ORDER NO. E22-42

STATE OF NEW JERSEY
DEPARTMENT OF BANKING AND INSURANCE

MARLENE CARIDE, COMMISSIONER NEW JERSEY DEPARTMENT OF BANKING AND INSURANCE,	)	OAL DKT. NO. BKI 14630-19 AGENCY DKT. NO. OTSC E19-77
Petitioner,	)	FINAL DECISION AND ORDER
v.	)	
LEE STOKES,	)	
Respondent.	)	

This matter comes before the Commissioner of Banking and Insurance ("Commissioner"), pursuant to the authority of N.J.S.A. 52:14B-1 to -31, N.J.S.A. 17:1-15, the New Jersey Producer Licensing Act of 2001, N.J.S.A. 17:22A-26 to -48 ("Producer Act"), and all powers express or implied therein, for the purposes of reviewing the December 21, 2021 Initial Decision ("Initial Decision") of Administrative Law William T. Cooper III ("ALJ"). In the Initial Decision, the ALJ found that the Department of Banking and Insurance ("Department") failed to meet its burden of proof in its case against Lee Stokes ("Respondent") and dismissed the Department's Order to Show Cause No. E18-126 ("OTSC").

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On December 24, 2018, the Department initiated this matter through the issuance of the OTSC against the Respondent seeking to revoke his producer license and impose penalties and costs of investigation and prosecution for violations of the Producer Act. The one count OTSC alleges that at the direction of the Respondent, the Respondent's employee purchased and sent a bottle of whiskey costing $377.22 to an individual, who was a prospective client of the

Respondent's, as an inducement to purchase insurance, in violation of N.J.A.C. 11:17A-2.3(a) and (h).[1]

On January 23, 2019, the Respondent filed a response to the OTSC ("Answer"), denying the allegations set forth in the OTSC and requesting a hearing. In the Respondent's Answer, he admits that he directed his ex-employee to purchase a bottle of whiskey for an individual named Tom Snyder ("Snyder"), however, he asserts that Snyder is a personal friend and was never a prospective client. On June 25, 2019, the matter was transmitted to the Office of Administrative Law ("OAL") for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. Initial Decision at 2.

On April 19, 2021, a one-day hearing[2] was conducted by Administrative Law Judge John Kennedy ("ALJ Kennedy"). Ibid. Thereafter, ALJ Kennedy was appointed to the Superior Court of New Jersey and was unable to render an Initial Decision. Ibid. On September 30, 2021, a conference was held before Administrative Law Judge Edward Delanoy, wherein the parties agreed to the matter being reassigned to a new judge to render an initial decision based upon the audio recording of the April 19, 2021 hearing, the written transcripts, and the documents admitted into evidence.[3] Ibid. On November 11, 2021, the parties submitted closing arguments and the

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[1] Count One of the OTSC alleges that the Respondent made improper gifts to three separate clients, as follows: a bottle of whiskey to T.S., with a monetary value of $377.22; a fruit basket to T.F., R.S. and T.O. with a monetary value of $114.00; and a fruit basket to E.O. with a monetary value of $152.77. See, OTSC. The Department only presented evidence regarding the alleged gift of a bottle of whiskey to T.S. at the hearing; therefore, the other three alleged gifts were not considered by the ALJ and are not discussed in the Initial Decision, nor herein. See, OTSC at 3, Initial Decision at 2.

[2] The hearing was conducted via videoconference software, as a result of the suspension of in-person appearances by the OAL due to Covid-19 pandemic.

[3] The procedure to be followed in the event of a judge's departure is set forth in N.J.A.C. 1:1-14.13, which provides that if a judge is unable to issue an initial decision, a conference is scheduled

record was closed as of that date. Ibid. On December 21, 2021, the ALJ issued the initial decision, concluding that the Department failed to prove, by a preponderance of the evidence, that the Respondent violated N.J.A.C. 11:17A-2.3(a) or (h), as alleged in the OTSC. Id at 9-10. On January 3, 2022, the Department filed exceptions to the Initial Decision. The Respondent did not file exceptions to the Initial Decision.

ALJ'S FACTUAL FINDINGS, LEGAL ANALYSIS, AND CONCLUSIONS

Based upon the evidence presented at the hearing and the opportunity to hear the witnesses and assess their credibility, the ALJ found the following facts. The ALJ found that the Respondent is a licensed resident insurance producer in New Jersey since 2007. Ibid. Allison Massler ("Massler") was employed by the Respondent as his administrative assistant in 2015. Ibid. On March 21, 2016, the Respondent instructed Massler to locate a bottle of Pappy Van Winkle whiskey. Ibid. At the Respondent's direction, Massler purchased the whiskey utilizing the Respondent's credit card and had the bottle shipped to Snyder's business office in Austin, Texas. Ibid. The total cost for the whiskey plus shipping came to $377.22. Ibid. Snyder acknowledged receipt of the Pappy Van Winkle whiskey. Ibid. Snyder reimbursed the Respondent for the cost of the purchase of the bottle of whiskey. Ibid. Snyder has never been an insurance client of the

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to determine if the parties can reach a settlement. In the event settlement is not reached, another judge is assigned to issue the initial decision as if he or she had presided over the hearing from its commencement, provided the judge is able to become familiarized with the proceedings and all testimony taken by reviewing the transcript, exhibits marked in evidence and any other materials which are contained in the record; and the judge determines that the hearing can be completed, with or without recalling witnesses, without prejudice to the parties. N.J.A.C. 1:1-14.13(b). An order or ruling entered into with respect to N.J.A.C. 1:1-14.13(b) may only be appealed interlocutorily; a party may not seek review of such orders or rulings after the judge renders the initial decision in the contested case. N.J.A.C. 1:1-14.13(d). Neither party filed an interlocutory appeal related to the assignment of the ALJ to issue the Initial Decision.

