DATE: September 22, 2004

Docket No. E2004-16

Division of Insurance, Petitioner
v.
Richard L. Brown, Respondent
Docket No. E2004-16

Decision and Order

Introduction and Procedural History

On June 10, 2004, the Division of Insurance ("Division") filed an Order to Show Cause ("OTSC") against Richard Brown ("Brown"), a licensed insurance producer. The Division alleges that, on four applications to be appointed as an insurance agent, Brown incorrectly answered "no" to Question 18, which asks about the applicant's criminal history. It seeks orders that Brown has failed to maintain the qualifications of suitability, competence and trustworthiness required of Massachusetts-licensed insurance agents and brokers, or the qualifications to be a license insurance producer in the Commonwealth. Further, the Division asserts, Brown's failure to disclose his criminal history on the applications is an unfair or deceptive act or practice that violates G. L. c. 176D, §3. It asks the Commissioner to find that Brown has violated the statutes and to revoke his license, prohibit his continued employment in the insurance industry, and impose fines for the alleged violations.

A Notice of Procedure ("Notice") issued on June 14, 2004, advising Brown that a hearing on the OTSC would be held on July 26, 2004, at the offices of the Division, that a

prehearing conference would take place on July 12, also at the Division, and that the hearing would be conducted pursuant to G.L. c. 30A and the Standard Adjudicatory Rules of Practice and Procedure, 801 CMR 1.00, *et seq*. The Notice advised Brown to file an answer pursuant to 801 CMR 1.01(6)(d) and that, if he failed to file an answer, the Division might move for an order of default, summary decision or decision on the pleadings granting it the relief requested in the Order. It also notified Brown, if he failed to appear at the prehearing conference or hearing, an order of default, summary decision or decision on the pleadings might be entered against him. The Commissioner designated me as presiding officer for this proceeding.

The Division filed a certificate of service stating that, on June 14, the Notice and Order were sent to the respondent by certified mail, return receipt requested, and by regular first class mail. On June 28, the Division filed the receipt for certified mail sent to Brown. On July 5, Brown filed a "Statement Regarding Order to Show Cause" ("Statement") and moved the Commissioner to determine that he is "not guilty." Pursuant to 801 CMR 1.01(10)(a), a prehearing conference was held on July 12. Douglas A. Hale, Esq., appeared for the Division. Brown represented himself. Because Brown, in his Statement, agreed with the factual allegations in the OTSC, it appeared that an evidentiary hearing would be required only if a party proposed to offer testimony related to his legal arguments or defenses. The parties were instructed to file a status report by August 20 and to indicate, among other things, whether an evidentiary hearing would be needed. If not, they were ordered to file memoranda in support of their respective positions by August 31. On August 20, the parties informed me that they would proceed on written submissions. The Division and Brown filed their memoranda on August 23 and August 30, respectively.

Findings of Fact

On the basis of the record before me, consisting of the Order, Brown's Statement, and the memoranda submitted by the Division and Brown, I find the following facts:

1. Respondent Richard Brown was first licensed in Massachusetts as a resident agent on or about November 7, 1980 and as a broker on or about July 14, 1981. His broker's license was later converted to a producer's license.

2. On or about July 21, 1994, Brown was arrested and subsequently arraigned in Framingham District Court on a charge of assault and battery (the "July 1994 incident"). On August 10, 1994, a finding of not guilty was entered in the case.

3. Between October 28, 1997 and June 8,2000, Brown applied to four insurance companies for appointment as an insurance agent. Question 18 ("Question 18") on each of those applications asked, in pertinent part, whether Brown had "ever been convicted of, or arrested or prosecuted for, any crime or offense against the laws of this or any other state or country…." On each application, Brown answered "no" to Question 18.

The Parties' Arguments

1. The Division

The Division asserts that Brown admits that he was arrested and that he was the subject of a criminal complaint. It states that Question 18 is unambiguous, and that Brown provided a false answer to it on four occasions. Arguing that the Division is entitled to receive objective and accurate answers to questions on its application forms, it characterizes Brown's position as one that would substitute a subjective standard for an objective standard for determining when an answer is correct. His proposed subjective standard, the Division asserts, would allow an applicant to base his responses to questions on what he felt about an incident, or on whether he had repressed it in his memory. Such a standard, the Division argues, would be meaningless.

The Division argues that it is essential that it receive complete and truthful information on licensing applications to ensure that prospective agents meet the statutory standards. It further maintains that the Division has the right to expect full disclosure if an applicant has been arrested or prosecuted, particularly when the application is signed under the penalties of perjury. Citing to past decisions in enforcement cases, the Division argues that it is important for a licensee to report whether he or she has been charged with a crime, even if there is no conviction, and notes that prosecution relates to the initiation of criminal proceedings.

