ORDER NO.: E17-30

STATE OF NEW JERSEY
DEPARTMENT OF BANKING AND INSURANCE

OAL DOCKET NO.: BKI-13459-12
AGENCY DOCKET NO.: E12-83

RICHARD J. BADOLATO, COMMISSIONER, NEW JERSEY DEPARTMENT OF BANKING AND INSURANCE, Petitioner, v. PHILLIP G. EDWARDS Respondent.	)	FINAL DECISION AND ORDER

This matter comes before the Commissioner of Banking and Insurance ("Commissioner")[1] pursuant to the authority of N.J.S.A. 52:14B-1 et seq., N.J.S.A. 17:1-15, the New Jersey Producer Licensing Act of 2001, N.J.S.A. 17:22A-26 to -57 ("Producer Act"), and all powers expressed or implied therein, for the purposes of reviewing the March 28, 2014 Order for Partial Summary Decision ("PSD") of Administrative Law Judge Tahesha L. Way ("ALJ Way"), which granted in part and denied in part a Motion for Summary Decision brought by the Department of Banking and Insurance ("Department"), and the December 19, 2016 Initial Decision ("December 19, 2016 Initial Decision") of Administrative Law Judge Jeffery A. Gerson ("ALJ Gerson"), (collectively referred to as the "Initial Decision").

In the PSD, ALJ Way granted summary decision to the Department and against Respondent Phillip G. Edwards ("Respondent") on Counts One, Four, Six, and Seven.

[1] Pursuant to R. 4:34-4, Commissioner Richard J. Badolato has been substituted as the current Commissioner in the caption.

In the December 19, 2016 Initial Decision, ALJ Gerson found the Respondent in violation of Counts Two and Five. ALJ Gerson recommended: the revocation of the presently expired license of the Respondent; the imposition of civil penalties against the Respondent in the amount of $10,000; the ordered reimbursement by the Respondent to Clara Lytle ("C. Lytle") in the amount of $4,227[2] and the reimbursement of the Department's costs for the investigation in the amount of $475. ALJ Gerson did not find the Respondent's conduct in violation of Count Three.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On July 31, 2012, the Department issued the Order to Show Cause No. E12-83 ("OTSC") against the Respondent, which sought to revoke his insurance producer license, and impose civil monetary penalties, reimbursement of funds to Clara Lytle, and costs of investigation for alleged violations of the Producer Act. In the OTSC, the Department alleges that the Respondent engaged in the following activities in violation of the insurance laws of this State:

> Count One: The Respondent failed to return approximately $4,226.18 in premiums to the insureds or forward same to Old Line Life Insurance Company of America a/k/a AIG American General ("AIG") within five days, in violation of N.J.S.A. 17:22A-40a(2) and (8), and N.J.A.C. 11:17C-2.2(a) and (b);
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> Count Two: The Respondent misappropriated premium payments in the amount of $4,226.18, in violation of N.J.S.A. 17:22A-40a(2)[3], (4), (8), and (16), and N.J.A.C. 11:17C-2.1(a) and (b);
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> Count Three: The Respondent commingled premium funds with his own personal funds, or the funds of unrelated insureds, in

[2] In the Initial Decision, ALJ Gerson determined restitution was due in the amount of $4,227. The OTSC provides that the Respondent misappropriated $4,226.18. The documents submitted in evidence reflect the amount due as $4226.18. See Respondent's Brief in Opposition to Petition's Motion for Summary Decision, Exhibit A and Exhibit C. This is the amount that will be referenced throughout this Final Decision and Order

[3] The OTSC provides that the Respondent's actions, as alleged in Count Two of the OTSC, are a violation of "N.J.S.A. 17:22A-40(2):" however, this appears to be a typographical error as the correct citation is N.J.S.A. 17:22A-40a(2). For clarification purposes, the correct statutory reference will be referred to throughout this Final Decision and Order.

violation of N.J.S.A. 17:22A-40a(2), (4), (8), and (16), N.J.A.C. 11:17C-2.1(a) and (b) and N.J.A.C. 11:17C-2.3(i);

Count Four: The Respondent's checks for the payment of premiums did not have the words "Trust Account" on them, in violation of N.J.S.A. 17:22A-40a(2) and (8) and N.J.A.C. 11:17C-2.3(b);

Count Five: The Respondent continued to collect premiums from the insureds after his insurance producer license expired on December 31, 2005[4], and thus engaged in the unlicensed business of insurance, in violation of N.J.S.A. 17:22A-29 and N.J.S.A. 17:22A-40a(2), (8), and (16);

Count Six: The Respondent destroyed his insurance books and records, in violation of N.J.A.C. 11:17C-2.5 and N.J.A.C. 11:17C-2.6; and

Count Seven: The Respondent failed to produce his insurance books and records as requested by the Department, pursuant to the Department's Subpoena No. 09-99, in violation of N.J.S.A. 17:22A-45a[5] and N.J.A.C. 11:17C-2.6(b).

The Respondent filed an Answer to the OTSC on or about October 1, 2013, wherein the Respondent denied all of the allegations set forth and requested an administrative hearing. Thereafter, the Department transmitted the matter as a contested case with the Office of Administrative Law ("OAL"), pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

On September 5, 2013, the Department filed a Motion for Summary Decision. On October 28, 2013, the Respondent filed a brief in Opposition to said Motion. By letter brief

[4] The OTSC and the Initial Decision state that the Respondent was licensed until December 31, 2005. However, a record of the Respondent's licensing activity reflects that his insurance producer license was active until July 31, 2005. See Certification of Daxesh Patel ("Patel Cert.") attached to the Department's Motion for Summary Decision at ¶4 and Exhibit A. For clarification purposes, the date of the Respondent's producer license expiration will be referred to as July 31, 2005 throughout this Final Decision and Order.

[5] The OTSC provides that the Respondent's actions, as alleged in Count Seven of the OTSC, are a violation of "N.J.S.A. 17:22A:45a;" however, this appears to be a typographical error as the correct citation is N.J.S.A. 17:22A-45a. For clarification purposes, the correct statutory reference will be referred to throughout this Final Decision and Order.

dated November 4, 2013, the Department submitted its reply to the Respondent's Opposition brief.

On March 28, 2014, ALJ Way issued the PSD, granting the Department's Motion for Summary Decision as to Counts One, Four, Six, and Seven of the OTSC. The ALJ, however, denied the Department's Motion for Summary Decision as to the issues of the misappropriation of funds (Count Two), the commingling of funds (Count Three) and whether the Respondent engaged in the business of insurance after the expiration of his insurance producer license (Count Five). On April 14, 2014, the Respondent filed Exceptions with the Department. By letter dated April 15, 2014, the Respondent was notified that the Exceptions would not be considered at that time, but that these and any other Exceptions submitted would be considered prior to the issuance of the Final Decision and Order. In November 2014, ALJ Way retired and this matter was reassigned to ALJ Gerson.

A hearing was held on July 10, 2015, before ALJ Gerson to determine the three counts that were left unresolved by the PSD. During the hearing, ALJ Gerson heard testimony from Anne Dwyer, a former employee at AIG's Audit Investigation Group, on behalf of the Department, and from the Respondent. The record was closed on or about July 29, 2015, after the Respondent submitted tax returns for 2012, 2013, and 2014, as requested by ALJ Gerson in order to determine the Respondent's ability to pay monetary penalties in this matter.

In the December 19, 2016 Initial Decision, ALJ Gerson found the Respondent had misappropriated funds (Counts Two) and engaged in the business of insurance without a license (Count Five). ALJ Gerson found that the Department did not establish that Respondent commingled funds (Count Three). ALJ Gerson recommended that the Respondent's presently expired insurance producer license be revoked, and civil penalties be assessed against the

Respondent in the amount of $10,000 (calculated at $2,000 per count), restitution be paid to C. Lytle in the amount of $4,227[6] and that he reimburse the Department for all costs relating to the investigation, totaling $475.

