COMMONWEALTH OF MASSACHUSETTS
Office of Consumer Affairs and Business Regulation
DIVISION OF INSURANCE

One South Station • Boston, MA 02110-2208
(617) 521-7794 • FAX (617) 521-7475
TTY/TDD (617) 521-7490
http://www.mass.gov/doi

DEVAL L. PATRICK
GOVERNOR

TIMOTHY P. MURRAY
LIEUTENANT GOVERNOR

GREGORY BIALECKI
SECRETARY OF HOUSING AND ECONOMIC DEVELOPMENT

BARBARA ANTHONY
UNDERSECRETARY

NONNIE S. BURNES
COMMISSIONER OF INSURANCE

Elias White, Petitioner
v.
Division of Insurance, Respondent

Docket No. E2009-17

Order on Motions to Dismiss or for Summary Judgment

On June 9, 2009, Elias White ("White") filed a Claim for Adjudicatory Procedure ("Claim") appealing the denial of his application for a Massachusetts insurance producer's license. A notice of procedure, issued on June 9, ordered the Division of Insurance ("Division") to file an answer and scheduled a prehearing conference for July 14 and a hearing for July 28, 2009. Douglas Hale, Esq., counsel for the Division, filed the Division's answer on June 11, 2009. White did not appear at the prehearing conference on July 14, and did not request that it be continued. Mr. Hale stated that there had been no communication between him and White.

On July 14, the Division filed a motion to dismiss White's appeal for failure to prosecute or, in the alternative, a motion for summary decision. On July 14, I issued an order instructing White to file any response to the Division's motions by July 27 and advising him that any hearing would take place on July 28 at the time initially set for an evidentiary hearing. White did not file a response to the motions and did not appear on July 28. Mr. Hale again reported that he had received no communication from White.

801 CMR 1.01 (7) (h) allows a party, when he or she is of the opinion that there is no genuine issue of fact relating to a claim, and that he or she is entitled to prevail as a matter of law, to file a motion for summary decision. Although White has also failed to pursue his appeal at this time, the issues he raises in his Claim may arise again in connection with any subsequent license application. To provide guidance for such an application and forestall future appeals this decision therefore addresses the substantive issues raised in White's Claim. No genuine issue of fact has been raised in connection with those claims, and I find that the Division is entitled to prevail as a matter of law.

By letter dated May 13, 2009, the Division's Director of Producer Licensing denied White's application for a producer license on the grounds of a criminal record that included felony convictions and his probationary status. White's Claim contests the denial on two grounds: 1) the Division mischaracterized incidents on his criminal record as felonies rather than misdemeanors; and 2) the licensing statute, G.L. c. 175, §162R (a) does not state that misdemeanors or probationary status following convictions are grounds for denying a license.

White erroneously contends that three of the four incidents in his Criminal Offender Record Information were misdemeanors, rather than felonies, and therefore could not be the basis for denying him a producer license. The Division's motion for summary decision addresses White's factual assertions, citing the specific statutes underlying each of those incidents. Three of the four incidents are punishable by imprisonment in the state prison and are therefore properly classified as felonies. G.L. c. 175, §162(a)(6) permits the Commissioner of Insurance ("Commissioner") to deny an application for a producer license because the applicant has been convicted of a felony. The Division correctly denied White's application pursuant to that statute.

White's assertion that a misdemeanor is not a permissible ground for denying his application is also incorrect. A misdemeanor may be a basis for denying an application if the criminal act involved behavior that permits the Commissioner to deny a license under c. 175, §162(a). For example, c. 175, §162(a)(8) allows her to deny a license if a person has used fraudulent, coercive or dishonest practices or demonstrated incompetence, untrustworthiness or financial irresponsibility in the conduct of business. Evidence of a

prosecution for such behavior would support denial of a license, regardless of whether the criminal violation is a misdemeanor or a felony.

With respect to White's assertion that his probationary status is not a basis for denying his license application, earlier Division enforcement decisions reflect a longstanding policy to deny licenses to individuals who are on probation or who apply for a license within a relatively short time period after a conviction. *See, e.g., Economou v. Division of Insurance*, E2001-09 (application made approximately two years after conviction, while applicant still on probation); *Pignone, Jr. v. Division of Insurance*, E96-7 (application submitted while applicant on probation for approximately 18 more months). *See, also, McCarthy v. Division of Insurance*, E95-12 (applicant still on probation at time of application.) The Division's denial of White's license application at this time is consistent with those precedents.

Because White's arguments relating to the nature of his criminal record and the effect of misdemeanors on licensing decision are incorrect as a matter of law, and denial of a license application from a person who is on probation following a conviction is consistent with Division precedent, the Division's motion for summary decision is allowed.

DATED: September 9, 2009

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Jean F. Farrington
Presiding Officer

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