



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

1000 Washington Street • Suite 810 • Boston, MA 02118-6200
(617) 521-7794 • FAX (617) 521-7475
<http://www.mass.gov/doi>

CHARLES D. BAKER
GOVERNOR

KARYN E. POLITO
LIEUTENANT GOVERNOR

JAY ASH
SECRETARY OF HOUSING AND
ECONOMIC DEVELOPMENT

JOHN C. CHAPMAN
UNDERSECRETARY

DANIEL R. JUDSON
COMMISSIONER OF INSURANCE

Division of Insurance, Petitioner
v.
Edward L. Austin, III, Respondent
Docket No. E2014-11

Decision on Petitioner's Motion
For Summary Decision

Introduction and Procedural History

On September 5, 2014, the Division of Insurance (“Division”) filed an Order to Show Cause (the “Initial OTSC”) against Edward L. Austin III (“Austin”), a licensed non-resident Massachusetts insurance producer. In the Initial OTSC, the Division alleges that Austin failed to report administrative actions by two states, Delaware and Vermont, within 30 days of the disposition of those actions. It further alleges that, on his November 21, 2013 application to renew his Massachusetts insurance producer license, Austin checked No in response to Question 27 (a) that asks if he was a party to an administrative proceeding relating to an occupational license that was not previously reported to the Division.

The Division contends that Austin’s answer to Question 27 (a) violated M.G.L. Chapter (“Chapter”) 175, §§162R (a)(1) and (a)(3), and that his failure to report the disposition of the administrative actions on a timely basis violated Chapter 175, §162V (a). It also asserts that his violations of Vermont and Delaware state insurance statutes are, pursuant to Chapter 175, §162R (a)(2), grounds for revoking his Massachusetts license.¹ It seeks revocation of Austin’s license

¹ These sections permit disciplinary action as follows: §162R (a)(1) providing incorrect, misleading, incomplete or materially untrue information in the license application; §162R(a)(2) violating any insurance laws, or violating any regulation, subpoena or order of the commissioner or of another state’s insurance commissioner; and §162R (a)(3) obtaining or attempting to obtain a license through misrepresentation or fraud..

and orders requiring him to dispose of any insurance-related interests in Massachusetts, prohibiting him from conducting any insurance business in the Commonwealth, and imposing fines for the alleged violations.

The Division served the Initial OTSC on Respondent by first class mail, postage prepaid, addressed to him at his residential, business and mailing address as shown on the Division's licensing records, 906 Ridgefield Road, Shelburne, VT 05482-6315. On October 9, 2014 Austin, by letter, responded to the Initial OTSC. His response stated that, as of July 11, 2014, he "relocated" to Bonita Springs, Florida.

On October 28, 2014 the Division moved to amend the Initial OTSC to add an additional count (the "Amended OTSC"), asserting that Austin was not qualified for a Massachusetts non-resident producer license because Vermont was no longer his home state and that he had violated Chapter 175, §162N (c) ("§162N (c)") by failing to report his new address to the Division within 30 days of the change of legal residence. In addition to the relief requested in the Initial OTSC, the Division requested that Austin's license be revoked for failure to maintain a producer license in his home state.

The Division served the motion to amend and the Amended OTSC on Austin by first-class mail, postage prepaid, addressed to him at 23650 Via Veneto Blvd., Unit #803, Bonita Springs, Florida 34134. On October 29, 2014, I allowed the Division's motion and ordered Austin to answer the Amended OTSC within 21 days of receipt. Austin did not file an answer or other response to the Amended OTSC. On April 10, 2015, the Division moved for summary decision against Austin on the grounds that he failed to answer the Amended OTSC.

An order, issued on April 13, 2015, instructed Austin to file any written response to the Division's motion by April 24, 2015 and scheduled a hearing on the motion for April 28, 2015. Austin did not respond to the Division's motion and did not appear at the April 28 hearing. Mary Ellen Thompson, Esq., counsel to the Division in this matter, stated that she had not been contacted by Austin or by any person purporting to represent him in this matter. She requested that he be found in default.

Finding of Default

The Amended OTSC, sent to Austin's address in Florida by first-class mail, was not returned. I conclude that Austin's failure to answer the Amended OTSC or to respond to the Division's motion, and his failure to appear at the hearing warrant a finding that he is in default.

