

STATE OF NEW JERSEY  
DEPARTMENT OF BANKING AND INSURANCE

OAL DOCKET NO.: BKI-14704-19  
AGENCY DOCKET NO.: OTSC #E19-47

MARLENE CARIDE,	)	
NEW JERSEY	)	FINAL DECISION AND ORDER
DEPARTMENT OF BANKING AND	)	
INSURANCE,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	
STEPHEN A. RUSSO,	)	
	)	
Respondent.	)	

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”), and all powers expressed or implied therein, for the purposes of reviewing the August 8, 2022 Initial Decision (“Initial Decision”) of Administrative Law Judge Hon. Catherine A. Tuohy (“ALJ”). The Initial Decision incorporates the September 21, 2021 Order Granting Partial Summary Decision (“PSD”) issued by the ALJ, which granted a Motion for Summary Decision brought by the Department of Banking and Insurance (“Department”). In the PSD, the ALJ found for the Department and against Respondent Stephen A. Russo (“Respondent”) on Counts One, Two, and Three, as alleged in Order to Show Cause No. E19-47 (“OTSC”) and found that revocation of the Respondent’s insurance producer license was appropriate. The ALJ reserved her recommendation regarding the assessment of civil monetary penalties until a hearing could be held.

After a hearing on penalties, the ALJ recommended that the Respondent be fined \$250 for Count Two and \$250 for Count Three of the Order to Show Cause (“OTSC”). In addition, the ALJ recommended that the Respondent be liable for costs of investigation in the amount of \$700.

### **STATEMENT OF THE CASE AND PROCEDURAL HISTORY**

On May 6, 2019, The Department issued the OTSC against the Respondent which sought to revoke the Respondent’s insurance producer license, impose civil monetary penalties, and costs of investigation, for violations of the Producer 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: That by being convicted of a felony or crime of the fourth degree or higher, the respondent is in violation of N.J.S.A. 17:22A-40(a)(6);

Count Two: The Respondent failed to advise the Commissioner of his arrest within 30 days, in violation of N.J.S.A. 17:22A-40(a)(18) and N.J.S.A. 17:22A-47(b); and

Count Three: The Respondent failed to advise the Commissioner of his subsequent conviction within 30 days, in violation of N.J.S.A. 17:22A-40(a)(18) and N.J.S.A. 17:22A-47(b).

The Respondent filed an Answer and requested a hearing. PSD at 2. The Department transmitted the matter as a contested case to the Office of Administrative Law (“OAL”) on October 17, 2019, pursuant to N.J.S.A. 52:14B-1 to -31 and N.J.S.A. 52:14F-1 to -23. Ibid.

On May 25, 2021 the Department filed a Motion for Summary Decision, which the Respondent opposed via e-mail dated August 28, 2021. Ibid. The Department filed its reply on September 10, 2021. Ibid. On September 21, 2021, the ALJ issued an Order granting Partial Summary Decision to the Department as to the violations and revocation of the Respondent’s insurance producer license, but denied as to the monetary penalty because the record did not contain enough facts to make an appropriate determination. Initial Decision at 2.

During a phone conference on October 28, 2021 to schedule the hearing to determine penalties, the Department requested an amended partial summary decision be issued to address the passage of N.J.S.A. 45:1-21.5, which had become effective on August 9, 2021. Ibid. In support of its request, the Department submitted a letter brief on November 15, 2019, which the Respondent opposed via e-mail the same day. Id. at 2-3. The Department filed its reply on November 19, 2021. Id. at 3.

At a phone conference on December 1, 2021 to discuss this issue, the ALJ advised that the OTSC was issued on May 16, 2019, before the passage of N.J.S.A. 45:1-21.5, and the order granting Partial Summary Decision was based on the law at that time and the ALJ would not issue an amended Partial Summary Decision. Ibid. The ALJ further advised the Department to speak to its client about withdrawing the OTSC and issuing a new OTSC to address N.J.S.A. 45:1-21.5. Ibid. By letter dated January 7, 2022, the Department declined to withdraw the OTSC. Ibid.

After several more phone conferences and adjournments, the penalty phase of the hearing was conducted on July 15, 2022 via Zoom and the record was closed the same day. Ibid.

### **ALJ'S FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS**

#### The ALJ's Factual and Legal Findings

The ALJ noted that pursuant to N.J.A.C. 1:1-12.5(b) a motion for summary decision requires analysis of whether “the papers and discovery which have been filed, together with affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law.” PSD at 3. Further, the ALJ stated that when evidence is so one-sided that one party must prevail as a matter of law, the trial court should not hesitate to grant summary judgment. Id. at 4 (citing Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 550 (1995)).

In light of this standard, the ALJ found the Department should prevail as a matter of law on the violations alleged in Counts One, Two, and Three of the OTSC. PSD at 5. The ALJ found the following facts were undisputed in granting summary decision. The Respondent was first licensed as an insurance producer on June 17, 2015, and his license expired on June 30, 2017. Id. at 2. On December 29, 2015, the Respondent was arrested and did not notify the Department of his arrest within 30 days. Id. at 2-3. On March 20, 2017, the Respondent was convicted of Theft by Deception in the third degree in violation of N.J.S.A. 2C:20-4 and did not notify the Department of this conviction within 30 days. Ibid. On March 20, 2017, the Respondent was sentenced to two years' probation, ordered to pay \$854.46 to ShopRite in restitution, and prohibited from entering several ShopRite locations. Id. at 3. The Respondent was not issued a waiver to be employed in the business of insurance pursuant to 18 U.S.C. § 1033(e) and N.J.A.C. 11:17E-1.3(a). Ibid.

