Division of Insurance, Petitioner
v.
William F. Tracy, Respondent

Docket No. E2005-28

Decision

I. Introduction and Procedural History

On December 21, 2005 the Massachusetts Division of Insurance ("Division") filed an Order to Show Cause ("OTSC") against William F. Tracy ("Tracy"), an insurance producer, alleging that he had incorrectly answered questions on Uniform Producer License Applications ("UPLAs") filed in 2003 and 2005. Specifically, the Division asserts that Tracy failed to disclose on those applications his criminal history and to report a prior administrative proceeding at the Division. It seeks findings that Tracy violated G.L. c. 175, §162R (a) (1) and (3), and G. L. c. 176D, §2, revocation of his producer license, fines, and orders barring him from the insurance business in Massachusetts.[1]

A Notice of Procedure ("Notice") was issued on December 23, advising Tracy that a hearing on the OTSC would be held on February 14, 2006, at the offices of the Division, that a prehearing conference would take place on January 31, also at the Division, and that

[1] Section 162R (a) provides, in pertinent part, that "[t]he Commissioner may place on probation, suspend, revoke or refuse to issue or renew a producer's license or may levy a civil penalty in accordance with c. 176D, §7, or any other applicable sections of the general laws or any combination of actions [sic] for any one or more of the following causes:

(1) providing incorrect, misleading, incomplete or materially untrue information in the license application; and

(3) Obtaining or attempting to obtain a license through misrepresentation or fraud.

the hearing would be conducted pursuant to G.L. c. 30A and the Standard Adjudicatory Rules of Practice and Procedure, 801 CMR 1.00, *et seq*. The Notice advised Tracy to file an answer pursuant to 801 CMR 1.01(6)(d) and that, if he failed to do so, the Division might move for an order of default, summary decision or decision on the pleadings granting it the relief requested in the OTSC. It also notified Tracy that, if he failed to appear at the prehearing conference or hearing, an order of default, summary decision or decision on the pleadings might be entered against him. The Commissioner designated me as presiding officer for this proceeding.

The Division sent the Notice and OTSC by certified mail to respondent at his mailing address as it appears on the Division's records. Joshua A. Lewin, Esq., filed a notice of appearance as counsel for Tracy on January 10. On January 21, Tracy filed an answer, admitting to the jurisdictional allegations in the OTSC as well as statements about his address, licensing status, and appointment as an exclusive representative producer, but declining to answer the other factual allegations on the grounds of privilege under the Fifth Amendment to the Constitution of the United States and Article XXII of the Declaration of Rights.[2]

Together with his answer, Tracy filed a motion to dismiss the OTSC or, in the alternative, to reschedule the conference and hearing. As grounds for the motion, Tracy asserted that the Division had not complied with the Standard Adjudicatory Rules; his counsel also stated that he had a scheduling conflict on January 31. Counsel for the Division, Douglas Perry, Esq., submitted an opposition to Tracy's motion on January 24. On January 26, an order issued denying respondent's motion to dismiss but allowing a continuance of the prehearing conference from January 31 to February 14.

As a result of counsels' unanticipated scheduling conflicts, the prehearing conference was ultimately continued to March 20. At that conference, the parties agreed that no facts were in dispute, and that both anticipated presenting their cases through documents, rather than witnesses. The parties were ordered to complete the exchange of documents by March 28, and a hearing was scheduled for April 21.

[2] Tracy stated in his answer that the name of the company to which he was appointed as an exclusive representative producer, identified in the OTSC as Boston Old Colony Insurance Company, had been changed to the Encompass Insurance Company.

On April 21, the Division submitted into evidence the following documents, pre-marked as Exhibits 1 through 10:

1. Tracy's application for a Resident Individual Insurance Producer License date stamped June 30, 2003;
2. Tracy's renewal application for an Individual Insurance Producer License date stamped June 10, 2005;
3. Response from the Hingham District Court to a request for court records relating to Tracy;
4. Response from the Middlesex Superior Court to a request for court records relating to Tracy;
5. Records from the Cambridge District Court relating to Tracy;
6. Response from the Wareham District Court to a request for court records relating to Tracy;
7. Response from the Lawrence District Court to a request for 1986 court records relating to Tracy;
8. Records from the Lawrence District Court relating to 1997 complaints against Tracy;
9. Records from the Lawrence District Court relating to 2004 complaints against Tracy; and
10. Copy of a consent order entered into by Tracy and the Division of Insurance on May 9, 1980.

Tracy submitted into evidence the following documents, pre-marked as his Exhibits 1 through 12:

1. Letter from Robin M. Pelletier;
2. Letter from Hajir Vakili;
3. Letter from Tracy A. Foley;
4. Letter from Suzanne Muggleton;
5. Letter from Michael A. Dailey;
6. Letter from Joan C. Petrick;
7. Letter from Route 28 Motors;
8. Letter from Carlos DeCarvalho;
9. Letter from Bill Tracy to Ms. LaMonte;

9A. Copy of letter from Peggy Baden to the Lawrence District Court;
9B. Letter from Toni Donnellan to William Tracy;

10. Letter fromG. Ronchi;
11. Letter from G. Ronchi;
12. Second copy of Tracy Exhibit 10;
13. Affidavit of William Tracy dated April 7, 2006; and
14. Letter from Roques Costa.

Neither party objected to the admission of these documents into evidence.[3] The Division also sought to introduce an additional exhibit consisting of an affidavit from Andrew

[3] At the hearing, Tracy withdrew Exhibit 11, because it is a duplicate of Exhibit 10.

