ORDER NO.: E21-36

STATE OF NEW JERSEY
DEPARTMENT OF BANKING AND INSURANCE

OAL DOCKET NO.: BKI-09165-17
AGENCY DOCKET NO.: OTSC #E17-31

MARLENE CARIDE,[1] COMMISSIONER, NEW JERSEY DEPARTMENT OF BANKING AND INSURANCE,	)
Petitioner,	)
v.	) FINAL DECISION AND ORDER
CONSTRUCTION, INVESTIGATIONS & ADJUSTMENTS, LLC, AND GENE MEHMEL,	)
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 Public Adjusters' Licensing Act, N.J.S.A. 17:22B-1 to -20, ("Public Adjusters' Act" or "Act"), and all powers expressed or implied therein, for the purposes of reviewing the March 17, 2020 Initial Decision of Administrative Law Judge Jacob S. Gertsman ("ALJ") ("Initial Decision"). The Initial Decision incorporates the July 17, 2019 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").

[1] Pursuant to R. 4:34-4, Commissioner Marlene Caride has been substituted in place of former Commissioner Richard J. Badolato in the caption.

In the PSD, the ALJ found for the Department and against Respondents Construction, Investigations & Adjustments, LLC ("CIA") and Gene Mehmel ("Mehmel") (collectively, "Respondents") on Counts One, Two, and Four, as alleged in Order to Show Cause No. E17-31 ("OTSC"). The ALJ reserved his recommendation regarding the assessment of civil monetary penalties, restitution, and revocation of the Respondents' public adjuster licenses related to these Counts until the conclusion of the matter. PSD at 12.

In the Initial Decision, the ALJ found for the Department and against the Respondents on Count Three of the OTSC. The ALJ recommended that the Respondents be jointly and severally liable for a fine in the amount of $23,000 and Respondent CIA be solely liable for a fine in the amount of $500, for a total civil monetary penalty of $23,500 for the violations found in Count One of the OTSC; the Respondents be jointly and severally liable for a fine in the amount of $23,000 and Respondent CIA be solely liable for a fine in the amount of $500, for a total civil monetary penalty of $23,500 for the violations found in Count Two of the OTSC; the Respondents be jointly and severally liable for a fine in the amount of $92,000 and Respondent CIA be solely liable for a fine in the amount of $2,000 for the violations found in Count Three of the OTSC; and the Respondents be jointly and severally liable for a fine in the amount of $2,500 for the violations found in Count Four of the OTSC. Initial Decision at 19-20, 22. In addition, the ALJ recommended that the Respondents be jointly and severally liable for costs of investigation in the amount of $2,900. Id. at 20, 22. Lastly, the ALJ recommended that the Respondents be jointly and severally liable for restitution in the amount of $32,440.25 and Respondent CIA be solely liable for additional restitution in the amount of $354.38, for a total of $32,794.63 for this matter. Id. at 20, 22. The ALJ incorporated the PSD into the Initial Decision, and additionally recommended the revocation of the Respondents' public adjuster licenses. Id. at 21.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On May 5, 2017, the Department issued the OTSC against the Respondents, which sought to revoke the Respondents' public adjuster licenses and impose civil monetary penalties, costs of investigation, and restitution for alleged violations of the Public Adjusters' Act. In the OTSC, the Department alleges that the Respondents engaged in the following activities in violation of the insurance laws of this State:

> Count One: Between October 1, 2012 through October 1, 2015, Respondent CIA, through Respondent Mehmel, entered into at least forty-seven contracts with New Jersey insureds without being licensed by the Commissioner, in violation of N.J.S.A. 17:22B-14(a)(1), (4), and (5); and N.J.A.C. 11:1-37.14(a)(1), (2), (4), and (5);
>
> Count Two: Between October 1, 2012 through October 1, 2015, Respondent CIA, through Respondent Mehmel, entered into at least forty-seven public adjuster contracts with New Jersey insureds that did not prominently include a section that specified the procedures by which an insured may cancel the contract, in violation of N.J.S.A. 17:22B-13(c); N.J.S.A. 17:22B-14(a)(1) and (4); N.J.A.C. 11:1-37.13(b)(5)(i) and (ii); and N.J.A.C. 11:1-37.14(a)(1), (2), (3), and (17);
>
> Count Three: Between October 1, 2012 through October 1, 2015, Respondent CIA, through Respondent Mehmel, entered into at least forty-seven public adjuster contracts with New Jersey insureds wherein the Respondents' fee structure for public adjuster services was not reasonably related to the services rendered, in violation of N.J.S.A. 17:22B-13(c); N.J.S.A. 17:22B-14(a)(1) and (4); N.J.A.C. 11:1-37.13(b)(3)(ii), and N.J.A.C. 11:1-37.14(a)(1), (4), and (17); and in the same contracts, the Respondents failed to clearly define the amount or extent of the Respondents' compensation for public adjuster services, in violation of N.J.S.A. 17:22B-13(c); N.J.S.A. 17:22B-14(a)(1) and (4); N.J.S.A. 56:12-2, N.J.A.C. 11:1-37.13(a); N.J.A.C. 11:1-37.13(b)(4); N.J.A.C. 11:1-37.14(a)(1), (4), (13), and (17); and
>
> Count Four: Between January through December 2013, the Respondents accepted insurance proceeds on behalf of insureds and failed to deposit those funds into an interest-bearing escrow or trust account, in violation of N.J.S.A. 17:22B-13(f); N.J.A.C. 11:1-37.11(a); and N.J.A.C. 11:1-37.14(a)(1) and (4).

On June 15, 2017, the Respondents filed an Answer to the OTSC, wherein the Respondents denied all of the allegations set forth in the OTSC and requested a hearing. The Department transmitted the matter as a contested case to the Office of Administrative Law ("OAL") pursuant to N.J.S.A. 52:14B-1 to -31 and N.J.S.A. 52:14F-1 to -23, where it was filed on June 27, 2017.

On December 22, 2017, the Respondents filed a Motion for Summary Decision, and on March 6, 2018, the Department filed its Motion for Summary Decision and its Opposition to the Respondents' Motion. PSD at 2. Both Motions sought summary decision on all Counts set forth in the OTSC. Ibid. The Respondents filed their Opposition to the Department's Motion on March 16, 2018 and the Department filed its Reply to the Respondents' Opposition on March 26, 2018. Ibid.

Oral argument was held on May 2, 2018. Ibid. The parties filed post-argument briefs on the issue of applicability of the entire controversy doctrine and its effects on the OAL's jurisdiction of allegations contained in Count One of the OTSC. Ibid. The Respondents' brief was filed on May 18, 2018, and the Department's brief was filed on June 12, 2018. Ibid.

On December 5, 2018, the ALJ directed the parties to file supplemental briefs that dealt with the applicability of Metromedia, Inc. v. Dir., Division of Taxation, 97 N.J. 313 (1984) to this matter. Ibid. The Respondents filed their brief on December 12, 2018, and on January 7, 2019, the Department filed its brief. Ibid. The Respondents then filed a response to the Department's brief on January 13, 2019. Ibid.

On July 17, 2019, the ALJ issued an Order granting partial summary decision to the Department in relation to Counts One, Two, and Four of the OTSC. The ALJ denied the Department's Motion for Summary Decision as it related to Count Three of the OTSC and denied the Respondents' Motion for Summary Decision as it related to all four Counts of the OTSC. PSD

at 6, 8, 13. The ALJ made no recommendation related to the suspension or revocation of the Respondents' public adjuster licenses and or the imposition of civil monetary penalties or restitution. Id. at 12. However, the ALJ noted that the penalty would be assessed at the conclusion of the matter. Ibid.

During an August 2, 2019 telephone conference, the parties agreed to file cross motions for summary decision on Count Three of the OTSC. Initial Decision at 2. The Department's Motion was filed on September 18, 2019 and the Respondents' Motion was filed on October 15, 2019. Ibid. The Department's Opposition to the Respondent's Motion was filed on October 30, 2019 and the Respondents' Opposition to the Department's Motion was filed on November 6, 2019. Ibid. On December 6, 2019, oral argument was held, and the record was closed on the motions. Ibid.

On March 17, 2020, the ALJ issued an Initial Decision that granted summary decision to the Department and denied the Respondents' Motion for Summary Decision in relation to Count Three of the OTSC. The ALJ incorporated the PSD into the Initial Decision and recommended the revocation of both of the Respondents' public adjuster licenses. Id. at 21. The ALJ additionally recommended that the Respondents be jointly and severally liable for a fine in the amount of $23,000 and Respondent CIA be solely liable for a total monetary fine in the amount of $143,500.. Id. at 19-20, 22. In addition, the ALJ recommended that the Respondents be jointly and severally liable for costs of investigation in the amount of $2,900. Id. at 20. 22. Lastly, the ALJ recommended that the Respondents be jointly and severally liable for restitution in the amount of

$32,440.25 and Respondent CIA be solely liable for additional restitution in the amount of $354.38, for a total of $32,794.63 for this matter.[2] Id. at 20, 22.

On March 27, 2020, the Department submitted Exceptions to the Initial Decision pursuant to N.J.A.C. 1:1-18.4(a). The Respondents requested and were granted several extensions to file their Exceptions to the Initial Decision and filed same on October 15, 2020. Pursuant to the Respondents' extension requests, the Department was granted an extension to file its Reply to the Respondents' Exceptions. On November 16, 2020, the Department filed its Reply to the Respondents' Exceptions pursuant to N.J.A.C. 1:1-18.4(d).[3]

ALJ'S FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS

The ALJ noted that pursuant to N.J.A.C. 1:1-12.5(b) a motion for summary decision requires analysis of whether "the papers and discovery which have been filed, together with affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." PSD at 7 and Initial Decision at 13. Further, the ALJ stated that the New Jersey Supreme Court has explained that when deciding a motion for summary judgment under R. 4:46-2,

> a determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials present, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged dispute issue in favor of the non-moving party.

---

[2] This is the amount of restitution requested by the Department in its initial Motion for Summary Decision. See Exhibit B attached to Investigator Eugene Shannon's Certification. However, in its Supplemental Motion for Summary Decision, the Department requested a total of $32,304.36. See Exhibit A to Deputy Attorney General Nicholas Kant's brief in support of the Department's Motion for Partial Summary Decision. Department Exceptions at 3-4.

[3] On April 14, 2020, Governor Phil Murphy signed Executive Order 127 (2020) ("EO 127"). EO 127 extends any pending deadline for adopting, rejecting, or modifying a decision on contested cases under N.J.S.A. 52:14B-10(c). The timeframes were also extended by P.L. 2019, c. 103.

PSD at 7 and Initial Decision at 14. (citing Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995)). Further, the ALJ stated that R. 4:46-2(c) provides further guidance regarding whether the Brill standard has been met in a case. PSD at 7 and Initial Decision at 14. R. 4:46-2(c) provides that

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

PSD at 8 and Initial Decision at 14.

In light of this standard, the ALJ issued a Partial Summary Decision on July 17, 2019, wherein he found the Department prevailed as a matter of law on Counts One, Two, and Four of the OTSC. The ALJ stated that with regards to Counts One, Two, and Four of the OTSC, the Respondents failed to produce affidavits that disputed any of the facts alleged by the Department and no issues of material facts existed. PSD at 9. On March 17, 2020, the ALJ additionally found that the Department prevailed as a matter of law on Count Three of the OTSC. Initial Decision at 16-17.

The ALJ found the following relevant facts in his grant of summary decision.

Count One

The ALJ stated that the Department alleged in Count One of the OTSC that CIA entered into public adjuster contracts with New Jersey insureds without being licensed to do so, in violation of N.J.S.A. 17:22B-3(a) and (b), which require a public adjuster to be licensed. PSD at 3. Additionally, the ALJ stated that Mehmel is alleged to be liable for these violations because he signed the contracts on behalf of CIA and was also the chief executive officer ("CEO") of CIA,

pursuant to N.J.A.C. 11:1-12.2(a). Ibid. In support of these allegations, the ALJ made the following findings of fact:

- Mehmel was first licensed as a resident public adjuster in the State of New Jersey on November 19, 1999;
- CIA was first licensed as a resident public adjuster in the State of New Jersey on October 1, 2015;
- Mehmel is the CEO of CIA;
- During the period from October 1, 2012 through October 1, 2015, CIA entered into forty-seven public adjuster contracts with New Jersey insureds;
- Each of the forty-seven CIA contracts began with identical language stating that the undersigned "hereby engages Construction Investigation & Adjustments hereinafter called 'public adjuster' to advise and assist in the adjustment of an insurance claim against the insurance companies covering and arising from a loss . . .";
- CIA was not licensed as a public adjuster at the time it entered into the forty-seven contracts at issue;
- Mehmel signed forty-six of the contracts on behalf of CIA;
- The remaining contract was signed by "Frank Boyle"[4]

Id. at 3-4.

The ALJ noted that it is not in dispute that the insureds entered into contracts with CIA as the public adjuster. Id. at 4. Therefore, the ALJ found that all forty-seven contracts were entered into by CIA in advance of its licensure as a public adjuster. Ibid. The ALJ additionally found that Mehmel enabled the actions by singing on behalf of CIA in forty-six contracts, thereby participating in the creation of the contracts with an unlicensed public adjuster. Ibid.

The ALJ noted that the Respondents argued that the OAL does not have jurisdiction for this Count because N.J.S.A. 17:22B-17 provides that "[a]ny action alleging the unlicensed practice

---

[4] The ALJ noted that the record does not reflect Frank Boyle's connection to either CIA or Mehmel. PSD at 4, n.1.

of public adjuster shall be brought pursuant to this section in the Superior Court." PSD at 9. The Department, however, stated that the OAL does have jurisdiction because the entire controversy doctrine requires that the Commissioner bring all allegations of violations against the Respondents in a single proceeding. Ibid.

The ALJ noted that the entire controversy doctrine provides that the non-joinder of claims or parties that are required to be joined shall result in the preclusion of the omitted claims. Ibid. (citing DiTrolio v. Antiles, 142 N.J. 253, 266 (1995) (citing R. 4:30A, which codified the entire controversy doctrine)). The ALJ further stated that the fundamental principle behind this policy is that the adjudication of a legal controversy should occur in one litigation in only one court. Id. at 9 (citing DiTrolio, 142 N.J. at 267 (citing Cogdell v. Hopsital Ctr., 116 N.J. 7, 15 (1989))). The primary consideration is whether the claims against the different parties arise out of related facts of the same transaction or series of transactions. Id. at 9-10 (citing DiTrolio, 142 N.J. at 267). Therefore, the ALJ noted that the test to determine whether claims must be brought in a single action is:

> If parties or persons will, after final judgment is entered, be likely to have engaged in additional litigation to conclusively dispose of their respective bundles of rights and liabilities that derive from a single transaction or related series of transactions, the omitted components of this dispute must be regarded as constituting an element of one mandatory unit of litigation.

Id. at 10 (quoting DiTrolio, 142 N.J. at 267 (citing O'Shea v. Amoco Oil Co., 886 F.2d 584 (3d. Cir. 1989))).

As it relates to this matter, the ALJ stated that there was no dispute that the OTSC was the result of one investigation by the Department, and it involved the same forty-seven contracts included in Exhibit A to the Shannon Cert. Id. at 10. Accordingly, the ALJ found that the

allegations, as set forth in Count One of the OTSC, were properly transmitted to the OAL pursuant to the entire controversy doctrine. Ibid. The ALJ additionally found that the OAL was the proper venue for the adjudication of the Department's allegation that the Respondents entered into public adjuster contracts without CIA being licensed to do so. Ibid.

The ALJ further stated that the Department had demonstrated that CIA entered into forty-seven public adjuster contracts prior to its licensure and the Mehmel, as the chief executive officer of CIA, enabled the execution of these contracts by signing on behalf of CIA in forty-six of those forty-seven contracts. Ibid. Therefore, the ALJ found "that the Department ha[d] proven violation of the statute." Ibid.

Count Two

The ALJ provided that the Department alleged in Count Two of the OTSC that the forty-seven contracts entered into by CIA between October 1, 2012 and October 1, 2015 failed to include required contractual language set forth in the Public Adjusters' Act and accompanying regulations. Id. at 4. Specifically, the Department alleged that the contracts failed to prominently include a section that specified the cancellation procedures. Ibid. The ALJ stated that the missing language was alleged to include (a) the requirement of written notice; (b) the rights and obligations of the parties if the contract is cancelled at any time; and (c) the costs to the insured or the formula for the calculation of costs to the insured for services rendered in whole or in part. Ibid.

The ALJ noted that the forty-seven contracts were into evidence through the Certification of Department Investigator, Eugene Shannon ("Shannon Cert."). Ibid. The ALJ noted that an examination of the forty-seven contracts showed that they all use the following language in the "Notice of Right to Cancel":

> The Insured has the right to cancel at any time prior to midnight of the third business day following the date of this contract. If such

> cancellation right is exercised, the insured will remain liable for reasonable and necessary emergency and out-of-pocket expenses and/or services which were paid for and/or rendered by the public adjuster during said three-day period to protect the interests of the insured. See the attached NOTICE OF RIGHT TO CANCEL, for further explanation.