By his default, Austin has waived his right to proceed further with an evidentiary hearing in this case and I may consider the Division's motion for summary decision based on the record. That record consists of the Initial OTSC, the four exhibits attached to it, Austin's response to the Initial OTSC, and the Amended OTSC.²

Findings of Fact

Based on my review of the record, I make the following findings of fact.

1. The Division first licensed Austin as a non-resident insurance producer on or about June 18, 1993.
2. At that time, Austin was a resident of Vermont, where he had been licensed to sell insurance since 1981.
3. In 2007 Austin joined TD Insurance, Inc. as executive vice president.
4. In September 2012, TD Insurance, Inc. was sold to USI Insurance Services and Austin became USI's president for the State of Maine.
5. Throughout this time, Austin was a resident of Vermont.
6. On April 14, 2014 Austin became vice-president of underwriting for the Maine Employers Mutual Insurance Company ("MEMIC").
7. On July 11, 2014 Austin relocated to Bonita Springs, Florida to manage MEMIC's southeast territory.
8. On or about November 16, 2011, the Vermont Department of Banking, Insurance, Securities and Health Care Administration fined Austin for failure to complete that state's continuing education requirements within the extension period allowed under Vermont law.
9. Austin promptly completed the continuing education requirement.
10. On or about May 31, 2012, the Delaware Insurance Commissioner fined Austin for failure to report the Vermont action to Delaware.
11. On June 21, 2012, TD Insurance, Inc. located in Portland, Maine notified the Division of the stipulation orders Austin entered into with Vermont and Delaware, and supplied copies of both stipulations and orders.
12. On November 21, 2013, Austin submitted an application to renew his non-resident Massachusetts insurance producer license.
13. Austin answered "no" to question 27 (2) on that application, that asks if the applicant has ever "been named or involved as a party in an administrative proceeding...regarding any professional or occupational license or registration, which has not previously been reported to this insurance department".

Analysis and Conclusions of Law

801 CMR 1.01(7)(h) permits a party to move for summary decision when, in its opinion, there is no genuine issue of fact relating to a claim and it is entitled to prevail as a matter of law.

² The four exhibits are: 1) June 21, 2012 letter from TD Insurance notifying the Division of the administrative actions in Vermont and Delaware; 2) Vermont stipulation and consent order; 3) Delaware Stipulation and consent order; and 4) Austin's 2013 application to renew his producer license.

Chapter 175, §§162G through 162X sets out, among other things, the requirements for obtaining and maintaining a Massachusetts insurance producer license. Chapter 175, §162R (a) specifies fourteen grounds on which the Commissioner of Insurance (“Commissioner”) may suspend or revoke a producer’s license.

The Initial Order to Show Cause

In the Initial OTSC, the Division identifies Chapter 175, §§162R (a)(1), (a)(2) and (a)(3) as grounds for revocation of Austin’s license, as well a failure to comply with Chapter 175 §162V(a)(1), a statute requiring a producer to report to the Commissioner administrative proceedings in any jurisdiction within 30 days of the final disposition of the matter.

Chapter 175, §§162R (a) (1) and (a)(3) both support disciplinary action against a producer for providing inaccurate or incorrect information on an application for a producer’s license. The Division alleges that Austin, by answering “no” to question 27 (2) on his application to renew his producer license, failed to disclose administrative actions against him in Vermont and Delaware, and provided inaccurate information to the Commissioner. However, the record does not support the Division’s position. According to Austin’s response to the initial OTSC, he became executive vice-president of TD Insurance, Inc. in 2007. On June 21, 2012, TD Insurance, Inc. notified the Division of Insurance that Austin had signed stipulations with both states.

Austin filed his application to renew his producer license on November 21, 2013. Question 27 (2) requires the applicant to report only administrative proceedings that have “not been previously reported to this insurance department [*i.e.* Massachusetts]. Because both the Vermont and Delaware actions had been reported to the Division seventeen months before Austin submitted his renewal application, he was not obligated to report them. Therefore, “no” was not an inaccurate or incorrect answer that might support disciplinary action against Austin.³

Chapter 175, §162V(a)(1) sets a 30-day time frame within which a producer must report to the Commissioner the final disposition of any administrative action taken against the producer in another jurisdiction. The Division contends that Austin did not report the Vermont and Delaware actions to Massachusetts within that time frame. However, the statute requires reporting of an “administrative action” without further defining that term.

