ORDER NO.: E22-56

STATE OF NEW JERSEY
DEPARTMENT OF BANKING AND INSURANCE

OAL DOCKET NO.: BKI-02968-22
AGENCY DOCKET NO.: OTSC #E18-24

MARLENE CARIDE,[1] ACTING COMMISSIONER, NEW JERSEY DEPARTMENT OF BANKING AND INSURANCE, Petitioner, v. JOHN P. DESTEFANO, Respondent.	)	FINAL DECISION AND ORDER

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 Producer Licensing Act of 2001, N.J.S.A. 17:22A-26 to -48 ("Producer Act"), the New Jersey Fraud Prevention Act, N.J.S.A. 17:33A-1 to -30 ("Fraud Act"), and all powers expressed or implied therein, for the purposes of reviewing the August 13, 2021 Initial Decision ("Initial Decision") and the May 17, 2022 Initial Decision on Remand ("Initial Decision on

[1] At the time this case was filed on May 4, 2018 Marlene Caride had not been sworn in. Commissioner Caride was sworn in on June 27, 2018.

Remand") of Administrative Law Judge Hon. Leslie Z. Celentano ("ALJ"). In the Initial Decision, the ALJ found that the Department of Banking and Insurance ("Department") had not met its burden of proof in its case against John P. DeStefano ("Respondent") and ordered that the Department's Order to Show Cause No. E18-24 ("OTSC") be dismissed with prejudice, that no action be taken against the Respondent's license, and no monetary fines be imposed. In the Initial Decision on Remand, the ALJ further explained her credibility findings concerning the witnesses at the hearing in this matter.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On or about December 7, 2017, the Department issued the OTSC against the Respondent seeking to revoke Respondent's insurance producer license, and impose civil monetary penalties and costs of investigation for violations of the Producer Act and Fraud Act. In the OTSC, the Department alleges that the Respondent engaged in the following activities in violation of the laws of this State:

> Count One: Respondent submitted a homeowners insurance policy to Lexington to insure 573 Valley Road in West Orange ("the Property") without Y.K.'s authorization or knowledge in violation of N.J.S.A. 17:22A-40(a)(2), (8), and (16); and
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> Count Two: Respondent knowingly submitted a forged homeowners insurance application and supporting documents to Lexington regarding the Property in violation of N.J.S.A. 17:22A-40(a)(2), (5), (8), (10), and (16); and
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> Count Three: Respondent knowingly submitted a forged insurance application to Lexington regarding the Property in violation of N.J.S.A. 17:33A-4(a)(4)(b); and
>
> Count Four: Respondent submitted a false Certification of Effort in violation of N.J.S.A. 17:22A-40(a)(2), (8), and (14), and forged Y.K.'s signature on the Notification Form, in violation of N.J.S.A. 17:22A-40(a)(2), (8), (10), and (16); and
>
> Count Five: Respondent knowingly completed and produced a forged Dwelling Fire insurance application to the Department to make it appear as the original homeowners insurance application submitted to Lexington, in violation of N.J.S.A. 17:22A-40(a)(2), (5), (8), (10), and (16); and

Count Six: Respondent failed to refund the full premium Y.K. paid to Lexington for the homeowners insurance policy which Y.K. did not authorize, in violation of N.J.S.A. 17:22A-40(a)(2), (4), (8), and (16), and N.J.A.C. 11:17C-2.1.

On or about April 23, 2018, the Respondent filed an Answer and requested a hearing. Initial Decision at 2. The Department transmitted the matter as a contested case to the Office of Administrative Law ("OAL") on May 4, 2018, pursuant to N.J.S.A. 52:14B-1 to -31 and N.J.S.A. 52:14F-1 to -23. Ibid. After several phone conferences and adjournments, the hearing was held virtually on November 4, 2020. Id. at 2-3. After the hearing, the parties submitted post-hearing briefs and the record was closed on May 27, 2021. Id. at 3.

The Department submitted its Exceptions to the Initial Decision on September 16, 2021. The Respondent did not file Exceptions or submit a response to the Department's Exceptions.

On April 12, 2022, the Commissioner issued an Order of Remand ("Order of Remand") pursuant to N.J.A.C. 1:1-18.7. This matter was remanded to the OAL to develop the record relating to the credibility of Yohannes Kidane ("Kidane")[2], Tsega Ghebremicael ("Ghebremicael"), and the Respondent, including as it relates to the witnesses' conflicting testimony of whether the Respondent had authorization from Ghebremicael to procure an insurance policy on the Property.

On May 17, 2022, the ALJ issued the Initial Decision on Remand, which included further credibility findings concerning the testimony of Kidane, Ghebremicael, and the Respondent.

ALJ'S FINDINGS OF FACTS, LEGAL ANALYSIS, AND CONCLUSIONS

The ALJ stated that no background information was provided at the hearing and described it as "a tangled mess." Initial Decision at 3. The ALJ stated that "the factual backdrop to these

[2] The OTSC refers to Kidane as "Y.K." and the Initial Decision uses his full name. To maintain consistency with the Initial Decision, Kidane's name will be used in the Final Decision and Order.

events" was given in the Department's post-hearing brief, "not in a certification or affidavit[.]" Ibid.

The ALJ noted that her summarization of witness testimony is "not a verbatim accounting of the testimony." Ibid. The ALJ summarized the witnesses' testimonies as follows:

Jared Stewart

The ALJ stated that Jared Stewart ("Stewart") had been an investigator with the Department Enforcement Unit since July 2016. Ibid. Stewart was assigned this case after the original investigator transferred to another department. Ibid. Stewart testified that he reviewed the investigation and agreed with the conclusions reached. Ibid.

Stewart testified that the Property was uninsured between April of 2013 and November of 2013. Ibid. Stewart stated that the "First Application"[3] was submitted from the DeStefano Agency to the Morstan General Agency ("Morstan") to request a quote for a Dwelling Fire Application for the Property. Ibid. Stewart testified that Kidane's signature, the proposed applicant, was not genuine on the First Application, and that the "Second Application"[4] to bind coverage also contained a forgery of Kidane's signature. Id. at 3-4.

The ALJ stated that Stewart testified that several documents submitted as part of the Second Application did not contain Kidane's genuine signature. Specifically, the Older Home

[3] The ALJ does not clearly define what constitutes the "First Application" and the "Second Application" until the summarization of Adam Goldfarb's testimony. The First Application was to request a quote for property insurance and the Second Application was to bind coverage. Initial Decision at 8. In its Exceptions, the Department first appears to first refer to this document as the "First Forged Application." Later, it appears to refer to the same document as the "First Forged Form." In this Final Order and Decision, it will be referred to as the First Application.

[4] In its Exceptions, the Department first appears to first refer to this document as the "Second Forged Application." Later, it appears to refer to the same document as the "Second Forged Form." In this Final Order and Decision, it will be referred to as the Second Application.

Update Questionnaire, the Surplus Lines Insurance Application, the Certification of Effort to Place Risk with Authorized Insurer ("Certification of Effort"), which is required to apply for a surplus-lines policy, the Warranty of No Known Losses, and the Animal Exclusion documents did not contain Kidane's genuine signature. Id. at 4. These documents were submitted as part of the Second Application, which the Respondent e-mailed on November 13, 2013 "through Morstan to Lexington for binding." Ibid. Kidane was issued a policy through Lexington Insurance Company ("Lexington"). Ibid.

The ALJ stated that Morstan issued a quote for $2,826.66 to the DeStefano agency on November 7, 2013. Ibid. Stewart testified that a check in that amount was issued to the DeStefano Agency from Ameritech Business Solutions, Kidane's mortgage company, on November 8, 2013. Ibid. Kidane requested a refund for the Lexington policy and the Respondent issued a partial refund in the amount of $2,141 to Kidane on January 27, 2014. Ibid. Kidane submitted a consumer complaint to the Department on February 20, 2014, in which he alleged that the application was submitted without his consent. Ibid. Stewart testified that the complaint contained Kidane's genuine signature, which did not match the applications or supplemental documents. Ibid.

The ALJ stated that Investigator Tom Stanley ("Stanley") was assigned to investigate the allegations in the complaint. Ibid. Stanley requested that the Respondent provide the application that was submitted to Morstan for the Lexington policy. Id. at 4-5. Stewart testified that the Respondent submitted the "Third Application"[5] dated November 3, 2013, which was not actually submitted to Morstan. Id. at 5. Stewart testified that this application had marks from words that

[5] The "Third Application" is never defined in the Initial Decision, but from context it appears this was the application submitted to the Department during its investigation. In its Exceptions, the Department first appears to first refer to this document as the "Third Forged Application." Later, it appears to refer to the same document as the "Third Forged Form." In this Final Order and Decision, it will be referred to as the Third Application.

were crossed-out, whited-out, and that the dates were altered. Ibid. He testified that the applicant's name, address, effective date, and expiration date were all altered. Ibid. The dates of November 3, 2013 to November 4, 2014 were added to the form. Ibid. Stewart testified that this document did contain Kidane's genuine signature, which was not altered. Ibid. Stewart testified that the Department determined that the Respondent used a genuine application, but altered the material terms. Ibid.

Stewart testified that the Third Application, which the Respondent submitted to the Department during its investigation, was not submitted to Morstan and was not the same as the First or Second Applications. Ibid. Stewart testified that the Department determined that Kidane's old 2010 and 2011 applications, which contained authentic signatures, were used to make the Third Application and the Respondent altered the effective date and property address. Ibid. Stewart testified that the Respondent confirmed in an e-mail to the Department that the Third Application was the genuine application submitted to Morstan to bind coverage with Lexington.

Stewart testified that Department Investigator Elana Herbert ("Herbert") contacted Morstan to confirm that the Third Application was the original application that had been submitted. Ibid. Stewart testified that Herbert received the Second Application from Morstan, which Morstan indicated was the application the Respondent submitted to bind Kidane to the Lexington policy. Id. at 5-6. Stewart testified that Kidane told Herbert that "all signatures on the Morstan Lexington applications were not his." Id. at 6.

Stewart testified that Herbert reached out several times to the Respondent for an explanation for his failure to obtain written authorization from Kidane and as to why the dates were altered on the application submitted to the Department, but did not receive a response. Ibid.

Stewart testified that the Department then concluded their investigation and determined that the Respondent submitted three forged insurance applications. Ibid.

The ALJ noted that Stewart was not the original investigator and he "[knew] nothing about the case." Id. at 3. The ALJ stated that no reports related to the investigation were entered into evidence, so "it is entirely unclear what Stewart 'independently reviewed' and where the 'conclusions reached' were set forth." Ibid. The ALJ stated that no explanation was offered as to who Kidane was, yet Stewart's testimony was "replete with references to Kidane signatures and whether or not they 'matched.'" Id. at 4. The ALJ noted that Stewart was not a handwriting expert. Id. at 5. The ALJ stated that Stewart played no role in the investigation, and testified regarding what others did, his opinions regarding which signatures are similar to others, and which he thought were forgeries. Id. at 6. The ALJ found that "the entirety of Investigator Stewart's testimony is hearsay unsupported by competent proof." Ibid.

Adam Goldfarb

Adam Goldfarb ("Goldfarb") is a team leader in the New Jersey branch of Morstan. Id. at 7. He testified that he has the authority to authenticate records on Morstan's behalf. Ibid. He stated that DeStefano agency is a retail agent that is contracted with Morstan, a wholesaler. Ibid. The insureds go through an insurance agent, who submits business to Morstan. Ibid. Morstan does not do direct business with insureds. Ibid.

Goldfarb testified that Morstan received an application for a quote on an account that had been canceled on November 4, 2013. Ibid. The policy was an "agency-bill item" where Morstan would bill the retail agent, who in turn would bill the insured. Ibid. The insured pays the retail agent, who in turn pays Morstan, and Morstan pays the carrier. Ibid. Goldfarb testified that Morstan never received the money from the Respondent for this policy. Ibid.

Goldfarb testified that Morstan received a request from the DeStefano Agency to bind the Lexington policy, which included the Lexington Insurance Company application completed by the insured and retailer, the Older Home Update Questionnaire, the Certification of Effort, and a No Loss Letter. Ibid. Goldfarb testified that surplus lines insurers, such as Lexington, cover irregular and higher kinds of risks, which are not covered in the standard market. Ibid. Goldfarb testified that the quote application that Morstan received was signed by the applicant, even though it did not require a signature. Ibid. Goldfarb confirmed that Lexington issued a policy on November 15, 2013, based on the application that the Respondent submitted to Morstan, even though the policy was not paid for. Ibid. Goldfarb testified that Morstan would bind coverage without receiving payment based on good faith and with the knowledge that as an agency-bill item, it must be paid within 30 days. Ibid.

The ALJ stated that Goldfarb testified that the policy was canceled on January 27, 2014 because payment was never received. Id. at 8. Goldfarb explained that because the policy was never paid for and was canceled, there is a 25 percent minimum earn, meaning the carrier retains 25 percent on the cancellation. Ibid. While Morstan would pay the commission because it was an agency-billed account, the retailer has the right to withhold his agency-billed commission. Ibid. Goldfarb was unsure if Morstan withheld the commission, and if Lexington was ever paid. Ibid.

The ALJ stated that Goldfarb testified that Morstan did not receive the Third Application for quoting or binding the Lexington policy. Ibid. He testified that the First and Second Applications are different from the Third Application. Ibid.

