ORDER NO.: E23-09

STATE OF NEW JERSEY
DEPARTMENT OF BANKING AND INSURANCE

OAL DOCKET NO.: BKI-03342-22
AGENCY DOCKET NO.: #337452

MARLENE CARIDE, COMMISSIONER, NEW JERSEY DEPARTMENT OF BANKING AND INSURANCE,	)	
Petitioner,	)	
v.	)	FINAL DECISION AND ORDER
FRANCISCO MANERI,	)	
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 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 January 4, 2023 Initial Decision ("Initial Decision") of Administrative Law Judge Nanci G. Stokes ("ALJ").

In the Initial Decision, the ALJ granted the motion for summary decision brought by the Department of Banking and Insurance ("Department") on both Counts alleged in Order to Show Cause No. E22-32 ("OTSC") and recommended the following: suspension of the Francisco Maneri's insurance producer license for a period of one year, penalties in the amount of $2,500 for violations of the Producer Act and costs of the investigation in the amount of $750.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On April 11, 2022, the Department issued the OTSC against Francisco Maneri ("Respondent"), which sought to revoke the Respondent's insurance producer license and impose civil monetary penalties and investigative costs for the alleged violations of the Producer Act. The OTSC alleges that the Respondent engaged in the following activities in violation of the insurance laws of this State:

> Count One: The Respondent collected premium funds from a policy holder and failed to remit those funds to the carrier, in violation of N.J.S.A. 17:22A-40(a)(2), (4) and (8); N.J.A.C. 11:17A-4.10; N.J.A.C. 11:17C-2.1(a); and, N.J.A.C. 11:17C-2.2; and,
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> Count Two: The Respondent failed to notify the Department of a change to his business mailing address within 30 days, in violation of N.J.S.A. 17:22A-40(a)(2) and (8); and, N.J.A.C. 11:17-2.8(f)(2).

On April 19, 2022, the Respondent filed an Answer, wherein the Respondent denied certain allegations set forth in the OTSC and requested a hearing. The Department transmitted the matter as a contested case to the Office of Administrative Law ("OAL") pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -23, where it was filed on April 27, 2022.

After completing discovery, the Department filed a motion for summary decision on November 22, 2022. On December 9, 2022, the Respondent filed a response in opposition to the motion. On December 20, 2022, the Department filed its reply. On December 29, 2022, the Department supplied an additional certification, the Respondent responded, and the record was closed.

On January 4, 2023, the ALJ issued the Initial Decision granting summary decision to the Department on both counts of the OTSC. The ALJ recommended the suspension of the Respondent's insurance producer license for a period of one year, civil penalties in the amount of $2,500 for violations of the Producer Act and costs of investigation totaling $750.

On January 11, 2023, the Department, through counsel, Deputy Attorney General Chandra M. Arkema ("DAG Arkema"), submitted timely Exceptions to the Initial Decision ("Dept. Except."). The Respondent, through counsel, Alan Genitempo, Esq., submitted Exceptions to the Initial Decision ("Resp. Except.") on or about January 20, 2023.[1] On January 13, 2023, DAG Arkema filed a Reply to the Respondent's Exceptions ("Reply Except.").

ALJ'S FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS

The ALJ noted that either party may move for summary decision upon all or any of the substantive issues in a contested case, pursuant to N.J.A.C. 1:1-12.5(a). Initial Decision at 5. Further, pursuant to N.J.A.C. 1:1-12.5(b), summary decision is appropriate when 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. Id. at 5. The ALJ noted that to determine whether a genuine issue of material fact exists, the court must consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to demonstrate that the moving party is entitled to a judgment as a matter of law. Id. at 6 (citing Brill v. Guardian Life Ins., 142 N.J. 520, 540 (1995)). Moreover, even if the non-movant comes forward with some evidence, the court

[1] Pursuant to N.J.A.C. 1:1-18.4, timely exceptions in this matter were due by January 17, 2023. On January 20, 2023, the Respondent's attorney sent an email to the Department wherein they purport to have filed exceptions via email, regular mail, certified mail with return receipt requested, and Federal Express well before the January 17, 2023 deadline. Appended to this email were the following: an internal email from Respondent's attorney to kangelone@pirozinnalaw.com requesting the DAG's Reply Exceptions be sent to the Respondent; an email from the OAL to kangelone@pirozinnalaw.com confirming receipt of the Respondent's Exceptions, dated January 13, 2023 and a copy of delivery receipt for FedEx Shipment #393412279010 to a mailroom in Trenton, NJ, address not provided. In addition, the Respondent attached their Exceptions and the Department's Reply. While the Commissioner is not in receipt of Respondent's exceptions via of any of the means delineated prior to the January 20, 2023 email, the Respondent's late filing will be considered in the issuance of this Final Decision and Order.

must grant summary judgment if the evidence is "so one-sided that [the movant] must prevail as a matter of law." Ibid. Lastly, if the non-moving party's evidence is "merely colorable or is not significantly probative," the judge should not deny summary judgment. Id. at 6 (citation omitted).

