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INSURANCE DEPARTMENT
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ADMIN HEARINGS OFFICE

BEFORE THE INSURANCE COMMISSIONER
OF THE
COMMONWEALTH OF PENNSYLVANIA

<p>IN RE:</p> <p>David Allan Johnson 108 Logan Boulevard Altoona, PA 16602</p> <p>Respondent</p>	<p>: ALLEGED VIOLATIONS:</p> <p>:</p> <p>: Sections 611-A(2)(7)(13)(17)(20) of</p> <p>: the Insurance Department Act of 1921,</p> <p>: P.L. 789, No. 285, <i>as amended</i></p> <p>: (40 P.S. §§ 310.1 <i>et seq.</i>).</p> <p>:</p> <p>: Sections 37.11, 37.33, 37.46, 37.47 and</p> <p>: 37.48 of the Insurance Department</p> <p>: Regulations (31 Pa. Code §§ 37.11,</p> <p>: 37.33, 37.46, 37.47 and 37.48)</p> <p>:</p> <p>: Docket No. SC05-12-007</p>
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ADJUDICATION AND ORDER

AND NOW, this 10th day of April, 2006, M. Diane Koken, Insurance Commissioner of the Commonwealth of Pennsylvania ("Commissioner"), makes the following Adjudication and Order.

HISTORY

This case began when the Pennsylvania Insurance Department ("Department") filed an Order to Show Cause ("OTSC") on December 8, 2005 directed to David Allan Johnson ("the respondent"). The OTSC alleged that the respondent violated the Insurance Department Act¹ and Department regulations.² Specifically, the OTSC alleged

¹ Act of May 17, 1921, P.L. 789, No 285, *as amended* 40 P.S. § 310.1 *et seq.*

² 31 Pa. Code §§ 37.11, 37.33, 37.46, 37.47 and 37.48.

DATE MAILED: April 10, 2006

that the respondent, a licensed insurance agent, failed to pay state or federal income taxes and participated in the improper sale of unregistered securities resulting in a monetary loss to Pennsylvania consumers.

The OTSC advised respondent to file an answer in accordance with applicable regulations (1 Pa. Code § 35.37), and further advised him that the answer must specifically admit or deny each of the factual allegations made in the OTSC. The OTSC also advised the respondent to "set forth the facts and state concisely the matters of law upon which Respondent relies." The OTSC further advised the respondent of the consequences of failing to answer. Following the filing of the OTSC, a presiding officer was appointed and the appointment order was served on respondent by first class mail.

The respondent did not answer the Department's Order to Show Cause or otherwise respond to the Administrative Hearings Office. On February 8, 2006, the Department filed a motion for default judgment and served respondent in accordance with 1 Pa. Code Chapter 33. The motion declared that the OTSC was mailed to the respondent to his last known home address as kept on file in the Department and that the document was not returned to the Department as undeliverable. The deadline for responding to the motion for default judgment has passed without a filing from the respondent who also has not filed a response to the OTSC, nor made any other filing in this matter.

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

DISCUSSION

This adjudication is issued without scheduling an evidentiary hearing, since respondent failed to answer both 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 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

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.

matter⁴ provides for a hearing procedure prior to certain penalties being imposed by the Commissioner. See 40 P.S. § 310.91.⁵ However, given that the respondent has not answered the order to show cause and given current case law, these hearing procedures are inapplicable.

While no court has directly addressed the power of a Commissioner to enter a default judgment without hearing in a case under the Insurance Department Act, the case law 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 2 Pa.C.S. § 504 and 40 P.S. § 47. 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

⁴ Insurance Department Act, Act of May 17, 1921, P.L. 789 as amended (40 P.S. §§ 310.1 et seq.).

⁵ The Insurance Department Act section mandates written notice of the nature of the alleged violations and requires that a hearing be fixed at least ten (10) days thereafter, and further provides that:

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

40 P.S. § 310.91(d).

treated as an order to show cause). The Court upheld the summary judgment since deemed admission of the factual averments presented no factual issues to be resolved at hearing.