Carpentier of Encompass Insurance Company ("Encompass") relating to Tracy's relationship with that company. Tracy objected, on the grounds that the affidavit addressed a separate matter between him and Encompass. The parties ultimately agreed to resolve the dispute by stipulating to the following facts: 1) Encompass has notified Tracy that it is terminating him as its exclusive representative producer ("ERP"); 2) Tracy has appealed that termination to Commonwealth Automobile Reinsurers ("CAR"); and 3) the proceeding at CAR has been stayed pending the outcome of this matter. The Carpentier affidavit was, therefore, not entered into evidence.

The Division and Tracy offered no witnesses at the hearing. Both parties, relying on the documentary record, argued their respective positions on appropriate sanctions. Post-hearing memoranda were submitted on May 12.

II. Summary of the Facts

Based on the documents submitted by the parties, I find the following facts.

The Division first licensed Tracy to sell insurance in 1965. Between 1965 and 1980 he worked as an insurance agent and an insurance broker. On May 9, 1980, Tracy executed a consent order with the Division in enforcement action Docket No. E80-4-6. The order required Tracy to surrender all licenses issued to him by the Division with the full force and effect of revocation, and ordered Tracy to permanently dispose of any interest he held in any insurance business, and to refrain thereafter from transacting any insurance business in Massachusetts. The findings of fact attached to the consent order indicate that Tracy had knowingly made misrepresentations of fact to the Midland National Life Insurance Company ("Midland") for the purpose of effecting policy loans on behalf of nine insureds, without their knowledge or consent.

The Division issued Tracy a license to sell life insurance in 1991; in 1996 he was licensed to sell property and casualty insurance as well. Tracy was a broker for John Hancock Insurance Company and later worked for two insurance agencies. He opened his own insurance agency in January 2003. CAR appointed Tracy as an ERP and assigned him to Encompass.[4]

[4] The record does not state when that appointment was made. The parties have stipulated that Encompass has sent a termination notice to Tracy, and he has appealed that termination to CAR.

In June or July, 2003, Tracy submitted to the Division a renewal application for an insurance producer's license.[5] On or about April 19, 2005, Tracy submitted a second renewal application for his producer's license. On each application Tracy answered "No" to question 1, which asks if the applicant has ever been convicted of, or is currently charged with, committing a crime, whether or not adjudication was withheld. He also answered "No" to Question 2, which asks if the applicant or any business in which he is or was an owner, partner, officer or director has ever been involved in an administrative proceeding regarding any professional or occupational license. Tracy's producer license was renewed in 2003 and 2005.

A record from the Hingham District Court relating to criminal docket number 409755ZZ shows that in March 1965 Tracy pleaded guilty to speeding in May 1964, and in January 1966 was found guilty of speeding and "endangering." Records from the Middlesex County Superior Court show that on or about June 15, 1981 Tracy pleaded guilty to charges of larceny over $100, comprising 15 counts of uttering a forged instrument and 15 counts of forgery. The victims of the larceny were the Metropolitan Life Insurance Company ("Metropolitan") and Midland. Tracy was ordered to make restitution to Metropolitan and to Midland, given a suspended two-year sentence to the House of Correction, and placed on probation for six years. On or about February 26, 1986, in the Cambridge District Court, Tracy was found guilty of multiple counts of making annoying telephone calls. He was fined and given a suspended sentence to the House of Correction.

In April 1986, in the Lawrence District Court, Tracy was charged with larceny of property over $100. The record indicates that he was found guilty, ordered to make restitution, and again given a suspended sentence to the House of Correction. In 1988, Tracy was charged in the Wareham District Court with operating a motor vehicle after his license to operate had been suspended; he admitted to sufficient facts. The record indicates that the case was finally disposed through payment of a fine and costs and discharge from probation.

[5] Tracy dated the application August 26, 1942, his birthday. However, the check for the license fee is dated June 30, 2003 and the date July 22, 2003 is noted on first page of the application.

In September 1997, in the Lawrence District Court, Tracy was charged with two counts of assault and battery with a dangerous weapon and one count of being a disorderly person. The record indicates that Tracy admitted to sufficient facts to support a finding of guilty, but that the case was continued without a finding and ultimately dismissed in October 1999. In October 2004, Tracy was charged with five counts of assault and battery with a dangerous weapon, later reduced to assault and battery. The record indicates that Tracy was found guilty, placed on probation until July 2007 and ordered to perform community service; the record also refers to an anger management program.

III. The Parties Arguments

A. The Division

The Division argues that Tracy's license should be revoked because of the serious nature of his extensive criminal history that he omitted from his 2003 and 2005 applications. It asserts that even though the Division licensed Tracy in 1991, it would be speculative to conclude that he did or did not disclose that history when he applied for that license. In any event, the Division argues, Tracy has a continuous obligation to tell the truth on all applications. Addressing Tracy's failure to report the 1980 administrative action on his applications, the Division argues that even if the documents relating to the action were in its possession, it is absurd to assume that employees who serve the ministerial function of licensing applicants would have known of such documents when they processed Tracy's applications. It points out that the burden is on the applicant, not the agency, to provide information to the licensing staff and that Tracy, regardless of what happened in 1991, did not tell the truth in 2003 and 2005.

