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INSURANCE DEPARTMENT
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ADMIN HEARINGS OFFICE

BEFORE THE INSURANCE COMMISSIONER
OF THE
COMMONWEALTH OF PENNSYLVANIA

IN RE: : **ALLEGED VIOLATIONS**
Roman and Janet Gutman : Sections 604, 622, 631 and 639 of
23 Addington Drive : the Insurance Department Act of
Langhorne, PA 19053 : 1921, Act of May 17, 1921, P.L. 789,
Respondents : No. 285, *as amended*, (40 P.S. §§
: 234, 235, 252, 271 and 279).
: Sections 37.11, 37.12, 37.17, 37.37,
: 37.45, 37.46, 37.47 and 37.48 of the
: Insurance Department's Regulations
: (31 Pa. Code §§ 37.11, 37.12, 37.17,
: 37.37, 37.45, 37.46, 37.47, 37.48).
:
: Docket No. **SC01-03-036**

ADJUDICATION AND ORDER

AND NOW, this 6th day of November, 2006, M. Diane Koken, Insurance Commissioner of the Commonwealth of Pennsylvania ("Commissioner"), makes the following Adjudication and Order.

HISTORY

The procedural history of this case is complex and extensive, but will be covered in detail to provide background for pending motions made at hearing which have not yet been ruled upon. The case began when the Pennsylvania Insurance Department ("Department") filed an Order to Show Cause ("OTSC") on March 25, 2003 directed to Roman and Janet Gutman ("the respondents"). The OTSC alleged that the respondents

DATE MAILED: November 6, 2006

violated the Insurance Department Act¹ and Department regulations.² Specifically, the OTSC alleged that the respondents, licensed insurance producers, were generally unworthy of licensure. In addition, the OTSC alleged that Roman Gutman was unworthy because of: 1) his criminal conviction; 2) his failure to report the conviction to the Department; 3) his misrepresentations to the Department concerning his criminal record; and 4) his unlicensed and unauthorized activity in the business of insurance. Janet Gutman was alleged to have engaged in unlicensed activity.

More specifically, the OTSC consisted of one hundred three (103) numbered averments divided into six counts. Count I was based upon the respondents' alleged lack of professional competence and general fitness. In Count II, the Department alleged that Roman Gutman's conviction of simple assault for punching his wife in the face rendered him unworthy of licensure because the crime involved moral turpitude or harm to another. In Count III, the Department alleged that Roman Gutman failure to report the conviction to the Department within ten days of being convicted of the crime violated Department regulations.³ The Department alleged in Count IV that by twice failing to disclose the criminal charge or resulting conviction on license applications, Roman Gutman provided incorrect, misleading or incomplete answers, subjecting him to administrative penalties. Count V charged Roman Gutman with fifty-four (54) incidents of unlicensed brokering and acting as an agent for a company without an appointment in violation of statutes and regulations.⁴ Finally, Count VI charged Janet Gutman with twenty-four (24) instances of unlicensed brokering and nineteen (19) instances of acting as an agent for a company without an appointment.

¹ Act of May 17, 1921, P.L. 789, No 285, 40 P.S. §§ 234, 235, 252 271 and 279.

² 31 Pa. Code §§ 37.11, 37.12, 37.17, 37.37, 37.45, 37.46, 37.47, 37.48.

³ 31 Pa. Code § 37.48.

⁴ 40 P.S. §§ 235, 252, 271; 31 Pa. Code §§ 37.11, 37.12, 37.17, 37.45.

Against Roman Gutman, the Department sought revocation of his insurance license, a civil penalty of \$825,000, a cease and desist order and other appropriate relief. Against Janet Gutman, the Department sought revocation of her insurance license, a civil penalty of \$115,000, a cease and desist order and other appropriate relief.

A presiding officer was appointed, and counsel for the Department and the respondents entered their respective appearances. On April 14, 2003, the respondents filed an answer to the OTSC. A prehearing schedule and hearing date were established. However, new counsel for the respondents entered his appearance on May 15, 2003 and on the following day the Department moved for a stay to allow additional investigation and to file an amended OTSC. The respondents concurred in the motion to stay the proceedings and the motion was granted on May 19, 2003. On May 21, 2003, the respondents filed an amended answer to the OTSC, which mirrored the previously-filed answer except that it modified the answer to Count V and incorporated an additional exhibit for that count.

On June 9, 2003, the Department moved to amend its Order to Show Cause by adding seventy-five (75) additional numbered averments and four additional counts against Roman Gutman. Count VII alleged lack of professional competence and general fitness based upon the additional factual allegations. Those averments included factual support for Counts VIII through X, as well as allegations concerning an incident in which Mr. Gutman allegedly threatened to shoot a woman who complained about her insurance policy. Count VIII alleged that additional criminal convictions not set forth in the original OTSC constitute an additional basis to impose penalties. In Count IX, the Department alleged that Roman Gutman's failure to report these additional convictions merits additional sanctions. Finally, in Count X, the Department alleged that by failing to disclose the additional criminal charges or resulting convictions on multiple license

applications, Roman Gutman provided incorrect, misleading or incomplete answers subject to additional administrative penalties.

On June 23, 2003, the respondents filed an answer to the proposed amended OTSC. This answer and the answer to the original OTSC contested the factual basis for each count. The original amended answer denied that Roman Gutman was convicted of simple assault but asserted that he rather was convicted only of a summary offense on the date alleged by the Department. According to the respondents, Roman Gutman disclosed the charges and conviction at the time of his 2000 and 2002 renewal applications despite the fact that the conviction only was for a summary offense. The respondents disputed the number of alleged incidents of unlicensed brokering and acting without a company appointment, and denied that Janet Gutman was acting as an agent. Rather, according to the respondents, Janet Gutman was not involved in her husband's automobile insurance business and only was assisting her husband as a notary or otherwise on the applications which the Department attributed to her.

With regard to the additional criminal convictions alleged by the Department in the amended complaint, the respondents admitted Roman Gutman's 1993 convictions by a Philadelphia Municipal Court but asserted that the charges were dismissed later in 1993. The respondents denied that Roman Gutman was convicted of two simple assault charges in 2001 as a result of punching his wife in the face. They asserted to the contrary that he entered a guilty plea to one count of simple assault and that the resulting conviction was not the result of punching his wife in the face. The respondents denied a failure to report charges or convictions to the Department, asserting that Roman Gutman did disclose the pending charges in 2000 and the conviction in 2002. Finally, the respondents denied that Roman Gutman threatened to shoot a woman who complained about insurance, asserting to the contrary that the woman refused to leave the agency and that the Gutmans called the police.

Although the respondents' June 23, 2003 filing answered the Department's amended order to show cause, it did not answer the Department's motion to amend. Accordingly, on June 24, 2003 the Department's motion to amend was granted and the proposed amendment was deemed to be filed. That order also established dates for prehearing statements, a prehearing conference and a hearing.

On August 8, 2003, the parties filed prehearing statements pursuant to the schedule as extended, accompanied by a joint stipulation of undisputed facts. The Department requested and obtained a subpoena for the attendance of Katherine Rossi, the alleged victim of Roman Gutman's alleged threats, for attendance at the August 28, 2003 hearing. A prehearing conference was held on August 13, 2003, and the parties supplemented the statement of stipulated facts on August 15, 2003. On September 20, 2003, the respondents requested and obtained a subpoena for David Peck, a witness material to the allegations that the respondents engaged in unauthorized insurance transactions. Also on this date, the respondents supplemented their prehearing statement with a list of additional exhibits to be introduced at hearing.

On August 21, 2003, the respondents requested a continuance of the August 28 hearing on the basis that Roman Gutman's mother in the Ukraine was critically ill. The Department did not oppose the request and the hearing was continued generally pending a return date for the Gutmans from the Ukraine. On September 10, 2003, counsel for the respondents reported that the Gutmans expected to return in mid-October, and a hearing was scheduled for November 12, 2003. On October 31, 2003, the Department requested a continuance due to communication difficulties with its subpoenaed witness. The unopposed motion was granted and the hearing was rescheduled for December 2, 2003.

On the basis that one of its witnesses would be unavailable on December 2, the Department on November 7, 2003 requested another continuance of the scheduled hearing. The respondents concurred with the continuance request, and a January 15, 2004 hearing date was established with the agreement of the parties.

On December 29, 2003, the Department again requested a continuance due to the unavailability of two witnesses at the scheduled hearing. A new hearing date was established with the agreement of the parties, with the hearing to occur on February 6, 2004. The respondents requested and received a reissued subpoena directed to David Peck. The Department requested and received a reissued subpoena directed to Katherine Rossi.

On January 30, 2004, the third counsel for the respondents: 1) entered his appearance; 2) indicated that the respondents' second counsel would withdraw; and 3) requested a continuance to prepare adequately for hearing. Over objection of Department counsel, the continuance request was granted and counsel for the parties were directed to appear at the time previously scheduled for hearing to discuss facilitating the orderly conduct and disposition of the proceeding. On February 2, 2004, the respondents' second counsel requested a continuance of the scheduled hearing for the reason of counsel's health. Two days later, the respondents' second counsel withdrew his appearance.

The prehearing conference was held on February 6, 2004. On that date following conference, an order was issued which established dates and procedures for prehearing motions and responses as well as amended prehearing statements. April 2, 2004 was established as the hearing date.

