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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:
: :
Shawn P. Kendrick : Section 604 of the Insurance
2444 East 26th Street : Department Act of 1921, P.L. 789, No.
Erie, PA 16510 : 285, *as amended* (40 P.S. §§ 234).
: :
Respondent : Sections 37.46, 37.47, 37.48 of the
: Insurance Department Regulations
: (31 Pa. Code §§ 37.46, 37.47, 37.48)
: :
: Docket No. SC04-03-022

ADJUDICATION AND ORDER

AND NOW, this 21st day of June, 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 19, 2004 directed to Shawn P. Kendrick ("Kendrick" or "the respondent"). The OTSC alleged that Kendrick violated the Insurance Department Act¹ and Department regulations.² Specifically, the OTSC alleged that Kendrick, a licensed insurance agent, pled guilty to three felony counts of

¹ Act of May 17, 1921, P.L. 789, No 285, 40 P.S. § 234.

² 31 Pa. Code §§ 37.46, 37.47, 37.48.

DATE MAILED: June 21, 2004

forgery, theft by deception and receiving stolen property but failed to inform the Department and denied the pending charges when he filed his "certificate of qualification application."

The OTSC advised Kendrick 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 Kendrick by first class mail.

Kendrick failed to answer the Department's Order to Show Cause or otherwise respond to the Administrative Hearings Office. On May 11, 2004, the Department filed a motion for default judgment and served Kendrick 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 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, because Kendrick failed to answer the order to show cause or motion for default judgment. As a

result, no factual disputes exist in this case. All factual averments in the OTSC are deemed to be admitted under 1 Pa. Code § 35.37. 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. § 279.⁵ However, given that the respondent has not answered the order to show cause and given current case law, these hearing procedures

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. §§ 1-321).

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 such hearing or failure of the accused to appear at such hearing, the Insurance Commissioner shall impose such of the above penalties as he deems advisable.

40 P.S. § 279(b).

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 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 the language contained in 2 Pa.C.S. § 504 and 40 P.S. § 47.⁶ 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 re Young*, SC98-08-027 (2000); *In re Jennings*, SC99-10-001 (2001); *In re Warner*,

⁶ The operative language is identical to that in 40 P.S. § 279 except reading "such penalties" instead of "such of the above penalties."

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, no factual matters need to be addressed 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 Kendrick was a licensed insurance agent who was arrested and charged on September 30, 2001 with 12 counts of forgery, theft by deception, unlawful taking, and receiving stolen property. [OTSC ¶3; Exhibit A]. On January 29, 2002, Kendrick filed with the Insurance Department a "certificate of qualification application." [OTSC ¶5; Exhibit B]. In that application the respondent denied that he had any currently pending misdemeanor or felony charges filed against him. [OTSC Exhibit B]. Thereafter on September 16, 2002, Kendrick pled guilty to three felonies of forgery, theft by deception and receiving stolen property. [OTSC ¶8; Exhibit C]. Kendrick did not notify the Department of this event. [OTSC ¶10].

As a result of these actions, the Department has charged Kendrick with violating

the Insurance Department Act because he demonstrated lack of worthiness to be an insurance agent. 40 P.S. § 234. The Department may deny an agent's application for a license if that agent has pled guilty to criminal conduct which relates to his suitability to engage in the business of insurance. *Id.*

In this case Kendrick pled guilty to crimes including forgery, theft by deception and receiving stolen property. All are felonies. 18 Pa. C.S.A. § 106. These crimes reveal Kendrick's unsuitability to engage in the business of insurance. Furthermore, when an agent provides misleading answers to application questions the Department may deny the application. 40 P.S. § 234; 31 Pa. Code § 37.46. The Department may also deny an application when an agent fails to comply with the requirement that a felony conviction must be reported to the Department within 10 days. 31 Pa. Code § 37.48. Kendrick has demonstrated his unworthiness of licensure by denying the existence of pending charges when he filed an application with the Department and failing to inform the Department of his guilty plea.

For these actions, the Commissioner has authority to impose remedial action against the respondent, including suspension or revocation of his certificate of qualification. Section 639 of the Insurance Department Act (40 P.S. § 279) provides for the imposition of these remedial actions "upon satisfactory evidence of such conduct that would disqualify the agent or broker from initial issuance of a certificate of qualification under section 604" 40 P.S. § 279(a). Section 604⁷ authorizes the issuance of a certificate of qualification for an insurance agent when the Insurance Department "is satisfied that the applicant is worthy" of such certification. Furthermore, "[o]nce a certificate is issued, the certificate holder is presumed worthy to secure additional specific lines of authority under the certificate unless the department files an action to suspend or revoke or refuse to renew the certificate pursuant to section 639." 40 P.S. §

⁷ 40 P.S. § 234.