The ALJ found that the Respondent was convicted of a felony in the third degree in violation of N.J.S.A. 17:22A-40(a)(6), which prohibits insurance producers from being convicted of a felony in the fourth degree or higher. Id. at 5. Further, the ALJ found that the Respondent failed to notify the Commissioner within 30 days of his arrest or his guilty plea in violation of N.J.S.A. 17:22A-40(a)(18) and N.J.S.A. 17:22A-47(b). Ibid.

#### Penalties Recommended by the ALJ

The ALJ concluded that the revocation of the Respondent's insurance producer license was appropriate pursuant to N.J.S.A. 17:22A-40(a). Ibid.

As to the appropriate monetary penalty, the ALJ noted that the Department sought a total fine of \$2,000 - \$1,000 for failing to notify the Commissioner of his arrest and \$1,000 for failing to notify the Commissioner of his conviction. Id. at 6. However, the ALJ stated that summary decision as to the penalty amount was inappropriate because the record did not have enough

information concerning the seven factors for determining monetary penalties set forth in Kimmelman v. Henkles & McCoy, Inc., 108 N.J. 123, 137-39 (1987). PSD at 6.

On July 15, 2022 the ALJ conducted a hearing to determine the appropriate monetary penalties. The ALJ summarized the testimony of the Respondent. Initial Decision at 3-4. The Respondent testified that on December 29, 2015, he wrote a check to ShopRite for \$854.46, but he had insufficient funds. Id. at 3.<sup>1</sup> He pled guilty to theft by deception and agreed to pay \$25 a month to ShopRite in restitution. Id. at 3-4. His restitution was fully paid when the remaining balance was taken from his state tax refund in 2019. Id. at 4.

The Respondent testified that in April 2016 or 2017 he became homeless after the home he was living in was condemned and he could not notify the Department of his arrest or conviction. Ibid.

The Respondent testified that he worked part-time as a bail bondsman and full time as a manager at Walmart from 2014-2015, then worked full time at a Burger King for three years. Ibid. He is currently unemployed and cares for his mother who needs constant care. Ibid. He will start getting paid as a caretaker through Medicaid, and believes he will receive minimum wage. Ibid. The ALJ found the Respondent to be a credible witness who “has been trying to put this isolated incident behind him.” Ibid.

The ALJ analyzed the seven factors for determining monetary penalties set forth in Kimmelman. Id. at 5-7. These factors include: (1) the good faith or bad faith of the Respondent; (2) the Respondent’s ability to pay; (3) the amount of profits obtained from the illegal activity; (4)

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<sup>1</sup> The Judgment of Conviction indicates that the date of the offense was December 21, 2015. Certification of Matthew Gervasio, Exhibit 2.

injury to the public; (5) duration of the illegal activity or conspiracy; (6) existence of criminal actions; and (7) past violations. Id. at 6.

As to the first factor in Kimmelman, the good or bad faith of the Respondent, the ALJ stated the Respondent's underlying conduct of passing a bad check did not involve "any wrongdoing concerning insurance" and supports a lesser penalty. Id. at 5.

As to the second factor in Kimmelman, the ability to pay, the ALJ stated that the Respondent was only ordered to pay \$25 a month in restitution, "indicating that the court took into account his ability to pay more." Ibid. Further, the Respondent is unemployed and caring for his ailing mother. The ALJ found that this factor supports a lesser penalty. Ibid.

As to the third factor, the profits obtained, the ALJ stated that the Respondent did not obtain any profit "related to any misconduct involving an insurance related activity" and made restitution to ShopRite. Ibid. The ALJ concluded that this factor supports a lesser penalty. Ibid.

As to the fourth factor, injury to the public, the ALJ reiterated that the Respondent's offense did not relate to insurance. Ibid. The ALJ further noted that as an insurance producer, he is held to a higher standard of conduct and found that this factor is neutral in the imposition of a penalty. Ibid.

Regarding the fifth factor in Kimmelman, the duration of illegal activity, the ALJ found that the Respondent's failure to report his arrest and conviction was an isolated incident and not indicative of a course of illegal conduct. Ibid. The ALJ found that this factor supports a lesser monetary penalty. Ibid.

Regarding the sixth factor, the existence of criminal charges related to the matter, the ALJ found that the Respondent's conviction for writing a bad check "was collateral to and not related to the insurance regulations" and supports a lower penalty. Id. at 6.

For the final factor in Kimmelman, previous relevant regulatory and statutory violations, the ALJ found that the Respondent had not previously violated the Producer Act and has not been the subject of any criminal proceedings before or after this conviction. Ibid. Accordingly, the ALJ found that this factor supports a lower penalty. Ibid.

The ALJ reiterated that the Respondent's conduct "did not involve an offense that has a direct or substantial relationship to the insurance industry." Id. at 7. Further, he has no prior violations, made restitution to ShopRite, and no longer has an insurance producer license because it expired before the recommendation of revocation in the PSD. Ibid.