The Division argues that making false statements in a licensing application has been found to be an unfair or deceptive practice under G. L. c. 176 D, §§2 and 3, and that G. L. c. 176D, §7 provides for a fine of not more than $1,000 for each violation of the statute and, in the case of repeated violations, revocation of insurance licenses.

The Division argues that G.L. c. 175, §162R permits revocation of Brown's producer license even though the conduct underlying the OTSC occurred while he was licensed under G.L. c. 175, §§163 and 166. It asserts that conduct that would have demonstrated a failure to maintain the standards of trustworthiness, competence and suitability required under those statutes permits revocation of a license under G.L. c. 175, §162R (a)(8).

2. Brown

Brown argues that he committed no crime, has no record of being convicted, and therefore has no criminal history. He urges the Commissioner to conclude that his answer to Question 18 was not unlawful. Brown defines the only issue to be resolved as whether his false statements were made willfully and whether he had a "serious motive to hide anything." Absent such findings, Brown argues, any action against his license would be a miscarriage of justice. Further, he asserts, if there is reasonable doubt, the Division should give him the benefit of that doubt. Brown argues that decisions issued in other Division enforcement actions, on which the Division relies to support its case against him, do not support its request for license revocation.

Brown points out that, as a result of passage of the Uniform Producer Licensing Act, the information on criminal history that an applicant for a Massachusetts insurance producer's license must now provide differs from the information that was required of an applicant for an insurance agent appointment. He argues that Question 18 on the agent application which required the applicant to disclose arrests or prosecutions, regardless of the outcome of the case, was inappropriate and invites discrimination against an insurance representative who has no criminal history (*i.e.*, no convictions or guilty pleas.) Brown asserts that the question unfairly presumed guilt, rather than innocence, and does not comply with due process. He argues that the analogous question on the Uniform Producer Licensing Act application was designed to protect the consumer but not to penalize unjustly an insurance representative by asking an unfair question. Brown notes that in any future applications for an insurance producer's license, he would not be required to disclose the July 1994 incident.

Brown argues that the domestic dispute for which he was arrested was a private matter, unrelated to the business of insurance, and would not have changed the results of

the application. Further, he asserts, because of the not guilty finding and the lack of a criminal history, no insurance company would have declined to license him. Brown states that he repressed the entire incident, and therefore did not willfully answer "no" to Question 18. He considers himself an innocent person, who did not start or escalate the July 1994 incident that resulted in police intervention, and was arrested because of an assumption in domestic disputes that the husband is the offender. He points out that the disposition of his case demonstrates that he was innocent and not guilty of a crime. Because Brown pushed the July 1994 incident from his mind, he argues, his mistake in answering Question 18 was unconscious yet "innocent." Brown contends, in addition, that the information provided in a correct answer would not have been material to a decision on his license applications. Therefore, he argues, absent his repression of the July 1994 incident, he would have had no reason to omit it from those applications.

Brown asks that, in resolving this matter, consideration will be given to "human behavioral fragilities" and his repressed memory of the July 1994 incident. He offers definitions of seventeen terms which, he argues, describe the basis of how people treat each other, and what they stand for, and therefore relate to the outcome he seeks in this matter. Those terms include: Arbitrary, Burden of Proof, Articles 26 and 29 of the Constitution of Massachusetts, Due Process, Duress, Fairness, Good Faith Defense, Intent, Motive, Mens rea, Material Lie, Morally Innocent, Perjury, Presumption of Fact, Repressed Memory, Subdue and Suppressive. He includes in his memorandum a series of references to Massachusetts decisions in criminal cases relating to willful false oaths and perjury.

Brown argues that the Division has treated him in an unfair and arbitrary manner because, in the course of efforts to settle this matter, it has sought a higher administrative assessment from him than it has from other licensees. He identifies nine proceedings, settled between July 18, 2003 and March 23, 2004, in which failure to make a required disclosure on a license application was at issue, and notes that the administrative assessments ranged from zero to $300. Brown asserts that there is no standard basis for such assessments, and that the assessment the Division has sought from him is not supported by substantial evidence and is "markedly disparate" from sanctions imposed in similar cases.

Analysis and Discussion

The OTSC that the Division filed against Brown arises from his response to Question 18 on four applications for an insurance agent's license. Brown agrees that he answered Question 18 incorrectly on those four applications. The Division asserts that his failure to answer Question 18 accurately is sufficient reason to revoke Brown's license and to impose fines. Brown argues that disciplinary action is not appropriate, because he has no criminal record, did not willfully provide false information, and committed no crime in answering Question 18. Further, he asserts, the information, even if reported, would not have changed any licensing decision. Brown argues, as well, that the sanctions sought by the Division are excessive and inconsistent with sanctions imposed in other actions involving failure to provide information on license applications.

