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ADJUTANT GENERAL'S OFFICE

BEFORE THE INSURANCE COMMISSIONER
OF THE
COMMONWEALTH OF PENNSYLVANIA

IN RE: : ALLEGED VIOLATIONS:
: :
Steven John Kelley : Sections 611-A (14), (20) and 678-A(b),
52 Coopers Way : of the Insurance Department Act of 1921,
Denver, PA 17517 : P.L. 789, No. 285, *as amended* (40 P.S.
: §§ 310.11 and 310.78).
: :
Respondent : Docket No. **SC10-01-002**

ADJUDICATION AND ORDER

AND NOW, this 21st day of July, 2010, Joel Ario, Insurance Commissioner of the Commonwealth of Pennsylvania ("Commissioner"), makes the following Adjudication and Order.

HISTORY

This case began when the Pennsylvania Insurance Department ("Department") filed an Order to Show Cause ("OTSC") on January 7, 2010 directed to Steven John Kelley ("Kelley" or "the respondent"). The OTSC alleged that Kelley violated the Insurance Department Act.¹ Specifically, the OTSC alleged that Kelley, a licensed insurance producer, was convicted of a felony and failed to inform the Department about the criminal charges against him or his guilty plea. According to the OTSC, this conduct violated applicable statutes in that the respondent: 1) failed to report the charges and guilty plea to the Department within 30 days of each; 2) committed a felony; and 3)

¹ Act of May 17, 1921, P.L. 789, No 285, 611-A (14), (20) and 678-A(b), 40 P.S. § 310.11 and 310.78.

DATE MAILED: July 21, 2010

demonstrated unworthiness to be in the business of insurance. The OTSC correspondingly was divided into three counts.

The OTSC advised Kelley to file an answer, and further advised him that the answer must specifically admit or deny each of the factual allegations made in the OTSC. The respondent was advised to set forth the facts and state concisely the matters of law upon which he relies. He further was advised of the consequences of failing to answer the OTSC. The OTSC was served by certified and first class mail both at his address of record with the Insurance Department and his address appearing on the criminal docket sheets of the Court of Common Pleas of Chester County.

Kelley failed to answer the Department's Order to Show Cause or otherwise respond to the Administrative Hearings Office. On February 8, 2010, the Department filed a motion for default judgment and served the respondent by certified and first class mail at both his registered address and his address with the Chester County Court. The motion declared that the certified mailing of the OTSC to the respondent's registered residential address was received and signed for, and that neither first class mailing was returned by the Post Office as undeliverable. Notice of the Order to Show Cause also was published in the Pennsylvania Bulletin on January 23, 2010. 40 Pa. Bull. 575. The respondent has not filed a response to the OTSC or motion for default judgment, nor made any other filing in this matter.

This adjudication 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 Kelley failed to answer the order to show cause or motion for default judgment. The order to show cause and motion advised as to the consequences of the failure to respond;² however, because of the language in the penalty provisions of applicable statutes, an analysis of the Commissioner's ability to impose penalties absent an evidentiary hearing is required.

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

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

In order for an adjudication by a Commonwealth agency to be valid, a party must have a "reasonable notice of a hearing and an opportunity to be heard." 2 Pa.C.S. § 504 (Administrative Agency Law). Similarly, the statute specifically applicable to the present

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

case³ provides for a hearing procedure prior to certain penalties being imposed by the Commissioner. *See* 40 P.S. § 310.91.⁴ However, given that the respondent has not answered the order to show cause and given current caselaw, these hearing procedures are inapplicable.

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

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

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

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

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

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 Phelps*, P95-09-007 (1997); *In re Crimboli*, SC99-04-015 (1999); *In re Young*, SC98-08-027 (2000); *In re Jennings*, SC99-10-001 (2001); *In re Warner*, SC01-08-001 (2002); *In re Taylor*, SC07-11-015 (2008); *In re Kroope*, SC09-12-005 (2010). The Commissioner adopts this reasoning in the present case: the important aspects of 2 Pa.C.S. § 504 and 40 P.S. § 310.91 are notice and the *opportunity* to be heard. Default judgment is appropriate, despite language in applicable statutes which seems to require a hearing, when a respondent fails to take advantage of his opportunity to be heard. When a respondent in an enforcement action is served with an order to show cause detailing the nature of the charges against him as well as the consequences of failing to respond, yet fails to answer the allegations or to answer a subsequent motion for default judgment, the Commissioner adopts the Commonwealth Court's reasoning that the respondent had an opportunity to be heard but has rejected the opportunity.

