ORDER NO.: E17-73

STATE OF NEW JERSEY
DEPARTMENT OF BANKING AND INSURANCE

OAL DOCKET NO.: BKI-7510-16
AGENCY DOCKET NO.: OTSC #E15-72[1]

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

This matter comes before the Commissioner of Banking and Insurance ("Commissioner")[2] 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 ("Producer Act"), N.J.S.A. 17:22A-26 et seq., and all powers expressed or implied therein, for the purposes of reviewing the March 30, 2017 Initial Decision ("Initial Decision") of Administrative Law Judge Jeff S. Masin ("ALJ"), which granted a Motion for Summary Decision brought by the Department of Banking and Insurance ("Department") on both Counts alleged in the Department's Order to Show Cause No. E15-72 ("OTSC"), and recommended revocation of the Respondent's producer license and the imposition of civil monetary penalties in the amount of $15,000 and unspecified costs of

[1] The Initial Decision in this matter incorrectly listed the Agency Docket No. as "217412."

[2] Pursuant to R. 4:34-4, Commissioner Richard J. Badolato has been substituted as the current, and no longer acting, Commissioner in the caption; however, for the purposes of this Final Decision and Order, Commissioner Badolato is recused and Director of Insurance Peter L. Hartt will serve as Acting Commissioner.

investigation. The Initial Decision additionally denied a Cross-Motion for Summary Decision brought by Respondent Paul J. Vinci ("Respondent").

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On June 1, 2015, the Department issued the OTSC against the Respondent, which sought to revoke the Respondent's producer license, and impose civil monetary penalties and costs of investigation for alleged violations of the Producer Act and the regulations governing the conduct of insurance producers in this State. The OTSC contains two Counts as follows:

> Count One – The Respondent demonstrated incompetence and untrustworthiness in the conduct of insurance business by continuing to work at Otterstedt Insurance Agency ("OIA") despite having a suspended insurance producer license, in violation of N.J.S.A. 17:22A-40a(2) and (8), and N.J.A.C. 11:17D-2.5(e); and
>
> Count Two – The Respondent violated an Order of the Commissioner by continuing to work for an insurance producer despite having consented to the suspension of his insurance producer license, in violation of N.J.S.A. 17:22A-40a(2) and (8).

On or about July 16, 2015, the Respondent filed an Answer to the OTSC, wherein he admitted to and denied some of the allegations set forth in the OTSC and requested a hearing. The Department transmitted the matter as a contested case to the Office of Administrative Law ("OAL") on May 18, 2016, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

On or about February 16, 2017, the Department moved for Summary Decision against the Respondent and submitted a Joint Stipulation of Facts, which was agreed to by the parties. On or about February 24, 2017, the Respondent filed his Opposition to the Department's Motion for Summary Decision and additionally filed a Cross-Motion for Summary Decision. The Department filed its Reply and Opposition to the Respondent's Cross-Motion for Summary Decision on or about March 8, 2017, and the record closed for purposes of the Cross-Motions on that date. On March 30, 2017, the ALJ granted summary decision to the Department on both

Counts of the OTSC and recommended revocation of Respondent's producer license and the imposition of civil monetary penalties against Respondent in the amount of $15,000 and costs of investigation in an unspecified amount. The ALJ additionally denied the Respondent's Cross-Motion for Summary Decision.

ALJ'S FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS

ALJ's Findings of Fact

The ALJ found the following relevant facts in his grant of summary decision. From on or about June 11, 1975, until the present, Otterstedt Insurance Agency ("OIA") has been licensed as a resident business entity insurance producer in the State of New Jersey. Initial Decision at 3. OIA's business and mailing address is 540 Sylvan Avenue, Englewood Cliffs, New Jersey 07632. Ibid. The Respondent was a licensed resident insurance producer in the State of New Jersey authorized to sell limited lines, casualty, life insurance, property and accident, and health and sickness lines of insurance, from May 2, 1990, through April 30, 2006, when his license expired.[3] Ibid. On or about September 2, 2008, OIA hired the Respondent as an insurance producer. Ibid. The Respondent's Producer Agreement with OIA stated that the "Agreement shall be governed in all aspects, whether as to its validity, construction, capacity, performance, or otherwise, by the laws of the State of New Jersey." Id. at 6.

By order dated July 26, 2011, Administrative Law Judge Richard McGill granted in part a Motion for Summary Decision brought by the Department and against the Respondent for previous violations of the Producer Act and the insurance regulations of this State ("July 26, 2011 Order"). Id. at 3. Specifically, the July 26, 2011 Order found that from June 2006 through

[3] The Respondent's producer license became inactive after its expiration on April 30, 2006. The Respondent's producer license is currently listed as suspended.

February 2007, the Respondent received an aggregate sum of $1,965.77 in commissions on 15 policies sold, solicited, and negotiated by the Respondent without an insurance producer license; the Respondent continued to sell, solicit, and negotiate 19 insurance policies in New Jersey between April 2007 through May 2008 and he collected $3,801.48 in commissions on these policies after his license expired; the Respondent continued to sell, solicit, and negotiate insurance contracts and accept commissions in New Jersey without being licensed to engage in the business of insurance; that he failed to notify the Department that he was indicted and convicted in 1999 of possession of cocaine, before his license expired; and also failed to disclose his criminal record when applying for a New Jersey resident insurance producer license on May 1, 2002 and on July 12, 2007. Id. at 3-4. Then on or about March 29, 2012, Vinci signed and entered into Consent Order No. E12-40 ("Consent Order") with the Department, wherein he admitted to the insurance violations found in the July 26, 2011 Order. Id. at 4. Specifically, the Respondent admitted that he sold, solicited, and negotiated New Jersey insurance policies and received commissions without an active license, and that he failed to report that he had a criminal conviction on two of his previous licensing applications. Ibid. Pursuant to the Consent Order, the Respondent agreed to pay a $15,000 fine and to have his New Jersey producer license "suspended for a period of two and one half years" commencing on March 29, 2012. Ibid.

On or about March 1, 2014, the Respondent submitted to the Department an application for a non-resident insurance producer license which identified his employer as OIA. Ibid. The Respondent's application was received by the Department before the expiration of the Respondent's producer license suspension, pursuant to the Consent Order. Ibid. On or about May 6, 2014, the Department emailed the Respondent to inform him that his application had been rejected because it was submitted before termination of the suspension period of his producer license under the Consent Order. Ibid.

By letter dated June 11, 2014,[4] the Department sent a letter to Robert J. Casazza, the Designated Responsible Licensed Producer for OIA, to confirm his May 2014 telephone conversation with the Department and to request documentation relating to the Respondent's employment with OIA. Ibid. On June 30, 2014, the Department received a letter from Lydia Barbara Bashwiner, Esq. of OIA, which stated that the Respondent's employment with OIA commenced on September 2, 2008 and was terminated by OIA on June 20, 2014. Id. at 5. Further, the letter stated that it was OIA's "understanding in February 2012 that [the Respondent] had resolved his dispute with the Department" and "that he would be ineligible to be licensed in New Jersey for a period of two and one-half years." Ibid. Moreover, the letter provided that OIA "erroneously believed that a license that was inactive could not be suspended" and the Respondent "never misled OIA about the nature of his agreement with [the D]epartment." Ibid. Additionally, the letter stated that the Respondent "did not conduct any New Jersey insurance business while employed at OIA, that "OIA did not maintain any offices outside of New Jersey," and that the Respondent "attended sales meetings, marketing meetings and other company functions at [OIA's] New Jersey office." Ibid. The letter also stated that the Respondent "had access to OIA's network and insurance carrier interface systems." Ibid.

In a letter dated August 12, 2014, the Department acknowledged the receipt of OIA's June 30, 2014 letter, and informed OIA that the employment of the Respondent violated N.J.A.C. 11:17D-2.5(e) because this regulation "prohibits the employment of a producer suspended or revoked by [the] Department." Ibid. This letter also informed OIA that the employment of the

[4] The Initial Decision provides that this date was June 11, 2016; however, this inclusion in the Initial Decision appears to be based upon a typographical error contained in the Joint Stipulation of Facts and the Certification of Supervisor Joseph McDougal ("McDougal Cert.") attached to the Department's Motion for Summary Decision. A review of the copy of the letter attached to both the Joint Stipulation of Facts and the McDougal Cert. provides that the correct date was actually June 11, 2014. See Joint Stipulation of Facts at ¶ 9 and Ex. 8 and Mc Dougal Cert. at ¶ 15 and Ex. 7. For purposes of consistency, the correct date of June 11, 2014 will be used throughout this Final Decision and Order.

Respondent while his New Jersey producer license was suspended permits the Department to pursue an administrative penalty against OIA; however, the Department provided that it "will not at this time pursue an administrative penalty."[5] Ibid.

On October 3, 2014, the Department received an application from the Respondent for the reinstatement of his New Jersey insurance producer license. Ibid. Then on December 12, 2014, the Department sent the Respondent a letter via email, regular mail, and certified mail wherein the Department requested that the Respondent answer questions regarding his employment with OIA. Ibid. On the same date, the Department also sent a letter to OIA via email, regular mail, and certified mail requesting answers to questions regarding the Respondent's employment with OIA. Id. at 5-6.