By letter dated December 27, 2016, the Respondent requested an extension of time to allow him to prepare Exceptions to the Initial Decision. His request was granted on January 6, 2017, and he was provided an extension until January 16, 2017. On January 3, 2017, the Department received Exceptions from Deputy Attorney Deputy Adam B. Massef. By letter dated January 13, 2017, the Department informed the Respondent that his previous attorney, James Lisa, Esq. had submitted Exceptions to the March 28, 2014 Order of Partial Summary Decision on April 9, 2014. The Department advised the Respondent that these Exceptions would be considered in the issuance of the Final Decision absent his objection. The Department requested any written objections be submitted by January 20, 2017. On January 19, 2017, the Respondent submitted a second request for an extension of 45 days to submit Exceptions. The Respondent's request for an additional 45 days to file Exceptions was denied, but the Respondent was provided with an additional extension of time until January 27, 2017, with the Department's reply to the Respondent's Exceptions due on February 1, 2017. The Respondent did not file additional Exceptions by the January 27, 2017 deadline. On January 31, 2017, the Commissioner received Exceptions on behalf of the Department, in reply to the April 14, 2014 Exceptions filed by the Respondent.

ALJ WAYS'S FINDING OF FACT, LEGAL ANALYSIS, AND CONCLUSIONS

Pursuant to N.J.A.C. 1:1-12.4(b), ALJ Way held that summary decision may be rendered in an administrative proceeding if the pleadings, discovery, and affidavits "show that there is no genuine issue as to any material fact." PSD at 3. Further, ALJ Way determined that the standard

[6] See Footnote 2.

under N.J.A.C. 1:1-12.5(b) is essentially the same as R. 4:46-2, which governs a motion for summary judgment in civil litigation matters. Ibid. (citing Conti v. Bd. Of Educ. Of Newark, 286 N.J. Super. 106, 121 (App. Div. 1995), certif. denied 145 N.J. 372 (1996)). ALJ Way noted that the standard for evaluating a motion for summary judgment was modified in Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). Id. at 3. Further, ALJ Way provided that:

> [u]nder this standard, a determination whether there exists a "genuine issue" of material fact that preludes summary judgement requires the motion judge to consider the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged dispute issue in favor of the non-moving party.
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> [Id. at 3-4.]

ALJ Way also held that the conduct of insurance producers in New Jersey is governed by the Producer Act, N.J.S.A. 17:22A-26 et seq. Id. at 4. Moreover, ALJ Way stated that N.J.S.A. 17:22A-40[7] authorizes the Commissioner to refuse to issue or renew a license; or revoke or suspend a license for various reasons. Ibid.

Based on this standard, ALJ Way found the following relevant facts in granting summary decision. The Respondent was previously licensed as a resident insurance producer in New Jersey until July 31, 2005. Id. at 2. The Respondent served as an insurance producer for AIG insurance policies that were held by Vincent Lytle ("V. Lytle"), policy number 2240101L, and James Lytle ("J. Lytle"), policy number 2440102L. Ibid. Both V. Lytle and J. Lytle's policies named their mother, Clara Lytle ("C. Lytle"), as the beneficiary. Ibid.

[7] ALJ Way inadvertently cited to the prior Producer Act at N.J.S.A. 17:22A-17.

The ALJ found that in a letter dated September 12, 2006, C. Lytle informed AIG she had recently learned that V. Lytle's policy was cancelled in 2004 due to non-payment of premiums.[8] Ibid. The ALJ further found that AIG had cancelled J. Lytle's policy on September 19, 2004, for non-payment of premiums. Ibid. However, C. Lytle maintained that she had been making payments in the total amount of $120 per month directly to the Respondent for both insurance policies, which should have been remitted to her insurance provider, AIG. Ibid. On May 20, 2007, AIG cancelled V. Lytle's policy for non-payment of premiums. Ibid. ALJ Way noted that at all times relevant, the Respondent continued to collect premiums from both of these polices and continued to do so after his insurance producer license expired on July 31, 2005. Ibid.

The ALJ also found that, on August 12, 2008, the Department requested that the Respondent undergo an Examination Under Oath ("EUO") and provide documentation regarding the aforementioned policies, but the Respondent failed to appear. Id. at 2-3. On July 14, 2009, the Department subpoenaed the Respondent to appear for another EUO, which was scheduled for July 30, 2009. Ibid. This time the Respondent appeared but without the requested documents. Ibid. By way of correspondence dated September 1, 2009, the Respondent again advised the Department that he destroyed the majority of his insurance documents in 2006. Ibid.

Count One: Failure to Remit Premiums within Five Days

Count One of the OTSC alleges that the Respondent collected $8,015 from C. Lytle between 1999 and 2006 for premium payments on two life insurance policies that named C. Lytle as sole beneficiary. PSD at 2. Of the amount collected, only $3,788.82 was remitted to

[8] While ALJ Way finds that C. Lytle was made aware that V. Lytle's insurance policy was cancelled in 2004, C. Lytle's letter to AIG also provides that she was informed "that not only was the above policy [2440101L] in arrears but that my policy 2440102L was cancelled in 2004." See Certification of Anne Dwyer ("Dwyer Cert.") attached to the Department's Motion for Summary Decision at Exh. D. Policy Number 2440101L is V. Lytle's policy, while 2440102L is J. Lytle's policy. As such, C. Lytle's letter provides evidentiary support for the fact that J. Lytle's policy was cancelled in 2004 and V. Lytle's policy was in arrears.

AIG in a timely manner. Id. at 5. The remaining monies (totaling $4,226.18) were not returned to C. Lytle or remitted to AIG. Ibid. This is in violation of N.J.A.C. 11:17C-2.2(a) and (b), which require an insurance producer to remit all premium funds to the insurer or other insurance producer within five business days after the receipt of the funds unless otherwise permitted by a contract with the insurer or by written contract with the insured. Ibid. In addition, these actions are in violation of N.J.S.A. 17:22A-40a(2) and (8). Id. at 4.

ALJ Way found that the Department maintained that not only did the Respondent fail to remit numerous premiums within the requisite five business days of receipt, but there did not exist any contract(s) between AIG, the Lytles, and the Respondent, permitting the Respondent to retain premiums beyond these five days. Id. at 5. The Respondent maintained that an implied agreement existed between himself and C. Lytle permitting him to hold the premiums until he could obtain insurance[9] for C. Lytle and that a "flexible payment plan" was in place. The Respondent argued that this implied agreement excused the five day remittance requirement. Id. at 4-5. Furthermore, the Respondent asserted that AIG had inaccurately reported the amounts it claimed to have received. Ibid.

ALJ Way granted summary decision, finding that the Respondent had failed to remit premium payments within the required five business day period. Ibid. The ALJ noted that the "creative financing" and "implied agreement" the Respondent described did not constitute a written agreement as required by law. Ibid. In addition, any dispute as to the accuracy of money

[9] The Respondent stated that C. Lytle and her sons were insured through Midland National Life in 1998. Due to financial hardship, the policy lapsed, and in 1999, C. Lytle requested that the Respondent find a new life insurance carrier for her family. Due to various factors, the Respondent stated that he was unable to find coverage for C. Lytle, but was able to secure life insurance coverage for her two sons through Old Line Life Insurance Company. Old Line Life Insurance Company was eventually acquired by AIG and these policies from 1999 are the same policies at issue in this matter. The Respondent claims that he and C. Lytle had an "informal escrow like" agreement where she would pay him $120 per month, $60 for her policy and $60 for the policies of her sons. Once he found a company that would provide her with coverage, that portion of the payments would be used to pay premiums of this new third policy. He tried to secure a policy for C. Lytle through several companies, but she was denied. See Respondent's Brief in Opposition at Exhibit 3D.

received by AIG was inconsequential because there is adequate proof of a clear discrepancy between the premium monies paid to the Respondent and remitted to AIG. Ibid.

Count Two: Misappropriation of Funds

Count Two of the OTSC alleges the actions described above in "Count One" are also in violation of N.J.S.A. 17:22A-40a(4) which require that an insurance producer not withhold, misappropriate or convert any monies or properties received in the course of conducing insurance business. Id. at 4. In addition, Count Two alleges violations of N.J.S.A. 17:22A-40a(8) and (16). Ibid.

