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DANIEL R. JUDSON
COMMISSIONER OF INSURANCE

Division of Insurance, Petitioner

v.

Gary Wayne Fravel, Respondent

Docket No. E2010-13

Order on Petitioner's Motion for Summary Decision

Introduction and Procedural History

On December 8, 2010, the Division of Insurance (“Division”) filed an Order to Show Cause (“OTSC”) against Gary Wayne Fravel (“Fravel”) who at the time held a Massachusetts individual insurance producer license. The Division alleged that Fravel collected insurance premiums from customers but failed to transmit those payments to insurance companies or their agents, thus violating G.L. c. 175, §176 and engaging in an unfair or deceptive practice in the business of insurance, a violation of G.L. c. 176D. It further alleged that his actions support disciplinary action for four reasons set out in 1) G.L. c. 175, §162R (a)(2), violating any insurance laws or regulation, subpoena or order of the Commissioner; 2) G.L. c.175, §162R (a)(4), improperly withholding, misappropriating or converting any monies or properties received in the course of doing business; 3) G. L. c. 175, §162R (a)(7), having admitted or been found to have committed any insurance unfair trade practice or fraud; and 4) G.L. c. 175, §162R (a)(8), using fraudulent, coercive or dishonest practices, or demonstrating incompetence, untrustworthiness or financial irresponsibility in the conduct of business in the commonwealth or elsewhere. The Division asked for revocation of Fravel’s license and orders requiring him to dispose of any insurance-related interests in Massachusetts, prohibiting him from conducting any insurance business in the Commonwealth, and imposing fines for the alleged violations.

A Notice of Procedure (“Notice”) was issued on December 8, 2010, advising Fravel that a prehearing conference would take place on January 11, 2011 and that a hearing on the OTSC would be held on January 25, 2011, both at the offices of the Division. It further advised him that 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 Fravel 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 Fravel 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.

On December 9, 2010, the Division sent the Notice and OTSC by certified mail to respondent at his business address as shown on the Division's records: Fravel Insurance Agency, 6 High Street, Danvers, MA 01923. Copies were also sent to him at that address and at his residential address shown on the Division's records, 183 Highland Street, South Hamilton, MA 01982, by first-class mail, postage prepaid. In addition, the Division sent copies of the Notice and OTSC to Fravel by first class mail to two additional addresses provided by counsel for an entity that was engaged in litigation with Fravel.¹ The post office returned the green card receipt for the certified mail sent to the Danvers business address to the Division on December 21.² The Division filed an affidavit on January 10, 2011 stating that, as of that date, none of the regular first-class mail was returned.

On January 11, 2011, a prehearing conference was held pursuant to 801 CMR 1.01(10)(a). Douglas A. Hale, Esq. appeared for the Division.³ Neither Fravel nor any person representing him appeared. Mr. Hale reported that he had received no communication from the respondent or from any person purporting to represent him. On January 11, the Division filed its motion for summary decision. On January 13, I ordered Fravel to file any response to the motion by January 21, and stated that any argument on the motion would be heard on January 25 at the time set for the evidentiary hearing.

¹ Those addresses were 231 Sutton Street, 1 B North, North Andover, MA 01845-1620 and 358 Ashbury Street, South Hamilton, MA 01982-1302.

² The receipt did not include the specific date on which the certified mail was accepted.

³ In my absence, Stephen Sumner, Esq., presided at the January 11 prehearing conference.

Thomas Beatrice, Esq., counsel for Fravel subsequently contacted the Division, seeking, by motion, to enlarge the time to file an answer and to continue the January 25 hearing. Fravel did not pursue his request to continue that hearing, but appeared with counsel and argued for an extension of time to answer the OTSC. That motion was taken under advisement. Fravel did not respond to the Division's motion for summary decision. I asked counsel to address the effect on this proceeding of a bankruptcy petition that Fravel filed in 2010.⁴ On September 11, 2011, I issued an order staying further action in this matter until the parties documented the status of the bankruptcy and the effect of the automatic stay provisions on this matter.

On July 9, 2015, the Division, now represented by Robert J. Kelly, Esq., moved to reopen this proceeding on the grounds that Fravel had been discharged in bankruptcy and that a final order closing his bankruptcy proceeding had been issued on August 12, 2013.⁵ The motion also stated that, as of June 26, 2015, Fravel was no longer licensed as an insurance producer. Fravel filed no response to Petitioner's motion. On July 27, I allowed the motion and ordered the parties to appear for a status conference on August 14, 2015.

