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JOSEPH G. MURPHY
COMMISSIONER OF INSURANCE

Division of Insurance, Petitioner
v.
Samuel Bicalho, Respondent

Docket No. E2014-06

Decision and Order

Introduction and Procedural History

On April 22, 2014, the Division of Insurance (“the Division”) filed an Order to Show Cause (“OTSC”) against Samuel Bicalho (“Mr. Bicalho”), a licensed Massachusetts resident individual insurance producer. The Commissioner of Insurance (“Commissioner”) assigned me to preside over the case. Matthew M. Burke, Esq., appeared on behalf of the Division; Saul M. Ostroff, Esq., represented Mr. Bicalho.

The Division asserts three claims against Mr. Bicalho under Massachusetts General Laws Chapter (“Chapter”) 175. The Division claims that he “violated” Chapter 175, § 162R(a)(1), by providing incorrect and materially untrue information in a Uniform Application for Individual Insurance Producer License (“Application”) dated June 8, 2010.¹ The Division also claims that Mr. Bicalho “violated” Chapter 175, § 162R(a)(6), by pleading guilty to the felony of Forging/Misuse of a RMV Document; and “violated” Chapter 175, § 162R(a)(8), by using fraudulent and dishonest practices, and demonstrating untrustworthiness in the conduct of his business, by issuing inspection stickers to motor vehicles that were not inspected.²

¹The substance of the Division’s claim is that this action by Mr. Bicalho constitutes a cause for disciplining him pursuant to Chapter 175, § 162R(a)(1). *See Division of Insurance v. Adolphus Nolan, Jr.*, Docket No. E2013-08.

²The substance of these claims is that these actions by Mr. Bicalho constitute causes for disciplining him pursuant to Chapter 175, § 162R(a)(6) and § 162R(a)(8), respectively. *See* note 1, *supra*.

Mr. Bicalho filed an Answer on May 12, 2014. Except for the Attorney General press release (Exhibit C to the OTSC), the accuracy of which he contested, Mr. Bicalho did not dispute the accuracy of Exhibits A and B to the OTSC. Mr. Bicalho in answer to Paragraph 8 of the OTSC “admits that he answered [Question 1 of the June 8, 2010, Application] incorrectly and states that it was his belief that he was never convicted of a crime.” Mr. Bicalho in answer to Paragraph 9 of the OTSC “denies he knowingly admitted to any crime.” Mr. Bicalho in answer to Paragraph 12 of the OTSC “restates that he was unaware of his conviction. He believed that the complaint against him was continued without a finding.”³ In his answer to Paragraph 14 of the OTSC Mr. Bicalho “denies any intentional wrongdoing.”

At a pre-hearing conference on July 22, 2014, Attorney Ostroff stated that Mr. Bicalho did not dispute the correctness of the information in the substituted Exhibit A and in Exhibit B to the OTSC.⁴ Attorney Ostroff disputed, however, the accuracy of many parts of the Attorney General press release that was attached to the OTSC as Exhibit C.⁵ Attorney Ostroff stated that his client wanted the Presiding Officer to decide the case based on the uncontested documents attached to the OTSC and the arguments of counsel.⁶ Attorney Burke stated that the Division agreed to this manner of proceeding to an adjudication of this case.

At the July 22, 2014, pre-hearing conference, Attorney Ostroff stated that Mr. Bicalho was “not denying that the incident happened” and that the paperwork attached to the OTSC was accurate, but that Mr. Bicalho “had a misunderstanding of what the proceeding result was in Middlesex Superior Court” and “he did not believe he was – was unaware -- that he was convicted based on conversation he had with his public defender.” Attorney Ostroff stated that Mr. Bicalho admitted that he was convicted of the crimes, but was unaware of that fact at the

³ The answer to Paragraph 12 of the OTSC as submitted in writing stated that Mr. Bicalho (emphasis added) “restates that he was *aware* of his conviction.” This circumstance was brought to the attention of counsel at the pre-hearing conference on July 22, 2014. Attorney Ostroff indicated that “aware” was a typographical error; the answer therefore was amended to read “unaware.”

