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COMMISSIONER OF INSURANCE

Andrew C. Berger, Petitioner
v.
Division of Insurance, Respondent
Docket No. E2010-12

Decision and Order

Procedural History

On September 29, 2010, Andrew C. Berger (“Berger”) filed with the Commissioner of Insurance (“Commissioner”) a Notice of Claim for an Adjudicatory Proceeding (“Notice of Claim”), appealing a decision by Division of Insurance (“Division”) staff denying his application for an individual public insurance adjuster’s license.¹ I was designated presiding officer for this proceeding. A Notice of Procedure, issued on September 30, 2010, scheduled a prehearing conference for October 26 and a hearing for November 12, 2010. Seth H. Hochbaum, Esq. represents Berger and Robert Kelly, Esq. is counsel for the Division. The Division filed its answer, consisting of copies of Berger’s application and cover letter, a letter from James D. Popkin in support of Berger’s application, the Division’s letter denying the application, and Berger’s Notice of Claim, on October 13. At the petitioner’s request, the prehearing conference and evidentiary hearing were rescheduled. At the January 7, 2011 evidentiary hearing two witnesses testified and twenty-one exhibits were entered into evidence.² The parties filed

¹ The applicable licensing statute, G.L. c. 175, §172 allows the Commissioner to reject an applicant who does not document two years of experience in connection with adjusting property losses, and requires no hearing on such rejection. The letter rejecting Berger’s application stated that he could appeal the decision. A hearing is appropriate in such circumstances. See *Yerardi’s Moody Street Restaurant v. Board of Selectmen of Randolph*, 19 Mass. App. Ct. 296 (1985).

² Berger testified on his own behalf and the Division presented Diane Silverman-Black, Director of Producer

posthearing memoranda on January 21. At issue in this case is the application to Berger of the requirement in G.L. c. 175, §172 (“c. 175, §172”), the statute setting out the qualifications for a public insurance adjuster’s license, that the applicant demonstrate that he has two years experience “performing services in connection with the adjusting of property losses.”

Background

On September 20, 2010, the Division’s Director of Producer Licensing denied Berger’s application for an insurance adjuster’s license for the stated reason that he failed to meet the statutory minimum qualifications for licensing because he had not demonstrated that he had the requisite experience. The letter stated that his application showed that he had been employed in assisting in performing such services only since November 2009, and that he therefore did not qualify for a license “at this time.” Berger appealed on the ground that in making its decision the Division did not properly account for his educational and work experiences that involved skills directly related to the adjustment process, including measuring structures, preparing site drawings, resolving conflicts among contractors, engineers and other architects, and resolving water damage claims. The Division does not dispute the facts about Berger’s education and experience as set out in his application and supporting documents, or in additional material made available after the Division denied his application, nor does it challenge Berger’s trustworthiness or competence. The parties’ posthearing memoranda state their respective positions on whether the Division justifiably denied Berger’s application.

Berger argues that his application and cover letter described his current position as an intern for Popkin Adjustment Company, his prior position as project manager/architect for the Related Companies, and his experience as an architect and project manager since receiving his master’s degree in architecture in 2004. He points out that after his application was denied he provided additional documentation to the Division that elaborated upon his qualifications and experience, including more detail about his experience in addressing remediation efforts in connection with water damage. Berger argues that the specific tasks performed in those positions are the same as those he has performed in his job at Popkin Adjustment Company. He points out as well that letters from two former employers confirm his experience in managing

Licensing, as its witness.

and resolving design issues and pricing construction.

Berger argues that the Division has approved applications for public adjuster's licenses from individuals who are far less qualified than he is, including those with criminal records and who do not use an approved written public adjuster's contract.³ He contends that some of those applicants have little, if any, experience in performing services in connection with property losses. One applicant, Berger observes, lived for the past five years in California, where he was either unemployed or working in the building trades in Nevada or California. His application stated that in the past he worked for his father, a licensed public adjuster, "on and off" but provided no further description of when he was so employed or what he did. A second applicant, Berger notes, was a project manager for a restoration services company that has no role in adjusting property losses and whose application shows no experience working for a public insurance adjusting firm, an independent adjusting firm or an insurance company.