Ibid. The ALJ Stated that this language appears in the same type font as the majority of the one-page agreement. Ibid. The ALJ additionally noted that below this language, in the same type font, appears a sentence that states: "This agreement contains the entire contract between the parties hereto, and shall not be changed, altered or amended except in writing and signed by the parties hereto." Id. at 4-5. Further, the "Notice of Right to Cancel" appears at the bottom of the page in capital letters and sets forth the following:

> IF YOU CANCEL, ANYTHING OF VALUE GIVEN BY YOU UNDER THE CONTRACT WILL BE RETURNED WITHIN TEN BUSINESS DAYS FOLLOWING RECEIPT BY THE PUBLIC ADJUSTER OF YOUR CANCELLATION NOTICE, AND ANY SECURITY INTEREST ARISING OUT OF THE CONTRACT WILL BE CANCELED.
>
> TO CANCEL THIS CONTRACT, MAIL OR DELIVER A SIGNED AND DATED COPY OF TIS NOTICE OR ANY OTHER WRITTEN NOTICE OR TELEGRAM, INDICATING CANCELLATION AND DATE THEREOF, COMPANY, AND LICENSED PUBLIC ADJUSTERS, NO LATER THAN MIDNIGHT OF __/__/___.
>
> I HEREBY CANCEL THIS CONTRACT.

Id. at 5.

Based upon a review of the contractual language set forth above, the ALJ found that "the contracts speak for themselves and clearly state, although not prominently, that it can only be changed by a written agreement and that the insured can cancel within three business days." Ibid. The ALJ further found that "the contracts include explicit language that written notice is required to cancel the contract within three business days." Ibid. However, the ALJ found that the language

does not make it clear that an individual is "free to cancel at any time, not just within three business days, and the contract does not provide any procedures for the insured to follow in order to effectuate a cancellation beyond three business days." Ibid.

The ALJ stated that the Respondents argued that the Department engaged in impermissible rulemaking by claiming that there exists a requirement that public adjuster contracts contain a provision that the contract could be cancelled at any time. Ibid. The Department countered this argument and stated that the Department's position is rooted in adopted regulations. Ibid.

The ALJ noted that N.J.A.C. 11:1-37.13(b)(5)(ii) requires that the written memorandum or contract between a licensed public adjuster and insured to prominently include a section which specifies "[t]he rights and obligations of the parties if the contract is cancelled at any time." Id. at 10-11. Further, the ALJ stated that the Department provided a response made to a comment on the original adoption of this provision on April 18, 1994, which noted that "a public adjuster contract shall include a section which specifically details an individual's obligation under the contract if he or she chooses to cancel the contract at any time." Id. at 11 (quoting 26 N.J.R. 1715 (April 18, 1994)).

The ALJ stated that licensees have been on notice of this requirement for a period of twenty-five years and therefore, he concluded that public adjuster contracts must contain a provision that contracts can be cancelled at any time, pursuant to N.J.A.C. 11:1-37.13(b)(5)(ii). Ibid. The ALJ further concluded that the Department's enforcement of this requirement is not a violation of Metromedia, 97 N.J. 313 (1984). Ibid.

In light of the above, the ALJ found that the Department had demonstrated that forty-seven contracts did not notify the insured of their right to cancel the contract at any time or provide a mechanism to effectuate that right. Ibid. Moreover, the ALJ found that the Department had proven

that CIA had violated regulations in forty-seven instances and Mehmel had violated regulations in forty-six instances, as he "enabled the contracts by signing on behalf of CIA." Ibid.

Count Three

The ALJ stated that the Department alleged in Count Three of the OTSC that the Respondents failed to clearly define the amount of compensation for their services, and further, that the Respondents utilized a formula to calculate their compensation that was not reasonably related to the services rendered. PSD at 5 and Initial Decision at 3.

As noted above, the ALJ denied the Department's first Motion for Summary Decision as it related to Count Three of the OTSC, but later granted the Department's second Motion for Summary Decision on Count Three of the OTSC.

Partial Summary Decision:

In the PSD, the ALJ stated that the Department offered the following evidence to support its allegations in Count Three of the OTSC: the forty-seven contracts entered into the record in the Shannon Cert., Exhibit A, which all require that the insureds pay a fee of ten to twenty percent of the "total insurance settlement reached." PSD at 5-6 (quoting the Shannon Cert. at ¶ 10). The ALJ noted that this contractual language was not in dispute.

The ALJ stated that the Shannon Cert. stated that, "[m]y investigation revealed that Mehmel and [CIA] calculated their fees based on Recoverable Cost Value [("RCV")]." Id. at 6 (quoting the Shannon Cert. at ¶ 12). Moreover, "[i]f Mehmel and [CIA] had calculated their fee based on the Actual Cash Value [("ACV")], or monies actually paid by an insurance carrier for a claim, these insureds collectively would have paid $32,794.63 less in fees." Id. at 6 (quoting the Shannon Cert. at ¶ 13, Exhibit B).

Upon his review of the record, the ALJ noted that there were several issues related to this Count. Id. at 6. The ALJ stated that while the Respondents seem to admit that they did calculate their fees based on the ACV rather than the RCV, those terms were not defined in the record. Ibid. Therefore, the ALJ stated that he was unable to substantiate Investigator Shannon's assertions regarding the method used by the Respondents in calculating their fees or the excess amount of fees collected. Ibid. The ALJ stated that the Shannon Cert. is "devoid of any details establishing that [the R]espondents utilized the ACV method [and] many of the names in the contracts offered in Exhibit A of the Shannon Certification are illegible and the individual documents are not Bates stamped." Ibid. The ALJ stated that he was unable to cross-reference the individual contracts with the spreadsheets provided by Investigator Shannon to verify the assertions that the Respondents collected $32,794.63 more in fees than they would have if they calculated their fees on the RCV method. Ibid. Therefore, in relation to the Department's first Motion for Summary Decision, the ALJ found that the record was insufficient to substantiate the Department's assertions as it related to Count Three of the OTSC. Ibid.

The ALJ stated that the deficiency of the record made the adjudication of Count Three premature. Id. at 8. Additionally, the ALJ concluded that issues of material fact existed in relation to Count Three of the OTSC and that there was insufficient evidence to dispose of the allegations contained in this Count on summary decision. Ibid. The ALJ further concluded that the record needed to be fully developed in subsequent dispositive motions or at a hearing in order to make a determination regarding whether the allegations contained in this Count could be substantiated. Ibid.

Initial Decision:

In the Initial Decision, the ALJ found the following undisputed facts:

- Respondent Mehmel was first licensed as a resident public adjuster in the State of New Jersey on November 19, 2019;

- Respondent CIA was first licensed a resident public adjuster in the State of New Jersey on October 1, 2015; and

- At all times relevant, Respondent Mehmel was the chief executive officer of Respondent CIA.

Initial Decision at 3.

The ALJ noted that although the Respondents contest the following findings of fact, the ALJ found these as fact in the PSD and are the "law of the case":

- During the period of October 1, 2020 through October 1, 2015, Respondent CIA entered into forty-seven public adjuster contracts with New Jersey Insureds;

- Mehmel signed forty-six of the forty-seven contracts on behalf of CIA; and

- The remaining contract was signed by "Frank Boyle."

Ibid.

The ALJ stated that in support of the allegations contained in Count Three of the OTSC, the Department additionally provided that by entering into forty-seven contracts, the insureds agreed to pay CIA a fee of ten to twenty percent:

> . . . of the total insurance settlement reached and necessary expenses incurred in connection therewith, all of which shall become due and payable after Proof of Loss (if required) have been submitted and the first insurance company draft or check along with the names of all parties notarized, on all insurance checks or drafts as security for the above stated fee.

Id. at 4. Additionally, "total settlement reached" was not defined by the Respondents in the contracts. Ibid. Moreover, the ALJ noted that in the fifty-one separate Settlement Statements, the Respondents charged each insured a fee based on the gross award from the insurance company,

before reductions for depreciation and deductibles.[5] Ibid. The ALJ found it notable that the Respondents did not challenge the validity of the documents presented by the Department or point to any inaccuracies in the Department's chart that summarized the Settlement Statements. Id. at 12.

The ALJ found that the documents speak for themselves and demonstrate that in fifty-one instances, the Respondents charged each insured a fee based on the gross award from the insurance company, before reductions for depreciation and deductible amounts. Ibid. Moreover, the ALJ found that if the Respondents had charged each insured their contractual fee based upon the net insurance award, or monies actually paid by an insurance carrier for a claim, these insureds collectively would have received $32,304.36[6] more in insurance benefits. Ibid.

The ALJ noted that the Department alleged in Count Three of the OTSC that the Respondents failed to clearly define the amount of compensation for their services in their public adjuster contracts. Id. at 14. The ALJ stated that N.J.S.A. 17:22B-13(c) provides that no individual, firm, association, or corporation licensed under the Public Adjusters' Act shall:

> . . . have any right to compensation from any insured for or on account of services rendered to an insured as a public adjuster unless the right to compensation is based upon a written memorandum, signed by the party to be charged and by the adjuster, and specifying or clearly defining the services to be rendered and the amount or extent of the compensation on a form and with such language as the commissioner may prescribe.

---

[5] The number of contracts and Settlement Statements do not match because some clients had more than one Settlement Statement. For example, D.T., D.W., and W.Q. all had one contract with the Respondents, and two Settlement Statements each.

[6] While the ALJ stated that they Respondents overcharged the insureds by $32,304.36, the ALJ later found that this overcharge was $32,794.63. Initial Decision at 20. The Department requested $32,794.63 in its initial Motion for Summary Decision. See Exhibit B attached to Investigator Eugene Shannon's Certification. However, in its Supplemental Motion for Summary Decision, the Department requested a total of $32,304.36. See Exhibit A to Deputy Attorney General Nicholas Kant's brief in support of the Department's Motion for Partial Summary Decision. Department Exceptions at 3-4.

Ibid. (quoting N.J.S.A. 17:22B-13(c) (emphasis added)). The ALJ further noted that N.J.A.C. 11:1-37.13(a) provides that:

> No individual, firm, partnership, association or corporation licensed under this subchapter shall have any right to compensation from any insured for or on account of services rendered to an insured as a public adjuster unless the right to compensation is based upon a written contract or memorandum between the adjuster and the insured and specifying or clearly defining the services to be rendered and the amount or extent of the compensation.

Id. at 15 (citing N.J.A.C. 11:1-37.13(a) (emphasis added)). The ALJ noted that pursuant to N.J.A.C. 11:1-37.13(b)(4), the written memorandum or contract between a licensed public adjuster and an insured shall conform to the requirements of the Consumer Contracts Act, N.J.S.A. 56:12-1 to –101,[7] and as set forth in N.J.S.A. 56:12-2, a consumer contract shall be written in a simple, clear, understandable, and easily readable way. Id. at 15.

The ALJ stated that the Department has shown that CIA entered into forty-seven contracts[8] with insureds between October 1, 2012 through October 1, 2015, where the insured agreed to pay Respondent CIA a fee of 10 to 20 percent

> of the total insurance settlement reached and necessary expenses incurred in connection therewith, all of which shall become due and payable after Proof of Loss (if required) have been submitted and the first insurance company draft or check along with the names of all parties notarized, on all insurance checks or drafts as security for the above stated fee.

Ibid. (quoting Shannon Cert. ¶ 11 and Exhibit A; Shannon Supp. Cert. at Exhibit, A). The ALJ additionally found that by the Respondents charging their contractual fee of ten to twenty percent on the gross rather

[7] There appears to be a typographical error in the citation in the Initial Decision. The Consumer Contracts Act is cited as "56:12-1 to -13, et seq." Initial Decision at 15. However, the correct citation is N.J.S.A. 56:12-1 to -101.

[8] The ALJ noted that Mehmel signed forty-six contracts on behalf of CIA.

than the net recovery, the Respondents actually charged the insureds a fee of between eleven and thirty-nine percent, in violation of the agreed upon terms in their own contracts. Id. at 15.

Further, and as noted above, the ALJ found that the Respondents failed to define the phrase "total settlement reached" in their contracts, which disadvantaged the insureds by not clearly indicating whether the fee charged would be based on the gross insurance award from the insurance company before subtractions for deductible or depreciation, the RCV, or the net award after subtractions, the ACV. Id. at 16. The ALJ stated that the failure to provide this information is a clear violation of the rules requiring the contracts to clearly define the services to be rendered and to be written in a simple, clear, understandable, and easily readable way. Ibid. Therefore, the ALJ found that the forty-seven contracts entered into by CIA violated the provisions of N.J.S.A. 17:22B-13(c), N.J.A.C. 11:1-37.13(a), N.J.A.C. 11:1-37.13(b)(4) and N.J.S.A. 56:12-2. Id. at 16. Moreover, given that Mehmel signed forty-six of the forty-seven contracts at issue, the ALJ further found that Mehmel violated the provisions of N.J.S.A. 17:22B-13(c), N.J.A.C. 11:1-37.13(a), N.J.A.C. 11:1-37.13(b)(4), and N.J.S.A. 56:12-2. Ibid.

The ALJ additionally noted that the Department alleged in Count Three of the OTSC that the Respondents used a fee structure that is not reasonably related to the services rendered. Ibid. The ALJ provided that N.J.A.C. 11:1-37.13 (b)(3)(ii) states that, the written memorandum or contract between a licensed public adjuster and an insured shall contain a list of services to be rendered and the maximum fees to be charged, which fees shall be reasonably related to services rendered. Ibid. In the present matter, the Department provided fifty-one separate Settlement Statements that the ALJ found demonstrated that the Respondents charged each insured based on the gross award from the insurance company, before reductions for depreciation and deductible. Ibid. Further, the ALJ stated that the chart in the Department's filing, which summarizes the fifty-one separate Settlement Statements, demonstrates that if the Respondents had charged each insured a fee based upon the net insurance award, or monies actually paid by

an insurance carrier for a claim, these insureds collectively would have received $32,304.36 more in insurance benefits. Ibid.

The ALJ stated that the collection of fees based upon funds that were not paid to the insureds is "undoubtedly a patent violation of the language of the rule requiring fees to be reasonably related to services rendered." Ibid. Accordingly, the ALJ found that CIA's fee structure was in violation of N.J.A.C. 11:1-37.13 (b)(3)(ii). Id. at 16-17. Additionally, because Mehmel signed forty-six of the forty-seven contracts at issue in this matter, the ALJ also found that Mehmel violated the provisions of N.J.A.C. 11:1-37.13 (b)(3)(ii). Id. at 17.

Finally, the ALJ found that based upon his findings above, the Respondents are in violation of N.J.S.A. 17:22B-14(a)(1) and N.J.A.C. 11:1-37.14(a)(1) for violating any provision of the State's insurance law and that the Respondents' actions demonstrate incompetency, financial irresponsibility, and untrustworthiness, in violation of N.J.S.A. 17:22B-14(a)(4), N.J.A.C. 11:1-37.14(a)(4), and N.J.A.C. 11:1-37.17.[9] Ibid.

Count Four

The ALJ stated that Count Four of the OTSC alleges that the Respondents failed to deposit settlement proceeds for insureds into an interest-bearing escrow or trust account. PSD at 6. In support of this allegation, the Department stated that a review of the CIA business account from January 2013 through December 2013 confirmed that the insurance proceeds were deposited into CIA's business account and that checks to clients were issued from the same CIA business account. Id. at 6-7. The ALJ noted that the Department provided copies of CIA's bank statements in support of the allegations in this Count. Id. at 7 (citing the Shannon Cert. at ¶ 15, Exhibit D).

[9] N.J.A.C 11:1-37.17 relates to public records and was not alleged as a violation in the OTSC in this matter. It is unclear why there is a reference to this regulatory citation.

The ALJ stated that while the Respondents claimed that they "never received, accepted or held any money on behalf of their clients," they do not dispute the Department's factual assertions. Ibid. (quoting the Respondent's Motion for Summary Decision at 17). Therefore, the ALJ found that CIA accepted insurance proceeds on behalf of insureds and failed to deposit these funds into an interest-bearing escrow or trust account. Ibid.

The ALJ noted that N.J.S.A. 17:22B-13(f) requires that no individual, firm, association, or corporation that is licensed under the Act shall:

> receive, accept or hold any moneys towards the settlement of a claim for loss or damage on behalf of an insured unless the public adjuster deposits the moneys in an interest bearing escrow account in a banking institution or savings and loan association in this State insured by an agency of the federal government. Any funds held in escrow together with interest accumulated thereon shall be the property of the insured until disbursement thereof pursuant to a written memorandum, signed by the insured and by the adjuster, specifying or clearly defining the services rendered and the amount of any compensation to be paid therefrom. In the event of the insolvency or bankruptcy of a public adjuster, the claim of an insured for any settlement moneys received, accepted or held by the adjuster shall constitute a statutory trust.