ALJ's Findings of Fact

In light of the summary decision standard, the ALJ issued the Initial Decision finding that the Department should prevail as a matter of law on the violations alleged in Count One and Count Two of the OTSC. Initial Decision at 6. The ALJ found the following facts were undisputed in the grant of summary decision.

The Respondent has been licensed as an insurance producer in the State of New Jersey since 1981. Id. at 3. From September 10, 2012 to April 6, 2018, the Respondent was employed by United Insurance Company of America ("United Insurance"). Ibid. On or about January 3, 2018, the Respondent collected a $550 cash payment from Mary Barnes ("Barnes"), a United Insurance customer, for an in-force life insurance policy, with an account ending in "22" that had a monthly premium of $411.96. Ibid. In return for the payment, the Respondent issued Barnes a dated Temporary Field Receipt acknowledging the collection of her cash payment. Ibid. The ALJ found that the Respondent did not record Barnes' payment in United Insurance's computer system or credit the payment to Barnes' account on that day.[2] Id. at 3. Further, the ALJ found that records prepared by the Respondent and submitted to United Insurance which purport to represent monies

[2] In support of this factual finding, the ALJ relies on a Client Payment History for Barnes, entered as Exhibit 5 of the Certification of Ronald Small. Id. at 3. The ALJ notes that Exhibit 5 reflects a partial cash payment of $81.92 on January 29, 2018. Ibid.

collected by the Respondent from insureds between January 2018 and April 2018, failed to reflect his collection of Barnes' January 3, 2018 payment.[3] Id. at 4.

United Insurance terminated the Respondent's employment on April 6, 2018. Ibid. On August 24, 2018, United Insurance commenced a routine final audit of the Respondent's book of business which then revealed the $550 cash shortage.[4] Id. at 5. United Insurance was able to trace the shortage to Barnes' account ending in "22". Ibid. Ultimately, United Insurance made Barnes whole after the funds collected by the Respondent went missing. Ibid.

The ALJ considered the Respondent's explanation, wherein he asserts that he may have accidentally deposited Barnes' cash payment into the account of her sister, Betty Phelps. The ALJ found that the evidence provided does not reflect Barnes' cash payment of $550.00 on or near January 3, 2018 into the account of Betty Phelps.[5] Initial Decision at 4. Further, the ALJ noted

[3] In support of this factual finding, the ALJ relies in part on a Collection/Debt Summary appearing at Exhibit 8 of the Certification of Ronald Small. Initial Decision at 4. Exhibit 8 appears to reflect payments collected by the Respondent between January 3, 2018 and January 7, 2018. However, the ALJ's findings state Exhibit 8 reflects payments collected between January 5 and January 8, this appears to be a typographical error.

[4] In support of this factual finding, the ALJ considered materials included in the Respondent's December 9, 2022 Brief in Opposition to the Motion for Summary Decision. Initial Decision at 4, FN 2. The first is a "Premium Receipt Book" for an account with a $411.98 premium payment, purportedly belonging to Barnes, which indicates her account was current compared to United Insurances' computer records as of April 2018. The second is an Agent Deficiency Report dated June 20, 2018, which indicated that another agent could take over the Respondent's book of business without any shortages or problems. However, the ALJ notes that the Respondent acknowledges that he took the cash payment from Barnes on January 3, 2018 and that United Insurance only learned this through the final audit process.

[5] In support of this factual finding, the ALJ relies in part on the Client Payment History for Phelps, appearing at Exhibit 7 of the Certification of Ronald Smalls. Initial Decision at 4. The ALJ notes the Client Payment History reflects two payments, made by check, and drawn from an account held by Mary Barnes, which were applied to Phelps' premiums: one check was dated January 3, 2018 in the amount of $424.46 and the other, January 11, 2018 in the amount of $141.52. Ibid. The ALJ noted that these two payments totaled $566.08 and further, that the Client Payment

the Respondent's interview with a Department Investigator, where the Respondent acknowledged that the missing funds may have been "an oversight." Id. at 5. In conclusion, the ALJ held that the Respondent's explanation is not credible, and a preponderance of evidence does not exist to support that the Respondent credited Barnes' payment to either Barnes or Phelps. Ibid.

Further, the ALJ found as fact that following his April 6, 2018 termination from United Insurance, the Respondent continued to hold an insurance producer license. Id. at 4. In addition, the ALJ found that Respondent updated his business address with the Department on July 20, 2019, months after his termination. Id. at 4.

In light of these facts, the ALJ determined that the matter was ripe for summary decision.