Berger argues that he is entitled to reasoned consistency in administrative agency determinations. That principle, he asserts, means that the same issue cannot be decided according to the whim or caprice of an administrative agency each time it is presented. In reviewing his application, he argues, the Division has departed from a long-established practice about its interpretation and application of the requirement that the applicant for a public adjuster license possess two years experience performing services in connection with adjusting property losses. Berger argues that the Division has consistently interpreted and applied the requirement as generously as possible, and at times has seemingly ignored it entirely. He notes that unemployment and construction work, as reported by one applicant, did not afford experience in connection with adjusting property losses, and that only a very generous reading would allow unspecified work for an adjuster "on and off" in the past to pass muster as the required experience. Similarly, Berger argues, work in the cleanup industry does not offer experience in estimating property losses. In contrast to the liberal interpretation of the two-year rule as applied to these two applicants, Berger argues that the Division took a stringent and narrow interpretation when it reviewed his application because it gave no credit for his experience as an architect and the "readily transferable" skills that he learned in that capacity, but looked only at the time he had been with the Popkin Adjustment Company. He contends that the approach

³ Berger notes that he has no criminal record.

taken to his application is irreconcilable and inconsistent with the Division's pattern in connection with other applications filed before and after his. Berger asserts, as well, that his lack of a criminal record supports a conclusion that he meets the standards of trustworthiness, suitability and competence required of an individual applying for a public adjuster's license.

Berger argues that the Division provided no explanation for its deviation from its established pattern of conduct, as it must do if it intends to change that pattern. By denying his application, Berger contends, the Division has improperly created a moving target for considering applications, so that an applicant cannot predict whether his or her past experience satisfies the two-year requirement. Because the Division's decision does not conform to the principle of reasoned consistency, Berger concludes, it must be reversed.

The Division argues that c. 175 §172 mandates that no application for a public adjuster's license shall be filed until the applicant demonstrates that he has two years experience performing services in connection with adjusting property losses. It states that after it denied Berger's application, but before this hearing, the Division offered to reconsider Berger's professional experience if he could substantiate direct experience in the adjustment of insurance claims. In response, Berger submitted the documents marked in this proceeding as Exhibits 6, 7, 18 and 19.⁴ The Division argues that its decision was justified because at the time of his application Berger's only evident experience in performing services in connection with adjusting property losses was his tenure at the Popkin Adjustment Company. The Division argues that Berger failed to meet his burden of demonstrating that he has the requisite experience. It asserts that the "normal" duties of a project manager/architect do not involve responsibilities for actually adjusting property losses. The Division characterizes other duties as "largely operational in nature" and not clear evidence of experience in adjusting such losses. The Division further contends that there is no direct correlation between working as an architect/owner's representative and as a public insurance adjuster, who is engaged to negotiate insurance claims. The Division asserts that the person whose application was marked as Exhibit 9 had direct professional experience at a claims adjustment company and that the "majority" of the

⁴ Exhibits 6 and 7 are Berger's statement summarizing the skills and work experience that he viewed as relevant to a conclusion that he had the requisite two year's experience "performing services in connection with property losses" and a two-page detailed curriculum vitae. Exhibits 18 and 19 are letters from former employers about Berger's experience; one is dated December 31, 2009 and the other December 23, 2010.

applications offered into evidence demonstrate clear, creditable professional experience in connection with adjusting property losses or contain statements attesting to such experience.

Analysis

G.L. c. 175, §172, in its entirety, sets out a series of qualifications for licensure as a public insurance adjuster. In brief, the Commissioner may, upon payment of a fee, completion of a written examination, and submission of a written application and supporting documents, issue a license to act as a public insurance adjuster to any “suitable person” over age 21.⁵ The Commissioner has discretion to issue a license to an applicant who satisfies those requirements, but “shall issue a license” if he is satisfied that the applicant is trustworthy and competent. The statute, in addition, imposes a specific experience requirement, stating that an application shall not be filed unless and until the applicant demonstrates that he has 2 years experience “performing services in connection with the adjusting of property losses.” It therefore permits the Commissioner to refuse to accept an application if the applicant does not satisfy the experience requirement.