In PSD, ALJ Way denied a finding of summary decision for Count Two and found that the Department did not properly establish the Respondent had misappropriated funds in a fraudulent, coercive, or untrustworthy manner. Id. at 5. She noted the Department assumed that because the Respondent did not remit payments to AIG in a timely manner, misappropriation is established. ALJ Way noted the necessity for additional witness testimony to determine what had occurred, creating a genuine issue of material fact. Ibid.

Count Three: Commingling of Funds

Count Three of the OTSC alleges that when the Respondent failed to remit premiums to AIG or return the funds to C. Lytle in a timely manner, as described above in "Count One," he commingled the Lytle's premiums with his own personal funds. Ibid. This is alleged to be in violation of: N.J.S.A. 17:22A-40a(2), (8), and (16); N.J.A.C. 11:17C-2.1(a) and (b); and N.J.A.C. 11:17C-2.3(i). Ibid.

Furthermore, ALJ Way noted that the Department argued that it is evident the Respondent commingled funds by using checks drawn from his personal bank account, from that of another account under the name "Gladstone P. Edwards," and from unrelated persons to make premium payments to insurance carriers. Meanwhile, the Respondent maintained that he did not

commingle funds but used the "Gladstone P. Edwards" account to pay the premiums at issue. The Respondent further stated that the "Gladstone P. Edwards" account was a trust account maintained for the purposes of managing client funds and not a personal account. ALJ Way noted the Respondent sought to supplement discovery with evidence of this nature, but was denied due to the extensive discovery period previously allowed. Id. at 6.

ALJ Way denied summary decision as to Count Three because an evidentiary hearing was necessary to resolve whether the account at issue was in fact a trust account and to determine the relationship between the unrelated individuals whose checks were used to pay premium payments on behalf of the insured to AIG. Ibid.

Count Four: Failure to Use Trust Account Checks

Count Four of the OTSC alleges that the Respondent used checks to pay insurance premiums that did not have the required "Trust Account" designation as required by N.J.A.C. 11:17C-2.3(b), and N.J.S.A. 17:22A-40a(2) and (8). Id. at 6. ALJ Way noted that the Respondent did not dispute the lack of "Trust Account" designation on the checks, and that one of the premium checks specified "Trust Account." Ibid. Accordingly, ALJ Way concluded that there were no material disputed facts regarding the lack of "Trust Account" designation on the subject checks, and granted summary decision as to Count Four. Ibid.

Count Five: Engaging in the Business of Insurance Without a License

Count Five of the OTSC alleges that the Respondent violated N.J.S.A. 17:22A-29 by continuing to engage in the business of insurance after his license expired. Id. at 7. Specifically, N.J.S.A. 17:22A-29 prohibits a person from selling, soliciting, or negotiating insurance in New Jersey if unlicensed to do so. Ibid. "Sell" is defined as "to exchange a contract or policy of insurance by any means, for money or its equivalent, on behalf of an insurer." Ibid. "Solicit" is

defined as "attempting to sell insurance or asking or urging a person to apply for a particular kind of insurance from a particular insurer." Ibid. Finally, "negotiate" is defined as "the act of conferring directly with or offering advice to a purchaser or prospective purchaser of a particular contract or policy of insurance provided that the person engaged in that act either: sells insurance or obtains insurance from insurers for purchasers." Ibid. See, N.J.S.A. 17:22A-28.

ALJ Way noted that the Department provided documentary evidence that shows the Respondent received at least 17 premium payments from C. Lytle and spoke to AIG to reinstate the insured's policies after they lapsed following his license expiration in 2005. Ibid. ALJ Way noted the Respondent did not challenge the facts or documentary evidence provided by the Department, rather, he argued that these actions do not comport with "engaging in the business of insurance." Ibid. The Respondent contended he was acting as a "friend" to C. Lytle and only mailed her premiums to AIG on her behalf, which cannot be considered selling insurance, exchanging insurance contracts, negotiating any insurance or advising the Lytles. Ibid. Furthermore, the Respondent argued that he never collected any commissions or profits from any premiums made after his license expiration and only attempted to reinstate the policies solely to correct a past issue. Ibid.

ALJ Way concluded that there was a genuine issue of fact that warranted an evidentiary hearing to determine whether selling, soliciting, or negotiating occurred and to determine the nature of the Respondent's conversations with AIG and declined granting summary decision on this issue. Id. at 8.

Count Six: Unlawful Destruction of Books and Records

Count Six of the OTSC alleges that the Respondent failed to maintain accurate and detailed records of all insurance related transactions for at least five years after the termination of

coverage, as required by N.J.A.C. 11:17C-2.5 and N.J.A.C. 11:17C-2.6. Id. at 8. The ALJ noted that the Department argued that the Respondent admitted in his September 1, 2009 letter that he destroyed his insurance documents and records after July 31, 2006.[10] Ibid. However, the Respondent argued that all insurance related transactions at AIG and Independence National Bank are in existence. Ibid. He maintained that he was adhering to standard business practices of that time in good faith, which require the insurance producer to keep only operative documents used to secure and commence life insurance policies, such as the initial application. Ibid.

ALJ Way granted summary decision regarding the unlawful destruction of books and records. The ALJ found that the Respondent, as a former insurance producer, should have been abreast of current maintenance requirements for his insurance books and records, with full awareness that this requirement encompassed more than maintaining the initial application. Id. at 9. Furthermore, the ALJ noted the Respondent acknowledged that he had destroyed insurance documents within the last five years, including those that were a product of his professional relationship with C. Lytle. Id. at 8-9.

Count Seven: Failure to Comply with Department's Subpoena

Count Seven of the OTSC alleges that the Respondent failed to comply with the Department's Subpoena No. 09-999, in violation of N.J.S.A. 17:22A-45a and N.J.A.C. 11:17C-2.6(b). Id. at 8. ALJ Way noted that the Department argued the Respondent admitted, both in his meeting with the Department and in his September 1, 2009 letter, that he failed to produce records in response to the Department's subpoenas. Ibid. The Respondent indicated that the

[10] In his September 1, 2009 letter, the Respondent stated: "In regards to the documents requested by the Department of Insurance's subpoena in 4/08 and 7/09, due to the fact that in 2006 and I got out of the insurance business and felt at the time I would not need all those files, I shred most of them and was only able to provide what I could to the Department of Insurance." See Respondent's Brief in Opposition at Ex. 3D.

requested books and records could not be produced within the provided timeframe due to adherence to standard business practices, thus he could only produce what was practicable. Ibid.

ALJ Way granted summary decision regarding the Respondent's failure to comply with the Department's Subpoena. Id. at 9. The Respondent was required via an August 12, 2008 subpoena to appear and provide relevant insurance books and records as requested by the Department, and he failed to do so. Id. at 8. Another subpoena was issued in July 2009, in response to which the Respondent appeared without any documents. Ibid. ALJ Way found that the Respondent's excuse that he could not produce records was of no consequence, especially given that he failed to appear initially and then was afforded another year to procure the requested information. Id. at 9.

ALJ Way reserved any penalty assessment for the conclusion of the matter after a hearing on the remaining counts. Ibid.

ALJ GERSON'S FINDINGS OF FACT, LEGAL ANALYSIS, AND CONCLUSIONS

On July 10, 2015, ALJ Gerson presided over a hearing to address the three counts left unresolved by the PSD: whether the Respondent misappropriated premium payments (Count Two), whether the Respondent commingled premium payment funds with his own (Count Three), and whether the Respondent engaged in the business of insurance after his license had expired (Count Five). December 19, 2016 Initial Decision at 2. Testimony was presented by Anne Dwyer ("Dwyer"), a former employee of AIG's Insurance Audit Investigation Group. Id. at 2-3. In addition, the Respondent testified on his own behalf. Ibid. After hearing the testimony and considering the documentary evidence submitted, together with the findings of the PSD, ALJ Gerson found the following.

