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DIVISION OF INSURANCE

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Division of Insurance, Petitioner
v.
Eugene W. Downing, Jr., Respondent
Docket No. E2009-01

Decision and Order

I. Introduction and Procedural History

On March 23, 2009 the Division of Insurance (Division) filed an order to show cause ("OTSC") against Eugene W. Downing, a/k/a Eugene W. Downing, Jr., ("Downing") who was licensed as an individual Massachusetts insurance producer on October 29, 2008. The Division alleges that Downing failed to disclose on his producer license application a disciplinary action initiated against him in 2006 by the Massachusetts Board of Bar Overseers ("BBO"). That action led to his resignation from the Bar of the Commonwealth of Massachusetts and the acceptance by the Supreme Judicial Court of that resignation in 2007 as a disciplinary sanction. The Division argues that, by answering "No" to the question on the application that asks if the applicant has ever been involved in an administrative proceeding regarding any professional license, Downing engaged in conduct that supports revocation of his Massachusetts producer license pursuant to the provisions of G.L. c. 175, §162R (a)(1) and (a)(3) ("§162R"). Those statutes permit the Commissioner of Insurance ("Commissioner") to take disciplinary action if a licensee has provided incorrect, misleading, incomplete or materially untrue information on a license application or has obtained an insurance

license through misrepresentation or fraud. The Division further argues that the reasons for the BBO's disciplinary action, misuse and misappropriation of client funds, support a third basis for imposing discipline against Downing under c. 175, §162R (a)(8), which permits such action if the licensee has engaged in dishonest practices or demonstrated incompetence, untrustworthiness and financial irresponsibility in the conduct of business in the Commonwealth. Finally, the Division claims that Downing, by failing to disclose the BBO action on the producer license application, committed an unfair or deceptive act or practice in the business of insurance, in violation of G.L. c. 176D, §2 ("c. 176D".)

A Notice of Procedure ("Notice") was issued on March 24, 2009, scheduling a prehearing conference for April 28, 2009 and a hearing for May 12, 2009. On April 22, counsel for Downing, David T. DeCelles, Esq., filed both a motion to dismiss the OTSC as a matter of law and an answer setting out a series of affirmative defenses. The motion to dismiss principally asserted that a disciplinary proceeding before the BBO is not an administrative proceeding, and that therefore Downing was not required to report it on the October 24 application. At the April 28 prehearing conference, I instructed the parties to complete any discovery by May 5, and to submit a statement of undisputed facts, an exhibit list, and witness lists by May 19. I also ordered the parties to submit memoranda of law on the issues raised in Downing's motion to dismiss, and scheduled oral argument on the motion for May 12. After reviewing the memoranda filed by the parties, and hearing argument, I issued a decision on May 13 denying Downing's motion to dismiss.

On May 28, the Division, on behalf of both parties, moved to file late two exhibit lists, one submitted jointly and one by the Division. The Division noted that the parties were unable to reach agreement on the facts. The motion was allowed, and the parties were ordered to file witness lists and memoranda on the disputed admissibility of document number seven on the joint list by June 10, 2009. The Division submitted a statement on June 9 indicating that it did not intend to call any witnesses at the hearing and that it no longer objected to admitting into evidence document number seven. On June 11, respondent submitted a witness list and his argument in support of admitting document number 7 into evidence.

The evidentiary hearing took place on June 12, 2009. Nine documents were marked as exhibits. The Division presented no witnesses, but relied on the exhibits to support its case. Downing testified on his own behalf but presented no other witnesses.[1] The parties were ordered to file post-hearing memoranda by July 3, 2009. By motion, that date was later enlarged to July 10. Downing filed his memorandum on July 1.