ALJ's Legal Analysis

The ALJ noted that the Department bears the burden of proving the allegations set forth in the OTSC by a preponderance of the competent, relevant, and credible evidence, that must be such as would lead a reasonably cautious mind to a given conclusion. Initial Decision at 7 (citation omitted). Further, that "the greater weight of credible evidence in the case not necessarily dependent on the number of witnesses but having the greater convincing power." Initial Decision at 7 (quoting State v. Lewis, 678 N.J. 47 (1975)).

As it relates to Count One of the OTSC, the ALJ noted that N.J.S.A. 17:22A-40(a) provides the following causes for suspension, probation, and revocation of a producer license: (2) violations of any insurance laws, or violating any regulation, subpoena, or order of the Commissioner or of another state's insurance regulator; (4) improperly withholding, misappropriating, or converting any monies or properties received in the course of doing insurance business; and (8) using

History reflects no cash deposits were made to Phelps' account in January 2018. The ALJ also notes that at that time, Phelps' monthly premium payment was $141.52. Ibid.

fraudulent, coercive, or dishonest practices, or demonstrating incompetence, untrustworthiness, or financial irresponsibility in the conduct of insurance business in this State or elsewhere. Id. at 7-8. Further, the ALJ noted that under N.J.S.A. 17:22A-40(a)(4) and N.J.A.C. 11:17C-2.1(a), all premium funds shall be held by an insurance producer in a fiduciary capacity and not be misappropriated, improperly converted to the insurance producer's own use, or illegally withheld by the licensee. Id. at 8. In addition, the ALJ noted that pursuant to N.J.A.C. 11:17C-2.2(b), all premiums must be credited to the insured's account within five business days after receipt by the insurance producer. Id. at 8. In the instant matter, the ALJ found that Barnes' $550 cash premium was not deposited to Barnes' account within five days, or at all. Ibid. Further, the ALJ found that the credible evidence does not support the Respondent's assertion that he may have mistakenly deposited Barnes' funds into her sister's account. Id. at 8. The ALJ concluded a preponderance of evidence exists to support a finding that the funds remain unaccounted for by the Respondent, who has a fiduciary obligation to be financially responsible with the premium funds collected; therefore, the Respondent's conduct is in violation of N.J.S.A. 17:22A-40(a)(4), (2), and (8), N.J.A.C.11:17C-2.2(b) and 2.1(a). Ibid.

As it relates to Count Two of the OTSC, the ALJ noted that pursuant to N.J.A.C. 11:17-2.8(f)(2), an insurance producer must notify the Department "of any change of business mailing or location address, residence address, phone numbers and email addresses within thirty days of the change and maintain a proof of notification." Id. at 8. The ALJ held that the Respondent was terminated on April 6, 2018 and did not notify the Department until July 20, 2018, which exceeds the 30 day window provided. Id. at 4, 8. Therefore, the Respondent's conduct is in violation of N.J.S.A. 17:22A-40(a)(2) and (8), and N.J.A.C. 11:17-2.8(f)(2). Id. at 8.

ALJ's Recommended Penalties

a. Licensure Action

As it relates to Count One, the ALJ found the following factors mitigating, as it relates to the appropriate licensure action against the Respondent: the Respondent's unblemished 40 year licensure with the Department, that the Respondent's conduct appears to be an isolated occurrence involving an amount that was not significant, and that the Respondent did not attempt to deny that he had collected the funds, but offered an explanation which was not supported by the documentation available as to what became of Barnes' payment. Initial Decision at 8-9.

As it relates to Count Two, the ALJ noted that while the Respondent did not timely notify the Department regarding his change in business address, he was contemplating retirement and working only sporadically as an insurance producer after his termination. Id. at 9. The ALJ found that the Respondent's failure to notify the Department was careless and not intentionally designed to mislead the public. Ibid.

In conclusion, the ALJ found that due to the mitigating factors addressed above, and in light of the high standards applicable to insurance producers and the importance of fiduciary obligations concerning premium funds, the Respondent's conduct warrants a suspension of his insurance producer license for a period of one year. Ibid.

b. Monetary Penalties

The ALJ noted that as the Respondent is liable for violations of the Producer Act, the imposition of a civil penalty is appropriate, which, pursuant to N.J.S.A. 17:22A-45(c), may amount to not more than $5,000 for the first offense and not more than $10,000 for each subsequent offense and permits the Commissioner to order the reimbursement for the costs of investigation. Id. at 9.

The ALJ found that in order to determine the appropriate penalty, a tribunal must consider the following factors: (1) the good or bad faith of the Respondent; (2) the Respondent's ability to pay; (3) amount of profits obtained from illegal activity; (4) injury to the public; (5) duration of the illegal activity; (6) existence of criminal or treble damages actions; and (7) past violations. Id. at 9-10 (citing Kimmelman v. Henkels & McCoy, 102 N.J. 123, 137-139 (1987)).