Id. at 11. The ALJ further noted that N.J.A.C. 11:1-37.11(a) provides that:

> Any public adjuster who receives, accepts or holds any moneys, on behalf of an insured, towards the settlement of a claim for loss or damage, shall deposit such moneys in an interest bearing escrow or trust account in a financial institution in this State which is insured by an agency of the Federal government.

Id. at 12.

The ALJ stated that the facts in this matter are not in dispute and that from January through December 2013, CIA accepted insurance proceeds on behalf of insureds and failed to deposit these funds into an interest-bearing escrow or trust account. Ibid. While the Respondents argued that "they never received, accepted or held any monies on behalf of their clients," this is irrelevant, as both the Act and regulation are clear that the public adjuster is required to deposit these funds into

an interest-bearing escrow or trust account. Ibid. Accordingly, the ALJ found that the Department had proven the violations of the Act and regulation. Ibid.

Penalties Recommended by the ALJ

As to the appropriate penalty, the ALJ noted that under the Public Adjusters' Act, the Commissioner may suspend or revoke any public adjuster license if the Commissioner determines that the adjuster has violated the insurance laws or regulations of this State. PSD at 12 and Initial Decision at 17. The ALJ stated that in addition to suspending or revoking a license, the Commissioner may impose penalties of not more than $2,500 for the first offense and not more than $5,000 for each subsequent offense pursuant to N.J.S.A. 17:22B-17. PSD at 12 and Initial Decision at 17. The ALJ also stated that the Commissioner may also seek an order restoring to any person "moneys or property acquired by means of an unlawful act or practice." PSD at 12 and Initial Decision at 17 (quoting N.J.S.A. 17:22B-17). The ALJ found that the Department had proven that the Respondents entered into contracts in violation of several sections of the Public Adjusters' Act, and therefore a penalty is warranted.[10] Ibid.

The ALJ noted that the Department had asked for a total of $143,500 in fines to be assessed against the Respondents in relation to the violations found against them. Initial Decision at 17. Specifically, the ALJ noted that that Department sought $23,500 in relation to Count One of the OTSC, $23,500 in relation to Count Two of the OTSC, $94,000 in relation to Count Three of the OTSC, and $2,500 in relation to Count Four of the OTSC. Id. at 18. The ALJ further noted that

[10] As noted above, in the PSD, the ALJ did not assess the Respondents a penalty for the violations found in Counts One, Two, and Four of the OTSC or recommend the revocation or suspension of the Respondents' public adjuster licenses. The ALJ reserved these assessments for the Initial Decision, at the conclusion of the matter.

the Department sought a total of $32,794.63 in restitution for the violations contained in Count Three of the OTSC. Ibid.

The ALJ applied the seven factors for determining monetary penalties set forth in Kimmelman v. Henkles & McCoy, Inc., 108 N.J. 123, 137-39 (1987). Id. at 18-19. These factors include: (1) the good faith or bad faith of the public adjuster; (2) the public adjuster's ability to pay; (3) the amount of profits obtained from the illegal activity; (4) injury to the public; (5) duration of the illegal activity or conspiracy; (6) existence of criminal actions; and (7) past violations. Initial Decision at 18.

As to the first factor in Kimmelman, the good or bad faith of the Respondents, the ALJ stated that the Respondents utilized a fee structure, which enabled the Respondents to recover fees based on amounts that were not paid to the insureds. Ibid. This permitted the Respondents to recover significantly higher payments than they would have if they based their fee on the net amounts paid to the insureds. Ibid. The ALJ noted that these actions were not an exercise in good faith.[11] The ALJ additionally stated that the Respondents contracting with clients prior to the time CIA was licensed, failing to notify insures of their right to cancel a contact at any time, failing to deposit insurance proceeds in an interest-bearing escrow or trust account, not clearly defining the services to be rendered, and utilizing a fee structure that was not reasonably related to the services rendered are all acts taken in bad faith. Ibid.

[11] The ALJ additionally noted that "[i]n six instances, respondents recovered more than the insureds, and in thirty-two instances, respondents recovered a fee higher than permitted by the contract." Initial Decision at 18. This is unrelated to the present matter and may relate to another matter involving another public adjuster who collected fees off of the gross settlement amount. See Commissioner v. Advocate Public Adjusters and Bellamy, OAL Dkt. No. BKI-13161-15, Initial Decision (02/26/20), Final Decision and Order (03/09/21).

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

As to the third factor, the profits obtained, the ALJ stated that the Department had shown that the Respondents improperly profited $32,304.36, which is established in Count Three of the OTSC. Id. at 19.

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

Regarding the fifth factor in Kimmelman, the duration of illegal activity, the ALJ found that the illegal activities at issue in the instant matter took place from October 2012 to October 2015, a period of three years. Ibid.

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

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

Based upon these factors, the ALJ recommended the following civil monetary penalties:

As to Count One of the OTSC, the ALJ stated that it is appropriate to assess the Respondents a penalty of $23,500 for the forty-seven separate instances of entering into contracts

prior to licensure; however, the ALJ stated that because Mehmel signed forty-six of the contracts at issue, the penalty for Mehmel in relation to Count One of the OTSC should be $23,000. Ibid. Accordingly, the ALJ recommended that CIA and Mehmel be jointly and severally liable for $23,000 and CIA solely liable for $500 in relation to Count One of the OTSC. Id. at 22.

As to Count Two of the OTSC, the ALJ stated that it is appropriate to assess the Respondents a penalty of $23,500 for failure to include proper cancellation procedures in the forty-seven separate violations found; however, the ALJ stated that because Mehmel signed forty-six of the contracts at issue, the penalty for Mehmel in relation to Count Two of the OTSC should be $23,000. Id. at 19. Accordingly, the ALJ recommended that CIA and Mehmel be jointly and severally liable for $23,000 and CIA solely liable for $500 in relation to Count Two of the OTSC. Id. at 22.

As to Count Three of the OTSC, the ALJ stated that the Department argued that as the Respondents have been found in violation of Counts One, Two, and Four of the OTSC, the violations in Count Three are subsequent violations, which empower the Commissioner to impose fines up to $5,000 per violation. Id. at 19. The ALJ noted that the Department is seeking $2,000 per violation for the forty-seven instances of failure to clearly define compensation and charging fees that are not reasonably related to the services rendered. Ibid. The ALJ stated that he agrees with the Department and that is appropriate to assess the Respondents a penalty of $94,000 in relation to this Count. Id. at 20. However, the ALJ stated that because Mehmel signed forty-six of the contracts at issue, the penalty for Mehmel in relation to Count Three of the OTSC should be $92,000. Id. at 19-20. Accordingly, the ALJ recommended that CIA and Mehmel be jointly and severally liable for $92,000 and CIA solely liable for an additional penalty $2,000 in relation to Count Three of the OTSC. Id. at 22.

As to Count Four of the OTSC, the ALJ stated that it is appropriate to assess the Respondents a penalty of $2,500 for the Respondents' failure to deposit funds in an interest-bearing escrow or trust account. Id. at 20. Accordingly, the ALJ recommended that CIA and Mehmel be jointly and severally liable for $2,500 in relation to Count Four of the OTSC. Id. at 22.

The ALJ additionally stated that the Department requested that the Respondents reimburse the Department for the costs of investigation in the amount of $2,900. Id. at 20. The ALJ determined that this was appropriate and recommended that CIA and Mehmel be jointly and severally liable for the reimbursement of $2,900 for the Department's costs of investigation. Id. at 22.

The ALJ further concluded that based on the findings of fact in relation to Count Three of the OTSC, restitution totaling $32,794.63 is warranted. Id. at 20. The ALJ additionally concluded that for all of the violations, except for the violations concerning the contract with S.E., which was not signed by Mehmel, the Respondents should be jointly and severally liable because they acted in concert. Ibid. The ALJ stated that the difference in fee between the Respondents' charge on the gross settlement funds than on the net settlement funds on the contract with S.E. was $354.38, and therefore, Mehmel is responsible for restitution totaling $32,440.25. Ibid. Accordingly, the ALJ recommended that CIA and Mehmel be jointly and severally liable for restitution totaling $32,440.25 and CIA be solely liable for additional restitution in the amount of $354.38. Id. at 22.

The ALJ additionally recognized that the Department sought revocation of the Respondents' public adjuster licenses for the violations found in the PSD and Initial Decision. Id. at 20. He noted that N.J.S.A. 17B:22-14(a) provides that the Commissioner may revoke a public adjuster license if the licensee:

> (1) Has violated any provision of the insurance law, including any rules promulgated by the [C]ommissioner, or has violated any law in the course of his, or its, dealings as an adjuster;
>
> (2) Has withheld material information or made a material misstatement in the application for a licensee;
>
> (3) Has committed a fraudulent or dishonest act;
>
> (4) Has demonstrated his, or its, incompetency, lack of integrity, bad faith, dishonesty, financial irresponsibility or untrustworthiness to act as an adjuster; or
>
> (5) Has aided, abetted or assisted another person in violating any insurance law of this State.

Ibid.

The ALJ stated that in relation to Count One, the Respondents were found to be in violation of N.J.S.A. 17:22B-3(a) and (b) for entering into public adjuster contracts with New Jersey insureds without being licensed to do so. Id. at 21.

The ALJ stated that in relation to Count Two, the Respondents were found to be in violation of N.J.A.C. 11:1-37.13(b)(5)(ii) for failing to include a provision that the contract can be cancelled at any time. Ibid.

The ALJ stated that in relation to Count Three, the Respondents were found to be in violation of N.J.S.A. 17:22B-13(c), N.J.A.C. 11:1-37.13(a), N.J.A.C. 11:1-37.13(b)(4), and N.J.S.A. 56:12-2 for failing to clearly define the services to be rendered under their contracts. Ibid. The ALJ additionally stated that the Respondents were also found to be in violation of N.J.A.C. 11:1-37.13(b)(3)(ii) for utilizing a fee structure that was not reasonably related to the services rendered. Ibid. Lastly, the ALJ stated that the Respondents were also found to be in violation of N.J.S.A. 17:22B-14(a)(1) and N.J.A.C. 11:1-37.14(a)(1) for violating any provision of the State's

insurance law, and N.J.S.A. 17:22B-14(a)(4), N.J.A.C. 11:1-37.14(a)4, and N.J.A.C. 11:1-37.17[12] for demonstrating incompetency, financial irresponsibility, and untrustworthiness as adjusters. Ibid.

The ALJ stated that in relation to Count Four of the OTSC, the Respondents were found to be in violation of N.J.S.A. 17:22B-13(f) and N.J.A.C. 1:1-37.11(a) for failing to deposit funds in an interest-bearing escrow or trust account. Ibid.

Based upon the foregoing, the ALJ found that the Respondents are in violation of N.J.S.A. 17:22B-14(a)(1) and (4) and therefore, the Department has demonstrated that the revocation of the Respondents' public adjuster licenses is warranted. Ibid.

EXCEPTIONS

By letter dated March 27, 2020, the Office of the Attorney General, on behalf of the Department, submitted Exceptions to the Initial Decision pursuant to N.J.A.C. 1:1-18.4(a). ("Department Exceptions"). After several extensions of time, the Respondents filed untimely Exceptions to the Initial Decision on October 15, 2020 pursuant to N.J.A.C. 1:1-18.4(a). ("Respondent Exceptions"). Although the Respondents' Exceptions were untimely, the parties were notified by letter dated October 16, 2020 that the Exceptions filed would be reviewed in this Final Decision and Order. Additionally, the parties were advised in the October 16, 2020 letter that the Department's Reply to the Respondent's Exceptions pursuant to N.J.A.C. 1:1-18.4(d) would be due on November 16, 2020, pursuant to the previous extension requests. The Department filed their Reply to the Respondent's Exceptions ("Department Reply") on November 16, 2020.

---

[12] As noted above, N.J.A.C 11:1-37.17 relates to public records and was not alleged as a violation in the OTSC in this matter.

Department's March 27, 2020 Exceptions

In its Exceptions, the Department concurred with the overall conclusions contained in the PSD and Initial Decision in this matter, with two exceptions. Department Exceptions at 2. Specifically, the Department disagreed with the ALJ not awarding all of the penalties and restitution jointly and severally against Mehmel and CIA. Ibid. The Department stated that as one of the contracts at issue in this matter was not signed by Mehmel, the ALJ did not make the penalties for this contract joint and several, but only assessed a penalty on CIA. Ibid. The Department noted that the recommended penalties related to this contract are: $500 for Count One, $500 for Count Two, and $2,000 for Count Three. Ibid. While the Department acknowledged that Mehmel did not sign this one contract, the Department argued that Mehmel should still be responsible for those penalties because he was the CEO of CIA at all relevant times. Ibid. The Department argued that pursuant to N.J.A.C. 11:1-12.2(a), active officers shall be held individually responsible for all insurance-related conduct of the corporate licensee. Ibid. Therefore, the Department noted that this provision applies to the present matter and all penalties should be joint and several. Ibid.

The Department further stated that the violations at issue in this matter would not have occurred without the CEO's knowledge, direction, and/or approval. Ibid. Specifically, the Department pointed out that in Count One, CIA acted as a public adjuster without being licensed. Ibid. The Department noted that Mehmel would have known that Frank Boyle was entering into a contract on CIA's behalf, and Mehmel would have given his direction or approval for the conduct. Id. at 2-3. The Department stated that the fact that Mehmel signed forty-six of the contracts at issue on behalf of CIA while CIA was unlicensed demonstrated that Frank Boyle was

not a rogue employee when he entered into a contract on behalf of CIA while CIA was unlicensed. Id. at 3.

The Department additionally noted that the allegations contained in Count Two were based upon the language in the contracts, and given that Mehmel signed forty-six other contracts with the same language, Mehmel must have directed or approved the language in the contracts. Ibid. Therefore, the Department stated that this additionally showed that Frank Boyle was not a rogue employee who entered into a contract that had deficient language in it. Ibid.

As to the allegations in Count Three, the Department argued that Mehmel signed forty-six of the contracts, which all involved the violative fee calculations, and therefore, Mehmel must have directed or approved this conduct. Ibid. The Department stated that this also proved that Frank Boyle was not a rogue employee of CIA when he entered into a contract that involved violative fee calculations. Ibid.

The Department lastly argued that for the reasons stated above, the restitution should also be joint and several, and the total amount due should be $32,304.36, as set forth in the Department's second Motion for Summary Decision. Ibid. The Department noted that restitution in the amount of $32,794.63 was corrected to $32,304.36 in its second Motion. Id. at 4.

Respondents' October 15, 2020 Exceptions

In their Exceptions to the PSD and Initial Decision, the Respondents summarized the allegations contained in the OTSC and the findings and penalty recommendations made by the ALJ in this matter. The Respondents made the following Exceptions related to each Count of the OTSC:

Count One:

The Respondents stated that the ALJ's decision that the entire controversy doctrine permits the adjudication related to the allegation that CIA was unlicensed at the time it entered into forty-seven public adjuster contracts in the OAL rather than the Superior Court of New Jersey was "the most obvious error." Respondent Exceptions at 2. Specifically, the Respondents stated that the entire controversy doctrine has never been applied to an administrative hearing and "there is no support for the ALJ's determination that this doctrine can overcome a clear and specific grant of jurisdiction by the legislature." Ibid. The Respondents stated that N.J.S.A. 17:22B-17 provides that "[a]ny action alleging the unlicensed practice of public adjuster shall be brought pursuant to this section in the Superior Court." Ibid. The Respondents additionally noted that R. 4:30A provides that the "[n]on-joinder of claims required to be joined by the entire controversy doctrine shall result in the preclusion of the omitted claims to the extent required by the entire controversy doctrine. . . ." Ibid.

The Respondents argued that the ALJ took "this shield of the [e]ntire [c]ontroversy [d]octrine and turned it into an offensive sword to strike down a clear and obvious grant of jurisdiction by the legislature." Id. at 3. Additionally, the Respondents argued that there is no support for this position and the doctrine does not exist for the reasons that the ALJ suggested. Ibid. The Respondents stated that the rule makes it clear that if one violates the entire controversy doctrine, that party does not get to bring the omitted claim in a subsequent litigation. Ibid.

The Respondents also claimed that the ALJ failed to explain why it was necessary that Mehmel's corporate entity needed to be licensed as a public adjuster. Ibid. The Respondents claimed that it was undisputed fact that for every one of the contracts, a licensed public adjuster was doing the public adjusting. Ibid.

Count Two:

As it relates to the ALJ's findings under Count Two of the OTSC, the Respondents stated that it must be absolutely clear that an insured may cancel a public adjuster contract at any time. Ibid. However, the Respondents contended that "this extraordinary power that this position requires [should be] embodied in the statute or rule." Ibid. The Respondents stated that "the ALJ had to go back to a notice in the New Jersey Register in 1994 where there was a comment from the Department that 'a public adjuster contract shall include a section which specifically details an individual's obligations under the contract if he or she chooses to cancel the contract at any time.'" Ibid. The Respondents argued that a comment is not a rule. Ibid.

