ORDER NO.: E22-48

STATE OF NEW JERSEY
DEPARTMENT OF BANKING AND INSURANCE

OAL DOCKET NO.: BKI-04239-18
AGENCY DOCKET NO.: OTSC #E17-82

MARLENE CARIDE,[1] COMMISSIONER, NEW JERSEY DEPARTMENT OF BANKING AND INSURANCE,	)	
Petitioner,	)	
v.	)	FINAL DECISION AND ORDER
MICHAEL PATRICK DIVINEY AND PROPERTY DAMAGE ADJUSTERS, INC.	)	
Respondents.	)	

This matter comes before the Commissioner of the Department 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 Public Adjusters' Licensing Act, N.J.S.A. 17:22B-1 to -20, ("Public Adjusters' Act" or "Act"), and all powers expressed or implied therein, for the purposes of reviewing the December 21, 2021 Initial Decision of Administrative Law Judge Jacob S. Gertsman ("ALJ") ("Initial Decision"), which granted a Motion for Summary Decision brought by the Department of Banking and Insurance ("Department").

In the Initial Decision, the ALJ found for the Department and against Respondents Michael Patrick Diviney ("Diviney") and Property Damage Adjusters ("PDA") (collectively,

[1] At the time this case was filed on March 20, 2018 Marlene Caride had not been sworn in. Commissioner Caride was sworn in on June 27, 2018.

"Respondents") on Counts One and Two, as alleged in Order to Show Cause No. E17-82 ("OTSC"). The ALJ recommended that the Respondents be jointly and severally liable for a fine of $1,000 per contract for a total fine in the amount of $80,000 for Counts One and Two of the OTSC. In addition, the ALJ recommended that the Respondents be jointly and severally liable for costs of investigation in the amount of $1,237.50.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On August 29, 2017, the Department issued the OTSC against the Respondents, which sought to revoke the Respondents' public adjuster licenses and impose civil monetary penalties, costs of investigation, and restitution for alleged violations of the Public Adjusters' Act. In the OTSC, the Department alleges that the Respondents engaged in the following activities in violation of the insurance laws of this State:

> Count One: Respondents entered into at least 80 public adjuster contracts with New Jersey insureds that did not specifically or clearly define the services to be rendered and did not indicate the time the contracts were executed in violation of N.J.S.A. 17:22B-13(c), and N.J.A.C. 11:1-37.13(b)(3)(ii) and (iii); and
>
> Count Two: Respondents entered into at least 80 public adjuster contracts with New Jersey insureds that did not prominently include a section which specified the procedures to be followed by the insureds if they sought to cancel the contract, including any requirement for a written notice and the rights and obligations of the parties if the contract were cancelled at any time, and the costs to the insured for services rendered in whole or in part, in violation of N.J.S.A. 17:22B-14a(1) and (4), and N.J.A.C. 11:1-37.13(b)(5)(i), (ii), and (iii), and N.J.A.C. 11:1-37.14(a)(1) and (4); and
>
> Count Three: Respondents entered into at least 15 public adjuster contracts with New Jersey insureds in which the maximum fees to be charged were not reasonably related to the services rendered, in violation of N.J.S.A. 17:22B-14(a)(1) and (4).[2]

[2] The Department stated that it would withdraw this Count if the ALJ granted summary decision on Counts One and Two, but would reserve it for trial if its Motion for Summary Decision was denied.

On January 16, 2018, the Respondents filed an Answer to the OTSC, wherein the Respondents denied all 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") pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13, where it was filed on March 20, 2018.

By order dated May 24, 2019, this matter was consolidated with OTSC E19-03, OAL Docket Number: BKI 03991-19, which was ultimately withdrawn by the Department and the matters were severed by order dated May 19, 2020.

During a telephone conference on September 16, 2020, both parties informed the ALJ that they would be filing motions for summary decision. Initial Decision at 3. On November 3, 2020, the Department filed a Motion for Summary Decision on Counts One and Two of the OTSC and indicated that it would dismiss Count Three if Summary Decision was found on Counts One and Two. Ibid. On December 3, 2020 the Respondents filed their Cross-Motion for Summary Decision to dismiss all three counts of the OTSC. Ibid. The Department's response was filed on December 18, 2020, and the Respondents filed their response on January 5, 2021. Ibid.

Oral argument was held on February 25, 2021. Ibid. After oral argument, on February 25, 2021, the Department filed a letter with the ALJ confirming that it was only moving for summary decision on Counts One and Two of the OTSC. Ibid.

On December 21, 2021, the ALJ issued an Initial Decision that granted summary decision to the Department and denied the Respondents' Motion for Summary Decision. The ALJ additionally recommended that the Respondents be jointly and severally liable for a fine in the amount of $80,000. Id. at 16, 17. In addition, the ALJ recommended that the Respondents be jointly and severally liable for costs of investigation in the amount of $1,237.50. Id. at 16, 17.

Pursuant to N.J.A.C. 1:1-18.4(a), the Respondents submitted Exceptions to the Initial Decision on December 30, 2021. On January 3, 2022, the Department indicated that it did not have any exceptions to the initial decision. On January 10, 2022, the Department filed its Reply to the Respondents' Exceptions pursuant to N.J.A.C. 1:1-18.4(d).

ALJ'S FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS

The ALJ's Factual and Legal Findings

The ALJ noted that summary decision may be granted if "the papers and discovery which have been filed, together with affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." Initial Decision at 8 (citing N.J.A.C. 1:1-12.5(b)). The ALJ noted that the standard for summary decision is

> a determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials present, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged dispute issue in favor of the non-moving party. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."

Initial Decision at 8 (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995) (additional citations omitted). R. 4:46-2(c) provides further guidance that

> [a]n issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.

Initial Decision at 8.

Based on this standard, the ALJ found that there were no material facts in dispute, and thus, summary decision was appropriate as to Counts One and Two in the OTSC. Initial Decision at 12, 14.

The ALJ found that the Department offered material facts that were supported by certifications with exhibits. Initial Decision at 3. The ALJ noted that the Respondents did not respond to the Department's statement of facts, and deemed them admitted. Ibid. (citing R. 4:5-65(a), R. 4:46-2(b), and N.J.A.C. 1:1-1.3(a)).

Findings Related to Counts One and Two

The ALJ found that on or about April 29, 2011, Diviney was first licensed as a resident public adjuster in the State of New Jersey. Initial Decision at 3. PDA was first licensed as a resident public adjuster entity in the State of New Jersey on or about November 5, 2013. Ibid. At all relevant times, Diviney was the sole owner, officer, and Designated Responsible Licensed Public Adjuster ("DRLP") for PDA. Id. at 4. On November 1, 2013, PDA was established as a domestic for-profit corporation in the State of New Jersey, with Diviney serving as its sole director. Ibid.

The ALJ further found that during the period of 2013-2015, Respondents entered into at least eighty pre-written service contracts entitled "Public Adjuster Contract" with New Jersey insureds. The ALJ found that the contracts are signed by Diviney. Id. at 4-5.

Count One

The ALJ found that the 80 contracts included only the following text concerning services to be rendered: "Property Damage Adjustment, or their representative is hereby retained to advise and assist in the adjustment of the insurance claim arising from loss by _____ which occurred on the _____ day of _____, 20_____." Initial Decision at 5. The ALJ further found

that the contracts did not include a blank space for the time each contract was executed by any party and did not include the time each contract was executed by any party. Id. at 6.

The ALJ found that the contracts "speak for themselves." Id. at 6. The ALJ found that in eighty contracts, the Respondents failed to provide language related to the services that the Respondents rendered beyond "advise and assist in the adjustment of the insurance claim" and failed to include the time the contract was executed. Ibid.

The ALJ stated that under N.J.A.C. 17:22B-13(c), no individual, or association licensed under the Public Adjusters Act has "any right to compensation from any insured for or on account of services rendered to an insured as a public adjuster unless the right to compensation is based upon a written memorandum, signed by the adjuster and their client, and specifying or clearly defining the services to be rendered and the amount of compensation on a form..." Initial Decision at 9 (quoting N.J.A.C. 17:22B-13(c)). The ALJ also stated that under N.J.A.C. 11:1-37.13(b)3(ii), a written contract between an insured and public adjuster must contain a list of the services to be rendered and the maximum fees to be charged, which shall be reasonably related to services rendered. Initial Decision at 10.

The ALJ stated that the Department demonstrated that the Respondents entered into eighty contracts which failed to provide language related to the services rendered beyond that the Respondents would "advise and assist in the adjustment of the insurance claim." Ibid.

