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INSURANCE DEPARTMENT

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ADMIN HEARINGS OFFICE
IN RE:

BEFORE THE INSURANCE COMMISSIONER
OF THE
COMMONWEALTH OF PENNSYLVANIA

Jesse James Nepywoda
3057 Richmond Street
Philadelphia, PA 19134-5825

Respondent

: ALLEGED VIOLATIONS:
:
: Article VI-A of the Insurance Department
: Act of 1921, P.L. 789, No. 285, *as*
: *amended* (40 P.S. §§ 310.11(15),
: 310.11(20) and 310.78(b)).
:
: Docket No. SC12-11-008

ADJUDICATION AND ORDER

AND NOW, this 20th day of March, 2013, Michael F. Consedine, 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 November 6, 2012 directed to Jesse James Nepywoda ("Nepywoda" or "the respondent"). The OTSC alleged that Nepywoda violated the Insurance Department Act.¹ Specifically, the OTSC alleged that Nepywoda, a licensed insurance agent, was charged with multiple criminal violations, pled guilty to retail theft, two counts of identity theft and possession of a controlled substance and failed to report either the charges or the convictions to the Pennsylvania Insurance Department.

¹ Act of May 17, 1921, P.L. 789, No 285, 40 P.S. § 310.11(15), 310.11(20) and 310.78(b).

DATE MAILED: March 20, 2013

The OTSC advised Nepywoda 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. Following the filing of the OTSC, a presiding officer was appointed and the appointment order was served on Nepywoda at his last known address by certified and first class mail. The certified mailing was returned by the postal service as "unclaimed" and the first class mailing was returned by the postal authorities as undeliverable.

Nepywoda failed to answer the Department's Order to Show Cause or otherwise respond to the Administrative Hearings Office. On December 11, 2012, the Department filed a motion for default judgment and served Nepywoda in accordance with 1 Pa. Code Chapter 33. The motion declared that notice of the OTSC was published in the Pennsylvania Bulletin on November 17, 2012.² The motion also declared that the OTSC was mailed to the respondent to his last known home address as kept on file in the Department both by certified and first class mail but those copies of the document were returned to the Department as undeliverable. Finally, the motion declared that although not required to do so, the Department over the course of months attempted in good faith and exhausted every reasonable measure to ascertain any other locations or addresses for the respondent without success.

Although the Order to Show Cause was returned to the Department as undelivered, 31 Pa. Code §37.43 provides that "notice of formal hearing sent to the last known address of the agent or broker shall constitute formal legal notice to the agent or broker." The notice was published in the Pennsylvania Bulletin and the Department

² See *Alleged Violation of Insurance Laws; Jesse James Nepywoda; Doc. No. SC12-11-008*, 42 Pa. Bull. 7154 (November 17, 2012).

attempted unsuccessfully to ascertain any other locations or addresses for the respondent after diligent efforts. 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 and order addresses the motion for default judgment and the order to show cause. Factual findings and legal conclusions are contained within the body of this adjudication.

DISCUSSION

This adjudication is issued without scheduling an evidentiary hearing, since Nepywoda 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

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.

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).⁴ Similarly, the statute specifically applicable to the present case⁵ provides for a hearing procedure prior to certain penalties being imposed by the Commissioner. *See* 40 P.S. § 310.91.⁶ 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

⁴ Mailings sent to the respondent's registered address, including the mailings from the hearings office, were returned by the post office as undelivered. However, notice of the alleged violations and requirement to answer the OTSC were contained in the Pennsylvania Bulletin publication. A producer licensed in Pennsylvania must notify the Department of a change in residence or business address within 15 business days of the change. 31 Pa. Code § 37.43. Notice of the formal hearing sent to the last known address constitutes formal legal notice to the producer. *Id.* Thus, the Department complied with the regulatory notice provision. In addition, the Department certified that it exhausted every reasonable measure to obtain an alternate address. Given these circumstances, including the respondent's failure to report his change of address with the Department as required, notice by publication in the Pennsylvania Bulletin satisfied statutory and constitutional requirements for reasonable notice of a hearing and an opportunity to be heard. *See Grimaud v. Department of Envtl. Res.*, 638 A.2d 299 (Pa. Cmwlth. 1994).

⁵ Insurance Department Act, Act of May 17, 1921, P.L. 789 as amended (40 P.S. §§ 1 *et seq.*).

⁶ 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 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.