Fravel did not appear on August 14, 2015 personally or through counsel.⁶ At the conference, the Division orally renewed its motion for summary decision in this matter and, on September 15, 2015, filed a written motion. On September 25, 2015 it submitted a revised written motion for summary decision. I issued an order on September 29, 2015 instructing Fravel to respond to the motion by October 13, 2015. Fravel did not respond.

Finding of Default

This is an adjudicatory proceeding as defined in G.L. c. 30A, §1 and is conducted, as stated in the Notice of Procedure, under the formal Standard Adjudicatory Rules of Practice and Procedure, 801 CMR 1.01 *et seq.* Although Fravel is no longer licensed as an insurance producer, pursuant to G. L. c. 175, §162R (e) the Commissioner retains authority to enforce the provisions of §162R against him. Fravel's failure to appear at the August 14, 2015 status conference and to respond to the Division's revised motion for summary decision warrant finding him in default. I may therefore consider the Division's motion for summary decision based on the record.

⁴The OTSC referred to the bankruptcy proceeding but provided no information on its status at the time the OTSC was filed. At the January 25 hearing, Attorney Beatrice stated that an open adversary proceeding in the Bankruptcy Court related to allegations in the OTSC.

⁵ Mr. Kelly replaced Douglas Hale, the original counsel for the Division, who had retired.

⁶ Attorney Kelly contacted Attorney Beatrice who informed him that he no longer represented Fravel.

That record consists of the OTSC and the exhibits attached thereto: A) Complaint about Fravel from the Breed's Hill Insurance Agency, Inc., principally documents relating to litigation between them including a judgment and execution; B) Affidavit from Ellen A. Mahoney, Executive Vice President and Director of Breed's Hill, dated October 19, 2010; C) Second affidavit from Ms. Mahoney dated October 29, 2010; D) Complaint about Fravel from the Geriatric Resource Center; E) Responses from the Geriatric Resource Center to correspondence from the Division; F) Responses from the Western World Insurance Group to correspondence from the Division seeking information on insurance covering the Geriatric Resource Center; G) Complaint about Fravel from Susan Knots received by the Division on August 2, 2010; and H) Correspondence dated August 20, 2010 from Ms. Kontos to the Division.

Findings of Fact

On the basis of the record, consisting of the OTSC and the exhibits attached to it, I find the following facts:

1. The Division first licensed Fravel as a Massachusetts insurance agent on or about July 5, 1991.
2. The Division first licensed Fravel as an insurance broker on or about August 9, 1997.
3. The Division cancelled Fravel's broker's license on or about August 9, 2000 because he failed to renew it, but licensed him again as an insurance broker on or about August 9, 2001.
4. As of approximately January 29, 2003, the Division authorized Fravel to do business under the name Fravel Insurance Agency. At least by June 2006, Fravel was also doing business under the name Fravel & Associates Insurance Agency.
5. On or about May 16, 2003, the Division cancelled Fravel's broker's license and agent licenses and, pursuant to G.L. c. 175, §162H, et seq., converted them to an insurance producer license.
6. As of the date of the OTSC Fravel's producer license was active, and he held eleven agent appointments.
7. Fravel's producer license was renewed on June 25, 2012. He did not renew that license in 2015 and it expired as a matter of law on June 26, 2015.
8. The Division first licensed Fravel as a surplus lines insurance broker, pursuant to G.L. c. 175, §168, on February 11, 1996, but cancelled the license on February 11, 1997 because he failed to renew it.

9. The Division again licensed Fravel as a surplus lines broker on August 25, 2003, but cancelled the license on August 25, 2005 because he failed to renew it.

10. Breed's Hill Insurance Agency, Inc. ("Breed's Hill") is a managing general agent for three insurance companies; it offers property and casualty insurance programs for real estate enterprises, such as apartment building and condominium associations.

11. Fravel had an agency agreement with Breed's Hill pursuant to which he could obtain insurance for his customers under the Breed's Hill programs.

12. Pursuant to the agency agreement, at Fravel's request Breed's Hill issued insurance policies to three Fravel customers over a two year period, from approximately June 24, 2005 to May 29, 2007.

13. Robert and Irene Butler (the "Butlers") were among the insureds on those policies. Over the two-year period from December 2005 through December 2007 the Butlers issued 12 checks to Fravel Insurance Agency or Fravel Associates to pay premium for the policies issued by Breed's Hill.

14. The checks were endorsed by Gary Fravel, sometimes for deposit and sometimes without restriction.

15. The Butlers also authorized a credit card company to transfer \$2,500 to Fravel for the purpose of paying insurance premiums on the policies issued by Breed's Hill.