ALJ's Analysis and Conclusions

The ALJ noted that the Department moved for Summary Decision in this matter based upon these stipulated facts and argued that despite the Respondent's acceptance of his thirty month producer license suspension, the Respondent continued to be employed by a licensed New Jersey insurance producer through June 20, 2014. Id. at 6. Specifically, the Department stated that N.J.A.C. 11:17D-2.5(e) provides that "[n]o person whose license has been suspended or revoked may be a partner, officer, director or owner of a licensed business entity or otherwise be employed in any capacity by an insurance producer." The ALJ stated that "there is no question regarding [the Respondent] having remained in the employ of OIA, as 'an insurance producer' while his license was suspended." Ibid. As such, the ALJ concluded that "the violation of [N.J.A.C. 11:17D-2.5(e)] is patent and summary decision is therefore warranted." Ibid.

[5] The Initial Decision provides that the Department's August 12, 2014 letter to OIA advised that the Department "will not this time pursue an administrative penalty." This appears to be a typographical error as the letter states that the Department "will not at this time pursue an administrative penalty." See Joint Stipulation of Facts at ¶ 9 and Ex. 9.

The ALJ further stated that the Respondent's argument in opposition to the Department's Motion for Summary Decision rested upon the Respondent's contention that during the period of his New Jersey producer license suspension, he engaged in no business activities involving any New Jersey insurance. Ibid. The Respondent pointed out that all of the insurance business that he was involved in throughout the period of his New Jersey producer license suspension and up until his termination from OIA involved only New York insurance business conducted under his valid New York insurance producer license. Ibid. The ALJ noted that the Respondent alleges that the Department's attempts to sanction him for activities that are unrelated to the business of insurance in the State of New Jersey, constitutes an unwarranted extension of the Department's jurisdiction. Id. at 6-7. However, the ALJ noted that the Respondent, while employed by OIA, attended meetings and otherwise worked on various dates in OIA's New Jersey office and had access to OIA's computer system. Id. at 6.

The ALJ stated that a review of the Joint Stipulation of Facts, the various Certifications attached to the Cross-Motions for Summary Decision in this matter, and accompanying documentation presented by both parties demonstrate that there are no material facts in dispute in this case. Id. at 7. Specifically, the ALJ notes that it is undisputed that the Respondent was employed by OIA, a company that was licensed as a business entity insurance producer in New Jersey, during the period of time when the Respondent's New Jersey producer license was suspended. Ibid. The ALJ further noted that the Respondent does not deny his employment nor does he deny that as part of his employment, he regularly appeared at and performed work in OIA's New Jersey office, was paid either by a salary or by commission by OIA, or that he made use of OIA's facilities in New Jersey, including its computer system. Ibid. The ALJ noted that the Respondent argues that OIA is licensed to engage in the insurance business in a total of 38 states and the business he conducted during the period of his New Jersey producer license

suspension involved only insurance business in New York, where he holds a valid license. Ibid. The ALJ stated that the Department does not dispute the Respondent's contention that he only engaged in New York insurance business during the time of his license suspension in New Jersey. Ibid. Moreover, the Department does not allege that any of the insurance business that the Respondent sold, negotiated, or solicited involved any New Jersey connection, other than his status as an employee of a licensed and headquartered New Jersey business entity. Ibid. The ALJ further noted that the dispute in this case involves whether a New Jersey insurance regulation can be applied to a person, who is employed by a New Jersey licensed business entity and whose only actual sale, solicitation, or negotiation, of insurance takes place in another state where that producer is actively licensed. Id. at 7 to 8. The ALJ noted that neither party has produced any New Jersey case law involving this specific topic. Id. at 8.

The ALJ stated that N.J.A.C. 11:17D-2.5(e), which provides that "[n]o person whose license has been suspended . . . may be . . . employed in any capacity by an insurance producer," "does not appear to present any ambiguity as to its meaning." Ibid. The ALJ noted that there is no dispute that OIA is considered "an insurance producer" and that the Respondent was "employed" by OIA. Ibid. Moreover, the ALJ stated that N.J.A.C. 11:17D-2.5(e) does not identify the nature, scope, or responsibilities of the employment in which such person may not be "employed." Ibid. The ALJ concluded that the wording of this regulation "appears to be absolute in nature," and the regulation "should be 'construed in accordance with the plain meaning of its language . . . and in a manner that makes sense when read in the context of the entire regulation.'" Ibid. (citing In re J.S., 431 N.J. Super. 321, 329 (App. Div. 2013) (citations omitted)). The ALJ further concluded that the facts of this matter "appear to fit directly with the regulation" and that the Respondent is "a 'person whose license has been suspended' [and] was

'employed' during the period of that suspension, 'in any capacity by [an] insurance producer.'" Id. at 8.

The ALJ noted that although N.J.A.C. 11:17D-2.5(e) is clearly applicable to the Respondent's employment with OIA during the time of his New Jersey license suspension, the Respondent argues that the application of this regulation to the present matter may run contrary to constitutional principles. Ibid. The ALJ further stated that the Respondent's "brief [did] not further identify and elaborate upon the precise constitutional concern;" however, during oral argument, the Respondent "noted that the Department was attempting to impose its jurisdiction on another state." Id. at 8-9. Specifically, the ALJ paraphrased the Respondent's argument by stating that because the Respondent only conducted New York insurance business during the period of this New Jersey producer license suspension, "what business is it of New Jersey to take action against him when his work did not involve any New Jersey insurance business?" Id. at 9.

The ALJ stated that "[t]he insurance business is highly regulated and . . . involves issues of trust, fiduciary responsibility, consumer protection, and compliance with [the] statutes and regulations governing the industry." Ibid. The ALJ additionally noted that New Jersey has a strong interest in those entities that are licensed by the State, as well as those who work for the entities it licenses, especially those that actually sell, solicit, and negotiate insurance. Ibid. Further, the ALJ stated that a license to engage in the insurance business is a privilege and not a right, and it is understandable that New Jersey would have an interest in assuring that the companies it chooses to license in the insurance industry do not employ persons who have shown an inability to abide by the statutes and regulations that govern the insurance industry. Ibid. The ALJ additionally stated that this "concern is not diminished if such persons of demonstrated questionable character employed by such a New Jersey-licensed company avoid dealing with New Jersey business." Ibid. Moreover, the ALJ noted that "New Jersey's exercise of

jurisdiction over its licensed entities in respect to their employment of persons with suspended or revoked New Jersey licenses does not offend the legitimate boundaries of the State's concerns." Thus, the ALJ concluded that N.J.A.C. 11:17D-2.5(e) does not overstep New York's jurisdiction in relation to its own licensing scheme, and the application of this regulation to the current matter "does not seek to prevent [the Respondent] from operating within the insurance industry in New York, so long as he does not do so as an employee of a New Jersey-licensed entity." Id. at 9-10. Further, the ALJ concluded that if a person, such as the Respondent, whose license is suspended in New Jersey, holds a valid license in another state, and wishes to pursue employment in the insurance industry, that person can seek employment with a business licensed in the state where he or she is validly licensed, but not with a business licensed in New Jersey. Id. at 10. The ALJ noted that there is no constitutional flaw in the Department's use of N.J.A.C. 11:17D-2.5(e) in this present matter. Ibid.

The ALJ found that although the evidence presented in this matter demonstrates that the Respondent's activities within New Jersey, while employed by OIA during his New Jersey producer license suspension, were limited and did not involve the sale, solicitation, or negotiation of insurance products within New Jersey, he was still employed by OIA, a licensed New Jersey insurance producer. Ibid. Thus, the ALJ concluded that the Respondent's employment violated N.J.A.C. 11:17D-2.5(e). Ibid. In addition, the ALJ found that the Respondent's continued employment during the period of his producer license suspension imposed by the Consent Order violated an order of the Commissioner, and therefore, the Respondent additionally violated N.J.S.A. 17:22A-40a(2). Ibid. Lastly, the ALJ found that as the Respondent demonstrated incompetence and untrustworthiness, in violation of N.J.S.A. 17:22A-40a(8), by working for a licensed New Jersey insurance business entity during his producer license suspension. Ibid.

ALJ'S FINDINGS AS TO THE PENALTY AGAINST RESPONDENT

The ALJ determined that the imposition of civil monetary penalties, costs, and the revocation of the Respondent's insurance producer license was appropriate in this matter. The ALJ noted that pursuant to the Producer Act, the Commissioner has the power to place on probation, suspend, revoke, or refuse to renew a license and to levy a civil penalty for violating any provision of the Producer Act. Ibid. The ALJ further noted that the trustworthiness and integrity of persons licensed to work in the business of insurance should be of the utmost concern to both the insureds and the insurance companies for which the licensees work. Ibid. Moreover, a licensee's honesty, trustworthiness, and integrity are of paramount concern, since an insurance producer collects money from insureds. Ibid. The nature and duty of an insurance producer "calls for precision, accuracy and forthrightness." Ibid. (citing Fortunato v. Thomas, 95 N.J.A.R. (INS) 73 (1993)).