Respondent. Ibid. The bottle of Pappy Van Winkle whiskey was not intended as a gift to Snyder as an inducement to purchase insurance. Ibid.

The ALJ stated that for testimony to be believed, it must not only come from the mouth of a credible witness, but it also must be credible. Ibid. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. Ibid. (citing Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961)). A credibility determination requires an overall assessment of the witnesses' story in light of its rationality or internal consistency and the manner in which it "hangs together" with other evidence. Ibid. (citing Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963)). Also, "the interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony." Ibid. (quoting State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted)). A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Ibid. (quoting Congleton v. Pura-Tex Stone Corp.,53 N.J. Super 282, 287 (App. Div. 1958)).

The ALJ found Massler (the Respondent's former administrative assistant) to be "generally credible", and found Snyder (the Respondent's friend who was also an insurance agent, and current business partner of the Respondent) and Roy Scheffler ("Scheffler") (Respondent's good friend who was previously married to the Respondent's sister) to be credible witnesses, but did not include any explicit credibility finding with respect to the Respondent. Id. at 6-7.

The ALJ stated that the Department has the burden of proving the allegations by a preponderance of the credible evidence. (citations omitted). Id. at 8-9. The ALJ noted that the

evidence must be such as would lead a reasonably cautious mind to a given conclusion. (citation omitted). Ibid. The ALJ further stated that "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." (citation omitted). Ibid.

The ALJ concluded that the Department failed to prove the Respondent violated N.J.A.C. 11:17A-2.3(a) or (h), as alleged in the OTSC. Id at 9-10. The ALJ highlighted that the Department's case relies entirely upon the Respondent's March 21, 2016 email to Massler stating that he is trying to "lock down a new client" and that he "didn't care about the cost" ("Email"), however, the ALJ accepted the Respondent's explanation for this. Ibid. Specifically, that the Respondent mislead Massler to avoid unnecessary questions from her. Ibid. Moreover, the ALJ found Snyder's explanation that the Respondent was assisting Snyder in obtaining the Pappy Van Winkle whiskey so that it could be presented to a friend who suffered a recent illness to be credible, and that it established that Snyder did not receive a gift as an inducement to purchase insurance. Id. at 10. The ALJ concluded that the Email alone is insufficient to prove the alleged regulatory violations. Ibid. Accordingly, the ALJ recommended that the OTSC be dismissed.

EXCEPTIONS

The Department submitted Exceptions to the Initial Decision on January 3, 2022 ("Department Exceptions"). The Respondent did not submit a reply to the Department's Exceptions, and did not file any Exceptions. In its Exceptions, the Department argues that sufficient evidence was presented at the hearing to prove the allegations against the Respondent; and that the ALJ erred in his factual findings and conclusions of law.

The Department Exceptions state that a preponderance of evidence is the applicable standard of proof, and mirrors the legal standard set forth by the ALJ in the Initial Decision.

Department Exceptions at 17; see also, Initial Decision at 8-9. The Department asserts that there is no *mens rea* requirement to show intent or knowledge for a violation of the Producer Act to be found. Department Exceptions at 18. The Department argues that it proved by a preponderance of the evidence that the Respondent violated N.J.A.C. 11:17A-2.3(a) and (h) by giving a gift worth more than $100 to obtain a client; and requests that the Initial Decision be modified to include such a finding. Department Exceptions at 22. The Department further argues that a finding that the Respondent violated N.J.A.C. 11:17A-2.3(a) and (h) necessitates finding that he also violated N.J.S.A. 17:22A-40(a)(2). Department Exceptions at 22. Furthermore, the Department argues that the Respondent's violation of N.J.A.C. 11:17A-2.3(a) and (h) demonstrates incompetence and untrustworthiness, in violation of N.J.S.A. 17:22A-40(a)(8). Department Exceptions at 23.

The Department's Exceptions Regarding the ALJ's Credibility Determinations

The Department asserts that the ALJ's findings are not entitled to any of the deference normally accorded to the credibility findings of the presiding administrative law judge, because the ALJ did not personally hear the case. Department Exceptions at 23. The Department sets forth the standard required for an agency head to overturn issues of lay witness credibility under the relevant portion of N.J.S.A. 52:14B-10(c), as follows:

> An agency head sitting in review of an ALJ's initial decision cannot 'reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record.' N.J.S.A. 52:14B-10(c). Where an agency head rejects or modifies an ALJ's fact finding or credibility determinations, 'the agency head shall state with particularity the reasons for rejecting the findings and shall make new or modified findings supported by sufficient, competent, and credible evidence in the record.' Ibid.
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> Id. at 23-24.

As set forth below, the Department challenges the ALJ's credibility determinations regarding Snyder, the Respondent, and Scheffler.

The Department's Exceptions Regarding the Testimony of Tom Snyder

The Department took exception to the ALJ's finding that Snyder was a credible witness. Id. at 24. The Department points out that Snyder's testimony that the Respondent is one of his best friends demonstrates a bias to lie on the Respondent's behalf, not appropriately considered by the ALJ. Id. at 25. The Department argues that his testimony constituted the recital of a practiced story, however, he could not remember other facts that he should have been able to. Id. at 24-25. The Department highlights portions of Snyder's direct examination regarding an affidavit that he signed.[4] Id. at 25. Specifically, the Department emphasizes that Snyder did not recall who prepared the affidavit or where he was when he signed the document. Ibid.