On February 23, 2004, the respondents moved to amend their amended answer to the original OTSC. The Department did not oppose the amendment and the motion was

granted. On March 22, 2004, pursuant to the Department's request, the subpoena directed to Katherine Rossi was reissued. Also on that date, the respondents requested a continuance of the April 2 hearing because of Roman Gutman's trip to Moscow, Russia to attend the grave dedication for his mother. The respondents also requested that rescheduled hearings be held on a day other than Friday for religious reasons, and in the event the April 2 hearing was not continued, that the hearing be adjourned by 1:30 p.m. to allow Janet Gutman to return to her home prior to sunset. The Department requested that an in-person conference be scheduled to discuss these issues.

The respondents' application for relief was granted in part, denied in part and deferred in part. The April 2, 2004 hearing would be held as scheduled. Should the hearing not be concluded by approximately 2:30 p.m. on that date, it would be recessed. The respondents were directed to provide documentation to support the reasons for the continuance request.

On March 24, 2004, the respondents filed an amended prehearing statement which identified as an additional witness the police officer who investigated the alleged incident with Katherine Rossi, and identified as an additional exhibit the police investigative report for that incident. The respondents requested and received a subpoena for the attendance of the police officer. The respondents also requested and obtained a reissued subpoena for the attendance of David Peck.

On March 29, 2004, the respondents filed documentation supporting the basis for the continuance request, and on that date it was ordered that following the April 2 hearing, the record would be held open upon the request of either party for the purpose of receiving Roman Gutman's testimony. On March 31, 2004, the respondents requested that the police officer be excused from attending the April 2 hearing because of family medical issues. They requested that he be allowed to present testimony at the time

established for Roman Gutman's testimony. The Department had no objection and the request was granted on March 31, 2004.

The hearing was held on April 2, 2004. The respondents were represented by counsel and Janet Gutman was in attendance. The Department was present represented by counsel. Testimony was received from Katherine Rossi and David Peck as well as from Jack Yanoski, the director of the Insurance Department's Bureau of Producer Services. Also received and admitted into the record were written factual stipulations of the parties including a number of documents. The respondents' counsel objected to a stipulated document which was generated from microfilm. The document was admitted into the record, but the Department was ordered to produce at the next hearing the original or better copy if existing.

Following the conclusion of Katherine Rossi's testimony, the Department moved to amend its OTSC to add an additional count against Janet Gutman for being present when Roman Gutman allegedly threatened Ms. Rossi with a firearm. Ruling was deferred until final adjudication. At the conclusion of the day's proceedings, the hearing was recessed, to be rescheduled following Roman Gutman's expected return from Russia on April 14, 2004.

On April 14, 2004, counsel for the respondents withdrew their appearance without explanation. The Department objected to the withdrawal and requested that the presiding officer order the respondents' third counsel to continue their representation until the close of hearings in the matter. The presiding officer deferred ruling upon the request, established a hearing date and set a date for the respondents and/or their third counsel to respond to the Department's request. The Department requested subpoenas to secure the attendance of the respondents at the scheduled hearing.

On April 21, 2004, the respondents *pro se* replied to the Department's request and joined in the request that third counsel be ordered to continue their representation of the respondents. In the alternative, the respondents requested a thirty-day continuance to secure new counsel. The respondents further requested that counsel be appointed if the respondents were unable to secure their own.

On April 23, 2004, third counsel responded to the Department's request and the respondents' reply. Counsel certified that their withdrawal was mandatory pursuant to the Rules of Professional Conduct and that they were constrained by the rules from divulging details about the basis for withdrawal.

On April 23, 2004, the presiding officer denied the Department's request and granted the respondents' continuance request in order for them to obtain new counsel. The respondents' contingent request for the appointment of counsel was denied. On April 26, 2004, a hearing was set for June 7, 2004, and subpoenas were issued to secure the respondents' attendance.

On May 14, 2004, fourth counsel for the respondents entered his appearance and requested a continuance of the June 7 hearing. The Department did not oppose the request and the hearing was rescheduled to July 1, 2004. The subpoenas were reissued at the Department's request.

On June 24, 2004, the presiding officer wrote the parties, clarifying the procedural posture of the case and notifying the parties that another hearing officer would preside over the hearing because of a conflict in the presiding officer's schedule. A telephone conference with the parties was held at the Department's request, and the Department's unopposed continuance request was granted. The hearing was rescheduled to August 26, 2004 and held on that date.

At the August 26 hearing, testimony was received from each respondent and the police officer. At the conclusion of the Department's case, the respondents moved for dismissal of all charges on the basis that the Department failed to meet its burden of proof. Ruling on this motion was deferred pending final adjudication.

Towards the end of the hearing, the respondents moved to strike two questions asked by Department counsel of Roman Gutman. The motion was denied and the respondents moved for a mistrial, which motion also was denied. The respondents moved to hold the record open to receive evidence to rebut the implications in the Department's questioning, which motion was denied. Following receipt of the hearing transcript a briefing schedule was established, and the parties filed briefs pursuant to that schedule as extended. This matter is ready to adjudicate.

FINDINGS OF FACT⁵

Background

1. Roman Gutman is a Pennsylvania licensed insurance agent residing at 23 Addington Drive, Langhorne, Pennsylvania. [Exhibit JS1 ¶ 1].
2. Janet Gutman, wife of Roman Gutman, is a Pennsylvania licensed insurance agent residing at the same address. [Exhibit JS1 ¶¶ 2, 3].
3. Roman Gutman became a licensed agent in 1981 and Janet Gutman became a licensed agent in approximately 1991, but neither has been licensed as an insurance broker at any time. [Exhibit JS1 ¶ 4; N.T. II⁶ 18, 96].
4. From December 1992 through May 2000, Roman Gutman engaged in the business of insurance as R&J Insurance Agency at 12037 Bustleton Avenue, Philadelphia, Pennsylvania. [Exhibit JS1 ¶ 7].
5. R&J Insurance Agency has never been licensed by the Pennsylvania Insurance Department and was a fictitious name under which Roman and Janet Gutman did business. [Exhibit JS1 ¶ 8].
6. The fictitious names R&J Insurance and R&J Insurance Agency were never

⁵ Certain findings are derived from the facts stipulated by the parties, and correspond to the numbered paragraphs in the stipulation. [Exhibit JS1]. The remainder of the findings are derived from the documents stipulated into the record and the testimony at hearing. No additional documents were offered at the hearing and the stipulated documents are part of the record for all purposes but with the parties reserving the right to argue weight or relevancy of the information contained within the documents. [N.T. 8-9]. In this adjudication, stipulated documents are designated as they are in the joint stipulation: Exhibits A-E.

⁶ Notes of Testimony from the April 2, 2004 hearing are designated as "N.T. I" and Notes of Testimony from the August 26, 2004 hearing are designated as "N.T. II".

registered with the Pennsylvania Department of State. [Exhibit JS1 ¶9; Exhibit JS4].

7. "R&J" stood for "Roman and Janet." [N.T. II 40].

8. In addition to conducting some insurance business at the agency, Janet Gutman operated a notary and automobile tag service. [N.T. II 18-26].

Roman Gutman's Criminal History

9. In November 1992, Roman Gutman was arrested for: 1) terroristic threats, a first degree misdemeanor; 2) indecent exposure, a second degree misdemeanor; and 3) harassment, a summary offense. He was accused of making violent and vulgar threats to a woman while exposing his genitals and buttocks to her. [Exhibit JS16; Exhibit JS1 ¶ 11].

10. On February 18, 1993, Roman Gutman was adjudged guilty of terroristic threats and indecent exposure by the Municipal Court of Philadelphia. [Exhibit JS1 ¶ 10; JS16]. On appeal to the Philadelphia County Court of Common Pleas, those charges were *nolle prossed* because of witness unavailability. [Exhibit JS17].

11. On October 6, 2000, a criminal complaint was filed against Roman Gutman in Bucks County Pennsylvania charging him with two counts each of simple assault and recklessly endangering another person, both misdemeanors. Roman Gutman was alleged to have caused injury to his wife and daughter and to have placed them in danger of death or serious bodily injury. [Exhibit JS1 ¶ 16; Exhibit JS5].

12. On November 1, 2000, Roman Gutman entered pleas of guilty to simple assault, a misdemeanor, and to misdemeanor disorderly conduct. The criminal information was amended to dismiss the charge of reckless endangerment. Roman Gutman was sentenced to nine months probation for the convictions. [Exhibits JS3B,

JS5, JS6].

13. On or about April 20, 2001, Roman Gutman was arrested and charged with two counts of simple assault, a second degree misdemeanor. [Exhibit JS1 ¶¶ 20-21; Exhibit JS19].

14. The two counts were based upon two subsections of 18 Pa.C.S. § 2701(a) but involved the same conduct by Roman Gutman, who was alleged to have caused bodily injury to Janet Gutman by punching her in the left eye. [Exhibits JS18, JS19].

15. On May 10, 2001, Roman Gutman pleaded guilty to one count of simple assault and was convicted of that offense. He was sentenced to twelve months probation for the offense. [Exhibit JS1 ¶ 22; Exhibit JS19].

