ORDER NO.: E22-50

STATE OF NEW JERSEY
DEPARTMENT OF BANKING AND INSURANCE

OAL DOCKET NO.: BKI-06261-19
AGENCY DOCKET NO.: OTSC #E19-32

MARLENE CARIDE, COMMISSIONER, NEW JERSEY DEPARTMENT OF BANKING AND INSURANCE,	)	
Petitioner,	)	
v.	)	FINAL DECISION AND ORDER
DIVERSIFIED PUBLIC ADJUSTERS LLC, AND JOSEPH VULPIS,	)	
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 -15, N.J.S.A. 17:1-15, the New Jersey Public Adjusters' Licensing Act at N.J.S.A. 17:22B-1 to -20, ("Public Adjusters' Licensing Act" or "Act") and all powers expressed or implied therein, for the purposes of reviewing the January 10, 2022 Initial Decision ("Initial Decision") of Administrative Law Judge Dean J. Buono ("ALJ"). The Initial Decision incorporates a December 14, 2020 Order Granting Partial Summary Decision ("PSD") issued by the ALJ, which granted the Motion for Summary Decision brought by the Department of Banking and Insurance ("Department").

In the PSD, the ALJ found for the Department and against Diversified Public Adjusters LLC ("Diversified") and Joseph Vulpis ("Vulpis") (collectively, "Respondents") for violations

alleged in the one count Order to Show Cause No. E19-32 ("OTSC"). In addition, the ALJ recommended that the Respondents reimburse the agency's investigative costs in the amount of $1,025. However, the ALJ denied both parties' motions on the issue of the appropriate monetary penalty, as genuine issues of material facts remained, and ordered a hearing which took place on December 15, 2021.

In the Initial Decision, the ALJ incorporated the findings set forth in the PSD, including finding for the Department as it relates to the violations alleged in Count One of the OTSC and reimbursement of investigative costs to the State. In addition, the ALJ recommended a civil penalty of $6,000.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On March 25, 2019, the Department issued the OTSC against the Respondents, which sought to revoke the Respondents' public adjuster licenses and impose civil monetary penalties and investigative costs for the alleged violations of the Public Adjusters' Licensing 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: Between December 26, 2017 and October 19, 2018, the Respondents entered into at least seven contracts for public adjuster services that failed to include: (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 he 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, in violation of N.J.A.C. 11:1-37.13(b)(5)(i) to (iii); N.J.S.A. 17:22B-14(a)(1) and 14(a)(4); and N.J.A.C. 11:1-37.14(a)(1) and 37.14(a)(4).

On April 9, 2019, the Respondents filed an Answer to the OTSC, wherein the Respondents denied 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 -23, where it was filed on May 6, 2019.

After several telephone conferences, the parties agreed that the issues involved were legal in nature and proper for opposing motions for summary decision and a briefing schedule was set.[1] Oral argument was held on December 1, 2020 and the record was closed.

On December 14, 2020, the ALJ issued an Order granting partial summary decision in favor of the Department as it relates to liability for violations alleged in Count One of the OTSC. In addition, the ALJ recommended that the Respondents reimburse costs to the State for the agency's investigation, in the amount of $1,025. However, the ALJ denied both parties' motions on the issue of the appropriate monetary penalty, as genuine issues of material facts remained and ordered a hearing.

A hearing was held on December 15, 2021 to resolve the outstanding issue of appropriate penalties to be assessed and the record was closed.

On January 10, 2022, the ALJ issued the Initial Decision. The Initial Decision incorporated the findings set forth in the PSD, including finding for the Department as it relates to liability for the violations alleged in Count One of the OTSC and reimbursement of investigative costs to the State. In addition, based on consideration of the factors enumerated in Kimmelman v. Henkels & McCoy, Inc., 108 N.J. 123 (1987) ("Kimmelman factors"), the ALJ recommended a civil penalty totaling $6,000.

On January 18, 2022, the Department submitted a letter stating that they had no Exceptions to the Initial Decision in this matter. The Respondents filed Exceptions to the Initial Decision

[1] The parties each filed their cross-motions on or about September 21, 2020. The Department's response to the Respondents' motion was filed on October 9, 2020. The Respondents' response to the Department's motion was filed on October 13, 2020.

dated January 19, 2022. The Department filed its Reply to the Respondents' Exceptions by letter brief on January 24, 2022. On January 25, 2022, the Department filed a "corrected version" of its Reply to the Respondents' Exceptions.

THE ALJ'S FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS

The ALJ noted that pursuant to N.J.A.C. 1:1-12.5(b) a motion for summary decision requires analysis of whether "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." PSD at 5. Further, the ALJ stated that the New Jersey Supreme Court has explained that when deciding a motion for summary judgment under R. 4:46-2,

> 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.'

PSD at 5. (citing Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995)). The ALJ stated that R. 4:46-2(c) provides further guidance regarding whether the Brill standard has been met in a case. PSD at 5. R. 4:46-2(c) provides that

> An 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.

Ibid.

Further, the ALJ cited the Uniform Administrative Procedure Rules, at N.J.A.C. 1:1-1.1 to -21.6, which governs the conduct of contested cases before the OAL, where a party may file a motion for summary decision on substantive issues in a contested case, with or without briefs and supporting affidavit. PSD at 6 (citing N.J.A.C. 1:1-12.5(a) and -12.5(b)). The presiding judge may grant a party's motion "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 ALJ further stated that pursuant to N.J.A.C. 1:1-12.5, "[i]f . . . a decision is not rendered upon all the substantive issues in the contested case and a hearing is necessary, the judge . . . shall, if practicable, ascertain what material facts exist without substantial controversy and shall thereupon enter an order specifying those facts and directing such further proceedings in the contested case as are appropriate." N.J.A.C. 1:1-12.5(d). Thus, "[a]t the hearing in the contested case, the facts so specified shall be deemed established." Ibid.