Count Two: Misappropriation of Funds

ALJ Gerson found that the documentary evidence in this matter conclusively demonstrated the Respondent collected $8,015 and only paid $3,788.82 to the AIG for the policies at issue. Ibid. Further, ALJ Gerson found that the Respondent's testimony offered no coherent explanation as to what had happened to the remaining $4,226.18 of premium payments collected, and that the Respondent failed to address the documentary and testamentary evidence as to the total sums collected and remitted. Id. at 3. The Respondent's only explanation was that he had destroyed all his records. Id. at 4. ALJ Gerson characterized the Respondent's testimony as "unintelligible, confused and inconsistent, offering little beyond babble and double talk in an attempt to refute the clear documentation of his wayward conduct." Ibid. In conclusion, ALJ Gerson found the Respondent's inability to account for the premium payments made by C. Lytle to him and not forwarded to the insurance company is a clear indication of misappropriation. Ibid.

Count Three: Commingling of Funds

ALJ Gerson stated that at the July 10, 2015 hearing, Dwyer produced evidence of a bank account in the name of "Gladstone Edwards" that was not labeled a trust account and was used to make payments on insurance policies. Id. at 3. The Respondent testified that he could not recall whether he used the account to hold funds for any other customers. Ibid. ALJ Gerson stated that while the Respondent's explanation for the account was weak at best, the Department was unable to establish whether either Respondent's personal funds or the money of other customers were commingled with premium funds at any point. Id. at 4.

Count Five: Engaging in the Business of Insurance Without a License

In the December 19, 2016 Initial Decision, ALJ Gerson reiterated that the Respondent admitted to collecting premiums from C. Lytle after his license had expired. However, the ALJ found the contention that these actions did not constitute "engaging in the business of insurance" to defy logic. ALJ Gerson found that in this case, the collection of premiums subsequently forwarded to a carrier constituted engaging in the business of insurance. Id. at 4.

ALJ'S FINDING AS TO THE PENALTY AGAINST PHILLIP EDWARDS

Revocation of Insurance Producer License

In regards to the Respondent's residence insurance producer license, ALJ Gerson found that there are mitigating factors present in this matter, including the Respondent's previously unblemished 30-year record as an insurance producer and his limited ability to pay a significant penalty based on the tax returns he submitted for 2012, 2013, and 2014. Id. at 6. However, ALJ Gerson noted that these mitigating factors pale in comparison to Respondent's actions in this matter, the violations found, and the Respondent's "display of incompetence contained in his testimony under oath." Ibid. As such, ALJ Gerson recommended the revocation of the Respondent's expired resident insurance producer license. Ibid.

Monetary Penalty Against Respondent

ALJ Gerson noted that the standards for determining the appropriateness of civil monetary penalties should be discussed as set forth in Kimmelman v. Henkles & McCoy, Inc., 108 N.J. 123, 137-39 (1987). Id. at 5. These factors include: (1) the good faith or bad faith of the producer; (2) the producer's ability to pay; (3) the amount of profits obtained from the illegal activity; (4) injury to the public; (5) duration of the illegal activity or conspiracy; (6) existence of criminal actions or treble-damages actions; and (7) past violations. Ibid.

With regard to the first factor, ALJ Gerson stated that he suspected that Respondent "did not in bad faith appropriate the premiums of Lytle," and that Respondent's testimony reflected incompetence rather than bad faith. Ibid.

As to the second factor, ALJ Gerson reviewed the Respondent's tax returns for 2012, 2013, and 2014 to determine the Respondent's ability to pay penalties. Ibid. The ALJ found that during those three years, the Respondent did not earn more than $15,000 per year. Ibid.

As to the third factor, ALJ Gerson found that the Respondent profited in the amount of $4,227.[11] Ibid.

For the forth factor, the ALJ found the injury to the public to be minimal, other than an erosion of the confidence the public may have in the insurance industry. Ibid.

Regarding the fifth factor, the ALJ noted that evaluation of the "duration of the conspiracy" or "scheme" is not applicable because a conspiracy or scheme did not take place. Ibid. Rather, the ALJ found that the Respondent displayed a pattern of incompetence over a period of eight years. Ibid.

With regard to the sixth factor, no criminal or damage actions have been filed. Id. at 6.

Lastly, with regard to the seventh factor, the ALJ found that the Respondent's unblemished record serves as a mitigating factor in this analysis. Ibid. The Respondent had been an insurance producer for over 30 years and there is no contention that any other violations were reported to the Commissioner during his licensure. Ibid.

Based upon the above analysis, in addition to the revocation of the Respondent's already expired insurance producer license, ALJ Gerson recommended a fine of $10,000, amounting to $2,000 per count charged. Ibid. In addition, ALJ Gerson recommended that the Respondent be

[11] See Footnote 2.

responsible for the reimbursement costs of the investigation totaling $475 and the reimbursement to C. Lytle in the amount of $4,226.18. Ibid.

EXCEPTIONS

By letter dated April 9, 2014, Respondent's then attorney, James R. Lisa, Esq. filed Exceptions to the PSD. Although he received an extension in which to do so, Respondent did not file any Exceptions to the December 19, 2016 Initial Decision. By letter dated January 3, 2017, the Office of the Attorney General, on behalf of the Department, submitted timely Exceptions to the December 19, 2016 Initial Decision. By letter dated January 31, 2017, the Office of the Attorney General, on behalf of the Department, submitted a reply to the Respondent's April 9, 2014 Exceptions to the PSD.

Respondent's April 14, 2014 Exceptions

As to Count One, the Respondent contends his testimony was misinterpreted to mean that he alleged an implied agreement between himself and C. Lytle which permitted him to hold the premium payments beyond the five business days allowed by statute. Rather, the Respondent intended to communicate that an agreement was simply not evidenced in writing at that time because C. Lytle knew about their payment "scheme;" he had informed her of such and was sending her an invoice when the premiums were due, which reflected that the entirety of her payments were not being remitted each month. In other words, he argued that these facts, as contended, gave rise to an implication that an agreement did, in fact, exist. Lastly, as the Respondent destroyed the majority of documentation relating to his insurance business in 2006, any written agreement "must have gotten swept up with those documents when they were destroyed, or in the alternative, was not properly kept." In light of this information, the Respondent argued an issue of genuine material fact exists and warrants a hearing on this Count.

As to Counts Four, Six and Seven, the Respondent took exception to the granting of summary decision because he contended that these actions at issue were taken in strict adherence to then prevailing standards in the business of producing insurance. He did not use checks with a "Trust Account" designation or keep and maintain records related to his insurance business due to what he contended were the prevailing business practices at the time. Had he been provided opportunity to testify to those then-prevailing standards, the Respondent asserted that this would have changed the determination of penalties dealt. Lastly, the Respondent pointed out that his behavior was not motivated by an insidious conspiracy to frustrate the Department's ongoing investigation, but had been done years before he had ever been served with a subpoena.

Petitioner's January 3, 2017 Exceptions

The Department concurred with ALJ Gerson's findings in the December 19, 2016 Initial Decision that the Department has proved the allegations contained in Counts One, Two, Four, Five, Six, and Seven of the OTSC; the revocation of the Respondent's insurance producer license; and the order requiring the payment of investigative costs of $475 to the Department and restitution in the amount of $4,226.18 to the insured. Nevertheless, the Department sought to clarify several issues.

The Department noted that ALJ Way found that the Department proved that the Respondent violated the Producer Act as follows: he failed to remit premiums to the insurer within five business days after receipt thereof (Count One); he used checks not designated as "Trust Account" checks (Count Four); he improperly destroyed records (Count Six); and he failed to comply with the Department's subpoena (Count Seven). Additionally, ALJ Gerson found that the Department proved that the Respondent violated the Producer Act by: misappropriating client funds (Count Two); and engaging in the business of insurance after the

expiration of his insurance producer license (Count Five). Therefore, the Respondent was found to have violated the Producer Act on six of the seven Counts of the OTSC. The Department stated that ALJ Gerson, however, based the assessment of penalties against the Respondent on only five Counts. See PSD at 6. Accordingly, the Department requested that the Commissioner correct this discrepancy and base the assessment of penalties against the Respondent on the Department's having proven six Counts of the Order to Show Cause.