Findings of Fact

I find as facts allegations in the OTSC and statements in the exhibits attached to it whose accuracy Downing does not contest, additional statements that neither party disputes, and Downing's testimony.[2]

1. The Division first licensed Downing as an insurance broker on February 1, 1989. His license was cancelled effective June 28, 1995. On October 29, 2008, the Division licensed Downing as a resident insurance producer.
2. Downing was first admitted to the Bar of the Commonwealth of Massachusetts on June 7, 1977.
3. On July 26, 2006, Bar Counsel filed with the BBO a Petition for Discipline ("Petition") against Downing. The Petition alleged that over a period of time between December 2004 and November 2005 Downing made misrepresentations to clients, mismanaged his client account, misused trust funds, commingled business and personal funds, and failed to maintain required records for his client account, all in violation of the Massachusetts Rules of Professional Conduct ("Rules") that apply to members of the Bar.
4. On January 21, 2007, Downing executed an Affidavit of Resignation ("Affidavit") which Bar Counsel submitted to the BBO on January 24, with the request that the resignation be accepted as a disciplinary sanction. In his affidavit, Downing stated that he did not wish to contest the pending disciplinary action and acknowledged that the allegations in the Petition relating to inadequate recordkeeping and negligent misuse of client funds were true. He also admitted that the other material facts underlying the Petition

[1] On May 28, I received a letter in support of Downing's application from counsel who represented him in the proceeding before the Board of Bar Overseers. The letter was not offered into evidence and therefore was not considered in this proceeding.

[2] The parties were ordered to submit an agreed-upon statement of facts, but stated that they were unable to do so.

could be established by a preponderance of the evidence at a hearing, and agreed not to contest either the facts set out or the Rules violations charged in the Petition.

5. On March 16, 2007, the Massachusetts Supreme Judicial Court entered an order accepting Downing's Affidavit as a disciplinary sanction and striking his name from the Roll of Attorneys. The order also imposed obligations on Downing with respect to, among other things, withdrawal from any pending matters, resignation from any fiduciary appointments, and notice to all clients, persons for whom he was a fiduciary, and counsel in pending matters about his resignation from the Bar.
6. On October 24, 2008, Downing signed a uniform application for a Massachusetts individual insurance producer license.
7. Question 2 in the Background Information section of the application asks if the applicant "or any business in which you are or were an owner, partner, officer or director has ever been involved in an administrative proceeding regarding any professional or occupational license." The text defines "involved" as "having a license censured, suspended, revoked, canceled, terminated, or being assessed a fine, placed on probation or surrendering a license to resolve an administrative action."
8. On the October 24 application Downing answered "No" to Question 2.
9. New York Life Insurance Company ("New York Life") transmitted the application on Downing's behalf to the Division, with a cover letter dated October 24, 2008.
10. The Division approved Downing's application effective October 29, 2008.
11. In September 2008, Downing asked his state representative to write a letter in support of his application for an insurance producer's license. The Division received the representative's letter, dated October 28, 2008, on November 3, 2008, four days after it had approved Downing's license application.
12. The representative's letter referred to Downing's 2007 resignation from the Bar, the effect of that resignation on his subsequent employment, and Downing's record of service as a member of his community.

13. In November 2008, the Division informed Downing that it was investigating his responses to the questions on the October 24 application.
14. After receiving the communication from the Division, Downing sent to Ms. Moran a letter dated December 4, 2008, enclosing with it a signed "amended" application for a producer license dated December 10, together with various supporting documents. [3]
15. Downing answered "Yes" to Question 2 on the amended application.[4]

Summary of Arguments

A. Downing

Downing addresses in his post hearing memorandum the series of arguments that he characterized as affirmative defenses in his answer to the OTSC.[5] He argues that there is no basis for the Division's claim that his failure to report the BBO proceeding constitutes an unfair and deceptive act or practice in the business of insurance and thereby violates c. 176D because, at the time of the alleged violation, he was not active in the business of insurance, but was applying for a job to become an insurance producer. Four cases, Downing asserts, illustrate the principle that not every person who might arguably have committed an unfair and deceptive practice will be found to be actively in the business of insurance. He argues as well that the facts in this proceeding do not encompass the types of conduct specifically characterized in c. 176D, §§3 and 4as unfair methods of competition or unfair and deceptive acts or practices in the business of insurance.