Based upon the above analysis, the ALJ recommended that a civil monetary penalty of \$250 be imposed for failing to notify the Commissioner within 30 days of his arrest (Count Two), and \$250 be imposed for failing to notify the Commissioner within 30 days of his conviction (Count Three) for a civil monetary penalty of \$500. Ibid. The ALJ additionally found that reimbursement of the costs of investigation and prosecution in the amount of \$700 was appropriate. Ibid.

### **EXCEPTIONS**

The Department filed its exceptions on August 15, 2022. ("Department Exceptions"). The Respondent also submitted his reply via e-mail on August 15, 2022. ("Respondent Reply").

#### **Department Exceptions**

The Department stated that it agreed with the ALJ's recitation of the statement of the case and procedural history. Department Exceptions at 1. However, the Department took exception to the ALJ not issuing an amended PSD to address N.J.S.A. 45:1-21.5, the ALJ's finding that the Respondent fully paid his restitution to ShopRite, and the amount of civil penalties recommended by the ALJ. Id. at 2-7.

### Exception 1-Analysis of N.J.S.A. 45:1-21.5

The Department argues that the ALJ erred in not amending the PSD to address N.J.S.A. 45:1-21.5, which became effective August 9, 2021 and bars the Commissioner from issuing a license to a person with a prior conviction, “unless the crime has a direct or substantial relationship to the regulated activity or would endanger the public’s health, safety, or welfare.” Id. at 2. The Department analyzed the four factors that should be considered when making this decision.

As to the first factor, the nature and seriousness of the crime and the passage of time since its commission, the Department argues that the Respondent was arrested on December 29, 2015 and convicted on March 17, 2017 for theft by deception in the third degree when he was licensed as an insurance producer. Ibid. The Respondent was sentenced to probation and to pay \$854.46 in restitution to ShopRite, “a substantial amount of money.” Id. at 2-3 (citing PSD at 3). The Department argues that the Respondent was arrested six years ago. Id. at 3.

As to the second factor, the relationship of the crime or offense to the purposes of regulating the profession or occupation regulated by the entity, the Department argues that insurance producers are held to a high standard of conduct. Ibid. Further, they act in a fiduciary capacity. Ibid. (citing Strawbridge v. New York Life Ins. Co., 504 F. Supp. 824 (1980)). The public’s confidence in a licensee’s honesty, trustworthiness, and integrity are of paramount concern. Ibid. (citing Commissioner v. Fonseca, OAL Dkt. No. BKI 11979-10, Initial Decision (08/15/11), Final Decision and Order (12/28/11)).

The Department argues that the Respondent was obligated to notify the Commissioner of his arrest and conviction within thirty days of each event. Ibid. (citing N.J.S.A. 17:22A-40(a)(18) and N.J.S.A. 17:22A-47(b)). However, he failed to do so. Id. at 4 (citing PDS at 3).

As to the third factor, any evidence of rehabilitation of the person following the prior



conviction, the Department argues that there is no evidence that the Respondent has been rehabilitated. Ibid. The Department argues that the Respondent has not provided any evidence that he has paid restitution to ShopRite. Ibid.

The final factor is the relationship of the crime or offense to the ability, capacity, and fitness required to perform the duties and discharge the responsibilities of the profession or occupation regulated by the entity. Ibid. The Department states that pursuant to N.J.A.C. 17:22A-40(a)(6), an insurance producer shall not be convicted of a felony of the fourth degree or higher. Ibid. The Department asserts that the Respondent was convicted of a felony of the third degree for writing checks to ShopRite without sufficient funds. Ibid. (citing PSD at 2). The Department argues that this was deliberate because he was aware that he did not have the funds available to “cover the checks” he wrote to ShopRite. Ibid. The Department argues that licensed producers are authorized to handle others’ funds and often process insurance claims on behalf of clients, which require a high degree of honesty and integrity. Ibid.

The Department argues that the Respondent’s conduct in defrauding ShopRite by intentionally passing bad checks, being convicted of a felony, and failing to inform the Commissioner as required reflects directly on the responsibilities of an insurance producer to act with a high degree of honesty and integrity. Ibid. The Department argues that the factors under N.J.S.A. 45:1-21.5 support the revocation of the Respondent’s license and are not mitigated by evidence of rehabilitation. Id. at 4-5.

The Department asserts that under N.J.S.A. 45:1-21.5(b)(1), the Respondent should be notified of the grounds and reasons for the denial or disqualification of licensure. Id. at 5. The Department states that the Respondent is disqualified from holding an insurance producer license because he was convicted of a felony involving a crime of dishonesty and failed to notify the

Commissioner of the Department within 30 days of his arrest and conviction for third degree Theft by Deception; and failed to obtain a waiver from the Commissioner to be employed in the business of insurance in New Jersey. Ibid.

The Department asserts that under N.J.S.A. 45:1-21.5(b)(2), the Respondent should be advised when he may reapply for an insurance producer license. Ibid. The Department states that the Respondent may apply five years from the date of the Final Order revoking his insurance producer license. Ibid. (citing N.J.A.C. 11:17D-2.7).

The Department asserts that under N.J.S.A. 45:1-21.5(b)(3), the Respondent should be notified that if he applies for a license in the future, he may submit evidence of rehabilitation that will be considered. Ibid. The Department states that the following may be evidence of rehabilitation:

- 1) enrollment in school; 2) attendance or participation in a job training program; 3) steady employment; 4) certificates showing good conduct; 5) letters from a parole or probation officer or clergy; 6) letters showing volunteer work; 7) evidence of completion of a social service program; and/or 8) anything else appropriate.