The ALJ found that Goldfarb's testimony and explanations of the workings of a wholesale insurance broker were not relevant to the determination of the issues in this hearing. Ibid.

Yohannes Kidane

The ALJ stated that Kidane was the alleged applicant on the Lexington account and had previously worked with the Respondent to insure his other properties. Ibid. Kidane testified that he did not ask the Respondent to obtain insurance for him in November of 2013 and the Respondent never asked him about the policy. Ibid. He testified that he did not authorize the Respondent to complete an insurance application for the Property, and did not authorize anyone to do so on his behalf. Ibid. He testified that the First Application was not in his handwriting and did not contain his signature. Ibid. He testified that the Second Application was not in his writing, that he did not complete it, that none of the signatures on the application were his, and that he did not ask anyone to sign it for him. Id. at 8-9.

The ALJ stated that Kidane testified that it was his signature on the Third Application, but that some portions appeared altered. Id. at 9. He testified that he complained to the Department about the Respondent because he did not recall asking the Respondent to get insurance and about the money refunded. Ibid. He testified that his genuine signature is on the complaint. Ibid. He further testified that he did not know that the Respondent obtained money from his mortgage company's escrow account for the policy. Ibid. Kidane also testified that he only learned about the policy when he received the insurance documents in the mail, at which point he asked the Respondent to refund the money and cancel the policy. Ibid. He further testified that he never authorized his wife to talk to the Respondent. Ibid.

The ALJ noted that Kidane was not a handwriting expert and no expert testified as to what portions of the Third Application were altered. Ibid. The ALJ further noted that the Department's investigation originated because Kidane filed a complaint asserting that he "did not recall asking [the Respondent] to get insurance." Ibid.

Tsega Ghebremicael

The ALJ stated that Ghebremicael testified that she is married to Kidane. Ibid. She testified that the Respondent did not contact her for permission to obtain the November 2013 policy, that she never spoke to the Respondent about the policy, and that she only learned of the policy when they received documents from the insurance company. Ibid. Ghebremicael testified that they usually pay approximately $1,500 for insurance, but the cost for this policy was approximately $2,800. Ibid.

Ghebremicael testified that Kidane never authorized her to talk to the Respondent about insurance. Ibid. She also testified that she never received notice from the Tower Group ("Tower") that their Tower policy had been canceled. Id. at 9-10. She testified that Kidane pays the mortgage company, and because they pay for insurance as part of their escrow, they were unaware that the Tower policy had been canceled. Id. at 10.[6] She testified that Kidane was unaware that the insurance was canceled or that the Respondent had renewed the insurance and only found out when they received documents in the mail. Ibid.

The ALJ noted that Ghebremicael testified on November 4, 2020 that she did not receive a call from the Respondent in November of 2013 regarding the renewal of the insurance policy from Tower. Id. at 9.

Respondent John DeStefano

The ALJ stated that the Respondent testified that he first met Kidane at the DeStefano Agency while working on other properties that Kidane owned. Initial Decision at 10. The

[6] It is unclear why Kidane and Ghebremicael never received notice that the insurance policy with Tower was cancelled. The cancellation notice from Tower is addressed to Kidane at an apartment in South Orange. Ex. P-1. It is also unclear why the policy would have been cancelled if the mortgage company received payment for it as part of escrow.

Respondent testified that the policy with Tower was canceled for non-payment "and his agency had this policy covered." Ibid. He testified that the mortgage company contacted his agency seven months later, in November of 2013, to inform him that the policy was canceled, and they were going to "put force-placed coverage" on the property. Ibid.

The ALJ stated that the Respondent testified that Kidane had been paying the premium directly to Tower. Ibid. The Respondent testified that Ghebremicael was involved "after the second property that Kidane got insured." Ibid. The Respondent testified that he contacted Ghebremicael to tell her that the Tower policy on the Property was canceled seven or eight months earlier and that the bank was going to put "force-placed coverage" on the Property. Ibid. The Respondent testified that Ghebremicael told him that he should get them a new policy. Ibid. The Respondent testified that he only spoke to Ghebremicael, and not Kidane, about the insurance on the Property. Ibid. He testified that after receiving authorization from Ghebremicael to obtain a policy, he bound a policy with a surplus and excess carrier because none of the voluntary markets would write insurance when there had been a lapse in coverage. Ibid.

The ALJ stated that the Respondent testified that his neighbor is Kidane's brother-in-law, with whom the Respondent had a business relationship, and that he felt obligated to get the coverage bound because force-placed coverage on the property would have cost a higher premium. Id. at 11.

The ALJ stated that the Respondent testified that after he received a quote for the Lexington policy, his agency sent it to the bank so the bank would not put force-placed coverage on the property. Ibid. He testified that the mortgage company sent a check from an escrow account for the policy and that he "bound the coverage." Ibid. He testified that Kidane and Ghebremicael

found that the price was too high, and opted to procure another policy on their own. Ibid. He testified that his agency was told to cancel the policy. Ibid.

The ALJ stated that the Respondent testified that Ghebremicael came into the office to pick up the refund check and signed a release that she had received $2,100, which was the amount of the premium minus 25 percent that would have gone to Morstan. Ibid. The Respondent testified that he could have kept the 25 percent commission, but did not and refunded that too. Ibid. He testified that he refunded the money to Ghebremicael directly instead of sending the refund to the mortgage company, which had sent him the check, because Ghebremicael was adamant that she should get the refund. Ibid. The Respondent testified that he also refunded the money to Ghebremicael instead of the mortgage company because if the Property was damaged in a fire without insurance coverage, their agency could have been sued. Ibid.

The ALJ stated that the Respondent testified that his signature was not on any of the applications. Ibid. He testified that the signature on the First Application, used to obtain the quote, was either Kidane's or Ghebremicael's signature, although it did not need to be signed by the proposed insured. Id. at 11-12.

The Respondent also testified that he changed the dates on the Third Application because "time was of the essence" so he changed the dates "to get a new quote." Id. at 12. He testified that "the signature was an original signature, but the dates were changed because of the new term, as the last policy had been canceled." Ibid. The Respondent testified that the Third Application was sent to the Department as the true application for the Lexington policy by an associate. Ibid.

The Respondent testified that the DeStefano Agency has a running total with Morstan, and if "they do not submit money as a deposit on accounts, Morstan takes it out of their commission total." Ibid. He testified that the check from the mortgage company was not submitted to Morstan

because when Ghebremicael found out about the cost of the policy she indicated she was going to find a policy on her own and his agency issued the refund to her. Ibid.

The Respondent testified that he would not go through the process of getting an insurance policy without Kidane's or Ghebremicael's knowledge or consent to get money from an insurance company. Ibid.

The ALJ found the Respondent to be a credible and reliable witness. Ibid.

The ALJ's Findings of Fact

Based on the testimony and documentary evidence presented, the ALJ made the following findings of fact. The ALJ found that the Respondent is a resident insurance producer licensed by the State. Initial Decision at 12. Kidane is a former client of the Respondent and is married to Ghebremicael. Ibid. Kidane owned the Property, which was insured by Tower. Ibid. On April 3, 2013, Kidane's insurance policy was canceled by Tower. Id. at 12-13. Seven months later, in November of 2013, the Respondent learned that the policy had been canceled and reached out to Ghebremicael and asked for her authorization to obtain coverage, believing time was of the essence. Id. at 13. The Respondent is neighbors with Kidane's brother-in-law, and he and the Respondent have a business relationship. Ibid. The Respondent was concerned that the Property was uninsured and that the mortgage company would put force-placed coverage on the Property, which would have a high premium. Ibid.

Ghebremicael authorized the Respondent to secure the insurance coverage over the phone. Ibid. The Respondent submitted an application, which did not require a signature of the insured, to Morstan to get a quote from Lexington, a surplus lines company. Ibid.

On November 7, 2013, Morstan quoted the coverage at $2,826.66. Ibid. On November 8, 2013, the Respondent contacted Kidane's mortgage company and asked for the funds to cover the

premium. Ibid. The mortgage company sent a check to the Respondent, who then completed an application on November 12, 2013 to bind coverage with Lexington. Ibid.

Lexington issued an insurance policy to Kidane to insure the Property, effective November 13, 2013. Ibid. Kidane received the policy and asked that it be canceled because he and Ghebremicael considered the price too high and procured another policy on their own. Ibid.

After the policy was canceled, Ghebremicael went to the Respondent's office to pick up the refund check and sign a release stating that she received $2,100 which was the premium minus Morstan's 25 percent fee. Id. at 14. The Respondent could have retained his commission, but declined to do so and refunded it to Ghebremicael, receiving no financial gain from the transaction. Ibid. The Respondent returned the funds to Ghebremicael instead of the mortgage company because Ghebremicael was adamant about receiving the refund and because the Respondent was concerned that if the Property was damaged in a fire and there was no insurance coverage, the Respondent's agency would be sued. Ibid.

The ALJ found that the Respondent's signature is not on any of the applications. Ibid. The "First Application" was from a prior policy and contained either Kidane's or Ghebremicael's signature. Ibid. The Respondent amended the dates on the Third Application to obtain a new quote for the term, as the last policy had been canceled. Ibid. The Third Application was sent to the Department by an associate in Respondent's office and contains Kidane's genuine signature. Ibid.

On February 20, 2014, Kidane filed a complaint with the Department asserting that his homeowner's insurance policy was canceled and that a new policy was procured by the DeStefano Agency without his consent. Ibid.

The ALJ found "that this matter was an overreach." Ibid. The ALJ stated that the Department's case is based on the hearsay testimony of the investigator without competent proofs. Ibid. The ALJ stated that no investigative reports were offered into evidence and no one who was involved in the investigation was called as a witness who could be subject to cross-examination and defend the investigation's conclusions. Id. at 14-15. The ALJ found that it would not be in the interests of fairness and justice to revoke the Respondent's license or subject him to fines and penalties "based upon entirely unsupported hearsay." Id. at 15.

The ALJ also found that even if Stewart's testimony was corroborated, the Department failed to prove that the Respondent acted with "ill intent or purpose." Ibid. The ALJ found that "a preponderance of the evidence does not exist that [the Respondent] misrepresented anything." Ibid. The Respondent had a long-standing professional relationship with Kidane's brother-in-law. Ibid. The Respondent felt pressured to modify the dates on an application because his client's property was uninsured and "time was of the essence." Ibid. The ALJ found that the Respondent "did not submit the prior year's application as alleged, and who or whether anyone else submitted it remains an open question." Ibid. The ALJ found that the preponderance of the evidence does not show that the Respondent forged any signatures. Ibid. The ALJ found that the Respondent testified credibly that he did not sign any documentation and there is no evidence that he did. Ibid. The ALJ found that the Respondent was motivated by the need to help his client and obtain coverage as quickly and economically as possible to avoid the risk of loss. Ibid. The ALJ found that the Respondent had a long, unblemished career, had no sinister motive in taking the actions he did, and acted to ensure his client was protected. Ibid.

The ALJ's Hearsay and Residuum Rule Analysis

The ALJ stated that hearsay evidence "is admissible in an administrative proceeding, and 'shall be accorded whatever weight the judge deems appropriate taking into account the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability.'" Id. at 16 (quoting N.J.A.C. 1:1-15.5(a)). The ALJ stated that hearsay that is admitted in an administrative hearing is subject to N.J.A.C. 1:1-15.5(b), which codifies the residuum rule and "mandates that hearsay evidence cannot be used as the sole basis for the ultimate findings of fact or making a legal determination." Ibid. The ALJ noted that hearsay may either be employed to corroborate other evidence, or evidence may be supported or given added probative force by hearsay testimony, but "'there must be a residuum of legal and competent evidence in the record to support it.'" Ibid. (quoting Weston v. State, 60 N.J. 36, 51 (1972)).

The ALJ stated that the residuum rule is consistent with N.J.A.C. 1:1-15.1(b), which requires that "'[e]vidence rulings shall be made to promote fundamental principles of fairness and justice and to aid in the ascertainment of truth.'" Ibid. The ALJ concluded that Department investigators or authors of investigative reports were not called as witnesses and Stewart agreed with the conclusions in the reports. Ibid.

The ALJ's Conclusions

The ALJ stated that the Department has the burden of proving the allegations by a preponderance of the credible evidence. Id. at 17 (citing Atkinson v. Parsekian, 37 N.J. 143 (1962) and In re Polk, 90 N.J. 550 (1982)). The ALJ noted that the evidence must be such as would lead a reasonably cautious mind to a given conclusion. Ibid. (citing Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958)). The ALJ further stated that "preponderance may be described as the greater

weight of credible evidence in the case, not necessarily dependent on the number of witnesses but having the greater convincing power." Ibid. (citing State v. Lewis, 67 N.J. 47, 49 (1975)).

The ALJ listed the regulations that the Respondent was alleged to have violated and concluded that the Department failed to meet its burden of proof and did not substantiate any of the OTSC's allegations. Id. at 17-18. The ALJ stated that "none of the counts were part of any witness's investigation" and the investigator's testimony was "entirely uncorroborated hearsay." Id. at 18. The ALJ concluded that no action was warranted against the Respondent's license and no monetary penalties should be levied. Ibid.

Initial Decision on Remand

On April 12, 2022 the Commissioner issued an Order of Remand ("Order of Remand") pursuant to N.J.A.C. 1:1-18.7. This matter was remanded to the OAL to develop the record relating to the credibility of Kidane, Ghebremicael, and the Respondent.