The ALJ stated that the Respondent had previously violated the provisions of the Producer Act, and the violations that he admitted to in the Consent Order were of such a severity that a two and one-half year suspension was imposed. Id. at 11. However, the ALJ noted that the Respondent has once again demonstrated that he is unable to comply with the insurance laws and regulations of this State. Ibid. The ALJ stated that although the Respondent was only involved with New York State insurance activities, the wording of N.J.A.C. 11:17D-2.5(e) is plain and clearly states that a person whose license has been suspended cannot be employed "in any capacity by an insurance producer." Ibid. Here, the ALJ stated that the Respondent was aware that his Producer Agreement with OIA specifically stated that it was governed by the laws of the State of New Jersey. Ibid. Moreover, the ALJ noted that if the Respondent had any concern about whether the language of the regulation and the reference to New Jersey law in his

Producer Agreement suggested that he could not be employed by OIA, he could have contacted the Department and inquired into whether his employment with OIA would conflict with the regulation. Ibid. The ALJ additionally noted that the burden of compliance with the statutes and regulations of this State rests primarily upon the individual licensee, regardless of whether the licensee is currently active or suspended. Ibid. However, the ALJ also stated that this duty upon a licensee does not absolve the employer of its obligation to assure that it does not employ a person whose license was suspended. Ibid. Yet, the failure of the employer to do so does not excuse the failure of the suspended licensee to comply with the insurance statutes and regulations of this State. Ibid. As such, the ALJ concluded that the Respondent was "certainly a violator of the Producer Act," and while his violations did not involve any financial misdeeds, given his prior history of violations, revocation of his New Jersey insurance producer license is "fully warranted." Ibid. The ALJ additionally concluded that this penalty is particularly warranted given that the Respondent's "prior violation and penalty was not trivial, and involved significant disregard of the licensing law, as well as indications of deception or neglect as regarding [the Producer] Act." Ibid. The ALJ noted that that the revocation of the Respondent's producer "license is necessary to assure that he will not have the opportunity for further mischief in this industry in this State." Id. at 14.

In regards to the appropriate monetary penalty in this matter, the ALJ noted that the standards for determining same should be discussed as set forth in Kimmelman v. Henkles & McCoy, Inc., 108 N.J. 123, 137-39 (1987). Id. at 11. 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; and (7) past violations. Id. at 11-12.

With regard to the first factor, the ALJ noted that the Respondent's defense has been based on the contention that during his New Jersey producer license suspension and while he was employed with OIA, he did not engage in any work involving the business of insurance in New Jersey nor did he participate in the sale, solicitation, or negotiation of New Jersey insurance products. Id. Further, the Respondent contends that during his New Jersey producer license suspension, he only engaged in the business of insurance in New York under his valid New York insurance producer license, and therefore, if a violation of the insurance laws of this State did occur, he did not purposely or knowingly violate same. Ibid. However, the ALJ noted that "the wording of [N.J.A.C. 11:17D-2.5(e)] is exceptionally clear." Ibid. The ALJ stated that there is nothing uncertain about how the regulation reads, and the ALJ has "difficulty concluding that in the face of such a clearly worded provision that [the Respondent] could have reasonably believed that it was legal for him to be 'employed in any capacity by the insurance producer.'" Id. at 12-13. The ALJ thus concluded that based upon the clearly worded prohibition of the regulation and the fact that the Respondent had to have known that his Producer Agreement with OIA was governed under New Jersey law, the Respondent's continued employment with OIA demonstrated bad faith. Id. at 13.

As to the second factor, the ALJ stated that there has been no claim regarding the Respondent's inability to pay a fine resulting from this matter. Ibid.

The ALJ noted that, as to the third factor, the Respondent's salary, commissions, and benefits were obtained through illegal activity as his employment was prohibited. Ibid. Thus, these are all viewed as profits gained. Ibid.

Further, the ALJ stated that factor four, injury to the public, "is more subtle, and it arises from the failure of the licensee to abide by the rules." Ibid. Specifically, the ALJ noted that the Respondent continued to be employed by a licensed New Jersey producer business entity in a

highly regulated industry when the purpose of the regulatory structure of this State "is to assure that only persons of appropriate integrity, honesty and devotion to compliance with the law work in entities licensed by [this] State." Ibid. The ALJ further stated that the harm created by the Respondent's activities is to the public's understanding that those employed by entities licensed in this State are of the highest integrity. Ibid. However, the ALJ noted that here, the Respondent, who was suspended by the Department because he did not demonstrate the necessary level of integrity and compliance, once again disregarded the regulatory protections set forth in order to protect the public. Ibid. The ALJ stated that even though the Respondent did not engage in the business of insurance in this State through the sale, solicitation, or negotiation of New Jersey insurance products, "his activity as an employee of OIA after his suspension and in violation of [N.J.A.C. 11:17D-2.5(e)] is still damaging to the public's confidence that the New Jersey regulatory system works to protect its citizens." Ibid.

With regard to the fifth factor, the ALJ noted that the Respondent's employment lasted from the date his suspension began on March 29, 2012 through June 2014, when his employment was terminated by OIA. Ibid. Thus, the ALJ stated that the Respondent's prohibited employment occurred for almost the entirety of his two and one-half year New Jersey producer license suspension. Ibid. Further, the ALJ stated that "[i]n effect, at least to the extent [the Respondent] maintained employment with a New Jersey producer, the impact of the New Jersey suspension was of little import and somewhat meaningless." Ibid. However, the ALJ additionally provided that, in terms of considering what the appropriate sanction the Respondent should receive for his violation of the Consent Order, it is significant that the Respondent could have worked for a non-New Jersey licensed producer during his New Jersey producer license suspension but did not do so. Id. at 13-14. Moreover, as the Respondent's prior suspension resulted, in part, from his engaging in the insurance business in this State without a valid New

Jersey insurance producer license, the ALJ noted that the Respondent's repeat character of these violations "suggests a need for a more severe penalty." Id. at 14.

The ALJ notes that in relation to factor six, the Respondent has not faced any criminal liability for his violation of the Producer Act and accompanying regulations. Ibid. The ALJ further noted that in Kimmelman, the Supreme Court held that a lack of criminal punishment weighs in favor of higher civil penalties, because the defendant was not punished for the unlawful conduct. Ibid.

Lastly, the ALJ noted that the Respondent committed prior violations of the Producer Act, was suspended for two and one-half years, and was fined $15,000. Ibid. The ALJ further noted that the Respondent's prior violations included selling New Jersey insurance policies and receiving commissions for such sales, despite the Respondent not having an active New Jersey producer license. Ibid. Moreover, the Respondent's previous violation included him not disclosing his criminal conviction within 30 days and failing to disclose that he had been convicted of a crime on two licensing applications. Ibid.

Based upon the above analysis, the ALJ recommended that a civil monetary penalty be imposed against the Respondent in the amount of $15,000, which should be allocated as follows: $5,000 for working at OIA while having a suspended license, in violation of N.J.A.C. 11:17D-2.5(e), and $10,000 for violating the Consent Order by continuing his employment at OIA despite having agreed in the Consent Order to a suspension of his New Jersey producer license. Ibid. Additionally, the ALJ recommended that an award of costs of investigation was appropriate; however, the ALJ provided that the costs of investigation "shall be determined upon the conclusion of the administrative proceedings, as directed by the Commissioner." Id. at 15.

EXCEPTIONS

By letter dated April 11, 2017, the Office of the Attorney General, on behalf of the Department, submitted timely Exceptions to the Initial Decision. On the same date, Thomas H. Prol, Esq., on behalf of the Respondent, submitted a request for a seven-day extension to file Exceptions to the Initial Decision. The Respondent's request for an extension was granted and by letter dated April 18, 2017, Thomas M. Prol, Esq., on behalf of the Respondent, submitted Exceptions to the Initial Decision. On April 24, 2017, the Office of the Attorney General, on behalf of the Department, filed its Reply to the Respondent's Exceptions.

Department's April 11, 2017 Exceptions

In its Exceptions, the Department concurs with the overall findings of fact and conclusions of law as set forth in the Initial Decision. The Department requested that the conclusions of law set forth in the Initial Decision be adopted as part of this Final Decision and Order, and that the penalties imposed against the Respondent, including the revocation of his producer license, a civil monetary penalty in the amount of $15,000, and reimbursement of costs of investigation be adopted.

However, the Department requested that certain modifications and clarifications be made as follows. First, the Department requests that the following typographical errors be corrected: (1) the Petitioner's name in the caption on page one should read "Richard J. Badolato, Commissioner, New Jersey Department of Banking and Insurance;" and (2) on page five of the Initial Decision, the last line of paragraph 12 of the recited Stipulation of Facts should read "but it will not at this time pursue an administrative penalty."

Next, the Department requests that the specific amount of costs in the amount of $637.50 be awarded to the Department in this Final Decision and Order. The Department noted that the reimbursement of costs of investigation and prosecution may be ordered pursuant to N.J.S.A.

