9 and October 24, 1983. These requested endorsements were for the change in the insured's address and the addition of all the named Jacobs companies. However, Ms. Schleif took no action on these requests and Ms. Huber again contacted her by way of written memos on January 6 and February 14, 1984 concerning the changes she had made to the policies. Ms. Schleif did not act on Ms. Huber's request. Ms. Huber was aware that the insureds mailing address listed on the declaration pages was incorrect and that the Nutmeg insurance policy which listed Jacobs Industries, Inc., J.Y.J. Corp. et. al. as the insured was intended to include 26 named Jacobs companies from the information contained in the Jacobs companies' files. Huber was licensed by the state to sell property and casualty insurance in 1982.

#### Count Three - Alleged Unauthorized Signatures

43. Since the summer of 1983, Mr. Johnson had been seeking director's and officer's liability insurance for the Jacobs companies. He initially procured an application for the insurance which was signed by Daniel Lindsay, Executive

Vice President of Jacobs Management Corporation. That application was dated June 30, 1983. The insurance company which gave an initial quote on the coverage refused to write the insurance, however, so Johnson requested the assistance of S & S Brokers. In early January of 1984, Bonnie Huber prepared a new director's and officer's application. However, instead of having anyone from the Jacobs companies review and sign the application, she made a

photocopy of Lindsay's signature from the June 30, 1983 application and placed that on the new application so it appeared that the application had been signed by Lindsay. This "new" application was forwarded to Ms. Schlieff who sent it to Chubb Custom Insurance Company in Chicago, Illinois to obtain a quote. Chubb Custom advised Ms. Schlieff, however, that it required each of the five companies for which coverage was sought to complete separate applications on Chubb Custom's own forms. Schlieff located the forms required and delivered them to the Hendrickson Agency in late January of 1984.

44. At this time, Mr. Wold called Mr. Johnson to inform him that the director's and officer's insurance for the C.O.M.B. Company needed to be split off from the other D and 0 coverages because C.O.M.B. was going to go public (have a public offering of stock). There was an urgent need to bind D and 0 coverage for all of the companies by February 1, 1984,

45. The D and 0 application forms were completed at the Hendrickson Agency and Mr. Johnson took them to Robert Wold for review. Mr. Johnson was aware that the applications needed Irwin Jacobs' signature, but because of the urgency to secure coverage, Mr. Johnson signed Mr. Jacobs' name on all of the applications in Mr. Wold's office. Wold was aware that Johnson had signed Jacobs' name but said nothing. These applications were then delivered to Lenore Schlieff at S & S on the same day and express mailed to Chubb Custom. Mr. Wold retained a copy of the C.O.M.B. application and delivered it to a Board of Directors meeting on the same day. Mr. Wold never did anything about Johnson's signing Irwin Jacobs' name to the D and 0 applications.

46. An agent of record letter is a letter from an insured instructing an insurance company to recognize a new insurance agent for the insured. In February of 1984, Robert Wold required a bond for Brown-Minneapolis Tank, one of the Jacobs companies, who was in the business of bidding on and erecting tanks. These projects required bonds, often time on short notice. Mr. Wold turned to Mr. Johnson in order to secure the bond required for Brown-Minneapolis Tank. Wold had previously given the Hendrickson Agency Jacobs companies letterhead stationery for the purpose of securing bonds.' Either Bonnie Huber or Michael McKinley signed Robert Wold's name on agency of record letters typed on Jacobs Industries, Inc. stationery which were mailed to the St. Paul Fire & Marine Insurance Company to secure the bonds required by Mr. Wold. Robert Wold had authorized the Hendrickson Agency (at this time AUI) and other insurance agencies to sign his name on agency of record letters typed on Jacobs Industries' stationery for the purpose of securing bonds as

long as copies were sent to Wold.

Count Four - Alleged False Statements in Applications for Director's and Officer's Liability Insurance

47. It is very important that applications for insurance coverage contain complete and accurate information to negate the possibility that an issuing company may avoid coverage due to misstatements on the application form.  
Ms.

2In February of 1984, Mr. Johnson had left the Hendrickson Agency and Agency Unlimited Insurance, Inc. was handling the Jacobs companies insurance accounts.