On May 17, 2022, the ALJ issued the Initial Decision on Remand, which included an analysis of the credibility of Kidane, Ghebremicael, and the Respondent.

The ALJ summarized the procedural history of the matter. Initial Decision on Remand at 1-3. The ALJ was "amply convinced" that the credible evidence supports that the Respondent testified "reliably and credibly" and that Ghebremicael authorized him to procure insurance on the Property. Id. at 3. The ALJ stated that she did not trust Ghebremicael's recollection that she never spoke to the Respondent about the policy and never gave him authorization to place the coverage. Ibid. The ALJ found that Kidane's and Ghebremicael's testimony "is each less than convincing, and each lacks the ring of truth that is needed to obtain credit." Ibid. The ALJ did not "credit the recall of either Ghebremicael or Kidane." Ibid. The ALJ found that the Respondent's testimony was "credible, reliable, and trustworthy." Id. at 3-4. The ALJ found that "the testimony offered

by Ghebremicael and by Kidane was not rational, and was inconsistent with and overborne by the credible testimony" of the Respondent. Id. at 4. The ALJ reiterated that she found that the Department failed to substantiate any of the allegations in the OTSC and no action was warranted against the Respondent' license. Ibid.

EXCEPTIONS

Under N.J.A.C. 1:1-18.4(a), Parties' Exceptions to the Initial Decision were due on or before August 26, 2021. On August 20, 2021, the Department requested a 20-day extension under N.J.A.C. 1:1-18.8(d). The request was granted on August 23, 2021. The Respondent did not submit Exceptions to the Initial Decision. The Department submitted its Exceptions to the Initial Decision on September 16, 2021. ("Department Exceptions"). The Respondent did not reply to the Department's Exceptions pursuant to N.J.A.C. 1:1-18.4(d). The Department submitted its Exceptions to the Initial Decision on Remand on May 31, 2022. ("Department Exceptions on Remand"). The Respondent did not reply to the Department's Exceptions on Remand pursuant to N.J.A.C. 1:1-18.4(d).

Department Exceptions and Department Exceptions on Remand

The Department argues that it presented sufficient evidence against the Respondent and the ALJ erred in her findings of fact and conclusions of law.

The Department's Exceptions Regarding the Testimony of Investigator Stewart

The Department objected to the ALJ's finding that Stewart was not part of the investigation of the Respondent. Department Exceptions at 5-6 (citing Initial Decision at 6). The Department argued that there is no requirement that Herbert, the initial investigator, testify at the hearing. Id. at 6. The Department also objected to the ALJ's finding that Stewart's testimony consisted entirely

of unsupported hearsay. Ibid., citing Initial Decision at 6. The Department argues that Stewart's testimony was supported by "voluminous competent proof admitted into evidence." Ibid.

The Department summarized the residuum rule of hearsay. Id. at 7. The Department argued that Stewart was not presented as a witness to provide his opinions about the underlying events. Ibid. Rather, Stewart's testimony provided factual background information and introduced documents which were discovered during the investigation and entered into evidence. Ibid. The Department argued that Stewart's testimony, if hearsay, is supported "by the residuum of voluminous competent evidence in the record." Id. at 7-8. The Department also argues that "all the salient facts of this matter" such as that neither Kidane nor his wife, Ghebremicael, authorized the insurance applications, were established through the testimony of other witnesses with direct personal knowledge. Id. at 8.

The Department's Exceptions Regarding the Testimony of Goldfarb

The Department took exception to the ALJ's characterization of Gorldfarb's testimony as "explanations of the workings of a wholesale insurer" which "offered nothing relevant to the determination of the issues in this matter." Id. at 8 (quoting Initial Decision at 8). The Department argues that Goldfarb's testimony was not presented to explain how wholesale insurers work, but instead to:

> (1) authenticate insurance applications and other documents submitted by [the Respondent], through Morstan, to Lexington; (2) confirm that [the Respondent]

> indeed submitted the First Forged Application[7] and Second Forged Application[8] through Morstan; and (3) confirm that [the Respondent] did not in fact submit the Third Forged Application[9] through Morstan, as he claimed.
> Id. at 8-9 (citing T9-21; T90-9 to 12; T93-9 to 12; 104-3 to 18).[10]

The Department's Exceptions Regarding the Testimony of Kidane

The Department argues that the ALJ correctly recited the critical parts of Kidane's testimony that:

> (1) Kidane never asked [the Respondent] to obtain the insurance policy at issue in this case; (2) Kidane never authorized [the Respondent] to complete an insurance application for [the Property]; (3) Kidane never authorized anyone else to talk to [the Respondent] about this insurance; (4) the First Forged Application was not in Kidane's handwriting and did not contain his true signature; (5) the Second Forged Application was also not in Kidane's handwriting, he did not complete the application, and none of the multiple signatures in the application were his; (6) he never asked anyone to sign the Second Forged Application for him.
> Department Exceptions at 9 (citing Initial Decision at 8-9).

The Department argues that the ALJ erred in not accepting this testimony as part of the

[7] The Department does not define the "First Forged Application." However, on page 20 of its Exceptions, the Department defines the "First Forged Form" as the insurance application completed on November 4, 2013 to obtain a new insurance policy for Kidane's rental property at 573 Valley Road, West Orange, New Jersey at Ex. P2. The "First Forged Application" and the "First Forged Form" appear to refer to the same document at Ex. P2 and is referred to as the First Application in this Final Decision and Order.

[8] The Department does not define the "Second Forged Application." However, on page 22 of its Exceptions, the Department defines "Second Forged Form" as the application the Respondent completed to bind coverage with Lexington at Ex. P5. The "Second Forged Application" and the "Second Forged Form" appear to refer to the same document at Ex. P5 and is referred to as the Second Application in this Final Decision and Order.

[9] The Department does not define the "Third Forged Application." However, on pages 24-25 of its Exceptions, the Department defines the "Third Forged Form" as the application that the Respondent fabricated to make it appear as a genuine application signed by Kidane in response to a request from Investigator Stanley. The Department refers to the Third Forged Form in its Exceptions on Remand. The "Third Forged Application" and the "Third Forged Form" appear to refer to the same document at Ex. P11 and is referred to as the Third Application in this Final Decision and Order.

[10] "T" refers to the transcript of the hearing conducted on November 4, 2020.

factual findings. Department Exceptions at 9.

The Department also takes exception to the ALJ's summarization of Kidane's testimony that certain portions of the Third Application appeared altered. Ibid. The ALJ found that Kidane is not a handwriting expert and no handwriting expert testified at the hearing. Ibid. (citing Initial Decision at 9). The Department argues that the altered portions of the Third Application can be easily observed by a lay person. Id. at 9-10 (citing Ex. P11). The Department also argues that the Respondent admitted that he altered the Third Application. Id. at 10 (citing T43-23 to 44-12; Initial Decision at 12).

The Department also took exception to the ALJ's characterization of Kidane's testimony that he "did not recall asking [the Respondent] to get insurance." Id. at 10 (quoting Initial Decision at 9). The Department argued that when asked about the substance of his complaint against the Respondent, Kidane testified, "[a]bout the, you know, my money - money paid for the insurance plus I don't remember asking for the insurance." Ibid. (quoting T121-23 to 25). The Department argues that the ALJ incorrectly interpreted and implied that Kidane was not sure whether or not he authorized the Respondent to procure insurance. Ibid. The Department argues that this characterization is inaccurate. Ibid. The Department argues that Kidane stated in his complaint and subsequent letter to the Department that the Respondent applied for insurance without Kidane's authorization. Ibid. (citing Ex. P9 and Ex. P22). Accordingly, the Department argues, the ALJ erred in her misinterpretation of Kidane's testimony to mean that Kidane was unsure about whether he asked the Respondent to apply for insurance. Id. at 11.

The Department's Exceptions Regarding the Testimony of Ghebremicael

The Department argues that the ALJ correctly recited the following critical elements of Ghebremicael's testimony:

> (1) [the Respondent] did not contact her to get permission to apply for insurance; (2) she never spoke with [the Respondent] about the insurance policy; (3) she and Kidane only learned about the policy when they received the insurance documents from the insurance company; (4) [the Respondent] did not tell her or Kidane that [the Respondent] was going to get an insurance policy for Kidane; and (5) Kidane never gave her authorization to deal with [the Respondent] on this insurance matter. Department Exceptions at 11 (citing Initial Decision at 9-10).

The Department argues that the ALJ erred in not accepting Ghebremicael's testimony in her factual findings without providing a reason. Department Exceptions at 11.

The Department argues that the ALJ's credibility of findings of Ghebremicael and Kidane should be rejected. Department Exceptions on Remand at 13. The Department states that the ALJ found that the testimony of Ghebremicael and Kidane "was not rational, and was inconsistent with and overborne by the credible testimony of the Respondent." Ibid. (quoting Initial Decision on Remand at 3-4). The Department argues that the ALJ erred in not citing to specific documents in the record that contradicted their testimony and instead basing the credibility determination on a subjective feeling that their testimony "lacked the ring of truth." Ibid. (quoting Initial Decision on Remand at 3). The Department argues that Ghebremicael and Kidane did not contradict each other, and documentary evidence, and was rational. Id. at 13-14. The Department also argues that neither Ghebremicael nor Kidane, unlike the Respondent, had any reason to lie about the insurance policy.

The Department's Exceptions Regarding the Testimony of the Respondent

The Department took exception to the ALJ's characterization of the Respondent as a "reliable and credible witness." Department Exceptions at 11 (quoting Initial Decision at 12).

The Department argues that an agency head may reject or modify the findings of credibility of a lay witnesses if, from a review of the record, those findings "are arbitrary, capricious, or unreasonable or are not supported by sufficient, competent, and credible evidence in the record."

Id. at 12; Department Exceptions on Remand at 2-3 (quoting N.J.S.A. 52:14B-10(c)). The Department posits that when an agency head rejects a credibility determination, "the agency head shall state with particularity the reasons for rejecting the findings and shall make new or modified findings supported by sufficient, competent, and credible evidence in the record." Department Exceptions at 12; Department Exceptions on Remand at 3 (quoting N.J.S.A. 52:14B-10(c); citing New Jersey Dep't of Hum. Servs. v. T.J., No. A-2435-14T3, (App. Div. July 16, 2018) (slip op. at 7); In re Mulcahy, No. A-2891-16T1, (App. Div. Mar. 28, 2019) (slip op. at 4)).[11]

The Department argues that the ALJ's finding that the Respondent was credible should be rejected because it was not supported by sufficient, competent, and credible evidence in the record. Department Exceptions at 12-13; Department Exceptions on Remand at 6. The Department argues that the Respondent's testimony and defense to the charges is predicated upon the contention that he received verbal authorization from Ghebremicael to procure insurance. Department Exceptions at 13 (citing Initial Decision at 10); Department Exceptions on Remand at 6. The Department argues that this is inadmissible hearsay, and should not have been considered by the ALJ. Department Exceptions at 13; Department Exceptions on Remand at 6-7. The Department also argues that this contention was contradicted by Ghebremicael's testimony that she did not authorize the Respondent to procure an insurance policy. Department Exceptions at 14-15; Department Exceptions on Remand at 7-8 (quoting T144-4 to 24).

The Department argues that the Respondent admitting to changing the dates on the Third Application because "time was of the essence." Department Exceptions on Remand at 9 (quoting

[11] The Department did not provide a copy of these unpublished opinions in its Exceptions, but did provide a copy with its Exceptions to the Initial Decision on Remand. The Department did not indicate if it knew of any contrary unpublished opinions. R. 1:36-3.

T44-7 to 12). The Department argues that fabricating the dates on the Third Application is sufficient evidence to find that the Respondent violated the Producer Act and the Fraud Act. Ibid.

The Department next argues that the Respondent's credibility was undermined when he presented the Third Application to the Department as a genuine application that was submitted to Lexington to combine coverage and falsely stated to a Department Investigator that the Third Application was the application submitted to Lexington. Id. at 10 (citing Ex. P10, Ex. P14, Ex. P14-D, Ex. P15, T52-6 to 12; T55-22 to 56-9). The Department argues that the Respondent continued to lie at the hearing, when he testified that he submitted the Third Application to Lexington, but stated that it was submitted to get a quote, rather than bind coverage. Id. at 10-11 (citing T43-24 to 44-12). The Department argues that it established that this form was never submitted to Morstan through the testimony of Goldfarb, and the Respondent only submitted the First Application and the Second Application. Id. at 11 (citing Ex. P16, Ex. P17, T44-14 to 20; T104-3 to 15).

The Department also argues that the Respondent's credibility was impugned because he did not forward the full insurance premium payment of $2,826.66 to Morstan, and instead retained it. Id. at 12 (citing T92-14 to 21; T103-25 to 104-2; T105-22 to 25). The Department argues that the Respondent received the check from Kidane's mortgage company of November 8, 2013 and Ghebmicael requested the refund on January 24, 2014. Ibid. (citing Ex. P4, Ex. P8).

The Department's Exceptions to the ALJ's Findings of Fact

The Department objected to the ALJ's entire findings of fact, which, the Department argues, were predicated upon the Respondent's testimony that Ghebremicael authorized him to procure insurance. Ibid. The Department argues that the Respondent's testimony was improbable and contradicted by the other witnesses and documentary evidence. Id. at 15-16.