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 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 Nepywoda was a licensed insurance agent. On April 21, 2012, Nepywoda had criminal charges filed against him for retail theft, identity theft, intentional possession of a controlled substance by a person who is not registered, use/possession of drug paraphernalia, acquiring or obtaining possession of controlled substances by misrepresentation, procure for self/other drug by fraud, procure for self/other drug by forgery, procure for self/other drug by concealing a material fact, and procure for self/other drug by false statement. The respondent failed to notify the Department of these criminal charges or provide the Department with any documentation concerning the charges. On July 16, 2012, Nepywoda pled guilty to one misdemeanor count of retail theft, two misdemeanor counts of identity theft and one misdemeanor count of intentional possession of a controlled substance by a person who is not registered. The respondent did not inform the Department of his conviction of these offenses.

In the present action, Nepywoda is charged with three distinct violations of the Insurance Department Act: 1) committing misdemeanors involving the misuse or theft of money or property belonging to another person in violation of 40 P.S. § 310.11(15); 2) demonstrating lack of worthiness to be an insurance agent in violation of 40 P.S. §

310.11(20); and 3) failing to report the criminal charges or the final disposition of the charges to the Department in violation of 40 P.S. § 310.78(b).

For each of the three counts, the Commissioner has authority to impose remedial action against the respondent, including suspension or revocation of his licenses as well as imposing a penalty of up to \$5,000.00 per violation. 40 P.S. § 310.91. In the present case, the admitted facts support sanctions for each of the charges against the respondent. With the respondent 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 Nepywoda'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). The underlying course of conduct in the present case is of a serious nature, and connected to Nepywoda's duties as an insurance agent. The underlying convictions involved theft of property and identity. By definition, agents and brokers have extensive personal contact with applicants and insureds. The applicants and insureds entrust financial and personal matters to the agent, and rely upon the agent's integrity. An agent who has recently inflicted financial and personal harm upon others is incapable of the trust necessary in the profession. Simply

put, Nepywoda at this time cannot be trusted with the pocketbooks, bank accounts and personal information of his customers.

In addition, the respondent's failure to report the charges and subsequent convictions to the Commonwealth's regulator also breached the respondents' 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.

No evidence exists to mitigate the seriousness of the violations. Nepywoda did not offer mitigating evidence or arguments.

The Department in its Order to Show Cause requested that the Commissioner impose a \$5,000.00 fine per violation, revoke all licenses, prohibit the respondent from future licensing for a minimum period of five years and grant other appropriate relief. The Department also requested that the respondent be barred from future licensing until all the terms of the Commissioner's Order are fulfilled and that if the respondent becomes relicensed at any future date, his license be subject to supervision for a minimum period of at least five years from the date of any such future licensure. In its motion for default judgment, the Department asks that the Commissioner enter a default judgment, deem all relevant facts and documents in the OTSC admitted, order that the respondent cease and desist from the alleged activities, impose a civil penalty of up to \$5,000 per violation and grant any other appropriate relief.

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

BEFORE THE INSURANCE COMMISSIONER
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IN RE:	:	ALLEGED VIOLATIONS:
	:	
Jesse James Nepywoda	:	Article VI-A of the Insurance Department
3057 Richmond Street	:	Act of 1921, P.L. 789, No. 285, <i>as</i>
Philadelphia, PA 19134-5825	:	<i>amended</i> (40 P.S. §§ 310.11(15),
	:	310.11(20) and 310.78(b)).
Respondent	:	
	:	Docket No. SC12-11-008

ORDER

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

1. Jesse James Nepywoda shall **CEASE AND DESIST** from the prohibited conduct described in the adjudication.
2. All of the insurance licenses or certificates of qualification of Jesse James Nepywoda **ARE REVOKED** for a minimum of five (5) years pursuant to 40 P.S. 310.91 for each of three violations with these revocations to run **consecutively** with each other for a total minimum period of fifteen (15) years. Additionally, Jesse James Nepywoda is prohibited from applying for a certificate of qualification to act as a producer in this Commonwealth for a minimum of fifteen (15) years. Jesse James Nepywoda is also prohibited from applying to renew any certificate of qualification previously held by him in this Commonwealth for a minimum of fifteen (15) years.
3. Should the respondent ever become licensed at any future date, his license shall be subject to supervision for five (5) years from the date of any relicensure during

which time the respondent's certificates and licenses may be immediately suspended by the Insurance Department following its investigation and determination that: (i) any other term of this order has not been complied with; or (ii) any complaint against the respondent is accurate and a statute or regulation has been violated.

4. This order is effective immediately.


MICHAEL F. CONSEDINE
Insurance Commissioner