Huber completed the director's and officer's liability insurance applications for the Jacobs companies based upon information she had obtained from Mr. Johnson.

48. The five applications for D and O insurance sent to Chubb Custom for the Jacobs companies contained the following inaccuracies:

a. C.O.M.B Company - (1) the application falsely stated that C.O.M.B Company had no shares of common stock outstanding; (2) the percentages of capital stock owned by shareholders listed on the application were incorrect; (3) the application falsely stated the Shaver Carlson Marketing, Inc., is a subsidiary of C.O.M.B.; (4) the application falsely stated the C.O.M.B. had not publicly announced any new public offering of securities; and (5) the application incorrectly stated that none of the directors, officers and/or other insured persons had been involved in any action or administrative proceeding charging a violation of any federal or state securities law.

b. Brown-Minneapolis Tank and Fabricating Company - (1) the application falsely stated that there were no outstanding shares of common stock; (2) the shareholders listed on the application were incorrect; (3) the application incorrectly stated that none of the directors, officers, and/or other insured persons had been involved in any action or administrative proceedings charging a violation of any federal or state securities law; (4) the information contained in the blank entitled "Name of Parent Organization" was incorrect; (5) the address on the application for the insured was incorrect; and (6) the application falsely stated that there are no subsidiary organizations.

c. Watkins, Inc. - (1) the reference to shares of common stock was incorrect; (2) the number and names of the shareholders was incorrect; (3) the application falsely stated that none of the directors, officers and/or other insured persons had been involved in any action or administrative proceeding charging a violation of any federal or state securities law; and (4) the name of the subsidiary listed was incorrect.

d. Jacobs Management Corporation - (1) the reference to "none" regarding the shares of common stock was incorrect; (2) the percentages of capital stock owned by shareholders was incorrect; and (3) the application falsely stated that none of the directors, officers and/or other insured persons had been involved in any action or administrative proceeding charging a violation of any federal or state securities law.

e. Insty-Prints - (1) the number of outstanding shares of stock was incorrect; (2) the number and names of shareholders was incorrect; and (3) the application falsely



stated that none of the directors, officers and/or other insured persons had been involved in any action or administrative proceeding charging a violation of any federal or state securities law.

49. The above-applications were reviewed by Robert Wold during a meeting with Donald Johnson on January 31, 1984. During that meeting, Mr. Wold did notice an inaccuracy on the C.O.M.B application; Ralph Klein had mistakenly been reported as being a 25% shareholder. Mr. Wold asked his secretary, Merle Riveness, to white out Klein's name and insert the correct person, Ted Deikel. After the review of these applications by Wold, Mr. Johnson delivered them to S & S Brokers who forwarded them to the potential insurer, Chubb Custom..

#### Count Five - Alleged Incurring of Unnecessary Finance Charges on Worker's Compensation Insurance

50. It was Donald Johnson's practice to explain to a purchaser of insurance that a policy premium could be financed if the insured did not wish to pay the full amount at the time the policy was delivered. Either method required a down-payment, however. If the insured elected to finance the policy, Johnson would inform the bookkeeping department of that decision and finance applications would be prepared by the Hendrickson Agency. Those applications would be based upon the information contained in the insurance proposal.

51. On or about July 1, 1983, Respondent procured workers' compensation insurance for Jacobs Management Companies, Watkins, Inc., and Kodacor from St. Paul Fire & Marine. St. Paul Fire & Marine Insurance Company had an endorsement on file which provided that it would finance a premium for 12 months with no finance charges. However, Mr. Johnson arranged for the financing of the Jacobs companies' workers' compensation policies through a finance company, AICCO, at a 12% interest rate. Mr. Johnson was aware of the endorsement at the time the policies were financed.

52. Terry Hendrickson was informed that the Jacobs companies' workers' compensation policies were financed through AICCO. He was also aware that the policy premiums could have been "financed" through St. Paul Fire & Marine with no finance charge. The Hendrickson Agency had a policy to "double finance" whenever possible. This resulted in the Agency having the "use" of the finance company's money while it paid the installments to the insurance

company pursuant to the installment plan.

53. Although Mr. Johnson was paid by the Hendrickson Agency by a draw against his commissions, receipt of the entire premium from the finance company meant that the entire commission would be credited to his account as soon as the payment was received. Otherwise, pursuant to the insurance company installment plan, his account would not be credited until the end of the payment schedule.