Roman Gutman's Disclosure of his Criminal Convictions

16. Roman Gutman did not report the 1993 convictions, subsequently *nolle prossed*, to the Insurance Department nor did he disclose that information on his 1998 license renewal application. [Exhibit JS1 ¶ 14].

17. At the time he submitted the 1998 application, Roman Gutman had been convicted of indecent exposure or terroristic threats but with the charges subsequently being *nolle prossed* on appeal because of witness unavailability. [Findings of Fact 9, 10].

18. On approximately October 15, 2000, Roman Gutman filed with the Department an application to renew his agent's license. On the application, he certified under penalty of perjury that the provided statements and information were true and correct. [Exhibit JS1 ¶ 17].

19. On the October 2000 application, Roman Gutman was asked the question

“[h]ave you ever been convicted of or pled nolo contendere (no contest) to any misdemeanor or felony or currently have pending misdemeanor or felony charges filed against you? (If yes, give date, name and address of court, type of charge (i.e. felony), basis of charge and outcome or sentence.)” [Exhibit JS1 ¶ 18; Exhibit JS7].

20. At the time of his 2000 application, Roman Gutman had misdemeanor charges pending against him. [Findings of Fact 11, 12; Exhibit JS1 ¶ 19].

21. In response to the question on the 2000 application concerning pending criminal charges, Roman Gutman answered “no.” [Exhibit JS7; N.T. I 132].

22. Roman Gutman did not otherwise notify the Department that he had pending misdemeanor charges against him at the time of the application, nor did he notify the Department when he was convicted of a misdemeanor on November 1, 2000. [N.T. I 132, 150].

23. At hearing, Roman Gutman testified that he submitted the 2000 application with both the “yes” and “no” boxes checked in response to the criminal charges question and that he contemporaneously submitted a letter dated October 11, 2000 disclosing the pending misdemeanor charges. [N.T. II 158-63].

24. In actuality, Roman Gutman originally checked “yes” to the criminal charges question as well as a question about licensure actions against him, but changed both answers to “no” and initialed the changes on the application submitted to the Department. He did not submit an explanatory letter. [Findings of Fact 20, 21; Exhibit JS7; N.T. I 131-32, 147, 150-153].

25. Roman Gutman fabricated the October 11, 2000 letter for use at hearing. [Findings of Fact 23-24; Exhibit R5].

26. Roman Gutman completed his 2002 renewal application electronically. [Exhibit JS1 ¶ 23].

27. Roman Gutman was asked the same question about criminal charges and convictions on the electronic 2002 application as he was on the 2000 application. [Exhibit JS1 ¶¶ 25-26].

28. At the time he submitted the 2002 application, Roman Gutman had been convicted of two misdemeanors in 2000 and convicted of a misdemeanor in 2001. [Findings of Fact 12, 15].

29. In response to the question whether he had been convicted or charged with a misdemeanor or felony, Roman Gutman answered “no.” [N.T. I 134-37; Exhibit D1].

30. Roman Gutman did not otherwise notify the Department that he had been convicted of misdemeanors in 2000 and 2001. [N.T. I 131-36, 152-53].

31. At hearing, Roman Gutman did not deny that he answered “no” to the question on the 2002 application, but claimed that he sent explanatory letters to the Department on October 12, 2002 and October 21, 2002. [N.T. II 99-106, 164-66].

32. The Department did not receive any explanatory letters relating to the criminal charges or convictions. [N.T. I 131-32; 152-53].

33. Roman Gutman did not mail letters to the Department in October 2000 or October 2002. [Finding of Fact 32]

34. The purported explanatory letters were fabricated by Roman Gutman for use at hearing. [Findings of Fact 29-33; Exhibits R6, R7].

Katherine Rossi Incident

35. An individual named Igor Vitrovych purchased automobile insurance through Roman Gutman which was placed with Meridian Insurance Company. [Exhibit JS1 ¶ 39].

36. Meridian notified Mr. Vitrovych that his insurance was being cancelled for nonpayment of premium. [Exhibit JS1 ¶ 40; Exhibit R2].

37. At that time, Katherine Rossi was Mr. Vitrovych's fiancé. [N.T. I 25].

38. Ms. Rossi helped to pay the premiums for the policy by contributing money towards the monthly premium and accompanying her fiancée to R&J Insurance Agency to pay the premium in cash. [N.T. I 26-29].

39. After receiving the cancellation notice, Ms. Rossi was upset and attempted to find out why the policy had been canceled when she believed that the premium payments had been made. [N.T. I 28-29].

40. Ms. Rossi initially contacted the agency of record, Five Points Insurance, which informed her that she needed to contact R&J Insurance where Mr. Vitrovych had purchased the policy and where the premium payments were made. [N.T. I 29-30].

41. R&J had moved from the agency's previous location in Philadelphia but Ms. Rossi eventually was able to obtain an address for the agency in Feasterville, Pennsylvania. [N.T. I 31].

42. In 1999 or 2000, Ms. Rossi went to that location but the agency's door was locked and nobody was present. [N.T. I 31-32].

43. Ms. Rossi obtained a telephone number for the Gutmans from a neighboring business and telephoned Mr. Gutman, telling him that she was interested in purchasing insurance so that he would come to the agency. [N.T. I 32-33].

44. Shortly thereafter, the Gutmans arrived in separate vehicles and entered the agency office, followed thereafter by Ms. Rossi. [N.T. I 33].

45. Initially, nobody was in the front room of the agency, but Roman Gutman emerged. Roman Gutman and Ms. Rossi engaged in a verbal altercation about Mr. Vitrovych's insurance policy. Both were angry. [N.T. I 34; N.T. II 43, 74-75, 78-79].

46. Janet Gutman was in a back room of the agency at the time Roman Gutman was arguing with Ms. Rossi in the front room. [N.T. I 35; N.T. II 41]

47. In the course of the argument, Roman Gutman said that he would shoot Ms. Rossi and Ms. Rossi believed him to have a gun. [N.T. I 34-35; N.T. II 85, 87-88; Exhibit R8].

48. Ms. Rossi left the agency and telephoned the police from a neighboring business while Roman Gutman also telephoned the police. [N.T. I 35; N.T. II 43].

49. An officer arrived and took statements from Ms. Rossi and Roman Gutman but did not make any arrests nor initiate any charges as a result of the incident. [N.T. II 73-90].

Five Points Transactions

50. Five Points Insurance, Inc. is a Pennsylvania corporation and insurance agency which maintains an address in West Chester, Pennsylvania. [Exhibit JS1 ¶ 30].

51. In 1999 and 2000, the qualifying active officers for Five Points were Joseph J. Naples and David B. Peck who possess valid Pennsylvania agent certificates of qualification and brokers licenses. [Exhibit JS1 ¶ 32].

52. On September 15, 1999, Roman Gutman, trading as R&J Insurance Agency, executed a producer agreement with Five Points. [Exhibit JS1 ¶ 32; Exhibit JS8].

53. The producer agreement designated Roman Gutman as "Producer" and Five Points as "Agency." The agreement provided in part as follows:

1. Agency hereby grants authority to Producer to solicit, submit and bind applications for Personal Automobile Insurance and Homeowners Insurance pursuant to rules and regulations of each insurance company which Agency authorized Producer to represent. Producer shall have such authorities for the following insurance companies: As Agreed Between Both Parties.

...

10. In order for the Producer to perform his duties under this Agreement the Agency shall provide the Producer with correct and updated insurance companies software, manuals, all necessary forms and with copies of all new, amended and renewal declarations of insurance policies produced by the Producer.

54. Five Points and Roman Gutman entered into the agreement because Five Points was looking for a producer for automobile insurance business and Roman Gutman was looking for additional automobile insurance carriers to offer his customers. [N.T. I 80-82].

55. In the arrangement, Roman Gutman received an application and submitted it to Five Points, which in turn evaluated the applicant and submitted qualified applications to an insurance company. [N.T. I 83].

56. Under the agreement, the commissions for the business produced by Roman Gutman were divided evenly between Roman Gutman and Five Points. [N.T. I 84; Exhibit JS8].

57. Between January and September 2000, Roman Gutman completed and forwarded at least 54 applications for insurance with three different companies together with premium payments he had collected for the policies. [N.T. 89; Exhibits JS8-JS12; Exhibit JS1 ¶ 34].

58. In a number of instances, insurance coverage was issued by the insurer to which the applications were submitted. [Exhibit JS1 ¶ 35].

59. On the policies which were issued, Five Points received the policies and financial responsibility cards from the companies and forwarded these items to Roman Gutman to be distributed to the policyholders. [N.T. I 92-93].

60. Five Points received the commissions from the companies and paid half of each commission to Roman Gutman. [N.T. I 93].

61. For one of the applications, Roman Gutman completed and personally signed it as producer; in the others he left blank the designation of producer. [Exhibit JS1 ¶ 36].

62. In nineteen instances where R&J Insurance Agency collected and forwarded premium payments to the insurer on behalf of the applicant, the payments were made to the companies by checks written from R&J's account and signed by Janet Gutman. [Exhibit JS1 ¶ 37].

63. Four of the applications included affidavits of the applicants which were notarized by Janet Gutman. [Exhibit JS11].

64. Janet Gutman received compensation for her notary services, and the records and monies were kept separate from the R&J Insurance business. [N.T. II 26, 31-33].

