

RECEIVED
INSURANCE DEPARTMENT BEFORE THE INSURANCE COMMISSIONER
OF THE
2013 FEB 27 PM 1:24 COMMONWEALTH OF PENNSYLVANIA
ADMIN HEARINGS OFFICE

IN RE: : ALLEGED VIOLATIONS:
: :
: Sections of the Insurance Department
Iso Gerard Finzi, Jr. : Act of 1921, P.L. 789, No. 285, *as*
140 So. Dixie Highway, Apt. #511 : *amended* (40 P.S. §§ 310.78,
Hollywood, FL 33020-7320 : 310.6(a)(6), 310.11(8), 310.11(20) and
Respondent : 310.91).
: :
: Docket No. SC12-10-027

ADJUDICATION AND ORDER

AND NOW, this 27TH day of February, 2013, Michael F. Consedine, 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 December 3, 2012 directed to Iso Gerard Finzi, Jr. ("the respondent"). The OTSC alleged that the respondent violated the Insurance Department Act.¹ Specifically, the OTSC alleged that the respondent, a licensed insurance agent, failed to report to the Pennsylvania Insurance Department that his insurance licenses all had been revoked in Florida based on his nolo contendere pleas

¹ Act of May 17, 1921, P.L. 789, No 285 *as amended through* the Act of June 25, 1997, P.L. 349, No. 40, *repealed and partially reenacted by* the Act of December 3, 2002, P.L. 1183, No. 147. (40 P.S. §§ 310.1 *et seq.*)

DATE MAILED: February 27, 2013

and convictions for felonies.

The OTSC advised the respondent to file an answer in accordance with applicable regulations (1 Pa. Code § 35.37), 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. Following the filing of the OTSC, a presiding officer was appointed and the appointment order was served to the respondent's last known address by certified and first class mail.

The respondent failed to answer the Department's Order to Show Cause or otherwise respond to the Administrative Hearings Office. On January 29, 2013, the Department filed a motion for default judgment and served the respondent in accordance with 1 Pa. Code Chapter 33. The motion declares that the OTSC was mailed to the respondent to his last known address as kept on file in the Department. The respondent has not notified the Department of any change of address.

Although the Order to Show Cause was returned to the Department as undelivered, 31 Pa. Code §37.43 provides that "notice of formal hearing sent to the last known address of the agent or broker shall constitute formal legal notice to the agent or broker." The motion also declares that the Department, over the course of months, has attempted unsuccessfully to ascertain any other locations or addresses for the respondent. 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 the respondent 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 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

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.

(Administrative Agency Law). Similarly, the statute specifically applicable to the present case³ 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 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.

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

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.

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 Young*, SC98-08-027 (2000); *In re Jennings*, SC99-10-001 (2001); *In re Warner*, SC01-08-001 (2002); *In re Czmus*, SC09-05-009 (2009); *In re Kroope*, SC09-12-005 (2010). 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 the respondent is a licensed insurance producer with a last reported address of 140 So. Dixie Highway, Apt. #511, Hollywood, Florida 33020-7320. [OTSC ¶ 1]. He currently is licensed as a non-resident producer in the Commonwealth of Pennsylvania. [OTSC ¶ 2]. On April 7, 2011, the Florida Office of Insurance Regulation ("Florida") issued a Notice of Revocation against the respondent, revoking the

respondent's insurance licenses. [OTSC ¶ 3]. Thereafter, on October 25, 2011, Florida issued a Final Order, affirming the revocation of the Respondent's insurance licenses for a period of 15 years because of his nolo contendere pleas and convictions of felonies related to drug possession, aggravated fleeing and eluding and felony driving while license suspended, and resisting an officer with violence. [OTSC ¶ 4; Exhibit B].

Based on these facts, the Department alleges that the respondent violated the Insurance Department Act. Although the OTSC does not set out the charges in separate counts, it charges that the respondent (1) failed to report to the Pennsylvania Insurance Department the Florida administrative action taken against him within 30 days of final disposition of the matter in violation of 40 P.S. § 310.78.; (2) demonstrated that he is not worthy of licensure under 40 P.S. §§ 310.6(a)(6), 310.11(20) because he failed to report the Florida Orders to the Department; and (3) had his insurance producer license revoked by a government entity in violation of 40 P.S. § 310.11(8).

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 charges against the respondent. With his actions, the respondent demonstrated that he is not worthy of licensure under 40 P.S. § 310.11(1) and 310.11(20). With the respondent 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). The underlying criminal convictions involved the respondent's possession of cocaine, resisting an officer with violence, aggravated fleeing and eluding and felony driving while license suspended. These actions demonstrate the respondent's current unworthiness of licensure. Furthermore, the respondent failed to comply with the statutory requirement to report the Florida criminal convictions or the Florida Office of Insurance Regulation's license revocation. This action too demonstrates the respondent's current unworthiness of licensure. No evidence exists to mitigate the seriousness of the violations.

The Department in its Order to Show Cause requests that the Commissioner impose a \$5,000.00 fine per violation, revoke all licenses, prohibit the respondent from future licensing for a minimum period of five years, require compliance with and fulfillment of the Florida Order and other appropriate relief. In its motion for default judgment, the Department asks that the Commissioner enter a default judgment, that the respondent be fined for committing insurance law violations, that he be barred from future licensing until all the terms of the Commissioner's Order are fulfilled and that if the respondent becomes relicensed at any future date, that his license be subject to supervision for a minimum period of at least five years from the date of any such future

licensure.

Considering the facts in this matter, the applicable law, the nature of the respondent's 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 agent or a broker has engaged in conduct which would disqualify him from initial issuance of a certificate or a license.

3. Unworthiness to hold a license may be established by a producer's failure to comply with the law which requires that the producer report to the Pennsylvania Insurance Department any administrative action taken against him in another jurisdiction within 30 days of final disposition of the matter.

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. Iso Gerard Finzi, Jr. by his conduct demonstrates current unworthiness to hold an insurance license.

6. 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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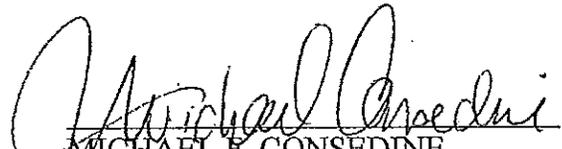
ORDER

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

1. Iso Gerard Finzi, Jr. shall **CEASE AND DESIST** from the prohibited conduct described in the adjudication.
2. All of the insurance licenses or certificates of qualification of Iso Gerard Finzi, Jr. **ARE REVOKED** for a minimum of five (5) years pursuant to 40 P.S. 310.91 for each of three violations with these revocations to run **consecutively** with each other for a total minimum period of fifteen (15) years. Additionally, Iso Gerard Finzi, Jr. is prohibited from applying for a certificate of qualification to act as a producer in this Commonwealth for a minimum of fifteen (15) years. Iso Gerard Finzi, Jr. is also prohibited from applying to renew any certificate of qualification previously held by him in this Commonwealth for a minimum of fifteen (15) years.
3. Should the respondent ever become licensed at any future date, his license

shall be subject to supervision for five (5) years from the date of any relicensure during which time the respondent's certificates and licenses may be immediately suspended by the Insurance Department following its investigation and determination that: (i) any other term of this order has not been complied with; or (ii) any complaint against the respondent is accurate and a statute or regulation has been violated.

4. This order is effective immediately.


MICHAEL F. CONSEDINE
Insurance Commissioner