The statute neither directly defines the meaning of “in connection with” nor prescribes standards for the two-year requirement, i.e., it does not require that the experience be gained through full-time work with an adjuster or within a specified time before the application is submitted. The Division has promulgated no regulations to clarify its interpretation of the statute or to set parameters for determining compliance. The guiding principle applicable when an agency exercises its discretion, in this case to determine whether an applicant for a public adjuster’s license has satisfied the two-year requirement, is that it must “exercise its discretion fairly and not act in an arbitrary and capricious manner.” *Gurry v. Board of Public Accountancy*, 394 Mass. 118, 128 (1985), quoting from *LaPointe v. License Bd. of Worcester*, 389 Mass. 454, 462 (1983). Licensing authorities may not act in an unreasonable or arbitrary manner and must consider and determine each application on its own set of facts. *Turnpike Amusement Park, Inc. v. Licensing Commission of Cambridge*, 343 Mass. 435 (1962). In making decisions, an administrative agency is expected to act with reasoned consistency. *Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Board*, 448 Mass. 45 (2006), referring to *Tofias v. Energy Facilities Siting Board*, 435 Mass. 340, 349 (2001), quoting *Boston Gas Co. v.*

⁵ According to the statute, “[t]he test is to examine an applicant’s knowledge of building construction techniques and

Department of Public Utilities, 367 Mass. 92, 104 (1975). That requirement of "reasoned consistency" means only "that any change from an established pattern of conduct must be explained." *Robinson v. Department of Public Utilities*, 416 Mass. 668, 673 (1993).

Berger argues that the applications approved by the Division demonstrate inconsistencies in determining what experience it views as meaningful for the purpose of determining that the applicant has two years of experience performing services "in connection with" adjusting of property losses. In his case, he asserts, the Division takes the position that because he worked for Popkin Adjustment Company for less than a year, he did not qualify for a public adjuster's license. The applications entered into evidence in this proceeding support a conclusion that an applicant need not have worked for a public adjuster for two years in order to qualify for a license.⁶ Exhibits 8, 9, 11, 14 and 17 show no apprenticeships or employment as public adjusters. Rejection of Berger's application for the sole stated reason that he did not satisfy the two-year requirement because he had not worked for Popkin Adjustment Company for two years is inconsistent with prior Division decisions approving applications from individuals without two

materials, as well as knowledge of relevant insurance principles and coverage."

⁶ Exhibit 8: Teacher and owner of a construction company. Cover letter refers to work, as a contractor, that included assisting homeowners in identifying damage caused by covered losses and seven years of work providing construction renovation estimates for homeowners, property managers and insurance adjusters. Exhibit 9. Project manager for a restoration company and a services group. As a project manager for the restoration company, applicant manages insurance claims resulting from fire or flood. Exhibit 10. Estimator for a public adjuster for four years and sales director for marketplace events, a trade show producer. Letter from adjuster confirms that applicant was an unpaid apprentice. Exhibit 11: President of a company called Oneco. On a 1/3 time basis he performs post-disaster field inspections as an independent contractor for PB/Alltech, Inc. and Parr Inspections, companies that have contracts with the Federal Emergency Management Agency. Exhibit 12. Unemployed from June 2009-October 2010; worked as a mason in California and Nevada from November 2005 to June 2008, and as a plumber's helper from January-March, 2008. States that "in the past" he has worked "on and off" for his father, a licensed Massachusetts public insurance adjuster, for a total of more than two years, doing work in connection with adjusting of property losses. Exhibit 13. Apprentice at Berman Adjusters, in Newton, MA from January 2006 to date of application, September 29, 2008. Until May 2007 he was concurrently a law student. Affidavit from Berman Adjusters states that he has performed various services in connection with adjusting property losses for a period in excess of 2 years. Exhibit 14. Claims supervisor for the Farmers Insurance Group from April 2004 to October 2009, and previously a claims adjuster for the insurer from 1997-2003. In answer to the question about engaging in business other than public insurance loss adjustment, he states that he is currently working full time as a claim supervisor. Exhibit 15. Applicant had two years of experience as an estimator for a Massachusetts public adjustment firm; before than a self-employed contractor. Exhibit 16. Working for various adjustment firms from February 2006 to date of application, January 24, 2009. Describes jobs as soliciting business, preparing estimates, taking photographs. Concurrently in the real estate business on a part-time basis. Exhibit 17. Director of operations for the American Lease Insurance Agency Corp. Describes his duties as oversight of the company's daily operations with respect to customer service, data entry, risk assessment and claims department. Attached to the application is a biography form the employer's website, which states that he submits claims files to the underwriting insurers with recommendations for settlement, and that his duties include requesting and orchestrating field adjusters on a national level.

years of work in the field of public adjusting.⁷ Imposition of such a requirement on Berger is arbitrary and an abuse of discretion.