Further, the Department argues that his testimony lacked documentary support and contradicted the Email. Ibid. The Department emphasizes that Snyder's contention that he reimbursed the Respondent for the Pappy Van Winkle whiskey had no supporting documentation. Ibid. The Department asserts that it is "highly unlikely nearly $400 in cash changed hands." Ibid.

Finally, the Department argues that Snyder's explanation surrounding the purchase of the whiskey is implausible and "highly unlikely" to be true. Ibid. Namely, it is highly unlikely that Snyder needed the Respondent to obtain the whiskey so that Snyder could then give it to someone else. Ibid. The Department points out that Snyder testified that he had two assistants at that time, therefore he could have easily obtained it himself through the Internet. Ibid.

The Department contends that Snyder's entire story is implausible, unsupported by any documentary evidence, and contradicted the Email. Accordingly, the Department argues that the

[4] This affidavit was marked for identification, but not entered into evidence.

ALJ's findings should be modified to find that Snyder was not a credible witness. Id. at 25.

The Department's Exceptions Regarding the Testimony of the Respondent

The Department argues that the ALJ's erred in not making a credibility determination regarding the Respondent and contends that the Initial Decision should be modified to find that the Respondent was not credible. Id. at 26.

The Department notes that the Respondent is an admitted liar, in that he testified that he lied to Massler regarding the reason for the whiskey, which demonstrates an immediate lack of credibility. Ibid. The Department points to the inconsistency between the Respondent's testimony at trial and the Email. Ibid. The Department argues that the contemporaneous Email is more likely to be the truth because it was sent only to his assistant, without the expectation that it would be examined in court by a judge and with the motivation to avoid liability. Ibid. Further, the Department contends that the Respondent's explanation for why he lied to Massler (to avoid unnecessary questions), by providing an illegal reason, is unreasonable. Ibid.

The Department reiterates that it is unlikely that Snyder could not just have obtained the whiskey himself. Id. at 27. The Department asserts that the simpler explanation, set forth in the Respondent's own emails, is more likely to be the truth. Ibid. The Department argues that the ALJ's acceptance of the chain of events testified to by the Respondent regarding the procurement of the whiskey is arbitrary, capricious, unreasonable and not supported by the credible evidence in the record. Ibid. Accordingly, the Department requests that the Initial Decision be modified to find the Respondent not credible. Ibid.

The Department's Exceptions Regarding the Testimony of Roy Scheffler

The Department argues that the ALJ's finding that Scheffler was credible should be rejected and modified. Ibid. The Department argues that he remembered almost nothing beyond

what he was put forward to state, that he saw Massler sign the Sub-Broker/Consultant Agreement dated February 7, 2021 (Exhibit P-7).[5] Ibid. Further, the Department points out that Scheffler's testimony was contradicted by Massler and also by the Respondent, who claimed that Scheffler was a mutual friend, when in reality, he was a longtime friend of the Respondent's and not friends with Massler. Ibid. The Department also asserts that these inconsistencies cast doubt on the Respondent's credibility as well. Ibid.

The Department's Exceptions Regarding the ALJ's Factual Findings and Conclusions

The Department argues that the ALJ's finding that Snyder reimbursed the Respondent for the bottle of Pappy Van Winkle whiskey is not supported by credible evidence in the record and should be rejected. Ibid. First, the Department argues that this finding is contradicted by the Email that the whiskey was a gift to "lockdown a new client." Id. at 27-28; see also, Exhibit P-15. Further, the Department asserts that it is unlikely that $400 cash changed hands, arguing that it is more likely that "such a large sum" would have been paid via check or some other verifiable form of transfer. Id. at 28. The Department argues that the ALJ's reliance on the "bare, unsupported and contradicted testimony" of Snyder and the Respondent was improper and therefore the finding should be rejected. Ibid.

Next, the Department takes exception to the ALJ's finding that Snyder has never been an insurance client of the Respondent. Id. at 32. The Department asserts that it is not necessary for

[5] The Respondent produced Scheffler to impeach Massler's credibility. During Massler's cross examination, she testified that she recalled signing an agreement in February 2017, which prohibited her from obtaining any of the Respondent's insurance clients for a period of two years after the termination of her employment relationship with the Respondent. T. 42:13-43:4. However, while examining the "Sub-Broker/Consultant Agreement" within Exhibit P-7, she denied that the document was the same as the one she signed and denied that the signature was hers. T. 43:17-22.

"T. 43:17-22" refers to the transcript of the April 19, 2021 hearing, page 43, lines 17-22.

Snyder to have been a client of the Respondent's for the violations alleged in the OTSC to be substantiated; and takes exception to the ALJ's reliance on the lack of a client relationship in finding for the Respondent. Ibid. The Department's position is that it is only necessary to prove that the gift was an inducement, which was stated in the Email. Ibid. More specifically, the Department argues that "anyone who buys insurance, which Snyder admitted he did, could have bought it from [the Respondent]...[t]hus, [the Respondent] had a motivation for anyone to be a client, even someone who may have been a friend." Ibid.

Further, the Department argues that the ALJ incorrectly stated:

> Further, the bottle of whiskey was intended to be a gift from Snyder for a friend who suffered a recent illness. He was having difficulty locating the specific brand "Pappy Van Winkle" and mentioned this to respondent, who volunteered to locate it for him. Snyder's explanation was credible and established that he did not receive a gift as an inducement to purchase insurance.
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> Initial Decision at 10.

Id. at 33. The Department asserts that the "ALJ inappropriately states this as if it were fact without including it in the findings of fact." Ibid. The Department argues that these findings of fact are arbitrary, capricious, unreasonable, and not supported by credible evidence in the record and should be rejected. Ibid. The Department highlights that there was no documentary support for the above as compared to the explanation set forth in the Email. Ibid.