As it relates to the good or bad faith of the respondent, the ALJ noted that pursuant to Kimmelman, bad faith does not require actual intent. Id. at 9 (citing Kimmelman, 102 N.J. at 137). Here, the ALJ found that the Respondent's actions, whether due to mistake or negligence, resulted in missing premium funds and supports a finding of bad faith. Id. at 10. As to the ability to pay, the ALJ noted that this factor is a neutral consideration as the Respondent does not suggest an inability to pay. Ibid. Regarding the profits obtained, the ALJ noted that the greater the profits obtained, the greater the penalty must be to serve as an effective deterrent. Id. at 10 (citing Kimmelman, 102 N.J. at 138). Here, the ALJ found that the missing funds were low; therefore, this factor supports a lower penalty or at best should be given neutral consideration. Id. at 10. Regarding the injury to the public, the ALJ noted that the Respondent's financial irresponsibility affects consumer confidence in the insurance industry, which supports the imposition of a significant civil penalty. Ibid. As it relates to the duration of illegal activity, the ALJ found the Respondent's mishandling of a single premium payment for one customer was an isolated occurrence. Ibid. Regarding the existence of criminal charges related to the matter, the ALJ found that because no criminal actions exists, the factor is a neutral consideration. Ibid. Finally, regarding whether the respondent has had any previous regulatory and statutory violations, the ALJ noted that the Respondent has no history of violations; therefore, this factor supports a lesser assessment. Ibid.

In conclusion, the ALJ recommended a civil monetary penalty of $1,000 for the Respondent's first violation of the Producer Act and $1,500 for the Respondent's subsequent violation. In addition, the ALJ noted that the Department does not seek restitution, but requested the reimbursement of investigative costs in the amount of $750, which the ALJ recommended pursuant to N.J.S.A. 17:22A-45(c). Id. at 11.

EXCEPTIONS

In its exceptions, the Department raised two issues related to the penalties recommended in the Initial Decision. First, the Department takes exception to the ALJ's imposition of a one-year suspension of the Respondent's license. Dept. Except. at 2. Citing several prior decisions where a producer engaged in the misappropriation of premium monies, the Department argues that the Respondent's breach of fiduciary duty is serious and merits revocation. Id. at 2-3.

Further, the Department took exception to the ALJ's imposition of a $2,500 penalty and asserted that the Respondent's conduct warrants the imposition of the maximum allowable penalty, which is $15,000. Id. at 3. Specifically, the Department asserts that the Respondent's bad faith and injury to the public demand more consideration and weigh in favor of a substantially higher penalty than that recommended by the ALJ. First, the Department asserts that the Respondent's admissions regarding his management of premium payments suggest a practice of nonchalance and negligence constituting bad faith. Id. at 4. Second, the Department asserts that the Respondent's incompetence and irresponsibility affects consumer confidence in the insurance industry as a whole, constituting injury to the public, and warrants the imposition of the maximum allowable penalty. Id. at 4-5.

In his exceptions, the Respondent asserts that he was not provided with all documents by both the Department or his former employer. Resp. Except. at 1. In its Reply, the Department

asserts that the Respondent did not file a discovery request when appropriate and to do so now is improper. Reply Except. at 2. Further, the Department points out that it has provided the Respondent with a complete copy of the Department's file in this matter and cannot produce what it does not have. Ibid.

Next, the Respondent asserts he did not receive an in-person hearing, where he would be better able to defend himself. Resp. Except. at 2. In rebuttal, the Department states that where a motion for summary decision is made and supported by documentary evidence and where the objector submits no evidence to demonstrate that a genuine issue of material fact exists, the motion procedure constitutes the hearing, and no trial-type hearing is necessary. Reply Except. at 2 (citing Contini v. Newark Bd. of Educ., 286 N.J. Super. 106, 120-21 (App. Div. 1995)).

Next, the Respondent asserts that he is being victimized by his former employer, whom he believes perpetrated age discrimination. Resp. Except. at 3. In reply, the Department notes that the Respondent appended a complaint he had threatened to file against United Insurance in 2018, which was never litigated, and in violation of N.J.A.C. 1:1-18.4, which prohibits evidence that was not submitted during the evidentiary phase of the proceedings from being offered as part of an exception. Reply Except. at 3. Further, the Department notes that the matter at hand concerns the Respondent's violation of the Producer Act, which cannot be deflected by the Respondent's irrelevant and immaterial claims of age discrimination by his former employer. Id. at 4.

As it relates to the recommended penalties set forth in the Initial Decision, the Respondent excepts to both the recommended licensure action and the calculation of the fine imposed under Kimmelman. Resp. Except. at 3 (citing Initial Decision at 8-9).

First, the Respondent asserts that suspension or revocation of his license is not warranted in light of the mitigating factors considered by the ALJ, and because the ALJ does not believe

there was intentional misappropriation or fraud on the part of the Respondent. Resp. Except. at 3. In reply, the Department asserts that the recommended one year suspension of the Respondent's license is insufficient, as revocation is warranted and most appropriate in cases wherein a licensed insurance producer engages in misappropriation of premium monies. Reply Except. at 2 (citations omitted).

