

COMMONWEALTH OF MASSACHUSETTS

Office of Consumer Affairs and Business Regulation

DIVISION OF INSURANCE

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NONNIE S. BURNES
COMMISSIONER OF INSURANCE

John Magennis, Petitioner

v.

Division of Insurance, Respondent

Docket No. E2007-6

Decision and Order

Introduction and Procedural History

On or about June 1, 2007, John C. Magennis ("Magennis") filed a Notice of Claim for an Adjudicatory Hearing with the Division of Insurance ("Division"), appealing the denial of his application ("Application") to renew his individual insurance producer's license. Initially, Stephen M. Sumner, Esq. was designated as the presiding officer for this proceeding; in August 2007, I was designated as his successor. A Notice of Procedure was issued on June 7, 2007, advising Magennis that a hearing would be held on August 29, 2007, at the offices of the Division, which would be conducted pursuant to M.G.L c. 30A and the Standard Adjudicatory Rules of Practice and Procedure, 801 CMR 1.00, *et. seq.* The Notice also notified Magennis that a pre-hearing conference would take place on July 11, 2007, and if he failed to appear at the pre-hearing conference or hearing, an order of default, summary decision, or decision on the pleadings could be entered against him. The Division filed its answer, a copy of the denial letter, pursuant to 801 CMR 1.01 (6)(e), on June 22, 2007.

At the pre-hearing conference on July 11, 2007, Magennis represented himself and Robert J. Kelly, Esq. represented the Division. The parties agreed to enter into a stipulation of

facts and exhibits prior to the August 29, 2007, adjudicatory hearing. Magennis, thereafter, retained counsel, Gerald M. Kirby, Esq. At the Petitioner's request, and with the assent of the Division, the dates for the submission of facts and exhibits and the hearing date were continued. The hearing was held on February 28, 2008.¹

Background

Based on the parties' stipulation of facts, exhibits, and testimony, Magennis submitted his application to renew his individual producer's license to the Division on or about November 30, 2006. Magennis affirmatively answered Question 1 on the Background Information portion of the application which inquired about criminal convictions. The Division responded with a letter, dated January 10, 2007, explaining that because of his affirmative answer to Question 1, the Division intended to perform a check of his Massachusetts Criminal History Record Information (CORI) through the Criminal History Systems Board. Magennis completed a CORI request form and returned it with a photocopy of a driver's license at the Division's request.

On March 5, 2007, the Division denied Magennis's application based on his CORI report from the Massachusetts Criminal History Systems Board. The Division also notified Magennis of his opportunity to dispute the accuracy and relevance of the CORI information. On March 20, 2007, Magennis submitted additional information for the Division's consideration. He did not dispute the accuracy of the convictions. On May 1, 2007, Magennis, Diane Silverman Black, the Division's Director of Producer Licensing ("Director"), and a member from the Legal Department, discussed the information via telephone. On May 4, 2007, the Director sent a letter to Magennis again declining the renewal of his license. The letter reiterated that the basis for the denial was his criminal history, specifically his five felony convictions relative to financial transactions in March 2002 in Middlesex Superior Court for which he remains on probation until

¹ On August 24, 2007, an Assented to Motion for Continuance was submitted, by Gerald M. Kirby, requesting a continuance of the adjudicatory hearing and status conference because Mr. Kirby had a conflict. The status conference was rescheduled for October 2, 2007, but was continued at Petitioner's counsel request because he was ill. On October 26, 2007, the status conference was held. Petitioner's counsel then requested a continuance of the adjudicatory hearing to December 11, 2007. The parties agreed to submit a statement of the issues to be litigated, a joint stipulation of facts, and an assented to list of exhibits and witnesses by November 29, 2007. On December 5, 2007, the Petitioner requested a continuance of the hearing due to a serious family illness. The adjudicatory hearing was rescheduled to January 9, 2008, and the statement of the issues to be litigated, a joint stipulation of facts, and an assented to list of exhibits and witnesses were to be submitted by December 21, 2007. On January 7, 2008, I issued an order rescheduling the hearing in this matter to February 21, 2008, and the submission date for the statement of the issues to be litigated, a joint stipulation of facts, and an assented to list of exhibits and witnesses to February 4, 2008, due to a scheduling conflict. The parties were unable to submit the statement of the issues to be litigated, a

June 2008.² The letter stated that the felony convictions, and the behavior underlying them violate M.G.L. c. 175, §§162R(a)(6) and (8).³ The basis of Magennis's appeal is that the Division should renew his license because it previously did so in 2004 when it also had the knowledge of his five convictions. He requested that the Division reconsider its decision.

The Parties' Arguments

Magennis argues that his license should be renewed because the Division previously renewed his license after he first disclosed his 2002 felony convictions on his 2004 application. Magennis states that he again disclosed his felony convictions on his 2006 application, and fully cooperated with the Division's request for additional information so that it could complete a CORI check. Magennis asserts the Division discovered no new pending charges or any other convictions as a result of that check, and that he has not violated the terms of his probation. He does not dispute his 2002 felony convictions.