The Division argues that Tracy's entire criminal history is relevant to the licensing process regardless of whether the specific incidents involve his trustworthiness or competence to place insurance. It points out that as of 2003, under the new producer law, the standard changed from a general reference to trustworthiness and competence to enumerated grounds for sanctions against licensees, including submission of fraudulent or misleading applications.

The Division asserts, as well, that because all criminal history must be reported on a license application, Tracy may not choose which misconduct to disclose. In opposition to Tracy's position that he need not have reported violations of the motor vehicle laws, it

argues that driving to endanger should not be considered a misdemeanor traffic citation. The Division asserts that, while the disposition of the charges brought against Tracy in 1997 in the Lawrence District Court may be ambiguous, the remainder of Tracy's criminal history is sufficiently serious to support license revocation. The age of some of the events in Tracy's criminal record is not significant, the Division argues, because the issue here is failure to report, not what the decision would have been if Tracy's record had been disclosed on the application. Further, the Division notes, any effect of the passage of time is vitiated by Tracy's failure to comply with the terms of his probation. It points out, as well, that his record continues through 2005.

The Division argues that little weight should be given to the documents Tracy submitted into evidence because the testimonial letters contain no indication that the writers knew of the Division's allegations or Tracy's criminal background. It points out that no insurers support Tracy, and that the only evidence relating to his relationship to an insurance company is the stipulated fact that Tracy has appealed his termination by the Encompass Insurance Company. It notes that Tracy's affidavit omits any mention of Encompass. On this record, the Division argues, Tracy's submission of applications that deny any prior criminal history or administrative actions justify immediate revocation of this license and imposition of maximum fines.

B. Tracy

Tracy argues that he has sold insurance for over 30 years, noting that the Division, which licensed him in 1991, now wants to take away his livelihood by permanently revoking his producer's license for failure to disclose information on his 2003 and 2005 applications. He asserts that the Division has a broad range of sanctions available to it, and that its position that revocation is required fails to take into account the facts and circumstances of his case. He contends that, based on his history, a lesser sanction consisting of a three-month license suspension and a $2,000 fine is appropriate. The purpose of sanctions, Tracy argues, is to ensure that the Commissioner receives all information relevant to assessing the applicant's qualifications for licensing, to maintain public confidence in the licensing process and to protect the public, if it appears that the applicant will misuse the license.

Tracy argues that some of the Division's facts are incorrect, and that only one criminal prosecution, which had no nexus to the insurance business, occurred after he was licensed in 1991. He asserts that the 2004 charges were not relevant to the Division's evaluation of his application for a license in 2005, because they were merely pending at the time. The other conduct that was not disclosed, Tracy argues, could not have affected the Division's judgment because it was either irrelevant or already known to the Division. He asserts that the evidence demonstrates that he has served consumers with competence, dedication and loyalty, catering to traditionally underserved minority communities, and that he poses no threat to consumers.

Tracy argues that the Commissioner must determine whether, and to what extent, his failure to disclose his criminal history impaired the Division's review of his application. Further, he asserts, it should also consider whether a conviction demonstrates a change in the applicant's qualifications for a license since he was originally licensed. A renewal license, he asserts, should focus on any circumstances that have changed since issuance of the applicant's original license.

The Commissioner should then, Tracy contends, consider the value of each conviction as evidence of the applicant's competence, trustworthiness or suitability. He argues that the Division was not prejudiced by his alleged violations of §162R. Tracy argues that failure to report misdemeanor traffic offenses or events that do not result in convictions does not violate §162R because the UPLA does not require him to report such offenses. He asserts that the 1964 and 1965 convictions for speeding and driving to endanger, and the 1988 conviction for operating after license suspension all fall within the category of misdemeanor traffic violations.[6] The 1997 charges of assault and battery and being a disorderly person, Tracy contends, did not result in convictions and therefore did not need to be reported on the license application. All three counts, he states were continued without a finding and ultimately dismissed. He argues that the notes in the court record do not refer to the actual disposition of the case, but to a procedure that allows a judge to accept an admission to sufficient facts by the defendant, continue without a finding and ultimately dismiss the case.

[6] Driving to endanger is, he argues, a misdemeanor under G.L. c. 90, §23.

Tracy points out that the 2004 assault and battery charges were brought after he submitted his 2003 applications, and contends that he did not need to report them on his 2005 application because they had not been disposed of when he submitted that application. He argues that non-disclosure of a prosecution is less egregious than non-disclosure of a conviction.

Tracy concedes that he did not disclose on his applications the 1981 [sic] license proceedings and corresponding convictions, as required.[7] He argues that the Division was a party to the 1981 license proceeding and had full knowledge of the conduct which prompted the proceeding as well as of the proceeding itself. Therefore, he asserts, the Division cannot be prejudiced by the non-disclosure of a proceeding that it had initiated or of conduct of which it was aware. Further, Tracy argues, the Division licensed him in 1991 to sell insurance, notwithstanding the 1981 matters and the 1986 convictions, as well as the later conviction for making annoying telephone calls. Therefore, he concludes, any prejudice caused by their non-disclosure in 2003 and 2005 was at most negligible. Further, Tracy argues, it would be arbitrary to deny renewal of his license in 2003 or 2005 on account of those convictions where they did not impede his licensing in 1991.