The Respondents stated that the comment referenced by the ALJ is preceded by other comments on the issue. Ibid. Specifically, the Respondents state the summary of public comments provides the following:

> Several commenters objected to the provision which permits the cancellation of a contract upon 20-days written notice. Generally, commenters noted that most of the critical adjusting process occurs within the first few days following a loss and, as written, the rules do not provide adequate compensation to adjusters who have done their job, where a contract is later cancelled by an insured. One commenter suggested that the provision may delay the commencement of the adjusting process until the 20-day period has expired.
>
> The Hearing Officer found the 20-day cancellation period to be impractical and that it could impede an adjusters' ability to provide the type of services customarily required within a reasonably short period of time following a loss. The Hearing Officer, therefore, recommended that the 20-day cancellation period should presently be deleted from these rules until the Department can properly analyze the circumstances surrounding the need for a cancellation period.

Ibid. (quoting 26 N.J.R. 1711 (April 18, 1994)). The Respondents stated that "[a]s a result of that hearing the Department amended the proposed Rule by deleting the cancellation provision as written" and adopted the regulation in which the "entire cancellation period is deleted." Id. at 3.

The Respondents additionally asserted that it is contrary to law that a comment is now a rule. Id. at 4. The Respondents argued that "[a]nd the expectation that a public adjuster would know this is the rule based upon a comment to a rulemaking process, a process which abandoned what is now proposed to be the rule, is unreasonable." Ibid.

Count Three:

As it relates to Count Three of the OTSC, the Respondents argued that the statute is silent as to the fees that a public adjuster can charge and says nothing related to the methodology to be used in determining fees. Ibid. The Respondents stated that the regulations have one provision that provides that the fee must be reasonably related to the services provided and from this one sentence the ALJ determined that the Respondents' fee structure violated the law. Ibid.

The Respondents stated that the ALJ's determination was based upon the fact that the phrase "total settlement reached" was not defined in the Respondents' contracts. Ibid. The Respondents further noted that the fee was a percentage of that item before deducting the deductibles and depreciation amounts. Ibid. The Respondents noted "[i]t seems at least ironic when the claim of a lack of definition comes from a department which has never defined what reasonably related to the services provided means." Ibid.

The Respondents stated that the ALJ found that the Respondents' failure to clearly indicate that the fee would be charged on the gross insurance award "is a clear violation of the rules requiring the contracts to clearly define the services to be rendered and to be written in a simple, clear, understandable and easily readable way." Ibid. (quoting the Initial Decision at 16). The Respondents stated that there is no explanation as to how the fee structure has anything to do with the services to be rendered and there is no explanation for what "is so unknowable about the phrase 'total settlement reached.'" Id. at 4.

Moreover, the Respondents stated that the ALJ also determined that the collection of fees upon the funds not paid to the insured "is undoubtedly a patent violation of the language of the rule requiring fees to be reasonable related to services rendered." Ibid. (quoting the Initial Decision at 16). The Respondents argued that there is no explanation related to "how it is that the fee structure has anything to do with the services rendered." Id. at 4. The Respondents argued that the ALJ's determination of the fee structure violation is "a twisty convoluted mess which is the antithesis of a regulatory body." Ibid.

Count Four:

The Respondents stated that Mehmel's method of handling insurance settlement checks was to meet the client at the bank, hand the client a business check for the client's share, have the client endorse the settlement check, and then deposit the settlement check into his business account. Ibid. The Respondents noted that Mehmel did this because there was no bank that he could find in New Jersey that permitted him to establish an interest-bearing escrow account. Ibid. The Respondents stated that Mehmel would have needed to set up individual accounts for each client, using the client's social security number. Ibid. Because the Respondents stated that this would be "unworkable," Mehmel created the above solution so that he would never "receive, accept or hold any monies on behalf of an insured." Ibid.

The Respondents stated that while the ALJ found that both the Act and regulation are clear that a public adjuster is required to deposit funds into an interest-bearing escrow or trust account, the "record below is undisputed that the ALJ's position was an impossible one." Id. at 5. The Respondents additionally noted that Mehmel never had any client money in any bank account. Ibid. The Respondents argued that there must be money to hold. Ibid.

Additional arguments:

The Respondents additionally set forth what they referred to as "Ignored Legal Issues," concerning due process, ultra vires, and impermissible rulemaking that were totally or mostly ignored by the ALJ. Ibid. The Respondents stated that these arguments are the core of the Respondents' position and "boil down to the idea that those being regulated are entitled to know what the regulations are." Ibid. A summary of each of these positions are set forth below:

(1) Respondents' due process arguments

The Respondents argued that there is nothing in the Public Adjusters' Act or regulations that stated that a public adjuster contract can be cancelled any time, that a business entity must be licensed as a public adjuster, or that a fee can be only a percentage of the money received by a client. Ibid.

The Respondents argued that the courts have dealt with due process in the regulatory process, and the New Jersey Supreme Court has stated that "due process means that administrators must do what they can to structure and confine their discretionary powers through safeguards, standards, principles and rules." Ibid. (citing Crema v. New Jersey Dep't of Environmental Protection, 94 N.J. 286, 301 (1983) (citations omitted)). The Respondents additionally stated that there must be both substantive and procedural safeguards to control agency discretion. Respondent Exceptions at 5. The Respondents additionally quote the New Jersey Supreme Court which provided that "[e]ven if a regulation falls within the scope of the agency's legislative authority, it will nonetheless be invalidated if the agency 'significant[ly]' fails 'to provide . . . regulatory standards that would inform the public and guide the agency in discharging its authorized function.'" Id. at 5 (quoting New Jersey Soc. For Prevention of Cruelty to Animals v. Dep't of Agriculture, 196 N.J. 366, 386 (2008) (citations omitted)).

The Respondents argued that the Superior Court of New Jersey, Appellate Division, stated that it is well settled that a rule that does not contain a clear or objectively ascertainable standard may not be upheld. Respondent Exceptions at 6 (citing In re N.J.A.C. 7:1B-1.1 Et Seq., 431 N.J. Super. 100, 128 (App. Div. 2013) (citations omitted)). The Respondents pointed out that the court stated that "[a] regulation will be invalidated if it fails 'to provide . . . regulatory standards that would inform the public and guide the agency in discharging its authorized function.'" Id. at 6 (quoting In re N.J.A.C. 7:1B-1.1 Et Seq., 431 N.J. Super. at 129 (citations omitted)). The Respondent argued that the court's "role is to assure that agency rulemaking conforms with basic tenets of due process and provides standards to guide both the regulator and the regulated." Ibid.

The Respondents argued that the rule that standards to guide both the regulator and the regulated must be provided, or there will be no due process was reiterated in In re New Jersey Maritime Pilot & Docketing Pilot Commission's Determination, 443 N.J. Super 325 (App. Div. 2015),. Respondent's Exceptions at 6.

The Respondents contended that the statute and rule that the Respondents are accused of violating "says nothing about giving a client the right to unilaterally cancel a contract, nor that a business entity must be licensed, nor that a fee can only be based upon a percentage of the net fee." Ibid. Therefore, the Respondents argue that if the statute and regulation do not provide for this requirement, "how can the public or regulated [entity] expect to know anything about such a requirement." Ibid.

(2) Respondents' ultra vires arguments

The Respondents argued that administrative regulations and administrative actions "cannot subvert or enlarge upon statutory policy." Ibid. The Respondents referenced In the Matter of the Freshwater Wetland Protection Act Rules, N.J.A.C. 7:7A-1.1 et seq., 238 N.J. Super 516 (App.

Div. 1989) where the court struck down a New Jersey Department of Environmental Protection ("DEP") regulation that imposed a five-year limitation on a statutorily granted exemption. Respondent Exceptions at 6. The Respondents stated that since the statute at issue in the above-referenced matter did not impose a time limit, the limit imposed under the regulation was invalid despite the DEP's argument that the Legislature delegated authority to DEP to deal with the problem. Ibid. The Respondents argued that the court concluded that if the Legislature wished to impose a time limit on exemptions, it would have specifically done so rather than leave such a decision to the regulatory authority because the exemption "was not the kind of incidental regulatory power a [c]ourt must imply as necessary to effectuate the Legislature['s] intent." Ibid.

The Respondents contended that the Department is attempting to impose a right to cancel a contract in a statute that does not include a provision about canceling a contract. Ibid. The Respondents argued that the cancellation of a contract would be "one of those things that one would expect the Legislature to address if that were in fact its intention." Ibid. Additionally, the Respondents stated that in the present matter, parties have entered into a contract and the Department "has decided to grant one of those parties the unilateral power to terminate the contract." Ibid. The Respondents asserted that this directive by the Department violates "Article 1, Section 10, of the Unites States Constitution which provides 'no State shall . . . pass any . . . law impairing the obligation of contracts. . . .'" Ibid.

The Respondents stated that the Public Adjusters' Act does not contain a statement of legislative intent "or any other sort of policy declaration." Id. at 7. The Respondents asserted that the "obvious intent" of the Public Adjusters' Act was "to define what a public adjuster is and does." Ibid. The Respondents noted that the Public Adjusters' Act, in addition to setting forth the process to obtain a license, includes prohibited behavior and discipline of licensees who engage in

that behavior as well as granting authority to the Commissioner to effectuate the purpose of the Act. Ibid. The Respondents argued that the Public Adjusters' Act does not provide, and the Legislature did not intend, that an insured has the power to cancel a contract whenever the insured chooses, that a business entity as well as the individual must be licensed, or that fees must be calculated a certain way. Ibid. The Respondents stated any administrative rule that sets forth such propositions would be ultra vires. Ibid.

(3) Respondents' rulemaking arguments in relation to Count Three of the OTSC

The Respondents alleged that the Department is attempting to establish regulations through litigation. Ibid. Respondents provided that although "[t]here is no clear [non]ambiguous statement in the statute or the administrative regulations tha[t] a public adjust[er] contract must contain a provision that the client can unilaterally cancel a contract that the business entity must be licensed or that fees must be handled in a particular way," the Department is seeking to impose those requirements. Ibid. The Respondents argued that if the Department wants to engage in rulemaking, there is a legal process to do so. Ibid.

The Respondents stated that in State of New Jersey, Dep't of Environmental Protection v. Stavola, 103 N.J. 425 (1986), the New Jersey Supreme Court held that an adoption by the rulemaking process is warranted if the agency determination involves many or most of the following:

> (1) is intended to have wide coverage encompassing a large segment of the regulated or general public, rather than an individual or a narrow select group; (2) is intended to be applied generally and uniformly to all similarly situated persons; (3) is designed to operate only in future cases, that is, prospectively; (4) prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization; (5) reflects an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or (ii) constitutes a material and

> significant change from a clear past agency position on the identical subject matter; and (6) reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy.

Ibid. (quoting State of New Jersey, Dep't of Environmental Protection v. Stavola, 103 N.J. at 437 (citing Metromedia Inc. v. Director, Div. of Taxation, 97 N.J. 313, 331-32 (1984))). The Respondents asserted that all of the above-referenced factors exist in the present matter. Further, the Department's position in this matter must be consistent with their position in other matters involving any other case that involves the same issue, or "there would be substantial equal protection issues." Respondent Exceptions at 8. The Respondents additionally argued that the Department's position is one that will be followed in the future and is not otherwise expressly provided for or officially set forth. Ibid. The Respondents stated that "[r]ulemaking is . . . designed to develop coherent and rational codes of conduct so that those concerned may know in advance the rules of the game and may act with reasonable assurance." Ibid. (citing General Assembly of New Jersey v. Byrne, 90 N.J. 376 (1982)). The Respondents contended that there is nothing in the Public Adjusters' Act that expressly provides for a requirement that contracts for public adjuster services must give the client the unilateral right to cancel the contract. Ibid. The Respondents additionally stated that there is also nothing in the Public Adjusters' Act or regulations that require a business entity to be licensed in addition to the individual nor anything regarding fees, other than the fees need to be reasonably related to the services rendered. Ibid.

The Respondents alleged that their position as to these legal principles is supported by the Department's responses to discovery in this matter. Ibid. The Respondents pointed to five interrogatory questions that they served on the Department and the Department's answers to said questions, which stated that the Department objected to the interrogatories, as they sought legal advice or were vague, ambiguous, overbroad, or not reasonable calculated to lead to the discovery

of admissible evidence. Id. at 8-10. The Respondents asserted that based upon these answers to their interrogatories, "the Respondents are not yet aware as to what language the Department believes should be included in a public adjuster's contract." Id. at 10. The Respondents stated that "[t]he Department has refused to provide that information meaning that we still do not have a standard to measure against." Id. at 10.

Department's November 16, 2020 Reply

In its Reply to the Respondent's October 15, 2020 Exceptions in this matter, the Department set forth the following arguments:

Count One:

The Department argued that the Respondent's arguments against the findings of liability on Count One of the OTSC lack merit. Department Reply at 2. First, the Department opposed the Respondents' contention that the violation alleged had to be brought before the Superior Court. Ibid. The Department argued that the OAL had jurisdiction in this matter because the entire controversy doctrine requires that the Commissioner bring all allegations of violations against the Respondents in a single proceeding. Ibid. Specifically, the Department argued that "the entire controversy doctrine provides that the non-joinder of claims or parties required to be joined shall result in the preclusion of the omitted claims." Ibid. (citing DiTrolio v. Antiles, 142 N.J. 253, 266 (1995) (citations omitted)). The Department stated that the principle behind this policy is that the adjudication of a legal controversy should occur in one litigation in only one court. Ibid. (citing Ditrolio v. Antiles, 142 N.J. at 267 (citations omitted.)). The Department stated the "central consideration is whether the claims against the different parties arise from related facts of the same transaction or series of transactions." Department's Reply at 2-3 (citing Ditrolio v. Antiles, 142

N.J. at 267 (citations omitted.)). The test to determine whether claims are so related to be brought in a single action is whether the

> parties or persons will, after final judgment is entered, be likely to have engaged in additional litigation to conclusively dispose of their respective bundles of rights and liabilities that derive from a single transaction or related series of transactions, the omitted components of this dispute must be regarded as constituting an element of one mandatory unit of litigation.

Ibid.

The Department argued that in the present matter, the Respondents are alleged to have acted in concert to violate the law and therefore, the claims must be determined in one proceeding under the doctrines of entire controversy, res judicata, and collateral estoppel. Department Reply at 3 (citing City of Hackensack v. Winner, 82 N.J. 1, 44 (1980)). The Department stated that separate claims should not be held in abeyance if the issue is part of the "overall dispute between the parties, in order to pay at rest all their legal differences in one proceeding and avoid the prolongation and fractionalization of litigation." Department's Reply at 3 (quoting Tevis v. Tevis, 79 N.J. 422, 434 (1979)). Moreover, the Department stated that the New Jersey Supreme Court has acknowledged that the entire controversy doctrine was necessary "not only to resolve the controversy between the parties but also to avoid the collision between two tribunals." Department's Reply at 3 (quoting City of Hackensack, 82 N.J. at 33). The Department further specified that the consideration is whether the common issue can be "fairly, competently and fully tried and adjudicated together with and as a constituent part of all other issues in the case before one agency so that fragmented and repetitious actions would be avoided, all relevant concerns addressed and the entire controversy concluded in a single proceeding." Department's Reply at 4 (quoting City of Hackensack, 82 N.J. at 33).

The Department contended that the OTSC in this matter was the result of one investigation by the Department and involves the same general and factual nexus, which is the Respondents' contracts from 2012 through 2014. Department's Reply at 4. The Department stated that Mehmel was CIA's CEO and the Respondents acted in concert in the matters referenced to in the OTSC. Ibid. The Department further argued that the allegations contained in Count One of the OTSC were properly transmitted to the OAL pursuant to the entire controversy doctrine, and the OAL was the proper venue for the adjudication of the Department's allegations that the Respondents entered into public adjuster contracts with New Jersey insureds without CIA first being licensed to do so. Ibid.

Secondly, the Department stated that the Respondents' claim that the ALJ did not explain why Mehmel's corporate entity needed to be licensed as a public adjuster is incorrect. Ibid. The Department stated that there is a clear legal basis for the violation, as set forth in the OTSC, the Department's briefs, and the PSD. Id. at 4-5. The Department pointed out that the N.J.S.A. 17:22B-3(a) explicitly requires that a business entity be licensed in order to act as a public adjuster in this State. Id. at 5. The Department argued that this provision was violated by CIA when it entered into public adjuster contracts while unlicensed and was furthered by Mehmel because he signed the public adjuster contracts on CIA's behalf at that time. Ibid.

Lastly, the Department stated that the Respondents misrepresented facts when they stated that "[t]he undisputed fact is that for every one of those contracts, a licensed public adjuster was doing the public adjusting." Ibid. The Department stated that even though CIA was unlicensed at the time, it was explicitly named as the public adjuster in each contract at issue. Ibid. Further, each public adjuster's contract had CIA's name in large letters at the top and explicitly stated that "[t]he undersigned hereinafter called 'insured', hereby engages Construction Investigation and

Adjustments hereinafter called 'public adjuster' to advise and assist in the adjustment of an insurance claim. . . ." Ibid. The Department stated that CIA was, thus, by the express terms of its own contract, retained as an adjuster under these contracts and was required to be licensed pursuant to N.J.S.A. 17:22B-3(a). Ibid.