Ibid.

The Department argues that when analyzing N.J.S.A. 45:1-21.5, summary decision in favor of the Department and license revocation is still appropriate. Id. at 6. The Department reiterates that the ALJ should have issued an amended PSD analyzing the factors in N.J.S.A. 45:1-21.5. Ibid. The Department “suggests the conclusion here should be the same but that the final decision should include a discussion of the factors under N.J.S.A. 45:1-21.5.” Ibid.

#### Exception 2- Payment of Restitution

The Department took exception to the ALJ’s finding that restitution that the Respondent owed to ShopRite was taken from his state tax refund in 2019. Ibid. The Department argues that this is only supported by the Respondent’s testimony and is not corroborated by any

documentation. Ibid. The Department argues that there is no evidentiary basis to support this finding of fact. Ibid.

### Exception 3- Penalty

The Department argues that the \$2,000 civil penalty is reasonable under the Kimmelman factors. Ibid. The Department reiterates the high standards of conduct that insurance producers are held to and that the Respondent's conduct in intentionally passing bad checks to ShopRite and failing to inform the Commissioner of his subsequent arrest and conviction "reflects directly on the responsibilities of an insurance producer to act with a high degree of honesty and integrity." Id. at 6-7.

The Department argues that it has considered the Respondent's reasons for failing to comply with the law and requests a penalty below the maximum authorized under N.J.S.A. 17:22A-45(c), which allows up to \$5,000 for a first violation and up to \$10,000 for each subsequent violation. Id. at 7. The Department argues that a penalty of \$2,000 is supported by the Kimmelman factors and is supported by prior precedent. Ibid. (citing Commissioner v. Gundy, OAL Dkt. No. BKI 9338-11, Agency Dkt. No. E11-26, Initial Decision, (02/12/12), Final Decision, (05/24/12); Commissioner v. Budge, OAL Dkt No. BKI-10260-2004S, Final Order (06/28/07), aff'd 2009 N.J. Super. Unpub. LEXIS 2023 (App. Div. 2009), certif. denied 201 N.J. 155 (2010)).

The Department incorporated by reference its Kimmelman analysis from its brief in support of the motion for summary decision. Department Exceptions at 7. In its brief in support of its motion for summary decision, the Department lists the factors at Kimmelman, and states that "[o]n balance, a review of the Kimmelman factors suggests \$1,000 is an appropriate penalty for each failure to notify violation, which aligns with the penalties assessed for failures to notify in other prior cases." Department's Letter Brief in Support of Motion for Summary Decision at 7 (citing

Gundy; Budge).

### Respondent Reply

The Respondent argued in his reply that the Department “is obviously pulling at straws” to obtain the largest fine possible. Respondent Reply at 1. The Respondent stated that the penalty recommended by the ALJ is fair and that the Department “is clearly over blowing this thing to a whole different level.” Ibid.

### LEGAL DISCUSSION

The Department bears the burden of proving the allegations in an Order to Show Cause by a preponderance of the competent, relevant, and credible evidence. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). The evidence must be such as would lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Preponderance may be described as “the greater weight of credible evidence in the case. It does not necessarily mean...the greater number of witnesses but...carries the greater convincing power...” State v. Lewis, 67 N.J. 47 (1975). To prove an allegation by the preponderance of the evidence, a party must show that the allegation is more likely true than not true. If the evidence is equally balanced, that issue has not been proven by a preponderance of the evidence. Civil Model Jury Charge 1.12H.

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

affidavit, set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding.” Ibid.

As noted by the ALJ, in Brill, the New Jersey Supreme Court clarified the summary judgment standard. The Court held that a determination as to whether there exists a genuine issue of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party. The court said:

The judge’s function is not himself (herself) to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. [citations omitted]. To send a case to trial, knowing that a rational jury can reach but one conclusion, is indeed worthless and will serve no useful purpose.

Brill, 142 N.J. at 541.

Motions for summary judgment in civil actions are considered under R. 4:46-2, which provides that the motion sought shall be granted if the evidence adduced shows there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law. R. 4:46-2(b). An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact. R. 4:46-2(c). The Brill Court noted that “by its plain language, R. 4:46-2 dictates that a court should deny a summary judgment motion only where the party opposing the motion has come forward with evidence that creates a genuine issue as to any material fact challenged.” Brill, 142 N.J. at 529.

The ALJ found that the Respondent failed to adduce evidence that would create a genuine issue as to any material fact challenged and that summary decision is appropriate as to the

allegations contained in Counts One through Three of the OTSC. I concur that summary decision is appropriate.

### Allegations Against Respondent

The OTSC charges the Respondent with violations of the Producer Act. Specifically, the OTSC alleges that the Respondent was convicted of a crime in the fourth degree or higher (Count One), and failed to inform the Commissioner of his arrest (Count Two), and conviction (Count Three) in violation of the Producer Act.

### Count One

Count One of the OTSC alleges that the Respondent was convicted of a felony or crime of the fourth degree or higher in violation of N.J.S.A. 17:22A-40(a)(6).