17:22A-45c. On page 15 of the Initial Decision, the ALJ ordered that the Respondent shall "pay the costs of investigation and prosecution;" however, the ALJ did not specify the exact amount of the costs to be awarded. As such, the Department requests that the amount of costs be specified in this Final Decision and Order.

Respondent's April 18, 2017 Exceptions

In his Exceptions, the Respondent asserts that the Department "asserts an interpretation of the pertinent regulation to sweep up [the Respondent's] employment at OIA [and] even an established entity like OIA, with a team of attorneys . . . has stated it was simply unaware that its employment of [the Respondent] was a violation. . . ." The Respondent contends that it would be unfair to turn the Respondent's "honest mistake" into "a revocable violation." Moreover, the Respondent alleges that he has not been afforded the opportunity to be heard by any decision-maker, and he requested that the Commissioner grant him an in-person hearing to plead his case and demonstrate that he did not intend to violate the Department's regulations. The Respondent contends that his actions "were not undertaken in bad faith or for an intentional act of misconduct."

The Respondent states that the penalty contained in the Initial Decision is extreme and the ALJ, during oral arguments on the Cross-Motions for Summary Decision, stated that the Respondent's actions of working for a New Jersey insurance producer to be a "technical violation" and that there was no harm to the public. The Respondent additionally argued that the penalty imposed in the Initial Decision is unfair, considering that OIA, which was charged with violating the same insurance regulation, did not have its producer license suspended or revoked and was only fined $5,000 by the Department.

Respondent's Factual Exceptions

In addition to the above-referenced contentions, the Respondent set forth the following "Factual Exceptions" to the Initial Decision.

First, the Respondent contends that although the ALJ's factual finding regarding OIA being licensed as an insurance producer in New Jersey is correct, the Respondent's employment with OIA "did not implicate an activity regulated by the [Department]." The Respondent additionally contends that the Initial Decision finds the Respondent in violation of a New Jersey regulation for activities permitted under his New York resident insurance producer license at a company that is licensed and operates in 38 states, including New York and New Jersey. As such, the Respondent argues that the ALJ "improperly, arbitrarily and capriciously, determined that [the Department] has jurisdiction over the regulated licensing activity of another state, and, in contravention of law, could thereby exert jurisdiction over that other state's licensed activities and plenary authority.

Second, the Respondent contends that the ALJ's factual finding relating to the Respondent's licensing history in New Jersey "provides a narrow and unrelated summary of [the Respondent's] pre-2006 New Jersey licensing activing only." The Respondent contends that this limited consideration of the Respondent's licensing activity fails to recognize that the Respondent is currently licensed in New York as a resident insurance producer. The Respondent states that the ALJ failed to mention the Respondent's New York resident insurance producer license in the ALJ's factual findings, which the Respondent alleges suggests "that the tribunal disregarded or diminished the impact of this fact in arriving at its determination." The Respondent additionally states that the parties negotiated and agreed to appear before the OAL on the Cross-Motions for Summary Decision based upon the "understanding and mutual submission that [the Respondent] never performed New Jersey-regulated activities and was

operating solely under his New York license." The Respondent contends that the ALJ's omission of the Respondent's New York licensing history from his factual findings "undercuts the legal conclusions [as] it fails to consider or include that" the Respondent was operating under his valid New York resident insurance producer license during his New Jersey producer license suspension.

Third, the Respondent contends that the ALJ's factual finding relating to the date the Respondent was first employed by OIA does not reflect the nature of the Respondent's employment with OIA. Specifically, the Respondent states that the Respondent was hired for New York insurance matters only throughout his employment with OIA.

Fourth, the Respondent further contends that the ALJ's factual finding, which holds that the New Jersey choice of law clause in the Respondent's May 16, 2011 Producer Agreement with OIA was dispositive of establishing New Jersey jurisdiction in this matter was clear error. The Respondent contends that contractual provision was negotiated and executed in New Jersey in 2011, prior to the Respondent's March 29, 2012 New Jersey producer license suspension, and therefore, "cannot be a legitimate basis for reaching into the future to create a retroactive violation of [the Respondent's] suspension and employment activity."

Fifth, the Respondent maintains that the Initial Decision does not include or consider several of the Respondent's papers, which he submitted in this matter, including the February 19, 2017 Certification of Paul J. Vinci and the February 20, 2017 Certification of Counsel Thomas H. Prol, Esq. The Respondent contends that these documents "are seminally important" as they dictate key components of the Respondent's arguments and defenses.

Lastly, the Respondent notes that the ALJ failed to include specific facts that address the Respondent's honesty, integrity, good faith, and trustworthiness. Specifically, the Respondent notes that since his criminal convictions, he has turned his life around by entering the Betty Ford

Center for drug and alcohol counseling and has lived a clean and sober life since then. The Respondent alleges that the Initial Decision focuses on the Respondent's past transgressions without giving attention to the Respondent's "contrition or sincere apology" related to same.

Respondent's Legal Exceptions

In addition to the "Factual Exceptions" noted above, the Respondent set forth "Legal Exceptions" to the Initial Decision as follows.

First, the Respondent alleges that "[t]he Initial Decision did not give proper consideration to the fact that his case presents a matter of first impression and was brought simultaneously with an action against the employer where no penalty was issued beyond a $5,000 settlement payment." The Respondent contends that the Department provided a lighter punishment against OIA for failing to adhere to the Department's regulatory interpretation, but has sought revocation of the Respondent's New Jersey insurance producer license and triple the amount of civil monetary penalties against Respondent. The Respondent asserts that there exists only two reported decisions where the Department brought enforcement actions under N.J.A.C. 11:17D-2.5(e),[6] and only one of these cases was brought against a suspended licensee. The Respondent contends that the actions of the respondent in Commissioner v. Thomas Dobrek and Mr. Lucky Bail Bonds, Inc., OAL Dkt. No. BKI 00361-05, Initial Decision (12/26/06), Final Decision and Order (03/26/07) were "more serious allegations."

[6] The Respondent additionally submits that no reported cases appear to address N.J.A.C. 11:17D-2.5(b). This regulatory citation is referenced in the OTSC; however, it is not addressed as a violation in either of the Two Counts contained in the OTSC. Moreover, the ALJ, in the Initial Decision, did not find that the Respondent's actions, as alleged in the OTSC constitute a violation of N.J.A.C. 11:17D-2.5(b). As such, N.J.A.C. 11:17D-2.5(b) will not be addressed as a violation alleged to be committed by the Respondent in this Final Decision and Order. However, it will be referenced when discussing the regulation's requirement that a period of suspension severs an agency relationship with insurance companies.

Second, the Respondent contends that the sanctions imposed against the Respondent in the Initial Decision are "significantly harsher and several times more punitive than every other licensee who was charged with the same violation in the past."

Third, the Respondent submits that the Initial Decision analyzed the Kimmelman factors incorrectly in order to "impose the most draconian penalty possible, even in the face of the other actor here – OIA – being penalized in a significantly reduced fashion." The Respondent alleges that in spite of the subtle nature of any violation alleged in this matter and the ALJ noting on page 11 of the Initial Decision that the Respondent's actions "did not involve any misdeeds,"[7] the Initial Decision failed to address "the substantial evidence presented on the record that there was, in fact, no bad faith . . . no profit from illegal activity . . . no injury to the public . . . and no existence of criminal actions. . . ."

Fourth, the Respondent argues that the purpose of N.J.A.C. 11:17D-2.5(e) is to prevent New Jersey licensed business entity from allowing a suspended licensee to sell or engage in the sale of New Jersey lines of insurance. The Respondent contends that this regulation must be read in concert with the Producer Act, which he alleges refers to the actions of New Jersey insurance producers, rather than a broad interpretation encompassing an entity engaging in the business of insurance in a multitude of states, like OIA.

Fifth, the Respondent points out that the Initial Decision makes it clear that the Department does not dispute that the insurance business engaged in by the Respondent involved only New York lines of insurance and did not involve the sale, solicitation, or negotiation of

[7] The Respondent misquoted and mischaracterized the ALJ's language in the Initial Decision. Specifically, the ALJ did not provide that the Respondent's actions "did not involve any misdeeds." The ALJ stated "[w]hile it is recognized that [the Respondent's] violations here did not involve any financial misdeeds, nevertheless given his prior history of violations, revocation of his license to operate in this industry is fully warranted." See Initial Decision at 11. As such, the ALJ concluded that the Respondent's actions in this matter did not contain any "financial misdeeds," rather than the Respondent's contention that the ALJ believed that the Respondent's actions did not involve "any misdeeds" at all.

New Jersey lines of insurance. Moreover, the Respondent submits that the main dispute in this matter relates to the Department's assertion that N.J.A.C. 11:17D-2.5(e) "can be applied to a person, employed by a New Jersey licensed entity, whose only actual solicitation, negotiation, or sale of insurance business takes place in another state where he is actively licensed."

Lastly, the Respondent asserts that the ALJ's statements in the Initial Decision, which provide that "neither party has produced any New Jersey case law involving a situation such as this case presents" and "counsel for [the Respondent] suggests that the regulation may run afoul of constitutional principles . . . [but] does not further identify and elaborate upon the precise constitutional concern," are false. The Respondent contends that his counsel conducted extensive research and cited, and distinguished, two prior decisions concerning N.J.A.C. 11:17D-2.5(e) and specifically cited to the Commerce Clause of the United States Constitution in the Respondent's Cross-Motion for Summary Decision.

