

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

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GARY D. ANDERSON
COMMISSIONER OF INSURANCE

Division of Insurance, Petitioner

v.

Paul E. Smyth, Respondent

Docket No. E2017-16

Order on Petitioner's Motion for Summary Decision

On July 28, 2017, the Division of Insurance ("Division") filed an Order to Show Cause ("OTSC") against Paul E. Smyth ("Smyth"), who was first licensed in 2003 as a Massachusetts non-resident insurance producer. The OTSC seeks revocation of Smyth's Massachusetts producer license on the grounds that he is subject to discipline pursuant to the provisions of M.G.L. c.175, §162R (a)(2), (a)(5) and (a)(9). It also alleges that Smyth failed timely to report to the Division the administrative action revoking his license in Connecticut, as M.G.L. c. 175, §162V (a) obligates him to do. In addition to revocation of Smyth's license and the imposition of fines, the Division seeks orders that, among other things, require Smyth to dispose of any insurance-related interests in Massachusetts and prohibit him from conducting business in the Commonwealth.

Smyth filed no answer or other response to the OTSC. On September 14, 2017, the Division moved for entry of default and summary decision ("the Motion"). An order, entered on September 15, set a date for responding to the Motion and scheduled a hearing on the Motion for October 17, 2017. Robert Kelly, Esq. represented the Division in this matter. Neither Smyth nor any person representing him attended the October 17 hearing. Mr. Kelly reported that he had not been contacted by Smyth or any person purporting to represent him.

Finding of Default

According to the certificate of service submitted with the OTSC, the Division served the OTSC and Notice of Action on Smyth by certified and regular United States mail addressed to him at the home and mailing address shown on the Division's producer licensing records, 1156 Hope Street, #1, Stamford, CT 06907 and at the business address on those records, 15 Fisher Lane, White Plains, N.Y. 10603. The Motion is based on the grounds that Smyth failed to answer the OTSC. The Division attached to the Motion photocopies of the envelopes sent to Smyth at his business address, both of which were returned to the Division with notations to "return to sender, unable to forward." The Post Office also returned the certified mail sent to Smyth at his home and mailing address, with the notation that it was unclaimed. The Division stated that the mail sent to Smyth at his home and mailing address by regular first class mail was not returned. I conclude that the OTSC was served on Smyth by United States mail.

I find that Smyth's failure to answer the OTSC or to respond to the Motion, and his failure to appear at the hearing warrant a finding that he is in default. By his default, Smyth has waived his right to proceed further with an evidentiary hearing in this case and I may consider the Motion based on the record.

The record in this proceeding consists of the OTSC, the Motion, and the documents attached to them. The exhibit to the OTSC consists of an order in a Connecticut administrative action revoking Smyth's insurance producer license in his home state.

Findings of Fact

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

1. The Division first licensed Smyth as a non-resident insurance producer on or about October 24, 2003.
2. By order dated May 19, 2017, the Connecticut Insurance Department revoked Smyth's insurance producer license.
3. Smyth failed to report to the Division, within 30 days after May 19, 2017, the Connecticut administrative action revoking his license.

Analysis and Discussion

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. Smyth has not contested the factual allegations in the OTSC or offered any

defense to the Division's claims for relief. M.G. L. c. 175, §§162G through 162X set out, among other things, the requirements for obtaining and maintaining a Massachusetts insurance producer license. Section 162R (a) identifies fourteen specific grounds on which the Commissioner may suspend or revoke a producer's license. The Division identifies §162R (a)(2), (a)(5) and (a)(9) as grounds for revocation of Smyth's license.¹

Subsection (a)(2) supports disciplinary action if the licensee has violated any insurance laws or violated any regulation, subpoena or other order of the Massachusetts Commissioner or of another state's insurance commissioner. The Division contends that Smyth's violations of the Connecticut insurance laws, as alleged in that state's administrative action against him, is a ground for disciplining him. It does not claim that Smyth is subject to discipline under (a)(2) for violating any Massachusetts insurance laws.

Subsection (a)(5) supports disciplinary action if a producer intentionally misrepresents the terms of an actual or proposed insurance contract or application for insurance. The Division contends that the allegations in the Connecticut complaint against Smyth support its request for discipline pursuant to this section. Smyth did not appear for a hearing at the Connecticut Insurance Department and was defaulted; for purposes of that state's disciplinary action the allegations in the complaint, both on the licensee's acts and the legal consequences of those acts, were therefore deemed admitted. The allegations in another state's complaint and its decision on a licensee's violations of its insurance laws, particularly when entered by default, has limited evidentiary value as support for disciplinary action against that licensee in another jurisdiction. On this record, I find that the Connecticut decision is insufficient to support the Division's requests to discipline Smyth, pursuant to (a)(2) or (a)(5), for allegations about events occurring in Connecticut.