⁴ The OTSC when it was filed had a copy of an Application dated May 29, 2012, attached as Exhibit A. This circumstance was brought to the attention of counsel at the pre-hearing conference on July 22, 2014. Attorney Burke thereupon proffered -- as a replacement for Exhibit A to the OTSC -- a copy of an Application by Mr. Bicalho dated June 8, 2010. Counsel for Mr. Bicalho did not object to substituting the June 8, 2010, Application as a replacement Exhibit A. The replacement Exhibit A was admitted into the record of the proceeding.

⁵ Exhibit C has played no part in my deliberations and adjudication of this case.

⁶ The Presiding Officer offered the opportunity to present oral testimony from Mr. Bicalho, if he so desired. The offer was declined.

time the case was handled at the Superior Court. Attorney Ostroff argued against revocation of Mr. Bicalho's insurance license. Attorney Burke stated that the Division was seeking revocation of Mr. Bicalho's insurance license for his failure to answer truthfully Question 1 of the Background Information section of the Application dated June 8, 2010.

Findings of Fact

On the basis of the record, consisting of the OTSC, Exhibit B, and replacement Exhibit A; Mr. Bicalho's Answer, and the arguments of counsel, I find the following facts:

1. Mr. Bicalho was licensed by the Division as an individual insurance producer pursuant to Chapter 175, § 162H *et seq.* on or about June 16, 2010.

2. Prior to his licensure, on or about June 8, 2010, Mr. Bicalho had submitted to the Division a Uniform Application for Individual Insurance Producer License ("2010 Application").

3. Question 1 of the Background Information section of the 2010 Application included the following question and explanatory information:

1. Have you ever been convicted of a crime, had a judgment withheld or deferred, or are you currently charged with committing a crime?

... "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.

4. In his 2010 Application, Mr. Bicalho answered "No" to Question 1.

5. Mr. Bicalho was the defendant charged in *Commonwealth v. Samuel Bicalho*, Criminal Docket MICR2009-00725, Middlesex Superior Court ("the Superior Court criminal proceeding").

6. Mr. Bicalho was represented by counsel in the Superior Court criminal proceeding on February 1, 2010.

7. Mr. Bicalho changed his plea from "not guilty" to "guilty" in the Superior Court criminal proceeding on February 1, 2010.

8. Mr. Bicalho on February 1, 2010, was “warned per Chapter 278, Sec 29D of alien status” by Justice Wendie I. Gershengorn when he changed his plea of “not guilty” to “guilty” in the Superior Court criminal proceeding.

9. Chapter 278, § 29D, which applies to “any defendant in any criminal proceeding,” provides as follows:

The court shall not accept a plea of guilty, a plea of nolo contendere, or an admission to sufficient facts from any defendant in any criminal proceeding unless the court advises such defendant of the following: “If you are not a citizen of the United States, you are hereby advised that the acceptance by this court of your plea of guilty, plea of nolo contendere, or admission to sufficient facts may have consequences of deportation, exclusion from admission to the United States, or denial of naturalization, pursuant to the laws of the United States.” The court shall advise such defendant during every plea colloquy at which the defendant is proffering a plea of guilty, a plea of nolo contendere, or an admission to sufficient facts. The defendant shall not be required at the time of the plea to disclose to the court his legal status in the United States.

If the court fails so to advise the defendant, and he later at any time shows that his plea and conviction may have or has had one of the enumerated consequences, even if the defendant has already been deported from the United States, the court, on the defendant’s motion, shall vacate the judgment, and permit the defendant to withdraw the plea of guilty, plea of nolo contendere, or admission of sufficient facts, and enter a plea of not guilty. Absent an official record or a contemporaneously written record kept in the court file that the court provided the advisement as prescribed in this section, including but not limited to a docket sheet that accurately reflects that the warning was given as required by this section, the defendant shall be presumed not to have received advisement. An advisement previously or subsequently provided the defendant during another plea colloquy shall not satisfy the advisement required by this section, nor shall it be used to presume the defendant understood the plea of guilty, or admission to sufficient facts he seeks to vacate would have the consequence of deportation, exclusion from admission to the United States, or denial of naturalization.