Department's April 24, 2017 Reply to the Respondent's April 18, 2017 Exceptions

The Department argues that the plain and ordinary meaning of N.J.A.C. 11:17D-2.5(e), which provides that "no person whose license has been suspended or revoked may be a partner, officer, director or owner of a licensed business entity, or otherwise be employed in any capacity by an insurance producer," is broad on its face and was correctly applied to the Respondent by the ALJ in the Initial Decision. Specifically, the Department points out that the ALJ, on page eight of the Initial Decision finds that "the wording of the regulation appears to be absolute in nature" and further finds that "the regulation should be construed in accordance with the plain meaning of its language and in a manner that makes sense when read in the context to the entire regulation." The Department further highlights that the ALJ found that facts of the present matter fit within the regulation because the Respondent is "a person whose license has been

suspended [and was] employed during the period of that suspension, in any capacity by an insurance producer."

Moreover, the Department asserts that it is undisputed that the Respondent was employed by OIA, a New Jersey licensed resident business entity insurance producer, whose office is located in Englewood Cliffs, New Jersey. The Respondent additionally continued his employment with OIA after his New Jersey insurance producer license was suspended. The Department stated that the Respondent attended meetings and conducted a portion of his business in the New Jersey office and accessed OIA's network, which contained New Jersey client information, and employed a standardized OIA company electronic mail signature. The Department further noted that the Respondent's Producer Agreement was governed by the laws of the State of New Jersey, and he was supervised and paid by a New Jersey licensed producer. He further received company benefits, and his tax deductions were withheld by the State of New Jersey.

The Department further states that the Respondent has failed to cite to any authority to support his request for an in-person hearing, and his contention that he has not been afforded the opportunity to be heard by any decision-maker is unfounded, as the Respondent has been provided an opportunity to be heard. Specifically, the Department provides that the Respondent was heard after the Respondent filed his Motion for Summary Decision, and he has filed briefs and certifications in support of his legal arguments. Moreover, the Department stated that at the Respondent's request, oral argument on the Cross-Motions for Summary Decision was heard before the ALJ, and the Respondent was not able to show that there was a genuine issue of material fact in dispute, as almost every material fact in this matter has been admitted by the Respondent in his Answer, during discovery, or in the Joint Stipulation of Facts filed with the OAL.

The Department contests the Respondent's assertion that the penalty imposed under the Initial Decision is the most extreme when compared to the sanctions imposed upon the Respondent's former employer and New Jersey insurance producer, OIA. The Department asserts that the Respondent's comparison of the dispositions of this matter is misplaced whereby OIA and the Department settled the present matter, and the Respondent's portion of the case was determined through an Initial Decision after the ALJ made findings of fact and conclusions of law in a contested litigation. The Department contends that the Respondent's insurance law violations are serious in nature, and he should be held accountable.

In relation to the Respondent's first "Factual Exceptions," the Department notes that the Respondent failed to provide any support for his argument that the ALJ "improperly, arbitrarily and capriciously, determined that the Department has jurisdiction over the regulated licensing activities of another state." Moreover, the Department contends that the facts in this matter show that the Respondent had substantial contacts with New Jersey, and there is a distinction between being employed by an insurance agency licensed in 38 states to conduct insurance business and being employed as an insurance producer by a resident New Jersey licensed producer who has an office in the State of New Jersey. The Department argues that as the Respondent chose to continue to work in New Jersey as an insurance producer despite his New Jersey producer license suspension, the Department, a New Jersey regulatory agency, has jurisdiction to charge the Respondent with violating New Jersey insurance laws.

Additionally, contrary to the Respondent's assertions, the Department notes that Initial Decision explicitly provides that "the business that [the Respondent] conducted during the time of his suspension only involved insurance business in New York State where he then held a valid license." Initial Decision at 7. As such, the Department maintains that the ALJ took the

Respondent's New York producer license and employment role at OIA into consideration when analyzing the facts of the present matter.

The Department further notes that the ALJ correctly found that the Respondent's Producer Agreement with OIA stated that it "shall be governed in all aspects by the State of New Jersey." The Department argues that the Respondent's statement that his Producer Agreement with OIA was entered into on May 16, 2011, when his New Jersey producer license suspension began on March 29, 2012, is irrelevant. The Department states that "just because [the Respondent] entered into this agreement before the suspension does not mean that he did not have the obligation to cease employment [in order] to be compliant with the Consent Order that he freely entered into with the Department." Moreover, the Department stated that on December 31, 2012, after the Consent Order was entered into, the Respondent signed an extension to his Producer Agreement with OIA.

Additionally, the Department contends that the "additional facts" that the Respondent alleges were not considered by the ALJ were actually considered by the ALJ on page six of the Initial Decision. Moreover, the Department states that it does not object to the Commissioner reviewing the certifications provided by the Respondent before issuing this Final Decision and Order.

In regards to the Respondent's "Legal Exceptions," the Department acknowledges that the ALJ addressed the precedent of Commissioner v. Dobrek, supra, and found that its facts differed from the present matter; however, the Department provides that "the Commissioner prohibited Dobrek, an individual whose license was revoked, from being a partner, officer, director or owner of, or otherwise employed by his wife's bail bonds agency or any other insurance producer during the revocation period, pursuant to N.J.A.C. 11:17D-2.5(e)."

In regards to the Respondent's second legal Exception, wherein the Respondent argues that the sanctions imposed upon him are "significantly harsher" than other licensees charged with the same violations, the Department maintains that most of the orders attached to the Respondent's Exceptions are consent orders, wherein the final disposition was agreed upon in settlement negotiations and did not occur during a contested litigation. The Department provides that none of these consent orders appear to find that the respondents violated N.J.A.C. 11:17D-2.5(e), and sanctions imposed may be commensurate with a first violation.

The Department disputes Respondent's assertion that the Kimmelman factors were inappropriately analyzed in the Initial Decision. The Department notes that the ALJ went through a detailed analysis of each Kimmelman factor on pages 11 through 14 of the Initial Decision. Moreover, the Department argues that the Respondent's extensive contacts with New Jersey insurance business through OIA demonstrates that he exercised bad faith by purposefully continuing his employment. Additionally, the Department argues that the Respondent "willfully executed the Producer Agreement with OIA knowing that the Agreement was governed by the laws of the State of New Jersey [and yet h]e proceeded with his employment with full knowledge that OIA's office was located in New Jersey and that OIA was a New Jersey licensed insurance producer." The Department further argues that the Respondent continued his employment with OIA even despite his requirement to physically come to New Jersey to work at OIA's offices and despite having full access to OIA's network, which contained New Jersey insurance business.

With regard to the Respondent's fourth legal Exception, the Department provides that N.J.A.C. 11:17D-2.5(e) does not apply only to "a New Jersey business entity," but also includes "individual(s)" as defined in N.J.A.C. 11:17D-1.2.

The Respondent's fifth legal Exception addresses the ALJ's analysis on page seven of the Initial Decision, wherein the ALJ addresses that the parties agree that the Respondent conducted

New York insurance business during his employment with OIA. The Department provides in its Reply that the ALJ confirms that neither party has produced any New Jersey case law involving the situation that this case presents.

Lastly, the Department's reply addresses the Respondent's final legal Exception that he raised constitutional concerns. The Department argues that although the Respondent made reference to the Commerce Clause in his brief and at oral argument, the Respondent failed to cite any support as to why N.J.A.C. 11:17D-2.5(e) is unconstitutional as applied to the present matter.

LEGAL DISCUSSION

Respondent's Request for an In-Person Hearing

As noted above, the Respondent, in his April 18, 2017 Exceptions requested that an in-person hearing be scheduled in order for the Respondent to plead his case and demonstrate that he did not intend to violate the Department's regulations. The Respondent further contended that he had not been afforded an opportunity to be heard by any decision-maker. However, the right to an evidentiary hearing is subject to the summary decision procedures established under the Administrative Procedure Act, N.J.S.A. 52:14B-1, et seq., and "[s]ince the OAL's summary decision rule is simply a procedural mechanism for determining whether a proposed administrative action turns on disputed adjudicatory facts, a summary decision does not abridge a party's right to a hearing." Contini v. Board of Educ. Newark, 286 N.J. Super. 106, 120 (App. Div. 1995). As such, an evidentiary hearing would only be required if there was any dispute as to the facts underlying the findings. Ibid. (citing In re Farmers' Mut. Fire Assuarance Ass'n of N.J., 256 N.J. Super. 607, 618 (App. Div. 1990) ("An evidentiary hearing is mandated only when the proposed administrative actions is based on disputed adjudicatory facts.")).