In light of this standard, the ALJ issued the PSD on December 14, 2020, wherein he found the Department should prevail as a matter of law on the violations alleged in Count One of the OTSC. PSD at 12. The ALJ stated that the Department alleged in Count One that the Respondents prepared and executed at least seven public adjuster service contracts between September 2018 and October 2018[2] ("Service Contracts") that failed to set forth the mandated provisions regarding

[2] The OTSC alleges that the Service Contracts at issue were executed between December 26, 2017 and October 19, 2018. OTSC at 3. The PSD and Initial Decision state that the conduct at issue occurred between September 2018 and October 2018. PSD at 3, Initial Decision at 4. The Service Contracts entered into evidence in support of the Department's and the Respondents' motions for summary decision and are dated between September 24, 2018 and October 23, 2018. Department's September 21, 2020 Letter Brief, Exhibit C; Respondents' September 18, 2020 Letter Brief, Exhibit C. The referenced Exhibits are reflected in the ALJ's factual findings and appear in the PSD at 4 and in the Initial Decision at 4.

procedures, rights and obligations and costs upon cancellation, in violation of N.J.A.C. 11:1-37.13(b)(5)(i), (ii), and (iii). PSD at 2 and 4.

The ALJ found the following facts were undisputed in the grant of summary decision. On or about October 6, 2017, Vulpis was first licensed as a resident public adjuster in the State of New Jersey. PSD at 3. On or about March 2, 2018, Diversified was first licensed as a resident public adjuster entity with the State of New Jersey. Ibid. At all relevant times thereafter, Vulpis was the owner, officer and sole Designated Licensed Public Adjuster ("DLPA") for Diversified. Ibid. Between September 2018 and October 2018, Diversified entered into at least seven pre-written Service Contracts with New Jersey insureds which set forth the terms and conditions governing the public adjuster services being rendered by Diversified on behalf of the insureds.[3] Ibid. Each Service Contract was one page long and signed by Vulpis on behalf of Diversified. Ibid. All seven Service Contracts include the same language:

> I/We hereby retain DIVERSIFIED PUBLIC ADJUSTERS, INC. to advise and assist in the adjustment of a _ loss which occurred on or about _ at _. I/We agree to pay [Diversified] for such services a fee of _ % of the total insurance proceeds payable and do hereby assign to [Diversified] said percentage of the insurance recovery …
> If you cancel this contract within the three-day rescission period, you will be responsible to reimburse [Diversified] for all out-of-pocket costs incurred or paid on your behalf. Thereafter if you cancel this contract and [Diversified] has undertaken any services on your behalf, you are responsible to pay [Diversified] the percentage of recovery set forth above, unless otherwise agreed.
>
> **NOTICE OF RIGHT TO CANCEL**
>
> **You have the right to cancel this contract and assignment at any time before midnight of the third business day after receiving a copy of this contract. If you wish to cancel this contract, you must either (1) send a signed and dated written notice of cancellation by mail or fax or (2) personally deliver a signed and dated written notice of cancellation to [Diversified] at the address stated above. If you cancel this contract, anything of value that you have given to**

[3] See FN 2.

> **[Diversified] will be returned to you or made available to you within ten business days following receipt of your notice of cancellation.**
>
> **This right to cancel terminates at midnight on _/_/_.**

Id. at 3-5. On or about September 3, 2019, the Commissioner and Respondents entered into Consent Order No. E19 85 ("Consent Order") in a separate matter, where Diversified and Vulpis admitted responsibility for the improper endorsement and deposit of a client's property insurance claim check, in violation of the Act and its implementing regulations, and agreed to pay a $2,500 fine. Id. at 5.

The ALJ noted that N.J.A.C. 11:1-37.13(b)(5)(i) requires that public adjuster contracts shall feature a prominent section that includes procedures to be followed by the insured if he or she seeks to cancel the contract, including any requirement for written notice, both during and after any rescission period provided by the contract. Id. at 10. The ALJ noted that the Respondents admit that the Service Contracts do not include the procedures to follow after the rescission period, and argue, rather, that the absence of the procedures gives the client the freedom to choose any method of cancellation, including by writing or by phone. Id. at 11. Based on the undisputed findings of fact above, including the text of the Service Contract, the ALJ found the Respondents' argument unpersuasive and concluded that the Service Contracts only include information for cancellation during the rescission period, and do not include procedures for post-rescission cancellation, in violation of N.J.A.C. 11:1-37.13(b)(5)(i). Ibid.

Next, the ALJ stated that N.J.A.C. 11:1-37.13(b)(5)(ii) requires that public adjuster contracts must state both that the client has the "right" to cancel at any time and that certain "obligations" may flow from the exercise of that right, but does not specify what that those obligations are. Id. at 11. Further, the ALJ noted that the rights and obligations that flow from

cancellation must appear prominently. The ALJ noted that the Department only takes issue with the lack of certain language pertaining to cancellation after, not during, the rescission period, arguing the Service Contracts are "completely silent" as to the client's rights and obligations after three days.[4] Id. at 12. The ALJ found this argument unpersuasive, noting that the Service Contracts acknowledge the right to cancel after three days by using the phrase "thereafter if you cancel this contract." Ibid. The ALJ notes that the Service Contract could have been more explicit, but as written, the Service Contracts are substantively compliant with the requirement in N.J.A.C. 11:1-37.13(b)(5)(ii) to provide notice of "the right to cancel any contract which he or she has entered into." Ibid. Similarly, the ALJ noted that the Service Contracts address the client's obligations after three days, such that "if you cancel this contract and [Diversified] has undertaken any services on your behalf, you are reasonable to pay [Diversified] the percentage of recovery set forth above, unless otherwise agreed." Ibid.