Count Six - Alleged Failure to Provide Underwriting Information for the ICTO Group

54. Shelly Grogan began working for Great American Insurance Company on August 17, 1983 as a multi-line underwriter. She was specifically hired by

Great American to aggressively seek business from insurance agencies which had been "targeted" by Great American to "put some money on the books quickly." On September 2, 1983, Grogan met with Donald Johnson and Mike McKinley to discuss, inter alia, group insurance for ICTO. A subsequent meeting was held on September 8 or 9, 1983 to obtain further information concerning the ICTO organization and the coverage required. On September 14, 1983, McKinley sent Ms. Grogan additional underwriting information on the ICTO program for the purpose of obtaining a quote. Based on the information she had received from Mr. Johnson and Mr. McKinley, she agreed to underwrite the ICTO group insurance policy and gave Mr. Johnson a written quote on September 27, 1983. This group policy was designed to be a master policy of insurance to be issued to ICTO. Individual certificates were to be issued to the insured members. This group policy provided more favorable rates to the insureds than individual policies. It was understood that Ms. Grogan would be able to review new insureds who were added to the group coverage.

55. At that time, ICTO had approximately 150 members. However, only a portion of those members were named in the initial underwriting information supplied by Johnson and/or McKinley. Ms. Grogan was aware of the ICTO membership at that time.

56. The Hendrickson Agency began issuing binders for the group policy on October 10, 1983, and bound approximately 65 ICTO members. Ms. Grogan did not receive these binders from the Hendrickson Agency until December 12, 1983.

57. After the initial discussions concerning the ICTO group policy occurred, Mike McKinley became responsible for servicing that account and providing information to Ms. Grogan. Questions arose as to the type of coverage, the nature of the insureds business activities, the amount of property that was insured, and the number of insureds. In the haste to bind this coverage and secure this account, the necessary underwriting information was not provided by the Hendrickson Agency and Ms. Grogan took no action until after the quotation was accepted and individual members were bound. Ms. Grogan did, however, attempt to get further information from the Hendrickson Agency through both Don Johnson and Mike McKinley. In February of 1984, Ms. Grogan became aware that the nature of the businesses insured, the types of property insured and the number of members insured was different than what was intended to be covered by Great American. Consequently, notices of cancellation were sent out to ICTO members based initially on the ground of nonpayment of premium. The insurance company learned that this notice was in error because the due date for payment of premium had not yet expired. A second notice of cancellation was then issued based upon underwriting reasons.

Count Seven - Alleged Failure to Return Unearned Premiums to Rucki and  
Jacobs  
Trucking

58. On February 1, 1984, Mr. Johnson met with Terry Hendrickson to discuss his (Johnson's) departure from the Hendrickson Agency (Mr. Johnson had removed his files from the Hendrickson Agency the previous day and opened Agency Unlimited Insurance, Inc.). During the course of this meeting, Johnson told Hendrickson that the Hendrickson Agency had funds on account for Rucki Trucking Company and Jacobs Trucking Company, both of whom were members of the ICTO group, that had credits on their account due to the cancellation of the group policy. The monies in these accounts included amounts owed to a number of ICTO members in addition to Rucki and Jacobs. Mr. Hendrickson authorized

the agency bookkeeper to issue checks for those two accounts because they had been transferred to AUI for servicing. Checks were made out to Rucki Trucking in the amount of \$5,396 and to Jacobs Trucking in the amount of \$5,656.90 and given to Mr. Johnson on February 1, 1984. Mr. Johnson had not made any specific requests concerning the name of the payee on the checks nor did he ask that the checks be made out in any particular manner.

59. Donald Johnson endorsed the names of Fred Rucki and Paul Jacobs on the "refund" checks and deposited them in his personal account at Southwest Fidelity Bank on February 1, 1984. At the time he endorsed Rucki and Jacobs names on the checks, he did not have their authorization to do so. Neither Rucki nor Jacobs was aware that Johnson had obtained and deposited checks in his account. Mr. Johnson had not opened a bank account for AUI at that time. However, one was opened that afternoon when Johnson wrote a check from his personal account for \$25,000 as the first deposit.