The Department takes exception to the ALJ's finding that the bottle of Pappy Van Winkle whiskey was not intended as a gift to Snyder as an inducement to purchase insurance. Id. at 28. The Department again emphasizes that the Respondent's testimony was without any documentary support and was contradicted by the Email. Ibid. Further, the Department points out that the Respondent "withheld" an explanation for the statement in the Email (that the whiskey was to "lockdown a new client") prior to the hearing, despite "many pre-hearing requests." Id. at 29. The

Department asserts that the ALJ's belief in the Respondent's testimony over the contemporaneous Email is unreasonable. Ibid. Accordingly, the Department argues that this finding is arbitrary, capricious and was not supported by credible evidence in the record and thus should be rejected. Ibid.

Next, the Department asserts that the following portion of the ALJ's analysis includes "inappropriately buried additional findings:"

> The Department contends that it has proven the violation as respondent provided a gift of a bottle of whiskey to Tom Snyder. The Department relies entirely upon respondent's e-mail to Massler on March 21, 2016. Admittedly, the e-mail is troublesome since respondent clearly stated that he is trying to "lock down a new client" and that he "didn't care about the cost." However, respondent misled his assistant because he did not want to be subjected to repeated questions from her concerning his instructions. He was looking to assist Snyder in obtaining the bottle so it could be presented to a third person as a gift. The e-mail alone is insufficient to prove a violation of the regulations.
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> Initial Decision at 9.

Id. at 29-30.

The Department argues that the above constitutes the basis of the ALJ's error and should be rejected as arbitrary, capricious or unreasonable, and not supported by sufficient competent and credible evidence in the record. Id. at 30. First, the Department asserts that it did not rely solely on the Email, it also "proved the whiskey was purchased by [the Respondent] and sent to Snyder." Id. at 30. Next, the Department again points out that the lack of documentary evidence in support of the Respondent's testimony, which is contradicted by the Email. Ibid.

Finally, the Department argues that the ALJ inappropriately found that "the e-mail alone is insufficient to prove a violation of the regulations." Id. at 32. The Department states that to meet the preponderance standard, it is only necessary to show that it is more likely than not that the purpose of the whiskey was "to lockdown a new client." Ibid. The Department contends that the

Email satisfied this standard, since it constitutes a contemporaneous statement by the Respondent as compared to the subsequent explanation, which the Department argues "defies credulity." Ibid.

The Department argues that the ALJ's conclusion that the alleged violation was not proven should be rejected. Id. at 34. The Department again emphasizes that the applicable standard of proof is a preponderance of the evidence. Ibid. The Department contends that many of the findings were based solely on the "self-serving" testimony of the Respondent and Snyder, who is his friend. Ibid. The Department points out the lack of documentation to support their story, including a receipt for the $400 reimbursement from Snyder to the Respondent. Ibid.

Further, the Department highlights that the Respondent did not produce Jim Zembo (the alleged recipient of the Pappy Van Winkle whiskey) ("Zembo") to testify and corroborate his story. Ibid.

The Department argues that conversely it entered several contemporaneous documents into evidence, including the Email wherein the Respondent said the whiskey was to "lockdown a new client" (Exhibit P-15); the purchase from a publicly-accessible online seller (Exhibit P-17); and emails regarding the sending of the bottle to Snyder (Exhibit P-16). Ibid. The Department points out that no mention of Zembo was made in the emails and argues that there is no reasonable basis to believe the "self-serving testimony," which is unsupported and contradicts the documents. Ibid.

Penalties

The Department argues that a maximum monetary penalty of $5,000 is appropriate in this case and provides an analysis of the seven factors for determining the appropriateness of penalties imposed by a state agency as set forth in Kimmelman v. Henkels & McCoy, Inc, 108 N.J. 123 (1987). Id. at 35-36. The Department also seeks reimbursement of the costs of investigation and

prosecution pursuant to N.J.S.A. 17:22A-45(c); and defers to the Commissioner as to whether license revocation is appropriate in this case. Id. at 37.

LEGAL DISCUSSION

As set forth by the ALJ, the Department bears the burden of proving the allegations in the OTSC 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, 275 (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, 67 N.J. 47, 49 (1975).

Allegations Against the Respondent

The OTSC alleges that the Respondent made a gift of a bottle of whiskey to Snyder in violation of N.J.S.A. 17:22A-40a(2) and (8), and N.J.A.C. 11:17A-2.3(a) and (h). N.J.A.C. 11:17A-2.3 states, in relevant part:

> (a) No insurance producer shall offer, make or give, or permit to be offered, made or given, to any person directly or indirectly, an inducement to purchase insurance other than that plainly expressed in the insurance contract.
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> ...
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> (h) Services or monetary benefits provided for free or at a discounted price that inure to the personal benefit of the person and that are largely extraneous to the coverage being purchased or the insurance services being provided by an insurance producer, or services offered in a discriminatory manner as an inducement to write or move business shall be deemed a prohibited rebate(s) or inducement(s). Examples of such services or benefits that the Department would consider prohibited rebates or inducements include:
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> 1. Payments of cash or cash equivalents of greater than $ 100.00;
> 2. Provision of tickets to a concert or event with a value greater than $ 100.00; and
> 3. COBRA-, HRA-, HSA-, and FSA-administration services offered only to new customers who agree to change producers or insurers, which are not otherwise provided to in-force accounts.

N.J.S.A. 17:22A-40a(2) prohibits "[v]iolating any insurance laws, or violating any regulation, subpoena or order of the commissioner or of another state's insurance regulator." N.J.S.A. 17:22A-40a(8) prohibits "[u]sing fraudulent, coercive or dishonest practices, or demonstrating incompetence, untrustworthiness or financial irresponsibility in the conduct of insurance business in this State or elsewhere."