Magennis argues that the Commissioner is estopped from refusing to renew his license. He asserts that he reasonably relied to his detriment upon the Division's 2004 decision to renew his license. See *Cannon v. Cannon*, 69 Mass. App. Ct. 414, 422 (2007).⁴ Because of his age and medical conditions, he is unable to pursue other employment avenues. He asserts that six years after his convictions, he is faced with losing his only source of income and, had he not relied on the actions of the Division in 2004, he would not be in his current situation.

Magennis argues that *Division of Insurance v. Larocque*, E2000-02, held that "a person who seeks a license must demonstrate that he has been rehabilitated and is now worthy of a public trust." He asserts that unlike Larocque who had a "pattern of repeated, planned and deliberate attempts to deceive an insurer in the conduct of business," his behavior was limited to an "isolated incident." Magennis also relies on *Economou v. Division of Insurance*, E2001-09,

joint stipulation of facts, and an assented to list of exhibits and witnesses on February 4, 2008. They were received on February 21, 2008. A final extension for the adjudicatory hearing to February 28, 2008, was allowed.

² Magennis was convicted of Embezzlement by a Fiduciary (1 count), Larceny over \$250 from a Person 60 Years or Older (1 count), and Larceny over \$250 by a Single Scheme (3 counts).

³ M.G.L. c. 175 §162R(a) states, "The commissioner may place on probation, suspend, revoke or refuse to issue or renew an insurance producer's license or may levy a civil penalty in accordance with section 7 of chapter 176D or any other applicable sections of the General Laws or any combination of actions, for any 1 or more of the following causes: (6) having been convicted of a felony; (8) using fraudulent, coercive or dishonest practices, or demonstrating incompetence, untrustworthiness or financial irresponsibility in the conduct of business in the commonwealth or elsewhere.

⁴ In *Cannon*, the insured's children brought an action against his estranged wife to recover their share of life insurance proceeds, contrary to the designation form, where estranged wife agreed to remit share to children.

in which the Petitioner's license was not renewed because the convictions were recent and because there was a "short history" and "scant" evidence of rehabilitation. He asserts that his matter is distinguishable because it involves older convictions from six years ago, and his license was renewed after full disclosure of the convictions in 2004.

Magennis points out that the judge in the criminal matter imposed a sentence, which he served, and probation, but did not impose any conditions regarding his employment. He contends that one should look to other areas of licensing to determine whether justice was served in his case and whether "equitable fairness is allowed or accepted" where he went back into practice and his license is now not being renewed.

The Division argues that its decision not to renew Magennis's license should be upheld and is based on the law. The Division cites to M.G.L. c. 175, §§162R(a)(6) and (a)(8) which permits the Commissioner to place on probation, suspend, revoke or refuse to issue or renew the license of an insurance producer who has been convicted of a felony or uses fraudulent, coercive or dishonest practices, or demonstrates incompetence, untrustworthiness or financial irresponsibility in the conduct of business in the commonwealth or elsewhere. The Division asserts that all of Magennis's criminal convictions fall within the realm of M.G.L. c. 175, §162R(a)(6), and the conviction for embezzlement by a fiduciary is a violation of M.G.L. c. 175, §162R(a)(8). The Division cites to *David v. Commissioner of Insurance*, 53 Mass. App. Ct. 162 (2001) as support for the Division's decision not to renew Magennis's license.⁵ The Division specifically relies on footnote 5 in the *David* case which states, "[A]n agency's decision may be overturned only in limited circumstances, namely, if the agency's decision violates a constitutional provision; is in excess of its statutory authority or jurisdiction; is based upon an error of law; is made upon unlawful procedure; is not supported by substantial evidence; is unwarranted by the facts; or is arbitrary, capricious, or an abuse of discretion." *David* at 165.

The Division argues that none of these factors are applicable in this case. It states that the Commissioner of Insurance has broad discretion as to whether to renew an insurance license provided that such discretion is exercised fairly, and that the Commissioner does not act in an

Magennis also cites to *Safety Insurance v. Day*, 65 Mass. App. Ct. 15 (2005) and *Harrington v. Fall River Housing Authority*, 27 Mass. App. Ct. 301 (1989).

⁵ Magennis argues that this case can be distinguished from his matter as David failed to disclose his criminal history to the Division whereas he did reveal his convictions.

arbitrary and capricious manner. *Id.* at 165.⁶ The Division asserts that the Commissioner was clearly within her statutory discretion to refuse to renew Magennis's license based on his five felony convictions, all which involve fraud, coercion, dishonesty, untrustworthiness, and financial irresponsibility.