60. No monies were refunded to Rucki or Jacobs, or to anyone else to whom they may have been owed, until after Rucki and Jacobs had called the Hendrickson Agency to complain that they had not received refunds. At that time, Rucki and Jacobs learned that checks had been issued by the Hendrickson Agency and given to Mr. Johnson. After Rucki and Jacobs contacted Mr. Johnson, he told him that he had endorsed their checks and deposited them into the Agency account. The monies were then repaid in March of 1984 after an accounting was performed.

Count Eight - Alleged Failure to Return Unearned Premiums to Mullin Trucking, Inc.

61. On January 30, 1984, an ICTO member, Mullin Trucking, came to the Hendrickson Agency to arrange for insurance coverage. A binder from the Hendrickson Agency was issued to Mullin binding Great American on the coverage. Mullin made a check for the premium payable to AUI, Inc. in the amount of \$1,200. At that time, AUI, Inc., had no authority to bind Great American.

62. The binder bears the signature of Don Johnson and is dated January 30, 1984. However, Michael McKinley would often sign Mr. Johnson's name on documents which were required to "service" accounts. At this time, Mr. McKinley was responsible for handling the ICTO account.

63. After Mullin Trucking Company's insurance was canceled by Great American, Mullin was entitled to a refund of the unearned premium. Mr. Johnson told the State of Minnesota that a refund of \$1,178 had been returned to Mullin Trucking on February 16, 1984. However, no refund was actually made until October 15, 1984, after Johnson had been informed by his attorney that Mullin had not received any money.

64. During this period of time, Mike McKinley was still in charge of the ICTO account and responsible for processing refunds to members.

Count Nine - Alleged Failure to Return Unearned Premiums to the Florens

65. Donald and Carol Floren (hereafter "the Florens") purchased automobile and homeowner insurance from Donald Johnson for the policy period

May 7, 1984 through May 7, 1985. On May 3, 1984, the Florens paid \$361 to AUI as partial payment for the aforementioned policies. Donald Johnson was married to the Florens' daughter, Candace.

66. Sam Floren, Donald and Carol Florens' son, also purchased insurance from Donald Johnson during the same period of time. Sam was in his early 30s and did not reside with his parents.

67. After the Florens purchased insurance from Mr. Johnson, Johnson and his wife began marriage dissolution proceedings which became very embittered. Due to the dissolution, the Florens decided to cancel their insurance policies with Mr. Johnson. On June 12, 1984, the Florens canceled the auto policy and on June 21, 1984 they canceled the homeowners policy by sending a written notice of cancellation to their new insurer, United Fire and Casualty Company. After receipt of the notices, the underwriter called Ms. Huber to inform her that the policies with AUI had been canceled. Ms. Huber informed Mr. Johnson of the cancellation in late July or the first part of August. Johnson told her to check it out with the Florens to make sure there was no break in insurance coverage and Huber called Mrs. Floren to verify the cancellation.

68. On September 10, 1984, the Florens wrote a letter to the Minnesota Department of Commerce, Insurance Division, because they had not received a refund from AUI for the unearned premiums for their insurance policies. In mid-September, Mr. Johnson decided to return only a portion of the unearned premium to the Florens. On September 28, 1984, he sent them a check for the amount of \$167.62 and a letter informing him that he had deducted the amount of \$184 from the unearned premium because their son, Sam, owned AUI that amount for delinquent premium payments.

69. In early October of 1984, the Florens sent another letter to the Insurance Division complaining that they had not received their refund from AUI. On October 12, 1984, AUI paid the Florens \$184, the remaining balance on their unearned premium.

#### Count Ten - Alleged Overcharges to Butwin Sportswear<sup>3</sup>

70. While Mr. Johnson was employed at CIM, David Clarren introduced him to Lefty Butwin, the President of Butwin Sportswear, in March of 1981. The purpose of this meeting was to enable Johnson to solicit Butwin Sportswear as a client for CIM. On or about May 1, 1981, Mr. Johnson submitted an insurance package proposal to Mr. Butwin which included workers' compensation insurance. Butwin accepted this proposal, and made a down-payment on the package. The premium for workers' compensation insurance in the proposal was \$59,166. This insurance was to cover the period July 1, 1981 to July 1, 1982.