Count 2:

In relation to the Respondents' arguments regarding Count Two of the OTSC, the Department argued that the Respondents' claim that the Department's "consideration of a provision that permits the cancellation of a contract upon twenty-days written notice . . . somehow establishes that their clients' rights to cancel a contract can be restricted is. . . contrary to logic and law." Id. at 6. Specifically, the Department noted that a proposed requirement for a twenty-day notice is not the same as only allowing cancellation to occur during the first twenty days of the contract, as the Respondents suggest. Ibid. Even so, the twenty-day requirement that the Respondents reference was never included in the adopted rules and therefore, there is nothing in the regulations that restricts a consumer's right to cancel a contract. Ibid. The Department stated that the law is clear and that consumers' right to cancel a public adjuster contract cannot be constrained, as the Respondents suggest. Ibid.

The Department stated that while the Respondents made three arguments related to their claim that they did not have adequate notice that the cancellation should be allowed at any time that are titled (1) due process; (2) ultra vires; and (3) rulemaking, all three arguments essentially assert that the Public Adjusters' Act does not provide the authority to require public adjusters to allow their clients to cancel contracts at any time, and the regulations at issue do not clearly require public adjusters to allow their clients to cancel contracts at any time. Id. at 6-7. The Department asserted that these arguments are without merit. Id. at 7.

The Department argued that the Legislature authorized the Department to "promulgate any rules and regulations as may be necessary to effectuate the purposes of [the Public Adjusters' Act] pursuant to the 'Administrative Procedures Act.'" Ibid. (quoting N.J.S.A. 17:22B-20). The Department contended that the clear purpose of the Public Adjusters' Act was to protect consumers from various types of unfair practices by public adjusters. Department's Reply at 7 (citing the requirements set forth in N.J.S.A. 17:22B-3 (licensing requirement); and N.J.S.A. 17:22B-12 (bonding requirement); N.J.S.A. 17:22B-13 (prohibited practices)).

Secondly, the Department asserted that New Jersey courts disfavor a finding that "an agency acted in an ultra vires fashion in adopting regulations." Department's Reply at 7 (quoting N.J. Coalition of Health Care Professionals, Inc. v. N.J. Dep't of Banking and Ins., Div. of Insurance, 323 N.J. Super. 207, 229 (App. Div. 1999), certif. denied, 162 N.J. 485 (1999)). The Department stated that courts give great weight to the expertise and judgment of agency heads, especially in the insurance field. Department's Reply at 7-8 (citing N.J. Coalition of Health Care Professions, Inc., 323 N.J. Super. at 229; Capital Health Sys. v. N.J. Dep't. of Banking and Ins., 445 N.J. Super. 522, 528 (App. Div.), certif. denied, 227 N.J. 281 (2016)).

The Department contended that the Respondents' citations are inapplicable to the present matter. Id. at 8. Specifically, the Department stated that while the Respondents cited to Crema, 94 N.J. at 286, to support their argument that there must be substantive and procedural standards to control agency discretion, "Crema concerned a conceptual review and approval of a proposed construction project, not regulations" and the Respondents failed to explain how Crema applies to this matter. Id. at 8.

Additionally, the Department stated that it is erroneous for the Respondents to contend that insureds have no right to cancel a service contract at any time because it violates the basic concept

of the law of agency. Ibid. The Department argued that since the public adjuster is the agent of the insured, the insured does and should have the right to cancel the contract unilaterally at any time. Ibid. If the insured does cancel the contract, the public adjuster would then be entitled to quantum meruit payment for the actual efforts expended and not the full payment under the contact. Ibid.

The Department argued that agency contracts are not specifically enforceable in a suit brought by the agent against his principal. Ibid. (citing Sarokhan v. Fair Lawn Memorial Hospital, 83 N.J. Super. 127, 133 (App. Div. 1964)). The Department stated that courts are reluctant to force a principal to keep an agent against his will "because the law has allowed every principal a power to revoke his deputation at anytime." Id. at 9 (citing Sarokhan, 83 N.J. Super. at 133). Therefore, "[t]he mere fact that the appointment recites that it will be irrevocable during the term of the appointment does not preclude the principal from exercising the power to revoke it." Ibid. "[I]t is not necessary for the principal to have any good reasons for his actions in revoking the agency, and he may cancel the agent's authority at his caprice, even though the instrument creating the agency contains an express declaration of irrevocability." Ibid. The Department contended that in light of the above, the requirement set forth in N.J.A.C. 11:1-37.13(b)(5) that public adjuster contracts allow cancellation at any time complies with the Public Adjusters' Act and case law. Department's Reply at 9.

Lastly, the Department stated that the regulations are sufficiently clear in what is required. Ibid. The Department stated that pursuant to N.J.A.C. 11:1-37.13(b)(5)(i), the contract between the public adjuster and the insured "shall prominently include a section which specifies . . . [t]he procedure to be followed by the insured if he or she seeks to cancel the contract, including any requirement for a written notice." Id. at 9-10. Further, the same regulation states that the public

adjuster's right to compensation must be "based upon a written memorandum, signed by the party to be charged and by the adjuster, and specifying or clearly defining the services to be rendered and the amount or extent of the compensation." Id. at 10. Moreover, the Department pointed out that the rule adoption for N.J.A.C. 11:1-37.13(b)(5)(i) specifically mentioned that an individual was entitled to cancel the contract at any time. Ibid. The rule adoption stated:

> The Department recognizes an individual's right to cancel any contract which he or she has entered into, and also recognizes that an individual may retain certain obligations upon such cancellation [therefore] a public adjuster contact shall include a section which specifically details an individual's obligation under the contract if he or she chooses to cancel the contract at any time.

Ibid. (quoting 26 N.J.R. 1715 (April 18, 1994)).

Therefore, the Department contended that the plain language of the regulations and the supporting explanation contained in the rule adoption are clear. Department Reply at 11. The Department stated that the inclusion of the phrases "procedures to be followed by the insured if he or she seeks to cancel the contract" and "at any time" in N.J.A.C. 11:1-37.13(b)(5)(i) and (ii), make it clear that public adjuster must allow for cancellation by the insured at any time. Ibid. The Department argued that "[i]t follows that the requirements in N.J.A.C. 11:1-37.13 for cancellation language in the contracts must address cancellation by insureds at any time." Ibid. The Department asserted that the Respondents' failure to provide the cancellation language past three days not only violates the regulations by not providing the required information that would inform the insured's decision to cancel, but it also improperly suggests that the insureds may only cancel a contract within three days after the contract is executed. Ibid.

Count Three:

The Department stated that Count Three of the OTSC encompasses two issues (1) the Respondents' contracts were unclear about how the fee was calculated and (2) the fee collected on the gross award was not reasonable. Ibid.

(1) Unclear contract allegation

The Department stated that the ALJ found that "[t]he contracts in the instant matter failed to define 'total settlement reached,' which disadvantages the insureds by not clearly indicating if the fee charged will be based on the gross insurance award from the insurance company before subtraction for deductible or depreciation, or the net award after subtractions." Ibid. (quoting the Initial Decision at 16). The Department further pointed out the ALJ found the contracts violated multiple provisions of the Public Adjusters' Act and regulations. Department's Reply at 12.

The Department stated that the Respondents' argument that there was no explanation "for what is so unknowable about the phrase 'total settlement reached'" is incorrect. Ibid. The Department argued that this phrase does not set forth whether the fee will be based on the gross award from the insurance company, which includes the unpaid amounts for depreciation and deductibles, or the net award, which is the amount of money actually paid by the insurance company to the insured. Ibid. The Department noted that this is an important distinction because charging their fee on the gross amount produces a much higher fee for the Respondents and reduces the benefits to the insureds. Ibid. Further, the Department stated that the Respondents relied on this lack of clarity in their own contracts in order to charge a fee on the amount that most benefitted the Respondents and caused the most detriment to their own clients. Ibid.

Additionally, the Department noted that the ALJ clearly addressed this problem and found that this language violated the Public Adjusters' Act and regulations. Ibid. The Department points to the following language from the Initial Decision where the ALJ stated:

> The contracts in the instant matter failed to define "total settlement reached," which disadvantaged the insureds by not clearly indicating if the fee charged will be based on the gross insurance award from the insurance company before subtractions for deductible or depreciation, or the net award after subtractions. The failure to provide this information is a clear violation of the rules requiring the contracts to clearly define the services to be rendered and to be written in a simple, clear, and understandable and easily readable way.

Id. at 12-13 (quoting the Initial Decision at 16).

Lastly, the Department stated that as mentioned in the Department's initial Exceptions in this matter, Mehmel should be held jointly and severally liable for every contract in this matter because N.J.A.C. 11:1-12.2(a) provides that active officers shall be held individually responsible for all insurance-related conduct of the corporate licensee, and Mehmel was the CEO of CIA. Id. at 13.

(2) Improper fees allegation

The Department stated the Respondents made two claims in defense to the allegation regarding the levying of improper fees: (1) they claimed that there needed to be an analysis of the services rendered and (2) they claimed that the regulation was not clear enough. Ibid. The Department stated that both of these arguments lack merit. Ibid.

The Department stated that the Respondents promised to charge their clients a contingency fee rate in their own contracts. Ibid. Therefore, the Department argued that there does not need to be any consideration of the actual tasks that the Respondents performed because the fee is based on the size of the recovery from the insurance company. Ibid.

The Department additionally contended that the regulation is sufficiently clear and that New Jersey courts have found that broad and flexible standards in regulations and statutes satisfy the requirements of due process. Id. at 13-14 (citing In re Application of Boardwalk Regency Corp. for Casino License, 180 N.J. Super. 324, 346 (App. Div. 1981) (ruling that the term "good character" in the Casino Control Act was not unconstitutionally vague), aff'd in part and modified, 90 N.J. 361 (1982); In re Proc. By the Commr. Of Banking & Ins., 98 N.J. Super. 263, 273 (App. Div. 1967) (finding that the terms "unworthiness" and "incompetency" as used in a statute were not inappropriate standards of conduct)). The Department further noted that a statute or regulation is unconstitutionally vague where "it either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess as to its meaning and differ as to its application." Department Reply at 14 (quoting N.J. Ass'n of Health Care Facilities v. Finley, 168 N.J. Super. 152, 166 (App. Div. 1979), aff'd sub nom. In re Health Care Admin. Board, 83 N.J. 67 (1980)). The Department stated that the same constitutional standard for vagueness applies to both statutes and regulations, and New Jersey courts "recognize that regulations of certain kinds of subject matter and statutes must of necessity be general." Ibid.

The Department further noted that the New Jersey Supreme Court in In re Health Care Admin. Board held that the use of the term "reasonable" in a regulation adopted by the Commissioner of Health was sufficiently definite to provide notice to regulated nursing homes. Department Reply at 14 (citing In re Health Care Admin. Board, 83 N.J. at 82-83). The Department furthers stated that in that case, the nursing homes challenged a regulation requiring them to provide beds for indigent persons if the Department of Health ("DOH") determined that certain criteria were present. Department Reply at 14-15 (citing In re Health Care Admin. Board, 83 N.J. at 76). The regulation at issue required DOH to consider "whether the nursing home would

be able to make a just and reasonable rate on equity if required to accept and care for indigent persons." Department Reply at 15 (quoting In re Health Care Admin. Board, 83 N.J. at 76). The Court held that the terms "just and reasonable" were "definite enough to satisfy the requirements of due process" because the terms are commonly used in similar contexts and have typically been interpreted and sustained by courts. Department's Reply at 15 (citing In re Health Care Admin. Board, 83 N.J. at 82).

The Department argued that the term "reasonably related" in the public adjustment fee regulations have a common and obvious meaning, and the use of these words in the regulation function the same way that the term "just and reasonable" in the regulation at issue in In re Health Care Admin. Board functions. Department Reply at 15. The Department stated that the term "reasonable" is common throughout the field of insurance regulation, which, the Department argued, indicates that the legislature has found the term sufficiently clear to provide notice and guide behavior. Ibid. (citation omitted).

The Department asserted that charging fees based on the gross, rather than net, payment, is not reasonably related to the services that a public adjuster provides. Id. at 15-16. The Department argued that the "[b]road language is necessary to effectuate the purpose of the Public Adjusters' Act, because a regulation cannot realistically enumerate all of the possible ways in which a public adjuster's fee can be unreasonable" and therefore, the regulation provided is adequate. Id. at 16.

Count Four:

The Department stated that the ALJ found that the Respondents failed to deposit client funds into an interest-bearing trust or escrow account as required. Ibid. The Department noted that in the Respondent Exceptions, the Respondents admit that they failed to deposit the client

funds into an interest-bearing trust or escrow account because the Respondents claim that no bank would allow the Respondents to do this through one account. Ibid. The Department argued that the Respondents unilaterally decided that they could simultaneously deposit the insurance company funds into their business account and issue the client a check for his or her share, nullifying the escrow account law. Ibid. The Department stated that the Respondents claim that it "is undisputed that the ALJ's position was an impossible one, and that the simple fact is that Mr. Mehmel's system was such that he never had any client's money in any bank account." Ibid.

The Department argued that this statement is incorrect, and that the Respondents do not get to decide on an alternative to complying with the law. Ibid. Moreover, the Department notes that their idea of simultaneously depositing one check and issuing another does not comply with the law, and it introduces several other problems. Ibid. The Department stated that the escrow or trust account is for tracking client funds, which is more difficult when client funds are mixed in with operating expenses in a business account. Ibid. The Department further noted that checks take time to clear; therefore, depositing one check at the same time as issuing another can be problematic because the funds are not actually going in and out at the same time. Ibid.

Moreover, the Department stated that the Respondents' claim that no bank could allow them to open an interest-bearing trust or escrow account is specious. Ibid. The Department noted that the Respondents never provided any evidence or details regarding their search, such as which banks they went to and what the conversations were. Ibid. The Department opined that the Respondents could not have gone to every bank "nor try all that hard to open such an account, because it is actually a simple procedure." Ibid.

The Department stated that nowhere in the applicable provisions, N.J.S.A. 17:22B-13 and N.J.A.C. 11:1-37.11, or related definitions sections, is "escrow" defined. Ibid. The Department

stated that the commonly-understood definition of "escrow" just means that the funds are being held for a third party, and therefore, opening such an account can be as simple as opening a normal interest-nearing business checking account, but it could be called "CIA Escrow Account." Id. at 17-18. The Department stated that the funds kept in such an account would just be kept separate from the normal operating funds in the general business account. Id. at 18. The Department stated that the Respondents failed to comply with the clear requirement of the Act and regulation and their claims that they chose a better solution and/or could not comply with the requirements are without merit. Ibid.

LEGAL DISCUSSION

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

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

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

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

Allegations Against Respondents

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

Count One

Count One of the OTSC alleges that between October 1, 2012 through October 1, 2015, Respondent CIA, through Respondent Mehmel, entered into at least forty-seven contracts with New Jersey insureds without being licensed by the Commissioner, in violation of N.J.S.A. 17:22B-14(a)(1), (4), and (5); and N.J.A.C. 11:1-37.14(a)(1), (2), (4), and (5). The ALJ found as fact that that CIA was first licensed in this State on October 1, 2015. Prior to being licensed as a public adjuster in this State, CIA entered into forty-seven public adjuster contracts with New Jersey insureds. PSD at 3-4, 10. The ALJ additionally found that Mehmel signed forty-six contracts on behalf of CIA and another contact was signed by "Frank Boyle." Id. at 4, 10. The ALJ stated that the Department had proven the violations of the statute, but failed to specifically set forth the

provisions that he found were violated in the PSD. However, in the Initial Decision, the ALJ stated that he had found in the PSD that the Respondents were in violation of N.J.S.A. 17:22B-3(a) and (b). Initial Decision at 21.

The Respondents argue in their Exceptions that there is no requirement for CIA to be licensed as a public adjuster and that Mehmel was the public adjuster on these contracts. Respondent Exceptions at 3. However, N.J.S.A. 17:22B-3(a) provides that "[n]o individual, firm, association or corporation shall act as an adjuster in this State unless authorized to do so by virtue of a license issued or renewed pursuant to this act." Moreover, N.J.A.C. 11:1-37.3(a) provides that "[n]o person shall act as a public adjuster in this State on behalf of an insured unless licensed pursuant to this subchapter." N.J.A.C. 11:1-37.1 defines "person" to mean "any individual, corporation, organization, firm, association, partnership or other legal entity," and N.J.S.A. 17:22B-2 and N.J.A.C. 11:1-37.1 define "public adjuster" to mean "any individual, firm, association or corporation . . . who, or which, for money, commission or any other thing of value, acts or aids in any manner on behalf of an insured in negotiating for, or effecting, the settlement of claims for loss or damage caused by, or resulting from, any accident, incident or occurrence covered under a property insurance policy." Both the Public Adjusters' Act and accompanying regulations require business entities, such as CIA, to obtain a public adjuster license prior to engaging in public adjusting. Additionally, as pointed out by the Department in its Reply to the Respondent Exceptions, the contracts at issue were entered into between the insured and CIA. Department Reply at 5. Mehmel signed forty-six of the contracts on behalf of CIA. As a named party to the contract, CIA, in addition to Mehmel, was required to obtain a public adjuster license prior to engaging public adjusting in this State.