The ALJ noted that the Respondents argue that SAB Public Adjusters v. Gormley, 2015 N.J. Super. Unpub. Lexis 42 decided issues that apply to the current matter. Ibid. The Court in Gormley stated "…we are satisfied that the contract otherwise complies with N.J.S.A. 17:22B-13(b). It specifies and clearly defines the services to be performed by expressing plaintiff's agreement to 'advise and assist in the adjustment of the insurance claim . . . covering loss which occurred the 2nd day

of December, 2011, at [defendant's residence].'" Initial Decision at 10. The court added "[w]e reject the contention that plaintiff was obligated by law to provide further detail about the services it was engaged to render." Ibid. (quoting Gormley at 3).

The ALJ noted that Gormley was unpublished and not binding. Ibid. (citing R. 1:36-3). Further, the relevant language in Gormley was not the holding, and the instant litigation concerns violations of N.J.A.C. 11:1-37.13(b)3(ii), which is not addressed in Gormley. Ibid. The ALJ concluded that Gormley is not binding or persuasive, and that the Respondents' arguments to dismiss Count One of the OTSC were meritless. Ibid.

Moreover, the ALJ noted that the Respondents argued that the regulations exceed statutory authority and are ultra vires. Id. at 9 (citing Respondents' Cross-Motion at 8, 11-16). The ALJ found that the Respondents' facial attack on the regulations are "purely questions of law" and should be addressed by the Appellate Division pursuant to Wendling v. New Jersey Racing Comm'n, 279 N.J. Super 477, 484 (1995). The ALJ concluded that the OAL was not the proper forum for the consideration of the Respondent's arguments that the regulations are ultra vires. Initial Decision at 9.

The ALJ stated that it was undisputed that all eighty contracts did not contain language related to services rendered beyond "advise and assist in the adjustment of the insurance claim" which the ALJ indicated was "amorphous and vague." Id. at 11. The ALJ noted that N.J.A.C. 11:1-37.13(b)3(ii) requires a contract to list the services that are to be rendered. Ibid. The ALJ found that all eighty contracts lacked this language. Ibid. The ALJ concluded that the eighty contracts provided an insufficient description of the services to be rendered and that the Department proved that the Respondents violated of the statute and associated regulations. Ibid.

The ALJ found that N.J.A.C. 11:1-37.13(b)(3)(iii) requires that a contract between a licensed public adjuster and an insured must contain the time and date of the execution of the

contract by each party in order to enable the enforcement of the provision on soliciting between 6:00 p.m. and 8:00 a.m. in the 24 hours after an insured suffers a loss contained in N.J.A.C. 1:1-37.13(d). Ibid.

The ALJ found that the Department demonstrated that all eighty contracts failed to include the time that the contract was executed. Ibid. The ALJ stated that the Respondents rely on Diviney's certification where he states that he never "entered into a public adjuster contract with an insured during the prohibited period from 6:00 p.m. to 8:00 a.m. during the 24 hours following a loss." Additionally, this requirement "was not mentioned by the Department in any of the materials he was given to review in preparation for licensing and was not otherwise ever brought to his attention." Ibid. (citing Respondents' Cross-Motion at 7-8).

The ALJ found that the Respondents' argument was unavailing because of the unambiguous language of the statute. Ibid. The ALJ also found that every person is presumed to know the law and ignorance does not excuse civil liability. Ibid. (citing State v. Moran, 202 N.J. 311, 320 (1995)). The ALJ found that the Respondents' excuses for failing to comply with the rule are "self-serving and an abdication of the responsibilities as licensees." Id. at 11-12. Accordingly, the ALJ concluded that the Department proved that the Respondents violated the statute and associated regulation. Id. at 12.

The ALJ stated that "active officers shall be held individually liable for all insurance related conduct of the corporate licensee." Ibid. at 14,, quoting N.J.A.C. 11:1-12.2(a). The ALJ found that all eighty of the contracts were made on behalf of PDA, and Diviney, who was the sole owner and DRLP of PDA, signed the contracts. Ibid. Accordingly, the ALJ found that both PDA and Diviney are liable for the violations in Count One. Ibid.

Count Two

The ALJ found that the contracts included only the following text pertaining to cancellation:

Notice of Right to Cancel

> You, the insured, may cancel this contract at any time prior to midnight on the *fourth calendar day* after the execution date of this contract. If you exercise your right to cancel this contract, you will be liable to Property Damage Adjustment for reasonable and necessary emergency out-of-pocket expenses or services which were paid for or incurred by Property Damage Adjustment to protect the interests of the insured during the preceding cancellation.
>
> If you cancel this contract, anything of value given by you under the contract will be returned to you within 15 business days following the receipt by Property Damage Adjustment of your cancellation notice, and any security interest arising out of the contract will be cancelled.
>
> To cancel this contract, mail, fax or deliver in person, a signed and dated copy of this notice or any other written notice indicating your intent to cancel and date thereof to Property Damage Adjustment at Deptford, NJ 08096, not later than midnight of _____. (Emphasis in original)).

The ALJ found that the eighty contracts "speak for themselves" and clearly, though not prominently, state that the insured can cancel by midnight on the fourth calendar day. Id. at 7.

The ALJ further found that although the contracts contain "explicit language" that written notice is required to cancel the contract by midnight on the fourth calendar day, the contracts do not make clear that: "the individual insured is free to cancel at any time, not just by midnight on the fourth calendar day; the contract does not provide any procedures for the insured to follow in order to effectuate a cancellation beyond midnight on the fourth calendar day; and the contract does not include the costs to the insured or the formula for the calculation of costs upon cancellation after midnight on the fourth calendar day." Initial Decision at 7-8.

The ALJ stated that N.J.A.C. 11:1-37.13(b)(5) requires that a written contract between a public adjuster and an insured include a prominent section that specifies:

> i. The procedures to be followed by the insured if he or she seeks to cancel the contract, including any requirement for a written notice;
>
> ii. The rights and obligations of the parties if the contract is cancelled at any time; and
>
> iii. The costs to the insured or the formula for the calculation of costs to the insured for services rendered in whole or in part.
> Ibid.

The ALJ found that the Department demonstrated that all eighty contracts clearly stated, though not prominently, that an insured can cancel until midnight on the fourth calendar day, and that written notice is required to cancel the contract. Ibid. However, the ALJ found, that the contracts do not make clear that: the individual insured is free to cancel at any time, not just until midnight on the fourth calendar day; the contract does not provide any procedures for the insured to follow in order to effectuate a cancellation beyond midnight on the fourth calendar day. Ibid. Further, the ALJ found, that the contract does not include the costs to the insured or the formula to calculate the costs upon cancellation after midnight on the fourth calendar day. Ibid.

The ALJ found that licensees have had notice since the adoption of N.J.A.C. 11:1-37.13 that every contract between a public adjuster and insured must include rights and obligations if the contract is cancelled at any time. Ibid. The ALJ noted that this requirement is contained in the plain language of N.J.A.C. 11:1-37.13(b)(5)(ii), and that the Department reiterated that "a public adjuster contract shall include a section which specifically details an individual's obligation under the contract if he or she chooses to cancel the contract at any time." Ibid. (quoting 26 N.J.R. 1715 (April 18, 1994)).

The ALJ found that the Respondents violated N.J.A.C. 11:1-37.13(b)(5)(i), because they did not provide cancellation procedures beyond midnight of the fourth calendar day. Id. at 13. The ALJ found that the Respondents violated N.J.A.C. 11:1-37.13(b)(5)(ii), because they did not include language specifying the parties' rights and obligations if the contract is cancelled at any time. Ibid. Further, the Respondents violated N.J.A.C. 11:1-37.13(b)(5)(iii), because they failed to provide the costs to the insured or the formula for the calculation of costs for services rendered in whole or in part before cancellation. Ibid.

The ALJ noted that the Department also contended that the Respondent violated N.J.S.A. 17:22B-14(a)(1) and (4) and N.J.A.C. 11:1-37.14(a)(1) and (2)[3] which allows the Commissioner to refuse to renew a license or suspend a license if the Commissioner determines that a licensee has "violated any provision of the insurance law…or has violated any law in the course of his, or its, dealings as an adjuster" and "demonstrated his, or its, incompetency, lack of integrity, bad faith, dishonesty, financial irresponsibility or untrustworthiness to act as an adjuster." Ibid.

