



COMMONWEALTH OF MASSACHUSETTS
Office of Consumer Affairs and Business Regulation
DIVISION OF INSURANCE

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JOSEPH G. MURPHY
COMMISSIONER OF INSURANCE

Division of Insurance, Petitioner
v.
Gary A. Gahan, Respondent
Docket No. E2012-03

Order On Petitioner's Motion for Summary Decision

Introduction and Procedural History

On June 7, 2012, the Division of Insurance (“Division”) filed an Order to Show Cause (“OTSC”) against Gary A. Gahan (“Gahan”) who was licensed, until January 24, 2011, as a Massachusetts non-resident individual insurance producer. The Division alleges that Gahan, in violation of Massachusetts General Laws Chapter (“Chapter”) 175, §162V (a), failed to notify the Division of an administrative disciplinary action against him by the State of New Hampshire Insurance Department (“NHID”) that resulted in the November 15, 2010, revocation of his producer license in that state. The Division further alleges that Gahan’s transactions with consumers in New Hampshire, as described in the NHID decision, violate Massachusetts law and support revocation of his Massachusetts producer license pursuant to the provisions of Chapter 175, §162R (a)(2), (a)(4), (a)(7), (a)(8), (a)(9) and (a)(10), and Chapter 176D, §2.

Chapter 175, §162R (a) authorizes disciplinary action against a licensed producer if the licensee has: 1) violated any insurance law; 2) improperly withheld, misappropriated or converted money or property received in the course of doing insurance business;

3) admitted or been found to have committed any insurance unfair trade practice or fraud; 4) used fraudulent, coercive or dishonest practices, or demonstrated incompetence, untrustworthiness or financial irresponsibility in the conduct of business in Massachusetts or elsewhere; 5) had an insurance producer license revoked in any other state; or 6) forged another's name to an application for insurance or any other document related to an insurance transaction. Because the Division maintains that Gahan has violated each of these statutory provisions, and now asks for revocation of Gahan's license and seeks 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 June 12, 2012, advising Gahan that a prehearing conference would take place on July 10, 2012 and that a hearing on the OTSC would be held on July 24, 2012, both at the offices of the Division. It further advised him that the hearing would be conducted pursuant to Chapter 30A and the Standard Adjudicatory Rules of Practice and Procedure, 801 CMR 1.00, *et seq.* The Notice advised Gahan 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 Gahan 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 of Insurance ("Commissioner") designated me as presiding officer for this proceeding.

The Division sent copies of the Notice and OTSC by certified mail to respondent at the residence and business address shown in the Division's licensing records: 125 Daniel Webster Highway, Merrimack, NH 03061 and to the mailing address in the Division's records: P. O. Box 1305, Nashua, NH 03061. A copy of each document was also sent by first-class mail, postage prepaid, to Gahan at his residence and business address and at his mailing address. The certified mail sent to Gahan at the residence and business address was returned to the Division, stamped "unclaimed" and the certified mail sent to the mailing address returned marked "unable to forward." None of the documents sent by regular first class mail was returned to the Division.

Gahan failed to file an answer or other response to the OTSC. On July 10, 2012, a prehearing conference was held pursuant to 801 CMR 1.01(10)(a). Mary Lou Moran, Esq. appeared for the Division, substituting for Robert Kelly, Esq. Neither Gahan nor any person representing him appeared. Ms. Moran reported that Mr. Kelly had received no communication from the respondent or from any person purporting to represent him. At the conclusion of the prehearing conference, the Division filed its motion for summary decision. On the same date, I issued an order advising Gahan to file any response to the motion by July 20, 2012, and stating that any argument on the motion would be heard on July 24, 2012, at 10:00 a.m., the time initially set for the evidentiary hearing. Gahan filed no response to the Division's motion and did not appear at the July 24, 2012 hearing. At that hearing, Mr. Kelly stated that neither the respondent nor any person representing him had communicated with the Division.

Finding of Default

On the basis of the record before me, I conclude that the Division took appropriate actions to ensure proper service, and that sufficient service was made.¹ The first-class mail sent to Gahan's residence and business address and to his mailing address, all as shown on the Division's records, was not returned. I conclude that Gahan's failure to answer the OTSC or to respond to the Division's motion, and his failure to appear at the prehearing conference or at the hearing warrant findings that he is in default. By his default, Gahan has waived his right to proceed further with an evidentiary hearing in this case and I may consider the Division's motion for summary decision based on the record. That record consists of the OTSC and the document attached to it as Exhibit A, a Final Order from the NHID issued in an administrative action against Gary A. Gahan and dated November 15, 2010.

Findings of Fact

On the basis of the record, I find the following facts:

¹ I note that Chapter 175, §174A provides that hearing notices in matters involving revocation of licenses "shall be deemed sufficient when sent postpaid by registered mail to the last business or residence address of the licensee appearing on the records of the commissioner. . . ." This section, however, does not require that notices of hearing must be sent by registered mail; nor does it provide that registered mail is the only method of service, which may be found to be sufficient.