Additionally, the Department took exception to the ALJ's Kimmelman analysis to the extent that ALJ Gerson assessed a $2,000 fine for each count proven, treating each allegation as equally egregious, when penalties should be imposed according to the gravity of the offense. The Department noted that central to this case is that the Respondent was found to have misappropriated $4,226.18, which resulted in the cancellation of two life insurance policies for non-payment. The Department maintained that this misappropriation at issue should not be overlooked.

Here, the Department noted that the Respondent collected at least 36 premium checks from the insured after the policies were cancelled for non-payment. Each premium check that was misappropriated by the Respondent amounted to a separate violation of the Producer Act, subject to a separate penalty for each violation. Accordingly, the Department requested that the Commissioner modify the Initial Decision to increase the fine assessed against the Respondent from $10,000 to $15,000, increasing the $2,000 fine for misappropriation of funds (Count Two) to $5,000, for a total civil penalty of $19,702. The fine should be allocated as follows: Count One - $2,000; Count Two - $5,000; Count Four - $2,000; Count Five - $2,000; Count Six - $2,000; and Count Seven - $2,000.

Petitioner's January 31, 2017 Reply to Respondent's April 14, 2014 Exceptions

As to Count One, the Department asserted that ALJ Way correctly found that the Respondent violated the Producer Act when he failed to remit C. Lytle's premiums to AIG within five business days as required by law without a written contract between the insured and the insure providing otherwise. The Department argued that the Respondent's assertion, that his original argument was "misunderstood" by ALJ Way, is without merit. The Respondent stated that he was not arguing that an implied agreement existed, but that no evidence of its existence was produced at oral argument on the Department's Summary Decision Motion and that any written agreement "must have gotten swept up with" documents he destroyed in 2006 or that the agreement was not properly kept. Furthermore, the Department stated that it clearly cited to evidence to the contrary of the Respondent's assertion. Specifically, a portion of the October 24, 2014 Opposition Brief to the Department's Summary Decision Motion where Edwards stated: "Although no written evidence of an agreement between Mr. Edwards and the insureds has been shown to exist, it is clear that at a minimum an agreement is in fact exist." The Department stated that it was clear that ALJ Way did not misunderstand the Respondent's argument because the Respondent argued that an implied agreement existed between himself and C. Lytle. The law clearly states the need for a written contract between the insured and the insurer, which was not met in this matter.

Lastly, in reply to the other Exceptions made by the Respondent, the Department pointed out that the Respondent did not challenge the ALJ's findings as to violations of the Producer Act in his failure to use designated "Trust Account" checks, his destruction of records and his failure to comply with the Department's subpoena. Rather, the Respondent argued that he should have had the opportunity to testify as to these matters. The Department maintained that this argument

is moot because the Respondent did have the opportunity to address any mitigating factors under Kimmelman at the July 10, 2014 hearing before ALJ Gerson.

LEGAL DISCUSSION

The conduct of an insurance producer in New Jersey is governed by the Producer Act, authorizing the Commissioner to refuse to issue or renew a license or to revoke or suspend an existing license for various reasons. N.J.S.A. 17:22A-26 et seq. Furthermore, N.J.S.A. 17:22A-40a and 45c permits the Commissioner to impose civil penalties for violations of the Producer Act. In addition, through administrative enforcement proceedings, such as license revocation or suspension matters, the Commissioner bears the burden of proving a violation. Commissioner v. Myerson, OAL Dkt. No. BKI 6740-01, Initial Decision (06/14/02), Final Decision and Order (08/02/02). Furthermore, the Commissioner must establish the essential elements of fact by a fair preponderance of the evidence. Liberty Mut. Ins. Co. v. Land, 186 N.J. 163, 169 (2006), In re Polk, 90 N.J. 550, 560 (1982). A fair preponderance of the evidence is evidence that is sufficient to assure reliability and to avoid the appearance of arbitrariness. Commissioner v. Ladas, OAL Dkt. No. BKI 0947-02, Initial Decision (02/05/04), Final Decision and Order (06/22/04).

Allegations Against Phillip Edwards

As found by ALJ Way, the Respondent failed to adduce evidence that creates a genuine issue as to any material fact for Counts One, Four, Six, and Seven of the OTSC. Moreover, the Respondent provided no legally competent defenses to the violations of the Producer Act and implementing rules charged in Counts One, Four, Six, and Seven of the OTSC. As a result, the Department was clearly entitled to prevail as a matter of law on these counts. Consequently, I hereby ADOPT the ALJ's undisputed factual findings and grant of summary decision as to the

allegation that: the Respondent had failed to remit premiums within five business days as required by N.J.A.C. 11:17C-2.2(a) (Count One); the Respondent failed to use checks labeled "Trust Account" when submitting premium payments as required by N.J.A.C. 11:17C-2.3(b) (Count Four); the Respondent unlawfully destroyed his insurance books and records (Count Six); and the Respondent failed to comply with the Department's subpoena and investigation (Count Seven).

Count One: Failure to Remit Premiums

Count One of the OTSC alleges that the Respondent failed to return $4,226.18 in premiums to the insured or forward same to AIG within five business days, in violation of N.J.S.A. 17:22A-40a(2) and (8), and N.J.A.C. 11:17C-2.2(a) and (b). As previously noted, ALJ Way found that the Respondent failed to remit premium payments within a five business day period as required by law. I concur with ALJ Way's finding; however, the Initial Decision does not specifically set forth the statutory and regulatory violations that the Respondent committed in relation to Count One of the OTSC. As ALJ Way found the Respondent failed to remit premium payments within five days, I MODIFY the Initial Decision to find the Respondent's actions as alleged in Count One of the OTSC are in violation of N.J.A.C. 11:17C-2.2(a) (premium funds shall be remitted to the insurer or other insurance producer within five business days after receipt of funds unless a written contract is in place permitting otherwise) and N.J.A.C. 11:17C-2.2(b) (premiums due the insured shall be paid to the insured or credited to the insured's account within five business days after receipt.

Additionally, N.J.S.A. 17:22A-40a(8) prohibits using fraudulent, coercive or dishonest practices, or demonstrating incompetence, untrustworthiness or financial irresponsibility in the conduct of insurance business. Here, the Respondent was receiving regular payments of

approximately $120 per month from C. Lytle with the express intent that he was to remit those funds to AIG to pay insurance premiums. The documentary evidence provides that C. Lytle paid the Respondent $8,015 total, yet, only $3,788.82 of that amount was remitted to AIG. The Respondent did not notify C. Lytle or her sons at any point that he was keeping a portion of the payments he had collected and there is no written agreement between these parties permitting him to do so. These practices were both dishonest and fraudulent. Thus, there is a factual basis to find the Respondent's practices both fraudulent and dishonest under N.J.S.A. 17:22A-40a(8). In addition, ALJ Gerson noted in the Kimmelman analysis portion of the December 19, 2016 Initial Decision, that the Respondent's actions demonstrated a general pattern of incompetence as to all counts alleged. The actions at issue in Count One are a reflection of this pattern. Therefore, I MODIFY the Initial Decision and find the Respondent's actions, as alleged in Count One of the OTSC, are also a violation of N.J.S.A. 17:22a-40a(8).

Moreover, as I have found that the Respondent violated N.J.S.A. 17:22A-40a(8), N.J.A.C. 11:17C-2.2(a), and N.J.A.C. 11:17C-2.2(b), I further MODIFY the Initial Decision and find that the Respondent's actions, as alleged in Count One of the OTSC, are also a violation of N.J.S.A. 17:22A-40a(2) (violation of an insurance law or regulation).