However, the ALJ noted that N.J.A.C. 11:1-37.13(b)(5)(ii) requires that the aforementioned language be included prominently. The ALJ noted that the language provided with respect to cancellation after the rescission period appears in regular typeface, above an emboldened section titled "Notice of Right to Cancel." Ibid. The ALJ found that the aforementioned section is prominently featured, designated by the use of bold typeface; therefore, the Respondents understood the need for a distinct section. The ALJ also found that the Respondents failed to include, in this prominent section, those required rights and obligations for

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[4] The Department also argues that the rights and obligations that should be addressed are "non-monetary" in nature, including "the return of documents and information, the insured's ability to retain a new public adjuster and have Respondents forward the insured's information to a new public adjuster, the insured's ability to work directly with the insurance company and without any public adjuster at all, etc." PSD at 11. The ALJ examined the regulatory history of the subsection and concluded that this "non-monetary" requirement cannot be inferred and dismissed the Department's argument. Id. at 12.

cancellation after the rescission period. Id. at 13. The ALJ concluded that the Service Contracts, as written, do not conform to the letter of the law and are in violation of N.J.A.C. 11:1-37.13(b)(5)(ii). Ibid.

Next, the ALJ found that the Service Contracts violate N.J.A.C. 11:1-37.13(b)(5)(iii) in both form and substance. The ALJ noted that subparagraph (iii) requires that the Service Contracts prominently include the costs to the insured, or the formula for the calculation of costs to the insured, for services rendered in whole or in part. Id. at 13. The ALJ found the Service Contracts do not break down the costs for services rendered in whole or in part as required by the provision. Id. at 13-14. Further, the ALJ noted that the Service Contracts, as written, obligates the client pay the Respondents the same fee whether services were rendered in whole or in part, and the failure to set different fees is in violation of subparagraph (iii).[5] Id. at 14. Lastly, the ALJ found that the language regarding costs upon cancellation was not prominent and is in violation of N.J.A.C. 11:1-37.13(b)(5)(iii). Ibid.

In conclusion, as to the liability of Respondents, the ALJ found the Department is entitled to partial summary decision because there are no issues of genuine fact at issue, the Service Contracts speak for themselves, and the Department should prevail as a matter of law with respect to liability. Id. at 15.

The ALJ noted that the appropriate forum for the Respondents' alternative argument, challenging N.J.A.C. 11:1-37.13(b)(5) on the grounds that it is "void for vagueness" or "ultra

[5] The ALJ also noted the Department's persuasive argument that the stipulation that a different fee may be charged if "otherwise agreed" fails to save the Service Contracts from running afoul of N.J.A.C. 11:1-37.13(b)(5)(iii) because it does not provide the client with certainty with respect to the costs he or she will be obligated to pay for services rendered in whole or in part, as required by the regulation. PSD at 14.

vires," is before the Appellate Division pursuant to R. 2:2-3(a)(2), which provides that appeals may be taken to the Appellate Division as of right to review the validity for any rule promulgated by an agency.

THE ALJ'S RECOMMENDED PENALTIES

As it relates to the penalties to be imposed, the ALJ noted that as the Respondents were liable for violations of N.J.A.C. 11:1-37.13(b)(5), civil penalties of not more than $2,500 may be imposed for the first offense and not more than $5,000 for each subsequent offense, and that each transaction or statutory violation shall constitute a separate offense. PSD at 15 (citing N.J.S.A. 17:22B-17 and N.J.A.C. 11:1-37.14(b)). Further, the ALJ noted that to determine the appropriate penalty, the Commissioner must apply the factors set forth in Kimmelman, including: (1) the good or bad faith of the Respondents; (2) the Respondents' ability to pay; (3) amount of profits obtained from illegal activity; (4) injury to the public; (5) duration of the illegal activity; (6) existence of criminal or treble damages actions; and (7) past violations. Id. at 15-16.

The ALJ noted that the Department argued that monetary penalties are appropriate under Kimmelman due to the Respondents' violations of the Public Adjusters' Licensing Act and implementing regulations and that those penalties assessed should be enhanced because the instant matter is the Respondents' second violation of the Act.[6] Ibid. Accordingly, the Department sought $35,000 in monetary penalties.[7] In addition, the Department sought $1,025 for the investigative

[6] As noted above, the ALJ found as undisputed fact, that on or about September 3, 2019, the Commissioner and Respondents entered into a Consent Order, wherein Diversified and Vulpis admitted responsibility for the improper endorsement and deposit of a client's property insurance claim check, in violation of the Public Adjusters' Licensing Act and its implementing regulations, and agreed to pay a $2,500 fine.

[7] The Department sought a penalty of $5,000 per Service Contract, totaling $35,000 in penalties, subject to an enhancement as this is the Respondents' second violation of the Act. Initial Decision at 8.

costs incurred by the agency and provided the certification of Investigator Drew Gowen in support of this request. Ibid.

The ALJ noted that the Respondents argue that the Kimmelman factors weigh against the imposition of fines, citing several mitigating factors including the absence of bad faith, the limited amount of profits obtained from the illegal activity, and that penalties for the instant action are not subject to enhancement. Id. at 8. Lastly, the Respondents argue that reimbursement of investigative costs is not appropriate and is based on "false allegations." Ibid.

