

06 JUL 19 AM 11:47

BEFORE THE INSURANCE COMMISSIONER
OF THE
COMMONWEALTH OF PENNSYLVANIA

IN RE: : ALLEGED VIOLATIONS:
: :
Patrick R. Rex : Sections 611-A(20), 611-A(5) and 611-A
7421 Behler Road : of the Insurance Department Act of 1921,
Lynnport, PA 18066 : P.L. 789, No. 285, *added by* the Act of
Respondent : December 6, 2002, P.L. 1183, No. 147 § 2
: (40 P.S. §§ 310.11 and 310.47).
: :
: Docket No. SC04-03-002

ADJUDICATION AND ORDER

AND NOW, this 19th day of July, 2004, 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 March 2, 2004 directed to Patrick R. Rex ("Rex" or "the respondent"). The OTSC alleged that Rex violated the Insurance Department Act.¹ Specifically, the OTSC alleged that Rex, a licensed insurance agent, submitted a backdated insurance application to cover a previously existing loss for a client.

The OTSC advised Rex to file an answer in accordance with applicable regulations (1 Pa. Code § 35.37), and further advised him that the answer must

DATE MAILED: July 19, 2004

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. Following the filing of the OTSC, a presiding officer was appointed and the appointment order was served on Rex by first class mail.

Rex failed to answer the Department's Order to Show Cause or otherwise respond to the Administrative Hearings Office. On April 14, 2004, the Department filed a motion for default judgment and served Rex 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 first class regular mailing of 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 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 Rex 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

¹ Act of May 17, 1921, P.L. 789, No 285, 40 P.S. § 310.11 and 310.47.

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

analysis of the Commissioner's ability to impose penalties absent an evidentiary hearing is required.

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

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

In order for an adjudication by a Commonwealth agency to be valid, a party must have a "reasonable notice of a hearing and an opportunity to be heard." 2 Pa.C.S. § 504 (Administrative Agency Law). Similarly, the statute specifically applicable to the present matter³ 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.

³ Insurance Department Act, Act of May 17, 1921, P.L. 789 as amended (40 P.S. §§ 1-326.7).

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 upon failure of the person to appear at the hearing, if a violation of this act is found, the Insurance 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).

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 2 Pa.C.S. § 504 and 40 P.S. § 47.⁵ Also, the Court specifically has upheld a decision in which the Commissioner granted default judgment for an Unfair Insurance Practices Act (UIPA) violation. *Zimmerman v. Foster*, 618 A.2d 1105 (Pa. Cmwlth. 1992).

In a case involving another agency, the Commonwealth Court upheld summary judgment imposing discipline issued by a commission despite the fact that the respondent had requested a hearing. *Kinniry v. Professional Standards and Practices Commission*, 678 A.2d 1230 (Pa. Cmwlth. 1996). In *Kinniry*, the applicable statute (24 P.S. §§ 2070.5(11), 2070.13) provided for a hearing procedure before discipline was imposed. However, the respondent's attorney merely requested a hearing without answering the specific factual averments in the charges against the respondent (which charges were treated as an order to show cause). The Court upheld the summary judgment since deemed admission of the factual averments presented no factual issues to be resolved at hearing.

The Commissioner consistently has applied the reasoning of *United Healthcare* and similar cases when the respondent does not answer the order to show cause and a motion for default judgment. See *In re Kozubal*, P93-08-13 (1997); *In re Phelps*, P95-09-007 (1997); *In re Taylor*, SC96-11-034 (1997); *In re Crimboli*, SC99-04-015 (1999); *In*

⁵ The operative language was functionally equivalent to that in 40 P.S. § 310.91.

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

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

The facts include that Rex was a licensed insurance producer. [OTSC ¶ 2]. On March 14, 2002 the respondent, while an employee of an insurance agency, completed and remitted to an insurance company an application for a homeowners insurance policy together with an agency check for the premium. [OTSC ¶ 3]. The insurance company did not receive the check. [OTSC ¶ 4]. Between March and August 2002 the respondent took no steps to verify that the homeowners policy was issued. [OTSC ¶ 5].

On August 21, 2002, the homeowners policy applicant suffered a homeowners loss. [OTSC ¶ 6]. In early September, Rex's client spoke with him and advised him about the loss. [OTSC ¶ 7]. On September 3, 2002, Rex completed and mailed a second

homeowners application for his client, backdating the date of the application to August 8, 2002 so that the loss would be covered. [OTSC ¶ 9]. He did not tell the company about the first application or about the loss already experienced by his client. [OTSC ¶ 9].