Downing further contends that the record provides no basis for determining under c. 176D, §§2 and 6 that he engaged in an unfair or deceptive practice in the business of insurance. His actions relating to his producer license application did not violate c. 176D, Downing argues, because he had no purpose, objective, or conscious intent to deceive or to act unfairly. He points to his testimony that a third party, whom he

[3] The letter was addressed to Mary Lou Coleman, identified as counsel to the Commissioner. It indicated that it was written in response to correspondence from her to Downing.
[4] The December 10 application was not otherwise identical to the October 24 application; it also reported that Downing had been advised of a Massachusetts tax deficiency.
[5] Downing did not pursue an affirmative defense included in his answer to the OTSC that he is a handicapped person under the Americans with Disabilities Act, and that the Division is therefore obligated to consider his limitations.

surmised to be an employee of New York Life filled out the application form and that New York Life asked him to sign "perhaps as many as a hundred other forms" when he met with the company at its Waltham office. Downing further argues that the application reports accurate information about his prior employment history and shows that he was a self-employed attorney from July 1985 through October 2005. That disclosure, he contends, shows his intent to divulge on the application that he was no longer an attorney. Downing characterizes the answer to Question 2 on the October 24 application as an oversight.

Downing asserts that he wanted to reveal his difficulty with the BBO in the context of his medical difficulties and other stresses at the time and therefore met with his state representative, Sean Garballey, in September 2008 to ask him to write a letter on his behalf. Downing asserts that he expected that Mr. Garballey's letter, dated October 28, 2008 and received by the Division on November 3, would be incorporated into the application process, and expressed surprise that the Division issued the license "immediately," before receiving the letter. He anticipated that the application process would involve some outside inquiry by the DOI and would include the receipt of relevant materials from third parties. Downing points out that he attempted to amend the earlier application by submitting a new one dated December 10, 2008 with Question 2 "appropriately amended," but that the DOI returned that second application to him. He argues that the evidence, taken as a whole, shows no intent on his part to deceive or to act unfairly.

In any event, Downing asserts, even if he were found to have violated c. 176D, the statute does not permit revocation of his license. He contends that the sanctions of license revocation and fines are available under c. 176D only if a person has repeatedly violated §§3 or 4 of that chapter. Otherwise, he asserts, a cease and desist order is the only available sanction under c. 176D.

Downing argues that his failure to disclose his resignation from the practice of law does not support license revocation under §162R (a)(1) and (a)(3) because he did not intentionally provide incorrect, misleading, incomplete or materially untrue information in his license application and did not seek to obtain a producer's license through misrepresentation or fraud. There can be no finding of fraud or deceit, he asserts,

because he lacked the requisite malicious intent. Fraud, deceit and misrepresentation, Downing contends, are intentional torts that require a showing that the alleged tortfeasor intended that the false information would influence the recipient of the incorrect information.

Downing argues that the Division's claim that §162R (a)(8) supports revocation of his license incorrectly interprets the statute. The Commissioner's authority under that statute, he asserts, only permits her to impose sanctions and control conduct within the business of insurance. Downing contends that the Legislature could not have intended to allow the Commissioner to impose discipline against a licensee for inappropriate business conduct in any business other than insurance. He further asserts that the BBO's Petition is a complaint and that the misconduct described therein occurred before he was actively and "occupationally" involved in the business of insurance. Downing further argues that revoking his license under §162R (a)(8) would expose him to a second adjudicatory process based on the same accusations, an outcome that is inconsistent with equitable principles.

Downing argues that the introductory language of §162R limits the sanctions that the Commissioner may impose even if she finds sufficient facts to support disciplinary action under that statute. He asserts that the statute permits her to take specific actions against the licensee's status, or to level a civil penalty in accordance with c. 176D, §7, or any other applicable sections of the general laws. Downing interprets the statute to link the sanctions available under §162R to those available under c. 176D, arguing that the latter limit the Commissioner's authority under the former. He therefore concludes that the only permitted sanction is a cease and desist order, because his alleged failure to disclose the BBO proceeding does not constitute a violation of conduct prohibited under c. 176D, §§3 or 4. Prior Division administrative decisions, Downing asserts, also establish no legal precedents for the relief sought in this action, because they were conducted before the enactment, in 2002, of c. 175, §162R.

B. The Division

The Division argues that §162R (a) authorizes the Commissioner, among other things, to revoke an insurance producer's license and levy civil penalties in accordance with c. 176D, §7. It asserts that Downing's failure to disclose the BBO disciplinary

proceeding violated §162R (a)(1) and (3) and deprived the Division of information that is appropriate to consider in the licensing process. Decisions in a number of prior enforcement actions, it points out, establish the importance of providing accurate information on a licensing application.[6]

The Division argues that prior Division decisions do not support Downing's attempts to justify his failure to report the BBO disciplinary proceeding on the October 24 application. Downing's intent, it contends, does not determine the outcome of this proceeding. In response to Downing's position that he did not intend to mislead the Division, it argues that Downing had a duty to provide full, complete and accurate responses to the questions on the October 24 application for a producer's license, and that his decision to rely on New York Life to complete that application did not relieve him of that duty. As support for the Division's position, it cites the decision in *Division of Insurance v. Warner*., Docket No. E2001-04.