16. Fravel did not transfer the Butlers' premium payments to Breed's Hill.

17. In May 2008, Breed's Hill filed a lawsuit against Fravel to recover premiums due for the policies it issued to Fravel's customers; on September 24, 2008 a justice of the Superior Court entered judgment for Breed's Hill. In May 2009, another justice of the Superior Court issued a writ of execution to collect the judgment.

18. On or about June 26, 2008, Fravel obtained liability insurance for the Geriatric Resource Center ("GRC") from the Western World Insurance Company, through Connecticut Underwriters. Fravel and the GRC executed an affidavit stating that Fravel had informed the consumer that the desired coverage could not be obtained from a company licensed or admitted to transact business in Massachusetts.

19. The affidavit stated that the premium for the policy would be \$11,555.

20. On June 26, 2008, the GRC sent a check payable to Fravel in the amount of \$12,102.20 to cover the entire premium for the policy. The GRC also signed an application form for financing the premium through a premium finance company.

21. On or about July 21, 2008, Fravel submitted an application to the Prime Rate Premium Finance Corporation, Inc. ("Prime Rate") seeking to finance \$9,012.20 of the premium for the GRC policy. The application acknowledged receiving a cash down payment for \$3,000.

22. The GRC had no knowledge that the premium finance agreement had been submitted until it received a telephone call, in December 2008, from a bank representative informing it that a payment on the finance agreement was overdue. The GRC subsequently learned that the policy had been cancelled on September 18, 2008 for non-payment of premium.

23. According to the printout from Prime Rate dated October 8, 2008, it sent information on the GRC account to Fravel Insurance that listed all transactions including the policy cancellation date.

24. On January 21, 2009 Fravel sent a letter to the GRC admitting that the policy was financed in error and stating that he had arranged to pay any obligations relating to that financing. A second letter, dated February 11, 2009 confirmed that the GRC's check represented full payment for the policy.

25. Fravel stated that he had been out of his office for much of July and August because of family issues and that he was not aware that "funds were released" to the finance company.

26. The GRC asked Fravel to refund the premium it had paid for the period after the policy was cancelled but received no return premium from him.

27. On August 2, 2010, Susan Kontos complained to the Division that on June 25, 2010 she sent Fravel a check for \$803.38 to pay the premium for a commercial liability policy written by the Scottsdale Insurance Company through Connecticut Underwriters. Although the check cleared her bank on June 29, on July 16 she received a notice of cancellation for nonpayment of premium.

28. Ms. Kontos telephoned Fravel but received no response. Fravel did not transfer the premium payment to the insurer, even after he was notified that Ms. Kontos had received the notice of cancellation.

29. Breed's Hill initiated an adversary proceeding in Fravel's bankruptcy seeking to exempt Fravel's debt to it from discharge. The Bankruptcy Court's decision supports a conclusion that Fravel did not transmit premium payments to Breed's Hill; however, that court found that because the evidence did not show that failure to transmit those payments was done with the intent to cause willful and malicious injury, the debt could be discharged.

Analysis and Conclusions of Law

801 CMR 1.01 (7) (h) allows a party who is of the opinion that there is no genuine issue of fact relating to a claim and that he or she is entitled to prevail as a matter of law, to file a motion for summary decision. Based on the record, I find that the Division is entitled to prevail as a matter of law.

G.L. c. 175, §162R (a) specifies fourteen grounds on which the Commissioner may suspend or revoke a producer's license. The Division identifies four subsections of that statute

as grounds for revocation of Fravel's license: 1) §162R (a)(2) which, in pertinent part, permits disciplinary action for violating any insurance laws or regulation, subpoena or order of the Commissioner; 2) §162R (a)(4), improperly withholding, misappropriating or converting any monies or properties received in the course of doing business; 3) §162R (a)(7), having admitted or been found to have committed any insurance unfair trade practice or fraud; and 4) §162R (a)(8), using fraudulent, coercive or dishonest practices, or demonstrating incompetence, untrustworthiness or financial irresponsibility in the conduct of business in the commonwealth or elsewhere.

The Division also asserts that Fravel, by collecting insurance premiums from clients and failing to remit them to insurance companies, violated G.L. c. 175, §176, and engaged in unfair or deceptive practices in the business of insurance in violation of G.L. c. 176D, §2.

Fravel repeatedly failed to transfer premium payments he received from his customers to the managing general agent representing the insurer writing the coverage. Exhibits attached to the OTSC show that one pair of customers wrote twelve checks to the Fravel agency, as well as making one payment by credit card. Fravel did not respond to the managing general agent's demand for payment. Two other customers wrote one check each to Fravel for the full premium due on their policies; in each case the payment was not sent to the insurer. On this record, I conclude that Fravel's failure to transmit premium payments on at least 15 different occasions supports disciplinary action under G. L. c. 175, §162R (a)(4) for improperly withholding, misappropriating or converting any monies or properties received in the course of doing business.