Tracy argues that the probative value of much of his criminal record is limited because of the age of the incidents. He notes that the convictions in the Hingham District Court occurred over forty years ago, and that the 1986 larceny convictions and the conviction for making annoying telephone calls concerned conduct that happened nearly twenty years before the applications were submitted. He asserts that, pursuant to G.L. c. 233, §21, older criminal convictions cannot be introduced into evidence into civil or criminal trials. Similarly, Tracy argues, his conviction for making annoying telephone calls and the charges for assault and battery with a dangerous weapon are irrelevant to the assessment of his qualifications for licensure. He contends that they do not relate to the business of insurance or reflect on his ability to conduct such business.

The letters of reference submitted on his behalf, Tracy argues, demonstrate that he provides extraordinary services to his customers, and that they appreciate his efforts. He states that he is committed to serving segments of the market, notably Iranian and

[7] Tracy's brief refers to the 1981 License Proceeding, although he notes that the consent order was filed with the Division on May 9, 1980. In this decision, it will be referred to as the 1980 License Proceeding.

Brazilian immigrant communities, that generally do not receive personalized attention from insurance agents, and that he has a long record of compassionate and humane behavior.

Tracy argues that revocation of his license is too severe a sanction for his conduct. He asserts every reported decision posted on the Division's website, in cases where an applicant defends himself, imposes a sanction of license suspension and a fine. Further, he asserts, suspending his license is a sanction that would prevent him from working. Revocation is also inappropriate, he asserts, because nothing in the record suggests that he will abuse the privileges of holding a license. To the contrary, Tracy argues, his conduct for the past fifteen years demonstrates that he poses no threat to consumers and customers.

Tracy argues that the decision in *Division of Insurance v. Neale*, Docket No. E2004-24, supports his contention that revocation is not warranted. He points out that Neale had failed to disclose four criminal proceedings in three separate license applications, but that the record did not support a finding that revocation was necessary. Tracy argues that past Division decisions show that non-disclosure of pending prosecutions is not grounds for license revocation. He also argues that his appearance in this matter is significant, that he has not offered any tenuous defenses such as not understanding the questions, and that he has accepted responsibility for the non-disclosures. Tracy contends that permanent revocation would be inconsistent with precedent and not proportional to the conduct proved by the Division.

IV. Discussion and Analysis

The Division argues that Tracy, by omitting from his 2003 and 2005 UPLAs information about his criminal history and a prior Division administrative action against him, provided incorrect, misleading, incomplete or materially untrue information on those applications, and obtained a license through misrepresentation or fraud, in violation of G.L. c. 175, §162R. Tracy does not deny that he failed to report his criminal history or the 1980 administrative action on these two applications but argues, in essence, that the Division has overstated his obligations to report and that a lesser sanction, consisting of license suspension and fines, is appropriate. Tracy contends, in support of his position, that: 1) some of his criminal history need not have been reported on the UPLAs that he submitted in 2003 and 2005; 2) the age of many of the incidents reduces their probative

value for determining whether he qualifies for an insurance license; 3) many of the incidents did not involve the insurance business; 4) the Division knew of his criminal history and the 1980 administrative action but nevertheless licensed him in 1991; 5) the Division was not prejudiced by his failure to answer the questions correctly; and 6) prior Division decisions support a sanction other than revocation.

Question 1 on the UPLA that Tracy signed in 2003 and 2005 asks if the applicant has ever been convicted of, or is currently charged with, committing a crime, regardless of whether adjudication was withheld. It defines "crime" as a misdemeanor, felony or military offense and states that "convicted" "includes, but is not limited to, having been found guilty by verdict of a judge or jury, having entered a plea of guilty or nolo contendere, or having been given probation, a suspended sentence or a fine." A person who answers yes to this question must attach documents to the application, including a written statement of the circumstances of the incident and certified copies of relevant documents relating to the charges and the disposition. The instructions also allow the applicant to exclude misdemeanor traffic citations and juvenile offenses. The UPLA does not exempt incidents based on the length of time since they occurred, previous reporting on a prior license application, or the applicant's opinion that the incidents are not relevant to an evaluation of the application.

The plain language of the application does not support Tracy's position that he did not need to report his criminal history. As an applicant for an insurance license, Tracy had an affirmative obligation to answer questions correctly in accordance with the UPLA definitions. Further, he certified, under penalty of perjury, that the information submitted in his application was true and complete. The UPLA, with two exceptions, does not exempt reporting of the applicant's criminal record but, rather, gives the applicant an opportunity to explain the circumstances of reportable events.

Further, is does not distinguish between a first license application and an application for renewal, but requires complete information on each application. Tracy's argument that the Commissioner should draw a distinction between the reporting requirements depending on whether the applicant is looking for a first license or a renewal license is not persuasive. His position that, once a person has been licensed, any renewal application should focus primarily on changed circumstances, addresses the review

process. It does not excuse the applicant from answering the questions on the application completely and accurately.

Tracy argues that the UPLA does not require the reporting of misdemeanor traffic citations and therefore exempts from disclosure all of his convictions for infractions of the motor vehicle laws. The record, however, is inconclusive on the 1964 and 1965 convictions; the records from the Hingham District Court are abbreviated, and neither Tracy nor the Division addresses the connection between the current motor vehicle laws and the classification of motor vehicle violations in 1964 and 1965. Further, G.L. c. 90, §23 does include imprisonment among the penalties that may be imposed for driving after a license to operate has been suspended. However, because Tracy's motor vehicle infractions are only a portion of his extensive criminal history, resolution in this decision of any issues relating to the need to report those infractions on the UPLA is not essential.