The Division acknowledges that the 2004 renewal application was approved based on the same information. It does not dispute that Magennis was forthcoming about his felony convictions. The Division asserts that the Commissioner is not obligated to renew his license based on the 2004 decision as the 2006 application is the sole issue in this matter.⁷ The Division reviewed all of the facts and circumstances relevant to Magennis's 2006 individual application. It argues that the decision as to whether to renew a license is independent of any decisions based on prior renewals.⁸

The Division distinguishes this matter from *Division of Insurance v. Larocque*, E2000-02. Larocque was convicted of a single misdemeanor count of attempted larceny. The Division points out that Magennis has felony convictions for embezzlement by a fiduciary and larceny involving an elderly relative, which is far more egregious than the offenses for which Larocque was convicted.

The Division contends that the failure of the judge in the criminal case to make any findings regarding Magennis's licensing is irrelevant because the criminal case and this proceeding are in different forums. This matter is a licensing issue before an administrative agency. The criminal case and the administrative procedure address separate issues and the fact that the criminal court did not impose any restrictions on his license is not applicable to this administrative matter.

Analysis

Magennis has appealed the Director's decision to deny his 2006 license application for renewal. The crux of his appeal is that the Commissioner is estopped from denying his 2006 application for renewal since his 2004 application was approved and both submissions included the same criminal history information. He agrees that the facts she relied upon in reaching her

⁶ "As a general matter, a statute which merely regulates business interest need not specify with great particularity the relevant considerations with respect to whether to revoke a license....It is enough that the [agency] exercise its discretion fairly and not act in an arbitrary and capricious manner." *Id.* at 165 n.6.

⁷ The Division, however, does not offer any legal support in opposition to Petitioner's estoppel argument.

⁸ The Division points out that after reviewing Magennis' criminal history, it gave him the opportunity to dispute any of its findings.

decision were correct; he does not contest that her actions were permissible pursuant to M.G.L. c. 175, §162R(a). On this record, I find that the Director's decision on the 2006 application should be upheld.

The Commissioner of Insurance ("Commissioner") is authorized to regulate licensing issues pursuant to M.G.L. c. 175, §162R. The statutory language clearly states the grounds for refusing to renew an insurance producer's license. Magennis's conduct, which he does not dispute, undoubtedly falls within these listed causes.

Although Magennis may have had "a free bite at the apple" in 2004, the Commissioner is not, as Magennis argues, bound by that decision for his 2006 application. The Commissioner's duty is to protect the public interest. Her denial of an insurance license to a person convicted of financial crimes is appropriate. Generally the doctrine of estoppel is not applied against the government in the exercise of its public duties, or against the enforcement of a statute. Estoppel is specifically not applied to governmental acts where to do so would frustrate a policy intended to protect the public interest. *Risk Management Foundation of the Harvard Medical institutions, Inc. v. Commissioner of Insurance*, 407 Mass. 498, 510 (1990) citing *LaBarge v. Chief Administrative Justice of the Trial Court et. Al.*, 402 Mass. 462 (1988); *Langlitz v. Board of Registration of Chiropractors*, 396 Mass. 374, 378 (1985) (Court is reluctant to apply principle of estoppel to public entities where to do so would negate requirements of law intended to protect public interest.); *Highland Tap of Boston v. Commissioner of Consumer Affairs and Licensing of Boston*, 33 Mass. App. 559 (1992) (Doctrine of estoppel is generally not applied to the government's exercise of its public duties and is not applied where to do so would frustrate policy intended to protect public interest.). The law does not support Magennis's argument that the Commissioner is estopped from denying his 2006 application because his 2004 application was approved.

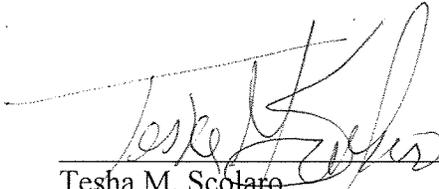
The decision to deny Magennis's 2006 license application was not an abuse of discretion. Magennis has five felony convictions involving theft, dishonesty, fraud, coercion, untrustworthiness, and financial irresponsibility by a fiduciary, and is currently on probation for his convictions. This decision is consistent with other Division decisions involving financial crimes. See, *Division of Insurance v. Steven Andrew Gilman*, E2007-09; *Division of Insurance v. Walliam T. Rowan and the Rowan Insurance Agency*, E2006-02; *Division of Insurance v. Thurston Gene Gilman*, E2005-02; *Favreau v. Division of Insurance*, E2004-06; *Doyle v.*

Division of Insurance, E2004-07; *Prevost v. Division of Insurance*, E2003-09; *Economou v. Division of Insurance*, E2001-09; *Division of Insurance v. Larocque*, E2000-02. I affirm the decision to deny Magennis's application for license renewal.

Conclusion

For the above-stated reasons, Magennis's appeal is denied, and the May 4, 2007, decision of the Director is upheld. A copy of this decision shall be sent to Magennis's attorney by certified mail, return receipt requested as well as by first class mail, postage prepaid.

Dated: April 25, 2008



Tesha M. Scolaro
Presiding Officer

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