The facts in this present matter have not been disputed by the parties and further, the parties submitted a Joint Stipulation of Facts, which accompanied the parties Cross-Motions for Summary Decision. As there are no factual findings in dispute and thus, no genuine issues as to any material facts, this matter was ripe for summary decision under the standard set forth below. It should also be noted that even though an in-person, evidentiary hearing is not required in this matter, the Respondent was still heard through the Respondent's filing of his Motion for Summary Decision, which included briefs and certifications reflecting the Respondent's position in this matter, which have all been reviewed prior to the Initial Decision and this Final Decision and Order being issued. Additionally, the ALJ heard oral argument on the Cross-Motions for Summary Decision prior to issuing the Initial Decision. For the reasons set forth above, the Respondent's request for an in-person, evidentiary hearing on this matter is DENIED.

Summary Decision Standard

Motions for summary decisions are governed by N.J.A.C. 1:1-12.5, which mirrors the language of R. 4:46-2, the Superior Court rule governing motions for summary judgment. Pursuant to these rules, summary decision may be rendered if the papers and discovery, which have been filed, together with affidavits, show no genuine issue as to any material fact and the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). When a motion for summary decision is made and supported, the burden shifts to the adverse party, who must respond by affidavit, setting forth specific facts showing that genuine issues of material fact exist, which are resolvable only by an evidentiary proceeding. Ibid. The judge, when deciding on a motion for summary decision, must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995). Even if the non-

moving party comes forward with some evidence, summary decision must be granted if the evidence is "so one-sided that [the moving party] must prevail as a matter of law." Id. at 536.

The Department bears the burden of proving the allegations in an Order to Show Cause by a preponderance of the competent, relevant, and credible evidence. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). The evidence must be such as would lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Preponderance may be described as: "the greater weight of credible evidence in the case not necessarily dependent on the number of witnesses, but having the greater convincing power." State v. Lewis, 678 N.J. 47 (1975). For all the reasons stated in the Initial Decision and those that follow, I find that the ALJ correctly granted summary decision to the Department on all Counts of the OTSC. As found by the ALJ, the Respondent failed to adduce evidence that creates a genuine issue as to any material fact and his defenses, as pled and developed during the course of the motion, fail as a matter of law. The Department is, therefore, entitled to prevail as a matter of law. Moreover, I concur with the ALJ that the Respondent's Cross-Motion for Summary Decision should be denied.

Count One—The Respondent continued to work at OIA despite having a suspended insurance producer license

Count One of the OTSC alleges that the Respondent continued to work for OIA despite having a suspended insurance producer license, in violation of N.J.S.A. 17:22A-40a(2) and (8) and N.J.A.C. 11:17D-2.5(e).

The facts pertinent to this Count are undisputed. Specifically, the Respondent admits that on March 29, 2012, he entered into a Consent Order with the Department for violations of the Producer Act, wherein he agreed to pay a fine in the amount of $15,000 and further agreed to a suspension of his New Jersey producer license for a period of two and one-half years. The

Respondent additionally admits that during the time of his New Jersey producer license suspension, he maintained employment with OIA, who is licensed in New Jersey as a resident insurance producer business entity. While the Respondent maintains that his employment with OIA was limited to New York lines of insurance under his valid New York resident insurance producer license, he was required to attend meetings at the New Jersey office and had access to OIA's computer network, which contained New Jersey insurance business. It should be noted that the Respondent's contentions in his Exceptions that certain factual findings set forth by the ALJ are incorrect or misleading are unwarranted. The ALJ noted that the Respondent was licensed originally in the State of New Jersey, and is currently licensed as a resident insurance producer in the State of New York. Additionally, the ALJ noted that the Respondent's employment with OIA was limited to New York lines of insurance under his valid New York producer license. Further, the ALJ's factual finding that the Respondent's Producer Agreement with OIA provided that the Producer "Agreement shall be governed in all aspects . . . by the laws of the State of New Jersey" is correct, and regardless of the Respondent entering into the Producer Agreement prior to his license suspension, the Respondent was aware of the terms of his agreement and that they still continued to apply after his New Jersey producer license was suspended.

While the facts are wholly undisputed, the application of the Producer Act and accompanying regulations to the facts of this matter are contested by the parties. Specifically, the Respondent contends that because he was hired by OIA to sell, solicit, and negotiate New York lines of insurance only, the Department is overstepping its regulatory authority under the Producer Act and N.J.A.C. 11:17D-2.5(e) by applying same to his activities engaged in under a valid insurance producer license in another state. However, as held by the ALJ in the Initial Decision, N.J.A.C. 11:17D-2.5(e) is absolute and clear in its terms. The regulation specifically

prohibits a "person whose license has been suspended or revoked [to] be employed in any capacity by an insurance producer." N.J.A.C. 11:17D-2.5(e). Thus, a licensee that has been suspended or revoked may not be employed by an insurance producer licensed by the State of New Jersey in any capacity, including any employment roles that are not related to the sale, solicitation and negotiation of insurance. See Commissioner v. Dobrek, supra (Dobrek's employment with his wife's bail bond agency as an office manager was prohibited under N.J.A.C. 11:17D-2.5(e)). In the present matter, the Respondent admitted that his New Jersey producer license was suspended. Moreover, he admitted that he was employed as an insurance producer by OIA, an insurance producer business entity licensed in the State of New Jersey. As such, the Respondent's employment with OIA during the term of his license suspension was clearly in violation of N.J.A.C. 11:17D-2.5(e).

Moreover, it should be noted that the N.J.A.C. 11:17D-2.5(e) does not prohibit the Respondent from engaging in the insurance business under his New York resident insurance producer license. It does, however, prohibit the Respondent from being employed by an insurance producer licensed and regulated by the State of New Jersey through the Department. As such, although the Respondent appears to contend that N.J.A.C. 11:17D-2.5(e) is effectively prohibiting him from engaging in the business of insurance in New York in violation of constitutional principles, his argument is without merit. The Respondent is free to maintain employment with an insurance producer in New York or any other state in which he is licensed, as long as that insurance producer is not also licensed in the State of New Jersey. Additionally, the Respondent's contention that N.J.A.C. 11:17D-2.5(e) is intended to only prevent a New Jersey business entity from allowing a suspended licensee to sell or be involved in the business of insurance in New Jersey, is unfounded and patently incorrect. As found by the ALJ, the plain

language of the rule clearly belies such a limited reading, and Dobrek above demonstrates that its scope has not been limited in any such way by prior decisions of this Department.

In light of the foregoing, I concur with the ALJ that the Department proved the allegations in Count One of the OTSC based upon the undisputed facts of this matter, and I FIND that the Respondent's actions violated N.J.A.C. 11:17D-2.5(e) ("No person whose license has been suspended or revoked may be a partner, officer, director or owner of a licensed business entity, or otherwise be employed in any capacity by an insurance producer") as charged. Moreover, I concur with the ALJ's conclusion that "because [the Respondent] was working in violation of his suspension[,] his conduct involved an element of incompetence and untrustworthiness, authorizing sanctions under N.J.S.A. 17:22A-40a(8)." As such, I FIND that the Respondent's actions also violated N.J.S.A. 17:22A-40a(8) ("Using fraudulent, coercive or dishonest practices, or demonstrating incompetence, untrustworthiness or financial irresponsibility in the conduct of insurance business in this State or elsewhere") as charged.

However, the ALJ appears to have made no determination as to whether the conduct as alleged by the Department in Count One of the OTSC was additionally in violation of N.J.S.A. 17:22A-40a(2), which prohibits an insurance producer from violating any insurance law, regulation, or Order of the Commissioner. As noted above, I find that the Respondent's continued employment with OIA despite the suspension of his New Jersey producer license violated N.J.S.A. 17:22A-40a(8), an insurance law, and N.J.A.C. 11:17D-2.5(e), an insurance regulation. As such, I MODIFY the Initial Decision and FIND that the Respondent's actions are also a violation of N.J.S.A. 17:22A-40a(2) as charged in the OTSC.

Count Two—The Respondent continued to work for an insurance producer in violation of an Order of the Commissioner

Count Two of the OTSC alleges that the Respondent violated an Order of the Commissioner by continuing to work for an insurance producer despite having consented to the suspension of his insurance producer license, in violation of N.J.S.A. 17:22A-40a(2) and (8). As noted above, the Respondent admitted that he consented to the suspension of his New Jersey producer license for a period of two and one-half years and during that time, he maintained employment as an insurance producer at OIA, a licensed resident New Jersey insurance producer business entity. N.J.A.C. 11:17D-2.5(b) provides that the "imposition of a period of suspension or of revocation shall sever any existing agency relationship with insurance companies, employment relationships with other insurance producers and licensed officer or partner relationships' with any licensed organization." As the Respondent failed to sever his relationship with OIA pursuant to the period of suspension imposed by the Consent Order on March 29, 2012, the Respondent's continued employment with OIA violated an Order by the Commissioner. As such, I concur with the ALJ that the Department proved the allegations in Count Two of the OTSC, and I FIND that the Respondent's actions violated N.J.S.A. 17:22A-40a(2) (violating any insurance law, regulation, or order of the Commissioner) as charged.