Tracy also argues that he was not required to report the 1997 prosecutions in the Lawrence District Court on two counts of assault and battery with a dangerous weapon and one count of being a disorderly person. He contends that he admitted to sufficient facts to support a finding of guilty but that his case was then continued, and ultimately dismissed. Tracy asserts that because he was not found guilty, did not plead guilty, was not convicted and did not receive a suspended sentence the prosecutions were exempt from disclosure on the UPLA. His argument fails, because it is inconsistent with the definition of "conviction" on the UPLA, which includes "having been given probation." It is apparent from the court records that Tracy was not only placed on probation, but that he violated the original terms of that probation.[8] I am not persuaded that he was not required to disclose these incidents on his 2003 and 2005 applications.

Tracy's criminal history includes three sets of incidents during the 1980s. In 1981, in the Middlesex Superior Court, he was indicted twice for larceny over $100; one indictment was for 15 counts of uttering a forged instrument and the other for 15 counts of forgery. Tracy pleaded guilty to all charges and was ordered to make restitution to Metropolitan and to Midland, given a suspended two-year sentence to the House of Correction, and placed on probation for six years. In 1986, in the Cambridge District

[8] Tracy cites to *Commonwealth v. Duquette*, 386 Mass. 834 (1982) as support for his position, but does not address the relationship between G.L. c. 278, §18 and the records in this matter.

Court, Tracy was found guilty of multiple counts of making annoying telephone calls, was fined and given a suspended sentence to the House of Correction. That year, as well, in the Lawrence District Court, Tracy was charged with larceny of property over $100. He admitted to sufficient facts, was found guilty, ordered to make restitution, and given a suspended sentence to the House of Correction.

Tracy argues that he should not now be sanctioned for his failure to report these incidents because the Division knew of his criminal history when it licensed him in 1991. His argument is not persuasive. Tracy's 1991 application for a broker's license is not in the record. No documentation supports the premise underlying Tracy's position, that he reported the 1986 incidents to the Division and was licensed after a review of his criminal history.[9] Any conclusion as to the contents of his license applications prior to 2003 would be purely speculative.[10] Tracy has established no foundation to support his position that his convictions in the 1980s were not an impediment to licensing him in 1991. In any event, reporting incidents in 1991 would not release Tracy from his ongoing obligation to comply with the UPLA requirements in 2003 and 2005.[11]

Tracy argues, as well, that the age of these incidents reduces their probative value for determining his qualifications for a producer license. He further asserts that the 1986 incidents did not involve the insurance business. Therefore, Tracy concludes, the Division was not prejudiced by his failure to report his criminal history from the 1980s. Tracy's arguments are inapposite. The basis for the Division's action is Tracy's conceded failure to report his criminal history on the 2003 and 2005 UPLAs. It is well established that, in evaluating a license application, the Division may properly consider any prior criminal convictions or disciplinary actions as evidence of the applicant's current suitability. *See*, *Pignone v. Division of Insurance*, Docket No. E96-7, 9. There is no restriction with regard to the age of the incidents in the criminal history.

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[9] The Division was asked to provide a copy of the 1991 application in response to a discovery request. At the hearing, Mr. Perry stated that he has explained to Tracy that the Division could not find a file from 1991. Counsel for Tracy stated that Tracy did not have the application from 1991.

[10] The argument that the Commissioner, in a case involving failure to report criminal history, should consider the outcome had the application been complete has been rejected, as speculative, in the past. Division of Insurance v. Neale, Docket No. E2004-24, 13, n. 7.

[11] Tracy's argument that the Divisions 1980 administrative action against him should be viewed as evidence that it knew of his 1981 convictions is not persuasive. The administrative action arose solely from misrepresentations to Midland about policy loans, in violation of G.L. c. 176D, §3, and is not based on his criminal history.

Tracy also asks that as part of this proceeding the Commissioner assess the applicability of the criminal history and 1980 administrative action that he did not disclose on his applications to his competence, trustworthiness or suitability to hold an insurance license. He also asks that the Commissioner consider his character to determine whether he poses a threat to insurance consumers. Tracy misconstrues the issue in this proceeding. The Division seeks revocation of Tracy's producer license because he failed to disclose his criminal history and the 1980 administrative action on two UPLAs. Asking the Commissioner, in this proceeding, to decide on Tracy's qualifications for a license would by-pass the procedures in place for reviewing applications. Underlying the OTSC is Tracy's undisputed failure to provide correct answers to two questions, which effectively prevented review of those applications. Determining the appropriate weight to be given Tracy's history is the initial task of the Commissioner's licensing staff. As the applicant, Tracy's obligation is to provide complete information, including an explanation of the circumstances of the incidents, so that her staff can make a decision based on a full record.[12] At issue in this case is whether the conceded omission of information from the application supports revocation of Tracy's license, the relief requested by the Division.

Similarly, the Division licensing staff, not Tracy, is responsible for assessing the probative value of incidents, whatever their age, with respect to applicant's qualifications for a current license. Conclusory statements about the relationships of particular incidents to the applicant's business, made in the context of defending an administrative action, are no substitute for full disclosure to Division staff in the course of applying for a license. The Division is invariably prejudiced when an applicant omits required information, because the record on which must make a decision is incomplete. Tracy's arguments that no harm resulted from his failure to report his criminal history from the 1980s are not only misplace, but unpersuasive.[13]

The most recent incidents in Tracy's criminal history arose in October 2004. He argues that he did not need to report them on his 2003 application, and that they had not been disposed of when he submitted the 2005 application. Tracy again misunderstands

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[12] The court records identify the statutory violations, but offer little, if any, additional information that would permit a determination on any connection to Tracy's insurance activities.