The ALJ found that the contracts violated N.J.A.C. 11:1-37.13 (b)(5)(i),(ii), and (iii), and that the Department has proved violations of N.J.S.A. 17:22B-14(a)(1) and N.J.A.C. 11:1-37.14(a)(1). Ibid. The ALJ also found that the Respondents' failure to include language in the eighty contracts that provide cancellation procedures beyond midnight on the fourth calendar day, specify the rights and obligations of the parties if the contract is cancelled at any time, and provide the costs to the insured or the formula for the calculation of costs to the insured for services rendered in whole or in part after cancellation, demonstrates incompetency and bad faith in

[3] This appears to be a typographical error, as the OTSC charges that Respondents with a violation of N.J.A.C. 11:1-37.14(a)(4), not N.J.A.C. 11:1-37.14(a)(2). Further, the Department argues in its Brief in Support of Motion for Summary Decision that the Respondents violated N.J.A.C. 11:1-37.14(a)(4). Department Brief at 16-17.

violation of N.J.S.A. 17:22B-14(a)(4) and N.J.A.C. 11:1-37.14(a)(4). Id. at 13-14. The ALJ concluded that the Department proved that the Respondents violated the statute and associated regulations. Id. at 14.

The ALJ stated that "active officers shall be held individually liable for all insurance related conduct of the corporate licensee." Ibid., quoting N.J.A.C. 11:1-12.2(a). The ALJ found that all eighty of the contracts were made on behalf of PDA, and Diviney, who was the sole owner and DRLP of PDA, signed the contracts. Ibid. Accordingly, the ALJ found that both PDA and Diviney are liable for the violations in Count Two. Ibid.

Count Three

The ALJ concluded that the Department withdrew Count Three of the OTSC. Ibid.

Penalties Recommended by the ALJ

As to the appropriate penalty, the ALJ noted that under the Public Adjusters' Act, the Commissioner may suspend or revoke any public adjuster license if the Commissioner determines that the adjuster has violated the insurance laws or regulations of this State.[4] Ibid. The ALJ stated that in addition to suspending or revoking a license, the Commissioner may impose penalties of not more than $2,500 for the first offense and not more than $5,000 for each subsequent offense pursuant to N.J.S.A. 17:22B-17. Ibid. The ALJ found that the Department had proven that the Respondents entered into contracts in violation of several sections of the Public Adjusters' Act, and therefore a penalty is warranted. Id. at 15. The ALJ noted that the Department requested a total of $80,000 in fines be assessed against the Respondents, or $1,000 per contract in Counts One and Two of the OTSC, in relation to the violations found against them. Ibid.

[4] The Department did not request any action be taken against the Respondents' public adjuster licenses in its moving papers.

The ALJ applied the seven factors for determining monetary penalties set forth in Kimmelman v. Henkles & McCoy, Inc., 108 N.J. 123, 137-39 (1987). Id. 15-16. These factors include: (1) the good faith or bad faith of the public adjuster; (2) the public adjuster'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 15.

As to the first factor in Kimmelman, the good or bad faith of the Respondents, the ALJ stated that the Respondents acted in bad faith in failing to provide the insureds with their "mandated rights and disclosures" including the right to cancel the contract at any time. Ibid. Further, the ALJ noted, that the contractual language was not in compliance with regulatory requirements and the insureds were not properly advised of their rights under the statue and regulations. Ibid.

As to the second factor in Kimmelman, the ability to pay, the ALJ stated that the Respondents have offered no evidence in relation to their ability or inability to pay a civil monetary penalty. Ibid.

As to the third factor, the profits obtained, the ALJ stated that the Department did not have enough information to ascertain how much profit the Respondents generated, but argued that the contracts were advantageous to the Respondents and should weigh in favor of a heavier monetary penalty. Ibid.

As to the fourth factor, injury to the public, the ALJ stated that the Department had demonstrated injury to the public through the Respondents' disregard of important safeguards and protections for consumers. Ibid.

Regarding the fifth factor in Kimmelman, the duration of illegal activity, the ALJ found that the illegal activities at issue in the instant matter took place from December 2013 to March 2015, a period of over one year. Id. at 16.

Regarding the sixth factor, the existence of criminal charges related to the matter, the ALJ noted that neither criminal actions nor actions concerning treble penalties exist in this matter and therefore, the only penalty contemplated derives from the present action. Ibid. The ALJ stated that the Department argued that the New Jersey Supreme Court in Kimmelman, 108 N.J. at 128, stated that a lack of criminal punishment weighs in favor of a larger civil penalty. Ibid.

For the final factor in Kimmelman, previous relevant regulatory and statutory violations, the ALJ noted that there was no evidence of the Respondents having ever been the subject of a regulatory action. Ibid.

Based upon these factors, the ALJ recommended that the Respondents be jointly and severally liable for $1,000 for each contract, for a total of $80,000. Ibid. The ALJ determined that it was appropriate for the Respondents to reimburse the Department for the costs of investigation and prosecution in the amount of $1,237.50.

EXCEPTIONS

Pursuant to N.J.A.C. 1:1-18.4(a), the Respondents filed Exceptions to the Initial Decision on December 30, 2021 ("Respondents Exceptions"). By letter dated January 10, 2022, the Department indicated that it did not have Exceptions to the Initial Decision, and requested that a typographical error on page 14 of the Initial Decision be corrected to make clear that both Diviney and PDA were liable for the violations. The Initial Decision reads, "Accordingly, I **CONCLUDE** that Diviney and are both liable for the violations found above." The Department requested that the Initial Decision be corrected to read "Accordingly, I **CONCLUDE** that Diviney and Property

Damage Adjusters are both liable for the violations found above." The Department filed its Reply to the Respondent's Exceptions on January 10, 2022. ("Department Reply").

Respondents' Exceptions

First Exception

In their first exception, the Respondents argue that the ALJ should have dismissed the OTSC in its entirety because the Department did not show that any insureds were injured by the language in the contracts. Respondents Exceptions at 2. The Respondents also argue that the Department failed to identify any contract that was entered into during the period between 6:00 p.m. and 8:00 a.m. following a loss. Ibid. The Respondents argue that 79 of the contracts were signed at least a day after the loss and the Department "is not frustrated in enforcing the statutory quiet time period." Id. at 3. The only contract that was signed the same day of the loss occurred during the day and the Respondent visited the scene on the afternoon, not during the prohibited time period. Ibid. n. 3.

The Respondents argue that any insured who requested cancellation was released from their contract. Ibid. The Department did not show any client who requested to be released, but was refused, and several clients did not pay the Respondents, despite recovering their claims. Ibid. The Respondents further argued that the Department failed to prove that any insured was misled or damaged by the language in the contracts with regard to cancellation, procedures to cancel after four calendar days, the insured's rights and obligations in the event of cancellation, or the costs or formula to determine the costs if the insured canceled after the fourth calendar day. Id. at 3-4.

Second and Third Exceptions

The Respondents' second and third exceptions are that the ALJ erred when he found the language in Gormley was not binding and that the language in the contracts provided an insufficient description of the services rendered. Id. at 4.

The Respondents argue that the Appellate Division's pronouncements, even in unpublished cases, are either binding or instructive of the law in this case, and "cannot be sloughed off as idle musings." Ibid. The Respondents argue that the Appellate Division in Gormley cited similar language in the public adjuster contract at issue here and stated that "advise and assist" was sufficient to comply with the applicable law, and that the court further stated, "we reject the contention that the plaintiff was obligated by law to provide further detail about the services it was engaged to render." Id. at 4-5, quoting Gormley at 3.

The Respondents argue that no provision of the Administrative Procedure Rules and Practice prohibit and ALJ from considering the Appellate Division's unpublished cases. Id. at 5. The ALJ cannot ignore relevant unpublished opinions. Ibid. (additional citation omitted).

The Respondents further argue that the full scope of services rendered by a public adjuster may not be known to the parties at the time they enter into the contract and depends upon the loss, the carrier's demands and requirements, and even the insured's record keeping practices. Ibid. The language "advise and assist" contained in the Respondents' contracts encompass a large scope of services and is more favorable to the insured. Ibid.

The Respondents also argue that the Respondent did not receive payment for fourteen of the contracts at issue, and that the regulations do not apply to those contracts. Ibid.

Fourth Exception

The Respondents' fourth exception is that the ALJ erred when concluding that the Department proved violations of the statute and associated regulation that require that the parties must enter the time of day the contract was signed. Id. at 6.

The Respondents argue that the contracts' failure to note the time of day the contract was signed is irrelevant because the Department did not prove any contract was signed between the hours of 6:00 p.m. and 8:00 a.m. in the 24 hours following the loss. Ibid. The Respondents argue that they were "not chasing losses and attempting to obtain retainers during the prohibited times." Ibid.

The Respondents argue that "[w]hen the reason for the rule ceases, the rule ceases." Ibid. They argue that the requirement for noting the time of day the contract is signed is necessary to ensure that the contract is not entered into during the prohibited period. Ibid. The Respondents argue that the Respondents did not solicit or sign contracts during the prohibited time, and that issue is at least a question of fact. Ibid. The Respondents argue that there is at least a day between the dates of loss and the date the contracts are executed, thus they argue that the Department's ability to enforce the statute is not frustrated. Id. at 6-7.