The ALJ found that the Respondent was convicted of a felony in the third degree in violation of N.J.S.A. 17:22A-40(a)(6), which prohibits insurance producers from being convicted of a felony in the fourth degree or higher. PSD at 5. The Respondent testified that on December 29, 2015, he wrote a check to ShopRite for \$854.46, but he had insufficient funds. Initial Decision at 3. As a result, the Respondent was convicted of theft by deception in the third degree pursuant to N.J.S.A. 2C:20-4. PSD at 4.

Neither party took exception to the ALJ's findings.

I find that the Department submitted undisputed evidence that the Respondent was convicted of a crime of the fourth degree or higher and summary decision is appropriate as to the allegations in Count One of the OTSC. Specifically, the Respondent was convicted of theft by deception in the third degree for writing a bad check to ShopRite.<sup>2</sup>

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<sup>2</sup> Theft can be a disorderly persons offense, or a crime of the fourth, third, or second degree depending on the amount of money involved. Theft is a third-degree offense if the amount exceeds \$500, but is less than \$75,000. N.J.S.A. 2C:20-2(b)(2)(a).

Accordingly, I ADOPT the ALJ's determination that the Respondent was convicted of theft by deception in the third degree and I find that the Department proved that the Respondent violated N.J.S.A. 17:22A-40(a)(6).

### Count Two

Count Two of the OTSC alleges that the Respondent failed to advise the Commissioner of his arrest within 30 days, in violation of N.J.S.A. 17:22A-40(a)(18) (failing to notify the commissioner within 30 days of the filing of formal criminal charges) and N.J.S.A. 17:22A-47(b) (an insurance producer shall report to the commissioner any criminal prosecution of the producer within 30 days of the initial pretrial hearing date).

The ALJ found that on December 29, 2015, the Respondent was arrested and did not notify the Department of his arrest within 30 days. PSD at 2-3. The Respondent testified that in April 2016 or 2017 he became homeless after the house he was living in was condemned and he could not notify the Department of his arrest or conviction. Initial Decision at 4. The ALJ found that the Respondent failed to notify the Commissioner within 30 days of his arrest in violation of N.J.S.A. 17:22A-40(a)(18) and N.J.S.A. 17:22A-47(b). PSD at 5.

Neither party took exception to the ALJ's findings.

I find that the Department submitted undisputed evidence that the Respondent was arrested on December 29, 2015 and did not notify the Commissioner within 30 days. Pursuant to N.J.S.A. 17:22A-40(a)(18) and N.J.S.A. 17:22A-47(b), the Respondent was to notify the Commissioner of charges being filed within 30 days, or January 28, 2016. However, he failed to do so.

Accordingly, I ADOPT the ALJ's determination that the Respondent failed to inform the Commissioner of the charges being filed against him within 30 days and I find that the Department proved that the Respondent violated N.J.S.A. 17:22A-40(a)(18) and N.J.S.A. 17:22A-47(b).

### Count Three

Count Three of the OTSC alleges that the Respondent failed to advise the Commissioner of his subsequent conviction within 30 days, in violation of N.J.S.A. 17:22A-40(a)(18) (failing to notify the commissioner within 30 days of the filing of a conviction of any crime) and N.J.S.A. 17:22A-47(b) (an insurance producer shall report to the commissioner any criminal prosecution of the producer within 30 days of the initial pretrial hearing date).

The ALJ found that on March 20, 2017, the Respondent was convicted of Theft by Deception in the third degree in violation of N.J.S.A. 2C:20-4 and did not notify the Department of this conviction within 30 days. PSD at 2-3. The Respondent testified that in April 2016 or 2017 he became homeless after the home he was living in was condemned and he could not notify the Department of his arrest or conviction. Initial Decision at 4. The ALJ found that the Respondent failed to notify the Commissioner within 30 days of his conviction in violation of N.J.S.A. 17:22A-40(a)(18) and N.J.S.A. 17:22A-47(b). PSD at 5.

Neither party took exception to the ALJ's findings.

I find that the Department submitted undisputed evidence that the Respondent was convicted of theft by deception on March 20, 2017 and did not notify the Commissioner within 30 days. Pursuant to N.J.S.A. 17:22A-40(a)(18) and N.J.S.A. 17:22A-47(b), the Respondent was to notify the Commissioner of his conviction within 30 days, or April 19, 2017. However, he failed to do so.

Accordingly, I ADOPT the ALJ's determination that the Respondent failed to inform the Commissioner of his conviction within 30 days and I find that the Department proved that the Respondent violated N.J.S.A. 17:22A-40(a)(18) and N.J.S.A. 17:22A-47(b).



## **PENALTY AGAINST THE RESPONDENT**

### **Revocation of the Respondent's Insurance Producer License**

The Respondent was first licensed on June 17, 2015. PSD at 2. He was arrested on December 29, 2015 and convicted on March 20, 2017. Ibid. His insurance producer license expired on June 30, 2017 and the Respondent did not apply to renew it. Ibid. Although the Respondent's license is currently expired, the Commissioner retains her authority to enforce the provisions of the Producer Act against any person charged with a violation. N.J.S.A. 17:22A-47(d). Accordingly, although the Respondent is no longer a licensed insurance producer, it is appropriate to take action against his license and levy appropriate fines.

