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INSURANCE DEPARTMENT

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ADMINISTRATIVE HEARINGS OFFICE

BEFORE THE INSURANCE COMMISSIONER
OF THE
COMMONWEALTH OF PENNSYLVANIA

IN RE:	:	ALLEGED VIOLATIONS:
	:	
John Albert Funari, Jr.	:	63 P.S. § 1606(5), (12), (13)
907 McKean Street	:	
Philadelphia, PA 19148	:	
	:	
Respondent	:	Docket No. SC14-01-005

ADJUDICATION AND ORDER

AND NOW, this 3rd day of December, 2014, 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") issued an Order to Show Cause on February 11, 2014, an Amended Order to Show Cause on February 19, 2014 and a reissued Order to Show Cause on July 3, 2014 ("OTSC") directed to John Albert Funari, Jr. ("Funari" or "the respondent"). The OTSC alleged that Funari violated Sections 6(a)(3), (5) and (12) the Public Adjusters Act.¹ Specifically, the OTSC alleged that Funari, a licensed public adjuster, endorsed insureds' names on an insurance claim check without their consent and failed to remit the insureds' portion of the settlement.

The OTSC advised Funari to file a written answer and further advised him that the

¹ Act of December 20, 1983, P.L. 260, No. 72 as amended, 63 P.S. §§ 1606(a)(5), (12) and (13).

DATE MAILED: December 3, 2014

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, including deemed admission of the alleged facts and authenticity of documents and the issuance of an order imposing penalties.

Funari failed to answer the Department's Order to Show Cause or otherwise respond to the Administrative Hearings Office. On October 28, 2014, the Department filed a motion for default judgment and served Funari in accordance with 1 Pa. Code Chapter 33. The motion declared that the OTSC was mailed to the respondent to his mailing and business address which the respondent supplied to the Department and that the document was not returned to the Department as undeliverable. Notice of the OTSC also was published in the Pennsylvania Bulletin on February 22, 2014 and September 13, 2014.² The respondent has not filed a response to the OTSC or motion for default judgment, nor made any other filing in this matter.

This adjudication 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 Funari 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;³ however, because of the language in the penalty provisions of applicable statutes, an

² 44 Pa. Bull. 1107 (February 22, 2014); 44 Pa. Bull. 5948 (September 13, 2014).

³ 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.

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 case⁴ provides for a hearing procedure prior to certain penalties being imposed by the Commissioner.⁵ However, given that the respondent has not answered the order to show cause and given current caselaw, these hearing procedures are inapplicable.

⁴ Act of December 20, 1983, P.L. 260, No. 72 *as amended*, 63 P.S. §§ 1601-1608.

⁵ "NOTICE AND HEARING.-- Before the Insurance Commissioner shall take any action as above set forth, he shall give written notice to the person accused of violating the law, stating specifically the nature of such alleged violation and fixing a time and place, at least ten days thereafter, when a hearing of the matter shall be held. After such hearing or upon failure of the accused to appear at such a hearing, the Insurance Commissioner shall impose such of the above penalties as he deems advisable. When the Insurance Commissioner shall have taken any actions as above set forth, the party aggrieved may appeal therefrom to the Commonwealth Court." 63 P.S. § 1606(c).

While no court has directly addressed the power of a Commissioner to enter a default judgment without hearing in a case under the Public Adjusters 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 an order to show cause and a motion for default judgment. See *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); *In re Kroope*, SC09-12-005 (2010); *In re Biles*, SC14-01-006 (2014). 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.

Funari was a licensed public adjuster. [OTSC ¶ 2]. On May 8, 2012, John Albert Public Adjusters entered into a public adjuster's contract for a loss that occurred on April 24, 2012 with insureds Jeff Papa and Kahlil Mir. [OTSC ¶ 3; Exhibit A]. On October 1, 2012, the Philadelphia Contributionship issued a \$4,884.75 check made payable jointly to John Albert Public Adjusters, Jeffrey Papa and Kahlil Mir. [OTSC ¶ 4; Exhibit B]. The respondent endorsed the insurer's check, signing the insureds' names without their consent and/or knowledge and failed to remit the insureds' portion of the insurer's settlement. [OTSC ¶ 5; Exhibit B].

Funari was charged with three distinct violations of the Public Adjusters Act: 1) misappropriation, conversion to his own use or improper withholding of moneys held on behalf of another party to the contract pursuant to 63 P.S. § 1606(a)(5); fraudulent

practices pursuant to 63 P.S. § 1606(a)(12); and 3) demonstrated incompetency or untrustworthiness to transact the business of a public adjuster.

For each of the counts, the Commissioner has authority to impose remedial action against the respondent, including suspension or revocation of his license as well as imposing a penalty of up to \$5,000.00 per violation. 63 P.S. § 1606(a) and (b). Penalties not only may be imposed for violating specific provisions such as the misappropriation and fraud provisions; they may be imposed if the public adjuster is determined to be untrustworthy or incompetent. In the present case, the admitted facts support sanctions for each of the three counts.