65. Janet Gutman received commissions for life insurance policies she sold in addition to the income from her notary business and car registration services, but she otherwise received no compensation from R&J or Roman Gutman. [N.T. II 31-34].

66. Roman Gutman managed the finances of R&J but Janet Gutman was authorized to sign checks for the agency and in fact did so. [N.T. II 35].

67. Janet Gutman signed the agreement with Five Points as witness to Roman Gutman's signature. [Exhibit JS1 ¶ 33; Exhibit JS8].

68. Janet Gutman was a self-employed insurance agent and not an employee of Roman Gutman. [N.T. II 31-32, 40].

69. Most of the insurance business involved in the Five Points transactions was conducted by Roman Gutman but Janet Gutman assisted him in that business and herself signed premium checks on nineteen occasions. [N.T. II 23; Findings of Fact 62-63].

70. Roman Gutman did not have a direct relationship at any time with any of the companies involved in the Five Points transactions and was not appointed as agent by any of them. [N.T. I 83].

71. Roman Gutman never possessed an insurance broker's license in Pennsylvania. [Exhibit JS1 ¶ 4].

72. Roman Gutman acted as broker in each of the transactions involving Five Points.

73. Five Points forwarded a letter to Roman Gutman dated January 4, 2000 purporting to terminate the producer agreement effective February 3, 2000. [Exhibit JS1 ¶ 38].

74. Five Points terminated the producer agreement because it was dissatisfied with the quantity and quality of the business generated by Roman Gutman. [N.T. I 94].

75. Additional factual findings contained in the discussion section of this adjudication are incorporated herein.⁷

76. Should any factual finding be deemed a conclusion of law, the finding shall be incorporated therein.

⁷ All conclusions of law are incorporated into the discussion section of this adjudication.

DISCUSSION

This case presents the picture of a licensed insurance producer prone to violence, dishonesty and disregard for insurance statutes and regulations. It also presents the picture of his spouse, also a licensed producer, who condoned or facilitated his conduct and herself engaged in conduct in violation of insurance statutes and regulations. Many of the facts in this case were hotly disputed, but many facts are indisputable.

The acts in question in this case took place between 1992 and 2001. At the time, Roman and Janet Gutman as licensed insurance agents were subject to provisions of the Insurance Department Act in effect at that time,⁸ as well as applicable Insurance Department regulations.⁹

Section 604 (40 P.S. § 234) of the Insurance Department Act¹⁰ authorized the issuance of a certificate of qualification for an insurance agent when the Insurance Department “is satisfied that the applicant is worthy” of such certification. Section 639 (40 P.S. § 279) provided for the imposition of various penalties “upon satisfactory evidence of such conduct that would disqualify the agent or broker from initial issuance of a certificate of qualification under section 604 . . .” 40 P.S. § 279(a). In other words, the penalties could be imposed if the agent or broker were determined to be untrustworthy or professionally unfit. The possible penalties include suspension or revocation of the certificate of qualification or license of the offending party and imposition of a civil penalty for each violation. 40 P.S. § 279(a)(1), (2).

⁸ Act of May 17, 1921, P.L. 789, No 285 *as amended through* the Act of June 25, 1997, P.L. 349, No. 40 (formerly 40 P.S. §§ 234, 235, 252, 271 and 279 (West 1999)), *repealed and partially reenacted* by the Act of December 6, 2002, P.L. 1183, No. 147. For ease of reference throughout this adjudication, citations will utilize the former Purdon’s sections and subsections.

⁹ 31 Pa. Code §§ 37.11, 37.12, 37.17, 37.37, 37.45, 37.46, 37.47, 37.48

¹⁰ Formerly 40 P.S. § 234.

These statutory provisions were implemented and clarified by Department regulations still in effect today. 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, specifically including the conduct recited in 31 Pa. Code § 37.46. 31 Pa. Code § 37.47. Section 37.46 provides that:

The Department may deny an application for a certificate or license upon finding after a hearing or upon failure of the applicant to appear at the hearing that:

...

(7) The applicant does not possess the professional competence and general fitness required to engage in the business of insurance. Determination will be made after thorough examination of the pertinent information and documents available to the Department which pertain to the honesty, reliability, efficiency, educational training and business experience and reputation of the applicant. . . .

(i) A showing that, within 5 years prior to applying for a certificate or license, an applicant has pleaded guilty, entered a plea of nolo contendere or been found guilty of a felony in a court of competent jurisdiction, or has pleaded guilty, entered a plea of nolo contendere, or been found guilty of criminal conduct which relates to the applicant's suitability to engage in the business of insurance, shall be evidence of lack of fitness for a certificate or license.

(A) Examples of criminal violations which the Department may consider related to the applicant's suitability to engage in the business of insurance are unlawful advertising of insurance business, unlawful coercion in contracting insurance, furnishing free insurance as an inducement for purchases, unlawful collection practices, embezzlement, obtaining money under false pretenses, conspiracy to defraud, bribery or corrupt influence, perjury or false swearing, unlicensed activity or a criminal offense involving moral turpitude or harm to another.

(B) Examples of violations or incidents which the Department will not consider related to the applicant's suitability to engage in the business of insurance are all summary offenses, records of arrests if there is no conviction of a crime based on the arrest, convictions which have been

annulled or expunged or convictions for which the applicant has received a pardon from the Governor.

31 Pa. Code § 37.46. Even prior to promulgation of this regulation in 1994, appellate courts affirmed revocations based solely on certain convictions.¹¹ See *In Re Friedman*, 457 A.2d 983 (Pa. Cmwlth. 1983); *Fumo v. Insurance Department*, 427 A.2d 983 (Pa. Cmwlth. 1981); *Romano v. Pennsylvania Insurance Commissioner*, 404 A.2d 758 (Pa. Cmwlth. 1979). Neither the applicable statute nor applicable regulations precluded considering any convictions other than summary, expunged or pardoned offenses when determining the worthiness of an agent for continued licensure.

Another specific regulatory provision provided that the Department may deny licensure if an applicant "has provided incorrect, misleading or incomplete answers to interrogatories on forms incident to the application for a certificate or license." 31 Pa. Code § 37.46(4).

Department regulations also governed the reporting of criminal convictions:

An agent or broker who has been denied a certificate or license or has had an existing certificate or license revoked, suspended or nonrenewed under § 37.46(5) (relating to standards for denial of certificate/license); or who has pleaded guilty or nolo contendere or has been found guilty of criminal conduct as set forth in § 37.46(7)(i), shall report this fact to the Department in writing within 10 business days after the occurrence of the event.

31 Pa. Code. § 37.48(a).

In addition to the general worthiness standards as supplemented and clarified by the regulations, the applicable statute proscribed certain specific conduct. Section 605 (40 P.S. § 235) provided that "[n]o agent shall do business on behalf of any entity without a written appointment from that entity." "Agent" was defined as any of the following:

¹¹ The prior version of the regulation provided that conviction of an offense reflecting on the honesty and integrity of the applicant was evidence of unfitness.

- (1) Any person authorized in writing by an entity:
 - (i) to solicit risks and collect premiums and to issue or countersign policies on its behalf; or
 - (ii) to solicit risks and collect premiums on its behalf.
- (2) A person, not a licensed insurance broker, who, whether or not for compensation:
 - (i) solicits insurance on behalf of any insurance entity;
 - (ii) transmits for a person other than himself an application for a policy of insurance to or from the entity;
 - (iii) offers or assumes to act in the negotiation of such insurance; orin any manner aids in transacting the insurance business of any entity by negotiating for or placing risks or delivering policies or collecting premiums for the entity.

40 P.S. § 231.

Also, Section 622(c) prohibited acting as an insurance broker without a license. 40 P.S. § 252(c). The term "insurance broker" was defined as "a person, not an officer or agent of the entity interested, who for compensation acts or aids in any manner in obtaining insurance, other than title insurance, for a person other than himself." 40 P.S. § 251(a).

Acting as an agent without an appointment or acting as a broker without a license subjects the actor to sanctions under 40 P.S. § 279. Just as for conduct evidencing unworthiness, possible sanctions for such an act includes suspension or revocation of the certificate of qualification or license of the offending party and imposition of a civil penalty for each violation. 40 P.S. § 279(a)(1), (2). The sanctions may be imposed regardless of whether the agent or broker was authorized by the Department so to act. 40 P.S. § 279(a).

In summary, among the acts possibly subjecting a licensee to suspension or revocation of an insurance license in addition to a monetary civil penalty are the following:

- conduct establishing a lack of professional competence and general fitness required to engage in the business of insurance
- certain criminal convictions
- providing incorrect, misleading or incomplete answers on a license application
- failure to report certain convictions to the Insurance Department within ten days
- acting as an agent for a company without a written appointment
- acting as a broker without a broker's license

The Department alleges that Roman Gutman committed these acts, in some cases on multiple occasions. The allegations comprise the charges against him as contained in the nine counts in the amended order to show cause. In the original amended OTSC, Janet Gutman was charged with acting as agent without appointment and with unlicensed brokering. The Department also moved at the initial hearing to amend the complaint to conform to the evidence concerning her involvement in the Katherine Rossi incident. [N.T. I 71]. Ruling upon the motion was deferred until this adjudication. [N.T. I 74-76].