Fifth Exception

The Respondents' fifth exception is that the ALJ erred when he found that public adjuster contracts must contain a provision that the contract can be cancelled at any time. Id. at 7. The Respondents argue that N.J.S.A. 17:22B-13 does not state that the contract between the public adjuster and the insured must be subject to cancelation at any time. Ibid.

The Respondents argue that the Department's reliance upon a comment in the New Jersey Register is not persuasive. Ibid. The Respondents argue that a comment is not a regulation, and

is "not entitled to deference." Ibid., quoting U.S. v. Mead. Corp., 533 U.S. 218, 229 (2001). The Respondents argue that the regulation does not clearly state that the insured has the right to cancel at any time. Ibid. The Respondents argue that the law of contracts applies and that a party seeking to terminate a contract can only do so with the consent of the other party. Id. at 7-8.

Sixth Exception

The Respondent's sixth exception is that the ALJ erred when it found that the Respondents violated N.J.A.C. 11:1-37.13(b)(5)(i) by failing to provide cancellation procedures beyond midnight on the fourth calendar day. Id. at 8.

The Respondents argue that the Department failed to prove that any insured requested to cancel the contract or suffered any damage as a result of the contract lacking any procedures to be followed if the insured wants to cancel beyond midnight of the fourth calendar day. Ibid. The Respondents further argue that the Department did not prove that any insured requested to cancel the contract, though seven insureds did not pay the Respondents. Ibid. The Respondents argue that there is no causal nexus between the language in the contracts and consumer injury, which negates civil liability. Ibid. The Respondents also argue that the regulation is not well grounded in the statute, which does not require that the contract contain procedures for cancelling the contract. Ibid.

Seventh Exception

The Respondents argue in their seventh exception that the ALJ erred when he found that the Respondents were in violation of N.J.A.C. 11:1-37.13(b)(5)(ii) for failing to include language in the contract that specifies the rights and obligations of the parties if the contract is cancelled at any time. Id. at 9.

The Respondents argue that the Department failed to prove that any insured sought to cancel the contract and was refused. Ibid. The Respondents argue that there is no causal nexus between the language in the contracts and consumer injury, which negates civil liability. Ibid. The Respondents argue that the contract states that "[t]his agreement contains the whole of the contract between the parties hereto and shall not be changed, altered, or amended." Ibid. The Respondents argue that this informs insureds that: (i) the insured may not unilaterally cancel this contract; (ii) the insured has no rights different from contract law and his or her obligations remain what they are pursuant to contract law; and (iii) the insured must pay the contingent fee to which they agreed. Ibid. The Respondents argue that the Commissioner had the obligation to state that contract law would not apply to public adjuster contracts, which the Commissioner did not do. Ibid.

Further, the Respondents argue that pursuant to N.J.S.A. 17:22B-13(e), public adjusters are prohibited from giving legal advice regarding the contract. Id. at 10. The Respondents argue that specifying rights and obligations of a party to a contract is engaging in the practice of law and would violate the statute. Ibid. The Respondents argue that they cannot be forced to violate the statute by complying with the regulation. Ibid.

Eighth Exception

The Respondents argue in their eighth exception that the ALJ erred when he found that the Respondents were in violation of N.J.A.C. 11:1-37.13(b)(5)(iii) for failing to provide the costs to the insured or the formula for the calculation of costs to the insured for services rendered beyond midnight on the fourth calendar day. Ibid.

The Respondents argue that the Department failed to prove any causal nexus between the contractual language and any loss suffered by the insured. Ibid. The Respondents argue that the contracts fairly advise the insured that the contract cannot be changed, and the insured is liable to

the public adjuster for the fee. Ibid. The Departments inability to show any injury to any insured "is fatal to the Department's position." Id. at 11. The Respondents argue that every contract contains an implied obligation of good faith and fair dealing. Ibid. (additional citations omitted). The Respondents argue that the Department did not prove that the Respondents breached any obligation of good faith and fair dealing. Ibid.

Ninth Exception

The Respondents argue in their ninth exception that the ALJ erred when he found that the Respondents' contracts were in violation of N.J.A.C. 11:1-37.13(b)(5)(i), (ii), and (iii), and therefore the Department proved a violation of N.J.S.A. 17:22B-14(a)(1) and N.J.A.C. 11:1-37.14(a)(1).

The Respondents argue that because the Department did not prove a violation of N.J.A.C. 11:1-37.13(b)(5), there are no violations of N.J.S.A. 17:22B-14(a)(1) and N.J.A.C. 11:1-37.14(a)(1). Id. at 11-12.

Tenth Exception

In their tenth exception, the Respondents argue that the ALJ erred when he found that the Respondents failed to include language in the eighty contracts that provide cancellation procedures beyond midnight on the fourth calendar day, specify the rights and obligations of the parties if the contract is cancelled at any time, and provide the costs to the insured or the formula for the calculation of costs to the insured for services rendered in whole or in part beyond midnight on the fourth calendar day, are acts of incompetency, and bad faith, in violation of N.J.S.A. 17:22B-14(a)(4) and N.J.A.C. 11:1-37.14(a)(4). Id. at 12.

The Respondents argue that the Department did not offer any proof to contradict Diviney's certification that he used the contractual language that other public adjusters were using

successfully for years. Ibid. The Respondents argue that a finding of incompetency or bad faith cannot be made without testimony regarding intent. Ibid.

Eleventh Exception

The Respondents argue in their eleventh exception that the ALJ erred when he found that the Department proved violations of the statute and the associated regulations for the reasons set forth in their previous exceptions. Id. at 13.

Twelfth Exception

The Respondents argue in their twelfth exception that the ALJ erred when he found that the penalty of $1,000 per contract for a total of $80,000 was appropriate. Ibid. The Respondents argue that the Department failed to prove any violations, and therefore, penalties are not appropriate. Ibid. The Respondents argue that the Department has not proved a causal nexus between any violations and any consumer injury. Ibid. The Respondents also argue that the Respondents were only paid for 58 of the 80 contracts at issue, so the penalty should only apply to those 58 contracts. Ibid.

The Respondents also argue that the ALJ did not give any reason for the penalty amount, other than it being what the Department requested. Ibid. The Respondents argue that although the ALJ went through the Kimmelman factors, he didn't state which ones he found relevant to his determination, and the Department didn't prove any of the factors. Ibid. The Respondents argue that several factors, such as the Respondents' ability to pay a fine, the fees received by the Respondent, and whether any of the Respondents' actions affected the public, contain factual questions that have not been resolved. Id. at 13-14. The Respondents argue that the Department failed to disseminate its regulations to out-of-state adjusters who are licensed in New Jersey after

filing an application and do not have to pass a test. The Respondents argue that this demonstrates a substantial gap in the Department's operations in communicating with the industry. Id. at 14.

Thirteenth Exception

The Respondents argue in their thirteenth and final exception that the ALJ erred when he concluded that the Department's request of reimbursement of the costs of investigation and prosecution in the amount of $1,237.50 is appropriate. Ibid. The Respondents argue that no costs are warranted. Ibid. The Respondents argue that the Department did not itemize the costs of investigation as to the Third Count of the OTSC, which was withdrawn. Ibid. The Respondents argue that the requested amount is not reasonably related to the Department's investigation of the language in the contracts. Ibid.

The Respondents conclude by suggesting that the Commissioner pursue several objectives: (1) revising the language of N.J.A.C. 11:1-37.13(b)(5) to provide clear guidance to public adjusters; (2) revise the Department's program to educate public adjusters on the requirements regarding public adjuster contracts and the process for admitting out-of-State public adjusters without examination; (3) rein in the Enforcement Section so that it does not "go tilting after windmills or allow itself to be used as a goon" of an insurance company; and (4) focus on education rather than attempting to financially ruin a public adjuster who is providing a service to the public. Id. at 15.

Department's Reply to Respondents' Exceptions

In its Reply to the Respondents' Exceptions in this matter, the Department points out that the Respondents submitted a certification that was not submitted to the OAL and should not be

considered under N.J.A.C. 1:1-18.4(c).[5] The Department set forth the following arguments in response to the Respondents' Exceptions:

First Exception

The Department states that the Respondents argue that the Department did not prove consumer harm. Department Reply at 2 (citing Respondents Exceptions at 2-4). The Department argues that there is nothing in the applicable law that requires that the Department show harm to consumers, and the law protects consumers, whether or not they complain. Department Reply at 2.