1. Gahan was first licensed in Massachusetts as a non-resident insurance agent on or about April 17, 1978.
2. On or about May 16, 2003, Gahan's agent license was converted to a non-resident individual insurance producer's license, pursuant to Chapter 175, §162H, *et seq.*
3. The Division terminated Gahan's Massachusetts non-resident insurance producer's license, effective January 24, 2011, for failure to renew.
4. On November 15, 2010, the NHID, after a hearing, issued an order revoking Gahan's New Hampshire insurance producer's license and ordering him to pay an administrative penalty of \$97,500.
5. The NHID decision identifies the following specific actions by Gahan as violations of the New Hampshire insurance laws:
 - a. Advising an elderly couple with limited income to purchase annuities with the proceeds of a reverse mortgage on their residence without grounds to believe that the recommendation was suitable.
 - b. A few years later advising the same clients to replace three of those annuities for contracts with lower guaranteed interest rates and higher surrender charges without grounds to believe that the recommendation was suitable.
 - c. Following the death of one member of the client couple, misappropriating and converting to his own use funds belonging to the surviving client by requesting that the client withdraw funds from the annuities and transfer them to Gahan or the corporation for which he worked.
 - d. Misrepresenting to the annuity company that the client had lent him the withdrawn funds pursuant to a written loan agreement.
 - e. Forging the client's initials on partial withdrawal requests sent to the annuity company to facilitate the misappropriation and conversion of the client's money.
 - f. Recommending to another elderly couple with limited income the purchase of an annuity and investment from the proceeds of a reverse mortgage on their residence without grounds to believe that the recommendations were suitable, and partially replacing the annuity less than a year later, also without regard to the suitability of the transaction.
 - g. Making false representations on the application for the replacement annuity about the source for the premium payment and the nature of the transaction, for the purpose of obtaining a commission.
 - h. Directing other clients, four years after selling them thirteen annuity contracts, to replace twelve of those contracts completely and one

partially, without grounds to believe that the recommendations were suitable.

6. Gahan failed to notify the Division of the NHID Final Order within 30 days of its issuance.

Analysis and Conclusions of Law

Chapter 175, §162R (e) authorizes the Commissioner of Insurance to enforce the provisions of the licensing statutes and to impose remedies or penalties pursuant to those statutes, even if a respondent no longer holds an active license. 801 CMR 1.01 (7)(h) allows a party, when he or she 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, with or without supporting affidavits. The Division bases its motion for summary decision on respondent's failure to file an answer to the OTSC and failure to appear at the scheduled prehearing conference. I find that respondent's failure to comply with the directives in the Notice warrant a finding that he is in default. No genuine issue of fact has been raised in connection with the Division's claims. I find that it is entitled to prevail as a matter of law.

Section 162R (a) specifies fourteen grounds on which the Commissioner may suspend or revoke a producer's license. The Division identifies six subsections of Section 162R (a) as grounds for revocation of Gahan's license: 1) (a)(2), in pertinent part, violating any insurance laws; 2) (a)(4) improperly withholding, misappropriating or converting money or property received in the course of doing insurance business or regulation; 3) (a)(7) admitting or being found to have committed any insurance unfair trade practice or fraud; 4) (a)(8) using fraudulent, coercive or dishonest practices, or demonstrating incompetence, untrustworthiness or financial irresponsibility in the conduct of business in Massachusetts or elsewhere; 5) (a)(9) having an insurance producer license revoked in any other state; and 6) (a)(10) forging another's name to an application for insurance or any other document related to an insurance transaction. I find that the record fully supports each of these grounds for revocation.

I conclude, based on the above findings of fact, that Gahan violated the insurance laws of New Hampshire. That finding permits revocation of his Massachusetts insurance producer's license pursuant to Chapter 175, 162R (a)(2). The findings based on the NHID Final Order amply support revocation of his license pursuant to subsections (4), (7), (8) and (10) of Chapter 175, §162R (a). The revocation of Gahan's insurance producer's license in New Hampshire permits the Commissioner to revoke his Massachusetts license under §162R (a)(9).

Chapter 175, §162V (a) requires a Massachusetts licensed producer to report to the Commissioner any disciplinary action taken by another state within 30 days of the final disposition. The above findings of fact indicate that Gahan did not report the New Hampshire administrative actions to the Division within the statutory time frame. His violation of §162V (a) is an additional basis for revocation of his license pursuant to §162R (a)(2).

On this record, I find that Gahan's Massachusetts producer 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. Chapter 175, §162R (a) also permits the Commissioner to levy a civil penalty in accordance with Chapter 176D, §7 for violations of the insurance laws and regulations. The maximum penalty permitted under Chapter 176D, §7 is \$1,000 per violation.

I also find that Gahan, by failing to report the New Hampshire administrative actions by other states, committed one statutory violation. Gahan's failure to report license revocations in compliance with his statutory obligations is a serious offense that directly affects his qualifications for a Massachusetts producer license. I therefore impose the maximum fine for that violation.

I further find that the acts underlying the NHID Final Order fully support disciplinary action in Massachusetts and the revocation of Gahan's Massachusetts producer's license, but also find that no evidence in the record demonstrates that those acts affected any Massachusetts consumers. For that reason, I will impose no additional fines for his violations of Chapter 175, §162R (a).

ORDERS

Accordingly, after due notice, hearing and consideration it is

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

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

FURTHER ORDERED that Gary A. Gahan 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 A. Gahan 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 A. Gahan shall pay a fine of One Thousand Dollars (\$1,000) to the Division within 30 days of the entry of this order.

This decision has been filed this 26th day of September 2012, in the office of the Commissioner of Insurance. A copy shall be sent to Gahan by certified mail, return receipt requested, as well as by regular first class mail, postage prepaid.

Jean F. Farrington
Presiding Officer

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