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

The facts include that Kelley is a licensed resident insurance producer. On December 15, 2008, the respondent was charged with various offenses including Criminal Trespass-Breaking into Structure,⁵ a felony of the second degree. During the plea and sentencing procedure, the offense was replaced by Criminal Trespass-Entering into Structure, a felony of the third degree. On April 9, 2009, Kelley pleaded guilty in the Court of Common Pleas of Chester County to the third-degree felony. He was sentenced to pay a \$25.00 fine and to undergo 2 years probation. Kelley neither reported the December 15, 2008 charges nor the April 9, 2009 guilty plea to the Insurance Department.

Kelley was charged by the Department in three counts with three distinct violations of the Insurance Department Act: 1) failure to report the charges and guilty plea to the Department within 30 days of each in violation of 40 P.S. § 310.78(b); 2) committing a felony in violation of 40 P.S. § 310.11(14); and 3) demonstrated unworthiness to be in the business of insurance in violation of 40 P.S. § 310.11(20).

For each of these three charges, the Commissioner has authority to impose remedial action against the respondent, including suspension or revocation of his certificate of qualification or license as well as imposing a penalty of up to \$5,000.00 per violation. 40 P.S. § 310.91. Prohibited acts including those contained in the second and third counts are listed in 40 P.S. §§ 310.11. In addition, 40 P.S. § 310.78 imposes upon a licensee an affirmative duty relative to criminal charges:

CRIMINAL CONDUCT REPORTING -- Within 30 days of being charged with criminal conduct, a licensee shall report the charges to the department. The licensee shall provide the department with all of the following within 30 days of their availability to the licensee:

- (1) A copy of the criminal complaint, information or indictment.
- (2) A copy of the order resulting from a pretrial hearing, if any.

⁵ 18 P.S. § 3503(a)(11)

(3) A report of the final disposition of the charges.

40 P.S. § 310.78(b).

In the present case, the admitted facts support sanctions for each of the three charges against the respondent. Kelley committed a felony, evidenced by his guilty plea and resulting conviction. He failed to report either the charges against him or the final disposition of those charges within 30 days. Finally, given this course of conduct, Kelley demonstrated a lack of general fitness, competence and reliability under 40 P.S. § 310.11(20). With Kelley liable for remedial action under each of these charges, the appropriate action must be established for each one.

PENALTIES

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

A Commissioner is given broad discretion in imposing penalties. *Termini v. Department of Insurance*, 612 A.2d 1094 (Pa. Cmwlth. 1992); *Judson v. Insurance Department*, 665 A.2d at 523, 528 (Pa. Cmwlth. 1995). Each of the underlying actions in the present case are connected to the respondent's duties as an insurance agent, and warrant penalties.

Kelley's conviction of felony criminal trespass, although not directly connected to the business of insurance, nonetheless demonstrates a disregard for the trust required in his profession. The offense to which he pleaded guilty is as follows:

§ 3503. Criminal trespass

(a) BUILDINGS AND OCCUPIED STRUCTURES. --

(1) A person commits an offense if, knowing that he is not licensed or privileged to do so, he:

(i) enters, gains entry by subterfuge or surreptitiously remains in any building or occupied structure or separately secured or occupied portion thereof;

18 P.S. § 3503. By definition, producers have extensive personal contact with applicants and insureds. The applicants and insureds entrust financial and personal matters to the producer, and rely upon the producer's integrity. Kelley's actions violated the criminal laws of this Commonwealth, and the commission of a felony specifically is prohibited by the Insurance Department Act. Further, Kelley's offense against another's property

evidences that he cannot be entrusted at this time with the pocketbooks, bank accounts and personal information of his customers.