The Division argues that Downing's submission of a second application to correct an erroneous answer on the October 24 application does not mitigate his failure initially to provide correct information. It points out that Downing submitted the second application in December 2008 after he had been licensed and only after the Division had notified him of its intent to initiate an administrative action based on his failure to disclose the BBO disciplinary action on the October 24 application. Characterizing Downing's attempt to make amends for that omission as "too little too late," the Division cites the decision in *Division of Insurance v. Cavalari*, Docket No. E2007-07, that supported revocation even when a licensee later attempted to correct an application.

The Division argues that Mr. Garballey's letter sent in support of Downing's application alerted the Division to the BBO proceeding, but did not mitigate Downing's duty, as the applicant, to provide correct information on the application itself. The Division points out, as well, that the letter arrived at the Division almost a week after it had licensed Downing based on the information in the October 24 application.

The Division argues that Downing's testimony acknowledged that an applicant signs a producer's license application under the penalties of perjury. Downing's failure,

[6] Those decisions include *Division of Insurance v. Brown*, Docket No. E2004-16, *Division of Insurance* v. *Preszler*, Docket No. E2001-18, and *Division of Insurance v. Ayala*, Docket No. E2001-25.

as an attorney, to read the application questions thoroughly and to verify the veracity of the responses before signing the document, the Division asserts, further calls into question his competency to hold a license. Characterizing an incorrect answer as an "oversight", the Division argues, does not excuse an applicant's failure to provide accurate information.

The Division contends that §162R (a)(8) fully supports revocation of Downing's license for conduct that occurred in his law practice. It points out that Downing, in his Affidavit, admitted that he kept inadequate records and negligently misused client funds. The Division points out that the statutory language permits a disciplinary action for using fraudulent, coercive or dishonest practices, or demonstrating incompetence, untrustworthiness or financial responsibility in the conduct of business in the Commonwealth or elsewhere. It argues that Downing's position, that the misconduct must occur in the business of insurance, incorrectly applies the statute. Prior enforcement decisions, it notes, have revoked licenses under §162R (a)(8) for conduct that did not occur in an insurance context.[7]

The Division argues that Downing's failure to disclose required information on his license application is properly characterized under c. 176D §2 as an unfair or deceptive act or practice in the business of insurance. It asserts that the Division had the right to expect full disclosure of information that the application form specifically requests, in this case the BBO administrative proceeding.

License revocation, the Division argues, is the appropriate sanction for Downing's conduct. It points out that the right to sell insurance as a licensed producer is a privilege conferred only on those who demonstrate fitness to carry out a producer's duties. The statute addresses the need for a licensee to be trustworthy. The goal of proceedings against licensees is to protect the public from conduct that would be hazardous to it. The reasons underlying the BBO's actions demonstrate untrustworthiness, which negatively impacts Downing's fitness to act as an insurance producer. The Division argues that in light of Downing's conduct in the practice of law and in the application process for a producer's license, failure to revoke his license would undermine a process designed to

[7] Those cases include *Division of Insurance v. Gilman*, Docket No. E2005-02, *Division of Insurance v. Bleidt*, Docket No. E2004-30, and *McCarthy v. Division of Insurance*, Docket No. E95-12.

ensure that only competent and trustworthy individuals are licensed to engage in the business of insurance in Massachusetts.

Discussion and Analysis

G.L. c. 175, §§162G through 162X set out, among other things, the requirements for obtaining and maintaining a Massachusetts insurance producer's license. G.L. c. 175, §162R (a) specifies fourteen grounds on which the Commissioner may suspend or revoke a producer's license, or may deny an application for a license. The Division identifies three of those grounds, set out in subsections §162R (a)(1), (a)(3) and (a)(8) as bases for revoking Downing's license. It also asserts that his actions violate c. 176D.