The Commissioner consistently has applied the reasoning of *United Healthcare* and similar cases when the respondent does not answer the order to show cause and a motion for default judgment. See *In re Taylor*, SC96-11-034 (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 Personal Surplus Lines, Inc.*, SC05-05-016 (2005). 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 he has been offered an opportunity to be heard. When the respondent 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 has rejected the opportunity to be heard.

Additionally, 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 and the attached exhibit.

The facts include that respondent has been a licensed insurance producer since 2004. [OTSC ¶¶ 2,3]. His license currently is scheduled to expire on November 7, 2006. [OTSC ¶ 3]. The respondent failed to pay both Pennsylvania and Federal personal income taxes during the years 2002 and 2003. [OTSC ¶¶ 4, 5, 6]. As a result the respondent has incurred a state tax lien in the amount of \$1,753.07 and a federal tax lien in the amount of \$41,647.17. [OTSC ¶¶ 4, 5].

Additionally the National Association of Securities Dealers ("NASD") on May 9, 2005 issued an Order against the Respondent pursuant to a default decision. [OTSC ¶ 7; Exhibit A]. The NASD found that the respondent solicited and sold unregistered securities resulting in monetary losses in excess of \$40,000.00 to two Pennsylvania consumers. [OTSC ¶ 8; Exhibit A]. The NASD ordered respondent to pay restitution to the two consumers in the amounts of \$22,702.83 and \$20,000.00 respectively plus interest within thirty (30) days of the order. [OTSC ¶ 9; Exhibit A]. The NASD also revoked respondent's NASD license. [OTSC ¶ 8]. Respondent has not paid the restitution or otherwise responded to the NASD Order. [OTSC ¶¶ 10, 11].

Consequently the Department has charged that the respondent's activities collectively violated five provisions of the Insurance Producers Act in the following ways: 1) violating the insurance laws or regulations of this Commonwealth (40 P.S. § 310.11(2)); 2) using fraudulent, coercive or dishonest practices and demonstrating incompetence, untrustworthiness or financial irresponsibility in doing business in this Commonwealth or elsewhere (40 P.S. § 310.11(7)); 3) failing to pay State income tax or complying with any administrative or court order directing the payment of State income tax (40 P.S. § 310.11(13)); 4) committing fraud, forgery, dishonest acts or an act involving a breach of fiduciary duty (40 PS.310.11(17)); and 5) demonstrating a lack of general fitness, competence or reliability sufficient to satisfy the department that the

licensee is worthy of licensure (40 P.S. § 310.11(20)). The undisputed facts in this case demonstrate that the respondent is not worthy of licensure. 40 P.S. § 310.11(20). Having established that the respondent is liable for remedial action for violating these provisions for the Act, the appropriate penalties must be considered.

PENALTIES

The Commissioner may suspend or revoke a license for conduct violating certain provisions of the Insurance Department Act, including those provisions violated by the respondent. 40 P.S. § 310.91. Each action violating a provision specified in section 310.11 subjects the actor to a maximum five thousand dollar civil penalty. 40 P.S. § 310.91(d)(2). In this case, the respondent sold three promissory notes to two Pennsylvania investors in a manner which violated NASD rules and 40 P.S. § 310.11(7). The notes were not repaid and the NASD ordered restitution in the amounts of \$22,702.83 and \$20,000 respectively. The respondent has failed to comply with the order in violation of 40 P.S. § 310.11(17). In addition to these violations, the respondent has demonstrated financial irresponsibility by failing to pay both state and federal income taxes during the years 2002 and 2003 in excess of \$42,000.00 in violation of 40 P.S. § 310.11(7) and (13). Taken all together, these actions demonstrate that respondent has violated the insurance laws and regulations of Pennsylvania and currently is not worthy of licensure. 40 P.S. § 310.11(2) and (20).

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 in the present case is serious, and directly connected to the respondent's duties as

an insurance producer and as a registered member of the NASD. His failure to pay required income taxes also reflects his inability to handle business affairs in a legal manner. The seriousness of his violations is reflected in the penalties imposed.