71. Donald Johnson was compensated by CIM in the form of a salary rather than receiving a portion of commissions. He also received bonuses which were partly contingent upon his job performance and how much money the agency was making.

3this allegation is based upon events which occurred while Mr. Johnson was employed at CIM, prior to his association with the Hendrickson Agency.

72. CIM billed Butwin beginning August 1, 1981 in the amount of \$5,259 as the monthly premium payment. Butwin paid this amount and the billings continued through the fall of 1981.

73. When the declaration page for the workers' compensation policy was received by CIM in late August of 1981, it showed that the actual premium for the policy was \$51,171. In November of 1981, CIM received a payment schedule from Hartford showing that the monthly installment payments were in the amount of \$4,264.

74. When the discrepancy in the amount of the monthly payment was brought to Mr. Johnson's attention by Kim Olson, an office clerical worker at CIM, Johnson told her that the payment schedule was incorrect and that a corrected installment sheet would be issued by the Company. Johnson told her to add \$995 to the schedule payment to arrive at an installment of \$5,259.

75. CIM had an office practice of using previous months invoices to bill the current month, rather than verifying the amount to be billed by looking at the appropriate insurance documents. At this time, the CIM accounting and bookkeeping records were "a mess."

76. The invoices to Butwin Sportswear remained at the \$5,259 amount until early 1982 when Mary Gleeson, a newly hired office manager, discovered that the billing was incorrect. When asked about this, Mr. Johnson had no explanation. The overbilling continued into the spring of 1982, but Butwin was not billed for the final installment on the policy at Ms. Gleeson's direction.

77. Mr. Johnson did not deliver either the declaration page for the workers' compensation policy or the schedule of payments to Butwin Sportswear. After the issue of the appropriate monthly payment was raised with Mr. Johnson by Kim Olson, he instructed her to change the premium on the declaration page of the policy so it would coincide with the total amount of payments invoiced to Butwin. This was not done, however, because Ms. Gleeson interceded on Ms. Olson's behalf and instructed her that such a change should not be made.

78. Donald Johnson was fired by Gunner Carteng in early March, 1982. CIM did not act on the overbilling until after Mr. Johnson had left its employ.

Pertinent Statutory Language

Minn. Stat. 60A.17 (1982):

Subd. 6. Persons who shall not be licensed as agents. No person shall be licensed by the commissioner as an insurance agent if the commissioner shall be satisfied that the person is incompetent or unqualified to act as an insurance agent, or that the person does not in good faith intend to carry on the business of insurance agent, or

intends to secure a license for the sole purpose of writing insurance upon the agent's own life or property; or that the person is untrustworthy or of bad moral character; . . .

Subd. 6b. Fees for services. No person shall charge a fee for any services rendered in connection with the solicitation, negotiation or servicing of any insurance contract unless:

(a) prior to rendering the services, a written statement is provided disclosing;

- (1) the services for which fees are charged;
  - (2) the amount of the fees;
  - (3) that the fees are charged in addition to premiums; and
  - (4) that premiums include a commission;
- (b) all fees charged are reasonable in relation to the services rendered.

Subd. 6c. Revocation or suspension of license. (a) The commissioner may suspend or revoke an insurance agent's license issued to a natural person or impose a civil penalty appropriate to the offense, not to exceed \$5,000 upon that licensee, if, after notice and hearing, the commissioner finds as to that licensee any one or more of the following conditions:

(2) Any cause for which issuance of the license could have been refused had it then existed and been known to the commissioner at the time of issuance;

(5) Improperly withholding, misappropriating, or converting to the licensee's own use any moneys belonging to a policyholder, insurer, beneficiary, or other person, received by the licensee in the course of the licensee's insurance business;

(6) Misrepresentation of the terms of any actual or proposed insurance contract;

(9) That in the conduct of the agent's affairs under the license, the licensee has used fraudulent, coercive, or dishonest practices, or the licensee has been shown to be incompetent, untrustworthy, or financially irresponsible;

(11) That the licensee has forged another's name to an application for insurance; or

(12) That the licensee has violated subdivision 6b.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

## CONCLUSIONS

1. The Minnesota Department of Commerce and the Administrative Law Judge have jurisdiction over this matter pursuant to Minn. Stat. 60A.17, subd. 6(d) and 14.50 (1984). The Notice of Hearing was proper in this matter and the Department has complied with all substantive and procedural requirements of law or rule.

