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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:
: :
Victoria Ann Cyr : 40 P.S. §§ 310.11(20), 310.12(a) and
5916 Upper Mud Run Road : 310.78(b)
Easton, PA 18040 : :
Respondent : Docket No. SC16-04-008

ADJUDICATION AND ORDER

AND NOW, this 24th day of June, 2016, Teresa D. Miller, 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 April 14, 2016 directed to Victoria Ann Cyr ("the respondent"). The OTSC alleged that the respondent violated the Insurance Department Act.¹ Specifically, the OTSC alleged that the respondent, a licensed insurance producer, twice has been arrested and charged with several misdemeanor counts.

The OTSC advised the respondent to file an answer in accordance with applicable

¹ Act of May 17, 1921, P.L. 789, No 285 as amended through the Act of June 25, 1997, P.L. 349, No. 40, repealed and partially reenacted by the Act of December 3, 2002, P.L. 1183, No. 147.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

DATE MAILED: June 24, 2016

regulations (1 Pa. Code § 35.37), and further advised her 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 she relies. She further was advised of the consequences of failing to answer the OTSC. Following the filing of the OTSC, a presiding officer was appointed and the appointment order was served on the respondent by first class mail and certified mail to the same address on which the OTSC was served. The return receipt indicated successful service.

The respondent failed to answer the Department's OTSC or otherwise respond to the Administrative Hearings Office. On May 16, 2016, the Department filed a motion for default judgment and served the respondent in accordance with 1 Pa. Code Chapter 33. The motion declared that the OTSC was served by certified mail and by first class mail to the respondent at her last known home address as kept on file in the Department and that the document was not returned to the Department as undeliverable. The respondent has not filed a response to the OTSC or motion for default judgment, nor made any other filing in this matter.

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

DISCUSSION

This adjudication is issued without scheduling an evidentiary hearing, since the respondent failed to answer the OTSC or motion for default judgment. The OTSC and motion advised as to the consequences of the failure to respond.² However, because of

² The OTSC warned the respondent that failure to answer in writing would result in the factual allegations

the language in the penalty provisions of applicable statutes, this adjudication includes an analysis of an agency's authority for imposing penalties without an evidentiary hearing.

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 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

being deemed admitted and that the Commissioner could enter an order imposing penalties.

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.

answered the OTSC and given current caselaw, these hearing procedures are inapplicable.

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

In a case involving another agency, the Commonwealth Court upheld summary judgment imposing discipline issued by a commission despite the fact that the respondent had requested a hearing. *Kinniry v. Professional Standards and Practices Commission*, 678 A.2d 1230 (Pa. Cmwlth. 1996). In *Kinniry*, the applicable statute (24 P.S. §§ 2070.5(11), 2070.13) provided for a hearing procedure before discipline was imposed. However, the respondent's attorney merely requested a hearing without answering the specific factual averments in the charges against the respondent (which charges were treated as an OTSC). 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 OTSC and a motion for default judgment. See *In re Czmus*, SC09-05-009 (2009); *In re Kroope*, SC09-12-005 (2010); *In re Chappel*, SC14-10-024 (2015); *In re Ott*, SC15-11-002 (2016). 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 OTSC detailing the nature of the charges against her as well as the consequences of failing to respond, yet fails to answer the allegations or to answer a subsequent motion for default judgment, the Commissioner adopts the Commonwealth Court's reasoning that the respondent had an opportunity to be heard but has rejected the opportunity.

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

The facts include that the respondent is a resident licensed insurance producer. [OTSC ¶ 2]. On March 26, 2015 the respondent was arrested and charged with one misdemeanor count of theft by deception and one misdemeanor count of conspiracy in Northampton County, Pennsylvania. [OTSC ¶ 3; Appendix A]. Subsequently on September 23, 2015, the respondent was arrested and charged with two misdemeanor counts of possession of a controlled substance, one misdemeanor count of conspiracy, and one misdemeanor count of possession of drug paraphernalia in Lehigh County, Pennsylvania. [OTSC ¶ 5]. The respondent did not report any of these charges to the Department. [OTSC ¶ 6]. She also failed to respond to a November 5, 2015 inquiry letter. [OTSC ¶ 7].