In light of the aforementioned, the ALJ held that genuine issues of material fact remained as to the Kimmelman factors and the appropriate penalties, and therefore a hearing was necessary. Id. at 16. Regarding the reimbursement of investigative costs incurred, the ALJ found that the Respondents failed to raise genuine issues of material fact challenging the Department's certification and granted partial summary decision with respect to these costs in the Department's favor, recommending that the Respondents pay the $1,025 reimbursement requested. Id. at 17.

The ALJ heard the remaining matters on December 15, 2021, where no witnesses were presented and the parties provided arguments on the issue of amount of the penalty to be imposed. Initial Decision at 3, 7. Subsequently, the ALJ issued the Initial Decision and found the following.

As to the first factor in Kimmelman, the good or bad faith of the respondent, the ALJ found no evidence, or allegation, of bad faith, weighing against the imposition of a monetary penalty. Initial Decision at 9. Furthermore, the ALJ emphasized that the Respondents had hired an attorney to draft the Service Contract, engaging a professional that had more experience that was better qualified to draft the document. Ibid.

As to the second factor in Kimmelman, the ability to pay, the ALJ found that this factor weighed in favor of a monetary penalty in that the Respondents offered no evidence in relation to

their ability or inability to pay a monetary penalty. Ibid. The ALJ concluded that the Department should prevail as it relates to this factor, as it is uncontroverted and uncontested, noting that the Respondents currently operate a functional commercial business, which speaks to their ability to pay penalties assessed. Ibid.

As to the third factor, the profits obtained, the ALJ stated that the record reflects that the Respondents generated fees in an undisclosed amount. Ibid. However, the ALJ notes that only six of the seven Service Contracts were fulfilled, resulting in profits and the Respondents' argument that of those that went forward, they did not collect excessive profits. Ibid. The ALJ stated that consideration of Respondents' profits from the proscribed activity must be reflective of this amount and significant enough to be an effective deterrent. However, as there was no evidence proffered by the Respondents regarding fees, the ALJ found that this factor weighs in favor of imposition of a monetary penalty. Ibid.

As to the fourth factor, injury to the public, the ALJ noted that while the injury to the public is not limited to those who received the deficient public adjuster Service Contracts, but the Department had not provided evidence that a public harm had occurred. Initial Decision at 10 – 11. The ALJ found that this factor weighs against the imposition of a monetary penalty. Ibid.

Regarding the fifth factor in Kimmelman, the duration of illegal activity, the ALJ found that the illegal activities in the instant matter took place from September 2018 and October 2018. Initial Decision at 11. The ALJ held that this is a short period of time and weighs in favor of the Respondents in considering the appropriate penalty. Ibid.

Regarding the sixth factor, the existence of criminal charges related to the matter, the ALJ noted that the Department correctly asserts that the lack of criminal actions weighs in favor of a more significant monetary penalty. Ibid. However, the ALJ found the Department's argument

that as the present action is the only penalty contemplated for this conduct, therefore, this is their "one bite at the apple" and it should be a "good one," disingenuous and at odds with the purpose of Kimmelman.[8] The ALJ found that the Department's argument weighs in favor of the Respondents. Ibid.

For the final factor in Kimmelman, previous relevant regulatory and statutory violations, the ALJ noted the record reflects one other violation of the Public Adjusters' Licensing Act.[9] Initial Decision at 11. The ALJ noted that the Respondents argue that this other violation occurred after the violations at issue here, therefore, it should not count as a "prior violation". Ibid. The ALJ found that this argument was disingenuous, that the violations at issue in this matter constitutes a second violation, and weighs in favor of a monetary penalty. Ibid.

In conclusion, after weighing the factors set forth in Kimmelman and discussed above, the ALJ recommended a civil monetary penalty of $6,000 for the violations found in the Partial Summary Decision. The ALJ noted that the penalty imposed represents $1,000 for each of the six fulfilled Service Contracts. Initial Decision at 12. The ALJ reaffirmed his previous recommendation for the reimbursement of the Department's investigative costs totaling $1,025. Ibid.

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[8] The ALJ states that the purpose of Kimmelman is to impose a reasonable civil penalty which is proportionate to the violation committed and the amount of the wrongdoing, and should not be "harsh and oppressive" or "fundamentally unfair." Initial Decision at 11.

[9] The ALJ appears to be referring to the September 3, 2019 Consent Order, wherein Diversified and Vulpis admitted responsibility for the improper endorsement and deposit of a client's property insurance claim check in August 2019, in violation of the Act and its implementing regulations, and agreed to pay a $2,500 fine.

EXCEPTIONS

On January 18, 2022, the Department submitted a letter stating that it had no exceptions to the Initial Decision in this matter. The Respondents filed their Exceptions to the Initial Decision on January 19, 2022 ("Resp. Exceptions"). The Department filed a Reply to the Respondents' Exceptions on January 24, 2022. On January 25, 2022, the Department filed a corrected version of their Reply to the Respondents' Exceptions ("Dept. Reply").[10]

The Respondents raise several exceptions to the ALJ's Initial Decision. The Respondents take exception to the ALJ's interpretation of the regulatory text appearing at N.J.A.C. 11:1-37.13(b)(5)(i), (ii), and (iii). Specifically, the Respondents argue that subparagraph (i) does not impose a distinction between time periods for cancellation of the contract; that "prominent" is not defined as applied in subparagraph (ii), and thus the regulation is impermissibly vague; and, that the ALJ's interpretation of subparagraph (iii) assumes that differing fees must be charged depending upon the work of the public adjuster and is not an accurate reflection of the Department's intent. Resp. Exceptions at 2-4. In response, the Department contends that Commissioner is authorized to promulgate regulations for public adjuster contracts as prescribed by the Act and the requirements set forth in the regulations imposed are reasonable and clear. Dept. Reply at 1-6.