2. For the reasons set forth in the Memorandum below, the Judge concludes that:

a. Respondent has violated Minn. Stat. 60A.17, subd. 6b by the conduct set forth in Count 1 (Findings 23-39) and Count 10 (Findings 70-78);

b. Respondent has violated Minn. Stat. 60A.17, subd. 6c(a)(5) by the conduct set forth in Count 1 (Findings 23-39), Count 7 (Findings 58-60), Count 8 (Findings 61-64), Count 9 (Findings 65-69) and Count 10 (Findings 70-78);'

c. Respondent has violated Minn. Stat. 60A.17, subd. 6c(a)(6) by the conduct set forth in Count 1 (Findings 23-39), and Count 10 (Findings 70-78);

d. Respondent has violated Minn. Stat. 60A.17, subd. 6c(a)(9) by the conduct set forth in Count I (Findings 23-29), Count 2 (Findings 40-41), Count 3 (Findings 43-45), Count 4 (Findings 47-53), Count 5 (Findings 50-53), Count 6 (Findings 54-57), Count 7 (Findings 58-60), Count 8 (Findings 61-64), Count 9 (Findings 65-69), and Count 10 (Findings 70-78);

e. Respondent has violated Minn. Stat. 60A.17, subd. 6c(a)(11) by the conduct set forth in Count 3 (Findings 43-45);

f. Respondent has violated Minn. Stat. 60A.17, subd. 6c(a)(2) due to the violations found above.

3. The violations above constitute sufficient grounds to take disciplinary action against Respondent's insurance agent's license or to impose a civil penalty not exceeding \$5,000, or both, pursuant to Minn. Stat. 60A.17, subd. 6c(a) (1982).

4. The Administrative Law Judge has no authority to decide the constitutional issue raised by the Respondent (whether Minn. Stat. 60A.17, subd. 6b is unconstitutionally vague). See, *Starkweather v. Blair*, 71 N.W.2d, 869, 884 (Minn. 1955); *Johnson v. Robison*, 415 U.S. 361, 368 (1974); *Johnson v. Elkin*, 263 N.W.2d 123, 126-127 (N.D. 1978); 3 *Davis, Administrative Law Treatise*, 20.04 (1958 and Supp. 1976).

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:



RECOMMENDATION

IT IS HEREBY RECOMMENDED that the Commissioner of Commerce take disciplinary action against Donald Johnson's insurance agent's license and/or impose a civil penalty pursuant to Minn. Stat. 60A.17, subd. 6c(a) (1982).

Dated this                    day of December, 1985.

PETER C. ERICKSON  
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Hearing taped, transcript prepared by Mary Ann Hintz.

MEMORANDUM

The Findings of Fact made above and resulting Conclusions required that the Administrative Law Judge make determinations as to the credibility of many witnesses. Respondent has argued that all of the witnesses who testified adversely to Donald Johnson either had something to gain if Johnson lost his license or were trying to cover their own mistakes. The Judge has evaluated each person's (witnesses and parties) interest in this proceeding, their demeanor while testifying and any impeaching evidence brought forward by either party. The Judge has not believed Mr. Johnson's account of most of the transactions at issue where there has been conflicting testimony. Johnson obviously had the most at stake in this proceeding, the loss of his livelihood. The evidence in this case showed overwhelmingly that Mr. Johnson had engaged in a course of dishonest and deceptive conduct while selling insurance.

Additionally, the Judge points out that the testimony of Mr. Wold was also found to not be believable. Wold's recollection of events was impeached by a neutral witness, Merle Riveness, and the Judge has found that Wold had permitted other insurance agencies to sign his name on agent of record letters, contrary to his testimony. Mr. Wold was obviously trying to cover his errors in judgment during his dealings with the Hendrickson Agency, Donald Johnson and AUI.

The State offered the testimony of Fred Gedelman as an expert in the area of property and casualty insurance. Sufficient foundation was laid for Mr. Gedelman to testify concerning the insurance policy contract itself. However,

the State asked Gedelman to testify about the "custom and practice" in insurance agencies regarding the legal relationships between employees and how policies are written and serviced. Mr. Gedelman had semi-retired in 1972 and has only worked in a consultant capacity since then, outside of an operating insurance agency. Consequently, the Judge has given little weight to Gedelman's testimony which pertains to the "acceptable" business practices in insurance agencies.

