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ADMIN HEARINGS OFFICE

BEFORE THE INSURANCE COMMISSIONER
OF THE
COMMONWEALTH OF PENNSYLVANIA

<p>IN RE:</p> <p>John Giaccio, Jr. 304 Crestview Circle Wallingford, PA 19086</p> <p>South Penns, Inc. 2040 South 13th Street Philadelphia, PA 19148</p> <p>Respondents</p>	<p>: ALLEGED VIOLATIONS:</p> <p>:</p> <p>: Sections 611-A and 641.1-A of the</p> <p>: Insurance Department Act of 1921,</p> <p>: P.L. 789, No. 285, <i>as amended</i> (40 P.S.</p> <p>: §§ 310.11, 310.41a).</p> <p>:</p> <p>: Sections 37.46 and 37.47 of the</p> <p>: Insurance Department Regulations</p> <p>: (31 Pa. Code §§ 37.46 and 37.47)</p> <p>:</p> <p>:</p> <p>: Docket No. SC06-01-021</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 January 26, 2006 directed to John Giaccio, Jr. and South Penns, Inc. (“Mr. Giaccio” or “South Penns” or collectively “the respondents”). The OTSC alleged that the respondents violated the Insurance Department Act¹ and Department regulations.² Specifically, the OTSC alleged that the

¹ Act of May 17, 1921, P.L. 789, No 285, *as amended* 40 P.S. § 310.11 *et seq.*

² 31 Pa. Code §§ 37.46 and 37.47.

DATE MAILED: April 10, 2006

respondents, both Pennsylvania licensed insurance producers, negotiated, solicited and sold automobile insurance policies through various unlicensed individuals employed by South Penns, Inc. and failed to forward premium monies to American Independent Insurance Company.

The OTSC advised the respondents to file an answer in accordance with applicable regulations (1 Pa. Code § 35.37), and further advised them that the answer must specifically admit or deny each of the factual allegations made in the OTSC. The respondents were advised to “set forth the facts and state concisely the matters of law upon which Respondents rely.” They further were 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 respondents by first class mail.

The respondents failed to answer the Department’s Order to Show Cause or otherwise respond to the Administrative Hearings Office. On March 17, 2006, the Department filed a motion for default judgment and served the respondents in accordance with 1 Pa. Code Chapter 33. The motion declared that the OTSC was mailed to the respondents to the last known address of each respondent as kept on file in the Department. The OTSC was claimed and signed for by Mr. Giaccio and by an undetermined individual at the address used for South Penns. The copies of the OTSC sent by first class mail were not returned as undeliverable. However, neither respondent has 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 because the respondents failed to answer both the order to show cause and the 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.

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 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

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.

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

answered the order to show cause and given current case law, these hearing procedures are inapplicable. Furthermore, all factual averments in the OTSC are deemed to be admitted under 1 Pa. Code § 35.37.

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 statutory language providing for a hearing before the imposition of any penalty. The Court held that the statute did not require an evidentiary hearing when a case did not have any factual disputes. 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

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).

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 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 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. When a 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 Mr. Giaccio is a Pennsylvania-licensed insurance producer.

[OTSC ¶ 1]. South Penns is a Pennsylvania corporation, registered with the Department of State and a Pennsylvania-licensed insurance producer. [OTSC ¶ 2]. During all the time relevant to this action, Mr. Giaccio was the only licensed insurance producer associated with South Penns and served as its Designated Licensee (formerly “Qualified Active Officer”). [OTSC ¶ 3]. As the Designated Licensee, Mr. Giaccio is statutorily responsible for South Penns’ compliance with Pennsylvania insurance laws and regulations. 40 P.S. § 310.1.

From 2002 through the present time, South Penns, through various unlicensed individuals employed there, solicited, negotiated and sold automobile insurance policies from its Philadelphia and other locations. [OTSC ¶ 5]. Although Mr. Giaccio is listed as the producer of record for seven (7) insurance transactions known to the Department, he played little or no role in the soliciting, negotiating or sale of these insurance policies emanating from South Penns, except as a signatory where necessary. [OTSC ¶ 9]. Department evidence reveals that these seven (7) transactions are not the only ones sold by unlicensed South Penns employees. [OTSC ¶¶ 6-9].

In addition to allowing unlicensed employees conduct the business of insurance, South Penns and Mr. Giaccio also failed to forward premium monies to American Independent Insurance Company (“American Independent”) between September 2002 and March 2004. [OTSC ¶ 10]. The respondents failed to forward premium monies in the approximate amount or \$7,327.00 collected from six American Independent policyholders. [*Id.*]. As a result, these six policyholders experienced policy lapses and/or cancellations of their American Independent policies as well as Pennsylvania department of Transportation vehicle registration suspensions. [OTSC ¶ 11]. In March 2005 another policy holder gave \$567.00 in cash to someone at South Penns to purchase an insurance policy from American Independent. [OTSC ¶ 12]. The policy subsequently was

cancelled in April, 2005 for non-payment because American Independent did not receive the full premium amount from the respondents. [*Id.*]. Since the initiation of the Department investigation into the seven transactions described above, the respondents have forwarded all premium monies to American Independent and the policies have either been restored or terminated at the insureds' discretion. [OTSC ¶ 13]. The activities described in the OTSC were similar to the unlicensed and premium misappropriation activities which resulted in a disciplinary action concluded by a 2002 Consent Order between the respondents and the Department. [OTSC ¶ 14; Exhibit A].