The Respondents also take exception to the ALJ's order to reimburse investigative costs totaling $1,025, arguing that investigative costs should not be granted because the investigation arose out of a consumer complaint filed by a competitor. Resp. Exceptions at 9-11. The Respondents assert that the documents produced in discovery demonstrate that Department

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[10] There is no discernable difference between the Reply submitted by the Department on January 24, 2022 and January 25, 2022, references to these documents will simply be referred to as "Dept. Reply" throughout.

Investigator Drew Gowan ("Gowan") attempted to contact each of the named insureds to confirm the consumer complaint but was unable to do so. Ibid. Further, the Respondents argue that the supporting certification does not include any time entry for the analysis of the language of the Service Contracts themselves. Ibid. In response, the Department asserts that this argument is meritless, and that the certification provided is appropriate for reimbursement. Dept. Reply at 6.

The Respondents further take exception to the ALJ's analysis of the profits realized by the Respondents. Resp. Exceptions at 11. The Respondents argue that the Department failed to provide proof of "criminally obtained excess profits," therefore, this factor should be found in their favor. Resp. Exceptions at 12. In addition, the Respondents argue that the ALJ does not delineate the weight given to each factor. Ibid. The Department asserts that these contentions are meritless and notes that six Service Contracts were fully performed; therefore, the ALJ correctly concluded that some profits were realized based on illegal contracts. Dept. Reply at 7.

The Respondents take exception to the ALJ's analysis of whether they had previously engaged in other statutory or regulatory violations of the Public Adjusters' Licensing Act. Resp. Exceptions at 12-13. This relates to the Consent Order wherein Respondents admitted responsibility for the improper endorsement and deposit of a client's property insurance claim check, in violation of the Act and its implementing regulations, and agreed to pay a $2,500 fine. Respondents argue that had they not taken responsibility for their actions and entered into the Consent Order, which occurred following the execution of the Service Contracts at issue in the instant matter, a "prior violation" could not be asserted by the Department. Ibid. Further, the Respondents argue that even if there was a "prior violation," the ALJ noted this conduct in his Kimmelman analysis and still chose not to impose an enhanced penalty in this matter. Ibid. The

Department contends that the prior violation is irrefutable and the ALJ's finding of a prior violation is correct. Dept. Reply at 7.

In conclusion, the Respondents reiterate their position that the imposition of civil penalties and reimbursement of investigative costs recommended by the ALJ is inappropriate. Resp. Exceptions at 13. The Department contends that the Respondents have violated applicable laws and regulations, and therefore, the statutorily prescribed penalties must follow. Dept. Reply at 8.

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 rule 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." PSD at 6. 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.

Applying this standard, 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 Count One of the OTSC. I concur that summary decision is appropriate in this matter.

Allegations Against Respondents

For the reasons set forth in the PSD and the Initial Decision, and based on the summary decision standard, I find that there exists no genuine issue of material fact challenged as it relates to the Respondents' conduct and I ADOPT the statutory and regulatory violations found by the ALJ under Count One of the OTSC, except as modified below.

Count One of the OTSC alleges that between December 2017 and October 2018,[11] the Respondents prepared and executed the Service Contracts with New Jersey insureds that failed to set forth the mandated provisions regarding the procedures, rights and obligations and costs upon cancellation, in violation of N.J.S.A. 17:22B-14(a)(1) and 14(a)(4); N.J.A.C. 11:1-37.13(b)(5)(i) to (iii); and N.J.A.C. 11:1-37.14(a)(1) and 37.14(a)(4).

N.J.A.C. 11:1-37.13(b)(5) provides that public adjuster contracts shall prominently feature the following:

> (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

[11] As previously noted in FN 2, the OTSC alleges that the Service Contracts at issue were executed between December 26, 2017 and October 19, 2018. OTSC at 3. The ALJ found in both the PSD and Initial Decision that the conduct at issue occurred between September 2018 and October 2018. PSD at 3, Initial Decision at 4. However, the change in dates was not addressed in the PSD. The Service Contracts were entered into evidence in support of the Department's and Respondents' motions for summary decision and are dated between September 24, 2018 and October 23, 2018. Department's September 21, 2020 Letter Brief, Exhibit C; Respondents' September 18, 2020 Letter Brief, Exhibit C. These are the dates reflected in the ALJ's factual findings. I concur with the ALJ's finding that the conduct at issue occurred between September and October 2018.

> (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.

PSD at 10, 11, 13; Initial Decision at 3.

As set forth above, the Respondents take exception to the ALJ's findings as it relates to N.J.A.C. 11:1-37.13(b)(5)(i). The Respondents assert that the regulation does not impose a distinction between time periods for cancellation of the contract, therefore their Service Contract does not violate N.J.A.C. 11:1-37.13(b)(5)(i). Resp. Exceptions at 4. The Department argues that the plain language of the regulation is clear, the contract must specify the procedures for cancellation at any time, and as written, only set forth procedures for cancellation during the rescission period. Dept. Reply at 3. As noted by the ALJ, the regulation's intent is to ensure that the contracts provide specific details regarding "an individual's obligation under the contract if he or she chooses to cancel the contract at any time." PSD at 10 (quoting 26 N.J.R. 1715). I CONCUR with the ALJ's findings that the procedures for cancellation at any time are not provided by the Service Contracts, in violation of N.J.A.C. 11:1-37.13(b)(5)(i).