Second and Third Exceptions

The Department argues that the Respondents' claim that the "advise and assist" language in their contracts sufficiently defined the services to be rendered and that the contracts on which the Respondent were not paid should not be included in the violations is meritless. Ibid. (citing Respondents Exceptions at 4-5).

The Department argues that N.J.S.A. 17:22B-13(c) and N.J.A.C. 11:1-37.13(b)(3)(ii) require that the contracts specifically define the services to be rendered, and that entering into deficient contracts, rather than being paid under a deficient contract, constitutes the violation. Ibid. The Department also contends that the language in the contract that references the services to be rendered is insufficient. That sentence of the contract reads: "Property Damage Adjustment, or their representative is hereby retained to advise and assist in the adjustment of the insurance claim arising from loss by _____ which occurred on the _____ day of _____, 20_____." The

[5] This objection appears to refer to the certification of Thomas E. Maloney, Esq., ("Maloney") the Respondents' counsel. Maloney provided a certification, which attached answers to interrogatories relevant to Count Three, which the Department withdrew because its Motion for Summary Decision on Counts One and Two was granted. Maloney's certification also attached the Department's responses to a Request for Production of Documents regarding any materials the Department provided to Diviney in preparation for his application and licensing exam.

Department argues that the term "advise and assist" is "amorphous and vague" and does not provide the specificity or clarity required by law. Ibid.

The Department argues that Respondents' defense under Gormley, 2015 N.J. Super. Lexis 42 (App. Div. 2015) is meritless because the applicable language in Gormley "is nothing more than dicta." Id. at 2-3.

The Department points that in New Jersey unpublished opinions generally can be considered as persuasive authority, but they are not binding precedent. Id. at 3 (citing R. 1:36-3). The Department also notes that Division of Motor Vehicles v. Festa, 6 N.J.A.R. 173 (1982), which the Respondents cite, is also considered an unpublished opinion under R. 1:36-3. Ibid. Festa states that "an administrative agency must either apply the reasoning of an unpublished appellate opinion, distinguish the situation on the facts, or explain its policy reasons for declining to follow the decision." Ibid.

The Department further argues that none of the four cases cited by the Respondents for the proposition that lower courts must follow appellate precedent discuss unpublished cases. Ibid. The Department argues that the court in Mountain Hill, L.L.C. v. Township Comm. of Tp. Middletown recognized that "citation to unpublished opinions is generally prohibited by R. 1:36-3." Ibid. (quoting 403 N.J. Super. 146, 155 n.3 (App. Div. 2008)). The Department states that the court then noted that one exception to the non-binding nature of unpublished opinions is that they are binding on the parties to the case. Ibid. The Department points out the Respondents' reliance on Gormley is deficient because the Department was not a party in Gormley and the language cited by the Respondents is dicta, not the holding. Id. at 3-4. The Department further states that the issue in Gormley was whether a three-day right to rescind was required in public adjuster contracts by a combination of the Public Adjusters' Act, the Consumer Contracts Act, N.J.S.A. 56:12-1 to -

18, the Federal Trade Commission Act, 15 U.S.C. 41, and 16 C.F.R. subsection 429.1 (1993). Department Exception at 4 (citing Gormley at 2).

The Department states that the Gormley court acknowledged there may have been a violation of the Public Adjusters' Act and held that the adjuster may still be entitled to compensation from the insured based on quantum meruit, and remanded the case to the trial court on that issue. Id. at 4 (citing Gormley at 14-15). The Department argues that the Gormley case suggests that the public adjuster there should be in the same place that Respondents here would be had the regulations been followed, i.e., paid for their services pursuant to quantum meruit. Ibid.

The Department further argues that the discussion in Gormley about the description of services to be rendered that is statutorily required to be included in a public adjuster contract was not the holding in the case. Ibid. Further, the Department points out that it was not a party in Gormley and did not have the opportunity to argue that language "advise and assist" is insufficient to comply with New Jersey law. Ibid. The Department concludes that Gormley is distinguishable from the case at bar. Ibid.

Fourth Exception

The Department argues that the Respondents incorrectly claim that the Department needed to show when the contracts were executed, not only that they lacked the required time and date of execution. Id. at 5. The Department argues that the ALJ's reasoning that "the language of the regulation is unambiguous, and the sole manner of compliance is the inclusion of the time and date of execution of the contract (day, month, year) by each party." Ibid. (quoting Initial Decision at 11). The Department argues that because the Respondents complied with the rule against contracting with an insured between 6:00 p.m. and 8:00 a.m. during the 24 hours following a loss, that does mean that they did not have to comply with the rule requiring that the time and date a

contract is executed be documented. Ibid.

Fifth through Eighth Exceptions

The Department states that the Respondents entered into eighty contracts that contained violative language regarding cancellation. Ibid. (citing Initial Decision at 12-14 and Kant Cert at Ex. A-C). The Department states that the Respondents first argue that no consumers were harmed, and they were not paid on all the contracts, which the Department discussed previously. Id. at 6.

The Department states that the Respondents' next argument is that the applicable regulation lacks statutory authority and the general laws of contract apply to Respondents' contracts, which the Department states also is incorrect. Ibid. First, the Department argues, the Legislature authorized the Commissioner to "promulgate any rules and regulations as may be necessary to effectuate the purposes of [the Public Adjusters' Act] pursuant to the 'Administrative Procedure Act.'" Ibid. (quoting N.J.S.A. 17:22B-20). Further, the purpose of the Public Adjusters' Act is to regulate public adjusters and protect consumers from unfair practices by public adjusters. Ibid. (citing N.J.S.A. 17:22B-3 (license requirement), N.J.S.A. 17:22B-12 (bond requirement); N.J.S.A. 17:22B-13 (prohibited practices); Sen. Commerce Comm. Statement to A. 1548 1 (L. 1993, c. 66)). The Department argues that the cancellation regulation at issue, N.J.A.C. 11:1-37.13(b)(5), furthers the Public Adjusters' Act's purpose of protecting consumers and is authorized by the statute. Ibid.

The Department also argues that the Commissioner is authorized to promulgate regulations regarding public adjuster contracts, and that requiring public adjuster contracts to provide for the rights, procedures, and costs upon cancellation at any time, including after the first four days of execution, is an appropriate exercise of the Commissioner's authority to protect the public. Id. at 6-7. The Department argues that insurance is a highly regulated industry and "compelling the

inclusion of certain contract terms in public adjuster contracts is a reasonable condition related to appropriate government objectives in protecting consumers." Id. at 7 (additional citations omitted).

The Department states that the Respondents next argue that the regulation is unclear. Ibid. The Department argues that the ALJ correctly ruled that the plain language of the regulation requires that public adjuster contracts allow cancellation at any time. Ibid. The Department argues that the plain language of N.J.A.C. 11:1-37.13(b)(5)(ii) requires public adjuster contracts to state the rights and obligations of the parties if one decides to cancel the contract at any time and that N.J.A.C. 11:1-37.13(b)(5)(iii) requires public adjuster contracts to state the costs upon cancellation for services rendered in whole or in part. Ibid.

The Department also states case law regarding an agency's interpretation of its regulations demonstrates that Appellate Courts defer to the agency, unless the agency's interpretation is "plainly unreasonable." Ibid. (quoting U.S. Bank, N.A. v. Hough, 210 N.J. 187, 200 (2012), further citations omitted)). In applying the "plainly unreasonable" standard, courts look first to the words of the statute, "affording to those words 'their ordinary and commonsense meaning.'" Ibid. (quoting In re Eastwick College LPN-RN Bridge Program, 225 N.J. 533, 542 (2016) further citations omitted). The "'paramount goal'" is to determine the drafter's intent, which is generally found in the "actual language of the enactment.'" Ibid. (quoting In re Eastwick College LPN-RN Bridge Program, 225 N.J. 533, 542 (2016) further citations omitted). If "the plain language yields more than one plausible interpretation of the regulation, a reviewing court may consider extrinsic sources, including 'the long-standing meaning ascribed to the language by the agency charged with its enforcement.'" Ibid. (quoting In re Eastwick College LPN-RN Bridge Program, 225 N.J. at 542 (2016) further citations omitted).

The Department states that the language of the regulation requires that the contracts "shall" include a provision "setting forth the rights and obligations of the parties if the contract is canceled at any time." Ibid. (quoting N.J.A.C. 11:1-37.13(b)(5)(ii)). The Department argues that the text "plainly means that the contracts must specify the rights and obligations of the public adjuster and the insured upon cancellation and those rights and obligations are to be applicable 'if' the contract is cancelled at any time, including after the three day free look or rescission period under 16 CFR 429.1." which requires a notice of right to cancel stating: "You may CANCEL this transaction, without any Penalty or Obligation, within THREE BUSINESS DAYS from the above date." Ibid. The Department argues that the Respondents did not specify the rights and obligation of the parties "if" their clients wanted to cancel at any time, because they only provided for cancellation only within four days of contract execution. Ibid.