The exhibits in this proceeding demonstrate that the Division has approved applicants for public adjuster licenses with varied backgrounds and experiences but without two years of employment with a public adjustment firm. In practice, decisions are based on the application form, which asks the applicant to report his or her occupational history, and any additional documentation submitted with the application. In this case, according to the Division, it determined, based on the four corners of the application and cover letter, that as of the date of his application Berger had less than one year of experience “assisting in performing services in connection with adjusting property losses.” The denial was not based on any assessment of Berger’s experience prior to his employment with Popkin Adjustment Company and reflected no consideration of Berger’s statements that included specific information on experience negotiating issues relating to construction costs and handling property damage caused by water.

After Berger filed his appeal, the Division reviewed additional material from him relating to his prior work experience but did not thereafter reverse its rejection or issue a second formal decision setting out its conclusions on the relevance of his experience to the two-year requirement. In their post-hearing memoranda the parties argue their respective positions on whether Berger’s past experience is adequate to demonstrate that he satisfies the qualifications for an adjuster’s license. For that reason, this decision will address that issue. The Division asserts that Berger has not met his burden of demonstrating that his past experience is sufficient to demonstrate two years experience in connection with adjusting insurance claims. Berger disagrees, arguing that the Division did not give proper credit, or indeed any credit, to his lengthy employment history and the tasks he performed, particularly in his role as project manager.

The Division argues that Berger does not meet the experience requirement because he has no direct experience working with insurers to resolve claims. It asserts that, by definition, a public insurance adjuster is involved in negotiating insurance claims with insurance companies.

⁷ The Division, if the applicant states he or she has had two years experience, does not investigate either the actual amount of time spent performing services in connection with adjusting property losses in that two-year period or the type of services that were performed. The Division has approved applications of individuals who have been associated with public adjusters less than full-time and whose experience is limited to a single aspect of the adjustment process, such as preparing estimates.

It contends that a “majority” of the individuals whose applications were in evidence demonstrated “clear, creditable professional experience in connection with adjusting property losses” or stated that they had two or more years of experience with such adjustments. The statutory qualification, experience “in connection with” adjusting property losses, prescribes no particular form of connection. Consumers engage adjusters to resolve property claims; c. 175, §172 recognizes a number of services, including negotiation, appraisals and assessment of damages, that an adjuster may offer. The statute does not circumscribe the loss adjustment process to the extent that it requires the adjuster to negotiate directly with an insurer or settle claims.⁸ In assessing an application for a license, therefore, it is appropriate to consider an applicant’s experience that is relevant to the range of services that an adjuster may be expected to perform.⁹ The Division’s discretion to determine what experience it views as relevant must be exercised fairly.

The Division has articulated no standards for determining what it views as “clear, creditable [and] professional” experience. The application itself offers no guidance about on and solicits no specific information on the aspects of an applicant’s employment history and experience that Division views as relevant are relevant to a determination of his or her qualifications for licensure. It asks only that the applicant identify his or her occupation for the five years preceding the application date and state whether he or she engages in occupations other than public loss adjustment.

The Division argues that it correctly rejected Berger’s application because he could not demonstrate experience in the direct negotiation or representation of insureds in connection with insurance claims. The exhibits in this case support a conclusion that the Division has licensed individuals whose applications do not demonstrate direct negotiation or representation of insureds in connection with insurance claims and that it imposed this criterion on Berger, without explanation. Approved applications for public adjusters licenses have come from individuals whose experience is in the construction industry, in property inspection following disasters, and

⁸ G.L. c. 175, §172, in the section relating to written contracts for adjustment services, includes in the services to be performed “the assessment of damages, negotiation, settlement, appraisal or reference of a loss arising under property damage insurance of any sort.”