Next, the Respondents take exception to the ALJ's findings as it relates to N.J.A.C. 11:1-37.13(b)(5)(ii). The ALJ found that the Service Contracts complied in substance, but not in form, as the required language regarding the rights and obligations that flow from post-rescission cancellation do not appear prominently, as required by the regulation. The Respondents argue "prominent" is not defined; therefore, the regulation is impermissibly vague and unenforceable. Resp. Exceptions at 5. The Respondents argue that the contracts must be read in their entirety and that the inclusion of the rights and obligations in a stand-alone paragraph satisfies the requirement that this language appear prominently. Id. at 6. I find this argument supports the Department's position. If the contract is comprised of only three paragraphs and one paragraph appears in bold typeface and the other two do not, the emboldened paragraph is prominent. The Department

asserts that appellate courts "defer to an agency's interpretation of... [a] regulation, within the sphere of [its] authority, unless the interpretation is 'plainly unreasonable.'" Dept. Reply at 3 (citations omitted). In determining whether language is "plainly unreasonable," courts look to the ordinary and common sense meaning of the words to determine the drafter's intent. Emboldened text implies an emphasis on those words selected, attaching additional prominence. This is plainly a reasonable interpretation of which text is prominent in the context of these three paragraph, one single-sided page contracts. The required text regarding the rights and obligations that flow from cancellation following the rescission period does not appear in this prominent section, and as such, I concur with the ALJ and FIND that the seven Service Contracts are in violation of N.J.A.C. 11:1-37.13(b)(5)(ii).

Next, the Respondents take exception to the ALJ's findings as it relates to N.J.A.C. 11:1-37.13(b)(5)(iii). The Respondents argue that the ALJ erred in finding that subparagraph (iii) requires that contracts impose different fees depending on the amount of work performed at the time of cancellation. Resp. Exceptions at 8. This is an inaccurate representation of the ALJ's findings. Rather, the ALJ found the Service Contracts, as written, obligate the client to pay Respondents the same fee (a percentage of the "total insurance fees payable") whether the Respondents rendered services in whole (by securing payment of the insurance proceeds) or rendered services in part (by taking certain actions to secure payment of the insurance proceeds, but not yet having done so), in violation of N.J.A.C. 11:1-37.13(b)(5)(iii).[12] PSD at 14. The Department asserts that the language used, specifically, the written stipulation that a different fee may be charged if "otherwise agreed," leaves the parties to negotiate a fee arrangement in the event

[12] As noted by the ALJ, "[N]ot only is the fees language in the Service Contracts insufficient, the language regarding costs upon cancellation also violates N.J.A.C. 11:1-37.13(B)(5)(iii) by failing to include the language in a prominent, emboldened section of the Service Contracts." PSD at 14.

of cancellation following the rescission period, and is totally dependent on the Respondents' willingness to negotiate an alternative arrangement on an ad hoc basis. Dept. Reply at 6. I find the Department's assertion compelling and agree that the plain language of the regulation mandates the adjuster provide a calculation of costs to the insured for services rendered in whole or in part, that the language "unless otherwise agreed" does not provide the client with certainty with respect to the costs he or she will be obligated to pay, and concur with the ALJ and FIND the language of the Service Contracts is in violation of N.J.A.C. 11:1-37.13(b)(5)(iii).

The ALJ did not make specific determinations regarding whether the Respondents' actions, as alleged in Count One of the OTSC, constituted violations of N.J.S.A. 17:22B-14(a)(1) and N.J.A.C. 11:1-37.14(a)(1) (violated any provision of the insurance law, including any rules promulgated thereunder); and N.J.S.A. 17:22B-14(a)(4) and N.J.A.C. 11:1-37.14(a)(4) (conduct demonstrated incompetency).

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 Service Contracts demonstrates incompetency in the practice of adjuster business, in violation of N.J.S.A. 17:22B-14(a)(4) and N.J.A.C. 11:1-37.14(a)(4). Further, I have found that the Respondents did violate provisions of the Public Adjusters' Licensing Act and the regulations promulgated thereunder by failing to include certain language in the Service Contracts, as set forth above, the Respondents' actions additionally constitutes violations of N.J.S.A. 17:22B-14(a)(1) and N.J.A.C. 11:1-37.14(a)(1).

Accordingly, I MODIFY the Initial Decision and FIND that the Respondents' actions also constitute violations of N.J.S.A. 17:22B-14(a)(1) and (4); and N.J.A.C. 11:1-37.14(a)(1) and (4).

PENALTIES

Respondents' Public Adjuster Licenses

With respect to the appropriate action to take against the Respondents' public adjuster licenses, the Department did not request that any adverse action be taken against the Respondents' public adjuster licenses. Moreover, the ALJ did not recommend any action be taken against the Respondents' public adjuster licenses and the Department did not take exception to that determination. 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' Licensing Act, not exceeding $2,500 for the first offense and not exceeding $5,000 for the second offense, and each subsequent offense, and each transaction or statutory violation shall constitute a separate offense. N.J.S.A. 17:22B-17, N.J.A.C. 11:1-37.14(b). As noted by the ALJ, pursuant to Kimmelman, certain factors are to be examined when assessing monetary penalties such as those that may be imposed under the Public Adjusters' Licensing Act.