Subsequently, the insurance company discovered that Rex had submitted two separate applications with different effective dates. [OTSC ¶11]. The respondent acknowledged to the company what he had done, and the company paid the client for the loss. [OTSC ¶¶ 12, 13].

Rex was charged with three distinct violations of the Insurance Department Act: 1) demonstrated lack of worthiness to be a licensed insurance producer pursuant to 40 P.S. § 310.11; 2) misrepresenting the terms of an insurance contract issued or to be issued in violation of 40 P.S. § 310.47; and 3) misrepresenting the terms of an actual or proposed insurance contract or application in violation of 40 P.S. § 310.11(5).

For each of these three charges, the Commissioner has authority to impose remedial action against the respondent, including suspending or revoking his license, imposing a civil penalty not to exceed \$5,000.00, ordering him to cease and desist from the conduct and imposing additional conditions. 40 P.S. § 310.91. This remedial provision essentially reenacted the remedial provisions of former section 639 of the Insurance Department Act (formerly 40 P.S. § 279). The former section provided remedial action for the conduct now proscribed by 40 P.S. §§ 310.11(20) (lack of worthiness)⁶ and 40 P.S. § 310.47 (misrepresenting policy terms)⁷.

⁶ Former section 639 allowed remedial action "upon satisfactory evidence of such conduct that would disqualify the agent or broker from initial issuance of a certificate of qualification under section 604 . . ." Act of May 17, 1921, P.L. 789 § 639, 40 P.S. § 279(a) (Purdon's 1999). Former section 604 authorized the issuance of a license for an insurance agent when the Insurance Department was "satisfied that the applicant is worthy" of such certification. 40 P.S. § 234(a) (Purdon's 1999).

However, prior to 2002, the Insurance Department Act contained no provision corresponding to 40 P.S. § 310.11(5) (misrepresenting insurance contract or application terms). The current remedial sections of the Insurance Department Act were not effective until 2003, at which time the prior sections were repealed.⁸ In the current case, the respondent's conduct took place in 2002, and the proscriptions of 40 P.S. § 310.11(5) thus are inapplicable. Nonetheless, Rex is liable for remedial action for conduct demonstrating unworthiness and for misrepresenting the terms of a policy to be issued to his client.

The respondent's course of conduct in backdating an application to cover an existing loss demonstrates a lack of trustworthiness necessary in the profession. When confronted with his client's loss, rather than investigating what happened to the application and premium submitted six months previously, or resubmitting the application, he submitted a new application backdated and to be effective thirteen days prior to the existing loss. He failed to inform the company of the prior application and the existing loss. This calculated deception at once deprived the company of the premium to which it might have been entitled for coverage between March and August and provided coverage for a known loss after the fact. Also, had the respondent been more diligent between March and August, he would have been aware that a policy had not been issued.⁹ This entire course of conduct demonstrates unworthiness for which the respondent is liable for remedial action.

In addition, the specific act of using a fabricated application date misrepresented

⁷ Formerly proscribed by section 637 of the Insurance Department Act, Act of May 17, 1921, P.L. 789 § 637, 40 P.S. § 277 (Purdon's 1999).

⁸ Act of December 3, 2002, P.L. 1183, No. 147 § 1 (effective in 180 days).

⁹ No finding is made that the lack of diligence itself would constitute unworthiness, in the absence of evidence whether Rex deviated from reasonable standards or his employer's practices in failing to follow up on his client's application. However, had he followed up on the original application prior to his client's loss, he would have had no reason to falsify a new application.

the terms of a policy to be issued to the respondent's client. The client did not speak with Rex until early September, which would have been the earliest date possible for a new application. Rex knowingly utilized August 8, 2002 as the application date, which misrepresented the effective date of the policy to be issued to his client. Rex is liable for this specific charge in addition to his liability for the course of conduct in the scheme to deceive the company.

With Rex liable for remedial action for each of the two charges, the appropriate remedial action must be established for each charge.

PENALTIES

Under the provisions of the Insurance Department Act existing at the time of the respondent's conduct, the Commissioner may suspend or revoke a license for each of the respondent's violations. 40 P.S. § 279(a)(1) (Purdon's 1999). Also, each violation subjects the actor to a maximum five thousand dollar civil penalty. 40 P.S. § 279(a)(2) (Purdon's 1999).

