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INSURANCE DEPARTMENT

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ADMIN HEARINGS OFFICE
IN RE:

Patrick J. Fleming
3336 Ivanhoe Drive
Pittsburgh, PA 15241-1573

Respondent

BEFORE THE INSURANCE COMMISSIONER
OF THE
COMMONWEALTH OF PENNSYLVANIA

: ALLEGED VIOLATIONS:

:
: Sections 611-A (1), (2), (3), (7), (13) and
: (20) of the Insurance Department Act of
: 1921, P.L. 789, No. 285, *as amended* (40
: P.S. §§ 310.11 (1), (3), (7), (13) and (20)
:).

:
: Sections 37.46 and 37.47 of the Insurance
: Department Regulations (31 Pa. Code §§
: 37.46 and 37.47)

:
: Docket No. **SC11-02-008**

ADJUDICATION AND ORDER

AND NOW, this 13th day of April, 2011, Michael F. Consedine, Acting 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 February 15, 2011 directed to Patrick J. Fleming (“Fleming” or “the respondent”). The OTSC alleged that Fleming violated the Insurance Department Act¹ and Department regulations.² Specifically, the OTSC alleged that Fleming, a licensed insurance agent, failed to pay Pennsylvania income tax due in the

¹ Act of May 17, 1921, P.L. 789, No 285, 40 P.S. § 310.11 (1), (3), (7), (13) and (20) .

² 31 Pa. Code §§ 37.46 and 37.47.

DATE MAILED: April 13, 2011

years 1995 through 2002 and misrepresented to the Insurance Department on his 2007 and 2009 license renewal applications that he had paid state income taxes.

The OTSC advised Fleming 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 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 on the respondent at his residential address by certified and first class mail and notice was published in the Pennsylvania Bulletin on February 26, 2011 (41 Pa. Bull. 1080). Following the filing of the OTSC, a presiding officer was appointed and the appointment order was served on Fleming by first class mail.

Fleming failed to answer the Department's Order to Show Cause or otherwise respond to the Administrative Hearings Office. On March 21, 2011, the Department filed a motion for default judgment and served Fleming 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 the signed certified receipt card was attached to the motion. 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 Fleming 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;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.

case⁴ 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 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

⁴ 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.*).

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 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 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 Fleming was licensed by the Insurance Department as a resident insurance producer. He did not remit personal income tax due to the

Commonwealth of Pennsylvania for the tax years 1995 through 2001 and owed \$18,381.00 in back taxes resulting in a tax lien in this amount against him. He also did not remit personal income tax for 2002, resulting in an additional tax lien of \$346.29 against him. In addition, on his 2007 and 2009 license renewal applications to the Insurance Department, he misrepresented that he paid his state income taxes.

Fleming was charged with four distinct violations of the Insurance Department Act: 1) failure to pay State income tax in violation of 40 P.S. § 310.11(13); 2) misrepresentation on two license applications in violation of 40 P.S. § 310.11(1) and (3) and 31 Pa. Code § 37.46(4); 3) demonstrated untrustworthiness or financial irresponsibility in the conduct of doing business in violation of 40 P.S. § 310.11(7); and 4) demonstrated lack of worthiness to be licensed as an insurance producer pursuant to 40 P.S. § 310.11 (20).

For each of these four charges, the Commissioner has authority to impose remedial action against the respondent, including suspension or revocation of his 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 all four counts are listed in 40 P.S. § 310.11.

In the present case, the admitted facts support sanctions for each of the four charges against the respondent. Fleming failed to pay state income taxes, resulting in administrative action against him by the Department of Revenue. He misrepresented on his insurance license renewal applications that his taxes were paid. His course of conduct demonstrated unworthiness and financial irresponsibility. Finally, given this course of conduct of not paying his taxes and concealing his actions from the Department, Fleming demonstrated a lack of general fitness, competence and reliability under 40 P.S. § 310.11(20).