The Department also argues that the Respondent's version of events does not explain why he did not obtain authorization from Kidane, the actual insured; why Kidane's authentic signature is not on any of the applications; why the Respondent contacted Kidane's mortgage bank to obtain the funds instead of asking Kidane or Ghebremicael; why Kidane and Ghebremicael asked for a full refund after learning about the policy; why he never forwarded the premium to Morstan;[12] or why Kidane filed a complaint with the Department upon not receiving the full refund for the premium. Id. at 16-17 (internal citations omitted).

The Department also took exception to following findings of fact:

> (a) "a preponderance of the evidence does not exist that DeStefano intended to deceive anyone"; (b) "a preponderance of the evidence does not exist that DeStefano intended to misrepresent anything"; (c) "DeStefano's sole motivation was to help his client obtain coverage as quickly and as economically as possible, and avoid a risk of catastrophic loss"; and (d) "DeStefano harbored no sinister motive in taking the actions he did."
> Id. at 17.

The Department argues that none of these factual findings are relevant because neither the Producer Act nor the Fraud Act requires a finding of intent or motive. Id. at 17-18. The Department argues that the Fraud Act, unlike common law fraud, does not require proof of an intent to deceive. Id. at 18 (citing, Open MRI of Morris & Essex, L.P. v. Frieri, 405 N.J. Super. 576, 583 (App. Div. 2009) (further citations omitted)). The Department also argues that intent is not a necessary element under the Producer Act. Ibid. (citing Commissioner v. Dobrek, BKI 2360-13, Initial Decision, (06/02/2014), Final Decision and Order, (01/15/2015) (further citations omitted)).

The Department's Proposed Findings of Fact.

[12] The Department did not charge the Respondent violating N.J.A.C. 11:17C-2.2(a) (premium funds shall be remitted to the insurer within five business days after receipt of the funds).

The Department argued that all of the ALJ's findings of fact should be rejected and proposed new findings of fact. The Department argued that the Respondent is a licensed insurance producer. Id. at 19 (citing T6-22 to 24). Kidane was the Respondent's client. Ibid. (citing T112-14 to 19). Morstan is a wholesale insurance agency licensed in New Jersey. Ibid. (citing T89-11).

In 2013, the Respondent was a retail agent for Morstan, and through Morstan he was able to access certain insurance markets that he would not otherwise be able to access directly. Id. at 19-20 (citing T89-12 to 13).

In 2012, Kidane owned the Property which he insured through Tower. Id. at 20 (citing Ex. P1). Tower cancelled the policy on April 3, 2013. Ibid. (citing Ex. P1; T14-8 to 17). On November 4, 2013 the Respondent completed an insurance application to obtain a new policy for the Property. Ibid. (citing Ex. P2). Kidane did not request that the Respondent procure a new policy, and Kidane did not authorize anyone else, including his wife, to obtain the policy. Ibid. (citing T114-12 to 25; T115-4 to 6; T127-9 to 19; T144-1 to 3). Ghebremicael did not speak to the Respondent about the policy and did not request that he obtain a new insurance policy for the Property. Id. at 20-21 (citing T143-4 to 9).

The Department argues that DeStefano forged Kidane's signature on the form submitted to Morstan to obtain a quote on an insurance policy from Lexington, a surplus lines company. Id. at 21 (citing Ex. P2; T19-13 to 14; T90-9 to 19; T114-9 to 11; T134-17 to 18). Kidane was unaware that the Respondent had reached out to Morstan to get a quote. Ibid. (citing T117-18 to 22). On November 7, 2013, Morstan quoted $2,826.66 for the insurance policy. Ibid. (citing Ex. P3; T90-23 to 25).

The Department argues that on November 8, 2013, the Respondent contacted Kidane's mortgage company and requested that it send him the funds for the insurance policy. Ibid. (citing

T135-17 to 25; Ex P4; T21-8 to 15). The Respondent received a check in the amount of $2,826.66 from Kidane's mortgage company. Ibid. (citing Ex. P4). Kidane was not aware that the Respondent had contacted or received a check from his mortgage company. Ibid. (citing T123-6 to 10).

The Respondent did not remit the payment to Morstan for the policy. Id. at 22 (citing T92-14 to 21; T103-25 to 104-2; T105-22 to 25).

The Department argues that on November 7, 2013, after receiving the quote from Morstan, the Respondent completed an application to bind coverage with Lexington, without first obtaining Kidane's consent or authorization to complete the application. Ibid. (citing Ex. P5; T118-1 to 14). On November 12, 2013, the Respondent submitted the Second Application through Morstan to Lexington to bind coverage, without Kidane's knowledge. Id. at 23 (citing Ex. P5; T93-9 to 94-12; T118-11 to 14). On November 13, 2013, Morstan forwarded the Second Application to Lexington to bind coverage. Ibid. (citing Ex. P6; T97-18 to 98-4).

The Department argues that on the Second Application, the Respondent forged Kidane's signature on the following forms that were necessary to bind the coverage: (1) insurance application; (2) Older Home Update Questionnaire; (3) Surplus Lines Policy Notification Form; (4) Warranty of No Known Losses; (5) and Animal Exclusion Form. Id. at 22 (citing Ex. P5; T22-22 to 27-10; T118-17 to 22; T119-8; T119-17 to 18; T119-23; T120-5 to 6).

Lexington issued an insurance policy to Kidane to insure the Property effective November 13, 2013. Id. at 23 (citing Ex. P7). Kidane learned of the policy after its issuance and requested that the Respondent refund the premium for the unauthorized insurance policy. Ibid. (citing T23-3 to 7; T123-11 to 16).

On January 14, 2014, Lexington canceled the policy for non-payment of premium because the Respondent never remitted the payment. Ibid. (citing T99-7 to 15). Lexington billed Morstan 25 percent of the policy premium. Ibid. (citing T99-20 to 23; T101-13 to 18). Morstan then withheld 25 percent of the policy premium from the Respondent's earned commissions. Id. at 23-24 (citing T100-18 to 20). Because of the withheld commissions, the Respondent issued a partial refund of $2,141.00 to Kidane on January 27, 2014. Id. at 24 (citing Ex. P8).

On February 20, 2014, Kidane filed a consumer complaint with the Department, where he requested that he receive a full refund because the insurance policy was purchased without his consent. Ibid. (citing P9). After Kidane filed his complaint, the Department opened an investigation and Investigator Stanley was assigned. Ibid. (citing T34-21 to 35-4). On May 21, 2014, Investigator Stanley requested that the Respondent produce a copy of the insurance application that the Respondent submitted through Morstan to Lexington to bind coverage for Kidane. Ibid. (citing Ex. P10; T35-5 to 18). In response, the Respondent fabricated an application using a 2010 application genuinely signed Kidane and himself, but whited-out and altered the date of the application, Kidane's address, and the term of the policy to make the application appear that it was completed in 2013. Id. at 24-25 (citing Ex. P11; Ex. P12; T40-19 to 42-1; T43-7 to 12; T43-24 to 44-12). The Respondent sent this form to the Department on May 21, 2014 and August 5, 2014, presenting it as a genuine application purportedly signed by Kidane to bind coverage with Lexington. Id. at 26 (citing Ex. P10; Ex. P14; Ex. P14-D; T52-6 to 12). The Respondent sent the Second Application, not the Third Application, to bind coverage with Lexington. Ibid. (citing Ex. P5; Ex. P16; Ex. P17; T44-14 to 20; T59-17 to 20; T93-9 to 94-12; T104-3 to 15).

On August 15, 2014, Investigator Herbert e-mailed the Respondent and requested that he confirm that the Third Firm was submitted to Lexington to bind coverage for Kidane. Ibid. (citing

Ex. P15; T55-22 to 56-9). The Respondent replied later that day, stating that the Third Application was submitted to Lexington. Ibid. (citing Ex. P15).

On April 1, 2015, Investigator Herbert sent an e-mail to Kidane to verify his signatures on the insurance applications that the Respondent completed for Kidane, and attached the Second and Third Applications. Id. at 26-27 (citing Ex. P21; Ex. P-21A; Ex. P-21B). In that e-mail, Investigator Herbert also asked Kidane to confirm if he authorized Ghebremicael to procure insurance through the Respondent. Id. at 27 (citing Ex. P21).

On April 3, 2015, Kidane responded to Investigator Herbert's request via letter wherein he stated that none of the signatures on the Second Application were his signature, the signature on the Third Application was his, but the dates were altered, and that he did not authorize Ghebremicael to call the Respondent for insurance coverage with Lexington. Ibid. (citing Ex. P22).

By letter dated May 21, 2015, Investigator Herbert e-mailed the Second and Third Applications to the Respondent and requested that he explain the discrepancies between the two applications. Ibid. (citing Ex. P23; Ex. P-23A; Ex. P-23B). Investigator Herbert also requested that the Respondent explain his failure to get written authorization from Kidane and requested that he explain his alterations on the Third Application. Id. at 27-28 (citing Ex. P23).

The Respondent replied to Investigator Herbert on June 1, 2015 that he sent the Second Application to Morstan to get a quote, and sent the Third Application to bind coverage. Id. at 28 (citing Ex. P24). However, the Respondent sent the Second Application to bind coverage with Lexington, not to obtain a quote. Ibid. (citing Ex. P5). Further, the Respondent did not send the Third Application through Morstan to Lexington to bind coverage, but instead he fabricated it and

submitted it to the Department as evidence of a genuine application signed by Kidane. Ibid. (citing T44-14 to 20; T78-1 to 3).

On June 1, June 5, and June 9, 2015, Investigator Herbert e-mailed the Respondent requesting that he explain the alterations on the Third Application and his failure to obtain written authorization from Kidane. Ibid. (citing Ex. P25; Ex. P26). The Respondent did not respond to these e-mails. Ibid. (citing T79-14 to 19; T83-7 to 12).

The Department's Discussion and Analysis

The Department took exception to the ALJ's legal conclusion that the Department failed to sustain its burden of proof, did not substantiate any of the allegations in the OTSC, and the testimony recounting the investigation was uncorroborated hearsay. Id. at 29 (citing Initial Decision at 18). The Department argued that the ALJ should have addressed each count individually, rather than dismissing all of them. Ibid. Further, the Department argues that there is no requirement that the Department present the testimony of the investigator who was originally assigned. Ibid. The Department also argues that the ALJ failed to consider the testimony of the witnesses with direct personal knowledge and the records in evidence that support the allegations in each Count of the OTSC. Ibid. The Department requested that all of the ALJ's legal conclusions be rejected and suggested the following legal conclusions be made. Ibid.

The Department's Proposed Legal Conclusions

Point I: The Respondent Violated the Producer Act by Applying for an Insurance Policy without his Customer's Knowledge or Consent, as Alleged in Count One[13]

The Department argues that the Respondent completed two different insurance applications without Kidane's knowledge or consent. Id. at 30. The Department argues that the Respondent

[13] Count One of the OTSC alleges that the Respondent submitted a homeowner's insurance policy to Lexington, and not that the Respondent submitted an application for a policy.

first completed an insurance application on November 4, 2013, for an insurance policy for Kidane's Property. Ibid. (citing Ex. P2). After receiving the quote, the Respondent then completed another application to bind coverage with Lexington. Id. at 30-31 (citing Ex. P5).

The Department asserts that the Respondent did not obtain Kidane's consent or authorization to apply for, or to procure, insurance on his behalf. Id. at 31 (citing T114-12 to 15). Kidane did not authorize Ghebremicael to obtain a policy. Ibid. (citing T115-4 to 6; T127-8 to 19; T144-1 to 3). Ghebremicael did not speak to the Respondent about the policy, and never requested that he obtain a new policy. Ibid. (citing T143-4 to 9). In order to obtain the policy, the Respondent forged Kidane's signatures on the First and Second Applications. Ibid. (citing Ex. P2; T19-13 to 14; T114-9 to 11; Ex. P5; T22-22 to 27-10: T118-17 to 22: T119-17 to 18; T119-23; T120-5 to 6; T148-2 to 6).

The Department argues that by applying for insurance without Kidane's knowledge or authorization, and by forging Kidane's signature on the applications, the Respondent used fraudulent or dishonest practices, demonstrated incompetence or untrustworthiness, and committed a fraudulent act in violation of N.J.S.A. 17:22A-40(a)(8), (10),[14] and (16). Id. at 31-32.

Point II: The Respondent Violated the Producer Act by Submitting Forged Documents to an Insurer, as Alleged in Count Two

The Department argues that after forging the insurance applications, the Respondent submitted them to an insurer, a separate violation of the Producer Act, as alleged in Count Two. The Department argues that the Respondent first submitted the First Application to Lexington,

[14] N.J.S.A. 17:22A-40(a)(10) was not alleged as a violation in Count One of the OTSC. In its Exceptions, the Department did not ask to amend the pleadings to include this violation as an additional violation of Count One.

through Morstan, to obtain a quote for a policy. Id. at 32-33 (citing Ex. P2; T90-9 to 19). After he received the quote, the Respondent then submitted the Second Application to Lexington, through Morstan, to bind the coverage. Id. at 33 (citing Ex. P5; T93-9 to 94-12). The Department argues that by submitting these forged documents to Lexington, the Respondent represented that Kidane authorized the submission of the applications, when Kidane was unaware of these applications. Ibid. (citing T117-18 to 22; T118-11 to 14). The Department argues that this conduct constitutes mispresenting the terms of an insurance application in violation of N.J.S.A. 17:22A-40(a)(5). Furthermore, the Department argues, that by submitting these forged documents to an insurer, the Respondent used fraudulent or dishonest practices, demonstrated incompetence or untrustworthiness, and committed a fraudulent act in violation of N.J.S.A. 17:22A-40(a)(8) and (16).[15] Id. at 33.