Here, it is uncontested that the Respondent purchased and sent a bottle of Pappy Van Winkle whiskey worth approximately $350 to Snyder. The central dispute in this case is whether sending the whiskey to Snyder constituted "an inducement to purchase insurance" by the Respondent as contemplated by N.J.A.C. 11:17A-2.3. In order to prevail, the Department is required to prove, by a preponderance of the of the competent, relevant, and credible evidence, that sending the Pappy Van Winkle whiskey to Snyder equated to an inducement for him to purchase insurance from the Respondent. The ALJ found that the Department failed to meet its burden. For the reasons set forth below, I ADOPT the ALJ's conclusion as set forth in the Initial Decision.

The Department failed to produce any evidence that Snyder was ever a client, or a prospective client, of the Respondent's. The Department's inability to rebut this crucial fact is significant. Although there is no intent requirement for violations of the Producer Act and associated regulations, where the recipient of a gift is not a current client of the person giving the gift, there must be some nexus between the alleged gift and insurance business to find that said gift constitutes an inducement to purchase insurance. For example, an offer to purchase insurance, or other discussion regarding insurance services, accompanied by a gift. The Department argues that "Snyder was a purchaser of insurance, and therefore, he could have bought that insurance from

[the Respondent]." Department Exceptions at 3. This is a specious argument. In modern society, virtually every person is a "purchaser of insurance" therefore, such an interpretation leads to potentially absurd results.

The record reflects that it is unlikely that the Respondent ever had an expectation that Snyder would purchase insurance from the Respondent. As the owner of a business that sells insurance himself, Snyder likened this to owning a car dealership but purchasing your vehicles from another dealer. T. 66:1-4. Furthermore, the Department does not contend, nor was any evidence introduced to indicate, that the ultimate recipient of the whiskey, Zembo, was a client or prospective client of the Respondent.

As stated by the ALJ, the Department essentially relies entirely on a single piece of evidence, the Email. Initial Decision at 9. I agree with the ALJ, that on its face, the Email is troubling, however, the context of the surrounding emails between the Respondent and Snyder discussed an upcoming hunting trip and contained no discussion related to insurance. Exhibit P-17. Taken together, the documents entered into evidence and the witness testimony in this case support that the Pappy Van Winkle whiskey was wholly unrelated to the purchase of insurance, therefore, the Email is not enough to meet the Department's burden. Overall, the record reflects that the Respondent procuring the bottle of whiskey for Snyder was a personal favor for a close friend, not an inducement to purchase insurance.

Credibility Determinations

The ALJ found that Massler was "generally credible" and found that Snyder and Scheffler were credible witnesses. Initial Decision at 7. The Initial Decision does not include a specific finding related to the credibility of the Respondent. The Department argues that the ALJ's credibility findings regarding Snyder, Scheffler and the Respondent should be rejected and

modified. For the reasons set forth below, I reject the Department's arguments and FIND that the ALJ's credibility findings should not be modified.

An "agency head may not reject or modify any finding of fact as to issues of credibility of lay witness testimony unless it first determines from a review of a record that the findings are arbitrary, capricious or unreasonable, or are not supported by sufficient, competent, and credible evidence in the record." N.J.A.C. 1:1-18.6(d). The trial judge's credibility findings are significantly influenced by "'the opportunity to hear and see the witnesses and to have the feel of the case, which a reviewing court cannot enjoy.'" State v. Locurto, 157 N.J. 463, 472, (1999) (quoting State v. Johnson, 42 N.J. 146, 161 (1964)). Even the best and most accurate transcript "is like a dehydrated peach; it has neither the substance nor the flavor of the peach before it was dried." Ibid. (citation and internal quotation marks omitted).

In its exceptions, the Department asserts that the ALJ's findings are not entitled to any of the deference normally accorded to the credibility findings of the presiding administrative law judge, because the ALJ did not personally hear the case. Department Exceptions at 23. I disagree. The parties agreed, during a conference on September 30, 2021, that an initial decision should be rendered by a newly assigned administrative law judge, utilizing audio recordings of the proceedings, in addition to written transcripts and documents admitted into evidence. Initial Decision at 2. The record contains no indication that the parties contemplated that the ALJ's determination would be limited in any way. In fact, N.J.A.C. 1:1-14.13(b) required the ALJ to determine that the hearing could be completed without prejudice to the parties. N.J.A.C. 1:1-14.13(b). The result was the ALJ's assignment to issue the Initial Decision, "as if he... had presided over the hearing from its commencement." Ibid. Furthermore, any order or ruling issued pursuant to N.J.A.C. 1:1-14.13(b) "may only be appealed interlocutorily; a party may not seek

review of such orders or rulings after the judge renders the initial decision in the contested case." N.J.A.C. 1:1-14.13(d). Although the Department is not technically seeking review of the ALJ's N.J.A.C. 1:1-14.13(b) determination, it cannot claim prejudice due to the ALJ's absence during witness testimony at this late stage.

Although the ALJ was not present for the videoconference hearing, he rendered the Initial Decision with the benefit of being able to listen to the audio recording of the witness testimony. The ability to review the audio recording of live witness testimony provides significant benefits over a mere review of the written transcripts for the purpose of assessing the credibility of testifying witnesses. It is well settled that credibility findings are appropriately influenced by the fact finder's observations regarding a witness's demeanor. See, e.g. Locurto, 157 N.J. at 474, (reviewing courts "should defer to trial courts' credibility findings that are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record"); see also, Id. at 472 (quoting Johnson, 42 N.J. at 161) ("the opportunity to *hear* and see the witnesses" significantly influences a trial judge's credibility determination (emphasis added)). A review of the audio of testimony can provide important insight in the assessment of witness credibility. Factors such as the witness's tone of voice and the length of any pauses during testimony are appropriately considered in the fact-finder's credibility assessment. Although I have reviewed the documentary evidence and the written transcript of the hearing, I do not have the same benefit of having heard the audio of the testimony as the ALJ did when assessing witness credibility.