As a result of her actions, the Department charged the respondent with four distinct violations of the Insurance Department Act: 1) failure to respond to department inquiry (40 P.S. § 310.12(a); 2) and 3) failure to report criminal charges; and 4) failure to demonstrate worthiness of licensure.

For each of the counts, the Commissioner has authority to impose remedial action against the respondent, including suspension or revocation of her licenses as well as imposing a penalty of up to \$5,000.00 per violation. 40 P.S. § 310.91(d)(1),(2). The Commissioner also may order the respondent to cease and desist and impose other conditions the Commissioner deems appropriate. 40 P.S. § 310.91(d)(3), (4). In the present case, the admitted facts support sanctions for all of the four counts against the respondent.

By failing to respond to the November 5, 2015 inquiry letter, Cyr has violated 40 P.S. § 310.12 as set forth in count one. The applicable statutory section reads in its entirety:

§ 310.12. Failure to respond or remit payment

(a) **Response.**—A licensee who fails to provide a written response to the department within 30 days of receipt of a written inquiry from the department or who fails to remit valid payment for all fees due and owing to the department shall, after notice from the department specifying the violation and advising of corrective action to be taken, correct the violation within 15 days of receipt of the notice.

(b) **Correction.**—If a licensee fails to correct the violation within 15 days of receiving notice, the department may assess an administrative fine of no more than \$100 per day per violation.

40 P.S. § 310.12. Unlike the 20 types of conduct listed in Section 310.11, Section 310.12 does not specifically prohibit the conduct of failing to respond to an inquiry. Further, the sanction described in this section only applies after the Department notifies the licensee of the action required of the licensee and allows 15 days following receipt to correct the deficiency. In the absence of a response to an appropriate notice, this section provides for a discretionary administrative daily fine of \$100.00 per day per violation.

In the present case, the admitted facts include that the Department sent a letter to the respondent on November 5, 2015 advising her that the Department was investigating

her for “failure to report criminal conduct” as required by 40 P.S. & 310.78(b). [OTSC Appendix C]. The letter also asked her to contact the Department “to address the allegations and present evidence.” [Id.]. Finally, the letter informed her that failure to correct the “violation of insurance laws” within 15 days could subject her to the fine described in 40 P.S. § 310.12. [Id.]. The respondent did not answer the letter or report the criminal charges as required by the law. [OTSC ¶ 8].

In addition, by failing to report the criminal charges against her in March and September 2015, Cyr in each instance violated 40 P.S. § 310.78(b) as set forth in counts two and three. That provision requires that “[w]ithin 30 days of being charged with criminal conduct, a licensee shall report the charges to the department” and also requires that the licensee supply the Department with copies of the charging document, pretrial orders and final disposition within 30 days. Cyr did not report the criminal charges from either March 26, 2015 or September 23, 2015.

Finally, Cyr violated 40 P.S. § 310.11(20) as contained in count four, which requires general fitness, competence and reliability demonstrating worthiness of licensure. The respondent’s course of conduct included dishonest criminal activity as well as failure to report and respond to the Department. Her course of conduct demonstrated a lack of fitness to be licensed as a professional insurance producer.

The elements of all these charges are established by the admitted facts. With the respondent liable for remedial action under each of these charges, the appropriate remedial 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(d)(1). Each action violating the Act subjects the actor to a maximum five thousand dollar civil penalty. 40 P.S. 310.91(d)(2). The actor may be ordered to cease and desist his conduct. 40 P.S. 310.91(d)(3). The Commissioner also may impose other appropriate conditions. 40 P.S. 310.91(d)(4).

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 of a serious nature, with some of the conduct directly connected to the respondent's duties as a licensed insurance producer to abide by the regulations which govern her profession.

Cyr committed two separate violations under 40 P.S. § 310.78(b) by: 1) failing to report the March 26, 2015 misdemeanor charge of theft by deception and one misdemeanor count of conspiracy in Northampton County; and 2) failing to report the September 23, 2015 charges of two misdemeanor counts of possession of a controlled substance, one misdemeanor count of conspiracy, and one misdemeanor count of possession of drug paraphernalia in Lehigh County. By failing to correct this violation after appropriate notice from the Department, the respondent also violated the provisions of 40 P.S. § 310.12(a). The respondent violated the worthiness provision by this conduct and her disregard towards the regulator of her profession. She will be penalized for each of the two reporting failures, for her failure to respond to the Department and for her conduct evidencing unworthiness to hold a license.