The Department's motion to amend the pleadings will be denied on substantive rather than procedural grounds. The Department correctly asserts that the timing of its request did not prejudice the respondents. The motion was made relatively early during the hearing on April 2, 2004. Both respondents had first hand knowledge of circumstances surrounding the incident. A subsequent hearing was conducted on August 26, 2004, allowing more than sufficient time for the respondents to present additional evidence. The police officer investigating the incident testified at the second hearing, and the respondents could have subpoenaed Ms. Rossi for the second hearing if they thought it advisable. Amendments to pleadings are allowed if the merits may be addressed

without prejudicing the public interest or the rights of any participant. 1 Pa. Code § 35.49(a). There was no prejudice here.

However, even if the OTSC is conformed to the evidence, it does not establish an additional count against Janet Gutman. The Department's motion was based upon the presence of Ms. Gutman at the scene when Roman Gutman allegedly pulled a gun on Ms. Rossi and threatened to shoot her. The Department argues that Janet Gutman should have prevented her husband from having access to her gun, should have interceded or otherwise prevented him from using deadly force, and should not have covered up for him in statements to the police and at hearing. All of these potential charges against Janet Gutman are premised upon her knowing that Roman Gutman threatened Ms. Rossi with a gun. Not only is there no evidence from which such knowledge could be inferred, all evidence is to the contrary.

Ms. Rossi testified that she observed both Janet and Roman Gutman enter the agency office and subsequently entered the office herself. [N.T. I 33-34]. Ms. Rossi described the office as vacant, bare and deserted and containing a "big mirror."¹² [N.T. I 33-34]. She testified that only Roman Gutman came out, and after a short discussion threatened her with a gun. [N.T. I 34-35]. She testified that "Mrs. Gutman was in the back" and "behind the mirrors" and when asked whether Janet Gutman said anything, she replied that Ms. Gutman "did not come out at all." [N.T. I 35].

Janet Gutman confirmed that she was in a back room when Ms. Rossi was on the premises. [N.T. II 41]. While Janet Gutman testified that she could hear Ms. Rossi screaming and yelling, she also testified that she did not hear any threats from anyone and

¹² Ms. Rossi speculated that the mirror was a see-through mirror: "I guess it's one of the see-through mirrors so he can see from the other side." [N.T. I 34]. Without any corroboration, this speculation is not competent evidence that the mirror was anything but a mirror. The Department requests that a finding be made that the mirror was one-way glass (Department's Brief at 17, Proposed Finding No. 89) but cites to no testimony or other evidence beyond Ms. Rossi's "guess."

that she did not observe Roman Gutman acting provocatively or offensively towards Ms. Rossi. Neither the investigating officer's testimony nor his incident report supply any evidence that Janet Gutman either observed her husband with a firearm at that time or heard anything representing a threat of imminent harm to Ms. Rossi. Ms. Rossi, even if she was terrified by Roman Gutman, was not shot. At most, given all of the evidence, an inference can be drawn that Janet Gutman was aware of a heated exchange between Roman Gutman and Ms. Rossi. Without any evidence that Janet Gutman had knowledge of an imminent threat, the OTSC when conformed to the evidence cannot contain an additional count of unworthiness for failure to prevent an alleged imminent threat. No such count will be considered on the merits.

Just as he did for the Department's motion to amend the pleadings, the presiding officer deferred ruling upon the respondents' motion to dismiss pending this adjudication. [N.T. 108]. Following conclusion of the Department's case in chief, the respondents moved for dismissal of all charges on the basis that the Department did not carry its burden of proof on all required elements of the charges. [N.T. 108]. The respondents, in addition to incorporating generally all of the record and their general arguments, specifically argue that: 1) Roman Gutman possessed the professional competence and general fitness to engage in the business of insurance as evidenced by his work in the Ukrainian community; 2) The conviction for domestic assault does not render Roman Gutman unworthy of licensure; 3) Roman Gutman did not fail to report his convictions to the Department, as he sent letters to the Department disclosing them; and 4) He did not provide incorrect information to the Department.

In addition to the motion to amend pleadings, several other procedural rulings are challenged by the respondents. At the hearing the presiding officer denied the respondents' motion to strike a document (Exhibit JS7) which had been admitted by stipulation of the parties. The presiding officer also denied a motion to strike questioning

and testimony about Roman Gutman's alleged use of a stun gun on a customer and an alleged advertisement taken out by the Russian community negative to Roman Gutman. The presiding officer denied a motion to hold the record open to allow the Respondents to rebut the questioning and testimony about the stun gun and advertisement, as well as for rebuttal testimony relating to three insurance companies concerning the authorization of their agents. The presiding officer also denied a motion to hold the record open for the respondents to elicit rebuttal testimony from a witness who had testified for the Department in the first hearing in the matter. The respondents challenge these rulings, focusing on the questioning and testimony concerning the stun gun and advertisement.

The motion to hold the record open or for continuance to present additional testimony properly was denied. The only testimony presented at the hearing was from the respondents themselves and from their witness. There were multiple opportunities for the parties to amend their respective prehearing statements and the parties were warned that witnesses and documents not disclosed on the prehearing statements could not be used unless their use could not be anticipated. It is difficult to see how the respondents' own testimony and that of their witness could not have been anticipated. Moreover, the proffered additional testimony concerning authorization by insurance companies related to the testimony of David Peck at the hearing held nearly five months prior to the August hearing. The respondents had ample opportunity to present evidence in rebuttal to Mr. Peck's testimony. The respondents articulated no reason why they should be permitted to rebut their own testimony.¹³

The questioning and testimony concerning the stun gun and advertisement presented even less reason to hold the record open for rebuttal testimony. As noted by the presiding officer, questioning by the Department does not constitute evidence in this

¹³ Indeed, it is curious why the respondents argue that they should have been allowed to impeach their own testimony.

case. [N.T. II 196-99, 206]. The question about the stun gun was withdrawn by the Department after objection and there is no responsive testimony to rebut even if rebuttal of the respondent's own testimony were appropriate. The advertisement question was proper cross examination because Roman Gutman previously testified about the lack of complaints in the community against him. Since he denied that such an advertisement was taken out by members of the community and no other evidence was presented that it happened, there is nothing to rebut on this issue. The motion to hold the record open for rebuttal properly was denied.

For similar reasons, the presiding officer properly denied the motion to strike questioning and testimony concerning the alleged stun gun incident and advertisement or for a mistrial. As already indicated, the question about the alleged advertisement was proper cross examination, and there was no further questioning following Roman Gutman's denial. The question concerning use of the stun gun was withdrawn by the Department, does not constitute evidence in this case, will not be considered in this adjudication, and accordingly does not prejudice the respondents. The motions to strike and for mistrial properly were denied.

The motion to strike Exhibit JS7 properly was denied as well. It was sufficient justification for the ruling that the respondents' stipulated to the admission of the document. The respondents have presented no argument or authority why a document they stipulated was authentic and admissible should be stricken from the record. Their arguments concerning whether the admitted document constitutes the best evidence of Roman Gutman's application will be considered only as to the weight to be accorded the document. The presiding officer properly denied the motion to strike Exhibit JS7.

The presiding officer deferred ruling pending this adjudication upon the other motion presented by the respondents at the August hearing: a motion to dismiss

presented following the Department's case-in-chief. Most hearing testimony was presented and most exhibits were admitted prior to close of the Department's case-in-chief.¹⁴

The respondents argue their motion to dismiss in summary fashion, and incorporate the substantive arguments made elsewhere in their brief. [Respondents' Brief at 71-73]. Indeed, they make no argument that the only evidence on a particular element of any charge was presented following close of the Department's case. Since the Department did make out, prior to resting, a *prima facie* case for the charges as found below, the motion to dismiss will not be separately discussed. The discussion on the merits applies equally to the dismissal motion.

The Department met its burden of establishing each count in the Order to Show Cause. By far the more serious and numerous charges were against Roman Gutman, although the Department also established the liability against Janet Gutman. With its amendment to the OTSC, the Department added an additional count (VI) charging Roman Gutman with general unworthiness; this will be consolidated with Count I for the purpose of discussion. Count IX added an additional charge of failure to report the 1993 and 2001 convictions alleged in Count VII and thus will be consolidated with Count III which involved the failure to report a 2000 conviction. Similarly, Count X will be consolidated with Count IV, since both allege misrepresentation of convictions on Roman Gutman's license renewal applications.

Some of the charges against Roman Gutman (Counts II, III, IV, VIII, IX, X) relate to his criminal convictions. Others (Count V) relate to practicing the business of

¹⁴ The only testimony presented following close of the Department's case was additional testimony by Roman Gutman. [N.T. II 109-201]. All of the respondents' exhibits and one of the Department's were admitted following close of the case-in-chief. All of the stipulations and stipulated documents were admitted prior to close of the Department's case.

insurance in violation of applicable statutes and regulations. Roman Gutman also is charged with general unworthiness to engage in the business of insurance. (Counts I, VII). Janet Gutman is charged specifically with violating statutes and regulations in the business of insurance (Count VI) and charged with general unworthiness (Count I).

Factual findings supporting the conclusions reached herein are more fully set forth in the numbered findings already recited. Most of those findings are based upon stipulated or undisputed facts. Little testimony is in conflict, although some of the respondents' testimony is in conflict with other evidence.