Massler

Massler testified that she began working for the Respondent as his administrative assistant in 2015. Initial Decision at 7. The Respondent paid for her to attend training courses necessary

to obtain an insurance producer's license and Massler subsequently became licensed as an insurance producer in 2016. Ibid. On cross examination, Massler admitted that since obtaining her insurance producer's license, she has never produced any insurance business of her own. T. 28:3-11.

Massler further testified as to her understanding of what the Email intended and the actions she took based upon the Respondent's instructions therein. Initial Decision at 7. Massler also recalled the Respondent's general attitude regarding gifts, which the ALJ stated was consistent with the Email. Ibid. More specifically, Massler testified that she confronted the Respondent regarding the Email, stating that she had learned about the prohibition on illegal rebating for insurance producers and that "you're not supposed to do this." T. 26:9-20. She further testified that the Respondent responded by stating "you'll see in order to succeed ... you have to" and indicated that generally licensed insurance producers disregard this rule. T. 26:21-25; 32:17-24.

On cross examination, Massler testified regarding an email from the Respondent on December 17, 2015,[6] wherein the Respondent instructed her to "find a gift basket for around seventy-five" to send to certain clients. See, T. 35:11-36:11. She further testified that this occurred prior to her becoming licensed,[7] but that she has "champagne taste" and intended to find a nice basket to send.[8] Ibid. Massler further testified that she left the Respondent's employment

[6] This email was not entered into evidence.

[7] During cross examination, the Respondent's attorney asked Massler why the receipts she provided to the Department investigator were dated from 2016, to which Massler replied that she had no recollection and would need to see the receipts to respond. T. 35:23-36:4. These receipts were not entered into evidence.

[8] While not explicitly stated during Massler's testimony, it appears that Massler went on to purchase gift baskets over the $100 limit. In the Answer, the Respondent states that upon realizing that Massler did not follow his instructions, he did not send the baskets to any individual so as to

voluntarily and denied that the Respondent terminated her. T. 25:8-25. When confronted with documents related to her termination, including a termination letter sent to her home address and an email from the Respondent informing her of her termination, both of which were admitted into evidence as part of Exhibit P-7, Massler denied ever receiving them. T. 49:8-50:17. Massler further denied executing the "Sub-Broker/Consultant Agreement" which was part of Exhibit P-7 and entered into evidence.[9] T. 42:13-46:15. Massler also denied keeping any office files or equipment, attempting to steal any of the Respondent's clients or disparaging the Respondent to his clients. T. 40:5-42:12.

In his closing argument, the Respondent submits that Massler is a disgruntled ex-employee and avers that she was the individual that submitted a complaint to the Department regarding the Respondent, prompting an investigation and the issuance of the OTSC. Respondent Summation at 3. The Respondent highlights the inconsistency between Massler's testimony that she never took any documents or records from the Respondent's and her ability to provide documentation to the Department for its investigation of this matter. Ibid. The Respondent argues that Massler's credibility is questionable and highlights her denial of receiving the email regarding her termination or the letter from the Respondent's attorney, both of which were entered into evidence as part of Exhibit P-7. Ibid.

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comply with the rules. Answer at 2. This point was reiterated during the Respondent's direct examination. T. 82:7-20.

[9] Massler testified that she remembered signing a one-page document that contained the same language as page three of the "Sub-Broker/Consultant Agreement" in Exhibit P-7, but denied that the signature on that document entered into evidence was hers.

As stated above, the ALJ found Massler to be "generally credible". Initial Decision at 7. The Department does not argue that the ALJ's credibility finding regarding Massler should be modified. Accordingly, there is no reason to disturb the ALJ's finding.

Snyder

The totality of the record supports the ALJ's conclusion that Snyder's testimony was credible. Snyder, who was the Department's witness, testified regarding the circumstances surrounding the purchase of the bottle of Pappy Van Winkle whiskey. Specifically, he testified that he was seeking the whiskey was for a friend, Zembo, who had recently undergone open-heart surgery. T. 66:15-23. Snyder provided details regarding his relationship with Zembo, and that Zembo had previously stated he always wanted to try Pappy Van Winkle whiskey. T. 66:15-68:11. After Zembo's surgery, Snyder wanted to obtain a bottle for him in order to lift his spirits. Ibid. The ALJ found that Snyder's explanation of the intended purpose for the whiskey provided sufficient detail as to make same credible. Initial Decision at 7.

When asked, on cross-examination, why Snyder could not just have obtained the whiskey himself, he testified that he does not drink and therefore does not purchase alcohol often. T. 73:15-17. Snyder further testified that he asked his local liquor store for the Pappy Van Winkle whiskey and also had his brother searching to find it but was unsuccessful in locating a bottle. T. 73:4-14. As stated by the ALJ, Snyder testified that the Respondent volunteered to find a bottle for him. Initial Decision at 7; T. 66:15. This is consistent with Snyder's testimony that the Respondent is "one of his best friends." T. 71:8.

Importantly, Snyder unequivocally denied ever being an insurance customer of the Respondent's. T. 65:24-66:8. As emphasized by the ALJ, the Department did not produce any testimony or documentary evidence to contradict this critical fact. Initial Decision at 7. Instead,

the Department relies on arguments that Snyder's story was implausible and that as the Respondent's friend and business partner, Snyder had motivation to be dishonest at trial. See, Department Exceptions at 25. However, the Department's attempts to impeach its own witness are unconvincing.