The Department argues that even if the language in the regulation was unclear, extrinsic sources, such as the comments in the New Jersey Register explaining the regulation's meaning, support the ALJ's determination. Ibid. The Department states that the regulatory history explicitly states that the "Department recognizes an individual's right to cancel any contract which he or she has entered into." Id. at 8-9 (quoting 26 N.J.R. 1715 (April 18, 1994)). The proposed regulation was "amended to provide that a public adjuster contract shall include a section which specifically details an individual's obligation under the contract if he or she chooses to cancel the contract at any time." Id. at 9 (quoting 26 N.J.R. 1715 (April 18, 1994)).

The Department further argues that N.J.A.C. 11:1-37.13(b)(5)(ii) should be considered in the context of the rest of the regulation. Ibid. The Department posits that the "plain language" of the next provision, N.J.A.C. 11:1-37.13(b)(5)(iii), requires public adjuster contracts to address costs upon cancellation for services rendered in whole or in part. Ibid. If a contract states that

cancellation is allowed only within four days of execution, by implication the client must pay the full contingency fee if the contract is cancelled after four days. Ibid. By requiring full payment after four days, the contract fails to address costs upon cancellation for services rendered in part, which could occur if the contract was canceled after four days, but prior to completion. Ibid. The Department posits that N.J.A.C. 11:1-37.13(b)(5)(ii), which requires that contracts provide for the rights and obligations of the parties if the contract is canceled at any time, dovetails with N.J.A.C. 11:1-37.13(b)(5)(iii), which specifies that the contracts must delineate the payment required for services rendered in part. Ibid.

Finally, the Department argues that the Respondents' argument regarding legal advice and good faith and fair dealing are "irrelevant and off point." Ibid. The Department argues that the regulations require certain terms to be included in public adjuster contracts, which is not legal advice, but informing clients about their rights. Ibid. The Department further argues that the Respondents' good faith and fair dealing discussion is "pointless" because the violation stems from not including required terms in their contracts, not a matter of good faith and fair dealing. Ibid.

Ninth Exception

The Department states that the Respondents' next argument is that they did not violate N.J.A.C. 11:1-37.13(b)(5), and the Department did not seek license revocation, so there was no violation of N.J.S.A. 17:22B-14(a)(1) or N.J.A.C. 11:1-37.14(a)(1). Id. at 10 (citing Respondents' Exceptions at 11-12). The Department argues that this "is incorrect and a misreading of the law." Ibid.

The Department argues that as it previously discussed and found by the ALJ, the Respondents violated N.J.A.C. 11:1-37.13(b)(5) by failing to include the required terms of cancellation in their contract. Ibid. Therefore, they also violated N.J.S.A. 17:22B-14(a)(1) and

N.J.A.C. 11:1-37.14(a)(1), which prohibit violating any insurance law or regulation. Ibid. The Department argues that any violation of the Public Adjusters' Act or associated regulation expose the violator to a civil penalty, so license revocation is not necessary. Ibid. (citing N.J.S.A. 17:22B-17 and N.J.A.C. 11:1-37.14(b)).

Tenth Exception

The Department states that the Respondents claim that testimony and proof of intent are necessary to find a violation of N.J.S.A. 17:22B-14(a)(4) and N.J.A.C. 11:1-37.14(a)(4). Ibid. (citing Respondents Exceptions at 10). The Department argues that neither provision includes an element regarding state of mind and testimony is unnecessary. Ibid.

The Department posits that incompetence and bad faith are not defined in the Public Adjusters' Act or associated regulations, but Black's Law Dictionary defines incompetence as "[t]he quality, state, or condition of being unable or unqualified to do something." Ibid. (quoting Black's Law Dictionary (11th ed. 2019)). The Department argues that the ALJ correctly ruled that the Respondents' failure to include required cancellation language in eighty contracts demonstrated incompetency. Ibid. The Department argues that the fact that the Respondents used a deficient contract eighty times demonstrates that they are unable to comply with the law. Id. at 10-11.

The Department argues that bad faith is defined as "[d]ishonesty of belief, purpose, or motive." Id. at 11 (quoting Black's Law Dictionary (11th ed. 2019). The Department argues that the Respondents' clients may have felt they had to continue to retain and pay Respondents by the language in the Respondents' contracts which indicated that cancellation is not allowed after four days. Ibid. The Department argues that the Respondents acted dishonestly by using incorrect

cancellation language in an attempt to enlarge their profits by misleading their clients, which improperly limited clients to a four-day cancellation period, showed bad faith. Ibid.

Twelfth Exception

The Department states that the Respondents again argue that no consumers were harmed, and they were not paid on all the contracts, which the Department discussed previously. Ibid. The Department states that entering into violative contracts is the violation. Ibid.

The Department also states that the Respondents argue that the ALJ's analysis of the Kimmelman factors was lacking. Ibid. The Department argues that the Respondents had a chance to address each of the Kimmelman factors with the ALJ. Ibid. The Department states that the ALJ's analysis of the Kimmelman factors was thorough and based on the record. Ibid. The Department also argues that the Respondents did not provide a reason to modify the Initial Decision. Ibid.

Eleventh Exception, Thirteenth Exception, and the Respondents' Conclusion

The Department states that the Respondents argue that because they did not violate any regulations or statutes, there should be no penalties. Ibid. The Department argues that the Initial Decision found they did violate the law, and Respondents have provided no persuasive reason for the Initial Decision to be rejected or modified. Ibid. The Department argues that the penalties against the Respondents are a result of those violations. Ibid.

The Department states that the Respondents' conclusion directs the Commissioner to meet several objectives. Id. at 12. The Department states that the Respondents have been found to have violated the law and should not make demands of the Commissioner. Ibid. Rather, the Department argues, that the Respondents must "suffer the consequences of their actions," the penalties authorized by the Public Adjusters' Act. Ibid.

LEGAL DISCUSSION

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).

As noted by the ALJ, N.J.A.C. 1:1-12.5(b) provides the standard to determine whether summary decision should be granted in a contested case. Specifically, the provision states that a summary decision may be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." Ibid. The rule also provides that "when a motion for summary decision is made and supported, an adverse party, in order to prevail must, by responding affidavit, set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." Ibid.

The ALJ found that the Respondents failed to adduce evidence that would create a genuine issue as to any material fact and that summary decision is appropriate as to the allegations contained in Counts One and Two of the OTSC. I concur that summary decision is appropriate.

Allegations Against Respondents

The OTSC charges the Respondents with violations of the Public Adjusters' Act and its associated regulations. Specifically, the OTSC alleges that the Respondents entered into eighty contracts with New Jersey insureds that did not specifically or clearly define the services to be

rendered, did not indicate the time the contracts were executed, and did not prominently include a section which specified the procedures to be followed by the insureds if they sought to cancel the contract, including any requirement for a written notice and the rights and obligations of the parties if the contract were cancelled at any time, and the costs to the insured for services rendered in whole or in part in violation of N.J.S.A. 17:22B-13(c), N.J.S.A. 17:22B-14a(1) and (4), N.J.A.C. 11:1-37.13(b)(3)(ii) and (iii), N.J.A.C. 11:1-37.13(b)(5)(i), (ii), and (iii), and N.J.A.C. 11:1-37.14(a)(1) and (4).

Count One

Count One of the OTSC alleges that the Respondents entered into eighty public adjuster contracts with New Jersey insureds that did not specifically or clearly define the services to be rendered and did not indicate the time the contracts were executed in violation of N.J.S.A. 17:22B-13c, and N.J.A.C. 11:1-37.13(b)(3)(ii) and (iii).

The ALJ found that it was undisputed that all eighty contracts did not contain language related to services rendered beyond that the Respondents would "advise and assist in the adjustment of the insurance claim" which the ALJ indicated was "amorphous and vague." Initial Decision at 11. The ALJ concluded that the eighty contracts provided an insufficient description of the services to be rendered and that the Department proved that the Respondents violated Public Adjusters' Act and associated regulations. Ibid. The ALJ found that the Department also demonstrated that all eighty contracts failed to include the time the contract was executed. Ibid.

In their Exceptions, the Respondents argue that the ALJ should have dismissed the OTSC in its entirety because the Department did not show that any insureds were injured by the language in the contracts. Respondents Exceptions at 2. The Respondents also argue that the Department failed to identify any contract that was entered into during the period between 6:00 p.m. and 8:00

a.m. following a loss. Ibid. The Respondents also argue that the ALJ erred when he found the language in Gormley, 2015 N.J. Super. Lexis 42 (App. Div. 2015), was not binding and that the language in the contracts provided an insufficient description of the services rendered. Id. at 4.