The State used Mr. Gedelman's testimony that insurance agents are responsible for all work done by CSRs as the basis to impute actions taken by Bonnie Huber or Michael McKinley to Donald Johnson. No case law, statute or rule was cited to support this proposition. Because Gedelman has not actively worked in an insurance agency for over 13 years and is not part of any insurance industry regulatory body, the Judge has not concluded that Mr. Johnson had violated the law based on the independent activities of either Huber or McKinley. Although civil liability may attach because of actions taken by employees, this case does not fall within those parameters. The Judge additionally points out that Ms. Huber was a licensed insurance agent. (The record does not show whether McKinley was licensed.) Consequently, Ms. Huber must be held accountable for her own actions if they were not the result of a direct order or instruction from Mr. Johnson.

#### Conclusion 2a - Charging Fees

The record in this matter shows clearly that Respondent engineered a scheme to collect a substantial fee from the Jacobs companies without their knowledge and without informing Johnson's employer, the Hendrickson Agency.' This scheme involved several selling and billing procedures which made it very difficult for either the Hendrickson Agency or Jacobs to calculate the total amount of the premium based upon the individual invoices. (See, Findings 28-35 and 41). Johnson received the fees (over \$50,000) without informing Jacobs or the Hendrickson Agency in any way. These activities constitute a clear violation of Minn. Stat. 60A.17, subd. 6b.

The billings for the Butwin workers' compensation policy were initially based on a premium figure which was several thousand dollars more than the actual cost of the coverage. Mr. Johnson became aware of the correct figure after the policy declaration page and the installment payment plan were received by CIM. However, he did nothing to correct the overbilling and even instructed the office bookkeeper to continue the billing at the excess amount and change the declaration page to coincide with the total charges. Although

Johnson did not receive these overages directly, the insurance agency did at his direction. Butwin was not informed about the discrepancy until the very end of the installment payment period. These overages were fees charged by Mr. Johnson in violation of Minn. Stat. 60A.17, subd. 6b.

'Respondent has argued that the amounts Don Johnson received were commissions rather than fees. Although S & S Brokers labeled the payments as commissions initially on their books, the monies paid to Johnson were not part of any commission arrangement between either the insurance company and S & S or S & S and the Hendrickson Agency. Rather, the amounts were added to the gross premium, which already included commissions. Regardless of what Don Johnson or S & S called the payments, the amounts were in excess of the commissions charged and must fall within the definition of fee.

Conclusion 2b - Improperly Withholding, Misappropriating, or Converting Moneys

As set forth above, Don Johnson improperly converted moneys from the Jacobs companies and Butwin.s Additionally, when Johnson's fees were added to the gross premium for the Jacobs companies account, the Hendrickson Agency received a greater commission, in the form of monies paid by Jacobs. The record shows that Johnson withheld monies belonging to Rucki Trucking Company and Jacobs Trucking Company by depositing the checks made out to them in his personal account and not paying them for several months. Respondent withheld monies owing to Mulling Trucking Company, while acting for AUI, for a period of approximately ten months. The Respondent withheld \$184 in unearned premiums owed to Mr. and Mrs. Donald Floren for several months. These actions constitute violations of Minn. Stat. 60A.17, subd. 6c(a)(5).

Conclusion 2c - Misrepresentation of an Actual or Proposed Insurance\_Policy

Respondent misrepresented the terms of the declaration pages for the Jacobs companies policies when he directed Ms. Huber to white out the premiums and substitute the word "included". He also misrepresented the cost of the workers' compensation policy to Butwin Sportswear because the proposal contained an inflated premium which was never revised by Johnson for billing purposes. In fact, he never delivered copies of the declaration page or the installment payment plan to Butwin showing the correct premium amount.'