While the underlying criminal charges in the present case does not appear to be directly connected to the respondent's duties as an insurance producer, at least one of the charges involves deception. By definition, producers and brokers have extensive personal

contact with applicants and insureds. The applicants and insureds entrust financial and personal matters to the producer, and rely upon her integrity. A producer who has recently demonstrated a lack of trustworthiness is incapable of the trust necessary in the profession. Simply put, the respondent at this time cannot be trusted with the pocketbooks, bank accounts and personal information of her customers.

In addition, the respondent's failure to report the charges and convictions to the Commonwealth's regulator also breached her duties to the Commonwealth and to the public. Whether a conscious concealment or a negligent nondisclosure, the failure to disclose the charges and convictions hampered the Insurance Department's ability to regulate the profession and protect insurance consumers. This concealment goes to the heart of the requirement that insurance producers be trustworthy and reliable in their work with the insurance-buying public.

As additional aggravating factors, Cyr did not respond to the Department's written inquiry. Furthermore, she has not appeared in these disciplinary proceedings, further evidencing a lack of respect towards her profession and its regulatory system.

Little evidence exists to mitigate the seriousness of the violations. Cyr did not offer mitigating evidence or arguments. However, the Department did not allege prior complaints or disciplinary action against the respondent, and administrative notice is taken that no enforcement actions or consent orders were entered against the respondent until the present action. Also, without minimizing the seriousness of the respondent's criminal conduct underlying this case, the criminal conduct did not involve the business of insurance and there exists no evidence that the conduct directly inflicted financial or personal harm upon insurance consumers.

The Department in its OTSC asks that the Insurance Commissioner revoke the

respondent's insurance producer license(s), bar her from future licensure, impose a civil penalty of \$5,000 per violation, order the respondent to cease and desist from violating the insurance laws and to impose any other condition deemed appropriate. In its motion for default judgment, the Department seeks the same relief.

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.

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IN RE: : ALLEGED VIOLATIONS:
: :
Victoria Ann Cyr : 40 P.S. §§ 310.11(20), 310.12(a)
5916 Upper Mud Run Road : and 310.78(b)
Easton, PA 18040 : :
: :
Respondent : Docket No. SC16-04-008

ORDER

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

1. Victoria Ann Cyr shall **CEASE AND DESIST** from the prohibited conduct described in the adjudication.

2. All of the insurance licenses or certificates of qualification of Victoria Ann Cyr **ARE SUSPENEDED** for a minimum of five (5) years pursuant to 40 P.S. 310.91 for one violation of 40.P.S. § 310.12(a) (count one) and for each of two violations of 40 P.S. § 310.78(b) (counts two and three), with these suspensions to run **concurrently** with each other. Additionally, Victoria Ann Cyr is prohibited from applying for a certificate of qualification to act as a producer in this Commonwealth for a minimum of five (5) years. Victoria Ann Cyr also is prohibited from applying to renew any certificate of qualification previously held by her in this Commonwealth for a minimum of five (5) years.

3. Victoria Ann Cyr shall pay a civil penalty to the Commonwealth of

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

- a. Count one: \$1,000.00
- b. Counts two and three (two violations, \$2,000 per violation): \$4,000.00
- c. Count four: \$3,000.00

for a total of Eight Thousand Dollars (\$8,000.00). Payment shall be made by certified check or money order, payable to the Commonwealth of Pennsylvania, directed to: Administrative Assistant, Bureau of Licensing and 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.

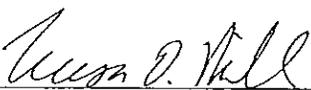
4. Should the respondent ever become licensed at any future date, the respondent's licenses may be immediately suspended by the Insurance Department following its investigation and determination that: (i) the penalty has not been fully paid; (ii) any other term of this order has not been complied with; 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 five (5) years from the date of any relicensure.

5. Victoria Ann Cyr 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 she is worthy of an insurance license.

7. In the event that the respondent's 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 the respondent is worthy of a license, the respondent's suspended licenses shall be revoked.

8. This order is effective immediately.



TERESA D. MILLER
Insurance Commissioner