Furthermore, I do not find the Respondent's Exception to Count One compelling. As previously discussed, N.J.A.C. 11:17C-2.2(a) and (b) clearly require an insurance producer to remit all premium funds to the insurance producer within five business days after the receipt of the funds unless otherwise permitted by a contract with the insurer or by written contract with the insured. In this matter, in his Exceptions, the Respondent contends that ALJ Way misunderstood his argument to mean an implied contract existed between himself and C. Lytle, when in fact, he meant to indicate that an written agreement did exist but proof of such agreement was not

produced during these proceedings. Alluding to the fact a written contract may have existed at some point and alleging it was later destroyed in violation of additional regulations, namely N.J.A.C. 11:17C-2.5 and 2.6 (insurance producers must maintain accurate and detailed records of all insurance related transactions for at least five years after termination of coverage), is not a defense. Nor does it prove that an appropriate written contract was ever in existence. I agree with the Department's position that ALJ Way's finding the Respondent was in violation of Count One is correct and reject the Respondent's Exception.

Count Two: Misappropriation of Premiums

Count Two of the OTSC alleges that the Respondent misappropriated premium payments in the amount of $4,226.18, in violation of N.J.S.A. 17:22A-40a(2), (4), (8), and (16); and N.J.A.C. 11:17C-2.1(a) and (b). As previously noted, after a hearing, ALJ Gerson found that the Respondent misappropriated funds when he failed to remit $4,226.18 in premiums to AIG or to C. Lytle. I concur with ALJ Gerson's findings; however, the Initial Decision does not set forth the specific statutory and regulatory violations that the Respondent committed in relation to Count Two of the OTSC. As ALJ Gerson found that the Respondent misappropriated premium payments when he failed to remit $4,226.18 in premiums to AIG or to C. Lytle, I MODIFY the Initial Decision to find the Respondent's actions as alleged in Count Two of the OTSC, were in violation of N.J.A.C. 11:17C-2.1(a) (premium funds will held by an insurance producer in a fiduciary capacity and will not be misappropriated, improperly converted for personal use or withheld); N.J.A.C. 11:17C-2.1(b) (premium funds will be segregated and not commingled with any other funds); and N.J.S.A. 17:22A-40a(4) (improperly withholding, misappropriating or converting any monies or properties received in the course of doing insurance business). Additionally, as I have found the Respondent violated N.J.A.C. 11:17C-2.1(a),

N.J.A.C. 11:17C-2.1(b) and N.J.S.A. 17:22A-40a(4), I further MODIFY the Initial Decision and find the Respondent's actions, as alleged in Count Two of the OTSC, are also a violation of N.J.S.A. 17:22A-40(a)(2) (violation of an insurance law or regulation).

Additionally, N.J.S.A. 17:22A-40a(8) prohibits using fraudulent, coercive or dishonest practices, or demonstrating incompetence, untrustworthiness or financial irresponsibility in the conduct of insurance business. In a similar vein, N.J.S.A. 17:22A-40a(16) prohibits the commission of any fraudulent acts. Here, as previously discussed, the Respondent was receiving regular payments of approximately $120 per month from C. Lytle with the express intent that he was to remit those funds to AIG to pay insurance premiums. The documentary evidence provides that he failed to remit $4,226.18 over a period of eight years. The whereabouts of the remaining $4,226.18 are unknown, as the Respondent could not provide a coherent explanation as to what had happened to these monies. Thus, there is a factual basis to find the Respondent's practices both fraudulent and dishonest. Therefore, I MODIFY the Initial Decision and find the Respondent's actions, as alleged in Count Two of the OTSC, are also a violation of N.J.S.A. 17:22A-40a(8) and N.J.S.A. 17:22A-40a(16).

Count Three: Commingling of Premium Funds

Count Three of the OTSC alleges that the Respondent commingled premium funds with his own personal funds, or the funds of unrelated insureds, in violation of N.J.S.A. 17:22A-40a(2), (4), (8) and (16), N.J.A.C. 11:17C-2.1(a) and (b), and N.J.A.C. 11:17C-2.3(i). As previously noted, ALJ Way declined to grant summary decision to this issue due to ALJ's determination of the existence of genuine issues of material facts. In the December 19, 2016 Initial Decision, ALJ Gerson found that, while the Respondent provided a weak explanation for where the funds at issue had been deposited, the Department was unable to establish that the

Respondent had commingled these funds with his own at any point. I concur with ALJ Gerson's findings that there are no facts to substantiate a finding of commingling of funds in this matter. Therefore, I ADOPT the findings in the Initial Decision as to Count Three of the OTSC.

Count Four: Failure of Checks to Include "Trust Account"

Count Four of the OTSC alleges that the Respondent's checks used for premium payments did not have the words "Trust Account" on them, in violation of N.J.S.A. 17:22A-40a(2), (8), and N.J.A.C. 11:17C-2.3(b). As previously noted, ALJ Way found that the Respondent's checks did not have the required "Trust Account" designation. I concur with ALJ Way's findings; however, the Initial Decision does not specifically set forth the statutory and regulatory violations that the Respondent committed in relationship to Count Four of the OTSC. As ALJ Way found the Respondent's checks did not have the "Trust Account" designation that was required by law, I MODIFY the Initial Decision to find the Respondent's actions as alleged in Count Four of the OTSC, were in violation of N.J.A.C. 11:17C-2.3(b) (bank records and checks will have appropriate "Trust Account" designation). Additionally, as I have found the Respondent violated N.J.A.C. 11:17C-2.3(b), I further MODIFY the Initial Decision and find the Respondent's actions, as alleged in Count Four of the OTSC, are also in violation of N.J.S.A. 17:22A-40a(2) (violation of an insurance law or regulation).

Moreover, N.J.S.A. 17:22A-40a(8) prohibits using fraudulent, coercive or dishonest practices, or demonstrating incompetence, untrustworthiness or financial irresponsibility in the conduct of insurance business. As noted by ALJ Way, as a former insurance producer, the Respondent should have been abreast of current standards and practices throughout his career as an insurance producer and failure to do so is a manifestation of the Respondent's ongoing pattern of maintaining incompetent business practices. Therefore, I MODIFY the Initial Decision and

find that the Respondent's actions, as alleged in Count Four of the OTSC, are also a violation of N.J.S.A. 17:22A-40a(8).

The Respondent raised an Exception to ALJ Way's grant of summary decision to Count Four. He maintained that he did not use checks with a "Trust Account" designation because he was strictly adhering to then prevailing business practices for insurance producers which did not require these markings and he should be afforded the opportunity to testify as such. The Department contended that this point is moot since the Respondent subsequently had the opportunity to testify to this point at the July 10, 2014 hearing before ALJ Gerson. I agree with the Department and reject the Respondent's Exception. The Respondent's so-called adherence to a perceived prevailing business practice is not a valid excuse for failing to comply with an explicit directive established by law.[12]

Count Five: Engaging in the Unlicensed Business of Insurance

Count Five of the OTSC alleges that the Respondent continued to engage in the business of insurance after his license expired on July 31, 2005, in violation of N.J.S.A. 17:22A-29 and N.J.S.A. 17:22A-40a(2), (8), and (16). As previously noted, ALJ Gerson found that the Respondent continued to engage in the business of insurance even after his license expired. I concur with ALJ Gerson's findings; however, the Initial Decision does not specifically set forth the statutory and regulatory violations the Respondent committed in relationship to Count Five of the OTSC. As ALJ Way found that the Respondent continued to engage in the business of insurance after his license expired on July 31, 2005, I MODIFY the Initial Decision to find the Respondent's actions as alleged in Count Five of the OTSC, were in violation of N.J.S.A.

[12] Although apparently not raised during the hearing, the Respondent's answer to the OTSC stated that the rules the Respondent is alleged to have violated in the OTSC apply only to property/casualty insurance, and not life insurance. This is incorrect. The rules cited by their terms are not limited in their application and properly apply to the Respondent.