With respect to the appropriate action to take against the Respondent's insurance producer license, I find that the record is more than sufficient to support license revocation and compels the revocation of the Respondent's license. Accordingly, I ADOPT the ALJ's recommendation that the Respondent's insurance producer license be revoked due to violations of the Producer Act.

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. Fonseca, (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). Additionally, a licensed producer is better placed than a member of the public to defraud an insurer. Strawbridge v. New York Life Ins. Co., 504 F. Supp. 824 (1980). A producer is held to a high standard of conduct,

and should fully understand and appreciate the effect irresponsible conduct has on the insurance industry and on the public.

I find that revocation of the Respondent's insurance producer license is warranted. The Respondent wrote checks to ShopRite with insufficient funds, then failed in his duty to report his arrest and conviction to the Commissioner within 30 days.

Application of N.J.S.A. 45:1-21.5

The Department took exception to the ALJ's decision not to issue an amended PSD to include an analysis of N.J.S.A. 45:1-21.5. Department Exceptions at 2-6. The Department does not argue why the ALJ's reason to not issue an amended PSD was incorrect. The Department states that the provisions of N.J.S.A. 45:1-21.5 "may be applicable" to this case. Id. at 2.

"A statute takes effect as of the time it goes into effect..." Cruz v. Cent. Jersey Landscaping, Inc., 195 N.J. 33, 42 (2008) (citing Cruz v. Cent. Jersey Landscaping, Inc., 393 N.J. Super. 34, 54-55 (Holston, J.A.D., dissenting)). Individuals are put on notice of legislative enactments on the date the legislation becomes effective. Schirmer-National Co. v. Dir., Div. of Taxation, 17 N.J. Tax 495, 504 (1998). "[T]he effective date of an enactment puts the public on notice of the same, and the date it is effective." Pres. II, Inc. v. Dir., Div. of Taxation, 30 N.J. Tax 133, 178 (2017) (citing Brasko v. Duchek, 127 N.J. Eq. 567, 569 (Prerog. Ct. 1940) ("A statute does have the effect, immediately upon its enactment, of giving notice to all persons that the law will be as set forth in the statute, on and after the specified date for it to come into effect")). Further, if an effective date is in the future, then the enactment "is to be construed in the same manner as if it had been enacted on that date,—that it speaks only from the date on which it is to go into effect, and has no force or effect whatever until the arrival of that date." Ibid.

The OTSC was issued May 6, 2019. PSD at 2. The Department filed a motion for summary decision on May 25, 2021. Initial Decision at 2. N.J.S.A. 45:1-21.5 became effective on August 9, 2021. The PSD was issued on September 21, 2021. Id. N.J.S.A. 45:1-21.5 applies to this matter.

Pursuant to N.J.S.A. 45:1-21.5,

an entity shall not disqualify a person from obtaining or holding any...license issued by an entity solely because the person has been convicted of or engaged in acts constituting any crime or offense, unless the crime or offense has a direct or substantial relationship to the activity regulated by the entity or is of a nature such that...licensure of the person would be inconsistent with the public's health, safety, or welfare.

N.J.S.A. 45:1-21.5 lists four factors to consider when making this determination.

The first factor at N.J.S.A. 45:1-21.5(a)(1) is the nature and seriousness of the crime and the passage of time since its commission. The Department argues that the Respondent was arrested on December 29, 2015 and convicted on March 17, 2017 for theft by deception in the third degree when he was licensed as an insurance producer. Department Exceptions at 2. The Respondent committed this act six years ago. This factor weighs in favor of disqualifying the Respondent from licensure because of the seriousness of the offense and the proximity in time.

The second factor at N.J.S.A. 45:1-21.5(a)(2) is the relationship of the crime or offense to the purposes of regulating the profession or occupation regulated by the entity. The Department argues that insurance producers are held to a high standard of conduct and act in a fiduciary capacity. Id. at 3. As stated above, 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. This factor also weighs in favor of disqualifying the Respondent from licensure because of the high standards of conduct expected of insurance producers.

The third factor at N.J.S.A. 45:1-21.5(a)(3) is any evidence of rehabilitation in the time following the prior conviction that may be made available. The Department argues that there is no evidence that the Respondent has been rehabilitated. Id. at 4. The Department further argues that the Respondent has not provided any evidence that he has paid restitution to ShopRite. Ibid. The Department also took exception to the ALJ's finding that the Respondent paid restitution to ShopRite because he has not corroborated this claim with any documentation. Id. at 6. However, the ALJ found the Respondent to be "a credible witness that has been trying to put this isolated incident behind him." Initial Decision at 4. I find that the Respondent was able to show some evidence of rehabilitation. He testified credibly that he made restitution and was trying to move on and focus on taking care of his ailing mother. This factor is neutral in regard to disqualifying the Respondent from licensure.

The final factor at N.J.S.A. 45:1-21.5(a)(4) is the relationship of the crime or offense to the ability, capacity, and fitness required to perform the duties and discharge the responsibilities of the profession or occupation regulated by the entity. The Department argues that a licensed insurance producer is better placed than a member of the public to defraud an insurer or client and should fully understand and appreciate the effect of fraudulent or irresponsible dealing on the industry and on the public. Department Exceptions at 4. The Department asserts that the Respondent was convicted of a felony of the third degree for writing checks to ShopRite without sufficient funds in violation of N.J.S.A. 17:22A-40(a)(6). Ibid. (citing PSD at 2). The Department argues that licensed producers are authorized to handle others' funds and often process insurance claims on behalf of clients, which require a high degree of honesty and integrity. Ibid.