Subsection 162R (a)(1) permits disciplinary action if an applicant has provided incorrect, misleading, incomplete or materially untrue information in the license application. Subsection (a)(3) permits disciplinary action if the applicant is found to have obtained a license through misrepresentation or fraud. The factual basis for disciplinary action under each of these provisions is Downing's undisputed failure to report on his producer license application the BBO administrative action against his license to practice law. The information provided on the license application was incorrect and untrue, and fully supports disciplinary action against Downing under §162R (a)(1).[8] Section 162R (a)(3) permits disciplinary action if the applicant has obtained a license through "misrepresentation or fraud." The Division approved Downing's application based on the information on his application, which misrepresented his past history by omitting the fact that he had been the subject of an administrative action by the BBO.[9] Prior Division enforcement decisions consistently emphasize the importance of providing complete and accurate information on a license application.

Downing argues that §162R (a)(1) and (a)(3) do not support license revocation because he did not intentionally provide incorrect or misleading information on his license application and did not seek to obtain his license through misrepresentation or fraud. He contends that he is not responsible because his employer, New York Life,

[8] A disciplinary proceeding against a member of the Bar is material to a decision on an application for an insurance license. *See, Doyle v. Division of Insurance*, Docket No. E2004-07.

[9] Downing initially moved to dismiss the OTSC on the ground that the BBO's disciplinary action was not an administrative proceeding. His position was thoroughly considered, and rejected, in an order dated May 13, 2009.

filled out the application.[10] Characterizing the omission on the application as an oversight, Downing asserts that he attempted to provide information on his disbarment in alternative ways, a letter from his legislator and a subsequent "amended" application.

Downing's effort to impute intent as a necessary element in a disciplinary action under §162R ignores both the nature of the licensing process and past Division decisions which address his argument. As the applicant for a license, Downing bears full responsibility for ensuring that the answers to questions on the application form are correct. The form itself instructs the applicant to read it carefully and to certify, under penalty of perjury, that all the information submitted is true and complete. The applicant must acknowledge that submitting false information or omitting pertinent or material information is ground for license revocation, and that he or she understands the state's insurance laws and regulations. Downing's failure, as a former attorney, to comply with unambiguous instructions about his obligations is particularly egregious.

Past Division decisions have soundly rejected the argument that an applicant should not be held responsible if a third party filled out the application. *Doyle v. Division of Insurance*, E2004-07 (Appeal of license denial on the ground that a representative of an insurance company had filled out the application); *Division of Insurance v. Warner*, E2001-04 (Reliance on advice from a trainer for a company representing an insurer did not discharge applicant from responsibility for answering questions truthfully and completely.) Past decisions also confirm that such responsibility is not discharged even if the applicant did not intend to mislead the Division or misrepresent the facts. *Division of Insurance v. Richard Brown*, E2004-16 (That the answer was not motivated by an intent to mislead does not dictate the outcome of the proceeding); *Division of Insurance v. Michael Doyle*, E93-04 (License revoked despite respondent's assertions that he did not intend to deceive anybody).

As the Decision in *Division of Insurance v. Tracy*, E2005-18, observed, the license application provides an opportunity to explain the circumstances of events that must be reported. Downing, rather than acknowledge the BBO proceeding, provide the related documentation required on the application, and avail himself of the opportunity to provide additional explanation, chose not to report it. His contention that he provided

[10] Downing testified that he did not observe anyone at New York Life fill out papers.

information to the Division, but in an alternative format, is not convincing. Downing asserts that he sought a recommendation from Mr. Garballey in order to show the context for his resignation from the Bar. The Division received Mr. Garballey's letter approximately five days after it had approved Downing's license application. Even if the licensing process provided for consideration of materials submitted by third parties, a letter of recommendation is not a substitute for compliance by the applicant with an unambiguous obligation to disclose specific information. Mr. Garballey's letter refers to Downing's resignation from the Bar, but does not fully explain the circumstances that led to his resignation.[11] His letter further informed the Division that Downing was disabled, for purposes of receiving Social Security disability benefits, from August 2005 through September 2006, and that he has a history of community service in the Town of Arlington. The disability determination is coterminous with some, but far from all, of the events which underlie the BBO proceeding, but is not relevant to the issue in this proceeding: Downing's failure, in 2008, to report the BBO proceeding on a license application. His failure to report occurred over two years after the termination of his disability benefits. Assuming, *arguendo*, that Downing's disability is relevant to an evaluation of his trustworthiness, a review of the BBO Petition also demonstrates that events underlying its disciplinary action occurred well before Downing's period of disability. The additional information in Mr. Garballey's letter about Downing's record of community service provides no basis for ignoring conduct that directly relates to Downing's trustworthiness and competence. *See, e.g., Janecek v. Division of Insurance*, E96-5.