Fleming is separately liable under each count because each statutory subsection of 40 P.S. § 310.11 proscribes certain aspects of his course of conduct. Subsection (13) prohibits the failure to pay State income tax or to comply with any administrative order directing the payment of State income tax. Subsections (1) and (3) proscribe the furnishing of incorrect, misleading or false information to the Insurance Department in a license application and also obtaining an insurance license through misrepresentation or fraud. Subsection (7) prohibits the use of fraudulent or dishonest practices and also prohibits demonstrated untrustworthiness or financial irresponsibility. Subsection (20) addresses general fitness, competence and reliability reflecting on the producer's worthiness to hold a license.

With Fleming liable for remedial action under each of the four counts, the appropriate action must be established for each count.

PENALTIES

The Commissioner may suspend or revoke a license for conduct violating certain provisions of the Insurance Department Act, including those provisions violated by Fleming's conduct. 40 P.S. § 310.91(d)(1). Each action violating a provision specified in section 310.11 also subjects the actor to a maximum five thousand dollar civil penalty. 40 P.S. § 310.91(d)(2). The respondent may also be ordered to cease and desist from prohibited conduct. 40 P.S. § 310.91(d)(3). Finally, the Commissioner may impose any other conditions deemed appropriate. 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 failure to pay income taxes over a period of years breached Fleming's duties to the Commonwealth and to the public. In addition, this failure undermined the confidence placed by insurance consumers in him personally as well as in the profession. Applicants and insureds entrust financial and personal matters to the producer, and rely upon the producer's integrity. Fleming's actions violated the laws of this Commonwealth and thus damaged the trust consumers place in their producers.

In addition, Fleming's concealment about the unpaid taxes and tax lien to the Insurance Department directly relates to his duties to the profession and his customers. Misrepresenting his activity represents deception which misled the Department, delayed the Department's investigation into Fleming's suitability for the profession and caused the Department twice to renew the respondent's license without knowing of his failure to pay taxes. By concealing his activity, Fleming thus 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. If he misleads the regulator, then Fleming cannot be entrusted with the welfare of individuals he purports to serve. He currently is incapable of the trust necessary in the profession.

Demonstrating financial responsibility also goes to the heart of a producer's obligations. Insurance consumers entrust their financial well-being to the agent, and rightfully expect thorough explanations and sound advice concerning company and coverage choices. A producer making poor personal financial choices commands less of the trust and respect so necessary for a consumer making his or her own financial decisions. Fleming needs to rebuild that trustworthiness before he again can command that respect.

Finally, Fleming's course of conduct taken as a whole between 1995 and the present demonstrates a lack of general fitness, competence and reliability. That course of conduct is a separate violation under 40 P.S. § 310.11(20) and itself would merit sanction. However, all of the respondent's actions will be addressed through the other three counts, and no separate penalty will be imposed for this violation.

An aggravating factor is the respondent's lack of participation in these proceedings. This demonstrates a lack of respect towards the regulator and of the charges brought against him. Without the respondent's participation, it is impossible to determine whether Fleming tacitly acknowledges and accepts the charges against him or passively denies the charges by ignoring them. Lack of remorse or acceptance of responsibility is a substantial aggravating factor. *In re O'Dell*, SC04-09-041 (2007). Remorse and acceptance of responsibility mitigates the seriousness of the conduct. *In re Gottfried*, SC98-06-009 (1999); *In re Walters*, SC03-12-021 (2004). By not participating, Fleming lost the opportunity to explain his actions or otherwise mitigate the charges and instead demonstrates that he does not fully appreciate the importance of this matter.