17:22A-29 (a person will not sell, solicit or negotiate insurance without a license). Additionally, as I have found the Respondent in violation of N.J.S.A. 17:22A-29, I further MODIFY the Initial Decision and find the Respondent's actions, as alleged in Count Five of the OTSC, are also in violation of N.J.S.A. 17:22A-40a(2) (violation of an insurance law or regulation).

Further, N.J.S.A. 17:22A-40a(8) prohibits using fraudulent, coercive or dishonest practices, or demonstrating incompetence, untrustworthiness or financial irresponsibility in the conduct of insurance business. In a similar vein, N.J.S.A. 17:22A-40a(16) prohibits the commission of any fraudulent acts. Here, as previously discussed, the Respondent's license expired on July 31, 2005, however, as the evidence demonstrates, he continued to sell and negotiate their policies for years afterwards without disclosing that he was no longer licensed. The evidence demonstrates that, even after the expiration of his license, the Respondent collected at least 17 payments from the insured, remitted seven and negotiated with AIG regarding these policies in his capacity as an insurance producer. Thus, there is a factual basis to find the Respondent's practices both fraudulent and dishonest. Therefore, I MODIFY the Initial Decision and find the Respondent's actions, as alleged in Count Five of the OTSC, are also a violation of N.J.S.A. 17:22A-40a(8) and (16).

Count Six: Failure to Maintain Business Records

Count Six of the OTSC alleges that the Respondent failed to maintain accurate and detailed records of all insurance related transactions for at least five years after the termination of coverage, in violation of N.J.A.C. 11:17C-2.5 and N.J.A.C. 11:17C-2.6. As previously noted, ALJ Way found that the Respondent did destroy his insurance books and records within the five year period following termination of coverage. I concur with ALJ Way's findings; however, the Initial Decision does not specifically set forth the statutory and regulatory violations the

Respondent committed in relationship to Count Six of the OTSC. As ALJ Way found that the Respondent had failed to maintain accurate and detailed records of all insurance related transactions for at least five years after the termination of coverage, I MODIFY the Initial Decision to find the Respondent's actions as alleged in Count Six of the OTSC, were in violation of N.J.A.C. 11:17C-2.5 (minimum recordkeeping requirements for insurance producers includes accurately kept books and records reflecting all insurance transactions) and N.J.A.C. 11:17C-2.6 (all required books and records, including bank records, will be maintained for a period of five years after the termination of coverage).

In addition, the Respondent raised an Exception to the grant of summary decision to Counts Six and Seven. He maintained that he did not keep and maintain insurance books and records as required by N.J.A.C. 11:17C-2.5 and N.J.A.C. 11:17C-2.6 because he was strictly adhering to then prevailing business practices for insurance producers. Thus, he was unable to produce these documents as requested by the Department's subpoena. Lastly, the Respondent argued that he should have been afforded the opportunity to testify to this point during an evidentiary proceeding. In the Department's reply, the Department argued that the Respondent's point is moot since he was afforded this opportunity to testify at the July 10, 2014 hearing before ALJ Gerson. I agree with the Department's position and reject the Respondent's Exception.

Count Seven: Failure to Comply with a Department Subpoena

Count Seven of the OTSC alleges that the Respondent failed to comply with Subpoena No. 09-999 when he did not produce the books and records as requested by the Department, in violation of N.J.S.A. 17:22A-45a and N.J.A.C. 11:17C-2.6(b). As previously noted, ALJ Way found that the Respondent did not comply with Subpoena No. 09-999 when he failed to produce the books and records as requested by the Department. I concur with ALJ Way's findings;

however, the Initial Decision does not set forth the specific statutory and regulatory violations the Respondent committed in relationship to Count Seven of the OTSC. As ALJ Way found the Respondent had failed to comply with Subpoena No. 09-999 when he did not produce the books and records as requested by the Department, I MODIFY the Initial Decision to find the Respondent's actions as alleged in Count Six of the OTSC, were in violation of N.J.S.A. 17:22A-45a (the Commissioner has the power to conduct investigations, to administer oaths, to interrogate licensees and others, and to issue subpoenas to any licensee or any other person in connection with any investigation, hearing or other proceeding) and N.J.A.C. 11:17C-2.6(b) (all records, books and documents required to be maintained, upon his or her request, be produced for examination by the Commissioner or his or her duly authorized representatives).

Penalty Against Phillip Edwards

With respect to the appropriate action to take against the Respondent's insurance producer license, I agree with the ALJ Gerson's determination that license revocation is appropriate. Because of the strong public interest in regulating insurance producers, revocation has consistently been imposed against the licenses of New Jersey insurance producers that engage in fraudulent acts. Commissioner v. Hohn, OAL Dkt. No. BKI 12444-11, Initial Decision (11/01/12), Final Decision and Order (03/18/13). Revocation has consistently been imposed upon licensees who have personally engaged in misconduct involving "misappropriation of premium monies, bad faith and dishonesty." Commissioner v. Strandskov, OAL Dkt. No. BKI 03451-07, Initial Decision (09/25/08), Final Decision and Order (02/04/09); See also Commissioner v. Feliz, OAL Dkt. No. BKI 85-05, Initial Decision (12/16/05), Final Decision and Order on Remand (03/13/06) (license revocation, restitution and fines for failure to remit payment to the insurer or return premiums to insureds); Shipitofsky v. Commissioner, 95

N.J.A.R.2d. (INS) 67; 1994 N.J. AGEN LEXIS 505 (license revocation and fines for withholding premiums and misappropriation of funds); Commissioner v. Erwin, OAL Dkt. No. BKI 4573-06, Initial Decision (07/09/07), Final Decision and Order (09/17/07) (license revocation and administrative fines for, among other things, failure to remit premiums and failure to maintain a trust account). Only the rarest of mitigating factors will preclude license revocation for those who directly commit fraud. Commissioner v. Goncalves, OAL Dkt. No. BKI 03301-05, Initial Decision (11/17/2005), Final Decision (02/15/2006). The typical mitigating factors of restitution, inexperience, lack of prior negative history, motivations and pressures of the misconduct and the possibility of reform cannot form a basis to support a sanction other than revocation in cases involving the misappropriation of client funds. Commissioner v. Ladas, supra.

As the aforementioned decisions show, revocation is appropriate in almost all cases wherein a licensed insurance producer has engaged in misappropriation or failure to remit insurance premiums. The types of unscrupulous behaviors that the Respondent participated in are some of the most egregious violations an insurance producer can commit. Accordingly, I ADOPT ALJ Gerson's determination that the revocation of the Respondent's insurance producer license is necessary and appropriate.

As previously discussed, under Kimmelman v. Henkles & McCoy, Inc., 108 N.J. 123, 137-139 (1987), certain factors are to be examined when assessing administrative monetary penalties such as those that may be imposed pursuant to N.J.S.A. 17:22A-45 upon insurance producers. The factors include: (1) the good faith or bad faith of the violator; (2) the violator's ability to pay; (3) the amount of profit obtained from the illegal activity; (4) injury to the public; (5) duration of the illegal conduct; (6) existence of criminal actions and whether a large civil

penalty may be unduly punitive if other sanctions have been imposed; and (7) past violations. Kimmelman, supra, 108 N.J. at 137-39.

With regard to the first factor, whether the Respondent acted in bad faith, I disagree with ALJ Gerson who "suspects" that the Respondent's misappropriation of C. Lytle's funds is a reflection of incompetence and not bad faith. December 19, 2016 Initial Decision at 6. The Respondent was a licensed insurance producer that demonstrated bad faith by failing to remit and then misappropriating funds paid to him by C. Lytle to be applied to her insurance premiums on a monthly basis for a period of eight years. The Respondent had many occasions to admit to these acts and return the monies, but he did not do so until C. Lytle contacted the insurance company, only to learn that one of her policies was cancelled due to non-payment of premium. Subsequently, the Respondent continued to collect premiums from her and her second policy was cancelled for non-payment of premium less than 12 months later. Additionally, the Respondent, in a letter dated September 12, 2009, volunteered to return the monies he failed to remit to the Lytle family, but has not made any attempt to do so. This factor weighs in favor of a significant monetary penalty.