Second, the Respondent argues that the mitigating factors in this matter support a lower penalty of a total of $1,000 for both violations. Resp. Except. at 4. In reply, the Department asserts that the Respondent's conduct warrants the imposition of the maximum allowable penalty. Reply Except. at 4. Specifically, the Department asserts that both the Respondent's bad faith, evidenced by this serious breach of fiduciary responsibility and practice of nonchalance and negligence in his profession, and the Respondent's apparent incompetence and irresponsibility which affect consumer confidence in the insurance industry as a whole, constituting injury to the public, demand more consideration and weigh in favor of a substantially higher penalty than the $2,500 recommended by the ALJ. Reply Except. 4-5. The Department requests the imposition of a $15,000 penalty and the revocation of the Respondent's license. Id. at 5.

LEGAL DISCUSSION

As noted by the ALJ, N.J.A.C. 1:1-12.5(b) provides the standard to determine whether summary decision should be granted in a contested case. Specifically, 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." 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." Applying this standard, the ALJ found that the Respondent failed to adduce evidence that would create a genuine issue as to any material fact.

Absent any genuine issues of material fact, the Department bears the burden of proving the allegations in an Order to Show Cause by a preponderance of the competent, relevant, and credible evidence. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). The evidence must be such as would lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Preponderance may be described as: "the greater weight of credible evidence in the case not necessarily dependent on the number of witnesses, but having the greater convincing power." State v. Lewis, 678 N.J. 47 (1975).

As discussed above, the ALJ found that summary decision is appropriate as to the allegations contained in Count One and Count Two of the OTSC. I concur with the ALJ's finding that summary decision is appropriate.

Allegations Against Respondent

Count One of the OTSC alleges that the Respondent collected premium funds from a policy holder and failed to remit those funds to the carrier, in violation of N.J.S.A. 17:22A-40(a)(2) (violating any insurance law), (4) (improperly withholding, misappropriating, or converting monies received in the course of doing insurance business), and (8) (fraudulent or dishonest practices, or demonstrate unworthiness or financial irresponsibility), N.J.A.C. 11:17A-4.10 (an insurance producer acts in a fiduciary capacity), N.J.A.C. 11:17C-2.1(a) (funds held in a fiduciary capacity may not be misappropriated, improperly converted, or illegally withheld) and N.J.A.C. 11:17C-2.2.[6]

[6] The OTSC alleges a violation of N.J.A.C. 11:17C-2.2 under "Count One" appearing on page 3, paragraph 7. On page 2, paragraph 5 of the OTSC, the OTSC describes N.J.A.C. 11:17C-2.2(b) (all premiums due the insured shall be paid to the insured or credited to the insured's account within

The ALJ found that the Respondent did not deposit Barnes' $550 cash for payment of her premium into her account within five days, or at all. Initial Decision at 8. Having carefully reviewed the Initial Decision and the record herein, I concur with and adopt the ALJ's findings that a preponderance of the evidence exists that the Respondent's conduct is in violation of N.J.S.A. 17:22A-40(a)(2), (4) and (8); and N.J.A.C. 11:17C-2.1(a).

The ALJ held that the Respondent's conduct was in violation of N.J.A.C. 11:17C-2.2(b). However, Count One of the OTSC alleges that the Respondent's conduct is in violation of N.J.S.A. 11:17C-2.2 and does not specify which subsection was charged. Subsection (a) addresses the remittance of premium funds to an insurer after receipt of the funds whereas subsection (b) addresses the return of premium funds due to an insured after receipt from an insurer. The ALJ found credible evidence supports a finding of N.J.A.C. 11:17C-2.2(b), however, the remittance at issue here concerns those monies paid by the insured to the Respondent and due to United Insurance, the insurer, and not return premiums owed to the insured. Therefore, I modify the ALJ's findings and find a violation of N.J.A.C. 11:17C-2.2(a). The ALJ found that the records prepared by the Respondent and submitted to United Insurance which purport to represent monies collected by the Respondent from insureds between January 2018 and April 2018, failed to reflect his collection of Barnes' January 3, 2018 payment. Initial Decision at 7. Further, the ALJ found that on August 25, 2018, United Insurance commenced a final audit of the Respondent's book of business revealing the $550 cash shortage. Id. at 5. These factual findings support a finding that the Respondent's conduct violates N.J.A.C. 11:17C-2.2(a).

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five business days after receipt by the insurance producer from the insurer or other insurance producer or premium finance company.)