Scant evidence exists to mitigate the seriousness of the violations because Fleming did not offer mitigating evidence or arguments. However, some mitigation is evident from the undisputed facts. The failure to pay taxes does not relate directly to the business of insurance even if it bears upon his fitness to be in the profession. There is no evidence that it harmed any of Fleming's clients other than as a member of the taxpaying public. There is no indication that Fleming misappropriated another's funds or personal property relative to his personal financial matters. The Department did not allege that Fleming has any other blemishes on his record as an insurance producer, although his concealment of the tax matter from the Department lessens the weight of this otherwise significant mitigating factor because it calls into question the respondent's honesty in reporting conduct. Nonetheless, the apparent lack of prior trouble is taken into consideration.

The Department in its Order to Show Cause and motion for default judgment requested revocation of the respondent's producer licenses, a \$5,000 civil penalty for each violation and restitution to the Department of Revenue in the amount of \$18,381.71⁶ plus other applicable charges according to law. Restitution is appropriate under either the Commissioner's cease and desist authority⁷ or the authority to impose appropriate conditions.⁸ Although the respondent's conduct was serious enough to warrant loss of license and civil penalties, it was not so egregious to warrant imposition of the maximum licensure and monetary penalties.

This case is very similar to one recently decided, *In re Burgunder*, SC10-08-017 (2010). In that case, the respondent failed to pay state income tax over a four-year period, resulting in a tax lien of \$6,965.94 against him. That respondent also

⁶ The Department did not request restitution for the second tax lien in the amount of \$346.29. However, this additional amount was established through the admitted facts and documents in the order to show cause.

⁷ 40 P.S. § 310.91(d)(3).

⁸ 40 P.S. § 310.91(d)(4).

misrepresented to the Department on three license renewal applications that he paid his state income taxes. Like Fleming, the respondent in *Burgunder* failed to respond to the Department's order to show cause or participate in the proceedings. The sanctions imposed in this case will be similar to those imposed in *Burgunder*.

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:
	:	:
Patrick J. Fleming 5035 Chestnut Street Philadelphia, PA 19139	:	Sections 611-A (1), (2), (3), (7), (13) and (20) of the Insurance Department Act of 1921, P.L. 789, No. 285, <i>as amended</i> , (40 P.S. §§ 310.11 (1), (3), (7), (13) and (20)
Respondent	:).
	:	:
	:	Sections 37.46 and 37.47 of the Insurance Department Regulations (31 Pa. Code §§ 37.46 and 37.47)

Docket No. **SC11-02-008**

ORDER

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

1. Patrick J. Fleming shall **CEASE AND DESIST** from the prohibited conduct described in the adjudication.

2. All of the insurance licenses or certificates of qualification of Patrick J. Fleming **ARE SUSPENDED** pursuant to 40 P.S. § 310.91 for a minimum of two (2) years for Count 1, three (3) years for Count 2, and three (3) years for Count 3, with these suspensions to run **concurrently** with each other for a total effective suspension of three (3) years. Additionally, Patrick J. Fleming is prohibited from applying for a certificate of qualification to act as an agent, broker or producer in this Commonwealth for a minimum of three (3) years. Patrick J. Fleming is also prohibited from applying to renew any

license previously held by him in this Commonwealth for a minimum of three (3) years. Patrick J. Fleming 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. Count two: \$2,000.00
- c. Count three: \$1,000.00

for a total of Four Thousand Dollars (\$4,000.00). Payment shall be made by certified check or money order, payable to the Commonwealth of Pennsylvania, directed to: Sharon Fraser, Manager, Bureau of Enforcement, 1227 Strawberry Square, Harrisburg, Pennsylvania 17120.

4. To the extent he has not already done so, Patrick J. Fleming shall pay restitution to the Commonwealth of Pennsylvania Department of Revenue in the amount of \$18,728.00 plus other applicable charges according to law. Compliance with any payment plan agreed to by the Department of Revenue will constitute compliance with this order.

5. In addition to the above restrictions on licensure, no certificate of qualification or other insurance license may be issued or renewed until the said civil penalty and restitution are paid in full.

6. This order is effective immediately.


MICHAEL F. CONSEDINE
Acting Insurance Commissioner