



COMMONWEALTH OF MASSACHUSETTS
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DIVISION OF INSURANCE

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JULIANNE M. BOWLER
COMMISSIONER OF INSURANCE

Division of Insurance, Petitioner
v.
Thomas J. Minichiello, Jr., Respondent

Docket No. E2005-21

Decision and Order

Introduction and Procedural History

On October 31, 2005 the Massachusetts Division of Insurance (“Division”) filed an Order to Show Cause (“OTSC”) against Thomas J. Minichiello, Jr., (“Minichiello”), who is currently licensed as a resident Massachusetts insurance producer. The Division states that Massachusetts first licensed Minichiello as an insurance broker on March 6, 1979 and as an agent on September 4, 1979. It alleges that he was appointed as an agent for Berkshire Mutual Insurance Company (“Berkshire”) and Safety Insurance Company (“Safety”), but that his agent appointments were cancelled in 1998. It alleges that, on or about November 3, 1998, Minichiello’s broker license was cancelled for non-renewal, and that on or about November 28, 2001, he was issued a new broker license, which was converted into a producer license on May 16, 2003.

The Division alleges that from about November 3, 1998 to November 28, 2001, Minichiello was not licensed to sell insurance because his broker license had been cancelled and he held no agent appointment with either Berkshire or Safety. During that period, the Division asserts, Minichiello produced 699 insurance policies for Berkshire

and 2,873 insurance policies for Safety. The Division alleges that he sold insurance while unlicensed in violation of G.L. c. 175, §175 and engaged in unfair and deceptive trade practices in violation of G.L. c. 176D, §2. It also alleges a general violation of the insurance laws of the Commonwealth under G.L. c. 175, §162R(a)(2); that he committed unfair or deceptive trade practices in violation of G.L. c. 175, §162R(a)(7); and that he demonstrated incompetence and financial irresponsibility in the conduct of his business in violation of G.L. c. 175, §162R(a)(8). As relief, the Division seeks findings on the facts alleged in the OTSC, a finding that Minichiello has violated G.L. c. 175, §§162R(a)(2), -(a)(7), and -(a)(8), G.L. c. 175, §175, and G.L. c. 176D, §(2). The Division seeks the imposition of the maximum fines for the alleged violations and the suspension of Minichiello's producer license if he does not pay any imposed fines within 30 days.

A Notice of Procedure ("Notice"), issued on November 3, advised Minichiello that a prehearing conference would take place on December 7, 2005 at the offices of the Division. The notice also informed him that a hearing on the OTSC would be held on December 21, 2005, also at the Division, and that the proceeding would be conducted pursuant to M.G.L. c. 30A and the Standard Adjudicatory Rules of Practice and Procedure, 801 CMR 1.00, *et seq.* The Notice advised Minichiello to file an answer pursuant to 801 CMR 1.01(6)(d) and that, if he failed to do so, the Division might move for an order of default, summary decision or decision on the pleadings granting it the relief requested in the OTSC. It also notified Minichiello that, 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.

On November 3, the Division sent the Notice and OTSC by certified mail to Minichiello at his business and mailing addresses as they appear on the Division's records: 229 South Main Street, Bradford, MA 01835 and 285 Main Street, Groveland, MA 01834. On November 10, before Minichiello's answer was due, the Division moved to strike from the OTSC two paragraphs that had alleged that Safety had cancelled Minichiello's agent appointment. The basis for the motion was the Division's receipt from Safety of documentation demonstrating that, contrary to the Division's licensing records, Safety had not cancelled Minichiello's agent appointment. The motion was granted.

Minichiello filed an answer on November 25 in which he denied the Division's allegations. He stated that in November 2001 he became cognizant that his broker's license had expired and he contacted the Division to renew it. Minichiello maintained that during the three year period from 1998 to 2001, he was a licensed agent with Arbella Insurance Company, Safety, and Berkshire.