The first Kimmelman factor addresses the good faith or bad faith of the respondent. The ALJ found that the Department did not demonstrate that Respondents acted in bad faith. Initial Decision at 9. Further, the ALJ emphasized that the Respondents had engaged an attorney, an experienced professional, who was better qualified to draft the Service Contracts at issue. Ibid. While ostensibly an unintended consequence of an enforcement proceeding where counsel drafts the form of the contract would be to discourage any attorney from undertaking to prepare a form of written memorandum for use by a public adjuster, it is established that the non-prevailing party could rely on the advice of counsel and still act in bad faith solely to harass, delay, or maliciously

injure. McKeown Brand v. Trump Castle Hotel and Casino, 132 N.J. 546, 559 (1993). Further, to permit the licensee's reliance on the advice of counsel to be a complete defense to a penalty enforcement proceeding would open the door to any violating public adjuster simply pointing their finger at that attorney to avoid prosecution and penalty. However, as there is no indication that the Respondents or their counsel acted in bad faith in the preparation of the Service Contracts, I concur with the ALJ and ADOPT the ALJ's finding that this factor does not weigh 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 an inability to pay the monetary penalties that could be assessed in this matter. 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). Moreover, the Commissioner has issued substantial fines against licensees despite their arguments regarding their inability to pay. See Commissioner v. Fonseca, OAL Dkt. No. BKI 11979-10, Initial Decision (08/15/11), Final Decision and Order (12/28/11). (issuing a $100,500 civil penalty despite the Respondent's argument that he was unable to pay); See also Commissioner v. Erwin, OAL Dkt. No. BKI 4573-06, Initial Decision, (07/09/07), Final Decision and Order (09/17/07) (fine of $100,000 imposed despite evidence of the Respondent's inability to pay); and Commissioner v. Malek, OAL Dkt. Nos. BKI 4520-05 and BKI 486-05, Initial Decision (12/06/05), Final Decision and Order (01/18/06) (fine increased from $2,500 to $20,000 even though the Respondent argued an inability to pay fines in addition to restitution). In the instant matter, the Department offers that the Respondents currently operate a functioning commercial business. As Respondents proffered no testimony, the argument made by the Department is uncontroverted and uncontested. As such, I

concur with the ALJ and adopt the ALJ's finding that this factor favors the imposition of a monetary penalty against the Respondents.

The third Kimmelman factor relates to the profits obtained by the activity at issue. 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. The record reflects that the Respondents generated fees in an undisclosed amount. Initial Decision at 10. The Respondents argue that only six of the seven Service Contracts were fulfilled, and that of those six, no "criminally obtained excess profits" were realized, rather, only "normal profits" were obtained. Resp. Exceptions at 12. I do not find the Respondents' argument persuasive. Six deficient contracts were fully performed; therefore, profits were realized based on six Service Contracts that violated applicable law. Further, the Respondents proffered no evidence regarding the amount of profits obtained, "normal," "criminally obtained," "excess," or otherwise. As such, I concur with the ALJ and ADOPT the ALJ's finding that this factor favors the imposition of a monetary penalty against the Respondents.

The fourth factor in Kimmelman examines the resulting injury to the public. The ALJ noted that the Department has not provided any evidence to demonstrate public harm beyond those who received the deficient Service Contracts; therefore, this factor weighed against the imposition of a monetary penalty. Initial Decision at 11. I disagree with the ALJ's finding. The Commissioner is charged with the duty to protect the public welfare and to instill public confidence in the insurance industry as a whole. 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)). Accordingly, the public's confidence in a licensee's competence is of paramount concern. The Respondents are licensed public adjusters who act under a duty of care

with respect to their client insureds. The very essence of a public adjuster's responsibilities is to aid an insured in negotiating and effecting the settlement of loss damage claims. See N.J.S.A. 17:22B-2 (defining "public adjuster" to mean "any individual, firm, association, or corporation who, or which, for money, commission or any other thing of value, acts or aids in any manner on behalf of an insured in negotiating for, or effecting, the settlement of claims for loss or damage caused by or resulting from any accident, incident, or occurrence covered under a property insurance policy. . . ."). Public adjusters interact with consumers during a stressful time in the consumers' lives, where they are seeking someone to advocate for them in order to replace or repair damaged property. By providing Service Contracts that do not provide these required and important safeguards and protections for these consumers, the Respondents' have effectively undermined the public's confidence in the industry and interacting with public adjusters, causing harm to the public. As such, I MODIFY the ALJ's findings as it relates to this factor and find that the Respondents' conduct resulted in injury to the public, therefore, this factor weighs in favor of a higher monetary penalty.

Regarding the fifth Kimmelman factor, the duration of illegal activity, I concur with the ALJ's finding that the Respondents entered into the non-compliant Service Contracts with New Jersey insureds between September 2018 and October 2018, spanning a period of one to two months. As such, the factor does not favor the imposition 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. 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. In the instant matter, no criminal punishment has been levied for the underlying conduct. However, the ALJ found that this factor weighs in favor of the

Respondents, as the Departments makes the "disingenuous" argument that this is their "one bite of the apple" and it should be a "good one," which is against the point and purpose of Kimmelman. The Court in Kimmelman provided that a "civil penalty should be reasonable and proportionate to the violation committed and the amount of the wrongdoing, so that the amount of such penalty is not 'harsh and oppressive' or 'fundamentally unfair.'" I FIND that the Department is seeking a reasonable and proportionate penalty for the violations committed. The only penalty for the violations committed are derived from this action and have not been addressed by any criminal actions. As such, I MODIFY the ALJ's findings as it relates to this factor and find this factor weighs in favor of a monetary penalty.

The final factor examined in Kimmelman is the previous relevant regulatory and statutory violations of the Respondents. The ALJ found that the record reflects one other violation of the Public Adjusters' Licensing Act. Initial Decision at 11. The Respondents argued before the ALJ and again in their Exceptions that the other violation actually occurred in August 2019[13], after the violations at issue here, and should not count as a "prior violation." I concur with the ALJ's findings that the conduct contained in the Consent Order constitutes a prior violation and that this factor weighs in favor of a monetary penalty.