Downing also testified that he did not expect the Division to approve his application so quickly and thought it would conduct its own investigation and include a review of materials submitted by third parties. His comment reveals a misunderstanding of the Division's licensing procedures; third-party statements, required under the statutory scheme in place before January 1, 2003, were not incorporated into the current licensing statute.[12]

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[11] Those circumstances are the relevant issue in this case.

[12] Before enactment of c. 106 of the Acts and Resolves of 2002, the broker licensing statute, c. 175, §166 required at least three statements about the trustworthiness and competency of the applicant from "reputable citizens of the Commonwealth."

Downing's submission of a second application in December 2008 does not relieve him of responsibility for submitting correct information on his initial application. No statutory provision permits a licensee to correct an application, either before or after the Division discovers that questions were answered incorrectly. Prior Division decisions uphold the principle that truthfulness on an application is imperative to enable the Division to determine eligibility for licensing. *Division of Insurance v. Cavalari*, E2007-07 (License revoked of a producer who reported his criminal record several months after the Division had approved a license application that omitted the information); *Despres v. Division of Insurance*, E2004-18 (Applicant not permitted to obtain reconsideration of the denial of his license application to allow him to include information omitted on that application.)

Subsection 162R (a)(8) allows disciplinary action for "using fraudulent, coercive or dishonest practices, or demonstrating incompetence, untrustworthiness or financial irresponsibility in the conduct of business in the commonwealth or elsewhere." The record amply supports the Division's claim that Downing's actions while he was a practicing attorney form the basis for disciplinary action under §162R (a)(8). The BBO petition for discipline, Exhibit 9 in this proceeding, sets out specific conduct, including misuse and mismanagement of client funds, misrepresenting to clients the status of settlement funds, issuing checks on insufficient funds, commingling funds held in trust for clients with personal funds, failing to establish a separate client trust account and failing to keep accurate bank account records, that are relevant to assessing Downing's untrustworthiness, incompetence and financial irresponsibility. Downing, in his affidavit, admitted to the truth of allegations in the BBO petition relating to the misuse of client funds and inadequate record keeping, and acknowledged that the other material facts in the petition could be established by a preponderance of the evidence at a hearing.

Downing attempts to avoid disciplinary action under §162R (a)(8) by arguing that the Commissioner's authority to revoke a license under that section is limited to conduct that occurs in connection with the business of insurance. His interpretation misreads the plain language of the statute. Downing offers no support for his theory that the Legislature could not have intended to allow the Commissioner to revoke an insurance license for conduct that would arguably support revocation on the grounds set out in

§162R (a)(8) when that conduct occurred in another occupation. To the contrary, a review of §162R as a whole demonstrates that the Legislature took different approaches to specific grounds that support disciplinary action against an insurance licensee. Section §162R (a)(4), for example, permits such an action for misappropriating or converting money received in the course of doing insurance business. In contrast, §162R (a)(8) permits disciplinary action for conduct in the course of business generally, whether in Massachusetts or elsewhere.[13] As the Division notes in its memorandum, past Division decisions uniformly uphold disciplinary action based on misconduct related to business operations in fields other than insurance. *Division of Insurance v. Bleidt*, E2004-30 (misconduct in connection with investment advisory clients); *Division of Insurance v. Thurston Gilman*, E2005-02 (misconduct in connection with estate administration and financial services); *Division of Insurance v. Ayala*, E2001-25 (misconduct in connection with bank accounts.[14]

Adoption of Downing's interpretation would permit an absurd situation in which a person who holds multiple licenses or authorizations could, for example, engage in misconduct in the sale of securities, be subject to disciplinary action only by securities regulators, and continue to engage in the prohibited conduct in connection with an insurance business. Downing's theory would also prevent the Commissioner, when a person who has been employed in another field applies for an insurance license, from considering any information relating to the applicant's prior occupation as evidence of compliance with the statutory standards. Such a result is inconsistent with the goal of licensure, to protect the public by ensuring that only those who satisfy the statutory standards are licensed.