Funari is liable for remedial action under count one (misappropriation). His retention of the claim proceeds harmed his clients, and constitutes the precise conduct proscribed by 63 P.S. § 1606(a)(5). He is liable under the first count.

In addition, Funari is liable for violating the proscription on fraudulent practices when he endorsed the check with his clients' names without their knowledge or consent. By representing via the false signatures that his clients signed off on the check, he defrauded not only his clients, but the insurance carrier and financial institution. He thus violated 63 P.S. § 1606(a)(12). He is liable under the second count.

Also, by his course of conduct, Funari demonstrated untrustworthiness to transact the business of a public adjuster and defeated his central obligation to his clients: obtain payment for their loss. Funari's failure to remit the insurance proceeds intended to compensate his clients for their loss, after promising to do so in his contract with them, demonstrates that he cannot be trusted with the financial affairs of consumers and companies alike. He violated 63 P.S. § 1606(a)(13) and is liable under the third count.

Liability under each of the three counts results from Funari's course of conduct relative to the Jeff Papa and Kahlil Mir claim. However, he is separately liable under each count because each statutory section proscribes certain aspects of the course of conduct. The misappropriation/conversion section requires that funds received for others be paid to the intended recipients. The fraud section proscribes fraudulent conduct such as forging his clients' signatures on the check. Finally, by entering into a contract to provide compensation for his clients' loss but instead engaging in acts which denied his clients their compensation, Funari callously disregarded basic standards of conduct required of public adjusters. Even had he not appropriated the funds for himself or forged his clients' signatures, failure to carry out the central duty to obtain compensation for his clients establishes a lack of diligence towards those Funari purported to serve.

With Funari liable for remedial action under each of the three counts, the appropriate action must be established for each count.

PENALTIES

The Commissioner may suspend or revoke a license for conduct violating certain provisions of the Insurance Department Act, including those provisions violated by Funari's conduct. 63 P.S. § 1606(a). Each action violating a provision specified in section 1606 subjects the actor to a maximum five thousand dollar civil penalty. 63 P.S. § 1606(b).

A Commissioner is given broad discretion in imposing penalties against licensees. *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 course of conduct in the present case is of the most serious nature, and directly connected to Funari's duties as a public adjuster. This seriousness is reflected in the penalties imposed. Funari's infliction of financial harm on others evidences a moral turpitude which is antithetical to the trustworthiness required in the profession. By definition, a public adjuster investigates and adjusts claims for insurance consumers who have suffered a loss, and advises them about their claims. 63 P.S. § 1601. Public adjusters thus work for and have personal contact with insureds, who rely upon the adjuster's integrity. An adjuster who has recently inflicted financial harm upon his own clients is incapable of the trust necessary in the profession. Simply put, Funari at this time cannot be trusted with the money and personal information belonging to his customers.

No evidence exists to mitigate the seriousness of the violations, other than it being one course of conduct involving two clients. Funari, not appearing in these proceedings, did not offer mitigating evidence or arguments. Failure to respond in this disciplinary proceeding brought by the regulator is an additional aggravating factor.

The Department in its Order to Show Cause requested a fine of not less than \$500 nor more than \$1,000 for each violation, revocation of any and all licenses, a prohibition from future licensing for a minimum period of five years, and any such other relief the Commissioner finds to be appropriate. In its motion for default judgment, the Department repeated these requests.

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.

BEFORE THE INSURANCE COMMISSIONER
OF THE
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IN RE: : ALLEGED VIOLATIONS:
: :
John Albert Funari, Jr. : 63 P.S. § 1606(5), (12), (13)
907 McKean Street : :
Philadelphia, PA 19148 : :
Respondent : Docket No. **SC14-01-005**

ORDER

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

1. John Albert Funari, Jr. shall **CEASE AND DESIST** from the prohibited conduct described in the adjudication.

2. All of the public adjuster licenses of John Albert Funari, Jr. **ARE REVOKED** for a minimum of five (5) years for each of Counts One, Two and Three, with these revocations to run concurrently with each other. Additionally, John Albert Funari, Jr. is prohibited from applying for a license to act as a public adjuster in this Commonwealth for a minimum of five (5) years. John Albert Funari, Jr. is also prohibited from applying to renew any license previously held by him in this Commonwealth and issued by the Insurance Department for a minimum of five (5) years.

3. John Albert Funari, Jr. shall pay a civil penalty to the Commonwealth of Pennsylvania within thirty (30) days of this order as follows:

a. Count one: \$2,000.00

- b. Count two: \$2,000.00
- c. Count three: \$2,000.00

for a total of Six Thousand Dollars (\$6,000.00). Payment shall be made by certified check or money order, payable to the Commonwealth of Pennsylvania, directed to: Administrative Assistant, Bureau of Enforcement, 1227 Strawberry Square, Harrisburg, Pennsylvania 17120. In addition to the above restrictions, no public adjuster license or insurance license may be issued or renewed until the said civil penalty is paid in full.

- 4. This order is effective immediately.



MICHAEL F. CONSEDINE
Insurance Commissioner