In its Reply, the Department argues that there is nothing in the applicable law that requires that the Department show harm to consumers, and the law protects consumers, whether or not they complain. Department Reply at 2.

The Department argues that Respondents' defense under Gormley, 2015 N.J. Super. Lexis 42 (App. Div. 2015) is meritless. Id. at 2-3. The Department points out that in New Jersey unpublished opinions generally can be considered as persuasive authority, but they are not binding precedent. Id. at 3 (citing R. 1:36-3). The Department posits that there is one exception to the non-binding nature of unpublished opinions, which is that they are binding on the parties to the case. Ibid. (citing Mountain Hill, L.L.C. 403 N.J. Super. at 155 n.3). The Department points out that it was not a party in Gormley, and did not have the opportunity to argue that language "advise and assist" is insufficient to comply with New Jersey law. Id. at 3-4. The Department argues that the Gormley case suggests that the public adjuster in that case should be in the same place that Respondents here would be, had they followed the regulations, i.e., paid for their services pursuant to quantum meruit. Ibid.

The Department argues that as to the contracts not including the date and time of execution, even if the Respondents complied with the rule against contracting with an insured between 6:00 p.m. and 8:00 a.m. during the 24 hours following a loss, that does not give them the option not to comply with the rule requiring that the time and date a contract is executed be documented. Ibid.

I find that the "advise and assist" language in the contracts is insufficient to comply with the statute and regulation. N.J.A.C. 11:1-37.13(b)(3)(ii) requires that a contract between an

insured and public adjuster contain "[a] list of services to be rendered…" The "advise and assist" language in the Respondents' contracts is too vague to comply with this regulation. I agree with the Department and the ALJ that Gormley is not binding because Gormley is an unpublished case and the Department was not a party. See R. 1:36-3, Mountain Hill, L.L.C. 403 N.J. Super. at 155 n.3. Further, I agree with the Department that the holding in Gormley was that the adjuster may be entitled to compensation from the insured based on quantum meruit, and the Court remanded the case to the trial court on that issue. Department Reply at 4 (citing Gormley at 14-15).

Further, I find that the Department does not have to show that the Respondents entered into a contract during the period between 6:00 p.m. and 8:00 a.m. following a loss to prove a violation of N.J.A.C. 11:1-37.13(b)(3)(iii). This regulation requires that contracts between a licensed public adjuster and an insured must contain "the time and date of the execution of the contract (day, month, and year) by each party." Soliciting the adjustment of a loss between 6:00 p.m. and 8:00 a.m. during the 24 hours after a loss has occurred is a different violation under N.J.A.C. 11:1-37.13(c), which the Respondents were not charged with.

It does not matter that the Department did not show that one of the Respondents' client complained, or that the Respondents were not paid for every contract at issue. Entering into deficient contracts is enough to constitute a violation.

Accordingly, I ADOPT the ALJ's determination and find the eighty contracts entered into by the Respondents violated the provisions of N.J.S.A. 17:22B-13(c) (no right to compensation from any insured for or on account of services rendered to an insured as a public adjuster unless the right to compensation is based upon a written memorandum), N.J.A.C. 11:1-37.13(b)(3)(ii) (requiring that a contract between an insured and public adjuster contain "[a] list of services to be rendered and the maximum fees to be charged, which fees shall be reasonably related to services

rendered"), and N.J.A.C. 11:1-37.13(b)(3)(iii) (providing that a contract between a licensed public adjuster and an insured must contain the time and date of the execution of the contract by each party).

Count Two

Count Two of the OTSC alleges that the Respondents entered into at least eighty public adjuster contracts with New Jersey insureds that did not prominently include a section which specified the procedures to be followed by the insureds if they sought to cancel the contract, including any requirement for a written notice and the rights and obligations of the parties if the contract were cancelled at any time, and the costs to the insured for services rendered in whole or in part, in violation of N.J.S.A. 17:22B-14a(1) and (4), and N.J.A.C. 11:1-37.13(b)(5)(i), (ii), and (iii), and N.J.A.C. 11:1-37.14(a)(1) and (4).

The ALJ found that the Department demonstrated that all eighty contracts clearly stated, though not prominently, that an insured can cancel until midnight on the fourth calendar day, and that written notice is required to cancel the contract. Initial Decision at 12. The ALJ found that the Respondents violated: N.J.A.C. 11:1-37.13(b)(5)(i) because they did not provide cancellation procedures beyond midnight of the fourth calendar day; N.J.A.C. 11:1-37.13(b)(5)(ii), because they did not include language specifying the parties' rights and obligations if the contract is cancelled at any time; and N.J.A.C. 11:1-37.13(b)(5)(iii), because they failed to provide the costs to the insured or the formula for the calculation of costs for services rendered in whole or in part before cancellation. Id. at 13. The ALJ also found that the Respondents' failure to include language in the eighty contracts that provide cancellation procedures beyond midnight on the fourth calendar day, specify the rights and obligations of the parties if the contract is cancelled at any time, and provide the costs to the insured or the formula for the calculation of costs to the

insured for services rendered in whole or in part after cancellation, demonstrates incompetency and bad faith in violation of N.J.S.A. 17:22B-14(a)(4) and N.J.A.C. 11:1-37.14(a)(4). Id. at 13-14. The ALJ concluded that the Department proved that the Respondents violated the statute and associated regulations. Id. at 14.

The Respondents argue in their Exceptions that N.J.S.A. 17:22B-13 does not state that the contract between the public adjuster and the insured must be subject to cancelation at any time. Respondent Exceptions at 7. The Respondents argue that N.J.A.C. 11:1-37.13(b)(5)(ii) does not clearly state that the insured has the right to cancel at any time. Ibid. The Respondents argue that the Department failed to prove that any insured requested to cancel the contract or suffered any damage as a result of the contract lacking any procedures to be followed if the insured wants to cancel beyond midnight of the fourth calendar day. Id. at 8. Further, the Respondents argue that pursuant to N.J.S.A. 17:22B-13(e), public adjusters are prohibited from giving legal advice regarding the contract. Id. at 10. The Respondents argue that specifying rights and obligations of a party to a contract is engaging in the practice of law and would violate the statute. Ibid. The Respondents also argue that they cannot be forced to violate the statute by complying with the regulation. Ibid. The Respondents further argue that because the Department did not prove a violation of N.J.A.C. 11:1-37.13(b)(5), there are no violations of N.J.S.A. 17:22B-14(a)(1) and N.J.A.C. 11:1-37.14(a)(1). Id. at 11-12. The Respondents argue that a finding of incompetency or bad faith cannot be made in the absence of testimony regarding intent. Id. at 12.

The Department argues in its reply that the Legislature has authorized the Commissioner to "promulgate any rules and regulations as may be necessary to effectuate the purposes of [the Public Adjusters' Act] pursuant to the 'Administrative Procedure Act.'" Department Reply at 5 (quoting N.J.S.A. 17:22B-20). The Department argues that the plain language of N.J.A.C. 11:1-

37.13(b)(5)(ii) requires public adjuster contracts to state the rights and obligations of the parties if one decides to cancel the contract at any time and that N.J.A.C. 11:1-37.13(b)(5)(iii) requires public adjuster contracts to state the costs upon cancellation for services rendered in whole or in part. Id. at 7. Neither N.J.S.A. 17:22B-14(a)(4) and N.J.A.C. 11:1-37.14(a)(4) include an element regarding the state of mind of adjusters, and testimony is unnecessary. Id. at 9. Finally, the Department argues that the Respondents' argument regarding legal advice and good faith and fair dealing are "irrelevant and off point." Ibid. The Department argues that the regulations require certain terms to be included in public adjuster contracts, which is not legal advice, but informing clients about their rights. Ibid.

The Legislature granted the Commissioner the authority to promulgate any regulations that may have been necessary to effectuate the purposes of the Act, which undoubtedly includes the protections of consumers from unfair practices by public adjusters. See N.J.S.A. 17:22B-20, N.J.S.A. 17:22B-3, N.J.S.A. 17:22B-12, and N.J.S.A. 17:22B-13. The Department was well within its authority under the Public Adjusters' Act to promulgate regulations that require that insureds be permitted to cancel their contracts at any time. The Respondents argue that N.J.A.C. 11:1-37.13(b)(5)(ii) does not clearly state that the insured has the right to cancel at any time. However, N.J.A.C. 11:1-37.13(b)(5)(i) and (ii) state that a public adjuster contract must "prominently include a section which specifies . . . [t]he procedure to be followed by the insured if he or she seeks to cancel the contract, including any requirement of written notice" and must "prominently include a section which specifies . . . [t]he rights and obligations of the parties if the contract is cancelled at any time." N.J.A.C. 11:1-37.13(b)(5)(iii) provides that the contract must set forth "[t]he costs to the insured or the formula for the calculation of costs to the insured for services rendered in whole or in part." The regulations set forth the requirement that insureds are

free to cancel a contract at any time, even after the four days specified in the Respondents' contracts. The Respondents' contracts lack the information required by N.J.A.C. 11:1-37.13(b)(5).

