BEFORE THE INSURANCE COMMISSIONER
OF THE
COMMONWEALTH OF PENNSYLVANIA

IN RE:	:	ALLEGED VIOLATIONS:
	:	
Akim F. Czmus 901 Rodman Street Philadelphia, PA 19147	:	Sections 611-A(1) and (20) of the Insurance Department Act of 1921, P.L. 789, No. 285, *as amended* (40 P.S. §§ 310.11).
	:	
Respondent	:	Docket No. **SC09-05-009**

ADJUDICATION AND ORDER

AND NOW, this 21st day of August, 2009, Joel Ario, Insurance Commissioner of the Commonwealth of Pennsylvania ("Commissioner"), makes the following Adjudication and Order.

HISTORY

This case began when the Pennsylvania Insurance Department ("Department") filed an Order to Show Cause ("OTSC") on May 5, 2009 directed to Akim F. Czmus ("Czmus" or "the respondent"). The OTSC alleged that Czmus violated the Insurance Department Act.[1] Specifically, the OTSC alleged that Czmus, a licensed insurance producer, failed to inform the Department about administrative actions taken against him by other regulators and denied the existence of any such administrative actions on his Pennsylvania license renewal application. According to the OTSC, this conduct violated applicable statutes in that the respondent: 1) provided incorrect, misleading, incomplete or false information to the Department; and 2) demonstrated unworthiness to be in the

[1] Act of May 17, 1921, P.L. 789, No 285, 40 P.S. § 310.11.

DATE MAILED: August 21, 2009

business of insurance.

The OTSC advised Czmus to file an answer, and further advised him that the answer must specifically admit or deny each of the factual allegations made in the OTSC. The respondent was advised to set forth the facts and state concisely the matters of law upon which he relies. He further was advised of the consequences of failing to answer the OTSC. The OTSC was served by certified and first class mail.

Czmus failed to answer the Department's Order to Show Cause or otherwise respond to the Administrative Hearings Office. On July 14, 2009, the Department filed a motion for default judgment and served Czmus in accordance with 1 Pa. Code Chapter 33. The motion declared that the certified mailing of the OTSC was returned by the post office as "unclaimed" but that the first class mailing to the respondent's last known home address as kept on file in the Department was not returned to the Department as undeliverable. The respondent has not filed a response to the OTSC or motion for default judgment, nor made any other filing in this matter.

This opinion and order addresses the motion for default judgment and the order to show cause. Factual findings and some legal conclusions are contained within the body of this adjudication.

DISCUSSION

This adjudication is issued without scheduling an evidentiary hearing, since Czmus failed to answer the order to show cause or motion for default judgment. The order to show cause and motion advised as to the consequences of the failure to respond;[2]

[2] The OTSC warned the respondent that failure to answer in writing would result in the factual allegations being deemed admitted and that the Commissioner could enter an order imposing penalties.

however, because of the language in the penalty provisions of applicable statutes, an analysis of the Commissioner's ability to impose penalties absent an evidentiary hearing is required.

There are no factual disputes in the present matter. All factual averments in the OTSC are deemed to be admitted under 1 Pa. Code § 35.37.

Under general rules of administrative procedure, a final order may be entered without hearing for an insufficient answer to the OTSC unless otherwise provided by statute. *See* 1 Pa. Code § 35.37 ("Mere general denials . . . will not be considered as complying with this section and may be deemed a basis for entry of a final order without hearing, unless otherwise required by statute, on the ground that the response has raised no issues requiring a hearing or further proceedings."). A respondent failing to file an answer within the time allowed shall be deemed in default. *Id.* Department regulations do not limit the Commissioner's ability to order a default judgment without a hearing, so any limitation must come, if at all, from a statute.

In order for an adjudication by a Commonwealth agency to be valid, a party must have a "reasonable notice of a hearing and an opportunity to be heard." 2 Pa.C.S. § 504 (Administrative Agency Law). Similarly, the statute specifically applicable to the present case[3] provides for a hearing procedure prior to certain penalties being imposed by the Commissioner. *See* 40 P.S. § 310.91.[4] However, given that the respondent has not

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[3] Insurance Department Act, Act of May 17, 1921, P.L. 789, No. 285 *as amended* by the Act of December 3, 2002, Act. No. 147 (40 P.S. §§ 310.1 *et seq.*).

[4] The Insurance Department Act section mandates written notice of the nature of the alleged violations and requires that a hearing be fixed at least ten (10) days thereafter, and further provides that:

> After the hearing or failure of the person to appear at the hearing, if a violation of this act is found, the commissioner may, in addition to any penalty which may be imposed by a court, impose any combination" of the following deemed appropriate: . . .

40 P.S. § 310.91. This Section then lists available penalties.

answered the order to show cause and given current caselaw, these hearing procedures are inapplicable.