⁹ Not all such services involve building codes. See, e.g., *Commonwealth v. Georgeou*, 12 Mass.App.Ct. 995 (1981), in which the defendant’s adjuster, described by the court as an expert in his own right, provided evidence of an accounting nature relating to the value of destroyed inventory.

at insurance company claims departments.¹⁰ Even applicants who report two years of experience “in connection” with adjusting property losses do not describe actual experience with insurance claim management.¹¹ The Division’s apparent imposition of such a requirement on Berger in reviewing his application and supporting materials is inconsistent with past practice.¹²

Berger’s burden is to demonstrate that he qualifies for a license because his past experience combined with his work at Popkin Adjusting Company satisfies the two-year experience requirement. In evaluating that past experience, the Division, in exercising its discretion, must apply consistent factors fairly to each applicant. Berger testified, and his resumé shows, that he has done residential and commercial property renovations, including rebuilding water-damaged property in New Orleans and, as an owner’s representative, assisted in water and mold remediation in three cases of water damage at the W Hotel. He testified that he was uncertain whether the property losses were covered by insurance, but observed that damages requiring remediation often result in insurance claims. His experience as a project manager and owner’s representative involved handling matters in connection with property losses and demonstrates knowledge of aspects of building renovation and repair that is consistent with that of individuals whose applications were approved.¹³ The Division offered no rationale for

¹⁰ The applicant in Exhibit 8 assisted homeowners in identifying damage caused by “covered” losses and provided estimates of such losses and construction renovation estimates for homeowners, property managers and insurance adjusters. The applicant in Exhibit 9 is a project manager for a restoration company who manages claims relating to fire and flood damage. He does not indicate that he represents insureds. The applicant in Exhibit 11 is a part-time post-disaster field inspector for companies that are hired by the Federal Emergency Management Agency. His application does not suggest that he has ever represented insureds in connection with property losses or insurance claims. The applicants in Exhibits 10, 12, 13 and 15 all state that they have worked for public adjusters for two years; two describe their duties as preparing estimates, but none provides details about direct experience working with insurers. The applicant in Exhibit 14 does not represent insureds but is a claims supervisor for an insurance company, and the applicant in Exhibit 17 is an operations manager for the American Lease Insurance Agency, where he develops claim files for insurance underwriters and engages insurance adjusters.

¹¹ Ms. Silverman Black testified that the Division does not ask for any details if an applicant states that he or she meets the two year experience requirement. If direct claim handling experience on behalf of insureds is viewed as an essential qualification for a public adjuster license, it would be appropriate for the application to require specific information about the candidate’s experience in that particular area.

¹² The rationale for the Division’s insistence on direct claims handling experience is unclear. The standard licensing examination mandated by G.L. c. 175, §172 is intended to test the applicant’s knowledge of insurance principles and coverage; it requires an applicant for a public insurance adjuster’s license to demonstrate both knowledge of those topics and of building construction techniques and materials. The statute imposes no additional claims handling experience as a condition for licensure.

¹³ Berger’s cover letter submitted with his application refers to responsibility for preparing detailed construction documents, floor plans and elevations for buildings, for permitting construction, for managing and resolving construction and design flaws, for resolving conflicts among contractors, architects and engineers about design costs, and resolving operational issues that included a water main break. In his supplemental description, he

applying a stringent standard to Berger focused exclusively on claims handling rather than the broader aspects of property loss adjustment.¹⁴

Conclusion

The Division's rejection of Berger's application for a public adjuster's license because at the time of his application he had worked for Popkin Adjustment Company for less than two years is inconsistent with the standard applied to other applicants who also were not affiliated with public adjusters for a two-year period. Its continued rejection of his application because his prior experience did not include direct experience settling insurance claims on behalf of insureds is also inconsistent with the Division's approvals of applications that did not demonstrate such experience. On this record, I conclude that the Division did not exercise its discretion fairly and, for that reason, hereby reverse its decision rejecting Berger's application for a public adjuster license.

DATED: March 22, 2011

Jean F. Farrington
Presiding Officer

describes additional experience in dealing with property damage caused by water, with rebuilding property in New Orleans post-Katrina, and with photographing, measuring and preparing drawings for building renovations. His background is remarkably close to that of the applicant in Exhibit 8; the applicant in Exhibit 16 also notes that his experience includes taking photos and estimating costs.

¹⁴ The Division's contention that there is no direct correlation between working as an architect/owner's representative and as a public insurance adjuster is not persuasive. In either position, the individual is acting as a representative of property owners in resolving issues related to that property.