However, the ALJ appears to have made no determination as to whether the conduct as alleged by the Department in Count Two of the OTSC was additionally in violation of N.J.S.A. 17:22A-40a(8), which prohibits the use "of fraudulent, coercive or dishonest practices, or demonstrating incompetence, untrustworthiness or financial irresponsibility in the conduct of insurance business in this State or elsewhere." Here, the Respondent failed to abide by the terms of his license suspension, as set forth in the Consent Order. As correctly held by the ALJ, a licensee is tasked with knowing and understanding the insurance laws that apply and regulate

their licenses and professions. By failing to abide by the terms of the Consent Order - possibly due to ignorance of the insurance laws applicable to him - that imposed a two and one-half year suspension of his producer license and required severing of his employment relationship with OIA, a licensed resident New Jersey insurance producer business, as required by N.J.A.C. 11:17D-2.5(b), the Respondent clearly demonstrated: incompetence in the conduct of insurance business; and, in light of his prior transaction of insurance business in New Jersey without a license, unworthiness, both in violation of N.J.S.A. 17:22A-40a(8). Although the Respondent has come a long way from his prior drug convictions and it is admirable that he has remained sober for such an extended period of time, it does not mitigate the fact that the Respondent has a history of disregarding the insurance laws of this State and that he disregarded the Consent Order, which was issued by the Commissioner. As such, I MODIFY the Initial Decision and FIND that 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).

PENALTY AGAINST THE RESPONDENT

Revocation of Respondent's Producer License

With respect to the appropriate action to take against the Respondent's insurance producer license, I find that the record is more than sufficient to support license revocation and, in fact, compels the revocation of the Respondent's producer license. As such, I concur with the ALJ's recommendation that the Respondent's producer license be revoked.

A licensee's honesty, trustworthiness, and integrity are of paramount concern, since an insurance producer acts as a fiduciary to both the consumers and insurers they represent. The nature and duty of an insurance producer "calls for precision, accuracy and forthrightness." Fortunato v. Thomas, supra. Additionally, a licensed producer is better placed than a member of the public to defraud an insurer. Strawbridge v. New York Life Ins. Co., 504 F.Supp. 824

(D.N.J. 1980). As such, a producer is held to a high standard of conduct, and should fully understand and appreciate the effect of fraudulent or irresponsible dealing on the industry and on the public. Our strong policy is to instill public confidence in both insurance professionals and the industry as a whole. In re Parkwood Co., 98 N.J. Super. 263 (App. Div. 1963). Courts have long recognized that the insurance industry is strongly affected with the public interest and the Commissioner is charged with the duty to protect the public welfare. See Sheeran v. Nationwide Mutual Insurance Company, 80 N.J. 548, 559 (1979).

I agree with the ALJ's findings and reasoning that Respondent's actions demand the revocation of his insurance producer license. Here, the Respondent previously admitted to violations of the Producer Act, which in part involved the Respondent engaging in the business of insurance in the State of New Jersey without an active license. Based upon his admission, the Respondent agreed to a pay a fine in the amount of $15,000 and agreed to have his New Jersey producer license suspended for a period of two and one-half years based upon this prior unlicensed activity and the failure to disclose his criminal proceedings while making application for licensure. Pursuant to the insurance laws of this State, the Respondent's consensual suspension of his New Jersey producer license required him to sever any employment relationship with a New Jersey licensed insurance producer. The Respondent admittedly continued his employment with OIA, who is a licensed resident New Jersey insurance producer business entity, after this consensual suspension of his license. While the Respondent alleges, and the Department does not dispute, that his employment dealt with New York insurance products only under his valid New York insurance producer license, the Respondent was still employed by a licensed resident New Jersey insurance producer and further, had access to OIA's network, which maintains New Jersey insurance business. It is the Respondent's duty as a former licensee and party to the Consent Order to be aware of the insurance laws that govern his

license, his suspension, and his employment with a resident New Jersey business entity insurance producer. The Respondent repeatedly failed to abide by the insurance laws of this State requiring licensure, and by doing so, violated the Producer Act and its accompanying regulations. This shows a purposeful disregard for these laws and the role of the Department in regulating the insurance industry to protect consumers by ensuring that they are served by knowledgeable and trustworthy insurance producers. Additionally, the Respondent's actions have the potential to harm the public's perception of the insurance industry, which results in the public's confidence in the insurance industry, as a whole, being eroded.

Accordingly, based upon my review of the record and the Initial Decision, I am compelled to agree with the ALJ's recommendation that the revocation of the Respondent's insurance producer license is necessary and appropriate.

Monetary Penalty Against Respondents

As discussed by the ALJ, under Kimmelman, supra, 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 (up to $5,000 for the first violation and up to $10,000 for any subsequent violations). No one Kimmelman factor is dispositive for or against fines and penalties. See Kimmelman, supra, 108 N.J. at 139 ("[t]he weight to be given to each of these factors by a trial court in determining . . . the amount of any penalty, will depend on the facts of each case").

The record herein indicates the following with respect to these factors. The first Kimmelman factor addresses the good faith or bad faith of the violator. I agree with the ALJ that the Respondent's conduct demonstrates bad faith and weighs in favor of a significant monetary penalty. Specifically, the Respondent had extensive contacts with the business of insurance in this State through OIA. The Respondent continued his employment with OIA despite knowing

that he would be required to report to OIA's Englewood cliffs, New Jersey branch several times each week as needed, and that OIA is licensed as a New Jersey insurance producer business entity. See Certification of Civil Investigator Eugene Shannon ("Shannon Cert.") attached to the Department's Motion for Summary Decision at Exhibit 5, question 7. Moreover, the Respondent admitted that he was required to physically come to OIA's New Jersey office, and he had access to OIA's network, which includes OIA's New Jersey business. The Respondent thus willfully continued his employment with OIA despite the fact that it was clearly prohibited under the insurance laws of this State pursuant to the terms of the Consent Order (i.e., his producer license suspension).

As to the second Kimmelman factor, I agree with the ALJ that no proofs have been provided regarding the Respondent's ability to pay the fines imposed. As such, this factor is neutral with regard to analysis of the penalty to be imposed.

The third Kimmelman factor addresses the amount of profits obtained or likely to be obtained from the illegal activity. The greater the profits an individual is likely to obtain from illegal conduct, the greater the penalty must be if penalties are to be an effective deterrent. Kimmelman, supra, 108 N.J. at 138. In the present matter, the Respondent profited by receiving his salary, commissions, as well as employee benefits, such as a 401(k), vehicle allowance, and gas card during almost the entirety of his New Jersey producer license suspension. See ("Shannon Cert.") at Ex. 3, question 1, and Ex. 5, question 9.

The fourth Kimmelman factor addresses the injury to the public. Licensed producers act in a fiduciary capacity. In re Parkwood Co., supra, 98 N.J. Super. at 268. 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. Here, the harm to the public is less tangible. The Department admits that the Respondent did not engage in the sale,

solicitation, or negotiation of New Jersey insurance products during his New Jersey producer license suspension term. However, there is a harm to the insurance industry as a whole – and to possibly New Jersey consumers if sales occur – when parties intentionally disregard our system of licensure and the requirements therein.

The fifth Kimmelman factor to be examined is the duration of the illegal activity. I agree with the ALJ that the Respondent's fraudulent actions continued for a period of 27 months from the date of the Consent Order of March 29, 2012 through OIA terminating his employment on June 20, 2014.

The existence of criminal actions and whether a civil penalty may be unduly punitive if other sanctions have been imposed is the sixth factor. 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. Kimmelmen, supra, 108 N.J. at 139. This factor weighs in favor of a substantial monetary penalty because the Respondent has not been subjected to criminal punishment or other sanctions for his actions as alleged in the OTSC.

The last Kimmelman factor addresses whether the producer had previously violated the Producer Act, and if past penalties have been insufficient to deter future violations. Here, as the ALJ noted, the Respondent entered into a Consent Order on March 29, 2012 for violating the Producer Act by selling, soliciting, and negotiating New Jersey insurance policies and receiving commissions without an active license, and that he failed to report that he had a criminal conviction on two of his previous licensing applications. The Respondent was assessed a fine of $15,000 and agreed to a suspension of his New Jersey producer license for a period of two and one-half years, which did not deter future misconduct because he continued to maintain employment as an insurance producer with OIA, a licensed resident New Jersey insurance

producer business entity in violation of the insurance laws of this State. As such, this factor also militates for imposition of substantial penalties.

Although I concur with the ALJ's Kimmelman analysis, as set forth in the Initial Decision and further addressed above, the lack of any evidence and the Department's apparent acquiescence that the Respondent did not sell, solicit or negotiate any insurance products to New Jersey consumers during this time and the imposition of the significant penalty of license revocation mitigate against the imposition of significant additional fines. Moreover, I note that both Counts of the OTSC are based upon the same conduct – namely the Respondent's employment as an insurance producer by a New Jersey resident business entity producer while suspended.