Count One also alleges that this conduct is in violation of N.J.A.C. 11:17A-4.10, which states that an insurance producer acts in a fiduciary capacity. As discussed above, it is uncontested that that the Respondent was acting as a licensed insurance producer when he collected a $550 premium payment in cash from a policyholder which was not remitted to the insurer, within five days, or at any point. Therefore, the Respondent failed to act in a fiduciary capacity. As such, I MODIFY the ALJ's findings as it relates to Count One and find that the Respondent's conduct is also in violation of N.J.A.C. 11:17A-4.10.

Count Two of the OTSC alleges that the Respondent failed to notify the Department of the change to his business mailing address within 30 days, in violation of N.J.S.A. 17:22A-40(a)(2) (prohibits violations of any insurance laws, or violating any regulation, subpoena, or order of the Commissioner or of another state's insurance regulator) and (8) (using fraudulent, coercive, or dishonest practices, or demonstrating incompetence, untrustworthiness, or financial irresponsibility in the conduct of insurance business in this State or elsewhere); and N.J.A.C. 11:17-2.8(f)(2) (requires licensees notify the Department of any change of business mailing or location address, residence address, phone numbers and email addresses within 30 days of the change). The ALJ found that United Insurance terminated the Respondent's employment on April 6, 2018, but that the Respondent did not update his business address with the Department until July 20, 2019. The ALJ concluded that this conduct is in violation of N.J.S.A. 17:22A-40(a)(2), (8) and N.J.A.C. 11:17-2.8(f)(2). Initial Decision at 9. I CONCUR with the ALJ's findings as it relates to Count Two.

Penalty Against Respondent

Revocation of Respondent's Insurance Producer License

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 modify the ALJ's recommendation that the Respondent's license be suspended for one year.

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). 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 of fraudulent or irresponsible conduct on the insurance industry and on the public.

Courts have long recognized that the insurance industry is strongly affected with a public interest and the Commissioner is charged with the duty to protect the public welfare. See Sheeran v. Nationwide Mutual Insurance Company, 80 N.J. 548, 559 (1979). Because of the strong public interest in regulating insurance producers, revocation is "appropriate in almost all cases wherein a licensed insurance producer has engaged in misappropriation of premium monies, bad faith, and dishonesty." Commissioner v. Brown and Guaranteed Bail Bonds, OAL Dkt. No. BKI 10377-13, Initial Decision (09/15/15), Final Decision and Order (12/14/15); See also Commissioner v.

Strandskov, OAL Dkt. No. BKI 03451-07, Initial Decision (09/25/08), Final Decision and Order (02/04/09); Commissioner v. Stone, OAL Dkt. No. BKI 6301-07, Initial Decision (09/15/08), Final Decision and Order (09/15/08); Shipitofsky v. Commissioner, 95 N.J.A.R.2d(INS) 67, OAL Dkt. No. INS 3722-93, Initial Decision (03/11/94), Final Agency Decision (04/29/94). The typical mitigating factors of restitution, inexperience, lack of prior negative history, motivations and pressures of the misconduct, and the possibility of reform cannot form a basis to support a sanction other than revocation in cases involving the misappropriation of client funds. Commissioner v. Ladas, OAL Dkt. BKI 0947-02, Initial Decision (02/05/04), Final Decision and Order (06/22/04).

The Department argues that revocation is warranted. Dept. Reply Except. at 2. The Respondent argues that in light of the mitigating factors considered by the ALJ, the recommended term of a one year suspension is excessive, and opines that not taking licensure action is the more appropriate remedy. Resp. Except. at 3.

The Initial Decision gives great weight to the fact the Respondent has not previously been the subject of any licensure action during his 40 year tenure in the profession and the Respondent's cooperation with the Department's Investigators upon discovery of the shortage. See Initial Decision at 8-9. As noted above, the typical mitigating factors of lack of prior negative history, and the motivations and pressures of the misconduct cannot form a basis to support a sanction other than revocation in cases involving the misappropriation of client funds.

The Respondent misappropriated a client's premium payment and is still unable to provide an accounting of those funds. Further, the Respondent's cooperation with Department Investigators upon discovery of the missing premium payment is expected in a profession where a licensee is held to such high standards and does not constitute a mitigating factor. Furthermore, the fact that the Respondent's "explanation" for the missing funds was not supported by the

evidence is also not an acceptable basis upon which to impose a lesser penalty.

Therefore, I find that revocation is warranted in this instance where a licensed insurance producer engaged in the misappropriation of premium monies. The revocation of the Respondent's insurance producer license is necessary and appropriate to serve the need of protecting the public and maintaining public faith in the insurance industry. For these reasons and based upon my review of the record and the Initial Decision, I MODIFY the ALJ's recommendation of a one-year term of suspension and ORDER the revocation the Respondent's insurance producer license.

Monetary Penalty Against 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.