Moreover, as argued by the Department, the unlicensed issue is only one allegation over a four Count OTSC against the Respondents. In order to effectuate a resolution of all of the alleged violations against the Respondents pursuant to the entire controversy doctrine, the Department was required to bring all of the allegations against the Respondents at once. Therefore, the OAL was the appropriate venue to adjudicate these claims. Accordingly, I concur with the ALJ's findings and FIND that the OAL maintained appropriate jurisdiction in this matter.

I concur with the ALJ that the Department proved the allegations in Count One of the OTSC. However, the statutory violations found by the ALJ, specifically, N.J.S.A. 17:22B-3(a) ("No individual, firm, association or corporation shall act as an adjuster in this State unless authorized to do so by virtue of a license issued or renewed pursuant to this act") and N.J.S.A. 17:22B-3(b) ("No adjuster shall act on behalf of an insured unless licensed as a public adjuster") were not set forth in the OTSC in this matter.

Courts have broad discretion to liberally permit amendment of pleadings to conform to the evidence. Cuesta v. Classic Wheels, Inc., 38 N.J. Super 512, 517 (App. Div. 2003). Moreover, N.J.A.C. 1:1-6.2(a) provides that "[u]nless precluded by law or constitutional principle, pleadings may be freely amended when, in the judge's discretion, an amendment would be in the interest of efficiency, expediency and the avoidance of over-technical pleading requirements and would not create undue prejudice." Prior Commissioners have permitted such amendments. For example, in Commissioner v. Furman, OAL Dkt. No. BKI 3891-06, Initial Decision (06/21/07), Final Decision and Order (09/17/07), the Order to Show Cause did not allege that the respondent supplied false information to an insurer; however, the respondent admitted to supplying said false information during cross examination. Accordingly, the Commissioner cited to N.J.A.C. 1:1-6.2 and concluded that "the pleadings in this case should be modified to conform with the evidence on

the record. . . ." Ibid. See also, Commissioner v. Citron, OAL Dkt. No. BKI-17272-15, Initial Decision (12/21/18), Final Decision and Order (05/06/19); and Commissioner v. Charles, OAL Dkt. No. BKI-06530-14, Initial Decision (03/02/15), Final Decision and Order (08/28/15).

Here, the Respondents were on notice that Count One of the OTSC related to CIA operating as a public adjuster without a license. The ALJ specifically found that Respondent CIA entered into at least forty-seven public adjuster contracts with New Jersey insureds without first obtaining a public adjuster license in this State. PSD at 4, 10. The Respondents, as public adjusters, are required to be aware of the statutes and regulations that govern their business. The Respondents should have been aware of the specific provisions of the Public Adjusters' Act that relate to licensure. Therefore, in the interests of efficiency, expediency, and the avoidance of over-technical pleading requirements, and since this amendment of the pleadings would not unduly prejudice the Respondents, the OTSC in this matter should be conformed to reflect the record in this matter. I concur with the ALJ's determination and FIND that as it relates to Count One of the OTSC, CIA, through Mehmel, entered into forty-seven public adjuster contracts with New Jersey insureds prior to CIA obtaining licensure in this State in violation of N.J.S.A. 17:22B-3(a) and (b). I AMEND the OTSC accordingly.

However, I disagree with the ALJ's assessment that because Mehmel only signed forty-six of the forty-seven contracts that he is not jointly liable for the violations found on the contract signed by "Frank Boyle." As noted by the Department in its Exceptions and the ALJ in the PSD, N.J.A.C. 11:1-12.2(a) provides that all active officers shall be held individually responsible for all insurance related conduct of corporate licensees. Department Exception at 2, PSD at 9. Here, the evidence shows, and the ALJ found as fact, that at all times relevant, Mehmel was the CEO of CIA. PSD at 4, 10. Therefore, Mehmel was responsible for all actions taken by his employees

and CIA. Mehmel was aware that CIA was not licensed at the time that all of the contracts were entered into and he failed to prevent any CIA and the insureds from entering into these contracts. As such, I MODIFY the PSD and Initial Decision and FIND that the Mehmel, in addition to CIA, violated N.J.S.A. 17:22B-3(a) and (b) for all of the contracts at issue in this Count.

The ALJ failed to make determinations regarding whether the Respondents' actions, as alleged in Count One of the OTSC, constituted violations of N.J.S.A. 17:22B-14(a)(1) and N.J.A.C. 11:1-37.14(a)(1) (both permit the Commissioner to suspend or revoke a license if the licensee has violated any provision of the insurance law, including any rules promulgated thereunder); N.J.A.C. 11:1-37.14(a)(2) (permitting the Commissioner to suspend or revoke a license if the licensee has violated any law in the course of acting as a public adjuster); N.J.S.A. 17:22B-14(a)(4) and N.J.A.C. 11:1-37.14(a)(4) (both permit the Commissioner to suspend or revoke a license if the licensee has demonstrated the licensee's incompetency, lack of integrity, bad faith, dishonesty, financial irresponsibility or untrustworthiness to act as an adjuster); and N.J.S.A. 17:22B-14(a)(5) and N.J.A.C. 11:1-37.14(a)(5) (both permit the Commissioner to suspend or revoke a license if the licensee has aided, abetted or assisted another person in violating any insurance law of this State).

Here, Mehmel personally entered into forty-six contracts with New Jersey insureds on behalf of an entity, CIA, that he knew was not licensed at the time that each of the contracts were executed. Moreover, Mehmel, as CEO of CIA, was responsible for another individual, Frank Boyle, entering into another contract on behalf of CIA when Mehmel was aware that CIA was not licensed at the time the contract was entered. Therefore, Mehmel, and by extension, CIA, clearly demonstrated, at the very least, incompetency in the practice of public adjusting, and at the very worst, lack of integrity, bad faith, and dishonesty by representing CIA as being a licensed adjuster

to New Jersey insureds, when it was clear that only Mehmel had been licensed as a public adjuster at the time that each of the contracts at issue in this Count were entered into, in violation of N.J.S.A. 17:22B-14(a)(4) and N.J.A.C. 11:37-14(a)(4). Moreover, as Mehmel signed forty-six of the contracts on behalf of a non-licensed entity, CIA, and is additionally responsible for the forty-seventh contract being entered into on behalf of CIA, pursuant to N.J.A.C. 11:1-12.2(a), he aided, abetted, and/or assisted in the violation the insurance laws of this state, in violation of N.J.S.A. 17:22B-14(a)(5) and N.J.A.C. 11:1-37.14(a)(5). Lastly, as the ALJ and I have found that the Respondents did, in fact, violate provisions of the Public Adjusters' Act and the regulations promulgated thereunder by CIA entering into contracts with New Jersey insureds for public adjuster services prior to CIA being licensed in this State and by Mehmel either directly executing those contracts on behalf of CIA or being responsible pursuant to N.J.A.C. 11:1-12.2(a), as set forth above, the Respondents' actions additionally constitute violations of N.J.S.A. 17:22B-14(a)(1), N.J.A.C. 11:1-37.14(a)(1), and N.J.A.C. 11:1-37.14(a)(2).

Accordingly, I MODIFY the PSD and Initial Decision and FIND that the Respondents' actions, as alleged in Count One of the OTSC, also constitute violations of N.J.S.A. 17:22B-14(a)(1) and (4); and N.J.A.C. 11:1-37.14(a)(1), (2), and (4). I additionally MODIFY the Initial Decision and FIND that Mehmel's actions in aiding, abetting, and assisting CIA in violating this State's insurance laws in Count One of the OTSC, constitute a violation of N.J.S.A. 17:22B-14(a)(5) and N.J.A.C. 11:1-37.14(a)(5).

<u>Count Two</u>

Count Two of the OTSC alleges that between October 1, 2012 through October 1, 2015, Respondent CIA, through Respondent Mehmel, entered into at least forty-seven public adjuster contracts with New Jersey insureds that did not prominently include a section that specified the

procedures by which an insured may cancel the contract, in violation of N.J.S.A. 17:22B-13(c); N.J.S.A. 17:22B-14(a)(1) and (4); N.J.A.C. 11:1-37.13(b)(5)(i) and (ii); and N.J.A.C. 11:1-37.14(a)(1), (2), (4), and (17). The ALJ found that the contracts speak for themselves and clearly state, although not prominently, that the contract can only be changed by a written agreement and that the insured can cancel the contract within three business days. PSD at 5. However, the ALJ additionally found that the language in the contracts at issue in this Count do not make it clear that the individual insured is free to cancel at any time and does not provide any procedures for the insured to follow in order to effectuate a cancellation after three business days. Ibid.

The Respondents' arguments contained in their Exceptions related to this Count are without merit. The Respondents argued that there is nothing in the Public Adjusters' Act or regulations that require an insured be given the ability to unilaterally cancel a contract with a public adjuster at any time. Respondent Exceptions at 3. However, the Legislature granted the Commissioner the authority to promulgate any regulations that may have been necessary to effectuate the purposes of the Act, which undoubtedly includes the protections of consumers from unfair practices by public adjusters. See N.J.S.A. 17:22B-20, N.J.S.A. 17:22B-3, N.J.S.A. 17:22B-12, and N.J.S.A. 17:22B-13. The Department was well within its authority under the Public Adjusters' Act to promulgate regulations that require that insureds be permitted to cancel their contracts at any time. While the Respondents argued that no regulation to this end exists, they are incorrect. N.J.A.C. 11:1-37.13(b)(5)(i) and (ii) state that a public adjuster contract must "prominently include a section which specifies . . . [t]he procedure to be followed by the insured if he or she seeks to cancel the contract, including any requirement of written notice" and must "prominently include a section which specifies . . . [t]he rights and obligations of the parties if the contract is cancelled at any time." N.J.A.C. 11:1-37.13(b)(5)(iii) provides that the contract must

set forth "[t]he costs to the insured or the formula for the calculation of costs to the insured for services rendered in whole or in part." The regulations clearly set forth the requirement that insureds are free to cancel a contract at any time, even after the three days specified in the Respondents' contracts.

Moreover, the Respondents, in their Exceptions, make reference to a comment on the adoption of N.J.A.C. 11:1-37.13. See 26 N.J.R. 1711 (April 18, 1994). The provision that this comment was discussing was in the original proposal for the public adjuster regulations at N.J.A.C. 11:1-37.13(b)(4)(iv) and stated that a contract between a licensed public adjuster and insured shall include "[n]otice that the contract can be cancelled by either party upon 20 days written notice." This proposed provision would have required that in order to cancel the contract, the insured would need to provide the adjuster with twenty days' written notice of the insured's decision to cancel. This proposed requirement is not the issue in this matter and the issue is whether the insured was permitted to cancel at any time. Upon readoption, the Department removed the provision cited by the Respondents and specifically added in N.J.A.C. 11:1-37.13(b)(5), which is currently included in the regulations, and contains the provision that the ALJ found that the Respondents had violated. As noted above, the regulations at issue in this matter clearly require that a contract between a licensed public adjuster and an insured must prominently include a section that sets forth the procedures to be followed by an insured to cancel the contract, the rights and obligations of the parties if the contract is cancelled at any time, and the costs to the insured or the formula for the calculation of costs to the insured for services rendered in whole or in part. Therefore, the Department clearly intended by this inclusion that an insured is permitted to cancel a contract at any time and without providing twenty days written notice to the adjuster of the insured's intent to cancel the contract.

Accordingly, I concur with the ALJ that the Department proved the allegations in Count Two of the OTSC, and therefore, I FIND that the Respondents' actions, as alleged in Count Two of the OTSC, constitute violations of N.J.A.C. 11:1-37.13(b)(5)(ii) (a written contract or memorandum between the public adjuster and an insured shall set forth the rights and obligations of the parties if the contract is cancelled at any time). However, as previously discussed under my analysis for Count One above, I disagree with the ALJ's assessment that because Mehmel only signed forty-six of the forty-seven contracts that he is not jointly liable for the violations found on the contract signed by "Frank Boyle." As set forth above, N.J.A.C. 11:1-12.2(a) provides that all active officers shall be held individually responsible for all insurance related conduct of corporate licensees. Additionally, as I have previously found, the evidence shows that at all times relevant, Mehmel was the CEO of CIA and he was responsible for all actions taken by his employees and CIA. Mehmel was clearly aware of the language contained in CIA's public adjuster contracts, as he signed at least forty-six contracts on behalf of CIA that contained the same language. Accordingly, I MODIFY the PSD and Initial Decision and FIND that Mehmel, in addition to CIA, is in violation of N.J.A.C. 11:1-37.13(b)(5)(ii) for all of the contracts at issue in this Count.

The ALJ did not make specific determinations regarding whether the Respondents' actions, as alleged in Count Two of the OTSC, constitute violations of N.J.S.A. 17:22B-13(c) (no public adjuster shall have any right to compensation from any insured for or on account of services rendered to an insured as a public adjuster unless the right to compensation is based upon a written memorandum, signed by the party to be charged and by the adjuster, and specifying or clearly defining the services to be rendered and the amount or extent of the compensation on a form and with such language as the commissioner may prescribe); N.J.S.A. 17:22B-14(a)(1) and N.J.A.C. 11:1-37.14(a)(1) (both permit the Commissioner to suspend or revoke a license if the licensee has

violated any provision of the insurance law, including any rules promulgated thereunder); N.J.A.C. 11:1-37.14(a)(2) (permitting the Commissioner to suspend or revoke a license if the licensee has violated any law in the course of acting as a public adjuster); N.J.S.A. 17:22B-14(a)(4) and N.J.A.C. 11:1-37.14(a)(4) (both permit the Commissioner to suspend or revoke a license if the licensee has demonstrated the licensee's incompetency, lack of integrity, bad faith, dishonesty, financial irresponsibility or untrustworthiness to act as an adjuster); N.J.A.C. 11:1-37.13(b)(5)(i) (a written memorandum or contract between a licensed public adjuster and an insured shall include the procedures to be followed by the insured if he or she seeks to cancel the contract, including any requirement for a written notice); and N.J.A.C. 11:1-37.14(a)(17) (permitting the Commissioner to suspend or revoke a license if the licensee has committed any other act, or omission which the Commissioner determines to be inappropriate conduct by a licensee of this State).

Here, although the ALJ found that the Respondents' contracts did set forth cancellation provisions for the three business days following the execution of the contracts, the ALJ additionally found that the Respondents failed to include a section in their contracts that would have notified insureds of their right to cancel the contract at any time and failed to provide the mechanism to effectuate that right. Therefore, the Respondents' failed to include a provision in the contract that set forth the procedures to be followed by the insured if the insured sought to cancel the contract after three business days, in violation of N.J.A.C. 11:1-37.13(b)(5)(i). Additionally, the Respondents, as licensed public adjusters, are required to be aware of and operate under the Act and rules that regulate their profession, and their failure to include the required language in their contracts, clearly demonstrates incompetency in the practice of adjuster business, in violation of N.J.S.A. 17:22B-14(a)(4) and N.J.A.C. 11:37-14(a)(4). Further, the Respondents

engaged in inappropriate conduct in dealings with their clients, in violation of N.J.A.C. 11:1-37.14(a)(17). Further, as the ALJ and I have found that the Respondents did violate provisions of the Public Adjusters' Act and the regulations promulgated thereunder by the lack of cancellation language in their contracts, as set forth above, the Respondents' actions additionally constitute violations of N.J.S.A. 17:22B-14(a)(1), N.J.A.C. 11:1-37.14(a)(1), and N.J.A.C. 11:1-37.14(a)(2).

Accordingly, I MODIFY the PSD and Initial Decision and FIND that the Respondents' actions, as alleged in Count Two of the OTSC, also constitute violations of N.J.S.A. 17:22B-14(a)(1) and (4); N.J.A.C. 11:1-37.13(b)(5)(i); and N.J.A.C. 11:1-37.14(a)(1), (2), (4), and (17).

Lastly, I cannot find that the allegations contained in Count Two of the OTSC or the findings of the ALJ related to Count Two of the OTSC support a conclusion that the Respondents' actions as found related to this Count constitute a violation of N.J.S.A. 17:22B-13(c). This Count does not relate to compensation provisions under the Respondents' contracts. Moreover, although the contracts did not contain the required language, the contracts were based upon a written contract, signed by the party to be charged and by the adjuster, and specified the services to be rendered. As such, I FIND that the Respondents' actions, as alleged in Count Two of the OTSC, do not constitute a violation of N.J.S.A. 17:22B-13(c).