Additionally, I disagree with the Respondent's contention that he should not be penalized in excess of what OIA was fined by the Department via consent order. The OIA Consent Order and the amount of the fine therein is irrelevant because it is the result of a negotiated settlement in which OIA admitted responsibility for its violations. Even if settlement negotiations had occurred with Vinci, such would be inadmissible to gauge the appropriateness of the penalties imposed by this Final Order subsequent to litigation of the matter. See generally N.J.R.E. 408. As such, the OIA Consent Order is not precedential or binding upon me in determining the appropriate penalty with regard to Vinci. Moreover, it should be noted that this is not the Respondent's first violation of the insurance laws of this State and as such, a penalty should be greater in order to deter such wrongful and repetitive conduct by him and the broader industry.

Overall, the Respondent's actions in disregarding the Consent Order and continuing his employment with OIA during the suspension of his New Jersey producer license is a significant and lengthy violation of the Producer Act and accompanying regulations. His acts demonstrated bad faith and allowed the Respondent the opportunity to illegally sell insurance products to New

Jersey consumers; despite this, there is no evidence that the Respondent did so. Under the totality of these circumstances and the Kimmelman analysis above and in the Initial Decision, I MODIFY the Initial Decision and impose a total civil monetary penalty against the Respondent in the amount of $7,500, allocated as follows: Count One: $2,500 and Count Two: $5,000. The fines are fully warranted, not excessive, or unduly punitive, and are necessary to demonstrate the appropriate level of opprobrium for the Respondent's conduct.

Pursuant to N.J.S.A. 17:22A-45c, it is also appropriate to impose reimbursement of the costs of investigation. As the ALJ awarded costs of investigation to the Department in the Initial Decision but failed to set forth the specific amount, I MODIFY the Initial Decision and set forth that the Respondent shall pay costs of investigation in the amount of $637.50, as set forth in the Certification of Supervisor of Investigations Thomas F. Ritardi ("Ritardi Cert.") attached to the Department's Motion for Summary Decision. See Ritardi Cert. at ¶¶ 3, 5, and 6.

CONCLUSION

Having carefully reviewed the Initial Decision and the entire record herein, I hereby ADOPT the Findings and Conclusions as set forth in the Initial Decision. Specifically, I ADOPT the ALJ's conclusions, except as modified herein, and hold that the Respondent violated the Producer Act and accompanying regulations as charged in the OTSC, and has failed to present any legally or factually viable defenses to the violations of the Producer Act. Further, I ADOPT the conclusion that the Department's Motion for Summary Decision should be granted on both Counts One and Two, as charged in the OTSC and that the Respondent's Cross-Motion for Summary Decision be DENIED.

I also ADOPT the ALJ's recommendation and hereby ORDER the revocation of Respondent's insurance producer license. I MODIFY the ALJ's recommendations as to the

imposition of civil monetary penalties and ORDER that fines totaling $7,500 be imposed against the Respondent for the violations contained herein. I further MODIFY the Initial Decision as it relates to the allocation of these penalties. Therefore, I impose the following fines: Count One: $2,500 and Count Two: $5,000. I further MODIFY the ALJ's recommendation and ORDER that the Respondent pay costs of investigation in the amount of $637.50. I further MODIFY the Initial Decision to correct any typographical errors as set forth in the Department's Exceptions. Lastly, for the reasons set forth above, the Respondent's request for an in-person, evidentiary hearing on this matter is DENIED.

It is so ORDERED on this 11TH day of August, 2017.

Peter L. Hartt[8]
Director of Insurance
Acting Commissioner

AV Vinci Final Order/Orders

[8] Pursuant to N.J.S.A. 17:1-14e(2) and the recusal of Commissioner Richard J. Badolato with regard to this matter, the Director of the Division of Insurance is the Acting Commissioner.

STATE OF NEW JERSEY
DEPARTMENT OF BANKING AND INSURANCE

IN THE MATTER OF:
Proceedings by Kenneth E. Kobylowski, Commissioner, New Jersey Department of Banking and Insurance, to fine and suspend or revoke the insurance producer license of Paul J. Vinci, Reference No. 9023126.

ORDER TO SHOW CAUSE

TO: Paul J. Vinci
31 Union Square, Unit 6F
New York, NY 10003

This matter, having been opened by Kenneth E. Kobylowski, Commissioner, New Jersey Department of Banking and Insurance, ("Commissioner"), upon information that insurance producer Paul J. Vinci may have violated various provisions of the insurance laws of the State of New Jersey, including the New Jersey Insurance Producer Licensing Act, N.J.S.A. 17:22A-26 et seq. ("Producer Act"); and

WHEREAS, pursuant to N.J.S.A. 17:22A-40a(2), an insurance producer shall not violate any insurance law, regulation, or order of the Commissioner; and

WHEREAS, pursuant to N.J.S.A. 17:22A-40a(8), an insurance producer shall not use fraudulent, coercive, or dishonest practices, or demonstrate incompetence, untrustworthiness, or financial irresponsibility in the conduct of insurance business; and

WHEREAS, pursuant to N.J.A.C. 11:17D-2.5(b), imposition of a period of suspension shall sever any existing agency relationships with insurance companies, employment relationships with other insurance producers, and licensed officer or partner relationships with any license organization; and

WHEREAS, pursuant to N.J.A.C. 11:17D-2.5(e), an insurance producer whose license has been suspended shall not be a partner, officer, director, or owner of a licensed business entity, or otherwise be employed in any capacity by an insurance producer; and

ALLEGATIONS COMMON TO ALL COUNTS

IT APPEARING that at all times relevant hereto, Otterstedt Insurance Agency ("OIA") was licensed as a resident business entity insurance producer pursuant to N.J.S.A. 17:22A-32; and

IT FURTHER APPEARING that Vinci was hired by OIA on September 2, 2008; and

IT FURTHER APPEARING that, on or about March 29, 2012, Vinci signed Consent Order No. E12-40 ("Consent Order"), in which he admitted that he had sold, solicited, or negotiated New Jersey insurance policies, and received commissions therefrom, without an active license, and that he failed to notify the Commissioner within 30 days of a criminal conviction and materially misrepresented on two licensing applications that he had not been convicted of a crime; and

IT FURTHER APPEARING that, pursuant to the Consent Order, Vinci agreed to pay a $15,000.00 fine for violations of the Producer Act; and

IT FURTHER APPEARING that, pursuant to the Consent Order, Vinci agreed to the suspension of his resident insurance producer license for a period of two and one half years, commencing March 29, 2012; and

IT FURTHER APPEARING that Vinci continued to work at OIA as an insurance producer until June 20, 2014 while his insurance producer license was suspended; and

IT FURTHER APPEARING that, on or about March 18, 2015, OIA entered into a Consent Order with the Department, in which OIA admitted that it had employed Vinci while his producer license was suspended, in violation of N.J.S.A. 17:22A-40a(2) and (8) and N.J.A.C. 11:17D-2.5(b) and (e); and

COUNT 1

IT FURTHER APPEARING that by continuing to work at OIA despite having a suspended insurance producer license, Vinci violated the insurance laws of New Jersey and demonstrated incompetence and untrustworthiness in the conduct of insurance business, in violation of N.J.S.A. 17:22A-40a(2) and (8) and N.J.A.C. 11:17D-2.5(e); and

COUNT 2

IT FURTHER APPEARING that, by continuing to work for an insurance producer despite having consented to the suspension of his insurance producer license, Vinci violated an Order of the Commissioner, in violation of N.J.S.A. 17:22A-40a(2) and (8); and

NOW, THEREFORE, IT IS on this 1st day of July, 2015

ORDERED that Respondent appear and show cause why the New Jersey insurance producer license issued to him should not be revoked by the Commissioner and why he should not be fined up to $10,000.00 for each offense, pursuant to N.J.S.A. 17:22A-40 and N.J.S.A. 17:22A-45c; and

IT IS FURTHER ORDERED that Respondent appear and show cause why he should not be subject to additional penalties including reimbursement of the costs of investigation and prosecution authorized pursuant to the provisions of N.J.S.A. 17:22a-45c; and

IT IS PROVIDED that Respondent has the right to request an administrative hearing, to be represented by counsel or other qualified representative, at his own expense, to take testimony, to call or cross-examine witnesses, to have subpoenas issued, and to present evidence or argument if a hearing is requested; and

IT IS FURTHER PROVIDED that, unless a request for a hearing is received within twenty (20) days of the service of this Order to Show Cause, the right to a hearing in this matter shall be

deemed to have been waived by the licensee and the Commissioner shall dispose of this matter in accordance with the law. A hearing may be requested by mailing the request to Virgil Dowtin, Chief of Investigations, Department of Banking and Insurance, P.O. Box 329, Trenton, New Jersey 08625, or by faxing the hearing request to the Department at (609) 292-5337. The request shall contain the following:

(a) The licensee's name, address, and daytime telephone number;

(b) A statement referring to each charge alleged in this Order to Show Cause and identifying any defense intended to be asserted in response to each charge. Where the defense relies on facts not contained in the Order to Show Cause, those specific facts must be stated;

(c) A specific admission or denial of each fact alleged in this Order to Show Cause. Where the licensee has no specific knowledge regarding a fact alleged in the Order to Show Cause, a statement to that effect must be contained in the hearing request. Allegations of this Order to Show Cause not answered in the manner set forth above shall be deemed to have been admitted; and

(d) A statement requesting a hearing.

PETER L. HARTT
Director of Insurance