Downing further argues that equitable principles do not permit the Commissioner to revoke his license under §162R (a)(8) based on the facts alleged in the BBO Petition. He asserts that such an action would expose him to a second adjudicatory proceeding on

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[13] The current statute is consistent with the prior standards for eligibility for a broker's license issued pursuant to G.L. c. 175, §166. That statute did not limit the conduct which the Commissioner could consider in determining whether a licensee met the standards of trustworthiness, suitability and competence to events that occurred in connection with the business of insurance. *See, e.g., Janecek v. Division of Insurance,* E96-5; *Swartz v. Division of Insurance,* E95-11.

[14] Downing's argument that cases decided before the effective date of the Producer Licensing Statute, January 1, 2003, should not be used as precedent fails to acknowledge that the standards at issue in those decisions are identical to those in the current law.

a single set of facts. Downing offers no legal support for his theory. Conduct that demonstrates untrustworthiness or incompetence is relevant to decisionmaking in multiple regulatory contexts; the actual consequences of the conduct will vary depending on the brief of the particular authority. The BBO is charged with disciplining attorneys whose conduct violates the Rules of Professional Responsibility; for an attorney who holds or wishes to obtain other occupational licenses, that conduct may equally support administrative actions by the authorities that issue or are responsible for instituting disciplinary actions in connection with those licenses. As with Downing's argument that, to support revocation under §162R (a)(8) misconduct must occur in the insurance business, adoption of his theory would permit a person who holds, or seeks to obtain, a license in more than a single occupational group to be subject to discipline by only one licensing authority. Such an outcome would not serve the goal of protecting the public by denying licenses, or revoking licenses already issued, to people whose history shows them to be untrustworthy or incompetent.

Downing objects to the Division's claim that his failure to report the BBO disciplinary action on his license application violates c. 176D, arguing that the misconduct did not occur in the business of insurance, that no section of c. 176D identifies the omission of information on the licensing application as a prohibited practice, and that he cannot be found under c. 176D, §2, to have engaged in an unfair or deceptive practice because he did not intend to mislead the Division. Section 2 of c. 176D explicitly prohibits engaging in unfair or deceptive acts or practices in the business of insurance, regardless of whether the practice is defined as such in c. 176D or is determined by the Commissioner, under §6, to fall within that category. Downing's assertion that he can only be disciplined under c. 176D for conduct that is specifically prohibited under that chapter ignores the plain language of the statute. Chapter 176D permits disciplinary actions against a person who has engaged or is engaged in an unfair or deceptive act or practice. It does not denote intent as an element that must be present in order to conclude that a practice is unfair or deceptive. To impose such a condition would conflict with the statute and be inconsistent with the Division's long-standing position, addressed earlier in this decision, that intent is not relevant to a determination that a licensee's conduct renders him or her ineligible for a producer's license.

Downing's third contention is that he was not active in the business of insurance when the application was submitted. The Division has long considered that failure to include complete information on an insurance license application is an unfair and deceptive practice in the business of insurance. *See, e.g.*, *Division of Insurance v. Pell*, E2004-29; *Division of Insurance v. Beier*, E2004-12; *Division of Insurance v. Ayala*, E2001-25. The examination and licensing process is an essential initial step that is integral to and determinative of all future activity. Failure to provide accurate and truthful information on a license application is unfair to the regulators charged with assessing the applicant's eligibility to hold a license and may deceive those who must make the decision. Downing cites several cases to support his proposition that claims for unfair and deceptive practices in the business of insurance are limited to circumstances in which the alleged wrongdoer is actively involved in the insurance business. Those cases address procedural issues relating to the statutory grounds for claims under G.L. 93A by private parties alleging violations of c. 176D and, because none addresses the characterization of the alleged events as violations of c. 176D, are inapposite in this proceeding.[15]

Downing argues, in effect, that a person cannot be considered to be engaged in the business of insurance until he or she is licensed by the Division. His position ignores the language of c. 176D which, in pertinent part, defines person, for purposes of that chapter, as "any individual" [and a series of business entities such as corporations and partnerships] and "any other legal entity or self insurer which is engaged in the business