Snyder, who lives in Texas, testified that purchasing insurance from the Respondent "would be like [Snyder] owning a Ford Dealership in one city and buying [his] cars from a Ford Dealership in another city." T. 66:1-4. Furthermore, Snyder denied any possibility that he was ever a prospective client of the Respondent, pointing out that they are in the same exact business, which is why they became business partners. Ibid. Snyder also pointed out that he and the Respondent were in fact business competitors until they became business partners, further highlighting why it would not make sense for him to purchase insurance from the Respondent. T. 70:1-4.

Scheffler

The ALJ found Scheffler to be credible, noting, however, that his testimony was limited to sole issue of Massler's execution of a non-competition agreement. The Department takes exception to this finding, highlighting his inability to recollect details surrounding the execution of the non-competition agreement (Exhibit P-7). See, Department Exceptions at 15-17, 27. However, as the Department pointed out: "Scheffler's testimony was essentially irrelevant" but the ALJ allowed his testimony as it could bear on credibility. Department Exceptions at 15. Scheffler was put forward as a rebuttal witness by the Respondent, for the purpose of impeaching Massler's credibility.

The Respondent

As stated above, the ALJ did not render a specific determination regarding the credibility of the Respondent. The Department argues that the Initial Decision should be modified to find that the Respondent was not credible. Department Exceptions at 26. As set forth more fully above, the Department takes issue with the discrepancy between his (and Snyder's) testimony and his statements in the Email; the lack of documentary support for his testimony; and the overall implausibility of his story. Ibid.

The ALJ acknowledged that the Respondent's testimony was inconsistent with the plain language in the Email. Initial Decision at 6. However, the ALJ also included that the Respondent admitted to misleading Massler to avoid questions. Ibid. Admittedly, as noted by the ALJ, the Email (Exhibit P-15) is "troublesome." See, Initial Decision at 9. However, for the reasons below, I reject the Department's request to find that the Respondent is not credible.

Respondent's testimony was consistent with Snyder's. Snyder corroborated the Respondent's testimony surrounding the reason for the purchase of the Pappy Van Winkle whiskey.[10] Importantly, the Respondent and Snyder both testified that Snyder was never an actual or prospective client of the Respondent's or of any of the insurance entities that he owns. T. 65:24-66:8, 78:18-21. Further, the Respondent and Snyder both testified that Snyder reimbursed Respondent for the cost of the Pappy Van Winkle whiskey. Ibid. While the Department attempts to paint this testimony as "ad hoc" both the Respondent and Snyder have maintained this explanation since the inception of this case. See, Answer at 2; see also, T. 63:13-22 (Snyder testifying regarding his sworn affidavit).

[10] During his testimony, the Respondent referenced "[t]he email from March 17th from [Snyder] when he asked me to locate [the bottle of Pappy Van Winkle], he gave no instructions as to [*sic*] it's intended purpose." T. 80:23-25. Such an email may have been probative of the central issue in this case; however, the record does not include a copy of the email referenced by the Respondent.

The Department also asserts that the Respondent immediately lacks credibility because he admitted to lying to Massler regarding the purpose of the Pappy Van Winkle whiskey. Department Exceptions at 26. Further, the Department argues that the Respondent's explanation for lying to Massler by providing an illegal explanation for the whiskey is implausible. Ibid. These arguments may have been more convincing if the Respondent's testimony was uncorroborated, however, as stated above, it was sufficiently corroborated by Snyder, who was found credible by the ALJ. See, Initial Decision at 7. Further, the Respondent's testimony, in large part, would not be subject to documentary verification. Perhaps the most important example of this is Snyder's cash reimbursement for the bottle of whiskey.

Finally, the Department argues that accepting that Snyder could not have found or obtained the whiskey himself is arbitrary, capricious, unreasonable and unsupported by credible evidence on the record. Department Exceptions at 27. However, this was explained by Snyder during his direct examination. See, T. 73:4-74:14. As stated above, the ALJ found that Snyder provided sufficient detail in his explanation for the intended purpose of the Pappy Van Winkle whiskey to make same credible. Initial Decision at 7.

Intent Under the Producer Act

As stated by the Department in its exceptions, the Commissioner has consistently held that there is no requirement to prove intent under the Producer Act. Comm'r v. Dobrek, 2015 N.J. AGEN LEXIS 822 (January 15, 2015), at 34 (citing Comm'r v. Pino, 2003 N.J. AGEN LEXIS 1570 (October 30, 2003); Comm'r v. Uribe, 2011 N.J. AGEN LEXIS 734 (September 28, 2011). "Under this legal analysis, the conduct of a licensed producer itself is the determinative factor as to whether or not a violation occurred." Dobrek, 2015 N.J. AGEN LEXIS 822 at 34. Here, therefore, there is no need for the Department to prove that the bottle of Pappy Van Winkle

whiskey was *intended* as an inducement to purchase insurance. Nonetheless, the Respondent's intent in purchasing and sending the bottle of whiskey is relevant to the question of whether the gift constituted an inducement to purchase insurance.

In fact, intent is the cornerstone of the Department's theory of this case. Distilled down, the Department argues that, although Snyder was not a client and no purchase of insurance was consummated, the Respondent violated the alleged regulations because he intended the whiskey to induce Snyder to purchase insurance from him. Obviously, a gift by a licensed producer to a close friend exceeding $100 does not violate N.J.A.C. 11:17A-2.3 on its face. There must be some nexus to the purchase of insurance for the gift to be prohibited. Therefore, while not necessary, intent may be sufficient to show a violation.