While no court has directly addressed the power of a Commissioner to enter a default judgment without hearing in a case under the Insurance Department Act, the caselaw supports such power. For example, in *United Healthcare Benefits Trust v. Insurance Commissioner*, 620 A.2d 81 (Pa. Cmwlth. 1993), the Court affirmed the Commissioner's grant of summary judgment for civil penalties despite the language contained in the applicable statutes which seemed to require a hearing. Also, the Court specifically has upheld a decision in which the Commissioner granted default judgment for an Unfair Insurance Practices Act (UIPA) violation. *Zimmerman v. Foster*, 618 A.2d 1105 (Pa. Cmwlth. 1992).

In a case involving another agency, the Commonwealth Court upheld summary judgment imposing discipline issued by a commission despite the fact that the respondent had requested a hearing. *Kinniry v. Professional Standards and Practices Commission*, 678 A.2d 1230 (Pa. Cmwlth. 1996). In *Kinniry*, the applicable statute (24 P.S. §§ 2070.5(11), 2070.13) provided for a hearing procedure before discipline was imposed. However, the respondent's attorney merely requested a hearing without answering the specific factual averments in the charges against the respondent (which charges were treated as an order to show cause). The Court upheld the summary judgment since deemed admission of the factual averments presented no factual issues to be resolved at hearing.

The Commissioner consistently has applied the reasoning of *United Healthcare* and similar cases when the respondent does not answer the order to show cause and a motion for default judgment. *See In re Kozubal*, P93-08-13 (1997); *In re Phelps*, P95-09-007 (1997); *In re Crimboli*, SC99-04-015 (1999); *In re Young*, SC98-08-027 (2000); *In*

re Jennings, SC99-10-001 (2001); *In re Warner*, SC01-08-001 (2002); *In re Taylor*, SC07-11-015 (2008). The Commissioner adopts this reasoning in the present case: the important aspects of 2 Pa.C.S. § 504 are notice and the *opportunity* to be heard. Default judgment is appropriate, despite language in applicable statutes which seems to require a hearing, when a respondent fails to take advantage of his opportunity to be heard. When a respondent in an enforcement action is served with an order to show cause detailing the nature of the charges against him as well as the consequences of failing to respond, yet fails to answer the allegations or to answer a subsequent motion for default judgment, the Commissioner adopts the Commonwealth Court's reasoning that the respondent had an opportunity to be heard but has rejected the opportunity.

Additionally, there are no factual matters to address at a hearing. Since the factual allegations of the OTSC are deemed admitted, the determination by the Commissioner is a legal rather than a factual one. A hearing is not necessary for this type of determination. *See Mellinger v. Department of Community Affairs*, 533 A.2d 1119 (Pa. Cmwlth. 1987); *United Healthcare, supra*. The Commissioner adjudicates the present case based upon the undisputed, admitted facts as alleged in the OTSC.

The facts include that Czmus was a licensed resident insurance producer since June 8, 2006. On August 26, 1992, the respondent surrendered his medical license to the Medical Board of California due to a disciplinary action against the respondent for certain fraudulent and grossly negligent conduct. On June 18, 1993, the New York Board for Professional Medical Conduct issued an order based upon reciprocal discipline, causing the surrender of the respondent's medical license in that state. On December 4, 2001, the New Jersey Supreme Court disbarred the respondent in the state of New Jersey due to professional misconduct. On December 30, 2005, the Pennsylvania Supreme Court disbarred the respondent in the state of Pennsylvania due to professional misconduct, specifically finding that the respondent engaged in continuous fraud for 21

years. The respondent failed to disclose the administrative actions on four resident producer license applications filed on May 23, 2006, July 15, 2006, March 8, 2007 and July 21, 2008.

Czmus was charged with two distinct violations of the Insurance Department Act: 1) failure to disclose the administrative actions to the Department on four insurance producer license applications in violation of 40 P.S. § 310.11(1); and 2) demonstrated lack of worthiness to be an insurance agent pursuant to 40 P.S. § 310.11(20).

For each of these three charges, the Commissioner has authority to impose remedial action against the respondent, including suspension or revocation of his certificate of qualification or license as well as imposing a penalty of up to $5,000.00 per violation. 40 P.S. § 310.91. Prohibited acts are listed in 40 P.S. §§ 310.11. In the present case, the admitted facts support sanctions for each of the two charges against Mr. Czmus. With his actions, Czmus demonstrated that he is not worthy of licensure under 40 P.S. § 310.11(1) and 310.11(20). With Czmus liable for remedial action under each of these charges, the appropriate action must be established for each one.