See Chapter 278, § 29D.

Analysis and Conclusions of Law

Based upon my findings of fact in this matter, I do not find credible Mr. Bicalho’s assertions that he did not understand or was unaware that he was pleading guilty to the charges

made against him in *Commonwealth v. Samuel Bicalho*, Criminal Docket MICR2009-00725, in particular because of the warning given him by Justice Gershengorn pursuant to Chapter 278, § 29D, and the fact that Mr. Bicalho was represented by counsel on the day that he changed his plea from “not guilty” to “guilty.” Question 1 of the 2010 Application clearly defines “convicted” as including “having entered a plea of guilty or nolo contendere.” Mr. Bicalho knowingly provided incorrect and materially untrue information when he failed to disclose his prior criminal guilty pleas on his 2010 Application.

Furthermore, even if I were persuaded, *which I have not been*, that Mr. Bicalho mistakenly “believed that the complaint against him was continued without a finding” (part of Mr. Bicalho’s written response in his Answer to Paragraph 12 of the OTSC), his answering “no” to Question 1 in this circumstance would have been incorrect and materially untrue because Question 1 also specifically asked: “Have you ever ... had a judgment withheld or deferred.”

Discipline

Mr. Bicalho provided incorrect and materially untrue information when he failed to disclose his prior criminal guilty pleas on his 2010 Application. He thereby subjected himself to discipline under Chapter 175, § 162R(a)(1) (“providing incorrect, misleading, incomplete or materially untrue information in the license application”). Chapter 175, § 162R(a), authorizes the Commissioner to place an insurance producer on probation, to suspend or revoke a producer’s license, or to levy on him or her a civil penalty in accordance with Chapter 176D, § 7, or to take any combination of these actions, for 14 enumerated reasons, including providing incorrect and materially untrue information in the license application.

Because Mr. Bicalho provided incorrect and materially untrue information when he failed to disclose his prior criminal guilty pleas on his 2010 Application, I now revoke all of Mr. Bicalho’s Massachusetts insurance licenses and assess a civil penalty under Chapter 176D, § 7, of \$1,000.00.

I decline to discipline Mr. Bicalho for the causes cited by the Division in connection with Chapter 175, § 162R (a)(6) and § 162R(a)(8) because the actions complained of occurred before Mr. Bicalho became a licensed insurance producer.

ORDER

After due notice, hearing and consideration, it is hereby ORDERED:

1. That Samuel Bicalho shall cease and desist from the conduct complained of in the Order to Show Cause;
2. That any and all insurance producer licenses issued to Samuel Bicalho by the Massachusetts Division of Insurance are hereby revoked;
3. That Samuel Bicalho shall return to the Massachusetts Division of Insurance any licenses in his possession, custody or control;
4. That Samuel Bicalho is, from the date of this Decision and Order, prohibited from directly or indirectly transacting any insurance business or acquiring, in any capacity whatsoever, any insurance business in the Commonwealth of Massachusetts;
5. That Samuel Bicalho shall comply with the provisions of Chapter 175, § 166B, and dispose of any and all interests in Massachusetts as proprietor, partner, stockholder, officer or employee of any licensed insurance producer; and
6. That Samuel Bicalho shall pay to the Massachusetts Division of Insurance **within 30 days of the entry of this Decision and Order** a civil penalty of **One Thousand Dollars (\$1,000)** pursuant to Chapter 175, § 162R(a)(1), and Chapter 176D, § 7.

Filed: September 17, 2014

Stephen M. Sumner
Presiding Officer

This decision may be appealed to the Commissioner of Insurance pursuant to Massachusetts General Laws Chapter 26, §7.

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