Where there was testimony by the respondents in conflict with other evidence, in most cases the conflict is resolved in favor of the other evidence. The testimony given by Roman Gutman at hearing in this matter lacked credibility. He may not be, as argued by the Department, a compulsive liar. However, his testimony was self serving, at times evasive, sometimes argumentative, internally inconsistent, and inconsistent with documents and other credible evidence as well as with documents stipulated into evidence by the respondents. At times, his testimony changed depending on how it would serve his case.

Janet Gutman's testimony, while more consistent internally and with other evidence, was incredible particularly regarding her husband's conduct. This especially was demonstrated in an exchange concerning weapons kept at the Gutmans' household:

Q. Do you own a Berretta 9 millimeter handgun, Mrs. Gutman?

A. Yes.

Q. In 1999 or 2000, did you own a Berretta 9 millimeter SF handgun?

A. That's correct.

Q. Did your husband have access to that handgun?

A. That was mine.

Q. I know, but if your husband wanted to grab the handgun or use the handgun, could he?

A. I don't think so.

Q. Why not?

A. Because it was mine.

Q. Has your husband ever handled your handgun before?

A. No.

Q. Berretta 9 millimeter SF, handgun. That's a black handgun, isn't it?

A. Correct.

Q. Isn't it true that in April of 1999, the lower South Hampton Police Department, of which Officer Koehnlein, who is scheduled to testify later, is a member, responded to a domestic dispute at your home and removed from your husband's possession or access the Berretta 9 millimeter handgun?

A. I was --- I gave him a gun. I gave him, voluntarily. I didn't want any guns in my house.

Q. Why did you give them the gun.?

A. And they still have it.

Q. Were you afraid that your husband would have access to the gun and might use it?

A. I just gave them the gun.

Q. It was ---?

A. It was a domestic dispute, right.

Q. And were you afraid for your safety?

A. And I decided it was the best thing to do.

Q. Were you afraid for your safety, Mrs. Gutman?

A. I just didn't want to keep a gun in the house.

Q. And why didn't you want to keep the gun?

A. Because I decided that the best thing to do.

Q. Were you afraid that the gun posed a danger to you?

A. I decided it's the best thing to do, that's all.

Q. Were you afraid that your husband could use the gun?

A. You asked me already.

Q. This is a different question, Mrs. Gutman. Did you ask the police to remove it because you were afraid your husband would use it.

A. I asked the police to keep a gun.

Q. Please, answer the question.

A. That's what I asked.

Q. Were you afraid that your husband would use the gun, is that why you asked the police ---?

A. No. I wasn't afraid he was going to use.

[N.T. II 51-53]. The police also removed other weapons from the Gutmans' home. [N.T. II 53-54]. Janet Gutman's dogged evasiveness and ultimate incredible answer were designed to protect Roman Gutman. As was her initial incredible denial that her husband had access to the handgun. Accordingly, her testimony concerning her husband's behavior and activities is given very little weight.

However, no specific finding is made that Roman Gutman actually pointed a gun at Katherine Rossi at the R&J offices on September 25, 2000. Ms. Rossi's testimony is credible in all respects except for her observation or recollection of Roman Gutman actually having a gun in his hand. Roman Gutman did threaten to shoot her, and she believed him to have a gun. [Finding of Fact 43]. However, she admitted that she didn't know anything about guns and was unable to describe the weapon. [N.T. I 60-61]. She also admitted that she was so shaken at the time, that it affected her powers of observation and recollection concerning what she observed and communicated to the police officer about the weapon. [N.T. I 61, 63].

Further, the police officer who investigated the incident confirmed that Ms. Rossi was very upset, shaken and flustered. [N.T. II 74]. Ms. Rossi told him that Roman Gutman threatened to shoot her but not that he actually had a gun. [N.T. II 78, 85]. When talking to Roman Gutman, the officer did not observe a handgun. [N.T. II 75-76,

81]. The officer did not arrest Roman Gutman, choosing instead to warn him that “he had better be damn careful about what he is saying” if he did threaten Ms. Rossi with a gun. [N.T. II 76, 87]. Without discounting the possibility that Roman Gutman pointed a gun at Katherine Rossi, the evidence is too tenuous to make such a finding and it will not be considered relative to that charge although the verbal threat will be considered.

On the other hand, the evidence established Roman Gutman’s criminal charges and convictions. Since the 1993 conviction was subsequently *nolle prossed* on appeal, the Department seeks no penalties for failure to report the conviction or disclose it on license renewal applications. [Department’s Brief at 40-41]. However, Roman Gutman was convicted in November 2000 of Simple Assault and Disorderly Conduct, and in May 2001 of Simple Assault. The 2000 conviction stemmed from allegations by Janet Gutman that he tore her clothing and punched her in the face numerous times as well as by the Gutmans’ daughter that Roman Gutman struck her in the face. [Exhibits JS1 ¶ 16; JS5, JS6]. The 2001 conviction stemmed from Roman Gutman punching his wife in the face. [Exhibit JS18].

Although Roman Gutman testified and the respondents argue that the 2000 guilty plea was only for a summary offense, the evidence belies this assertion. Court records show that Roman Gutman pleaded guilty to misdemeanor Simple Assault and to Disorderly Conduct, while a Reckless Endangerment charge was dismissed. [Exhibit JS6]. The sentencing sheet is somewhat ambiguous but shows the same disposition: dismissal of the Reckless Endangerment on one line while listing the Assault charge and third degree misdemeanor Disorderly Conduct charge on another line.¹⁵ [Exhibit JS3B].

¹⁵ The Disorderly Conduct charge is followed by the designation “M3” which in common usage stands for a third degree misdemeanor. Disorderly Conduct can be graded either as a summary or third degree misdemeanor offense. 18 Pa.C.S. § 5503(b). Even if the respondent pleaded guilty to a summary Disorderly Conduct, he also was convicted of Simple Assault, a misdemeanor.

The sentence of 9 months probation could not be imposed for just a summary offense. 18 Pa.C.S. §§ 106(c)(2), 1105. The respondents' assertion is disingenuous at best.

The respondents do not challenge Roman Gutman's 2001 Simple Assault conviction. Rather, they argue that both the 2000 and 2001 convictions relate to domestic situations and do not relate to the business of insurance. They also argue that since Roman Gutman served his sentences, the convictions do not automatically prevent him from being licensed. *See* 31 Pa. Code § 37.46(7)(ii).

Characterization of each criminal episode as a "domestic situation" does not negate the violence and harm to another demonstrated by those convictions. Roman Gutman has demonstrated a propensity towards violence and threats, and this propensity is not excused because his targets were his wife and daughter.¹⁶ Department regulations specifically make crimes involving harm to another a crime relevant to fitness to engage in the business of insurance. 31 Pa. Code. § 37.46(7)(1)(A). And with reason. By definition, insurance agents have close personal contact with individuals and families. Sometimes this contact occurs at their homes or places other than the agency's offices. These individuals and families expect that their agent will not have a demonstrated propensity for violence.

Just because Roman Gutman has served his sentence, he is not immune from administrative sanctions. The provision cited by the respondents¹⁷ provides as follows:

An applicant's probation, parole or incarceration in a penal institution may be considered by the Department when determining whether the applicant is worthy of a certificate or license. Applications from those who have been incarcerated in a penal institution for more than 1 year in a sentenced status may be denied by the Department until 1 year following release from the

¹⁶ *See, In re Fields*, SC00-02-013 (2001) (crimes of moral turpitude and harm to another grounds for license revocation even though the victim was the agent's daughter).

¹⁷ 31 Pa. Code § 37.46(7)(ii).

institution has expired, and applicants placed on probation or parole may be denied by the Department until the probation or parole has been terminated.

31 Pa. Code § 37.46(7)(ii). As recognized by the respondents, this section allows the Department to deny an application based solely upon an applicant's probation, parole or incarceration. It does not mandate that a license be granted simply because the sentence has been completed. The respondents' argument has no merit.

Roman Gutman's course of conduct demonstrates that he lacks the professional competence and general fitness required to engage in the business of insurance, and would disqualify him from initial issuance of a license. 31 Pa. Code § 37.46(7). The convictions themselves thus could be grounds for denial of an initial license application under 40 P.S. § 234 or 252 and trigger the remedial provisions of 40 P.S. § 279. The Commissioner finds that Roman Gutman is subject to the penalties of 40 P.S. § 279 under Counts II and VIII.

By failing to report the convictions and by misrepresenting their existence on his renewal applications, Roman Gutman is subject to sanctions under Counts III, IV, IX and X. Licensees are required to report misdemeanor or felony convictions within ten days. 31 Pa. Code § 37.48. The respondents argue that since this provision is separate from the standards for licensure in Section 37.46, its violation cannot be used to sanction Roman Gutman.

This argument is wholly specious. Section 37.48 applies to existing licensees. Unlicensed individuals are not required to report convictions to the Insurance Department within ten days. It makes no sense to include the requirement of Section 37.48 into the application standards of Section 37.46. Further, violation of insurance statutes and regulations as well as other conduct evidencing unworthiness provides independent basis for sanctions against a licensee. *In Re Friedman*, 457 A.2d 983 (Pa. Cmwlth. 1983);

Fumo v. Insurance Department, 427 A.2d 983 (Pa. Cmwlth. 1981); *Romano v. Pennsylvania Insurance Commissioner*, 404 A.2d 758 (Pa. Cmwlth. 1979).