Point III: The Respondent Violated the Fraud Act by Knowingly Submitting Forged Insurance Applications and Supporting Documents to an Insurer, as Alleged in Count Three

The Department argues that the Respondent's submission of the forged insurance applications and supporting documents constitutes a violation of the Fraud Act, as alleged in Count Three. Id. at 34. The Department argues that it proved during the hearing that the Respondent submitted an application to Lexington, through Morstan, to obtain an insurance policy for Kidane's Property, without Kidane's knowledge or consent. Ibid. (citing Ex. P5; T118-1 to 14).

The Department argues that in the application, the Respondent forged Kidane's signature on the following forms to bind the coverage: (1) insurance application; (2) Older Home Update Questionnaire; (3) Surplus Lines Policy Notification Form; (4) Warranty of No Known Losses;

[15] The Department does not assert that this conduct constitutes a violation of N.J.S.A. 17:22A-40(a)(10) as alleged in Count Two of the OTSC.

(5) and Animal Exclusion Form. Id. at 35 (citing Ex. P5; T118-17 to 22; T119-8; T119-17 to 18; T119-23; T120-5 to 6).

The Department argues that by submitting these forged documents to Lexington, the Respondent represented that Kidane authorized the submission of the applications, when Kidane was unaware of these applications. Ibid. (citing T117-18 to 22; T118-11 to 14). The Department argues that the Respondent knew these forms were fabricated because he was aware that they did not have Kidane's genuine signatures. Ibid. (citing T148-2 to 6).

The Department argues that by knowingly submitting the forged insurance documents to Lexington, the Respondent prepared or made written statements, intended to be presented to an insurance company for the purpose of obtaining an insurance policy, knowing that the statements contained false or misleading information in violation of N.J.S.A. 17:33A-4(a)(4)(b). Id. at 35-36.

Point IV: The Respondent Violated the Producer Act by Failing to Provide to a Prospective Insured the Surplus Lines Policy Notification Form Before Placing Coverage with a Surplus Lines Insurance Provider, as Alleged in Count Four

The Department argues that the Respondent did not obtain Kidane's signature to procure insurance from a surplus lines insurer, which is a separate violation of the Producer Act, as alleged in Count Four. Id. at 36.

The Department argues that an insurance producer who is placing coverage with a surplus lines insurance provider shall first make a diligent effort to place coverage with an authorized insurer and complete the Certification of Effort found at Appendix B to N.J.A.C. 11:1-33.1 to -33.4. Ibid. (citing N.J.A.C. 11:1-33.3(a)). Additionally, the Department argues, an insurance producer placing coverage with a surplus lines insurance provider shall, at the time of quotation,

provide to the prospective insured the Surplus Lines Notification Form ("Notification Form") found at Appendix A-1 to N.J.A.C. 11:1-33.1 to -33.4. Ibid. (citing N.J.A.C. 11:1-33.3(a)(3)).

The Department argues that the Respondent placed coverage with Lexington, a surplus lines insurer, and in order to do so, falsely certified that he was engaged by Kidane to procure the policy. Id. at 37 (citing T134-17 to 18; Ex. P5). However, Kidane did not ask the Respondent to place coverage with a surplus lines insurer and Kidane was not aware that the Respondent was doing so. Ibid. (citing T117-18 to 22; T118-11 to 14).

The Department further argues that the Respondent was required to provide the Notification Form to Kidane for his execution pursuant to N.J.A.C. 11:1-33.3(a)(3). Ibid. In the Notification Form, the Respondent falsely stated that he advised the Respondent that coverage would be placed with a surplus lines insurer. Ibid. (citing Ex. P5). However, the Respondent did not advise Kidane as he stated on the Notification Form, but instead forged Kidane's signature on the Notification Form. Ibid. (citing T119-23).

The Department argues that by making false statements on the Certification of Effort and by failing to provide to the prospective insured the Notification Form before placing coverage with a surplus lines insurer the Respondent violated N.J.S.A. 17:22A-40(a)(8) and (16)[16]; and N.J.A.C. 11:1-33.3 and 33.4.[17] Ibid.

Point V: The Respondent Violated the Producer Act by Fabricating an Insurance Application and Presenting it to the Department as a Genuine Insurance Application, as Alleged in Count Five

[16] The Department does not assert that providing a false Certification of Effort violates N.J.S.A. 17:22A-40(a)(14) as alleged in Count Four of the OTSC. The Department also does not assert that forging Kidane's signature on the Notification Form violates N.J.S.A. 17:22A-40(a)(10) as alleged in Count Four of the OTSC.

[17] N.J.A.C. 11:1-33.3 and 33.4 were not alleged as violations in Count Four in the OTSC. In its Exceptions, The Department did not ask to amend the pleadings to include these violations as additional violations of Count Four.

The Department argues that the Respondent fabricated the Third Application and presented it to the Department as a genuine application, which constitutes a separate violation of the Producer Act as alleged in Count Five. Ibid.

The Department argues that during its investigation, on May 21, 2014, the Department requested that the Respondent produce a copy of the insurance application he submitted to Lexington to bind coverage for Kidane. Id. at 38-39 (citing Ex. P10, T35-5 to 18). In response, the Respondent fabricated the Third Application to make it appear as a genuine application purportedly signed by Kidane. Id. at 39 (citing Ex. P11). To fabricate the Third Application, the Respondent used an application genuinely signed by Kidane in 2010 and whited-out and altered the date of the application, Kidane's address, and the term of the policy to make it appear as though the application was completed in 2013. Ibid. (citing Ex. P12;[18] T40-19 to 42-1; T43-7 to 12; T43-24 to 44-12). The Department argues that the Respondent then presented this form to the Department on three occasions—May 21, August 5, and August 15, 2014. Ibid. (citing Ex. P10; Ex. P14; Ex. P14-D; T52-6 to 12; Ex. P15). Investigator Herbert requested that the Respondent confirm that the application was submitted to Lexington for coverage, and the Respondent falsely stated that it was. Id. at 39-40 (citing Ex. P15; T55-22 to 56-9).

However, the Third Application was not the actual application submitted by the Respondent to bind coverage with Lexington. Id. at 40 (citing T44-14 to 20; T104-3 to 15). Rather, the Respondent submitted the Second Application to bind coverage with Lexington. Ibid. (citing Ex. P5; T93-9 to 94-1; Ex. P17).

[18] Ex. P12 is two pages. Each page is a fax cover sheet that has a small reproduction of a Dwelling Fire Application that is very difficult to read because of its size. Neither page seems to contain Kidane's signature. It is unclear from where the Department received this application.

The Department argues that the Respondent submitted the Third Application to the Department to obfuscate his fraud because that application reflected the genuine signature of Kidane. Ibid. (citing T49-18 to 50-8). The Department argues that this violates N.J.S.A. 17:22A-40(a)(5) because by intentionally misrepresenting a forged application as a genuine application he misrepresented the terms of an insurance application. Ibid. The Department also argues that this conduct constitutes fraudulent and dishonest practices and a fraudulent act in violation of N.J.S.A. 17:22A-40(a)(8) and (16).[19] Ibid.

Point VI: The Respondent Violated the Producer Act by Misappropriating Customer's Funds and Failing to Refund the Full Insurance Premium Amount to the Customer for the Unauthorized Insurance Policy, as Alleged in Count Six

The Department argues that after being caught, the Respondent refused to issue a full refund for the premium to Kidane for the unauthorized policy, which constitutes a separate violation of the Producer Act as alleged in Count Six. Id. at 41.

The Department posits that to procure the unauthorized policy, the Respondent contacted Kidane's mortgage company and requested that it send a check to the Respondent for $2,826.66. Ibid. (citing T135-17 to 25; Ex. P4; T21-8 to 15). The Respondent received the check from the mortgage company, but Kidane was not aware of this payment to the Respondent. Ibid (citing Ex. P4; T123-6 to 10). Kidane did not remit the payment from the mortgage company to Morstan and instead retained it. Ibid. (citing T92-14 to 21; T103-25 to 104-2; T105-22 to -25).

Kidane learned of the insurance policy after its issuance and requested that the Respondent refund the money for the policy. Id. at 42 (citing T123-11 to 13; T32-3 to 7; and T123-14 to 16). On January 27, 2014, the Respondent issued Kidane a partial refund of $2,141.00, which is $685

[19] The Department does not assert that this conduct violates N.J.S.A. 17:22A-40(a)(10) as alleged in Count Five of the OTSC.

less than the full premium of $2,826.66. Ibid. (citing Ex. P8). The Department posits that the Respondent withheld $685 because Lexington billed Morstan this amount for the time period the policy was in effect, and Morstan withheld this amount from the Respondent's accrued total commissions. Ibid. (citing T99-20 to -23; T101-13 to 18; T100-18 to 20). The Department asserts that the Respondent still owes Kidane $685.00. Ibid. (citing T123-17 to 18). Accordingly, the Department argues, by misappropriating Kidane's funds and failing to refund the full premium amount to Kidane for the unauthorized policy, the Respondent violated N.J.S.A. 17:22A-40(a)(4)[20] and N.J.A.C. 11:17C-2.1(a). Ibid.

Point VII: The Facts of this Case Support Various Sanctions for Various Findings of the Producer Act and the Fraud Act.

The Department argues that based on the violations, the Respondent's insurance producer license should be revoked, and the Respondent should be assessed $40,000 for violations of the Producer Act, $5,000 for the violation of the Fraud Act, $35,960.50 in attorney's fees; a $1,000 insurance fraud surcharge, $685 in restitution, and $912.50 in investigative costs. Id. at 42-43.

License Revocation

The Department argues that the Producer Act authorizes the Commissioner to revoke an insurance producer's license for any of the nineteen causes listed in in N.J.S.A. 17:22A-40(a)(1) to (19). Id. at 43. The Department argues that license revocation is appropriate because the Respondent applied for an insurance policy without his client's consent, forged documents, and misappropriated his client's money. Id. at 44.

Civil Penalties

[20] The Department does not assert that failing to refund the full premium to Kidane violates N.J.S.A. 17:22A-40(a)(8) and (16) as alleged in Count Six of the OTSC.

The Department posits that under the Producer Act, the Commissioner can levy penalties against any person violating the Producer Act, not exceeding $5,000 for the first offense and not exceeding $10,000 for each subsequent offense. Ibid. (citing N.J.S.A. 17:22A-45(c)). The Department also posits that under the Fraud Act, a penalty of not more than $5,000 for the first violation, $10,000 for the second violation and $15,000 for each subsequent violation may be imposed. Id. at 44-45 (citing N.J.S.A. 17:33A-5(a)).[21] The Department requests that the Respondent be assessed $40,000 for violating the Producer Act and $5,000 for violating the Fraud Act. Id. at 45.

The Department posits that the standard for the determination of appropriate monetary penalties is set forth in Kimmelman v. Henkels & McCoy, Inc., 108 N.J. 123, 137-139 (1987). Ibid. These factors are: (1) the good faith or bad faith of the producer; (2) the producer's ability to pay; (3) the amount of profits obtained from the illegal activity; (4) injury to the public; (5) duration of the illegal activity or conspiracy; (6) existence of criminal actions; and (7) past violations. Ibid.

The Department argues that as to the first factor, the Respondent demonstrated bad faith when he fabricated insurance applications and applied for insurance without his client's knowledge. Ibid. When confronted by the Department, the Respondent fabricated another application to make it appear genuine and that it had actually been signed by Kidane. Ibid. The Department also argues that the Respondent has yet to issue a full refund to Kidane. Ibid. The Department argues that this factor supports a higher penalty. Id. at 46.

[21] This appears to be a typographical error, as the correct citation is N.J.S.A. 17:33A-5(b).

As to the second factor, the Department posits that the Respondent has not produced any evidence regarding his ability to pay a monetary penalty. Ibid. The Department argues that this supports a higher penalty. Ibid.

As to the third factor, the Department argues that the Respondent profited by retaining money that he received from Kidane's mortgage company and still owes Kidane $685.00. Ibid. The Department also argues that the Respondent could have profited the amount of the full premium, $2,826.66 if he had not been caught. Ibid. The Department argues that this also supports a higher penalty. Ibid.

As to the fourth factor, the Department argues that the Respondent's conduct specifically hurt Kidane, and also the public at large. Ibid. Accordingly, the Department argues, this factor also supports a higher penalty. Ibid.

As to the fifth factor, the duration of the misconduct, the Department argues that the Respondent's fabrications occurred in 2013, and continued in 2014 and 2015 when the Respondent attempted to obfuscate his fraud and deceive the Department's investigator. Id. at 47. The Department argues that this factor supports a higher penalty. Ibid.

As to the sixth factor, the Department argues that there is no criminal or treble damage actions related to this matter. Ibid. The Department argues that this factor is neutral and supports a moderate penalty. Ibid.

As to the final factor, the Department argues that there is no evidence of any previous violations by the Respondent and this factor supports a lower penalty. Ibid.