234.

In other words, penalties may be imposed if the agent or broker is determined to be untrustworthy or professionally unfit. In the present case, the admitted facts support sanctions. Kendrick's crimes of forgery, theft by deception and receiving stolen property demonstrate a lack of trustworthiness necessary in the profession.

Additionally, Kendrick answered "no" to the application question "[h]ave you ever been convicted or pled nolo contendere (no contest) to any misdemeanor or felony or currently have pending misdemeanor or felony charges filed against you." He made this assertion even though 12 felony charges were pending against him at the time. Such falsification on an application directed to the Insurance Department makes Kendrick unworthy of licensure. This particular offense goes to the heart of the requirement that insurance agents be trustworthy and reliable in their work with the insurance buying public. If he is dishonest with the regulator, then Kendrick cannot be entrusted with the welfare of individuals he purports to serve. He is therefore unfit to hold an insurance license.

PENALTIES

The Commissioner may suspend or revoke a license for conduct violating certain provisions of the Insurance Department Act, including those provisions violated by Kendrick's conduct. 40 P.S. § 279(a)(1). Each action violating a provision specified in section 279 subjects the actor to a maximum five thousand dollar civil penalty. 40 P.S. § 279(a)(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 nature. This seriousness is reflected in the penalties imposed. Kendrick's infliction of financial harm on another evidences a moral turpitude which is antithetical to the trustworthiness required in the profession. 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 harm upon another is incapable of the trust necessary in the profession. Simply put, Kendrick at this time cannot be trusted with the pocketbooks, bank accounts and personal information of his customers.

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

The Department in its Order to Show Cause requested that Kendrick's license be revoked and that he be ordered to pay a \$5,000.00 penalty for each of his underlying convictions, failure to report the convictions to the Department and failure to disclose the pending charges on his certificate of qualification application. In its motion for default judgment, the Department asks that Kendrick's license be revoked for a minimum of five years and that he be subject to a civil penalty of \$15,000.00 (\$5,000.00 for each of his three violations). The Department also asks that no license be re-issued to Kendrick prior to his payment of any monetary penalty.

Considering the facts in this matter, the applicable law, and the seriousness of the conduct, 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 certificate or license upon finding that an agent or a broker has engaged in conduct which would disqualify him from initial issuance of a certificate or a license.
3. Unworthiness to hold a license may be established by criminal 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 agent's conduct as well as mitigating and aggravating factors.
5. Agents are held to a high degree of professionalism and must exercise good judgment.
6. Agents on the front line dealing with the insurance-buying public must avoid conduct demonstrating a disregard for regulations which protect those consumers.
7. Shawn P. Kendrick by his conduct demonstrates current unworthiness to hold an insurance license.
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:

Shawn P. Kendrick
2444 East 26th Street
Erie, PA 16510

Respondent

: ALLEGED VIOLATIONS:

:
: Sections 604 of the Insurance
: Department Act of 1921, P.L.
: 789, No. 285, *as amended* (40
: P.S. §§ 234).

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: Sections 37.46, 37.47, 37.48 of
: the Insurance Department
: Regulations (31 Pa. Code §§
: 37.46, 37.47, 37.48)

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: Docket No. **SC04-03-022**

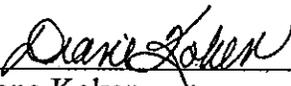
ORDER

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

1. All of the insurance licenses or certificates of qualification of Shawn P. Kendrick **ARE REVOKED** for a minimum of five (5) years pursuant to 40 P.S. § 279. Additionally, Shawn P. Kendrick is prohibited from applying for a certificate of qualification to act as an agent, broker or producer in this Commonwealth for a minimum of five (5) years. Shawn P. Kendrick is also prohibited from applying to renew any certificate of qualification previously held by him in this Commonwealth for a minimum of five (5) years.

2. Shawn P. Kendrick shall pay a civil penalty of \$15,000.00 to the Commonwealth of Pennsylvania as within thirty (30) days of this order. 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.

3. This order is effective immediately.



M. Diane Koken
Insurance Commissioner