One of those customers received advance notice that her policy would be cancelled for failure to pay premium. She notified Fravel of that possibility, but he again did not transmit her premium to the company. Fravel obtained the signature of the other customer on a premium finance application although he had received full payment of the policy premium. He misrepresented the facts on the premium finance application, stating that the customer had made a down payment of \$3,000 when she had actually paid over \$12,000 in premium.⁷ Approximately a month later, without the customer's knowledge, he submitted the application to the premium finance company, thereby financing the premium that had been paid in full. Six months after paying Fravel the entire policy premium, the customer learned about the financing arrangement from the lender and discovered that the policy had been cancelled for nonpayment of premium. As a result of the cancellation her organization had operated at risk without liability insurance for about three months. Further, the notice of cancellation indicated that it had been sent to Fravel, who failed to give the information to his customer.

⁷ It is not unreasonable to infer that Fravel retained for his own use the \$9,012 that was financed.

I conclude that Fravel's submission of a premium finance application for a policy that had been paid in full, his failure to notify his customer of a notice of policy cancellation, and his failure to transfer premium to a company after a customer informed him of a pending cancellation constitute dishonest practices and demonstrate incompetence, untrustworthiness or financial irresponsibility in the conduct of business in the commonwealth. The litigation with Breed's Hill supports a conclusion that Fravel also failed to honor his obligations to other licensees. I find that failure, too, demonstrates incompetence, untrustworthiness or financial irresponsibility in the conduct of business in the commonwealth. The record fully supports disciplinary action under G.L. c. 175, §§162R (a)(8).

G.L. c. 175, §176, in brief, states that an insurance agent or broker who acts in negotiating or renewing or continuing an insurance policy issued by a company lawfully doing business in the commonwealth and who receives money from an insured as premium for that insurance policy is deemed to hold that premium in trust for the company.⁸ If he fails to pay the premium, after written demand therefore, the failure to do so is declared to be prima facie evidence that he has used or applied the premium for a purpose other than paying it over to the company. Fravel did not forward premium payments in the form of checks and a credit card payment to Breed's Hill, which subsequently made demand for them and was eventually awarded a judgment. The documents support a conclusion that Fravel used or applied the premium payments for purposes other than paying them over to the company. Consistent with previous Division decisions I find, pursuant to G.L. c. 176D, §6, that diversion of funds is an unfair and deceptive practice that violates G. L. c. 176D, §2.⁹ Fravel's actions violate the insurance law and constitute unfair trade practices. The record fully supports disciplinary action under G. L. c. 175, §§162R (a)(2) and (a)(7).

The OTSC seeks relief in the form of license revocation pursuant to G. L. c.175, §162R, the statutory remedies provided by G.L. c. 175, §§166B and 174B and, pursuant to §162R (a) and G. L. c. 176D, §7, fines of up to \$1,000 per violation. I conclude that Fravel's multiple failures to transmit premium payments to insurers and his misrepresentations about customer payments are serious violations that fully support revocation of his producer license. On this record, then, I find that Fravel's license should be revoked, that he should be prohibited from transacting any insurance business, directly or indirectly, in Massachusetts, and that he should be required to dispose of any interest he may have in any insurance business in Massachusetts. I further find that his consistent failure on at least 15 occasions to transfer premium payments to insurers, his misrepresentations to a premium finance company, and his failure to transmit

⁸ The acts that form the basis for liability under the section are now performed by insurance producers.

⁹ See *Division of Insurance v. Kilcommons*, Docket No. E2003-08.

information about cancellation of coverage to a customer are serious violations that left his customers operating without liability insurance. For that reason, I impose the maximum fine of \$1,000 for each of seventeen violations.

ORDERS

Accordingly, after due notice, hearing and consideration it is

ORDERED: That any and all insurance producer licenses issued to Gary W. Fravel by the Division are hereby revoked; and it is

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

FURTHER ORDERED: that Gary W. Fravel 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 Gary W. Fravel 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 Gary W. Fravel shall cease and desist from the conduct that gave rise to this Order to Show Cause; and it is

FURTHER ORDERED: that Gary W. Fravel shall pay a fine of Seventeen Thousand (\$17,000.00) to the Division within 30 days of the entry of this order.

This decision has been filed this 28th day of October 2015, in the office of the Commissioner of Insurance.

Jean F. Farrington
Presiding Officer

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