In addition, Kelley's failure to report the charges or the conviction to the Insurance Department directly relates to his duties to the profession and his customers. Failing to report the activity as required, whether purposeful or inadvertent, represents deception by omission which misled the Department and delayed the Department's investigation into Kelley's suitability for the profession. By failing to report his criminal activity, Kelley thus hampered the Insurance Department's ability to regulate the profession and protect insurance consumers. This failure to report goes to the heart of the requirement that insurance agents be trustworthy and reliable in their work with the insurance buying public. If he misleads the regulator, then Kelley cannot be entrusted with the welfare of individuals he purports to serve. He currently is incapable of the trust necessary in the profession.

Finally, Kelley's course of conduct taken as a whole between 2008 and the present demonstrates a lack of general fitness, competence and reliability. That course of conduct is a separate violation and itself would merit sanction. However, all of the respondent's actions will be addressed through the other two counts, and no separate penalty will be imposed for this violation.

Scant evidence exists to mitigate the seriousness of the violations because Kelley did not offer mitigating evidence or arguments. However, some mitigation is evident from the undisputed facts. The crime for which Kelley was convicted does not directly relate to the business of insurance even if it bears upon his fitness to be in the profession. There is no evidence that it was more than an isolated incident, and no indication that it involved misappropriation of another's funds or personal property except for initial charges which ultimately were withdrawn. Finally, whether through a plea agreement or

open plea, the sentencing judge accepted or imposed a sentence which included no incarceration. Instead, the sentencing judge imposed two years of probation and a \$25.00 fine. The sentencing judge's leniency in the criminal matter does not bind the Commissioner relative to Kelley's violation of insurance statutes with purposes different from criminal statutes. However, the light sentence at least constitutes some evidence of the judge's view concerning the seriousness of Kelley's criminal conduct and the danger he presents to society as a whole. *See In re Grubb*, AG08-01-011 (2009) (When prosecutors, the sentencing judge and court officials recognized the limited extent of a license applicant's involvement in a felony through a negotiated plea, the imposition of probation only and the early termination of the probation, such recognition is a factor in determining whether the applicant is worthy of licensure).

The Department in its Order to Show Cause and in its motion for default judgment requested the Commissioner to revoke the respondent's insurance license and to impose a civil penalty of up to \$5,000 for each count. Considering the facts in this matter, the applicable law, the seriousness of the conduct and all aggravating and mitigating circumstances, penalties are imposed as set forth in the accompanying order.

CONCLUSIONS OF LAW

1. The Commissioner has jurisdiction over the parties and subject matter of these proceedings.
2. The Insurance Department may impose sanctions for an insurance producer's failure to comply with the Insurance Department Act.
3. Committing a felony violates the Insurance Department Act.
4. Failure to report criminal charges or the disposition of those charges within 30 days of each violates the Insurance Department Act.
5. Demonstrating a lack of general fitness, competency or reliability to be worthy of licensure violates the Insurance Department Act.
6. If a violation of the Insurance Department Act or 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.
7. Steven John Kelley by his conduct demonstrates current unworthiness to hold an insurance 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.

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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. All of the insurance licenses or certificates of qualification of Steven John Kelley **ARE REVOKED** for a minimum of four (4) years pursuant to 40 P.S. 310.91 for each of Counts One and Two, with these revocations to run **concurrently** with each other for a total minimum period of four (4) years. Additionally, Steven John Kelley is prohibited from applying for a license or certificate of qualification to act as a producer in this Commonwealth for a minimum of four (4) years. Steven John Kelley also is prohibited from applying to renew any license or certificate of qualification previously held by him in this Commonwealth for a minimum of four (4) years.

2. Steven John Kelley shall pay a civil penalty to the Commonwealth of Pennsylvania within thirty (30) days of this order as follows:

- a. Count one: \$1,000.00
- b. Count two: \$4,000.00

for a total of Five Thousand Dollars (\$5,000.00). Payment shall be made by certified check or money order, payable to the Commonwealth of Pennsylvania, directed to: Sharon Fraser, Administrative Assistant, Bureau of Enforcement, 1227 Strawberry Square, Harrisburg, Pennsylvania 17120. In addition to the above restrictions, no certificate of qualification or other insurance license may be issued or renewed until the said civil penalty is paid in full.

3. This order is effective immediately.



Joel Ario
Insurance Commissioner