On December 7, a prehearing conference was held, pursuant to 801 CMR 1.01(10)(a). Douglas Hale, Esq., appeared for the Division. Minichiello represented himself. Although Mr. Hale and Minichiello stated on the record that "no facts were in dispute," the record shows that they in fact disagreed about whether Minichiello was a licensed agent for Berkshire during the period between November 3, 1998 and November 28, 2001.

A hearing was held on December 21, 2005. Following the hearing, Mr. Hale was granted until December 28, to file a post hearing memorandum of law. The Division's memorandum was filed on December 27. By letter dated December 21, 2005, I advised the parties that Minichiello could file a response to the Division's memorandum of law by January 4th. Minichiello's response was filed on that date.

Summary of the Parties' Positions

At the heart of this case is Minichiello's status as a licensed agent of Berkshire during the period of November 3, 1998 to November 28, 2001. That status is disputed. The parties agree that Minichiello did not have a broker's license from November 3, 1998 to November 28, 2001, and that he placed policies with Berkshire during this time.

At the hearing, the parties confirmed the process for agent licensing and described the process for obtaining an agent's license prior to the change to the producer licensing law. Both stated that the insurance company sent the Division of Insurance a list of its agents and one check as compensation for the agent licensing fee for all of its agents. The Division then issued the agent licenses and sent them to the insurance company.

As evidence of the status of Minichiello's agent appointment to Berkshire, the Division presented an affidavit from Diane Silverman-Black, the Director of Producer Licensing, testifying to the information in the Division's records. Because the affidavit was unclear regarding the year when Minichiello's agent appointment to Berkshire was

cancelled, I sent a letter on December 29 requesting clarification of this issue. The Division filed a supplemental affidavit on January 4, 2006. The Division argued that based on the affidavit, Minichiello was not licensed as an agent for Berkshire after November 3, 1998. In further support of its position, the Division offered a letter dated June 14, 2005 from Harleysville, Berkshire's parent company, which identifies the number of new and renewal policies Minichiello wrote for Berkshire from November 2, 1998 to November 28, 2001.

Minichiello argued that to the best of his knowledge he was a licensed agent for Berkshire throughout the period from 1998 to 2001. It was Berkshire's practice to retain the agent license rather than provide the agent with the physical copy of the license. Accordingly, the only way in which he would be aware of a non-renewal of his agent's license would be through Berkshire's refusal to pay him commissions for new and renewal insurance business. He argued that just as documentation from Safety had shown that Safety had renewed his agent appointment, contrary to the Division's licensing information, if documentation were available from Berkshire, it would also show that his agent license had been renewed. Additionally, Minichiello stated that Berkshire's records were now in three cities in the Commonwealth, and despite his best efforts, he had not been able to get a response from Berkshire about documentation pertinent to the status of his agent appointment.

Analysis and Discussion

The OTSC, in reliance on the Division's licensing records, initially alleged that Berkshire and Safety had cancelled Minichiello's agent appointment. Subsequently, the Division obtained information from Safety that contradicted its licensing records and withdrew its allegations relating to Safety. Because the Division's records relating to Minichiello's agent appointment with Safety were not correct, I find it appropriate to consider additional evidence regarding Minichiello's agent appointment to Berkshire in this instance. Both parties attempted, without success, to obtain documentation from Berkshire relating to Minichiello's agent license. The letter that the Division received from Harleysville, Berkshire's parent insurance company, is not responsive on this issue, in that it merely confirms that Minichiello placed policies with Berkshire during the time period in question and does not address Berkshire's cancellation of Minichiello's agent

appointment. Although Berkshire was unable to document Minichiello's status as a licensed agent, it continued payment of commissions, thereby supporting an inference that it considered Minichiello to be a licensed agent.

On this record, I am not persuaded that Minichiello engaged in the business of insurance without a license. Accordingly, the Division's requests for relief are denied.

This decision has been filed this 12th day of May 2006, in the office of the Commissioner of Insurance. A copy shall be sent to Minichiello by certified mail, return receipt requested, as well as by regular first class mail, postage prepaid.

Amma A. Kokro, Esq.
Presiding Officer

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