The respondents also argue that only the 2001 conviction was required to be reported and that Roman Gutman did report it by two letters in October 2002. This argument also is devoid of merit. At least one of the 2000 convictions, and possibly both, as well as the 2001 conviction were required to be reported within ten days. The respondents produced no evidence that anything was reported within ten days of the convictions.

Further, the purported letters in October 2000 and October 2001 were fabricated for use at hearing and not sent to the Department. The Director of the Department's Bureau of Producer Services testified credibly and unequivocally that the letters were not received by the Department. Roman Gutman testified that he mailed the letters and that they were not returned by the postal service, thus implying that they were received by the Department. In effect, the respondents argue that the "mailbox rule" should apply for the mailings. Under that rule, which is founded upon the regularity of the mailing system, proof of mailing raises a rebuttable presumption that the mailed item was received, and the uncorroborated denial of receipt is insufficient to rebut the presumption. *Donegal Mut. Ins. Co. v. Insurance Dep't*, 719 A.2d 825 (Pa. Cmwlth. 1998).

However, if the proponent of the mailbox rule fails to establish that an item was mailed, the presumption of receipt does not arise. *Commonwealth, Dep't of Transportation v. Brayman Constr. Corp.—Bracken Constr. Co.*, 513 A.2d 562 (Pa. Cmwlth. 1986) (mere existence of a letter in a file is insufficient to establish that the letter was mailed); *Nationwide Ins. Co. v. Pennsylvania Insurance Dep't*, 779 A.2d 14 (Pa. Cmwlth. 2001) (presumption does not arise when the sender fails to introduce as evidence a copy of the mailed document, an exemplar of a computer generated form, or

detailed testimony about what was mailed on a particular date). In the present case, Roman Gutman's bare testimony that he mailed the letters is rejected as not credible, and the presumption of receipt by the Department does not arise.

In addition, the very foundation of the mailbox rule corroborates that the letters were not mailed. If the respondents' version of events were accepted, it would require a finding that the United States Postal Service failed three times. The regularity of the postal system renders infinitesimal the possibility that three isolated mailings from the same sender became lost in transit. Roman Gutman did not notify the Department of his convictions, and accordingly is liable under Counts III and IX.

Because Roman Gutman did not send the letters when he applied for renewal licenses in 2000 and 2002, his indication on those applications that he had no convictions constituted misrepresentations. The respondents sought to strike the 2000 application on which Roman Gutman checked "no" when asked if he had criminal convictions or pending charges, which motion is denied as discussed above. The Department may deny licensure if an applicant "has provided incorrect, misleading or incomplete answers to interrogatories on forms incident to the application for a certificate or license." 31 Pa. Code § 37.46(4). By denying in his 2000 application that he had pending charges, and by denying that he had convictions from 2000 and 2001 when he submitted his 2002 application, Roman Gutman violated this standard for licensure and is subject to sanction under Counts IV and X.

Roman Gutman also is liable under Count V for acting as a broker without a license and acting for an insurance entity without an appointment. The respondents argue that because there is no evidence that premium payments were sent with many of the

applications, the number of potential violations is less than as asserted by the Department. The respondents also assert that Roman Gutman was a "producer" working with Five Points agency, and not acting as an agent or broker. The respondents further assert that assuming *arguendo* that Roman Gutman acted as an agent for the three insurance companies, he reasonably relied upon representations of the agency that he was appointed by the companies.

The respondents have supplied no authority to support their position that Roman Gutman's acting without appointment is excusable because of what Five Points allegedly said.¹⁸ In any event, no such representations were made to Roman Gutman, contrary to his testimony. The producer agreement did not represent that either Gutman was appointed by any entity other than Five Points. Five Points did not verbally inform the Gutmans that either was appointed. Five Point's principal, David Peck, credibly testified to the contrary. [N.T. I 96]. Neither Janet nor Roman Gutman had a written appointment from any of the three carriers, and each instance of acting on behalf of those companies constitutes a violation of 40 P.S. § 235 and 31 Pa. Code §§ 37.17 and 37.45(d).

Nor did either Roman or Janet Gutman possess a broker's license, something not disputed by the respondents. Acting as an insurance broker without a license was prohibited by 40 P.S. § 252(c). The term "insurance broker" was defined as "a person, not an officer or agent of the entity interested, who for compensation acts or aids in any manner in obtaining insurance, other than title insurance, for a person other than himself." 40 P.S. § 251(a). Mr. Peck described a broker in terms of such common usage

¹⁸ The case cited by the respondents, *Commonwealth v. Ciervs*, 353 A.2d 900 (Pa. Cmwlth 1976) found that the Commonwealth did not meet its burden of showing that a broker knowingly supplied misinformation when the broker received the information from others. This is not analogous to the present case, since knowledge is not an element of 40 P.S. § 235. This section provided that "[n]o agent shall do business on behalf of any entity without a written appointment from that entity." The respondents do not claim that Roman or Janet Gutman had a written appointment from the three carriers.

that administrative notice could be taken of the description: "An agent represents a company, and a broker more or less represents the consumer, trying to find a market for him, to put it in simple terms." [N.T. I 99]. Also as noted by Mr. Peck, Roman Gutman was acting as broker for Five Points since he had not been appointed by any of the three companies. [N.T. I 100]. He thus violated 40 P.S. § 252(c) and is subject to sanctions for doing so.

Although Janet Gutman's activities relating to Five Points were not as extensive as her husband's, she also is subject to sanctions pursuant to Count VI. Acting in concert with her husband, she signed nineteen checks for the payment of premiums and as such acted as an agent in each instance. She was not appointed by any of the three companies, and knew that her husband was not appointed either. She thus violated 40 P.S. § 235 and 31 Pa. Code §§ 37.17 and 37.45(d) in each instance. Those acts also constitute acting as a broker while not being licensed, and accordingly violate 40 P.S. § 252(c).

On the other hand, the four instances in which Janet Gutman notarized statements by applicants did not constitute acting as a broker. While notarizing the statements aided Roman Gutman acting as an unlicensed broker, there is no evidence that Janet Gutman took the information from the applicants, explained policy options or otherwise engaged in the business of insurance. She was separately licensed as a notary and conducted a notary business at R&J. She will not be found liable for those four instances.

In addition to the specific provisions providing sanctions, both respondents are subject to sanctions because of a course of conduct relating to their worthiness to engage in the business of insurance. Both respondents were charged with general unworthiness under Count I, while Roman Gutman was charged under Count VII as well.

Roman Gutman is subject to sanctions under Counts I and VII. The pattern of violence combined with threats made to Ms. Rossi as well as Roman Gutman's disregard for insurance statutes and regulations represents a course of conduct establishing a lack of professional competence and general fitness required to engage in the business of insurance. He thus is liable for sanctions pursuant to 40 P.S. § 279(a).

Janet Gutman's course of conduct included disregarding insurance statutes and regulations as well as facilitating her husband's conduct. While her conduct was not as egregious in scope or nature as committed by her husband, she nonetheless demonstrated lack of professional competence and general fitness to engage in the business of insurance. She also is liable for sanctions pursuant to 40 P.S. § 279(a).

The respondents' motion to dismiss is DENIED. With the respondents liable for sanctions under all counts, it remains only to determine appropriate penalties and corrective action.

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 respondents' conduct.¹⁹ The Commissioner may order that the respondents cease and desist from each violation.²⁰ Each act constituting a violation subjects the actor to a maximum five thousand dollar civil penalty.²¹

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 course of conduct by Roman Gutman in the present case is of the most serious nature, and related to his duties as an insurance agent. Janet Gutman's conduct, while not as egregious as her husband's, also related to her duties as an insurance agent. The seriousness of each respondent's conduct is reflected in the penalties imposed.

The seriousness of the violation of insurance statutes and regulations is self-evident. The regulatory scheme is designed to protect the insurance consumer, industry and profession. Disregarding protective laws and regulations threatens not only the protective scheme itself but those it is designed to protect. With regard to the unlicensed activity, the Gutmans' actions were particularly serious. Licensure is the bulwark between honest and professionally competent activity and activity which is not. The Commissioner has consistently found unlicensed activity to be among the most serious of

¹⁹ This is true under either the prior section 639 (former 40 P.S. § 279(a)(1)) or the Producers Act (40 P.S. § 310.91(d)).

²⁰ Former 40 P.S. § 279(a)(1); 40 P.S. § 310.91(d).

²¹ *Id.*

violations. See *In re Abate*, P92-12-18 (1999); *In re Kozubal*, P93-08-13 (1997); *In re Pindell*, SC01-03-011 (2003).

Although the respondents argue that Roman Gutman's criminal violence was not serious relative to the business of insurance, such is not the case. Roman Gutman's infliction of personal harm on others evidences a moral turpitude which is antithetical to the trustworthiness required in the profession. By definition, agents and brokers have extensive personal contact with applicants and insureds. The applicants and insureds entrust financial and personal matters to the agent, and rely upon the agent's integrity. An agent who has inflicted personal harm upon others is incapable of the trust necessary in the profession. Although Roman Gutman committed his criminal acts in private, his actions affected his wife and daughter, members of the community to whom he owed the highest duty. This breach of trust with those who should have been able to trust him most calls into question the respondent's implication that he would not violate the trust of strangers in the community at large. This implication is belied by the fact that he threatened Katherine Rossi, a member of the community at large who came to Roman Gutman to resolve an insurance problem.