As noted by the ALJ, pursuant to Kimmelman, certain factors must be examined when assessing the appropriate monetary penalties that may be imposed under N.J.S.A. 45:15-17. No one 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"). Upon weighing the enumerated factors, the ALJ

recommended the imposition of a $1,000 penalty for the Respondent's initial violation of the Producer Act and $1,500 for the second violation.[7] The ALJ also recommended the reimbursement of investigative costs in the amount of $750, pursuant to N.J.S.A 17:22A-45(c). Initial Decision at 10-11.

The first Kimmelman factor addresses the good faith or bad faith of the Respondent. The ALJ noted that pursuant to Kimmelman, bad faith does not require actual intent, rather it is the producer's conduct which must be closely examined. Initial Decision at 10. (citing Kimmelman at 137). As a result, the ALJ concluded that the Respondent's actions related to Barnes' policy, whether made by mistake or due to negligence, resulted in a missing premium payment, which supports a finding of bad faith. Initial Decision at 10.

As discussed above, 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). While the Respondent's inability to demonstrate where he deposited the insured's premium payment represents a single incident of financial irresponsibility, his admissions regarding his management of insureds' premium payments, suggest a general practice of nonchalance and negligence, which fails to demonstrate the precision or accuracy demanded of an insurance producer, is in breach of his fiduciary responsibility as an insurance producer, and demonstrates bad faith.

As it relates to the Respondent's actions concerning his address, the ALJ found the Respondent's conduct was careless and was not made to intentionally mislead the public. Initial Decision at 8. As discussed above, the failure to satisfy his notification obligations to the Department, regardless of his motivation, constitutes bad faith. These findings are consistent with

[7] The ALJ did not denote which Count is considered the initial violation of the Act and which is considered the subsequent violation of the Act.

prior decisions that found that negligence on the part of a licensee can support a finding of bad faith. See Caride v. Tepedino, 2021 N.J. Super. Unpub. LEXIS 2834 (November 18, 2021). Accordingly, this factor weighs in favor of a monetary penalty for the Respondent's actions regarding Barnes' premium payment and his failure to notify the Department.

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). Further, an insurance producer's ability to pay is only a single factor to be considered and does not obviate the need for the imposition of an otherwise appropriate monetary penalty. In the instant case, the Respondent does not claim an inability to pay, accordingly, I concur with the ALJ's finding that this factor is neutral in determining an appropriate monetary 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 as the missing premium funds are "insubstantial," this factor supports the imposition of a lower penalty or at best, should be given neutral consideration. Initial Decision at 10. As discussed above, no one factor is dispositive in determining the appropriate penalty and in the instant case, the Respondent obtained a profit from his illegal conduct when he misappropriated Barnes' premium payment. However, the Respondent's failure to notify the Department of his change in address did not generate a profit. I modify the ALJ's finding and conclude that this factor warrants neutral consideration as it pertains to the Respondent's failure to notify the Department but weighs in favor of a monetary penalty as it relates to the missing premium payment.

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. "When insurance producers breach their fiduciary duties and engage in fraudulent practices and unfair trade practices, the affected insurance consumers are financially harmed and the public's confidence in the insurance industry as a whole is eroded." Commissioner v. Fonseca, OAL Dkt. No. BKI 11979-10, Initial Decision (08/15/11), Final Decision and Order (12/28/11). As it relates to the missing premium payment, the ALJ recognized that the Respondent's financial irresponsibility negatively affects consumer confidence in the insurance industry and supports a more significant civil penalty. Initial Decision at 10. In addition, the ALJ found that the Respondent failed to notify the Department of his updated business address within the required time period. Ibid. The Respondent's failure to do so also constitutes an injury to the public, as the public is harmed when licensees fail to abide by the rules that govern their profession and the public's confidence in the industry is eroded. Therefore, the Respondent's irresponsibility in his failure to remit premium funds and meet his notification obligations to the Department constitute an injury to the public and this factor weighs in favor of a 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 ALJ found that the conduct at issue appears to be an isolated occurrence which was short in duration, warranting a lower penalty or consideration as a neutral factor. Initial Decision at 10. I concur with the ALJ that the Respondent's conduct appears isolated as it relates to both Barnes' premium payment and his failure to notify the Department of a change in address. This factor weighs is favor of a lower 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. Regarding this factor, the ALJ found that as no criminal punishment against the Respondent exists, this factor should be given neutral consideration. Initial Decision at 10. I disagree with this finding. 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. Here, the Respondent has not faced any consequences for his misappropriation of premium funds or his failure to meet his notification obligations to the Department. Thus, this factor weighs in favor of a monetary penalty.

The final factor examined in Kimmelman is previous relevant regulatory and statutory violations of the Respondent. The ALJ found that as the Respondent has not had any prior action taken against his license, this factor supports a lesser assessment. Initial Decision at 10. I concur with the ALJ's finding. Thus, this factor weighs in favor of a lessor penalty.