The Department requested that the Respondent be assessed $40,000 for violations of the Producer Act, to be allocated as follows: $5,000 for Count One; $10,000 for Count Two; $5,000

for Count Four; $10,000 for Count Five; and $10,000 for Count Six. Id. at 47-48. The Department also requested $5,000 for the violation of the Fraud Act in Count Three. Id. at 48.

Fraud Act Surcharge

The Department also requests $1,000 as a surcharge under the Fraud Act pursuant to N.J.S.A. 17:33A-5.1. Ibid.

Attorneys' Fees and Investigative Costs

The Department also requested that the Respondent be assessed $35,906.50 in reasonable attorneys' fees pursuant to N.J.A.C. 17:33A-5(c). Ibid. The Department submitted a Certification of Deputy Attorney General Garen Gazaryan ("DAG Gazaryan") with an itemized record of the legal work performed in this matter. The Department also requested $912.50 for the costs of investigation in this matter pursuant to N.J.S.A. 17:22A-45(c). Ibid. The Department submitted a Certification of Investigator Ashley Mallory ("Mallory Cert") with an itemized accounting of the investigators' time spent on this case.

Restitution

The Department posits that the Respondent failed to issue a full refund to Kidane for the cost of the policy and still owes Kidane $685.00. Ibid. (citing T123-17 to 18). The Department requests that the Commissioner order $685.00 as restitution to Kidane pursuant to N.J.S.A. 17:22A-45(c) and N.J.S.A. 17:33A-5(c). Ibid., Department Exceptions on Remand at 12, 14.

LEGAL DISCUSSION

As noted by the ALJ, 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 37 N.J. at 143; 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, 26 N.J. at 263. 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." Lewis, 678 N.J. at 47.

Hearsay and Residuum Rule Analysis

Testimony of Investigator Stewart

In her Initial Decision, the ALJ reviewed hearsay and the residuum rule. Initial Decision at 16. The ALJ stated that Stewart played no role in the investigation, and only testified regarding what others did, his opinions regarding which signatures are similar to others, and which signatures he thought were forgeries. Id. at 6. The ALJ stated that Department investigators or authors of investigative reports were not called as witnesses and Stewart agreed with the conclusions in the reports. Ibid. The ALJ found that "the entirety of Investigator Stewart's testimony is hearsay unsupported by competent proof." Ibid.

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. N.J.R.E. 801. Hearsay is admissible in Administrative cases, subject to the judge's discretion. Hearsay evidence which is admitted shall be accorded whatever weight the judge deems appropriate considering the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability. N.J.A.C. 1:1-15.5(a). Notwithstanding the admissibility of hearsay evidence, some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness. N.J.A.C. 1:1-15.5(b).

Hearsay may either be employed to corroborate other evidence, or evidence may be supported or given added probative force by hearsay testimony. The residuum rule does not require that each fact be based on a residuum of legally competent evidence, but rather focuses on

the ultimate findings of material fact. Ruroede v. Borough of Hasbrouck Heights, 214 N.J. 338, 359-60 (2013) (internal citations omitted). Hearsay statements cannot provide the residuum of competent evidence that must support a fact material to the determination of a charge. Id. at 361. A legal determination cannot be based upon hearsay alone. Hearsay may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony. Weston, 60 N.J. at 51 (remanding where applicant for a firearms purchaser card was denied and at both the administrative and judicial level and the decision was based upon information from a third party in an investigative report).

Applying the residuum rule requires identifying the "ultimate finding of fact" that must be supported by a residuum of competent evidence. Matter of Tenure Hearing Cowan, 224 N.J. Super. 737, 750 (App. Div. 1988). In Cowan, the ultimate finding of fact was whether Cowan engaged in one or more of eleven acts of unbecoming conduct, or whether Cowan was engaged in a course of unbecoming conduct of which the acts charged were examples. Ibid. There did not need to be a residuum of competent evidence to prove each act so long as "the combined probative force of the relevant hearsay and the relevant competent evidence" sustained the ultimate finding of unbecoming conduct. Id. at 751, quoting, Weston, 60 N.J. at 52. The residuum rule "only applies to evidence which is inadmissible under the rules of evidence, but is allowed into evidence in an administrative proceeding in which the strict rules of evidence do not apply." In re Scioscia, 216 N.J. Super. 644, 654 (App. Div.), certif. denied, 107 N.J. 652 (1987).

Here, Investigator Stewart testified that he started working for the Department's investigation unit in July 2016. T12-13 to 15. This matter was assigned to him on August 10, 2017. Mallory Cert at ¶4. The investigation finished on June 12, 2015, over a year before

investigator Stewart began working at the Department, and more than two years before it was assigned to Investigator Stewart. Mallory Cert at ¶4.[22]

While Investigator Stewart may not have had personal knowledge of the investigation that occurred before he worked at the Department, he testified that he reviewed all the documents associated with the case. T12-19 to 23. Further, his testimony of how the investigation proceeded is corroborated by the documents admitted into evidence, such as e-mails between the Respondent and Morstan personnel; e-mails between Investigator Herbert and the Respondent; and e-mails between Investigator Herbert and representatives of Morstan.

Investigator Stewart also testified as to which of the signatures of Kidane were genuine and which were not. T19-11 to 15; Ex. P2; T22-25 to 23-22; T25-4 to 27-11; Ex. P-5; T33-23 to 34-1; Ex. P9; T42-18 to 21; Ex. P11; T73-9 to -14. This testimony was corroborated by Kidane, who also testified as to whether signatures purported to be his were genuine or not. T117-22 to 23; Ex P2; T118-16 to 12-7; Ex. P5; T120-21 to 23; Ex. P-11; T122-5 to 9; Ex. P9; T122-14 to 24; Ex. P22.

The ALJ erred in discounting Investigator Stewart's testimony and ruling it was uncorroborated hearsay. Investigator Stewart's testimony was corroborated by Kidane, and the documents entered into evidence at the hearing. Accordingly, while Investigator Stewart's testimony was hearsay, it was corroborated and should not have been completely discounted by the ALJ.

[22] There are two paragraphs that are numbered "4" in the Mallory Cert. The first Paragraph 4 states that the case was assigned to Investigator Stewart on August 10, 2017. The second Paragraph 4 is the schedule of costs, which includes dates and investigative activities. The last date in the schedule is June 12, 2015.

Need for Handwriting Expert

Investigator Stewart also testified that the signatures in Ex. P5 all look different from each other. T23-16 to 19; T25-18 to 23; T26-14 to 27-5. He further testified that the signatures in Ex. P5 look different from Kidane's genuine signatures at Ex. P9, Ex. P11, and Ex. P22. T34-2 to 8; T73-12 to 20. The ALJ noted that Investigator Stewart was not a handwriting expert and no such expert testified at trial. Initial Decision at 5. However, a handwriting expert is unnecessary when comparing disputed signatures with signatures proved to be genuine. N.J.S.A. 2A:82-1; State v. Carroll, 256 N.J. Super. 575, 593 (App. Div. 1992). N.J.S.A. 2A:82-1 prohibits using writing specimens produced after the dispute as to the genuineness arises "only when the writing is offered to disprove the handwriting of any person." Carrol, 256 N.J. Super at 594. Here, no signature of Kidane was produced solely to disprove that he did not sign the insurance applications at Ex. P2 and Ex. P5. Accordingly, no handwriting expert was necessary to compare Kidane's genuine signatures with those that were forged.

I do note, however, that the signature purported to be Kidane's genuine signature in Ex. P9 appears different from his other purported genuine signatures at Ex. P11 and Ex. P22. This casts doubt as to the relevance of the testimony that the signatures in Ex. P5 appear to be different from each other, and different from Kidane's purported genuine signatures at Ex. P9, Ex. P11, and Ex. P22 .

Intent Under the Producer and Fraud Acts

The ALJ found that a preponderance of the evidence does not exist to show that the Respondent intended to deceive anyone or make any misrepresentations. Initial Decision at 15. The ALJ also found that his sole motivation was to help his client secure insurance coverage as quickly as possible and he harbored no sinister motive. Ibid.

Under the Fraud and Producer Acts, the Respondent's intent is irrelevant. That is, it does not matter whether or not he intended to deceive. Fraudulent acts under the Producer Act, including an intentional misrepresentation of policy terms and/or information on an application, do not require intent to deceive. See Commissioner v. Dobrek, BKI 2360-13, Initial Decision, (06/02/14), Final Decision and Order, (01/15/15), at 20, aff'd sub nom. Badolato v. Dobrek, No. A-2990-14 (App. Div. June 30, 2016); Commissioner v. Pino, OAL Dkt. No. BKI 8070-02, Initial Decision (09/11/03), Final Decision and Order (10/30/03) (there is no mens rea requirement for violations of N.J.S.A. 17:22A-1 to -25, the predecessor of the Producer Act); Commissioner v. Uribe, OAL Dkt. No. BKI 07363-07, Initial Decision, (12/28/10), Final Decision and Order (9/28/11). "A fraudulent act under the Producer Act does not require criminal intent." Commissioner v. Shih, 94 N.J.A.R. 2d (INS) 34 (March 2, 1994).

Similarly, under the Fraud Act, intent is not a necessary element. The Fraud Act does not require proof of an intent to deceive. State v. Nasir, 355 N.J. Super. 96, 106 (App. Div. 2002), certif. denied, 175 N.J. 549 (2003). "Proof of fraud under the [Fraud Act], as opposed to common law fraud, does not require proof . . . of an intent to deceive." Open MRI, 405 N.J. Super. at 576.

Accordingly, the Department does not need to prove intent under the Producer Act or the Fraud Act. Whether or not the Respondent intended to hurt anyone is irrelevant in determining whether he violated the Producer Act or the Fraud Act.

Credibility Determinations

The ALJ also found that the Respondent was a credible and reliable witness. Id. at 12, Initial Decision on Remand at 3-4. An "agency head may not reject or modify any finding of fact as to issues of credibility of lay witness testimony unless it first determines from a review of a

record that the findings are arbitrary, capricious or unreasonable, or are not supported by sufficient, competent, and credible evidence in the record." N.J.A.C. 1:1-18.6(c). The trial judge's credibility findings are significantly influenced by "'the opportunity to hear and see the witnesses and to have the feel of the case, which a reviewing court cannot enjoy.'" State v. Locurto, 157 N.J. 463, 472, (1999) (quoting State v. Johnson, 42 N.J. 146, 161 (1964)). Trial courts' credibility findings are "often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record." Ibid. Even the best and most accurate transcript "is like a dehydrated peach; it has neither the substance nor the flavor of the peach before it was dried." Ibid. (citation and internal quotation marks omitted).

I ADOPT the credibility determinations of the ALJ, who had the opportunity to personally observe the witnesses, including their character and demeanor while testifying.

In its Exceptions, the Department argues that the Respondent's version of events does not explain why he did not obtain authorization from Kidane, the actual insured; why Kidane's authentic signature is not on any of the applications; why the Respondent contacted Kidane's mortgage bank to obtain the funds instead of asking Kidane or Ghebremicael; why Kidane and Ghebremicael asked for a full refund after learning about the policy; why he never forwarded the premium to Morstan; or why Kidane filed a complaint with the Department upon not receiving the full refund for the premium. Department Exceptions at 16-17 (internal citations omitted).

The Respondent consistently maintained throughout the investigation and his testimony that he obtained authorization from Ghebremicael, not Kidane, who was the actual insured. This does not necessarily mean that the Respondent is untruthful. There is no evidence in the record that Ghebremicael did not generally handle the household's insurance. Moreover, if the

Respondent were to lie about who authorized him to obtain insurance, testifying that he was authorized by Ghebremicael, not Kidane, the actual insured, would weaken his position.

The Respondent testified that the "original application[23] and the application to quote has an original signature. The other ones[24] it doesn't appear that they're original signatures, I'm not disputing that, okay." T148-2 to 6. In his opening statement, he denied forging any signatures. T10-24 to 11-5. The Department did not cross-examine the Respondent as to who signed the applications, and if they did so at his direction. Nor did the Department cross-examine the Respondent to ascertain if the applications were signed by multiple people, as it repeatedly argues that all of the signatures look different. There is no clear evidence presented that the Respondent forged the signatures, and that if he did, why they all look different. Further, it is unclear why the signatures would look different if they were forged by one person.

The Respondent did not testify that he contacted the bank to obtain funds for the policy, as argued by the Department. Department Exceptions at 16. The Respondent testified that he sent the insurance quote to the bank so they would not put force-placed coverage for the property, which would be more expensive, on the property. T135-17 to 21. The Respondent was unaware that it was an escrow account. T135-21 to 22. The bank informed the Respondent that it was an escrowed account, and sent him a check. T135-17 to 25. At no point does the Respondent aver that he asked the bank for funds.

[23] It is unclear which application the Respondent is referring to by the reference to the "original application."

[24] It is unclear which applications the Respondent is referring to. The Department posits that the Respondent is referring to the Second Application, which is the application to bind the policy at Ex. P5. Department Exceptions at 31, 35.

After Kidane and Ghebremicael received the insurance documents, they were able to find a cheaper policy on their own and asked for a refund. That they asked for a refund after finding a cheaper policy does not mean that the Respondent was lying when he testified that Ghebremicael authorized him to get a homeowner's policy on the uninsured property.