Conclusion 2d - Fraudulent, Coercive or Dishonest Practices, or the Licensee is Incompetent, Untrustworthy or Financially Irresponsible

The Findings of Fact and discussion above, incorporated herein, show that dishonest or incompetent acts were committed by Mr. Johnson in each of the Counts listed. In addition to the above-discussion, Mr. Johnson fraudulently prepared the applications for D and O insurance for the Jacobs companies by signing the name of Irwin Jacobs.' Although the D and O applications were submitted to Robert Wold for review, Mr. Johnson was responsible for the information contained on those documents, much of which was grossly incorrect. Johnson should not have expected Wold to verify information for five distinct Jacobs' entities, especially when the applications were intended to be sent on that day. Donald Johnson was incompetent by not informing the Jacobs companies that their workers' compensation insurance policy could be paid on a no-finance charge, monthly installment plan. Johnson was shown to be incompetent in his handling of the Great American Insurance Company group policy for ICTO because his failure to supply underwriting information

'Although there is no evidence that Johnson actually received any of the Butwin overages directly, he was acting on behalf of CIM at that time and was paid a salary and bonuses by the agency.

6The Judge has not concluded that Mr. Johnson was in violation of the law because of the alternations made on the Jacobs companies' policies by Ms. Huber on her own initiative. (See, Finding 42). This has been discussed, supra.

'The "unauthorized signature" Count will be discussed, infra.

resulted in the cancellation of the policy (at the initial stages of putting this policy together, Johnson acted with Michael McKinley in supplying, or being responsible for, the necessary information).

#### Conclusion 2e - Unauthorized Signatures<sup>8</sup>

The Judge has found, *supra*, that Robert Wold had authorized the Hendrickson Agency, Donald Johnson and/or AUI to sign his name to agent of record letters. The record in this matter shows additionally that Donald Johnson signed Irwin Jacobs' name to five applications for D and O insurance.

Although Robert Wold was aware of this at the time the signing occurred, Respondent was never given express authority to sign Jacobs' name by anyone.

Wold merely acknowledged that it was done. Respondent argues that Johnson had

"apparent authority" from Wold to sign Jacobs' name, citing *Hornblower & Weeks*

-*Hemphill Noyes v. Lazere*, 301 Minn. 462, 222 N.W.2d 799 (1974); and *Duluth Harold & News Tribune v. Plymouth Optical Company*, 288 Minn. 495, 176 N.W.2d

552 (1970), because of Wold's position of authority in the Jacobs companies and that he (Wold) did not make Johnson retract the signatures immediately.

*Hornblower* and *Duluth* hold that a "principal" must do some act which an "agent" would reasonably interpret as constituting authority to do something

on the principal's behalf. 222 N.W.2d at 805; 176 N.W.2d at 555-556. In this

matter, the record shows that Donald Johnson signed Irwin Jacobs' name to the

applications because of the need to have the documents fully completed and executed on that day. The Judge concludes there were no acts upon which Donald Johnson could reasonably rely to constitute authority to sign Jacobs'

name. Respondent simply felt he had to sign the applications himself in order

to meet the time deadline. Wold's failure to insist that Johnson obtain Jacobs' signature may have been remiss, but it surely was not an act constituting "apparent authority".

#### Conclusion 2f - Revocation Based Upon Reasons Which Would Justify Nonissuance

of a License if Those Reasons were Known at the Time the Decision to Issue was

Made

Minn. Stat. 60A.17, subd. 6 (1982) states that an insurance agent's license shall not be issued to a person if the Commissioner finds that the person is "incompetent or unqualified to act as an insurance agent . . . is untrustworthy or of bad moral character." The Findings, Conclusions and discussion above show clearly that if a decision to issue Donald Johnson an

'This Conclusion requires that an act of forgery has been committed. This proceeding is not criminal in nature and nothing herein is intended to suggest that any criminal acts have been proved. Because the word "forgery" is contained in Minn. Stat. 60A.17, subd. 6c, a "civil" regulatory provision, and the statute does not require that a conviction for forgery be the basis for a violation, the Judge will assign a "civil" definition to the term (proof by a preponderance of the evidence): The unauthorized signing of another person's name to a document with the intent that the signature be accepted as that person's. See, Blacks Law Dictionary, Revised 4thEd. (1968).

insurance agent's license were to be made today, a license would not be issued based upon the grounds of incompetency, untrustworthiness and/or bad moral character. Consequently, the Judge has found a violation of Minn. Stat. 60A.17, subd. 6c(a)(2) (1982).

P.C.E.