[13] Tracy argues that older incidents should not be considered, citing to the provision in G.L. c. 233, §21, that places limits on the introduction of criminal records as evidence of the credibility of a witness. He offers no persuasive argument that the statute is applicable to the licensing process.

his obligation to report his criminal history on the UPLA; it specifically requires disclosure of any crime with which the applicant is currently charged.[14] He offers no justification for his failure to report the 2004 incidents on his 2005 UPLA.

Tracy also answered "No" to Question 2 on the UPLA, which asks if the applicant or any business in which he is or was an owner, partner, officer or director has ever been involved in an administrative proceeding regarding any professional or occupational license. "Involved" means, in addition to having a license revoked, cancelled or terminated, surrendering a license to resolve an administrative action. Tracy argues that although he was required to disclose the 1980 administrative action, the Division was a party to that action and had full knowledge of the conduct underlying the proceeding and the proceeding itself. Therefore, he concludes, the Division was not prejudiced by his failure.

Tracy again ignores the instructions on the UPLA and, in effect, attempts to substitute for his obligation to disclose an administrative action on his licensing application a requirement that the Division ensure that current licensing staff are aware of prior enforcement actions.[15] Rather than accept responsibility for his actions, he argues that his conduct did not harm the Division. As discussed above, an applicant's failure to provide full and complete answers to questions inevitably affects the Division's ability to review a license application properly.

On this record, I find that Tracy incorrectly answered questions 1 and 2 on the UPLAs that he submitted in 2003 and 2005. The arguments he makes to justify his failure to report his criminal history and the 1980 administrative action are not persuasive. After considering them, I find no basis on which to excuse Tracy from compliance with the unambiguous reporting requirements on the UPLA. I find that Tracy has provided incorrect, misleading, incomplete or materially untrue information on a license application, and is therefore subject to administrative action based on that fact. Further, even assuming, *arguendo*, that Tracy had previously reported his criminal history and the 1980 administrative action to the Division, his obligation is to answer the questions on the

[14] G.L. c. 175, §162Valso requires a licensee to report any criminal prosecution within 30 days of the initial pretrial hearing date. The OTSC does not allege violations of this section.

[15] Tracy's position appears to be somewhat inconsistent with his argument that a twenty-year old enforcement action is not relevant.

UPLA accurately and completely. In addition, he failed to report the 2004 incidents on his 2005 UPLA. I find, therefore, that his 2003 and 2005 licenses were obtained through misrepresentation and that Tracy is subject to disciplinary action for that reason as well. Failure to provide accurate information on a license application has also been found to be an unfair or deceptive practice in the business of insurance prohibited by G.L. c. 176D, §2. *See, e.g., Division of Insurance v. Ledoux*, Docket No. E2005-01; *Division of Insurance v. Pell*, Docket No. E2004-19; *Division of Insurance v. Neale*, Docket No. E2004-24; *Division of Insurance v. Beier*, Docket No. E2004-16.

The producer licensing statute, c. 175, §162R, specifically permits the Commissioner to deny, suspend or revoke a license and to levy civil penalties in accordance with G.L. c. 176D, §7 if, among other things, a licensee or an applicant has provided incorrect, misleading, incomplete or materially untrue information on a license application, or has obtained a license through misrepresentation or fraud.[16] The Division seeks revocation of Tracy's license, alleging that his failure to answer correctly two questions on his 2003 and 2005 UPLAs is sufficiently serious to justify that result. Tracy contends that in his case revocation is too severe, and that an appropriate penalty is a three-month suspension and a fine. Such an outcome, he argues, is consistent with the results in other Division actions against individuals who have failed to provide complete information on license applications.

At the outset, I note that Tracy, as an applicant for a producer license, had notice that failure to report his criminal history and the 1980 administrative action could result in revocation of his license. By signing the application, in addition to certifying that the information on the UPLA is true and complete, he acknowledged that "submitting false information or omitting pertinent or material information in connection with this application is grounds for license revocation or denial of the license, and may subject me to civil or criminal penalties." The UPLA unambiguously specifies that license revocation, not suspension, may occur if the applicant answers questions incorrectly or omits material information. The Division's request for revocation is therefore consistent with the representations made to applicants for producer licenses.

[16] The maximum fine under G.L. c. 176D, §7 is $1,000 per violation.

The Division has decided a number of enforcement actions brought against licensees who failed to answer correctly questions on the licensing application. Prior decisions also address arguments that Tracy makes to support his position as to an appropriate penalty. Contrary to Tracy's position that the relief sought by the Division is excessive, prior Division decisions provide ample precedent for revocation of the license of a person who failed to report convictions on a license application. *See, e.g., Division of Insurance v. Pell, supra*, *Division of Insurance v. Ledoux*, *supra*; *Division of Insurance v. Beier*, *supra*; *Division of Insurance v. Ayala,* Docket No. E2001-25; *Division of Insurance v. Preszler*, Docket No. E2001-18; *Division of Insurance v. Barry Brown*, Docket No. E2001-19; *Division of Insurance v. Pare*, Docket No. E2001-07; *Division of Insurance v. Warner*, Docket No. E2001-04. These decisions reiterate the principle that it is essential that applicants provide full and accurate information to the Division on license applications. Prior Division decisions have also determined that failure to report an administrative action supports license revocation. See, *Division of Insurance v. Bradford Bleidt*, Docket No. E2004-30; *Division of Insurance v. Snell*, Docket No. E2001-14.