[15] Downing refers to a number of cases limiting the circumstances in which conduct that allegedly violates c. 176D provides a cause of action. *Kiewit Construction Company v. Westchester Fire Insurance Company*, 878 F. Supp, 298 (1995). (Court found that although G.L. 93A, §11, unlike §9 of that statute, did not incorporate violations of G.L. c. 176D, §3, Kiewit, as a commercial plaintiff, could assert a claim under c. 93A, §§2 and 11 for unfair and deceptive practices, including insurance practices.) *Bertrand v. Quincy Market Cold Storage & Warehouse Co.*, 728 F. 2d 568 (1984) (Court upheld dismissal of plaintiff's claim of c. 176D violations by his employer, a worker's compensation insurance self-insurer, because a self-insurer is not automatically engaged in the business of insurance.) *Nelson v. Blue Cross Blue Shield of Massachusetts*, 377 Mass. 746 (1979) (Exhaustion of administrative remedies); *Poznan v. Massachusetts Medical Professional Insurance Association*, 417 Mass. 48 (1994) (The Massachusetts Medical Professional Insurance Association was not engaged in trade or business and therefore was not subject to a claim under G.L. c. 93A alleging violations of c. 176D.)

of insurance, including agents, brokers and adjusters…." The statute embraces anyone who falls within the definition of "person," without regard to licensing status.[16]

In the event, resolution of this proceeding does not depend on determining whether Downing's conduct violated c. 176D. The Division's claim that Downing violated c. 176D is only one of four asserted bases for revocation of his license. As discussed above, the facts in this case fully support the Division's claims that c. 175, §162R (a)(1), (3) and (8) are grounds for disciplinary action against Downing.

Downing argues that the introductory language to §162R limits the sanctions available to the Commissioner to actions against the license or a civil penalty under c. 176D, §7. He further asserts that c. 176D, §7 does not permit license revocation unless the licensee has committed multiple violations of conduct prohibited under c. 176D, §§3 and 4. A reading of §162R in its entirety makes clear that the Commissioner, in determining the sanctions available against a licensee, need not choose between license revocation or suspension and imposition of a fine. Section 162R (d) explicitly states that "In addition to, or in lieu of any applicable license denial, suspension or revocation a person may, after a hearing, be subject to a civil fine under c. 176D, §7." The full panoply of sanctions is therefore available in this matter.

Downing, by failing to disclose his disbarment proceeding on his October 24 application for an insurance producer's license, committed an act that supports the Division's claims for disciplinary action under §162R (a) (1) and (3). The conduct underlying that disbarment proceeding provides an additional ground for disciplinary action under §162R (a) (8). License revocation is an appropriate sanction when an applicant fails to comply with his affirmative obligations under the licensing statutes and provide the Division with information that he or she is specifically directed to submit. *See, e.g., Division of Insurance v. Tracy*, E2005-28 (Commenting that the Division is invariably prejudiced when an applicant omits required information because the record on which to make a decision is incomplete); *Division of Insurance v. Cavalari*, E2007-07 (Truthfulness of an application is imperative to determine who is an eligible candidate for licensure.) The seriousness of the violations which form the basis for the Division's

[16] G.L. c. 175, §162J lists eight classes of individuals engaged in various aspects of the insurance business who are not required to hold a producer license.

claims under §162R (a) supports a fine of $1,000.00, the maximum amount permitted under c. 176D, §7.

ORDERS

Accordingly, after due notice, hearing and consideration it is

ORDERED: that any and all insurance producer licenses issued to Eugene W. Downing, Jr. by the Division are hereby revoked; and it is

FURTHER ORDERED: that Eugene W. Downing, Jr. shall return to the Division any licenses in his possession, custody or control; and it is

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

FURTHER ORDERED: that Eugene W. Downing, Jr. shall cease and desist from the conduct complained of in the Division's Order to Show Cause; and it is

FURTHER ORDERED: that Eugene W. Downing, Jr. shall pay a fine of One Thousand Dollars ($1,000) to the Division within 30 days of the entry of this order.

This decision has been filed this 22nd day of October 2009, in the office of the Commissioner of Insurance.

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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.