The ALJ's Findings of Fact

In its Exceptions, the Department argues that several findings of fact should be modified. For the reasons set forth below, I reject the Department's arguments.

First, the Department argues that there should not be a finding that the Respondent reimbursed Snyder for the cost of the purchase of the bottle of Pappy Van Winkle whiskey as the lack of supporting documentation suggests that Snyder did not reimburse the Respondent. This argument falls short. If in fact the Respondent was reimbursed in cash, there would be no documentation in existence to prove that it occurred. It is unlikely that a friend would request a written receipt for a personal favor. Further, contrary to the Department's argument, $400 is not "such a large sum" as would have likely been paid via check or other "verifiable form of fund transfer." See, Department Exceptions at 28. Reimbursement in this manner seems to fit with the nature of the Respondent's relationship with Snyder, which was described as a close friendship (a fact relied on by the Department to impeach Snyder and the Respondent's testimony).

Both Snyder and the Respondent, the only two parties that would have direct, first-hand knowledge of this fact, have maintained that Snyder reimbursed the Respondent for the Pappy Van Winkle whiskey. In his Answer, the Respondent stated that he was "fully reimbursed" by Snyder for the purchase. Answer at 2. Next, both Snyder and the Respondent stated that Snyder reimbursed the Respondent in cash in sworn affidavits signed in 2019. See, T. 64:16-18, 111:1-8. Finally, this important fact was confirmed by testimony from both Snyder and the Respondent during the hearing. See, T. 64:4-13, 109:19-20. The Department has not produced any evidence to rebut this evidence. Therefore, I FIND that the ALJ's finding should not be modified.

Next, the Department argues that an insurance client relationship is not necessary to prove the alleged violation. See, Department Exceptions at 32. However, this argument misses the mark. Although not required, the existence of a client relationship would certainly have been probative to the central issue in this case. The true nature of the relationship between the Respondent and Snyder is relevant to the determination of whether the Pappy Van Winkle constitutes an "inducement to purchase insurance" as alleged in the OTSC.

This finding is supported by the witness testimony indicating that Snyder and the Respondent are close friends and that a client relationship would not make any sense. For example, Snyder testified that purchasing insurance from the Respondent "would be like [Snyder] owning a Ford Dealership in one city and buying [his] cars from a Ford Dealership in another city." T. 66:1-4. Furthermore, Snyder denied any possibility that he was ever a prospective client of the Respondent's, pointing out that they are in the same exact business, which is why they became business partners. Ibid. Snyder also pointed out that he and the Respondent were in fact business competitors until they became business partners, further highlighting why it would not make sense for him to purchase insurance from the Respondent. T. 70:1-4.

Indeed, a showing that Snyder was the Respondent's client or that the bottle of whiskey was given contemporaneous to an offer to purchase insurance may have been compelling evidence, tending to show that the personal favor constituted an inducement. However, as noted by the ALJ, "[t]he Department did not produce any testimony or documentary evidence that would contradict this important fact." Initial Decision at 7. Instead, the Department argues that since Snyder was a person who buys insurance, the Respondent "had a motivation for anyone to be a client, even someone who may have been a friend." Department Exceptions at 32. Interpreting the regulatory prohibition in this way amounts to a bar on licensed insurance producer from giving any gift exceeding $100 to "anyone who buys insurance," an absurd result. See, Department Exceptions at 32. Therefore, I FIND that the ALJ's finding should not be modified.

The Department argues that the ALJ's acceptance of fact that the Respondent "misled his assistant because he did not want to be subjected to repeated questions concerning his instructions" should be rejected. Department Exceptions at 31. Additionally, the Department argues that the ALJ's belief that the Respondent "was looking to assist Snyder in obtaining a bottle to be presented to a third person as a gift" should be rejected as well. Ibid. The Department asserts that the ALJ's belief in the Respondent's explanation is in error, citing the lack of documentary support from the Respondent; and highlights the inconsistency with the Email. Ibid. The Department reiterates that a contemporaneous email is more likely to contain the truth than an explanation at trial years later. Id at 32. However, the ALJ's findings were based on his assessment of the credibility of the witness testimony at trial. See, Initial Decision at 6-10.

The ALJ accepted the explanation provided in the testimony by the Respondent and Snyder regarding the true purpose of the whiskey and concluded that the Respondent did not intend the bottle of Pappy Van Winkle whiskey to be an inducement to purchase insurance. Moreover, the

ALJ found that the "Respondent admitted that he mislead his assistant to avoid her questioning him" and that "[Snyder's] explanation of the intended purpose of the whiskey provided sufficient detail as to make same credible. It was his testimony that [the Respondent] volunteered to obtain the whiskey for him". See, Initial Decision at 6, 7.

Finally, the Department argues that the ALJ inappropriately found that the "e-mail alone is insufficient to prove a violation of the regulations" and points to the uncontested fact that "the Department proved" that the Pappy Van Winkle whiskey was bought by the Respondent and sent to Snyder. Department Exceptions at 32. However, to prove a violation of the regulation, the Department was required to prove that the whiskey was an inducement to purchase insurance. The evidence in the record does not support that finding.

CONCLUSION

For the foregoing reasons and based on the ALJ's findings, I hereby ADOPT the Initial Decision.

THEREFORE, IT IS on this 16th day of May 2022, ORDERED that the OTSC be dismissed.

Justin Zimmerman[11]
Chief of Staff
Acting Commissioner

JR2022 Stokes FO/Final Orders-Insurance

[11] Commissioner Marlene Caride is recused from this matter and Justin Zimmerman, Chief of Staff, is Acting Commissioner.