Question 18, on the four applications at issue, required Brown to report, among other things, whether he had ever been arrested or prosecuted for any crime. A person who answers "yes" to Question 18 is instructed to attach details to the application. Despite the undisputed fact that he had been arrested and charged with a criminal offense, Brown answered "no" to Question 18. He now argues that, for a variety of reasons, he should not be sanctioned for his actions. For the following reasons, I do not find his arguments persuasive.

Brown's assertion that he answered Question 18 correctly, because he had no criminal record, ignores the plain language of that question and fails to acknowledge that person who answers the question affirmatively is further asked to provide details about the underlying events. The information that Question 18 seeks includes arrests and prosecutions. The Division does not dispute that Brown's case was terminated with a "not guilty" finding. A correct response to Question 18 would have included a full account of the July 1994 incident, including information on the outcome. The issue in this proceeding is whether Brown provided accurate information on four license applications. I find that he did not. Brown's belief that his arrest was unjustified, and his comment that the July 1994 incident did not involve the business of insurance, do not excuse his failure to answer Question 18 correctly. *See, e.g., Economou v. Division of Insurance,* E2001-09.

Brown's argument that he did not intentionally provide incorrect information is not persuasive. His reliance on cases that identify intent as an element in criminal

prosecutions for perjury is misplaced. Criminal liability is not at issue in this proceeding; it is an administrative proceeding to determine whether Brown should be sanctioned for failure to provide correct answers on license applications. That the answer was not motivated by an intent to mislead does not determine the outcome of this matter. A person who applies for an insurance license is expected to read the application carefully and to provide accurate answers to the questions. Prior decisions in enforcement proceedings stress the importance of providing accurate information to the Division, so that it can adequately evaluate the applicant. *See, e.g., Division of Insurance v. Preszler*, Docket No. E2001-18; *Division of Insurance v. Warner,* Docket No. E2001-04; *Division of Insurance v. Ayala*, Docket No. E2001-25. Brown's further assertion that repression of the July 1994 incident should excuse him from his obligation to answer Question 18 correctly is similarly unpersuasive. *See, e.g., Division of Insurance v. Kitchell*, E2003-03 (alleged short-term memory loss did not excuse compliance with Division requirements.)

Brown's argument that the requested information would have been irrelevant to any licensing decision is also not persuasive. He provided no evidentiary support for his position that, because the July 1994 incident concluded with a finding of not guilty, no company would have used it as a basis for denying him a license. The agent license applications at issue in this proceeding each include a certification from an insurance company representative stating that it had completed an investigation "as to the character and ability of the applicant name herein and is satisfied that the applicant is of good moral character, financially responsible, and trustworthy." Because Brown answered Question 18 incorrectly, none of the insurers who sought to appoint Brown as their agent had an opportunity to evaluate him in light of the July 1994 incident. Nothing in the record of this proceeding, therefore, supports a conclusion that the insurers would have found the information irrelevant.

Brown asserts that the information required by Question 18 is inappropriate and discriminates against an applicant who has not been convicted of or pleaded guilty to a crime. He points out that, because the analogous question on the Uniform Producer Licensing Act application does not require an applicant to report arrests or prosecutions, he would not now need to disclose the July 1994 incident. Brown's argument fails to recognize that the OTSC is based on actions taken before enactment of the Uniform

Producer Licensing Act. The Division's authority to ask about the applicant's criminal was affirmed some twenty-five years ago. *Commonwealth v. McDuffee*, 7 Mass. App. 129 (1979). That the Uniform Producer Licensing Act no longer requires the same information as did the agent licensing application does not negate Brown's obligation to complete those applications correctly, in compliance with the law at that time.

After consideration of Brown's arguments, I find no basis for excusing him from responsibility for non-compliance with the agent licensing requirements that were in place when he completed the four applications at issue in this proceeding. Prior decisions in enforcement actions conclude that failure to provide correct information on an application is evidence that the applicant did not satisfy the standards in G.L. c. 175, §163 and that such conduct is an unfair and deceptive practice that is prohibited under G.L. c. 176D. I find that: 1) Brown's answers to Question 18 demonstrate that when he completed those applications he did not comply with the statutory standards; and 2) such failure is an unfair practice. I will therefore determine, based on the record, which of the sanctions available under those statutes, and under the current Uniform Producer Licensing Act, are appropriate. Those sanctions include license revocation, suspension, cease and desist orders, and fines. The maximum fine under G.L. c. 176D, §7, is $1,000 per violation.