As stated above, insurance producers are held to a high standard of conduct and the public's confidence in a licensee's honesty, trustworthiness, and integrity are of paramount concern. The

Respondent's conviction of theft by deception is directly related to his fitness for licensure as an insurance producer. This factor also weighs in favor of disqualifying the Respondent from licensure because of the high standards of conduct expected of insurance producers and the relationship of theft by deception to those standards.

Under N.J.S.A. 45:1-21.5(b), after a person is disqualified from licensure, the entity shall notify the person in writing of the grounds for disqualification, the earliest date they may reapply for licensure, and that additional evidence of rehabilitation may be considered upon reapplication.

Under N.J.S.A. 45:1-21.5(b)(1), the Respondent must be notified for the grounds for disqualification. The Respondent is disqualified from licensure due to his conviction for theft by deception in the third degree and his failure to notify the Commissioner of his arrest or conviction within 30 days in violation of N.J.S.A. 17:22A-40(a)(18) and N.J.S.A. 17:22A-47(b).

Under N.J.S.A. 45:1-21.5(b)(2), the Respondent must be notified of the earliest date he may apply for licensure. The Respondent may apply for a producer license five years from the date of this Final Order revoking his insurance producer license. N.J.A.C. 11:17D-2.7.

Lastly, the Respondent must be notified that additional evidence of rehabilitation may be considered if he applies for licensure. Evidence of rehabilitation may include the absence of any misconduct over a period of intervening years and a particularly productive use of one's time subsequent to the misconduct. In re Matthews, 94 N.J. 59, 82 (1983) (citations omitted). Evidence of rehabilitation may include, but is not limited to: enrollment in school or job training, maintaining steady employment, volunteer work, letters from probation officers indicating that probation has been successfully completed without any violations, letters of recommendation from people aware of the applicant's misconduct who specifically consider the individual's fitness in light of that behavior, and no further involvement with the criminal justice system.

### Monetary Penalty 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. Strandkov, OAL Dkt. No. BKI 03451-07, Initial Decision (09/25/08), Final Decision and Order (02/04/09). The Producer Act provides that the Commissioner may impose a penalty not exceeding \$5,000 for the first offense and not exceeding \$10,000 for each subsequent offense. N.J.S.A. 17:22A-45.

As noted by the ALJ, pursuant to Kimmelman, certain factors are to be examined when assessing administrative monetary penalties. No one Kimmelman factor is dispositive for or against fines and penalties. See Kimmelman, 108 N.J. at 139 (“[t]he weight to be given to each of these factors by a trial court in determining . . . the amount of any penalty, will depend on the facts of each case”).

The first Kimmelman factor addresses the good faith or bad faith of the Respondent. The ALJ stated the Respondent’s underlying conduct of passing a bad check did not involve “any wrongdoing concerning insurance” and supports a lesser penalty. Initial Decision at 5. I find that the Respondent demonstrated bad faith when he wrote a check to Shoprite knowing that he had insufficient funds. It is immaterial that the conduct did not involve the Respondent’s insurance license. Further, he also acted in bad faith in not notifying the Commissioner of his arrest or conviction within 30 days as required. Accordingly, this factor weighs in favor of a higher monetary penalty.

The second factor in Kimmelman is the Respondent’s ability to pay. 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). An insurance producer's ability to pay is only a single factor to be considered in determining an appropriate fine and does not obviate the need for the imposition of an otherwise appropriate monetary penalty. Moreover, the Commissioner has issued substantial fines against insurance producers despite their arguments regarding their inability to pay. See Commissioner v. Fonseca, (issuing a \$100,500 civil penalty despite the producer arguing that he was unable to pay); See also Commissioner v. Erwin, OAL Dkt. No. BKI 4573-06, Initial Decision, (07/09/07), Final Decision and Order (09/17/07) (fine of \$100,000 imposed despite evidence of the Respondent's inability to pay); and Commissioner v. Malek, OAL Dkt. Nos. BKI 4520-05 and BKI 486-05, Initial Decision (12/06/05), Final Decision and Order (01/18/06) (fine increased from \$2,500 to \$20,000 even though the producer argued an inability to pay fines in addition to restitution).

The ALJ found that the Respondent is unemployed and caring for his ailing mother. Initial Decision at 5. I also note that the Respondent has struggled with homelessness. Accordingly, this factor weighs in favor of a lesser penalty.

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. The ALJ found that the Respondent did not profit from any misconduct related to insurance and made restitution to ShopRite. Initial Decision at 5. 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 laws of this State were successful. Kimmelman, 108 N.J. at 138. Accordingly, considering that the Respondent had the opportunity to profit \$854.46, the amount of the check, this factor weighs in favor of a higher monetary 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. The ALJ stated that the Respondent's offense did not relate to insurance, but noted that as an insurance producer, the Respondent is held to a higher standard of conduct. Initial Decision at 5. The public is harmed when licensed insurance professionals engage in illegal and dishonest activity. This undermines the public's confidence in insurance producers. The Respondent also failed in his duty to report his arrest and conviction, which impedes the regulator's ability to protect the public. Accordingly, I find 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 ALJ found that the Respondent's failure to report his arrest and conviction to the Commissioner was an isolated incident and "not evidence of a course of illegal conduct." Initial Decision at 5. The ALJ concluded that this factor supports a lesser penalty. Ibid. I find that the Respondent wrote the check to ShopRite on December 21, 2015. He was arrested on December 29, 2015 and convicted on March 20, 2017. He failed to inform the Commissioner of either his arrest or conviction. I find that the course of the Respondent's conduct was over a year and this factor weighs in favor of a higher monetary 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. Regarding this factor, the ALJ found that the Respondent's conviction for writing a bad check "was collateral to and not related to the insurance regulations" and supports a lower penalty. Initial Decision at 6. Here, the Respondent pled guilty to theft by deception and was sentenced to two years' probation. Accordingly, I find that this factor weighs against a significant monetary penalty.