Past decisions have also fined licensees for failure to report required information on a license application, both when that failure is the sole basis for the enforcement action or is a portion of the Division's case. *See, e.g., Division of Insurance v. Br*own, Docket No. E2004-16; *Division of Insurance v. David*, Docket No. E94-20, aff'd on appeal, 53 Mass. App. 162 (2001); *Division of Insurance v. Doyle*, E93-4. Tracy does not oppose imposition of a fine, but proposes that it should be set at one-half the maximum permitted by statute (*i.e.*, $500 per violation rather than $1,000) and that the number of violations be limited to four.

Tracy argues that when an applicant for a license defends himself in an administrative proceeding before the Division the outcome is invariably license suspension and a fine.[17] The thrust of his argument appears to be that if a respondent appears and defends himself in an adjudicatory proceeding revocation is not an appropriate outcome. He offers no support for that theory, and a review of past Division

[17] He cites to no specific cases, but states that he is "limited to the reported decision posted on the Division's website." The Division's website includes reports of proceedings against Division licensees that are settled and do not result in formal administrative proceedings. Matters that are settled can be given no weight in determining an appropriate outcome in this matter.

decisions demonstrates that the underlying premise is incorrect. *See, e.g., Division of Insurance v. Shiner*, Docket Nos. E84-10-3 and E84-11-2, *Division of Insurance v. Barry Brown*, Docket No. E2001-19; *Division of Insurance v. Ekanem*, E2001-16; *Division of Insurance v. Lew*, Docket No. E2003-04. That Tracy contests the Division's action is not *per se* relevant to reaching a particular conclusion on the merits of the OTSC or on the relief that the Division requests. However, contested cases, because they generally provide a more complete record of arguments made on behalf of both parties to an enforcement action, provide particularly useful guidance for determining appropriate penalties.

Tracy argues that revoking his license will prevent him from earning a living; suspension for a brief period, he asserts, will affect his income and is more than a "slap on the wrist." Past Division decisions, however, have not considered the length of time a respondent has been in the insurance business or the economic effect of revocation on a licensee in connection with determining a sanction for conduct that relates to a licensee's continued qualifications to hold a license. *See, e.g., Swartz v. Division of Insurance*, Docket No. E95-11; *Janeczek v. Division of Insurance*, Docket No. E96-5.[18]

In support of his position that suspension and a fine are appropriate sanctions in this matter, Tracy relies on the recent decision in *Division of Insurance v. Neale, supra*. He asserts that the evidence in this matter addresses factors that support suspension, rather than revocation of his license, and demonstrates that he will not misuse the privilege granted by the license, consumers will not be jeopardized if he is licensed, and public confidence in the licensing process will not be undermined if he receives suspension and a fine. Because the facts in this case differ significantly from those in *Neale*, I am not persuaded that it provides a precedent for the relief Tracy proposes.

Tracy argues that at this time he has been licensed for fifteen consecutive years, has a record of serving his customers with competence, fidelity and honesty, and provides exceptional service to his customers, particularly to members of underserved minority or immigrant communities. He also asserts that he has a long record of helping people resolve problems. As support for his position, Tracy submitted a series of letters. However, none of the writers appeared to testify on his behalf, nor did Tracy testify or

[18] In any event, it appears from Tracy's affidavit that he has not always been in the business of insurance.

make himself available for cross-examination with respect to any of his documentary submissions. Little weight can be given to these letters as evidence to support Tracy's contention that he should retain his producer's license. None of Tracy's customers directly addresses the matter at issue in this case or indicates that the writer has any information or knowledge of Tracy's criminal history or the 1980 administrative action.[19] Tracy's criminal history is both of much greater magnitude than Neale's record and includes incidents that directly relate to the business of insurance. For that reason, statements that do not demonstrate knowledge of Tracy's criminal history or the prior administrative action are of limited evidentiary value.[20] Statements from consumers that Tracy has helped them obtain insurance do not address his qualifications for an insurance license or the quality of his work.[21] Similarly, Tracy's willingness to assist people with problems outside his business, while admirable, has limited evidentiary value for purposes of determining an appropriate sanction in this case. *Janeczek v. Division of Insurance*, *supra*. The facts underlying the 1980 administrative action belie Tracy's position that he constitutes no threat to consumers.

Further, unlike Neale, Tracy is not an employee of an agency owned by a third party but operates his own business. Neale's employers testified that they intended to retain him as an employee, whether or not he was licensed; the decision in his case points out the value of testimony from a person who was aware of the licensee's record but had overseen, and would continue to oversee, his work in the industry.[22] Tracy offers no testimony from his previous employers, and no explanation of his reasons for leaving those agencies.[23] Encompass, the only third party that has been linked to some oversight of Tracy's ERP activities has apparently discovered problems with his motor vehicle

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[19] See, *Ginsburg v. Division of Insurance*, E89-12, 9.

[20] In any event, character references must be balanced by the seriousness of the criminal conduct. *See, e.g., Doyle v. Division of Insurance*, Docket No. E2004-07.

[21] Although some letters refer, for example, to Tracy's help in working with the Registry of Motor Vehicles, it is not clear that his service differs from that generally provided by insurance producers. On this record, as well, the extent to which the dispute between Tracy and Encompass reflects transactions with consumers cannot be determined.