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). Although the respondent's course of conduct in the present case related to a single client, the conduct is nonetheless quite serious. The conduct related directly to Rex's duties as an insurance agent. Further, even as his client received the benefit of coverage for his loss, the client witnessed first-hand a deceit which reflects on the honesty of Rex's profession. Consumers rely upon the integrity of insurance producers, entrusting them with financial and personal information as well as money. The fact that this particular consumer benefited from Rex's deception does not remove the taint on the profession. Finally, Rex deceived his principal to, which he owed a duty of loyalty. The respondent's course of conduct damaged trust in the profession by consumers and companies alike, and demonstrates that Rex cannot be trusted in the insurance matters of his clients and principals. The seriousness of this course of conduct is reflected in the penalties imposed.

Some facts exist to mitigate the seriousness of the violations. Although Rex chose not to offer mitigating evidence or arguments, evident from the facts in this case is that Rex's actions were not designed for him to profit directly from his deception, but rather for the benefit of his client. In addition, the facts include that his client should have had

coverage in March 2002 had the original application and premium payment reached the intended destination. These facts are taken into consideration in the penalties imposed.

Tempering these facts somewhat is that Rex received indirect benefits from his deception. Pleasing his client made it more likely that he would keep the client and resulting commissions. Also, his actions made it more likely that his client would overlook the lack or perceived lack of diligence in following up with the original application. Rex also would have avoided questioning about his diligence from his employer and the company had the company not discovered the original application. These potential benefits are more remote than the direct benefit to the respondent's client, and are given only slight consideration.

However, while an intent to help a client is laudable, the mechanism chosen by the respondent is abhorrent. Rex possibly could have "made things right" by contacting the company to trace the original application. He could have resubmitted the original application. Even if the company balked at providing coverage, Rex thus would have done his best to help his client while maintaining his own integrity. Instead, he withheld from the company the fact that an application and premium were submitted in March 2002. He withheld information from the company about the existing loss. He falsified the application date. Together, these things establish calculated deceit in the course of the respondent's insurance business. Any intent to help the consumer is far outweighed by the respondent's intent to deceive and his disregard for the integrity of the profession.

The Department in its Order to Show Cause requested an unspecified period of license revocation, an unspecified monetary penalty and a five year period of supervision should the respondent become relicensed. In its motion for default judgment, the Department requests a civil penalty of \$5,000, revocation of the license for a minimum of five (5) years and imposing a five year period of supervision should the respondent

become relicensed.

Considering the facts in this matter, the applicable law, the seriousness of the conduct and all other circumstances, penalties are imposed as set forth in the accompanying order.

BEFORE THE INSURANCE COMMISSIONER
OF THE
COMMONWEALTH OF PENNSYLVANIA

IN RE:	:	ALLEGED VIOLATIONS:
	:	
Patrick R. Rex	:	Sections 611-A(20), 611-A(5) and 611-
7421 Behler Road	:	Aof the Insurance Department Act of
Lynnport, PA 18066	:	1921, P.L. 789, No. 285, <i>as amended</i> , (40
	:	P.S. §§ 310.11 and 310.47).
Respondent	:	
	:	Docket No. SC04-03-002

ORDER

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

1. Patrick R. Rex shall **CEASE AND DESIST** from the prohibited conduct described in the adjudication.

2. All of the insurance licenses or certificates of qualification of Patrick R. Rex **ARE REVOKED** for a minimum of three (3) years for each of his two violations of the Insurance Department Act, with these revocations to run concurrently with each other. Additionally, Patrick R. Rex shall be ineligible to apply for, or receive, any certificate of qualification or license for a period of three (3) years from the date of this order.

3. Patrick R. Rex shall **PAY A CIVIL PENALTY** to the Commonwealth of Pennsylvania within thirty (30) days of this order in the amount of Three Thousand Dollars (\$3,000.00). 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, 1321 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.

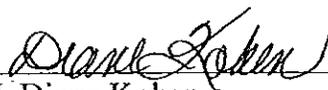
4. Should Patrick R. Rex ever become licensed at any future date, his certificates and licenses may be immediately suspended by the Insurance Department following its investigation and determination that: (i) the penalty has not been fully paid; (ii) any other term of this order has not been complied 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. Patrick R. Rex 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 5 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. This order is effective immediately.



M. Diane Koken
Insurance Commissioner