The Commissioner has broad discretion in determining sanctions for violations of the laws she is charged with administering. In re Scioscia, 216 N.J. Super. 644, 660 (App. Div. 1987). The factors weighing in favor of a monetary penalty include the Respondents' ability to pay penalties assessed, profits obtained, injury to the public, the lack of criminal actions, and the existence of prior regulatory and statutory violations by the Respondents. As such, I MODIFY the ALJ's

[13] Respondents' conduct is memorialized in the Consent Order, wherein Diversified and Vulpis admitted responsibility for the improper endorsement and deposit of a client's property insurance claim check and were assessed a fine in the amount of $2,500.

recommendation and find that a penalty in the amount of $7,000 is appropriate. This amount represents a $1,000 fine for each of the seven Service Contracts executed by the Respondents between September 2018 and October 2018 which failed to comply with the applicable regulations.

The ALJ did not recommend a fine for all seven Service Contracts, distinguishing between the six fully executed Service Contracts and the one Service Contract cancelled by insureds during the rescission period, without substantive explanation. Because the seventh Service Contract also failed to set forth the required language such cancellation does not change the fact that the Service Contract was deficient. Therefore, I FIND that the imposition of a $1,000 fine for this seventh Service Contract is appropriate.

These penalties are necessary and appropriate under the above Kimmelman analysis given the Respondents' conduct. The Respondents executed seven Service Contracts that failed to appropriately set forth the procedures, rights and obligations and costs of cancellation of public adjuster services following the rescission period. These penalties demonstrate the appropriate level of opprobrium for such misconduct, and will serve to deter future misconduct by the Respondent and the industry as a whole. Commissioner v. Mehmel, OAL Dkt. No. BKI 09165-17, Initial Decision (03/17/20), Final Decision and Order (08/19/21) (penalty of $2,500 ordered per contract for failing to include certain required language); Commissioner v. Bellamy, OAL Dkt. No. BKI 13161-15, Initial Decision (02/26/20), Final Decision and Order (03/09/21) (penalty of $250 ordered per contract for failing include certain required language).

I note the ALJ's statement that the recommended penalty of $6,000 is appropriate, in part, because the violations at issue in this matter constitute "minor technical violations." Initial Decision at 12. The Public Adjusters' Licensing Act does not make a distinction between minor

and substantive violations, and I do not recognize that distinction here. See BJM Insulation & Const., Inc. v. Evans, 287 N.J. Super. 513, 518 (App. Div. 1996) (holding that the Consumer Fraud Act does not make a distinction between technical and substantive violations). Further, I note that the penalty imposed here is far less than the Department could have requested under N.J.S.A. 17:22B-17, which allows the imposition of up to $2,500 for the first violation and up to $5,000 for any subsequent violations of the Public Adjusters' Licensing Act.

Further, I find that as Vulpis was the owner, officer and sole Designated Licensed Public Adjuster for Diversified between September 2018 and October 2018, when Diversified entered into at the Service Contracts at issue, and each was signed by Vulpis on behalf of Diversified, I MODIFY the PSD and Initial Decision and FIND that Vulpis and Diversified are jointly and severally liable for the monetary penalty assessed for the violations found totaling $7,000.

Reimbursement for Investigative Costs

The Commissioner may order the reimbursement for costs for the use of the State, including investigative costs, pursuant to N.J.S.A. 17:22B-17. The ALJ recommended that the Respondents reimburse the Department in the amount of $1,025 for costs of the investigation. Initial Decision at 12, PSD at 17.

In their Exceptions, the Respondents argued that investigative costs should not be awarded because the investigation arose out of a consumer complaint filed by a competitor making "false allegations" and that the certification provided does not include any time entry for the analysis of the language of the Service Contracts themselves. Resp. Exceptions at 9-11. In response, the Department asserts the Respondents' arguments are meritless and that the certification provided by Gowan is appropriate for reimbursement. Dept. Reply Exceptions at 6.

I concur with the ALJ's finding that reimbursement of investigative costs is appropriate. The Respondents' argument related to the origin of the investigation are irrelevant. Further, the ALJ found, and I concur, that the requested amount of $1,025 is reasonable and appropriate. Therefore, I ADOPT the recommendation of the ALJ that the Respondents are jointly and severally liable to reimburse the Department for its costs of investigation in the amount of $1,025.

CONCLUSION

Having carefully 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, except as modified herein, and hold that the Respondent violated the Public Adjusters' Licensing Act and accompanying regulations as charged in Count One of the OTSC, and have failed to present any legally or factually viable defenses to the violations of the Public Adjusters' Licensing Act and the regulations promulgated thereunder. Specifically, I ADOPT the ALJ's conclusion that the Respondents' seven Service Contracts are in violation of N.J.A.C. 11:1-37.13(b)(5)(i), (ii) and (iii). In addition, I MODIFY the Initial Decision and find that the Respondents are also in violation of N.J.S.A. 17:22B-14(a)(1) and (4); and N.J.A.C. 11:1-37.14(a)(1) and (4).

For the reasons set forth above, I MODIFY the recommended monetary penalty and ORDER the Respondents jointly and severally liable for a fine in total of $7,000 allocated as follows: $1,000 for each of the seven Service Contracts that failed to properly include language regarding the procedures, rights and obligations, and costs of cancellation following the rescission period.

I further ADOPT the ALJ's recommendation and ORDER the Respondents jointly and severally liable for reimbursement of the Department's investigative costs in the amount of $1,025.

It is so ORDERED on this __20_______ day of ______June_______ 2022.

Marlene Caride
Commissioner

Final Orders – Insurance/AR Diversified FO