Count Three

Count Three of the OTSC alleges that Between October 1, 2012 through October 1, 2015, Respondent CIA, through Respondent Mehmel, entered into at least forty-seven public adjuster contracts with New Jersey insureds wherein the Respondents fee structure for public adjuster services was not reasonably related to the services rendered, in violation of N.J.S.A. 17:22B-13(c); N.J.S.A. 17:22B-14(a)(1) and (4); N.J.A.C. 11:1-37.13(b)(3)(ii), and N.J.A.C. 11:1-37.14(a)(1), (4), and (17); and in these same contracts, the Respondents failed to clearly define the amount or

extent of the Respondents' compensation for public adjuster services, in violation of N.J.S.A. 17:22B-13(c); N.J.S.A. 17:22B-14(a)(1) and (4); N.J.S.A. 56:12-2; N.J.A.C. 11:1-37.13(a); N.J.A.C. 11:1-37.13(b)(4); N.J.A.C. 11:1-37.14(a)(1), (4), (13), and (17).

The ALJ found that in fifty-one instances, the Respondents charged each insured a fee based on the gross award from the insurance company, before reductions for depreciation and deductible amounts. Initial Decision at 13. Moreover, the ALJ found that if the Respondents had charged each insured their contractual fee based upon the net insurance award, or monies actually paid by an insurance carrier for a claim, these insureds collectively would have received $32,304.36 more in insurance benefits. Ibid.

The ALJ stated that the failure to provide information regarding the amount upon which CIA's fee would be collected is a violation of the rules requiring the contracts to clearly define the services to be rendered and to be written in a simple, clear, understandable, and easily readable way. Id. at 15. Therefore, the ALJ found that the forty-seven contracts entered into by CIA violated the provisions of N.J.S.A. 17:22B-13(c), N.J.A.C. 11:1-37.13(a), N.J.A.C. 11:1-37.13(b)(4) and N.J.S.A. 56:12-2. Id. at 16. Moreover, because Mehmel signed forty-six of the forty-seven[13] contracts at issue, the ALJ further found that Mehmel violated the provisions of N.J.S.A. 17:22B-13(c), N.J.A.C. 11:1-37.13(a), N.J.A.C. 11:1-37.13(b)(4), N.J.A.C. 11:1-37.13(b)(3)(ii), and N.J.S.A. 56:12-2. Id. at 16-17. The ALJ stated that the collection of fees based upon funds that were not paid to the insureds is "undoubtedly a

[13] While the original forty-seven contracts provided in the Shannon Cert. only had one contract that was signed by a "Frank Boyle" and not Mehmel, the Shannon Supp. Cert included three contracts that were signed by "Frank Boyle," Bates stamped as 031, 051 (this was included in both submissions), and 078. In the supplemental submission, there is one contract that is signed by another adjuster by the name of "Scott Franks," Bates stamped as 068. Therefore, there were four contracts that were presented by the Department in relation to its second Motion for Summary Decision that Mehmel did not sign on behalf of CIA. Based upon the above, it appears that the ALJ was under the impression that the same contracts provided in the Shannon Cert. were the same contracts provided in the Shannon Supp. Cert. for Count Three.

patent violation of the language of the rule requiring fees to be reasonably related to services rendered." Id. at 16. Accordingly, the ALJ found that CIA's fee structure was in violation of N.J.A.C. 11:1-37.13(b)(3)(ii). Id. at 16-17. The ALJ also found that Respondents were in violation of N.J.S.A. 17:22B-14(a)(1) and N.J.A.C. 11:1-37.14(a)(1) for violating any provision of the State's insurance law and that the Respondents' actions demonstrate incompetency, financial irresponsibility, and untrustworthiness, in violation of N.J.S.A. 17:22B-14(a)(4), N.J.A.C. 11:1-37.14(a)(4), and N.J.A.C. 11:1-37.17. Ibid.

The Respondents argue in their exceptions that the statute is silent as to the fees that a public adjuster can charge and the methodology to be used in determining fees. Respondent Exceptions at 4. The Respondents stated that the regulations provide that the fee must be reasonably related to the services provided and from this one sentence the ALJ determined that the Respondents' fee structure violated the law. Ibid. The Respondents argued that there is no explanation related to "how it is that the fee structure has anything to do with the services rendered." Ibid. at 4. The Respondents alleged that the Department is attempting to establish regulations through litigation. Id. at 7. The Respondents argued that if the Department wants to engage in rulemaking, there is a legal process to do so. Ibid.

In its reply, the Department argued that the phrase "total settlement reached" contained in the Respondents' contracts does not set forth whether the fee will be based on the gross award from the insurance company, which includes the unpaid amounts for depreciation and deductibles, or the net award, which is the amount of money actually paid by the insurance company to the insured. Department Reply at 12. The Department noted that this is an important distinction because charging their fee on the gross amount produces a much higher fee for the Respondents and reduces the benefits to the insureds. Ibid. The Department asserted that charging fees based

on the gross, rather than net, payment, is not reasonably related to the services that a public adjuster provides. Id. at 15-16.

I agree with the ALJ and find the language contained in the Respondents' contracts that their fee will be based upon the "total settlement reached" is ambiguous. The term "total settlement reached" could refer to the gross award obtained from the insurance company, or to the net award. The Respondents exploited this ambiguity and charged their fee on the higher, gross award, rather than the lower, net award. Accordingly, I concur with the ALJ and find the forty-seven[14] contracts entered into by CIA violated the provisions of N.J.S.A. 17:22B-13(c) (no right to compensation from any insured for or on account of services rendered to an insured as a public adjuster unless the right to compensation is based upon a written memorandum), N.J.A.C. 11:1-37.13(a) (requiring that a written contract or memorandum must specify or clearly define "the amount or extent of the compensation"), N.J.A.C. 11:1-37.13(b)(4) (requiring public adjuster contracts to confirm to the requirements of the Consumer Contracts Act, N.J.S.A. 56:12-1 to -101), and N.J.S.A. 56:12-2 (consumer contracts must be "written in a simple, clear, understandable and easily readable way"). Further, by collecting fees on the higher, gross award, the Respondents collected monies from insureds that the insureds never received from their insurance companies. The Respondents' fee structure enabled them to collect money on awards that were never given to the insureds. I agree with the ALJ and find that CIA's fee structure was in violation of N.J.A.C. 11:1-37.13(b)(3)(ii) (requiring that a contract between an insured and public adjuster contain "[a] list of services to be rendered and the maximum fees to be charged, which fees shall be reasonably related to services

[14] Although the Department entered different contracts into evidence between their original motions for Summary Decision and their second motion for Summary Decision, they entered forty-seven contracts each time. For Count Three, only the contracts that the Department entered into the evidence with their second motion for Summary Decision are analyzed.

rendered"). I also concur with the ALJ that the Respondents violated N.J.S.A. 17:22B-14(a)(1) and N.J.A.C. 11:1-37.14(a)(1) for violating any provision of the State's insurance law and that the Respondents' actions demonstrate incompetency, financial irresponsibility, and untrustworthiness, in violation of N.J.S.A. 17:22B-14(a)(4) and N.J.A.C. 11:1-37.14(a)(4).

However, as previously discussed under the analysis for Counts One and Two above, I disagree with the ALJ's assessment that because Mehmel did not sign all of the forty-seven contracts that he is not jointly liable for the violations in this Count. As set forth above, N.J.A.C. 11:1-12.2(a) provides that all active officers shall be held individually responsible for all insurance related conduct of corporate licensees. The evidence shows that at all times relevant, Mehmel was the CEO of CIA and he was responsible for all actions taken by his employees and CIA. Accordingly, I MODIFY the PSD and Initial Decision and FIND that the Respondents are jointly liable for all of the contracts at issue in this Count.

The ALJ failed to make determinations regarding whether the Respondents' actions, as alleged in Count Three of the OTSC, constitute violations of N.J.A.C. 11:1-37.14(a)(13) (forbidding any misrepresentation of facts or advice on questions of law in conjunction with the business as a public adjuster) and (17) (committed any other act, or omission which the Commissioner determines to be inappropriate conduct by a licensee of this State). As noted above, the Respondents' contracts contained ambiguous language as to how the Respondents would calculate their fee, whether on the gross award, or the net award. They exploited this ambiguity to collect on the higher fee, collecting their fee based on the award of insurance proceeds from which the insureds would not receive or benefit. The Respondents misrepresented the nature and extent of the fee to their clients, which is inappropriate in the business of adjusting services. Accordingly, I MODIFY the Initial Decision and FIND that the Respondents' actions, as alleged

in Count Three of the OTSC, also constitute violations of N.J.A.C. 11:1-37.14(a)(13) and N.J.A.C. 11:1-37.14(a)(17).

Although I concur with ALJ's findings regarding the violations committed by the Respondents in relation to Count Three of the OTSC, a review of the contracts, Settlement Statements, and fees charged by the Respondents provided by the Department as attached to the Shannon Supp. Cert. at Exhibit, A. shows that not all contracts and Settlement Statements can be matched together.

For client S.H., Exhibit A to Deputy Attorney General Nicholas Kant's Brief indicates that the contact is Bates stamped 003, and the Settlement Statement is Bates stamped 004. However, the Settlement Statement only has a name and does not have a date of loss or an address. The name on the contract is completely illegible. Further, the cause of loss on the contract is vehicle impact, but the cause of loss on the Settlement Statement is a windstorm. Based upon the evidence provided, the contract and Settlement Statement cannot be linked.

For client N.U. the Department provided a Settlement Statement attached to the Shannon Supp. Cert. and is Bates stamped as 037. However, the contract related to this Settlement Statement was not provided. Exhibit A to Deputy Attorney General Nicholas Kant's Brief indicates that the citation pages are 037-038. However, 038 is a copy of the check. There is no contract to correspond to this Settlement Statement. Without a contract, it cannot be ascertained what the fee percentage was supposed to be.

For client, B.V., the contract is reportedly Bates stamped 042. Exhibit A to Deputy Attorney General Nicholas Kant's Brief. However, the contract at 042 is so faint that it looks to be completely blank and is unreadable. Based upon the evidence provided, the contract and Settlement Statement cannot be linked.

For client D.T., the Department provided a Settlement Statement at 043 and a second Settlement Statement at 044. The contract is reportedly at 045. Exhibit A to Deputy Attorney General Nicholas Kant's Brief. However, the contract at 045 is unreadable. The name, address, and date of loss cannot be determined from the contract the Department provided. Based upon the evidence provided, the contract and Settlement Statements cannot be linked.

For client T.E., the Settlement Statement is reportedly at 062 and the contract at 064.[15] Exhibit A to Deputy Attorney General Nicholas Kant's Brief. The Settlement Statement at 062 is faint and difficult to read, and a name or address cannot be ascertained from the Settlement Statement. Based upon the evidence provided, the contract and Settlement Statement cannot be linked.

A Settlement Statement for S.W. was provided in the Shannon Supp. Cert. and is Bates stamped as 084, but the contract related to this Settlement Statement was not provided. Without a contract, it cannot be ascertained what the fee percentage was supposed to be.

According to Exhibit A to Deputy Attorney General Nicholas Kant's Brief, the documents for client R.L. should be located at 091-092. However, the initials of the client on the contract at 092 are J.L. While the date and cause of loss is the same, the names and addresses do not match. There is no information as to where the Settlement Statement for J.L. is, or where the contract for R.L is. Based upon the evidence provided, the contract and Settlement Statement cannot be linked.

Below is a chart setting forth the Bates stamp for the contract, the client's initials, the Bates stamp for the settlement sheet, the total negotiated award, the total negotiated award minus deductibles, depreciation, and other fees, the fee collected by the Respondents, the fee the

[15] The document Bates stamped as 063 is a copy of a check from T.E. to CIA.

Respondents would have collected if they had based the fee on the net award, and the difference between the fee the Respondents charged and the fee that they should have charged on the net award.

Contract Bates No.	Client Name	SS Bates No.	Total Negotiated Award. Gross/RCV Amount	Total award minus deductibles, depreciation, and other fees. Net/ACV Amount.	Fee Collected by the Respondents based on Total Award	Fee on Net award	Difference
02	M.C.	01	$192,060.47	$168,566.60	$19,206.04	$16,856.60	$2,349.44
06	C.M.	05	$10,276.04	$9,776.74	$2,005.35	$1,995.35	$100.00
07 and 08[16]	M.M.	09	$26,071.28	$23,121.14	$5,206.35	$4,624.23	$582.12
13	S.B.	10	$10,473.28	$9,473.28	$2,094.66	$1,894.65	$200.00
12	S.B.[17]	11	$8,540.61	$6,647.13	$1,708.12	$1,329.43	$378.69
15	Y.K.	14	$15,855.11	15,355.11	$3,171.02[18]	$2,303.27	$867.75
17	A.H.	16	$20,980.48	$17,801.46	$4,196.09	$3,560.29	$635.80
19	R.D.	18	$38,576.50	$32,368.51	$7,715.30	$6,473.70	$1,241.60
21	G.G.	20	$19,359.35	$14,174.36	$2,865.46	$2,126.15	$739.31
23	D.M.	22	$67,444.43	$55,838.77	$10,116.66	$8,375.82	$1,740.84
25	J.M.	24	$8,591.27	$6,390.78	$1,288.69	$958.62	$330.07
27	C.M.[19]	26	$3,333.58	$2,583,58	$500.03	$387.54	$112.49
29	M.P.	28	$23,463.30	$16,764.88	$3,440.52	$2,514.73	$925.79
31	T.R.	30	$39,888.28	$33,019.26	$5,983.24	$4,952.89	$1,030.35
33	N.S.	32	$10,517.29	$8,519.34	$2,103.45	$1,703.87	$399.58
36	K.S.	34	$7.060.03	$5,268.38	$1,059.00	$790.26	$268.74
40	R.T.	39	$40,755.51	$35,511,16	$8,051.10	$7,102.23	$948.87
47	D.R.	48	$17,872.15	$15,981.19	$3,574.43	$3,196.24	$378.19

[16] The Contract was included in Exhibit A of the Shannon Supp. Cert twice.

[17] S.B. is the same client in the row above. The total overcharge to S.B. is $578.69.

[18] According to the Settlement Statement, the Respondents took a 20 percent fee. However, the agreed percentage rate in the contract was 15 percent. The fee on the Net Award is based on the 15 percent agreed upon in the contract.

[19] C.M. is the same client in Bates stamped documents 05-06. The total overcharge to C.M. is $212.49.

49	L.B.	48	$9,601.81	$6,121.27	$1,440.27	$918.19	$522.08
51	S.E.	50	$15,706.54	$13,344.03	$2,355.98	$2,001.60	$354.38
53	P.C.	52	$9,404.06	$8,904.06	$1,410.60	$1,335.61	$74.99
55	T.B.	54	$7,813.54	$5,450.17	$1,172.03	$817.53	$354.50
57	G.B.	56	$16,042.77	$11,454.52	$2,406.64	$1,718.18	$688.46
59	G.B.[20]	58	$2,698.19	$1,688.90	$404.72	$337.78[21]	$66.94
61	R.B.	60	$20,244,38	$19,744.38	$3,036.65	$2,961.66	$74.99
65	E.C.	66	$31,613.92	$24,025.45	$6,332.78	$4,805.09	$1,527.69
68	S.C.	67	$5,850.14	$4,850.14	$1,170.02	$970.03	$199.99
70	C.B.	69	$61,654.37	$55,885.90	$6,156.44	$5,588.59	$567.85
72	R.M.	71	$20,571.15	$17,461.15	$4,114.23	$3,492.23	$622.00
74	B.N.	73	$15,314.04	$12,374.00	$3,062.80	$2,474.80	$588.00
76	D.U.	75	$10,706.23	$10,206.23	$1,605.93	$1530.93	$75.00
78	J.G.	77	$13,802.36	$8,515.77	$2,070.35	$1,277.37	$792.98
79	D.W.	80	$19,872.02	$15,100.81	$3,974.41	$2,718.15	$1,256.26
79	D.W.[22]	81	$10,237.68	$7,517.61	$1,842.78	$1,353.17	$489.61
83	L.S.	82	$17,201.05	$15,263.65	$3,440.21	$3,052.73	$387.48
85	Estate of J.K.	86	$80,665.46	$73,665.37	$12,099.82	$11,049.81	$1,050.01
88	J.T.	87	$34,261.18	$31,831.60	$6,582.24	$6,366,32	$485.92
89	C.M.	90	$20,067.08	$17,123.92	$4,013.41	$3,424.78	$588.63
93	A.S.	94	$15,772.41	$12,508.88	$2,365.86	$1,876.33	$489.53
96	A.F.	95	$5,016.07	$3,373.13	$1,003.21	$674.63	$328.58
98	H.L.	97	$6,127.54	$5,627.54	$1,225.50	$1,125.51	$99.99
101	W.Q.	99, 100[23]	$21,994.40	$18,393.53	$4,388.88	$3,678.71	$710.17
103	J.S.	102	$117,785.08	$104,226.78	$11,778.51	$10,422.68	$1,335.83
							Total Overcharge: $26,961.49

[20] G.B. is the same client in the row above. The total overcharge to G.B. is $755.40.

[21] According to the Settlement Statement, the Respondents took a 15 percent fee. However, the agreed percentage rate in the contract was 20 percent. The fee on the Net Award is based on the 20 percent agreed upon in the contract.