The Department also argues that Kidane and Ghebremicael had no motivation to lie about authorizing the Respondent to procure the insurance policy. Department Exceptions on Remand at 2, 12, 14. However, the Department also argues that the Respondent owes Kidane and Ghebremicael $685 and asks for restitution pursuant to N.J.S.A. 17:22A-45(c) and N.J.S.A. 17:33A-5(c). Id. at 12, 15. Accordingly, Kidane and Ghebremicael had a monetary interest in the outcome of the case and were not uninterested parties.

Allegations Against the Respondent

Counts One, Two, and Four through Six of the OTSC charge the Respondent with violations of the Producer Act, which governs the licensure and conduct of New Jersey insurance producer licensees and empowers the Commissioner to suspend or revoke the license of, and to fine, an insurance producer for violations of its provisions. Count Three of the OTSC charges the Respondent with violations of the Fraud Act which empowers the Commissioner to impose penalties for violations of its provisions. The Counts are discussed below.

Count One

Count One alleges that the Respondent submitted a homeowner's insurance policy to Lexington to insure the Property without Kidane's authorization or knowledge in violation of N.J.S.A. 17:22A-40(a)(2), (8), and (16).

The ALJ found that Ghebremicael, Kidane's wife, gave the Respondent authorization to secure coverage during a phone call in November of 2013. Initial Decision at 13. The Respondent

then submitted an application to Morstan to get a quote from Lexington, a surplus lines company. Ibid. After receiving the quote, the Respondent contacted the mortgage company, who sent the funds to cover the premium. Ibid. Respondent then completed an application to bind the coverage with Lexington. Ibid.

In its Exceptions, the Department argues that the Respondent completed two different insurance applications without Kidane's knowledge of consent. Department Exceptions at 30. The Department argues that by applying for insurance without Kidane's knowledge or authorization, and by forging Kidane's signature on the applications, the Respondent used fraudulent or dishonest practices, demonstrated incompetence or untrustworthiness, and committed a fraudulent act in violation of N.J.S.A. 17:22A-40(a)(8), (10), and (16). Id. at 31-32.

The OTSC charges the Respondent with submitting a homeowner's insurance policy to Lexington without Kidane's consent. It does not charge the Respondent with submitting an application for an insurance policy, as argued by the Department in its Exceptions. An insurance application is not the same as an insurance policy. An insurance policy is the written contract of insurance.

Nevertheless, the Department argues that the Respondent submitted an application for homeowner's insurance without authorization. N.J.A.C. 1:1-6.2(a) provides that "[u]nless precluded by law or constitutional principle, pleadings may be freely amended when, in the judge's discretion, an amendment would be in the interest of efficiency, expediency and the avoidance of over-technical pleading requirements and would not create undue prejudice." Generally, defendants who are aware of the charges against them are not free to "lie in repose but are called upon to prepare and defend." See Lawlor v. CloverLeaf Memorial Park, Inc. 56 N.J. 326, 339

(1970). I find that amending the pleadings to charge that the Respondent submitted an application without authorization is appropriate to avoid technicalities that do not serve the interests of justice.

Nevertheless, as I have adopted the ALJ's credibility determination that the Respondent received authorization from Ghebremicael to secure insurance coverage on the Property, I ADOPT the ALJ's determination that the Department did not prove the that Respondent violated N.J.S.A. 17:22A-40(a)(2) (violating any insurance law or regulation), (8) (fraudulent coercive or dishonest practices, demonstrating incompetence, unworthiness, or financial irresponsibility), or (16) (commit any fraudulent act) by a preponderance of the evidence as alleged in Count One of the OTSC.

Count Two

Count Two of the OTSC alleges that the Respondent knowingly submitted a forged homeowners insurance application and supporting documents to Lexington regarding the Property in violation of N.J.S.A. 17:22A-40(a)(2), (5), (8), (10), and (16).

The ALJ found that Ghebremicael gave the Respondent authorization to "secure" coverage during a phone call in November of 2013. Initial Decision at 13. The Respondent then submitted an application to Morstan to get a quote from Lexington, a surplus lines company. Ibid. After receiving the quote, the Respondent contacted the mortgage company, who sent the funds to cover the premium. Ibid. The Respondent then completed an application to bind the coverage with Lexington. Ibid. The ALJ found that the Respondent's signature was not on the application. Id. at 14.

In its Exceptions, the Department argues that the Respondent submitted forged forms to Lexington, through Morstan, to obtain a quote and then to bind coverage. Department Exceptions at 32-33. The Department argues that by submitting these forged documents to Lexington, the

Respondent represented that Kidane authorized the submission of the applications, when Kidane was unaware of these applications. Id. at 33 (citing T117-18 to 22; T118-11 to 14). The Department argues that this conduct constitutes mispresenting the terms of an insurance application in violation of N.J.S.A. 17:22A-40(a)(5). Furthermore, the Department argues, that by submitting these forged documents to an insurer, the Respondent used fraudulent or dishonest practices, demonstrated incompetence or untrustworthiness, and committed a fraudulent act in violation of N.J.S.A. 17:22A-40(a)(8) and (16). Id. at 33.

The Department did not present any evidence to show that the Respondent forged any signatures on the Second Application. In his opening statement, the Respondent denied forging any signatures. T10-24 to 11-5. The Department did not cross-examine the Respondent as to who signed the applications, and if they did so at his direction. The Department presented no evidence that Respondent forged the applications that were submitted to Morstan, or if he was aware that they were not signed by Kidane.

Accordingly, I ADOPT the conclusion of the ALJ and find that the Department did not prove that the Respondent violated N.J.S.A. 17:22A-40(a)(2) (violating any insurance law or regulation), (5) (intentionally misrepresenting the terms of an insurance contract, policy, or application), (8) (fraudulent coercive or dishonest practices, demonstrating incompetence, unworthiness, or financial irresponsibility), (10) (forging another's name on an application for insurance or any document related to insurance transaction), or (16) (any fraudulent act). Accordingly, I ADOPT the ALJ's determination that the Department did not prove the allegations in Count Two by a preponderance of the evidence.

Count Three

Count Three of the OTSC alleges that Respondent knowingly submitted a forged insurance application to Lexington regarding the Property in violation of N.J.S.A. 17:33A-4(a)(4)(b). The ALJ found that Ghebremicael gave the Respondent authorization to secure coverage during a phone call in November of 2013. Initial Decision at 13. The Respondent then submitted an application to Morstan to get a quote from Lexington, a surplus lines company. Ibid. After receiving the quote, the Respondent contacted the mortgage company, which then sent the funds to cover the premium. Ibid. Respondent then completed an application to bind the coverage with Lexington. Ibid. The ALJ found that the Respondent's signature was not on the application. Id. at 14.

In its Exceptions, the Department argues that by submitting a forged application and supporting documents to Lexington, the Respondent represented that Kidane authorized the submission of the applications, when Kidane was unaware of these applications. Department Exceptions at 35 (citing T117-18 to 22; T118-11 to 14). The Department argues that the Respondent knew that these forms were fabricated because he was aware that they did not have Kidane's genuine signatures. Ibid. (citing T148-2 to 6). The Department argues that by knowingly submitting the forged insurance documents to Lexington, the Respondent prepared or made written statements intended to be presented to an insurance company for the purpose of obtaining an insurance policy, knowing that the statements contained false or misleading information in violation of N.J.S.A. 17:33A-4(a)(4)(b). Id. at 35-36.

Count Three relies upon the same factual basis as Count Two. However, Count Three is pled under the Fraud Act, while Count Two is pled under the Producer Act. As found above, the

Department did not present any evidence to show that the Respondent forged any signatures on the application, or if he was aware that they were not signed by Kidane.

Accordingly, I ADOPT the ALJ's determination that the Department did not prove the violation of N.J.S.A. 17:33A-4(a)(4)(b) (making any written or oral statement intended to be presented to any insurance company for the purpose of obtaining an insurance policy, knowing that the statement contains any false or misleading information concerning a material fact) by a preponderance of the credible evidence.

Count Four

Count Four of the OTSC alleges that the Respondent submitted a false Certification of Effort in violation of N.J.S.A. 17:22A-40(a)(2), (8), and (14), and forged Kidane's signature on the Notification Form, in violation of N.J.S.A. 17:22A-40(a)(2), (8), (10), and (16).

The ALJ found that Ghebremicael gave the Respondent authorization to secure coverage during a phone call in November of 2013. Initial Decision at 13. The Respondent then submitted an application to Morstan to get a quote from Lexington, a surplus lines company. Ibid. After receiving the quote, the Respondent contacted the mortgage company, who sent the funds to cover the premium. Ibid. Respondent then completed an application to bind the coverage with Lexington. Ibid. The ALJ found that the Respondent's signature is not on any of the applications. Initial Decision at 14.

In its Exceptions, the Department argues that an insurance producer who is placing coverage with a surplus lines insurance insurer shall first make a diligent effort to place coverage with an authorized insurer and complete the Certification of Effort found at Appendix B to N.J.A.C. 11:1-33.1 to -33.4. Department Exceptions at 36 (citing N.J.A.C. 11:1-33.3(a)). The Department argues that the Respondent placed coverage with Lexington, a surplus lines insurer,

and in order to do so, falsely certified on the Certification of Effort that he was engaged by Kidane to procure the policy. Id. at 37 (citing T134-17 to 18; Ex. P5). However, Kidane did not ask the Respondent to place coverage with a surplus lines insurer, and Kidane was not aware that the Respondent was doing so. Ibid. (citing T117-18 to 22; T118-11 to 14).

The Department also argues that the Respondent was required to provide the Notification Form to Kidane for his execution pursuant to N.J.A.C. 11:1-33.3(a)(3). Ibid. In the Notification Form, the Respondent falsely stated that he advised the Respondent that coverage would be placed with a surplus lines insurer. Ibid. (citing Ex. P5). However, the Respondent did not advise Kidane that coverage would be placed with a surplus lines insurer, as he stated on the Notification Form, but instead forged Kidane's signature on the Notification Form. Ibid. (citing T119-23). The Department argues that by making false statements on the Certification of Effort and by failing to provide to the prospective insured the Notification Form before placing coverage with a surplus lines insurer the Respondent violated N.J.S.A. 17:22A-40(a)(8) and (16); and N.J.A.C. 11:1-33.3 and 33.4. Ibid.

As I have adopted the ALJ's credibility determination that the Respondent received authorization from Ghebremicael to secure insurance coverage on the Property, I find that the Respondent did not make a false statement on the Certification of Effort and the Department did not prove violations of N.J.S.A. 17:22A-40(a)(2) (violating any insurance law or regulation), (8) (fraudulent coercive or dishonest practices, demonstrating incompetence, unworthiness, or financial irresponsibility), or (14) (failing to pay income tax).[25]

[25] There was no evidence presented that the Respondent failed to pay income tax and the Department never argued that the Respondent was delinquent on his income taxes.

It is unclear why the Department specifically mentions the Notification Form in Count Four of the OTSC. It seems as though the Notification Form would be one of the forged supporting documents that the Respondent provided to Lexington as alleged in Count Two of the OTSC. Nevertheless, as I have adopted the ALJ's credibility determination, I find that the Respondent acted with the authorization of Ghebremicael to secure insurance coverage for the Property. Accordingly, I find that the Department did not prove that the Respondent violated N.J.S.A. 17:22A-40(a)(2) (violating any insurance law or regulation), (8) (fraudulent coercive or dishonest practices, demonstrating incompetence, unworthiness, or financial irresponsibility), (10) (forging another's name on an application for insurance or any document related to insurance transaction), or (16) (any fraudulent act). Accordingly, I ADOPT the ALJ's determination that the Department did not prove the allegations in Count Four by a preponderance of the evidence.

Count Five

Count Five of the OTSC alleges that the Respondent knowingly completed and produced a forged Dwelling Fire insurance application to the Department to make it appear as the original homeowners insurance application submitted to Lexington, in violation of N.J.S.A. 17:22A-40(a)(2), (5), (8), (10), and (16).

The ALJ found that the Respondent amended the dates on the application to obtain a new quote for a new term, because the last policy had been canceled. Initial Decision at 14. The ALJ found that the application was sent to the Department from someone in the Respondent's office, but not the Respondent. Ibid. The ALJ found that the document contains Kidane's original signature and not a forgery. Ibid.

In its Exceptions, the Department argues that during its investigation, the Department requested that the Respondent produce a copy of the insurance application he submitted to

Lexington to bind coverage for Kidane. Department Exceptions at 38-39 (citing Ex. P10, T35-5 to 18). In response, the Respondent fabricated an application to make it appear as a genuine application purportedly signed by Kidane. Id. at 39 (citing Ex. P11). However, this application was not the actual application submitted by the Respondent to bind coverage with Lexington. Id. at 40 (citing T44-14 to 20; T104-3 to 15). The Department argues that the Respondent submitted this application to the Department to obfuscate his fraud because that application reflected the genuine signature of Kidane. Ibid. (citing T49-18 to 50-8). The Department argues that this conduct violates N.J.S.A. 17:22A-40(a)(5), (8), and (16). Ibid.

I find that the Department requested that the Respondent provide the documents submitted to Morstan to bind coverage with Lexington, and in response, the Respondent, or someone from his office, used a document that had Kidane's actual signature, changed the dates, and submitted it to the Department as the Third Application. However, this application was not the Second Application that was submitted to Morstan to bind coverage with Lexington.