With regard to the second factor, the Respondent's ability to pay civil penalties assessed, ALJ Gerson examined the Respondent's tax returns dated 2012, 2013, and 2014. The Respondent did not earn more than $15,000 in any one of the years reviewed. As noted in Kimmelman, the weight to be given to each factor in determining the appropriate penalty is determined by the facts of each individual case. 108 N.J. at 140. Thus, no one factor is dispositive and a totality of the factors must be assessed.

The third Kimmelman factor addresses the amount of profits obtained from the illegal activity. I agree with ALJ Gerson who found that Respondent clearly profited from the illegal activity at issue in the amount of $4,226.18.

The fourth Kimmelman factor addresses injury to the public. Here, ALJ Gerson found the "injury to the public to be minimal other than an erosion of the confidence the public may have in the insurance industry." I disagree with ALJ Gerson's finding. Licensed insurance producers act in a fiduciary capacity. In re Parkwood Co., 98 N.J. Super. 268, 268 (App. Div. 1963). Moreover, the Commissioner is charged with the duty to protect the public welfare and to instill public confidence in both insurance producers and the insurance industry. "When insurance producers breach their fiduciary duties and engage in fraudulent practices and unfair trade practices, the affected insurance consumers are financially harmed and the public's confidence in the insurance industry as a whole is eroded." Commissioner v. Fonseca, OAL Dkt. No. BKI 11979-10, Initial Decision (08/15/11), Final Decision and Order (12/28/11). Here, the Respondent's actions resulted in the misappropriation of funds consistently over a period of eight years leading to the termination of two separate life insurance policies and directly harmed three different individuals. In addition, the Respondent's conduct injured the public at large because Respondent's conduct erodes the public confidence in both insurance producers and the insurance industry. This factor weighs in favor of a significant monetary penalty.

With regard to the fifth factor, the duration of the conspiracy or scheme, I disagree with ALJ Gerson that this factor is not applicable because a conspiracy or scheme did not take place. Rather, the ALJ found the Respondent displayed a pattern of misappropriating premium funds over a period of eight years. The Respondent's actions were not a single, isolated incident but a series of frauds, which occurred over a period of several years. Additionally, the fraud is still

being perpetrated today as the Respondent has failed to return the monies owed to the insured. This factor weighs in favor of a significant monetary penalty.

The existence of criminal actions and whether a civil penalty may be unduly punitive if other sanctions have been imposed is the sixth factor in the Kimmelman analysis. The Supreme Court held in Kimmelman that a lack of criminal punishment weighs in favor of a more significant civil penalty because the defendant cannot argue that he or she has already paid a price for his or her unlawful conduct. Kimmelman, supra, 108 N.J. at 139. Here, the Respondent has not faced any criminal punishment for his actions. As such, this factor weighs in favor of a significant monetary penalty.

The last Kimmelman factor deals with whether the producer had previously violated the Producer Act and if past penalties have been insufficient to deter future violations. Here, there has been no evidence presented that the Respondent has committed a previous violation.

As previously discussed, the Initial Decision found that the Respondent failed to remit funds in a timely manner (Count One), misappropriated funds (Count Two), failed to use checks with the required designation (Count Four), engaged in the business of an insurance producer without an insurance producer license (Count Five), destroyed insurance books and records within the document retention period (Count Six), and failed to comply with the Department's investigation (Count Seven). Thus, in the Initial Decision, ALJ Way and ALJ Gerson found the Respondent guilty of six of the seven counts alleged in the OTSC. However, in the December 19, 2016 Initial Decision, the ALJ calculated the civil penalties assessed at $10,000, or $2,000 per penalty, based on a total of five counts. The Department took exception to this error and requested that the Commissioner correct the discrepancy in the December 19, 2016 Initial

Decision that the Respondent is guilty of five counts when the record clearly indicates, and I have affirmed, a finding of six separate counts.

Furthermore, in regard to the civil penalty assessed for the Respondent's violation of Count Two of the OTSC, which addresses the misappropriation of funds, I disagree with ALJ Gerson that a penalty of $2,000 per Count is a sufficient given the duration and frequency of the Respondent's misappropriation. I agree with the Department's position that the misappropriation here was egregious and that penalties should be imposed according to the gravity of the offense. As the documentary and testimonial evidence show, the Respondent collected a monthly payment from C. Lytle for a period of eight years, including payments he collected after the expiration of his insurance produce license. As the Department stated, each payment amounts to a separate misappropriation and violation of the Producer Act, subject to a separate penalty for each violation. Accordingly, I MODIFY the Initial Decision and increase the fine assessed against the Respondent for misappropriation of funds from $2,000 to $5,000 as requested by the Department. In light of the above Kimmelman analysis, the violations the Respondent has committed and the Exceptions submitted by the Department, I MODIFY the Initial Decision as to the civil penalties assessed as follows:

> Count One: Failure to remit or return premiums within five business days: $2,000;
>
> Count Two: Misappropriation of premium payments: $5,000;
>
> Count Four: Failure to have the words "Trust Account" on checks paying premiums: $2,000;
>
> Count Five: Transaction of business of insurance by collecting premiums after Producer License expired: $2,000;
>
> Count Six: Destruction of insurance books and records: $2,000; and

Count Seven: Failure to comply with the Department's subpoena: $2,000.

These penalties total $15,000, are reasonable and justified, and are significantly less than what the Department is entitled to seek under the Producer Act.

Pursuant to N.J.S.A. 17:22A-45(c), it also is appropriate to impose reimbursement of the costs of investigation. As such, I ADOPT the ALJ's recommendations that the Respondent pay costs of investigation in the amount of $475.

Additionally, I ADOPT the ALJ's recommendations that the Respondent shall make restitution in the amount of $4,226.18 to C. Lytle, related to premiums owed.

CONCLUSION

Having carefully reviewed the Initial Decision, the Exceptions and Responses thereto, and the entire record herein, I hereby ADOPT the Findings and Conclusions as set forth in the Initial Decision, except as modified supra.

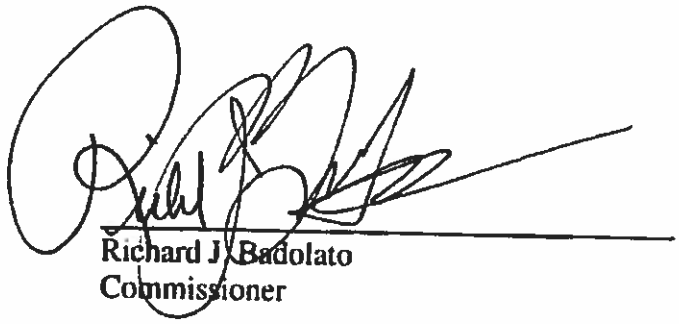
Specifically, I ADOPT the conclusions that the Respondent has failed to present any legally or factually viable defense to the violations of the Producer Act and corresponding regulations as charged in the OTSC and that the Department's motion for summary decision should be granted on Count One, Count Four, Count Six, and Count Seven as charged in the OTSC as amplified herein.

I ADOPT the findings in the Initial Decision in that there is no factual basis to support a finding under Count Three of commingling of premium funds. I ADOPT the conclusions made after a hearing that the Respondent's conduct was in violation of the Producer Act and corresponding regulations as charged in Counts Two and Five of the OTSC.

I ADOPT the conclusion in the Initial Decision that revocation of the Respondent's insurance producer license is the appropriate sanction. I MODIFY the recommended civil

monetary penalty and ORDER the Respondent to pay a total $15,000 in fines, $2,000 per count for Counts One, Four, Five, Six, and Seven as charged in the OTSC and I ORDER that the Respondent pay a fine of $5,000 fine for Count Two, the misappropriation of funds. I ADOPT the finding that the Respondent pay restitution in the amount of $4,226.18 and reimburse the Department $475 for its investigation costs pursuant to the Producer Act.

IT IS SO ORDERED on this 4th day of May, 2017.



Richard J. Badolato
Commissioner

AR Phillip Edwards Final Order Draft/orders