³ The record indicates that the Division knew about the Vermont and Delaware stipulations and orders in June 2012, 17 months before the date of Austin’s application to renew his producer license, but did not use them as a ground for denying his application.

The Stipulation and Consent Order from Vermont is dated November 17, 2011. The document, after reciting facts relating to Austin's non-compliance with that state's continuing education requirements, states that in such circumstances the Vermont Commissioner is authorized to suspend the producer's license. The agreement then states that [Austin] has been "made aware that the [Vermont] Department may proceed with an administrative action against him for violating 8 V.S.A. §4800a and Insurance Regulation I-2000.02" The language of the agreement distinguishes a potential "administrative action" from the procedure that generated the Stipulation and Consent Order. Because Vermont, by its own terms, did not initiate an administrative action, I am not persuaded that the transaction with that state should be characterized as a "proceeding" that requires reporting to another jurisdiction.⁴

On May 31, 2012, Austin executed a Stipulation and Consent Order with the Delaware Insurance Department. The basis for the agreement with Delaware was Austin's failure to report "an administrative action taken by another jurisdiction" to the Delaware Department. The "other jurisdiction" is not identified. The Delaware Stipulation and Consent Order indicates that Austin admitted to a violation, but also that the matter was resolved without recourse to a formal hearing. Assuming, *arguendo*, that Delaware correctly interpreted its statute as applied to Austin's interactions with another state's insurance regulatory agency, the record shows that the Division was informed of the Delaware action within 30 days of its disposition. TD Insurance, Inc.'s June 12, 2012 letter advised the Division of the Delaware settlement less than two weeks after the date of the agreement. Because the Division was notified of the action within the statutory 30-day framework, the evidence does not support a claim that Austin violated Chapter 175, §162V(a)(1).

Chapter 175, §162R (a)(2), in pertinent part, supports disciplinary against a licensee for "violating any insurance laws, or violating any regulation, subpoena or order of the Commissioner or of another state's insurance commissioner." The phrase "any insurance laws" on its face permits an action based on violations of statutes enacted by other jurisdictions.⁵

⁴ Question 27 (a) on the producer license renewal form includes assessment of a fine as a form of "involvement" in an administrative proceeding. However, it also permits the applicant to exclude "terminations" due solely to noncompliance with continuing education requirements. The issue in Vermont was Austin's compliance with those requirements.

⁵ In addition to subsection (a)(2), other sections of Chapter 175, §162R (a) specifically permit the Division to base a disciplinary action on actions in or by other jurisdictions. As examples, subsection (a)(8) permits such an action if the producer has engaged in "fraudulent, coercive or dishonest practices" or demonstrated "incompetence,

Exhibits 2 and 3 to the Initial OTSC support the Division's allegations that Austin violated the insurance laws of both Vermont and Delaware. Based on those violations, the Division seeks fines and revocation of Austin's Massachusetts producer license. The Commissioner, in a disciplinary action against a Massachusetts licensee for violations of the insurance laws, has discretionary authority to choose an outcome from a range of statutory options that include probation, suspension, revocation, or refusal to issue or renew a license. Determining an appropriate outcome requires an analysis of the nature of the violation, wherever it occurred, and of the weight to be given to the particular conduct.

The violations of Vermont and Delaware law both consist of non-compliance with state-specific licensing requirements relating, respectively, to continuing education requirements and to timely reporting an action in another state. Each matter was resolved without a formal hearing and with no suspension or revocation of Austin's license or other restriction on his ability to conduct business. Principles of comity persuade me that Massachusetts should not now revoke Austin's license on the basis of violations in Vermont and Delaware that did not result in formal administrative proceedings in either state. I also find that imposing a second fine for violations of another state's statutes that were satisfactorily resolved in that jurisdiction would unfairly penalize Austin. Moreover, a practice of relying on Chapter 175, §162R (a)(2) to impose fines on non-resident Massachusetts licensees for no reason other than violation of another state's insurance laws could be viewed by the licensee's home state as an attempt to increase revenue at the expense of their resident producers and might have the undesirable result of leading to similar actions against Massachusetts resident producers.⁶

The Amended Order to Show Cause

The Amended OTSC added an additional count, alleging that Austin is no longer eligible for a non-resident Massachusetts producer license because he relocated from Vermont to Florida and has provided no evidence of licensure in Florida. Austin applied for renewal of his non-resident Massachusetts producer license on November 21, 2013; the initial OTSC identified him

untrustworthiness or financial irresponsibility in the conduct of business in the commonwealth or elsewhere"; subsection (a)(9) allows disciplinary action if another jurisdiction denies, suspends or revokes a license issued to that producer.