The Respondent is the principal and sole owner of the DeStefano Insurance Agency, LLC. Ex. P34. It is irrelevant whether someone from the Respondent's office, and not Respondent himself, supplied the application to the Department, as found by the ALJ, because the Respondent is responsible for the insurance-related conduct of his employees. N.J.A.C. 11:17-2.10(b)(4).

Accordingly, I REJECT the ALJ's findings and find that the Department proved by a preponderance of the evidence that the Respondent violated N.J.S.A. 17:22A-40(a)(2) (violating any insurance law or regulation), (5) (intentionally misrepresenting the terms of an insurance contract, policy, or application), (8) (fraudulent coercive or dishonest practices, demonstrating incompetence, unworthiness, or financial irresponsibility), and (16) (any fraudulent act).

I ADOPT the ALJ's findings that the Department did not prove that the Respondent

violated N.J.S.A. 17:22A-40(a)(10) (forging another's name on an application for insurance or any document related to insurance transaction). There is no evidence that the Respondent, or someone from his office, forged Kidane's signature on the application submitted to the Department. Rather, the Department argues that the Respondent took an application with Kidane's actual signature and altered the dates and other information to make it appear as though it was submitted to Lexington. The Department does not argue that the Respondent, or someone from his office, forged Kidane's signature on this application, and does not argue that the Respondent violated N.J.S.A. 17:22A-40(a)(10) in its Exceptions as to this Count.

Count Six

Count Six of the OTSC alleges that the Respondent failed to refund the full premium Kidane paid to Lexington for the homeowners insurance policy which he did not authorize, in violation of N.J.S.A. 17:22A-40(a)(2), (4), (8), and (16), and N.J.A.C. 11:17C-2.1.

The ALJ found that after the policy was canceled, Ghebremicael received the refund check in the amount of $2,100, which was the premium less 25 percent owed to Morstan for its commission. Initial Decision at 14. The ALJ further found that the Respondent did not retain a commission and received no financial gain. Ibid.

In its Exceptions, the Department argues that after being caught, the Respondent refused to issue a full refund for the premium to Kidane for the unauthorized policy as alleged in Count Six. Department Exceptions at 41. The Department argues that after Kidane learned of the insurance policy, he requested that the Respondent refund the money for the policy. Id. at 42 (citing T123-11 to 13; T32-3 to 7; and T123-14 to 16). On January 27, 2014, the Respondent issued a partial refund to Kidane in the amount of $2,141.00, which is $685 less than the full premium of $2,826.66. Ibid. (citing Ex. P8). The Department asserts that the Respondent still

owes Kidane $685.00. Ibid. (citing T123-17 to 18); Department Exceptions on Remand at 12, 14. Accordingly, the Department argues, by misappropriating Kidane's funds and failing to refund the full premium amount to Kidane for the unauthorized policy, the Respondent violated N.J.S.A. 17:22A-40(a)(4) and N.J.A.C. 11:17C-2.1(a). Ibid.

As I have adopted the ALJ's credibility determination, and I find that the Respondent acted with the authorization of Ghebremicael to secure insurance coverage for the Property. After requesting a refund, Ghebremicael received a check in the amount of $2,141.00, which is $685 less than the full premium of $2,826.66. The Respondent retained 25 percent for Morstan's commission. He did not retain his own commission for the transaction. The Respondent did not benefit financially from the transaction and did not misappropriate Kidane's money. Accordingly, I find that the Department did not prove that the Respondent violated N.J.S.A. 17:22A-40(a)(2) (violating any insurance law or regulation), (4) (improperly withholding, misappropriating, or converting monies), (8) (fraudulent coercive or dishonest practices, demonstrating incompetence, unworthiness, or financial irresponsibility), or (16) (any fraudulent act). Accordingly, I ADOPT the ALJ's determination that the Department did not prove the allegations in Count Six by a preponderance of the evidence.

PENALTY AGAINST THE RESPONDENT

Suspension of the Respondent's Insurance Producer License

The ALJ recommended that no action be taken against the Respondent's license. Initial Decision at 18.

The Department argues in its Exceptions that license revocation is necessary and appropriate. Department Exceptions at 44.

With respect to the appropriate action to take against the Respondent's insurance producer license, I FIND that the record is more than sufficient to support the suspension of his license for six months.

The Commissioner is charged with the duty to protect the public welfare and to instill public confidence in both insurance producers and the 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)). An insurance producer collects money from insureds and acts as a fiduciary to both the consumers and the insurers they represent. Accordingly, the public's confidence in a licensee's honesty, trustworthiness, and integrity are of paramount concern. Ibid. The nature and duty of an insurance producer "calls for precision, accuracy and forthrightness." Fortunato v. Thomas, 95 N.J.A.R. (INS) 73 (1993). A producer is held to a high standard of conduct and should fully understand and appreciate the effect of irresponsible conduct on the insurance industry and on the public.

Here, the Respondent's office supplied a fabricated form in response to a request from the Department during its investigation. It is irrelevant whether it was done by the Respondent or someone from his office, because the Respondent, as the principal and sole owner of the DeStefano Insurance Agency, is responsible for the insurance-related conduct of his employees under N.J.A.C. 11:17-2.10(b)(4). The Respondent owes honesty and forthrightness to the regulating authority. Instead, the Respondent attempted to impede the investigation.

Accordingly, I find that suspending the Respondent's license for six months is necessary and appropriate. This licensure penalty serves the need of protecting the public and maintaining public faith in the insurance industry.

Monetary Penalties Against the Respondent

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 penalties set forth in the Producer Act "are expressions by the Legislature that serve a distinct remedial purpose." Commissioner v. Strandskov, OAL Dkt. No. BKI 03451-07, Initial Decision (09/25/08), Final Decision and Order (02/04/09). The Commissioner may levy penalties against any person violating the Producer Act, not exceeding $5,000 for the first offense and not exceeding $10,000 for each subsequent offense. N.J.S.A. 17:22A-45(c). In addition, the Commissioner may order reimbursement of the costs of investigation and prosecution for violations of the Producer Act. Ibid.

Under Kimmelman, 108 N.J. at 137-139, certain factors must be examined when assessing administrative monetary penalties that may be imposed pursuant to the Producer Act and imposed pursuant to the Fraud Act. These factors are: (1) the good faith or bad faith of the producer; (2) the producer's ability to pay; (3) the amount of profits obtained from the illegal activity; (4) injury to the public; (5) duration of the illegal activity or conspiracy; (6) existence of criminal actions; and (7) past violations. 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").

Because the ALJ found that the Department did not meet its burden of proof that the Respondent violated any statutes or regulations, the ALJ declined to recommend a monetary penalty and did not analyze these factors.

The first Kimmelman factor addresses the good faith or bad faith of the Respondent. The Department argues in its Exceptions that as to the first factor, the Respondent demonstrated bad

faith when he "fabricated" an application to make it appear genuine and that it had actually been signed by Kidane. Department Exceptions at 45. I agree that supplying an application with amended dates, the Third Application, to the Department during its investigation shows bad faith and supports a higher penalty.

The second Kimmelman factor is the ability of the Respondent to pay the penalties imposed. 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 Department posits that the Respondent has not produced any evidence regarding his ability to pay a monetary penalty. Department Exceptions at 46. The Department argues that this supports a higher penalty. Ibid. I agree that the Respondent has presented no evidence of his ability or inability to pay the civil monetary penalties that could be assessed in this matter.

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. Kimmelman does not limit consideration to actual profits, but warrants the consideration of the profits that the Respondents would have likely made if their acts in violation of the insurance laws of this State were successful. Kimmelman, 108 N.J. at 138. The Respondent did not benefit financially from the transaction. Accordingly, I find that this factor weighs in favor of a lower penalty.

The fourth Kimmelman factor addresses the injury to the public. The Commissioner is charged with the duty to protect the public welfare and to instill public confidence in both insurance producers and the insurance industry. As to the fourth factor, the Department argues that the Respondent's conduct specifically hurt the public at large. Department Exceptions at 46.

Accordingly, the Department argues, this factor also supports a higher penalty. Ibid. I agree that the Respondent's actions caused injury to the public. The Respondent, or someone from his office, provided an application with amended dates, the Third Application, to the Department during its investigation, which undermined the Department's investigative process. I agree that this factor weighs in favor of a higher monetary penalty.

The fifth Kimmelman factor to be examined is the duration of the illegal activity. The Court in Kimmelman found that greater penalties are necessary to incentivize wrongdoers to cease their illegal conduct. Kimmelman, 108 N.J. at 139. The longer the illegal conduct, the more significant civil penalties should be assessed. Ibid. The Department argues that the Respondent's fabrications occurred in 2014 and 2015 when the Respondent attempted to obfuscate his fraud and deceive the Department's investigator. Department Exceptions at 47. The Department argues that this factor supports a higher penalty. Ibid. The Respondent first supplied the form to the Department on May 21, 2014 and confirmed to a Department investigator that it was sent to Morstan on August 5, 2014, and June 1, 2015. The duration of the illegal activity is over a year. I agree that this factor supports a higher penalty.

The existence of criminal punishment and whether a civil penalty may be unduly punitive if other sanctions have been imposed is the sixth factor under the Kimmelman analysis. The Supreme Court held in Kimmelman that a lack of criminal punishment weighs in favor of a more significant civil penalty because the defendant cannot argue that he or she has already paid a price for his or her unlawful conduct. Kimmelman, 108 N.J. at 139. The Department argues that there are no criminal or treble damage actions related to this matter. Department Exceptions at 47. The Department argues that this factor is neutral and supports a moderate penalty. Ibid. I disagree that this factor is neutral because there are no criminal or treble damages related to this matter. As

stated in Kimmelman, the lack of criminal punishment (or treble damages), as in this matter, weighs in favor of a more significant penalty because the Respondent cannot argue that he already paid a price for his unlawful conduct.

The final factor examined in Kimmelman is previous relevant regulatory and statutory violations of the Respondent, and if past penalties have been insufficient to deter future violations. The Department argues that as to the seventh factor, there is no evidence of past violations of the Respondent and this factor supports a lower penalty. Department Exceptions at 47. I agree that there is no evidence of past violations and this factor weighs in favor of a lower penalty.

In light of the above Kimmelman analysis and based on the violations I have concluded that the Respondent committed, I REJECT the ALJ's recommendation that the Respondent not be assessed any monetary penalty and instead impose a monetary penalty of $2,000 for producing a Dwelling Fire insurance application to the Department to make it appear as the original homeowners insurance application submitted to Lexington when it was not the application actually provided to the insurer, in violation of N.J.S.A. 17:22A-40(a)(2), (5), (8), and (16).

This amount is necessary and appropriate under the above Kimmelman analysis given the Respondent's conduct. The Respondent, or someone in his office, submitted a fabricated form in response to an inquiry from a Department investigator. The Respondent, or someone in his office, lied to his regulatory authority and impeded an investigation. As stated above, the Respondent is responsible for the insurance-related conduct of his employees. N.J.A.C. 11:17-2.10(b)(4). This penalty demonstrates the appropriate level of opprobrium for such misconduct, reminds insurance producers of the consequence of not adequately supervising their employees, and will serve to deter future misconduct by the Respondent and the industry as a whole.

I also REJECT the ALJ's recommendation that the Respondent not be assessed the costs of investigation. Pursuant to N.J.S.A. 17:22A-45(c), it also is appropriate to impose reimbursement of the costs of investigation. The Department requests $912.50 for the costs of investigation. This amount is consistent with the amount in the Certification of Department Investigator Ashley Mallory. Mallory Cert., ¶4. Accordingly, I ORDER the Respondent to reimburse the Department for the costs of investigation in the amount of $912.50.

The Department also requested a $1,000 Fraud Act surcharge pursuant to N.J.S.A. 17:33A-5.1. Department Exceptions at 48. Because the Department did not prove that the Respondent violated the Fraud Act, this charge will not be imposed on the Respondent. The Department requested $35,960.50 in attorneys' fees pursuant to N.J.S.A. 17:33A-5(c). Ibid. I also decline to impose this charge on the Respondent, as the Department did not prove violations of the Fraud Act.

Lastly, I ADOPT the ALJ's recommendation that the Respondent is not responsible for restitution to Kidane in the amount of $685.00.

CONCLUSION

Having carefully reviewed the Initial Decision, the Department's Exceptions, and the entire record herein, I hereby ADOPT the Findings and Conclusions as set forth in Initial Decision, except as MODIFIED or REJECTED as set forth herein. Specifically, as to Counts One to Four, and Count Six, I ADOPT the ALJ's recommendation that the Department did not prove the violations in the OTSC.

As to Count Five, I REJECT the ALJ's finding that the Department did not prove the violations in the OTSC and find that the Respondent violated N.J.S.A. 17:22A-40(a)(2), (5), (8),

and (16). I ADOPT the ALJ's findings that the Department did not prove that the Respondent violated N.J.S.A. 17:22A-40(a)(10).

I also REJECT the ALJ's recommendation that no action against the Respondent's insurance license be taken and hereby ORDER the suspension of the Respondent's license for six months effective as of the date of this Final Order and Decision. I also REJECT the ALJ's recommendation that the Respondent not be assessed monetary penalties and hereby ORDER the imposition of $2,000 in monetary penalties for the violations in Count Five of the OTSC and $912.50 in costs of the investigation.

It is so ORDERED on this ___24th____ day of _____June_____ 2022.

Marlene Caride
Commissioner

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