Brown argues that license revocation would be an excessive punishment that is inconsistent with the Division's resolution of disputes with other licensees who allegedly did not disclose their criminal history on license applications. I note that recent cases which resulted in the revocation of licenses arose from the applicants' failure to report actual convictions, and can therefore be distinguished from the circumstances in this case.[1] Even though Brown failed to respond correctly to Question 18, he did not fail to report a conviction. Furthermore, the language on the agent license application that asked about arrests and prosecutions has been deleted from the Uniform Producer Licensing Act. While that change does not excuse Brown's incorrect answers to Question 18, I am

---

[1] See, for example, *Division of Insurance v. Beier*, Docket No. E2004-16. (failure to report three convictions on a license application); *Division of Insurance v. Ayala,* Docket No. E2001-25 (failure to report guilty pleas to four counts of financial fraud); *Division of Insurance v. Preszler*, Docket No. E2001-08 (failure to report conviction for financial crime); *Division of Insurance v. Barry Brown*, Docket No. E2001-19 (failure to report convictions for larceny); *Division of Insurance v. Pare*, Docket No. E2001-07 (failure to report convictions for violations of the motor vehicle laws); *Division of Insurance v. Warner*, Docket No. E2001-04 (failure to report convictions for financial crimes).

persuaded that failure to report information that is no longer required is less egregious than failure to report criminal convictions, an action which continues to violate the licensing statute, and that a lesser penalty is therefore appropriate.

Past decisions in enforcement cases have noted that license revocation is appropriate when it appears that the licensee will misuse the privilege granted by the license, or that consumers will be jeopardized by continued licensure. License restrictions are also appropriate to ensure that public confidence in the licensing process is not undermined. *See, e.g., Division of Insurance v. MacLean,* Docket No. E93-12, at 14; *Division of Insurance v. Larocque*, Docket No. E2000-02, at 27. Brown has been engaged in the business of insurance for some twenty-five years as an agent, broker, and now producer. The Division argues that his answers to Question 18 demonstrate that he does not meet the statutory requirements of trustworthiness, competence and suitability that were in effect when he submitted the applications, but it does not link his alleged failure to meet those standards to any wrongful conduct in his business or harm to consumers. Nothing in the record would support a conclusion that revocation of Brown's license is necessary in order to protect consumers. At the same time, to impose no sanction for his conduct might reduce public confidence in the licensing process.

Brown argues that the financial settlements proposed by the Division before initiation of this proceeding are inconsistent with its position in past enforcement proceedings. To support his argument, Brown references nine cases settled within the past fourteen months that allegedly addressed failure to provide correct information on license applications. Because settlements are negotiated between parties based on specific facts and circumstances, Brown's reliance on those cases is misplaced. He does not identify the elements that supported those settlements or distinguish them from the circumstances of his case, and no relevant documents from such settlements were entered into the record of this proceeding. Therefore, the other settlements on which he relies do not provide a precedent for determining an appropriate sanction in this matter.

Recent Division decisions in litigated matters have, however, considered the question of sanctions for providing incorrect information on license applications. Review of those decisions affirms the position that fines, although they have not been universally imposed, are appropriate. In cases in which the respondent has been fined, the amount

assessed has ranged from $500 to $1,000, the maximum permissible under G.L. c. 176D. The factors that militate against revocation of Brown's license are also relevant to determining the amount of any fine; another factor to be considered is the respondent's willingness to accept responsibility for his or her actions. *See, e.g., Division of Insurance v. Larocque*, Docket No. E2000-02, at 25; *Division of Insurance v. Doyle*, Docket No. E93-4; *Division of Insurance v. McDermott*, Docket No. E94-3. Throughout this proceeding Brown, although he admits to the facts about his answers to Question 18, as set out in the OTSC, has consistently refused to accept responsibility for his actions. Failure to provide correct information on a license application is not a *de minimus* violation of the insurance laws. On balance, I conclude that it is appropriate to fine Brown $600 for each application on which he answered Question 18 incorrectly. Further, although the Division no longer oversees the process through which insurers appoint agents to represent them, the principle that a prospective agent should provide full and accurate information to an insurance company that seeks to make such an appointment has not changed. Therefore, I find it appropriate to order Brown to cease-and-desist from the conduct that gave rise to this OTSC, and to provide complete information in the future on any applications to represent an insurance company.

ORDERS

Accordingly, after due notice, hearing and consideration it is

ORDERED: That Richard L. Brown shall pay a total fine of Two Thousand Four Hundred Dollars ($2,400) to the Division of Insurance; and it is

FURTHER ORDERED: that Richard L. Brown shall cease and desist from the conduct that gave rise to this proceeding.

This decision has been filed this twenty-second day of September 2004, in the office of the Commissioner of Insurance. A copy shall be sent to Brown by certified mail, return receipt requested, as well as by regular first class mail, postage prepaid.

_____

Jean F. Farrington
Presiding Officer

Pursuant to G.L. c. 26, §7, this decision may be appealed to the Commissioner of Insurance.