Accordingly, I concur with the ALJ that the Department proved the allegations in Count Two of the OTSC, and therefore, I FIND that the Respondents' actions constitute violations of N.J.A.C. 11:1-37.13(b)(5)(i) (providing that a contract between a licensed public adjuster and an insured must prominently include the procedures to be followed by the insured to cancel the contract, including any written notice), N.J.A.C. 11:1-37.13(b)(5)(ii) (a written contract or memorandum between the public adjuster and an insured shall set forth the rights and obligations of the parties if the contract is cancelled at any time), and N.J.A.C. 11:1-37.13(b)(5)(iii) (providing that a contract between a licensed public adjuster and an insured must include the costs to the insured or the formula to calculate costs to the insured for services rendered). Additionally, the Respondents, as licensed public adjusters, are required to be aware of and operate under the Act and rules that regulate their profession, and their failure to include the required language in their contracts, demonstrates incompetency in the practice of public adjuster business, in violation of N.J.S.A. 17:22B-14(a)(4) and N.J.A.C. 11:37-14(a)(4). Further, because the Respondents violated the above regulations, they also violated N.J.S.A. 17:22B-14(a)(1) and N.J.A.C. 11:1-37.14(a)(1) (violation of any provision of the insurance law, including any rules promulgated by the Commissioner, or has violated any law in the course of his, or its, dealings as an adjuster).

PENALTY AGAINST RESPONDENTS

Respondents' Public Adjuster Licenses

The Department did not request that any adverse action be taken against the Respondents' public adjuster licenses. The ALJ did not recommend any action be taken against Respondents'

public adjuster licenses and the Department did not take any Exception. Accordingly, I will not order that any action be taken against the Respondents' public adjuster licenses.

Monetary Penalties Against the Respondents

The Commissioner may levy penalties against any person violating the Public Adjusters' Act, not exceeding $2,500 for the first offense and not exceeding $5,000 for each subsequent offense. N.J.S.A. 17:22B-17. As noted by the ALJ, pursuant to Kimmelman, certain factors are to be examined when assessing administrative monetary penalties such as those that may be imposed under the Public Adjusters' Act. No one Kimmelman factor is dispositive for or against fines and penalties. See Kimmelman, 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 first Kimmelman factor addresses the good faith or bad faith of the respondent. The ALJ found that the Respondents acted in bad faith in failing to provide the insureds with their "mandated rights and disclosures" including the right to cancel the contract at any time. Initial Decision at 15. I agree with the ALJ and find that the Respondents used contracts that did not meet the required elements under the regulations. I find that this factor weighs in favor of a higher monetary penalty.

The second Kimmelman factor is the ability of the respondent to pay the penalties imposed. The Respondents have presented no evidence of their ability or inability to pay the civil monetary penalties that could be assessed in this matter. Even so, respondents who claim an inability to pay civil penalties bear the burden of proving their incapacity. Commissioner v. Shah, OAL Dkt. No. BKI 11903-05, Initial Decision (04/15/08), Final Decision and Order (09/02/08). The ALJ found that the Respondents have offered no evidence in relation to their ability or inability to pay a civil

monetary penalty. Initial Decision at 15. I agree with the ALJ that the Respondents did not put forth any evidence regarding their ability to pay a fine. This factor is neutral.

The third Kimmelman factor relates to the profits obtained. 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, 108 N.J. at 138. As to this factor, the ALJ stated that the Department did not have enough information to ascertain how much the Respondents profited from the language in their contracts, but argued that the contracts were advantageous to the Respondents and should weigh in favor of a heavier monetary penalty. Final Decision at 15. I find that without showing how much, if any, profit the Respondents generated as a result of the language in their contracts, this factor is neutral.

The fourth factor in Kimmelman examines the resulting injury to the public. The ALJ stated that the Department had demonstrated injury to the public through the Respondents' disregard of important safeguards and protections for consumers. Initial Decision at 15. The Commissioner is charged with the duty to protect the public welfare and to instill public confidence in the insurance industry. Commissioner v. Fonseca, OAL Dkt. No. BKI 11979-10, Initial Decision (08/15/11), Final Decision and Order (12/28/11) (citing In re Parkwood, 98 N.J. Super. 263 (App. Div. 1967)). I agree with the ALJ that the Respondents' conduct harmed the public by disregarding important safeguards and protections for consumers. This factor weighs in favor of a higher monetary penalty.

Regarding the fifth Kimmelman factor, the duration of illegal activity, I agree with the ALJ that the illegal activities at issue in the instant matter took place from December 2013 to March 2015, a period of over one year. This factor weighs in favor of a higher monetary penalty.

The sixth factor contemplated in Kimmelman is the existence of criminal actions and whether a civil penalty may be unduly punitive if other sanctions have been imposed. A lack of criminal punishment weighs in favor of a larger civil penalty. Kimmelman, 108 N.J. at 128. I agree with the ALJ's conclusion and FIND the Respondents have not been charged with any criminal charges and the only penalty contemplated derives from this action. Accordingly, this factor weighs in favor of a higher monetary penalty.

The final factor examined in Kimmelman is the previous relevant regulatory and statutory violations of the Respondents. There is no evidence of prior violations by either of the Respondents.

The Respondents argue that the Department has not proved a causal nexus between any violations and any consumer injury. Respondents Exceptions at 13. The Respondents also argue that the Respondents were only paid for 58 of the 80 contracts at issue, so the penalty should only apply to those 58 contracts. Ibid.

I have found that the Respondents violated New Jersey law and regulations. It is irrelevant whether the Department showed consumer harm. The Department does not have to wait until it can prove that a particular consumer was harmed to bring an enforcement action against a licensee who is violating the law. Nor does it matter that the Respondents were only paid on 58 of the 80 contracts at issue. That the Respondents entered into contracts that do not meet the required standards is enough to find they violated the law.

After weighing the Kimmelman factors, I concur with the recommendation of the ALJ that the Respondents be assessed a civil monetary penalty of $1,000 per contract for the multiple violations contained in each contract for a total of $80,000, jointly and severally.

Diviney, as the sole officer, owner, and DRLP of PDA, was responsible for all of the contracts that PDA entered into, pursuant to N.J.A.C. 11:1-12.2(a). The Respondents are jointly and severally liable for a total of $80,00 in monetary penalties. This amount is appropriate considering the Respondents' conduct in failing to include necessary language in their contracts. These penalties demonstrate the appropriate level of opprobrium for their misconduct, and will serve to deter future misconduct by the Respondents and the industry as a whole. I also note it is far less than the Department could have requested under N.J.S.A. 17:22B-17, which allows the imposition of up to a $2,500 fine for the first violation and up to a $5,000 fine for any subsequent violations of the Public Adjusters' Act, and each of the 80 contracts contains multiple violations.

I also concur with and ADOPT the recommendation of the ALJ that the Respondents additionally be required to reimburse the Department for its costs of investigation in the amount of $1,237.50 pursuant to N.J.S.A. 17:22B-17. This amount is consistent with the amount in the Certification of Investigator Eugene Shannon. Shannon Cert. at ¶¶ 8-9.

CONCLUSION

Having reviewed the Initial Decision, the Exceptions submitted by the Respondents, the Reply submitted by the Department, and the entire record herein, I hereby ADOPT the findings and conclusions as set forth in the Initial Decision, and find that the Respondents violated the Public Adjusters' Act and accompanying regulations as charged in the OTSC, and have failed to present any legally or factually viable defenses to the violations of the Public Adjusters' Act and the regulations promulgated thereunder. Further, I ADOPT the conclusion that the Department's Motion for Summary Decisions should be granted on Counts One and Two as set forth in the OTSC.

I ADOPT the ALJ's recommendation as to the imposition of civil monetary penalties and ORDER that fines totaling $80,000 be imposed against the Respondent jointly and severally for the violations contained herein.

I ADOPT the ALJ's recommendation and ORDER the Respondents to pay costs of investigation in the amount of $1,237.50.

It is so ORDERED on this __8_____ day of ____June_____ 2022.

_____
Marlene Caride
Commissioner

JD Diviney and PDA FO/Final Orders