[22] D.W. is the same client in the row above. There is one contract, but two Settlement Statements. The total overcharge to D.W. is $1,745.87.

[23] There are two Settlement Statements, but one contract for W.Q.

Based upon the calculations above, the total difference between the amount charged by the Respondents and the amount the Respondents should have charged related to the contracts that have Settlement Statements associated with them, at issue in Count Three is $26,961.49, not the $32,304.36 difference found by the ALJ. Accordingly, I MODIFY the PSD and Initial Decision accordingly.

Lastly, the ALJ found that the Respondents' actions, as alleged in this Count, constitute violations of N.J.A.C 11:1-37.17. Initial Decision at 17. This provision relates to public records and was not alleged as a violation in the OTSC in this matter. As such, I REJECT this finding by the ALJ and MODIFY the Initial Decision accordingly.

Count Four

Count Four of the OTSC alleges that Between January through December 2013, the Respondents accepted insurance proceeds on behalf of insureds and failed to deposit those funds into an interest-bearing escrow or trust account, in violation of N.J.S.A. 17:22B-13(f); N.J.A.C. 11:1-37.11(a); and N.J.A.C. 11:1-37.14(a)(1) and (4). The ALJ found that the facts are not in dispute that from January through December 2013, the Respondents accepted insurance proceeds on behalf of insureds and failed to deposit these funds into an interest-bearing escrow or trust account. PSD at 12. The ALJ noted that the Respondents' argument that they "never received, accepted, or held any money on behalf of their clients" is irrelevant as both the Act and regulations are clear that the public adjuster is required to deposit these funds into an interest-bearing escrow or trust account. I concur with ALJ and also find that the Respondents' arguments in their Exceptions are without merit. Specifically, the Respondents argued that banks would not allow Mehmel to open an escrow account and that he would have been required to open one bank account for each client, using the clients' social security numbers. Respondent Exceptions at 4. Mehmel

then decided that he would have the insured come to the bank and endorse the insurance company check, while Mehmel would provide the insured with a check from CIA's business account in the amount due to the insured. Id. It is concerning that Mehmel thought that this was an acceptable alternative to depositing the funds into an interest-bearing trust or escrow account. The purpose of this requirement is to account for client funds and to make sure funds are being disbursed to clients and to the business entity appropriately. Moreover, the funds needed to be in the account prior to the insured cashing the check issued from CIA's business account. If that did not occur first, the insured was being paid with either CIA's business assets or funds belonging to other clients. This is entirely unacceptable conduct on the part of licensed public adjusters in this State. Additionally, the Respondents have provided no evidence to support their contention that Mehmel was denied the ability to open an interest-bearing escrow or trust account. The Respondents did not provide which banks Mehmel spoke to or any documentation to support their contentions. Additionally, if it is true that Mehmel was denied the ability to open an interest-bearing escrow or trust account pursuant to the Act and regulations from every bank in this State, then Mehmel should have contacted the Department to determine the next steps he should take. Instead, the Respondents took it upon themselves to develop this scheme in an attempt to circumvent the law and regulations. Accordingly, I concur with the ALJ that the Department proved the allegations in Count Four of the OTSC and FIND that the Respondents' actions, as set forth in Count Four of the OTSC, constitute violations of N.J.S.A. 17:22B-13(f) (no licensed public adjuster shall receive, accept or hold any moneys towards the settlement of a claim for loss or damage on behalf of an insured unless the public adjuster deposits the moneys in an interest bearing escrow account in a banking institution or savings and loan association in this State insured by an agency of the federal government) and N.J.A.C. 11:1-37.11(a) (any public adjuster who receives, accepts or holds any

moneys, on behalf of an insured, towards the settlement of a claim for loss or damage, shall deposit such moneys in an interest bearing escrow or trust account in a financial institution in this State which is insured by an agency of the Federal government).

The ALJ did not make specific determinations regarding whether the Respondents' actions, as alleged in Count Four of the OTSC, constitute violations of N.J.A.C. 11:1-37.14(a)(1) (permitting the Commissioner to suspend or revoke a license if the licensee has violated any provision of the insurance law, including any rules promulgated thereunder) and N.J.A.C. 11:1-37.14(a)(4) (permitting the Commissioner to suspend or revoke a license if the licensee has demonstrated the licensee's incompetency, lack of integrity, bad faith, dishonesty, financial irresponsibility or untrustworthiness to act as an adjuster).

Here, the Respondents demonstrated incompetency, lack of integrity, bad faith, and financial irresponsibility by claiming that they were unable to open an interest-bearing escrow or trust account for their clients' monies, and then creating a scheme in an attempt to circumvent a rule designed to protect insureds. Accordingly, I MODIFY the PSD and Initial Decision and FIND that the Respondents' actions, as set forth in Count Four of the OTSC, additionally constitute a violation of N.J.A.C. 11:1-37.14(a)(4). Lastly, as the ALJ and I have found that the Respondents violated provisions of the Public Adjusters' Act and the regulations promulgated thereunder by failing to establish and deposit client funds in an interest-bearing escrow or trust account, the Respondents' actions additionally constitute a violation of N.J.A.C. 11:1-37.14(a)(1).

PENALTY AGAINST RESPONDENTS

Revocation of Respondents' Public Adjuster Licenses

With respect to the appropriate action to take against the Respondents' public adjuster licenses, I find that the record is more than sufficient to support license revocation and, in fact,

compels the revocation of Respondents' public adjuster licenses in this State. Accordingly, I ADOPT the ALJ's recommendation that the both CIA and Mehmel's public adjuster licenses be revoked.

The Commissioner is charged with the duty to protect the public welfare and to instill public confidence in the insurance industry as a whole. Commissioner v. Fonseca, OAL Dkt. No. BKI 11979-10, Initial Decision (08/15/11), Final Decision and Order (12/28/11) (citing In re Parkwood, 98 N.J. Super. 263 (App. Div. 1967)). 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). Accordingly, the public's confidence in a licensee's honesty, trustworthiness, and integrity are of paramount concern. The Respondents, although not insurance producers, are licensed public adjusters who act under a duty of care and in a fiduciary capacity with respect to their client insureds. "A public adjuster's fiduciary obligation is bound to the highest degree of fidelity and good faith." Commissioner v. Marco Nicolo, OAL Dkt. No. BKI 10722-04, Initial Decision (05/32/206), Final Decision and Order (10/12/06). The very essence of a public adjuster's responsibilities is to aid an insured in negotiating and effecting the settlement of loss damage claims. See N.J.S.A. 17:22B-2 (defining "public adjuster" to mean "any individual, firm, association, or corporation who, or which, for money, commission or any other thing of value, acts or aids in any manner on behalf of an insured in negotiating for, or effecting, the settlement of claims for loss or damage caused by or resulting from any accident, incident, or occurrence covered under a property insurance policy. . . ."). It is the public adjuster's responsibility to honestly perform his or her job.

In the present matter, the Respondents' priority in representing their clients was their own self-interest, rather than in their appropriately effecting an insurance settlement for their clients. As found by the ALJ and confirmed in this Final Decision and Order, the Respondents entered into contracts with insureds when Respondent CIA was not yet licensed, failed to include appropriate cancellation language in their contracts, created a fee structure that was not reasonably related to the services rendered, failed to clearly define the amount or extent of their compensation in their contracts, and failed to establish and deposit client funds into an interest-bearing escrow or trust account in violation of the Public Adjusters' Act and the regulations promulgated thereunder. Public adjusters interact with consumers during a stressful time in the consumers' lives, where they are seeking someone to advocate for them in order to replace or repair damaged property. The Respondents' clients contracted with public adjusters that worried more about their bottom line than the insureds who entrusted their claims to them. The Respondents took advantage of the insureds with whom they contracted by not providing the information that was necessary for the insureds to make an informed decision regarding the services to be provided by the Respondents, the fees related to those services, and their rights under the contracts if they were unsatisfied with the Respondents' representation during the course of the contract. For these reasons and based upon my review of the record, the PSD, and the Initial Decision, and the violations that I have found that the Respondents committed, I ADOPT the ALJ's recommendation and ORDER the revocation of both CIA and Mehmel's public adjuster licenses.

Monetary Penalties Against the Respondents

The Commissioner may levy penalties against any person violating the Public Adjusters' Act, not exceeding $2,500 for the first offense and not exceeding $5,000 for each subsequent offense. N.J.S.A. 17:22B-17. As noted by the ALJs, pursuant to Kimmelman, certain factors are

to be examined when assessing administrative monetary penalties such as those that may be imposed under the Public Adjusters' Act. No one Kimmelman factor is dispositive for or against fines and penalties. See Kimmelman, 108 N.J. at 139 ("[t]he weight to be given to each of these factors by a trial court in determining . . . the amount of any penalty, will depend on the facts of each case").

The first Kimmelman factor addresses the good faith or bad faith of the respondent. I concur with the ALJ and FIND that the Respondents' bad faith was evidenced by the Respondents: (1) contracting with insureds prior the time CIA was licensed; (2) misleading insureds as to their right to cancel their contract at any time; (3) establishing a fee structure for public adjuster services that were not reasonably related to the services rendered; (4) failing to clearly define the amount or extent of the Respondents' compensation for public adjuster services in their contracts; and (5) failing to establish and deposit client funds into an interest-bearing escrow or trust account.

The second Kimmelman factor is the ability of the respondent to pay the penalties imposed. The Respondents have presented no evidence of their ability or inability to pay the civil monetary penalties that could be assessed in this matter. Even so, respondents who claim an inability to pay civil penalties bear the burden of proving their incapacity. Commissioner v. Shah, OAL Dkt. No. BKI 11903-05, Initial Decision (04/15/08), Final Decision and Order (09/02/08). Other than mentioning that the civil penalty would bankrupt the Respondents, the Respondents failed to produce any evidence to support this contention. In addition, the Respondent profited by overcharging clients in excess of $26,961.49. I concur with the ALJ and ADOPT the ALJ's finding that this factor favors the imposition of a larger monetary penalty against both Respondents, as the Respondents failed to introduce specific evidence regarding their financial limitations.

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. In addition to the Respondents entering into contracts and collecting fees prior to CIA being licensed, the Respondents specifically overcharged their clients referenced in Counts Three of the OTSC by $26,961.49.

The fourth factor in Kimmelman examines the resulting injury to the public. As previously noted, the Commissioner is charged with the duty to protect the public welfare and to instill public confidence in the insurance industry. The ALJ found injury to the public in the instant matter through the Respondents' disregard of important safeguards and protections for consumers. I concur with the ALJ and additionally find that the Respondents demonstrated injury to the specific insureds who they contracted with by failing to advise their clients of the clients' right to cancel their contract with the Respondents at any time and by not fully advising them of the Respondents' fee in their contract. The Respondents additionally demonstrated injury to the public by overcharging their clients in relation to Count Three of the OTSC in the amount of $26,961.49.

Regarding the fifth Kimmelman factor, the duration of illegal activity, I concur with the ALJ and find that the Respondents engaged in the violative behavior for a period of approximately three years, from October 2012 to October 2015.

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

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

In light of the above Kimmelman analysis and based on the violations I have concluded that Respondents committed, I ADOPT the recommendations of the ALJ, except as modified below:

As it relates to Count One of the OTSC, I concur with the recommendation of the ALJ that the Respondents be assessed a civil monetary penalty of $23,500 for the forty-seven separate instances of the Respondents entering into contacts prior to CIA's licensure in this State. However, as I stated above, I disagree with the ALJ that Mehmel is not responsible for the one contract that was signed by Frank Boyle. As set forth above, Mehmel, as the CEO of CIA, was responsible for all of the contracts that CIA entered into, pursuant to N.J.A.C. 11:1-12.2(a). Mehmel was aware of CIA's licensure status, the cancellation language contained in CIA's contracts, and CIA's fee structure contained in those contracts at the time that all of the contracts were entered into and he failed to prevent CIA and the insureds from entering into these contracts. Accordingly, I MODIFY the PSD and Initial Decision and FIND that the Mehmel and CIA are also jointly and severally liable for the civil monetary penalty related to the contract signed by Frank Boyle. Therefore, the Respondents are jointly and severally liable for a civil monetary penalty of $23,500 for the forty-seven violations found in relation to Count One of the OTSC.

As it relates to Count Two of the OTSC, I concur with the recommendation of the ALJ that the Respondents be assessed a civil monetary penalty of $23,000 for the forty-six separate instances of the Respondents failing to provide appropriate cancellation language in their public adjuster contracts. However, as I have found that Mehmel is responsible for the violations found in relation to the contract signed by Frank Boyle, I MODIFY the PSD and Initial Decision and

FIND that the Mehmel and CIA are also jointly and severally liable for the civil monetary penalty related to the contract that was signed by Frank Boyle. Accordingly, the Respondents are jointly and severally liable for a civil monetary penalty of $23,500 for the forty-seven violations found in relation to Count Two of the OTSC.

As it relates to Count Three of the OTSC, I concur with the ALJ's recommendation that the Respondents be assessed a $2,000 monetary penalty per violation for the forty-seven instances of failure to clearly define compensation and charging fees that are not reasonably related to the services rendered. However, as I stated above, I disagree with the ALJ that Mehmel is not responsible for the contracts that were signed by others on behalf of CIA. Accordingly, I MODIFY the PSD and Initial Decision and FIND that the Mehmel and CIA are also jointly and severally liable for the civil monetary penalty of $94,000 for the forty-seven violations found in relation to Count Three of the OTSC.

As it relates to Count Four of the OTSC, I concur with the recommendation of the ALJ that the Respondents be assessed a civil monetary penalty of $2,500 for failing to establish and deposit client funds in an interest-bearing escrow or trust account.

The Respondents are jointly and severally liable for a total of $143,500 in monetary penalties. This amount is appropriate considering the Respondents' conduct in entering into contracts before licensure, failing to include necessary language in their contracts, charging fees that are not reasonably related to the services rendered, and failing to deposit clients' funds in a trust account. These penalties demonstrate the appropriate level of opprobrium for their misconduct, and will serve to deter future misconduct by the Respondents and the industry as a whole. I also note it is far less than the Department could have requested under N.J.S.A. 17:22B-

17, which allows the imposition of up to a $2,500 fine for the first violation and up to a $5,000 fine for any subsequent violations of the Public Adjusters' Act.

As to restitution, the ALJ recommended that the Respondents be jointly and severally responsible for restitution in the amount of $32,440.25 and Respondent CIA be solely liable for additional restitution in the amount of $354.38, for a total of $32,794.63. Initial Decision at 20, 22. In its Exceptions, the Department requested $32,304.36 in restitution. Department Exceptions at 3-4. However, this amount is not supported by the documentary evidence. As noted above, several contracts submitted by the Department are illegible and could not be linked to Settlement Statements. For N.U. and S.W., no contracts were provided. The contract for R.L. should be located at 092, according to Exhibit A to Deputy Attorney General Nicholas Kant's Brief. However, the initials of the client on the contract at 092 are J.L. While the date and cause of loss is the same, the names and addresses do not match. Accordingly, I MODIFY the amount of restitution to $26,961.49 in accordance with the table above, and hold that the Respondents are jointly and severally responsible for $26,961.49 in restitution.

I additionally concur with and ADOPT the recommendation of the ALJ that the Respondents additionally be required to reimburse the Department for its costs of investigation in the amount of $2,900 pursuant to N.J.S.A. 17:22B-17.

CONCLUSION

Having reviewed the PSD, Initial Decision, the Exceptions submitted by the Respondents, the Exceptions and Reply submitted by the Department, and the entire record herein, I hereby ADOPT the findings and conclusions as set forth in the PDS and Initial Decision, except as modified herein, and hold that the Respondents violated the Public Adjusters' Act and accompanying regulations as charged in the OTSC, and have failed to present any legally or

factually viable defenses to the violations of the Public Adjusters' Act and the regulations promulgated thereunder. Further, I ADOPT the conclusion that both of the Department's Motion for Summary Decisions should be granted on all four Counts set forth in the OTSC.

I also ADOPT the ALJ's recommendation and hereby ORDER the revocation of both Respondent CIA and Respondent Mehmel's public adjuster licenses. I MODIFY the ALJ's recommendations as to the imposition of civil monetary penalties and ORDER that fines totaling $143,500 be imposed against the Respondent jointly and severally for the violations contained herein. I further MODIFY the Initial Decision as it relates to the allocation of these penalties. Therefore, the civil monetary penalty shall be allocated as follows: Count One: $23,500, Count Two: $23,500, Count Three: $94,000, and Count Four: $2,500. I further MODIFY the ALJ's recommendation as to the amount of restitution for Count Three of the OTSC and ORDER that the Respondents pay restitution in the total amount of $26,961.49 to their clients, as set forth in the chart above. I ADOPT the ALJ's recommendation and ORDER the Respondents to pay costs of investigation in the amount of $2,900.

It is so ORDERED on this _____19____ day of _____August___________, 2021.

____
Marlene Caride
Commissioner

Final Orders – Insurance/JD CIA and Mehmel FO