PENALTIES

The Commissioner may suspend or revoke a license for conduct violating certain provisions of the Insurance Department Act, including those provisions violated by the respondent's conduct. 40 P.S. § 310.91. Each action violating a provision specified in section 310.11 subjects the actor to a maximum five thousand dollar civil penalty. 40 P.S. § 310.91(d)(2).

A Commissioner is given broad discretion in imposing penalties. *Termini v. Department of Insurance*, 612 A.2d 1094 (Pa. Cmwlth. 1992); *Judson v. Insurance Department*, 665 A.2d at 523, 528 (Pa. Cmwlth. 1995). Each of the underlying actions in the present case directly are connected to the respondent's duties as an insurance agent. His failure to comply with applicable laws and codes of conduct in multiple states, including his falsification on an application directed to the Pennsylvania Insurance Department, makes Czmus unworthy of licensure and subject to significant penalty.

In particular, the misrepresentation on the respondent's Pennsylvania license applications goes to the heart of the requirement that insurance agents be trustworthy and reliable in their work with the insurance buying public. If he is dishonest with the regulator, then Czmus cannot be entrusted with the welfare of individuals he purports to serve. Furthermore, Czmus has ignored the directives of other state regulatory agencies as well as these current proceedings. This consistent and repeated disregard for the laws of multiple states demonstrates the respondent's unworthiness for licensure. By definition, producers have extensive personal contact with applicants and insureds. The applicants and insureds entrust financial and personal matters to the producer, and rely upon the producer's integrity. A producer who has consistently over a long period of time committed fraudulent acts including towards the regulators of his professions is incapable of the trust necessary in the profession. Simply put, Czmus at this time cannot

be trusted with the pocketbooks, bank accounts and personal information of his customers.

No evidence exists to mitigate the seriousness of the violations. Czmus did not offer mitigating evidence or arguments.

The Department in its Order to Show Cause and in its motion for default judgment requested the Commissioner to impose a civil penalty of $5,000 for each count and a period of revocation for a minimum of five years. Considering the facts in this matter, the applicable law, the seriousness of the conduct and all aggravating and mitigating circumstances, penalties are imposed as set forth in the accompanying order.

CONCLUSIONS OF LAW

1. The Commissioner has jurisdiction over the parties and subject matter of these proceedings.

2. The Department may revoke or suspend a certificate or license upon finding that an insurance producer has engaged in conduct which would disqualify him from initial issuance of a license.

3. Unworthiness to hold a license may be established by a producer's failure to comply with the law which requires the reporting of administrative actions in other jurisdictions and which prohibits misrepresentation on any application.

4. If unworthiness is established, the Commissioner may exercise discretion to impose remedial action in light of the producer's conduct as well as mitigating and aggravating factors.

5. Producers on the front line dealing with the insurance-buying public must avoid conduct demonstrating a disregard for regulations which protect those consumers.

6. Akim F. Czmus by his conduct demonstrates current unworthiness to hold an insurance license.

7. If any of the foregoing Conclusions of Law should be held to constitute Findings of Fact, the ones so found are incorporated therein by reference.

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IN RE:	:	ALLEGED VIOLATIONS:
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Akim F. Czmus	:	Sections 611-A(1) and (20)of the
5035 Chestnut Street	:	Insurance Department Act of 1921, P.L.
Philadelphia, PA 19139	:	789, No. 285, *as amended*, (40 P.S. §§
	:	310.11).
	:	
Respondent	:	Docket No. **SC09-05-009**

ORDER

AND NOW, based upon the foregoing findings of fact, discussion and conclusions of law, it is **ORDERED** as follows:

1. All of the insurance licenses or certificates of qualification of Akim F. Czmus **ARE REVOKED** for a minimum of five (5) years pursuant to 40 P.S. 310.91 for each of Counts One and Two, with these revocations to run **consecutively** with each other for a total minimum period of ten (10) years. Additionally, Akim F. Czmus is prohibited from applying for a certificate of qualification to act as a producer in this Commonwealth for a minimum of ten (10) years. Akim F. Czmus is also prohibited from applying to renew any certificate of qualification previously held by him in this Commonwealth for a minimum of ten (10) years.

2. Akim F. Czmus shall pay a civil penalty to the Commonwealth of Pennsylvania as within thirty (30) days of this order as follows:

a. Count one: $5,000.00
b. Count two: $5,000.00

for a total of Ten Thousand Dollars ($10,000.00). Payment shall be made by certified check or money order, payable to the Commonwealth of Pennsylvania, directed to: Sharon Fraser, Administrative Assistant, Bureau of Enforcement, 1227 Strawberry Square, Harrisburg, Pennsylvania 17120. In addition to the above restrictions, no certificate of qualification or other insurance license may be issued or renewed until the said civil penalty is paid in full.

3. This order is effective immediately.

Joel Ario
Insurance Commissioner