⁶ Both Vermont and Massachusetts limit the consequences of a producer's failure to comply on a timely basis with the state's continuing education requirements to suspension of that license. Revoking Austin's license in this proceeding would produce the anomalous result of imposing a penalty that is not allowed under Massachusetts law.

as an active licensee.⁷ Austin's response to the Initial OTSC indicated that he relocated to Florida after he submitted his Massachusetts renewal application. The application itself, however, did not provide incorrect information. The renewal application does not instruct the producer to report information that would change the answers to questions on that application.

Chapter 175, §162N permits licensure of producers who are non-resident in Massachusetts if they are licensed and in good standing in their "home state" and Massachusetts does not deny the application for reasons set out in Chapter 175, §162R.⁸ Chapter 175, §162N (c) requires a non-resident producer who moves from one state to another to file a change of address and provide certification from the new resident state within 30 days of the change of legal residence.⁹ Austin referred to his relocation in his response to the Initial OTSC, but did not otherwise file a change of address with the Division.

The record in this proceeding, however, is inadequate to support a conclusion that, as of July 2014, Austin was ineligible for a non-resident Massachusetts license or that he failed to file a timely change of address. A non-resident producer who moves from one state to another must submit a new certification within 30 days of the change of "legal residence." Austin states that he "relocated" to Florida on July 11, 2014. "Legal residence," however, is a term of art under each state's law that is based on specific facts. The record contains no documentation that permits me to make a finding on Austin's status as a legal resident of either Vermont or Florida. The date of any change to his status as a legal resident of Vermont, the status under which he was licensed as a Massachusetts non-resident producer, is essential to determining whether he remains eligible for a Massachusetts non-resident producer license or has complied with Chapter 175, §162N (c).

Conclusion

For the reasons stated above, I find that the record does not support the allegations that Austin's license should be revoked pursuant to Chapter 175, §§162R (a)(1) and (a)(3). With respect to the request for revocation of Austin's license for alleged violations of Chapter 175,

⁷ Division licensing records indicate that Austin's license was renewed as of January 10, 2014 for a three year period.

⁸ Chapter 175, §162H defines "home state" as the place where an insurance producer maintains his principal place of residence or his principal place of residence.

⁹ Pursuant to Chapter 175, §162O, a producer licensed in another state who moves to Massachusetts must apply to become a Massachusetts resident producer within 90 days of establishing legal residence in the state. The record does not indicate whether Florida has the same requirement.

§162R (a)(2), I find that, on the facts of this case, revocation and fines are not warranted. With respect to violations of Chapter 175, §162V, I find that 1) the facts do not support the allegation that Austin failed timely to report the Delaware matter; and 2) the language of the Vermont agreement and of the reporting requirement on the license renewal application raise material issues about whether Austin was required, as a matter of law, to report that matter.

The record is insufficient to support at this time the Division's request to revoke Austin's license on the ground that his relocation to Florida renders him ineligible for a non-resident Massachusetts license. The Amended OTSC, however, raises a significant issue that requires further investigation to establish the facts relevant to determining whether Austin now qualifies for a non-resident license. I am therefore suspending Austin's non-resident license until such time as he provides the Division with evidence identifying his current "legal residence" and certifying that he is licensed as an insurance producer in good standing in that jurisdiction.

ORDERS

Accordingly, after due notice, hearing and consideration it is

ORDERED: That any and all Massachusetts non-resident insurance producer licenses issued to Edward L. Austin, III are hereby suspended until such time as he provides the information required by this decision or his current license expires; and it is

FURTHER ORDERED: that until such time as Austin satisfies the Division that he meets the conditions for licensure as a non-resident insurance producer in Massachusetts he is, from the date of this order, prohibited from directly or indirectly transacting any insurance business or acquiring, in any capacity whatsoever, any insurance business in the Commonwealth of Massachusetts.

This decision has been filed this 28th day of October 2015, in the office of the Commissioner of Insurance. A copy shall be sent to Edward L. Austin, III by regular first class mail, postage prepaid.

Jean F. Farrington
Presiding Officer

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