The respondent's infliction of financial harm on others evidences a lack of the trustworthiness required in the profession. By definition, insurance producers have extensive personal contact with applicants, insureds, insurance companies and other financial entities. Investors and insureds entrust financial and personal matters to the insurance producer, and rely upon the producer's integrity. A producer who has inflicted financial harm upon others is incapable of the trust necessary in the profession. Simply put, the respondent cannot be trusted with the pocketbooks and bank accounts of any of those persons and entities with whom he deals.

When imposing a penalty on an insurance producer, the Commissioner may consider both aggravating and mitigating circumstances. Aggravating circumstances in this case include that the respondent effectively stole over \$40,000 from two Pennsylvania investors, failed to pay restitution to those investors, failed to pay taxes which resulted in tax liens and failed to comply with the NASD restitution order issued in 2005. Furthermore, he has completely disregarded the current proceedings. In contrast, the respondent has presented no evidence to mitigate the seriousness of his violations.

The Department in its Order to Show Cause has requested revocation of the respondent's license; a cease and desist order and a civil penalty not to exceed \$5,000.00 for each action in violation of the Act. Considering the facts in this matter, the applicable law, the seriousness of the conduct, all aggravating circumstances as well as the complete lack of mitigating circumstances, penalties are imposed as set forth in the accompanying order.

CONCLUSIONS OF LAW

1. The Commissioner has jurisdiction over the parties and subject matter of these proceedings.
2. The Department may revoke or suspend a license upon finding that an insurance producer has engaged in conduct which would disqualify him from initial issuance of a license.
3. Unworthiness to hold a license may be established by conduct which has resulted in financial harm to another.
4. If unworthiness is established, the Commissioner may exercise discretion to impose remedial action in light of the producer's conduct as well as mitigating and aggravating factors.
5. Insurance Producers are held to a high degree of professionalism and must exercise good judgment.
6. David Allan Johnson by his conduct demonstrates current unworthiness to hold an insurance producer license.
8. If any of the foregoing Conclusions of Law should be held to constitute Findings of Fact, the ones so found are incorporated therein by reference.

BEFORE THE INSURANCE COMMISSIONER
OF THE
COMMONWEALTH OF PENNSYLVANIA

<p>IN RE:</p> <p>David Allan Johnson 108 Logan Boulevard Altoona, PA 16602</p> <p style="padding-left: 40px;">Respondent</p>	<p>: ALLEGED VIOLATIONS:</p> <p>: : Sections 611-A92)(7)(13)(17)(20) : of the Insurance Department Act : of 1921, P.L. 789, No. 285, <i>as</i> : <i>amended</i> : (40 P.S. §§ 310.1 <i>et seq.</i>)</p> <p>: : Sections 37.11, 37.33, 37.46, : 37.47 and 37.48 of the Insurance : Department Regulations (31 Pa. : Code §§ 37.11, 37.33, 37.46, : 37.47 and 37.48)</p> <p>: : Docket No. SC05-12-007</p>
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ORDER

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

1. David Allan Johnson shall **CEASE AND DESIST** from the prohibited conduct described in the adjudication.
2. All of the insurance licenses or certificates of qualification of David Allan Johnson **ARE REVOKED**. Additionally, David Allan Johnson is prohibited from applying for relicensure while any federal or state tax liabilities or judgments remain

unpaid, or while restitution under the NASD Order remains unpaid. In the event that David Allan Johnson is ever relicensed, he will be subject to a five year supervision period beginning on any date of relicensure.

3. David Allan Johnson shall **PAY A CIVIL PENALTY** to the Commonwealth of Pennsylvania within thirty (30) days of this order in the amount of Thirty-Five thousand dollars (\$35,000.00). Payment shall be made by certified check or money order, payable to the Commonwealth of Pennsylvania, directed to: Sharon Harbert, 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 to David Allan Johnson until the said civil penalty is paid in full.

3. This order is effective immediately.



M. Diane Koken
Insurance Commissioner