The last Kimmelman factor addresses whether the producer had previously violated the Producer Act, and if past penalties have been insufficient to deter future violations. The ALJ found that the Respondent had not previously violated the Producer Act, which supports a lesser penalty. Initial Decision at 6. I concur with the ALJ that this factor weighs in favor of a lower monetary penalty.

Weighing all of the Kimmelman factors, and based upon the violations of the Producer Act as set forth above, I ADOPT the recommendations of the ALJ that the Respondent shall pay civil monetary penalties. The ALJ found that a penalty of \$250 for the violations in Count Two and \$250 for the violations in Count Three is appropriate. Initial Decision at 7. I ADOPT the recommendations of the ALJ that the Respondent shall pay civil monetary penalties. However, I MODIFY the ALJ's recommendation and order that the Respondent be fined \$500 in civil monetary penalties related to Count Two for failing to notify the Commissioner of charges being filed against him and \$500 related to Count Three for failing to notify the Commissioner of his conviction in violation of N.J.S.A. 17:22A-40(a)(18) and N.J.S.A. 17:22A-47(b).

These penalties are necessary and appropriate given the Respondent's misconduct. The Respondent wrote a check to ShopRite in the amount of \$854.46, when he had insufficient funds. Initial Decision at 3. He then failed to report his arrest and conviction to the Commissioner, as required by the Producer Act.

These penalties demonstrate the appropriate level of opprobrium for such misconduct, and will serve to deter future misconduct by the Respondent and the industry as a whole.

I note that the Department requested \$1,000 for the violations in Count Two and \$1,000 for the violations in Count Three for a total of \$2,000 in monetary penalties. In its Exceptions, the Department states that this amount is supported by the Kimmelman factors and cites to Commissioner v. Gundy and Commissioner v. Budge. Department Exceptions at 7. In Gundy, the Commissioner imposed a monetary penalty of \$1,000 for failing to notify the Department of the criminal charges having been filed against him and of pleading guilty to knowingly disobeying a judicial order and harassment in violation of N.J.S.A. 17:22A-47(b) and N.J.S.A. 17:22A-40(a)(2) and (18). The Commissioner imposed a penalty of \$1,500 for failing to notify the Commissioner of the criminal charges having been filed against him and of pleading guilty to forgery and theft by deception in violation of N.J.S.A. 17:22A-47(b) and N.J.S.A. 17:22A-40(a)(2) and (18). In Budge, the Respondent was fined \$1,000 for failing to notify the Commissioner of being indicted within 30 days.

In its Exceptions, the Department incorporated by reference its Kimmelman analysis from its brief in support of the motion for summary decision. Department Exceptions at 7. I note that the ALJ denied the Department's motion for summary decision as to monetary penalties because there was not enough information and the record had to be fully developed in a hearing. In its brief in support of its motion for summary decision, the Department lists the factors at Kimmelman, and states that "[o]n balance, a review of the Kimmelman factors suggests \$1,000 is an appropriate penalty for each failure to notify violation, which aligns with the penalties assessed for failures to notify in other prior cases." Department's Letter Brief in Support of Motion for Summary Decision at 7. The Department does not engage in any analysis of the Kimmelman

factors and how they apply to the facts of this case. Instead, the Department cites to Gundy, and Budge for prior similar matters.

Pursuant to N.J.S.A. 17:22A-45(c), it also is appropriate to impose reimbursement of the costs of investigation. The ALJ recommended that the Department be reimbursed \$700 for costs of investigation. Initial Decision at 7. This amount is consistent with the amount in the Certification of Matthew Gervasio at ¶¶ 7-10.

### CONCLUSION

Having carefully reviewed the PSD, the Initial Decision, the parties' Exceptions, Replies, and the entire record herein, I hereby ADOPT the findings and conclusions as set forth in the PSD and Initial Decision, except as modified herein, and hold that the Respondent violated the Producer Act as charged in the OTSC. Further, I ADOPT the conclusion that the Department's Motion for Summary Decisions should be granted on all three Counts set forth in the OTSC.

I also ADOPT the ALJ's recommendation and hereby ORDER the revocation of the Respondent's insurance producer license. I MODIFY the ALJs' recommendations as to the imposition of civil monetary penalties and ORDER that fines totaling \$1,000 be imposed against the Respondent for the violations in Counts Two and Three, to be allocated at \$500 per count. I ADOPT the ALJ's recommendation and ORDER the Respondent to pay the costs of investigation in the amount of \$700.

It is so ORDERED on this 1<sup>st</sup> day of September 2022.



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Marlene Caride  
Commissioner