Subsection (a)(9) supports disciplinary action if another jurisdiction has revoked an insurance producer's license. The evidence submitted by the Division, a copy of the order issued by Connecticut revoking Smyth's insurance producer license in that jurisdiction, fully supports disciplinary action under that section.

¹ According to Division of Insurance producer licensing records, Smyth's license was terminated for non-renewal on June 12, 2018. Pursuant to M.G.L. c. 175, §162R (e), the Commissioner retains the authority to enforce the provisions of and impose any penalty or remedy authorized by c. 175, §§162H through 162X, even though the license of the person charged has lapsed by operation of law.

The Division also seeks civil penalties in accordance with M.G.L. c. 176D, §7 (“Section 7 fines”), as permitted under §162R (a) for Smyth’s alleged violations of Massachusetts law. Decisions in administrative proceedings seeking license revocation distinguish grounds for disciplinary action that arise from the respondent’s affirmative acts from grounds arising from administrative or judicial actions initiated by third parties to revoke or suspend the respondent’s license. In this matter, the Division seeks disciplinary action, including fines, based on alleged violations of three sections of M.G.L. c. 175, §162R (a).

Discipline under (a)(2) and (a)(5) is based on affirmative acts by a respondent. In this case, however, those acts occurred in Connecticut and were the subject of an administrative action there that culminated in a default decision. For the reasons set out above, I find that that decision is insufficient to support the Division’s request for discipline under (a)(2) or (a)(5). As noted above, the Division did not allege that Smyth’s failure to report the Connecticut administrative action was a violation of (a)(2). In any event, had the matter had been fully litigated in Connecticut, I am not persuaded that it is reasonable to fine a Massachusetts licensee for actions committed elsewhere even if those actions would support a fine if committed in the Commonwealth. The third ground on which the Division seeks to discipline Smyth, (a)(9) is based entirely on an administrative action against him by another jurisdiction. I find no basis for imposing Section 7 fines on him.

M.G.L. c. 175, §162V (a), requires a Massachusetts licensee to report to the Commissioner any administrative action taken against him or her by another jurisdiction. The record supports a conclusion that Smyth did not report to the Division the administrative action initiated by Connecticut and thereby violated M.G.L. c. 175, §162V (a). Section 162V (a) does not specify a penalty for failure to comply with that statute. Violations of the section are therefore subject to fines authorized under M.G. L. c. 175, §194. The maximum fine allowed under that section is \$500 per violation. I find that Smyth committed one violation of M.G. L. c. 175, §162V (a) and impose the maximum fine.

One ground that the Division relies on as a basis for disciplinary action against Smyth, prior revocation of his producer license in one other jurisdiction, fully warrants

revocation of his Massachusetts license. I find that, in addition to revocation of his license, Smyth should be prohibited from transacting any insurance business, directly or indirectly, in Massachusetts, and be required to dispose of any interests he may have in any insurance business in Massachusetts.

ORDERS

Accordingly, after due notice, hearing and consideration it is

ORDERED: That any and all insurance producer licenses issued to Paul E. Smyth by the Division are hereby revoked; and it is

FURTHER ORDERED: that Paul E. Smyth shall return to the Division any licenses in his possession, custody or control; and it is

FURTHER ORDERED: that Paul E. Smyth shall cease and desist from the conduct that gave rise to this Order to Show Cause; and it is

FURTHER ORDERED: that Paul E. Smyth 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; and it is

FURTHER ORDERED: that Paul E. Smyth shall comply with the provisions of G. L. c. 175, §166B and dispose of any and all interests in Massachusetts as a proprietor, partner, stockholder, officer or employee of any licensed insurance producer; and it is

FURTHER ORDERED: that Paul E. Smyth shall pay a fine of Five Hundred Dollars (\$500) to the Division within 30 days of the entry of this order.

This decision has been filed in the office of the Commissioner of Insurance this 6th day of July 2018. A copy shall be sent to Smyth by regular first class mail, postage prepaid.

Jean F. Farrington
Presiding Officer

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