In its exceptions, the Department argues that the Respondent's conduct, both in his misappropriation of an insured's premium monies and his failure to timely notify the Department of his change of business address, warrant the imposition of maximum allowable penalty under the Producer Act which is $15,000. Dept. Except. at 3. While the Department does not except to any of the ALJ's findings related to the factors enumerated in Kimmelman, the Department argues that the Respondent's bad faith should be given more weight. Id. at 4. The Respondent asserts that the ALJ's recommended penalty is excessive in light of the mitigating factors and a penalty in the amount of $1,000 is more appropriate. Resp. Except. at 3.

In light of the above Kimmelman analysis and based on the violations of the Producer Act, I modify the ALJ's recommendation, and find that a total civil monetary penalty in the amount of

$3,500 for the violations of the Producer Act is appropriate. In determining the appropriate penalty, the ALJ gave neutral consideration to several factors that I have found support a monetary penalty. Furthermore, I concur with the Department that greater weight must be given to the Respondent's bad faith and resulting injury to the public. The Respondent's misappropriation of premium funds represents a serious breach an insurance producer's fiduciary duty. Furthermore, I find that the injury to the public is substantial in that it is in the public interest to ensure the utmost trust in licensees and the insurance industry. While the total amount of premium payments misappropriated by the Respondent may not be deemed substantial, nonchalant and negligent conduct on the part of licensees must to be rooted out and deterred. Therefore, upon rebalancing the factors enumerated in Kimmelman, I MODIFY the ALJ's recommendation to impose a total penalty of $3,500. For the violations alleged in Count One, I order the imposition of a $2,500 penalty. In addition, I impose a penalty of $1,000 for the violations alleged in Count Two of the OTSC, which is also consistent with prior decisions. Peduto and American Bail Bonds Associates, OAL Dkt. No. BKI 4255-12, Initial Decision (01/11/13), Final Decision and Order (2/25/13) (imposed $2,500 penalty for two counts of failure to notify change of address); Battista and Lay, OAL Dkt. No. BKI 4940-07, Initial Decision (03/06/08), Final Decision and Order (09/02/08) (imposed $2,300 penalty for failure to notify of change of address).

These penalties are necessary and appropriate given the Respondent's conduct. Moreover, 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 it is far less than the Department requested under N.J.S.A. 17:22A-45, which allows the imposition of up to $5,000 for the first violation and up to $10,000 for any subsequent violations of the Producer Act.

Reimbursement for Investigative Costs

The Commissioner may order the reimbursement of the costs of investigation and prosecution, pursuant to N.J.S.A. 17:22A-45(c). The ALJ recommended that the Respondent reimburse the Department in the amount of $750 for costs of the investigation. Initial Decision at 10.

I concur with the ALJ's finding that reimbursement of investigative costs is appropriate. Further, the ALJ found, and I concur, that the requested amount of $750 is reasonable and consistent with the amount in the Certification of Matthew Gervasio. Gervasio Cert. ¶¶ 13-16, Ex. A attached thereto. Accordingly, I ADOPT the recommendation and ORDER the Respondent to reimburse the Department for its costs of investigation in the amount of $750.

CONCLUSION

Having carefully reviewed the Initial Decision, the Exceptions submitted by the Department and the Respondent, the Reply submitted by the Department, and the entire record herein, I hereby ADOPT the findings and conclusions as set forth in the Initial Decision, except as modified herein, and hold that the Respondent violated the Producer Act and accompanying regulations as charged in Count One and Count Two of the OTSC, and has failed to present any legally or factually viable defenses to the violations of the Producer Act and the regulations promulgated thereunder.

Specifically, I ADOPT the ALJ's conclusion regarding the violations alleged in Count One that the Respondent's conduct is in violation of N.J.S.A. 17:22A-40(a)(2), (4) and (8) and N.J.A.C. 11:17C-2.1(a). In addition, I MODIFY the ALJ's finding that the Respondent's conduct is in violation of N.J.A.C. 11:17C-2.2(b) and find the Respondent is in violation of N.J.A.C. 11:17C-2.2(a). I MODIFY the Initial Decision and find that the Respondent is in violation of N.J.A.C. 11:17A-4.10. Furthermore, I ADOPT the ALJ's conclusion regarding the violations alleged in

Count Two, that the Respondent's conduct is in violation of N.J.S.A. 17:22A-40(a)(2) and (8); and, N.J.A.C. 11:17-2.8(f)(2).

For the reasons set forth above, I MODIFY the recommended one-year term of suspension recommended by the ALJ and ORDER the revocation of the Respondent's insurance producer license. In addition, I MODIFY the ALJ's recommended total monetary penalty of $2,500 and ORDER a total penalty of $3,500 for the aforementioned violations of the Producer Act. Lastly, I ADOPT the ALJ's recommendation and ORDER the Respondent to reimburse the Department $750 for costs of investigation.

It is so ORDERED on this __16_____ day of __February_____ 2023.

Marlene Caride
Commissioner

Final Orders – Insurance/AR Maneri FO