The serious nature of the convictions is compounded by the respondent's failure to report the crimes to the Insurance Department, and to misrepresent their existence on two renewal applications. Whether intentional or negligent, failure to comply with this simple and reasonable requirement itself evidences a lack of trustworthiness. Further, insurance consumers depend upon the Department to monitor the trustworthiness of agents and brokers. Failure to report serious crimes undermines the ability of the Department to carry out its duties to consumers. With regard to the misrepresentations on the applications, Roman Gutman's dishonesty with the regulator means that he cannot be trusted with the financial affairs of those he purports to serve. Thus, these serious violations merit serious remedial action.

In all events, the overriding consideration is protection of the insurance consumer, industry and profession. "The Commissioner has the duty to protect the public from unworthy agents and also to maintain the appearance of worthiness among agents." *Romano v. Pennsylvania Insurance Commissioner*, 404 A.2d 758, 760 (Pa. Cmwlth. 1979). This consideration is separate from the likelihood that either respondent would engage in similar activity again, but rather whether each respondent could command the trust necessary in the profession.

In its brief, the Department requested consecutive varying minimum periods of license revocation for individual violations totaling a 98-year minimum period of revocation. [Department's Brief at 87]. In a similar manner, the Department requested a total aggregate civil penalty in the amount of \$198,000. [*Id.*]. For Janet Gutman, the Department arrived at a requested 11-year minimum period of revocation by aggregating proposed periods for each violation. [Department's Brief at 88]. The requested aggregate civil penalty for Janet Gutman is \$43,000. [*Id.*].

Although the respondents misconduct was serious, the Commissioner has the discretion under 40 P.S. § 279 to consider mitigating factors in fashioning remedial action. The statute "expressly provides for the consideration of mitigating circumstances" even if a prima facie case of unfitness has been established. *In re Friedman*, 457 A.2d 983, 989 (Pa. Cmwlth. 1983); *See also Romano v. Pennsylvania Insurance Commissioner*, 404 A.2d 758, 759-60 (Pa. Cmwlth. 1979) ("[40 P.S. § 279] does permit the Commissioner discretion" to consider her responsibilities as well as the agent's circumstances.). Accordingly, both aggravating and mitigating circumstances are considered in imposing penalties.

The aggravating circumstances relative to Roman Gutman are substantial. The respondent's conduct was related to the business of insurance. The conduct covered a range of malfeasance including violence, dishonesty and disregard for the profession. Roman Gutman has been dishonest in these proceedings, even to the point of fabricating evidence. Finally, one of the most troubling aspects is the respondent's total lack of remorse or acceptance of responsibility for his actions. He minimizes the seriousness of his assault convictions and fails to acknowledge that he might have committed a single impropriety when in fact he committed many. At the hearing he was belligerent and combative instead of acknowledging even that he might have committed a mistake.

In mitigation are that this is the first disciplinary proceeding against him. While Roman Gutman's recitation of his service in the community likely was overstated in his testimony, it is undisputed that he serves a community having special difficulties in understanding the complexities of automobile insurance. There was no evidence of any history of complaints against Roman Gutman by consumers or the industry.

For Janet Gutman, aggravating circumstances include that although not specifically charged with acting in conspiracy with her husband in his illegal conduct, she facilitated that conduct with full knowledge of the relationship with Five Points. Further, she was less than truthful in her efforts to protect Roman Gutman. Like her husband, Janet Gutman has expressed no remorse or acceptance of responsibility. Like her husband, she did not admit even to the possibility that she made a mistake.

In mitigation, like for her husband, this is the first proceeding against Janet Gutman. There is no evidence of a history of complaints against her by consumers or the industry. She has not been as actively involved in the insurance business, and her personal involvement in the Five Points transactions was small compared to Roman Gutman's.

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
COMMONWEALTH OF PENNSYLVANIA

IN RE: : **ALLEGED VIOLATIONS**
Roman and Janet Gutman : Sections 604, 622, 631 and 639 of
23 Addington Drive : the Insurance Department Act of
Langhorne, PA 19053 : 1921, Act of May 17, 1921, P.L. 789,
Respondents : No. 285, *as amended*, (40 P.S. §§
: 234, 235, 252, 271 and 279).
: Sections 37.11, 37.12, 37.17, 37.37,
: 37.45, 37.46, 37.47 and 37.48 of the
: Insurance Department's Regulations
: (31 Pa. Code §§ 37.11, 37.12, 37.17,
: 37.37, 37.45, 37.46, 37.47, 37.48).
:
: Docket No. **SC01-03-036**

ORDER

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

1. Roman and Janet Gutman shall **CEASE AND DESIST** from the prohibited conduct described in the adjudication.
2. All of the insurance licenses of Roman Gutman **ARE REVOKED** as follows:
 - a) a minimum of five (5) years for Counts I and VII
 - b) a minimum of five (5) years for Counts II and VII
 - c) a minimum of two (2) years for Counts III and IX
 - d) a minimum of ten (10) years for Counts IV and X

- e) a minimum of fifteen (15) years for Count V

Such minimum periods of revocation to run CONSECUTIVELY for a total minimum period of revocation of thirty-seven (37) years. Additionally Roman Gutman is prohibited from applying for a license to act as insurance producer in this Commonwealth for a minimum of thirty-seven (37) years. Roman Gutman also is prohibited from applying to renew any insurance license previously held by him in this Commonwealth for a minimum of thirty-seven (37) years.

3. Should Janet Gutman have her producer's license restored while Roman Gutman's is revoked, Roman Gutman shall not perform any work in Janet Gutman's insurance business.

4. Should Roman Gutman ever become licensed at any future date, his licenses may be suspended immediately by the Insurance Department following its investigation and determination that: (i) the penalty has not been fully paid; (ii) any other term of this order has not been complied with; or (iii) any complaint against the respondent is accurate and a statute or regulation has been violated. The Department's right to act under this section is limited to a period of seven (7) years from the date of any relicensure.

5. Roman Gutman shall have no right to prior notice of a suspension imposed pursuant to paragraph 4 of this order, but will be entitled to a hearing upon written request received by the Department no later than thirty (30) days after the date the Department mailed to the respondent by certified mail, return receipt requested, notification of the suspension, which hearing shall be scheduled for a date within sixty (60) days of the Department's receipt of the respondent's written request.

6. At the hearing described in paragraph 5 of this order, the respondent shall

have the burden of establishing that he is worthy of a license.

7. In the event that the respondent's certificates and licenses are suspended pursuant to paragraph 4 of this order, and the respondent either fails to request a hearing within thirty (30) days or at the hearing fails to establish that he is worthy of a license, the respondent's suspended certificates and licenses shall be revoked.

8. Roman Gutman shall pay a civil penalty to the Commonwealth of Pennsylvania as within six (6) months of this order as follows:

- a) Counts I and VII: \$2,000
- b) Counts II and VII: \$2,000
- c) Counts III and IX: \$3,000
- d) Counts IV and X: \$10,000
- e) Count V: \$108,000

for a total of One Hundred Twenty-Five Thousand Dollars (\$125,000). 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 insurance license may be issued or renewed until the said civil penalty is paid in full.

9. All of the insurance licenses of Janet Gutman **ARE SUSPENDED** as follows:

- a) One (1) years for Count I
- b) Four (4) years for Count VI

Such suspensions to run CONSECUTIVELY for a total period of suspension of five (5) years.

10. Should Janet Gutman's licensure ever become restored at any future date, her licenses may be suspended immediately by the Insurance Department following its investigation and determination that: (i) the penalty has not been fully paid; (ii) any other term of this order has not been complied with including paragraph 3; or (iii) any complaint against the respondent is accurate and a statute or regulation has been violated. The Department's right to act under this section is limited to a period of seven (7) years from the date of restoration except that the Department's right to act for noncompliance with paragraph 3 shall not be limited by time.

11. Janet Gutman shall have no right to prior notice of a suspension imposed pursuant to paragraph 10 of this order, but will be entitled to a hearing upon written request received by the Department no later than thirty (30) days after the date the Department mailed to the respondent by certified mail, return receipt requested, notification of the suspension, which hearing shall be scheduled for a date within sixty (60) days of the Department's receipt of the respondent's written request.

12. At the hearing described in paragraph 11 of this order, the respondent shall have the burden of establishing that she is worthy of a license.

13. In the event that the respondent's certificates and licenses are suspended pursuant to paragraph 10 of this order, and the respondent either fails to request a hearing within thirty (30) days or at the hearing fails to establish that she is worthy of a license, the respondent's suspended certificates and licenses shall be revoked.

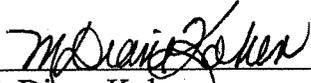
14. Janet Gutman shall pay a civil penalty to the Commonwealth of

Pennsylvania as within thirty (30) days of this order as follows:

- a) Count I: \$1,000
- b) Count VI: \$19,000

for a total of Twenty Thousand Dollars (\$20,000). 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, 1321 Strawberry Square, Harrisburg, Pennsylvania 17120. In addition to the above restrictions, no insurance license may be issued or renewed until the said civil penalty is paid in full.

15. This order is effective immediately.



M. Diane Koken
Insurance Commissioner