[22] See, also, *In the Matter of Richard J. Mazzaferro*, Docket No. E87-3, *Division of Insurance v. Larocque*, Docket No. E2000-02. Division of Insurance v. MacLean, Docket No. E93-12 (MacLean was allowed to remain on a corporate license, because he was a minority shareholder in the corporation and was not responsible for its accounting records.

[23] Tracy's account of his recent career is inconsistent. He describes himself on both UPLAs as self-employed for the five years before the date of the application. His affidavit, however, refers to work at two agencies and states that he opened his own agency in 2003.

insurance business. Overall, the circumstances that supported suspension and a fine in Neale's case are not present here.

Tracy argues that concern about the public confidence in the licensing process will be adequately addressed by a suspension and fine. If the public is to have confidence in the licensing process, it must be assured that the Commissioner has full and complete information available to her. Neale did not report his criminal history on two broker license applications, but subsequently partially complied with the UPLA reporting requirement. In contrast, Tracy did not include any of his far more extensive history on the two UPLAs at issue in this case. Further, even if license restrictions may be adequate, in principle, to ensure that public confidence in the licensing process is not undermined, those restrictions must be put in place after the licensing authority has an opportunity to examine a complete application that reports all material information. The Division's licensing staff did not have that opportunity, either in 2003 or 2005. Further, it has had no opportunity to consider the effect on Tracy's qualifications for a license of his conceded failure to report required information on his UPLAs, or to determine whether he has otherwise complied with all aspects of the Producer Licensing Statute.

Tracy's argument that revocation is inappropriate because he has accepted responsibility for his actions is not persuasive. Although he offers no personal excuses for his failure to submit complete applications, he consistently discounts the seriousness of his omissions, and attempts to displace his responsibility for providing accurate responses to questions. Tracy expresses no remorse for his failure to answer the questions on the 2003 and 2005 applications correctly. His reliance on past Division decisions declining to revoke licenses for failure to answer questions on application forms is misplaced; unlike the licensee in *Division of Insurance v. Fremont*, Docket No. R2005-04, Tracy has in fact been convicted.[24] Further, contrary to Tracy's position, non-disclosure of a pending prosecution is no less serious than non-disclosure of a closed criminal prosecution; G.L. c. 175, §162V (b) sets out a time frame within which a producers must report a prosecution to the Division.

[24] Further, that a criminal proceeding is ultimately dismissed does not necessarily exempt an applicant from reporting it on the UPLA.

The facts of Tracy's criminal history and the prior administrative action against him by the Division are not disputed. The record fully supports the basis for the OTSC, Tracy's failure to answer questions correctly on the UPLAs that he submitted to the Division in 2003 and 2005. Given the extent and nature of Tracy's criminal record, and the seriousness of the acts underlying the 1980 administrative action, I am not persuaded that a temporary suspension is appropriate. If Tracy is ever to be licensed as a producer, the Division must first have an opportunity to review a complete and current application that answers every question, not simply those related to criminal history and administrative proceedings, correctly.[25] On this record, I find that Tracy's license should be revoked.

The Division seeks the maximum fine of $1,000 per violation of the licensing statute, but does not quantify the number of violations. Tracy asks for a fine of $500 per violation, to be imposed for four violations. The undisputed facts show a total of eight separate prosecutions, one of which was apparently limited to a speeding violation in 1964. I find it reasonable to conclude that Tracy was not required to report that incident on the UPLAs, and that he should not be fined for omitting it. The record is insufficient to permit a determination as to whether the other incidents in Tracy's criminal history involving infractions of the motor vehicle laws, driving so as to endanger and operating after suspension of a license, are exempt from the reporting requirements on the UPLA. I find that these incidents should be reported on any future license applications, so that the Division may determine whether they should be exempt from the reporting requirement, but I will not impose a penalty for omitting them from the 2003 and 2005 applications. I do not find persuasive Tracy's arguments that he was not required to report the remaining incidents, particularly the felony prosecutions for larceny, or the 1980 administrative action. I will therefore impose the maximum fine of $1,000 per violation. I impose a fine of $5,000 on Tracy for omitting four incidents in his criminal history and the 1980 action from his 2003 application. I impose a fine of $6,000 on Tracy for omitting five incidents and the 1980 action from his 2005 application.

[25] Another question requests information about the applicant's relationship with insurance companies, such as Encompass.

V. Orders

Accordingly, after due notice, hearing and consideration it is

ORDERED: That any and all insurance producer licenses issued to William F. Tracy by the Division of Insurance, and any appointments based on his status as a licensed producer, are hereby revoked; and it is

FURTHER ORDERED: that William F. Tracy shall return to the Division any insurance producer licenses in his possession, custody or control; and it is

FURTHER ORDERED: that William F. Tracy shall dispose of any interest as proprietor, partner, stockholder, officer or employee of any insurance agency or licensed producer; and it is

FURTHER ORDERED: that William F. Tracy is, from the date of this order, prohibited from directly or indirectly transacting any insurance business, acquiring any insurance business in any capacity whatsoever, or acting as an insurance producer in Massachusetts; and it is

FURTHER ORDERED: that William F. Tracy cease and desist from the conduct that gave rise to the Order to Show Cause; and it is

FURTHER ORDERED: that William F. Tracy shall pay a fine of Eleven Thousand Dollars ($11,000) to the Division of Insurance within 30 days of this decision.

This decision has been filed this 4th day of August 2006, in the office of the Commissioner of Insurance.

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Jean F. Farrington
Presiding Officer

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