Consequently the Department has charged in Count I that the respondents' activities violated the provision of the Insurance Department Act which prohibits the knowing acceptance of insurance business which was sold, solicited, or negotiated by an unlicensed person. 40 P.S. § 310.11(11)). Each such action subjects an insurance entity or licensee to a civil penalty of not more than \$5,000.00 for each such action violating this statutory prohibition. 40 P.S. 3310.91(d). The respondents may also be subject to the suspension or revocation of the insurance producers license, an order to cease and desist and any other conditions which the Commissioner deems appropriate. 40 P.S. § 310.91.

Additionally, the Department has charged in Count II that the respondents' actions collectively violated the following sections of the Insurance Department Act which states that a licensee, *inter alia*, shall not . . . :

- (2) Violate the insurance laws or regulations of this Commonwealth. . .
- (4) Improperly withhold, misappropriate or convert money or property received in the course of doing business. . . .
- (7) Use fraudulent, coercive or dishonest practices or demonstrate incompetence, untrustworthiness or financial irresponsibility in the conduct of doing business in this Commonwealth or elsewhere. . . .
- (17) Commit fraud, forgery, dishonest acts or an act involving a breach of

fiduciary duty. . . .

(20) Demonstrate 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(2)(4)(7)(17)(20). The respondents' actions in conducting, or permitting the conducting of insurance business by unlicensed persons and failing to transmit premium funds to an insurer has caused harm to their customers. Taken all together, the undisputed facts in this case also demonstrate that the respondents are not worthy of licensure. 40 P.S. § 310.11(20). Having established that the respondents are 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). 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 the most serious, and are directly connected to the respondents' duties as insurance producers. The seriousness of his violations is reflected in the penalties imposed.

The respondents' 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. 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 respondents in this case cannot be trusted with the pocketbooks and bank accounts of any of those persons and entities with whom they deal.

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 respondents regularly and improperly conducted and permitted to be conducted insurance business by unlicensed individuals, that they withheld significant premium monies from American Independent, and that this action resulted in harm to policyholders who experienced policy lapses or terminations and automobile vehicle registration suspensions.

Additionally, the pattern of behavior at issue in this case is precisely the same as that which was investigated, prosecuted and concluded with a consent order in January 2002. These respondents have shown no regard for Pennsylvania law or for the agency enforcing the law. This illegal conduct also took place during the same time and for the same conduct which subjected the respondents to supervision under the 2002 consent order. Furthermore, the respondents have completely disregarded the current proceedings. In contrast, the respondents have presented no evidence to mitigate the seriousness of their violations.⁶

In its motion for default judgment, the Department requests revocation of the respondents' licenses; a cease and desist order and a maximum civil penalty of \$5,000.00

⁶ The respondents' ultimate payment of the premiums to American Independent after the Department began its investigation is not a mitigating factor. The harm already had been done and the action was taken too late.

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. John Giaccio, Jr. and South Penns, Inc. by their conduct demonstrate current unworthiness to hold insurance producer licenses.

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

IN RE:	: ALLEGED VIOLATIONS:
	:
John Giaccio, Jr.	: Sections 611-A and 641.1-A of
304 Crestview Circle	: the Insurance Department Act of
Wallingford, PA 19086	: 1921, P.L. 789, No. 285, <i>as</i>
	: <i>amended</i> (40 P.S. §§ 310.11,
	: 310.41a).
	:
South Penns, Inc.	: Sections 37.46 and 37.47 of the
2040 South 13 th Street	: Insurance Department
Philadelphia, PA 19148	: Regulations
	: (31 Pa. Code §§ 37.46 and 37.47)
	:
Respondents	: Docket No. SC06-01-021

ORDER

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

1. John Giaccio, Jr. and South Penns, Inc. shall **CEASE AND DESIST** from the prohibited conduct described in the adjudication.
2. All of the insurance licenses or certificates of qualification of John Giaccio, Jr. and South Penns, Inc. **ARE REVOKED**. Additionally, John Giaccio, Jr. and South Penns, Inc. are prohibited from applying for relicensure while any restitution remains unpaid. In the event that John Giaccio, Jr. and South Penns, Inc. are ever relicensed, they

will be subject to a five year supervision period beginning on any date of relicensure.

3. John Giaccio, Jr. and South Penns, Inc. shall **PAY A CIVIL PENALTY** to the Commonwealth of Pennsylvania within thirty (30) days of this order as follows:

a. Count one: \$ 35,000.00

b. Count two: \$40,000.00

for a total of Seventy-five Thousand Dollars (\$75,000.00). 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 John Giaccio, Jr. or South Penns, Inc. until this civil penalty is paid in full.

4. This order is effective immediately.



M. Diane Koken
Insurance Commissioner