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GARY D. ANDERSON
COMMISSIONER OF INSURANCE

Division of Insurance, Petitioner

v.

Michael Tarantino, Respondent

Docket No. E2017-06

Decision and Order on Motion to Revoke License

Introduction

On March 8, 2017, the Division of Insurance (“DOI”) filed an Order to Show Cause against Michael Tarantino (“Tarantino”), alleging that he had failed to remit premium on an auto insurance policy to the Plymouth Rock Assurance Corporation (“Plymouth Rock”), and had therefore violated M. G. L. c. 175, §162 R (a) (“§162 R (a)”), subsections (4) and (8). The DOI sought relief in the form of revocation of Tarantino’s license, orders that he no longer transact any insurance business in Massachusetts, cease and desist from the alleged conduct, and fines. The parties, stating that they were attempting to settle the matter, moved to enlarge the date for answering the OTSC. Respondent was ordered to submit his answer by May 5, 2017.

Tarantino, through counsel Joseph T. Desmond, Esq., timely filed his answer. He acknowledged that a check written to Plymouth Rock in September 2016, remitting premium on an automobile insurance policy, was returned for insufficient funds, but that subsequently the amount due was paid in full. The parties further advised me that they had been unable to settle the matter and requested a hearing date.

A prehearing conference took place on July 11, 2017. At that conference, Tarantino submitted documents issued by the Credit Collection Service confirming that Plymouth Rock had been paid in full; the receipt indicated that payment was made on February 22, 2017. Division counsel, Matthew Burke, Esq., stated that he had received a copy of those documents and acknowledged that they supported Tarantino's position that Plymouth Rock had been paid in full. Nevertheless, the Division contends that Respondent should still be subject to disciplinary action and stated that it would submit a memorandum supporting its position. On July 25, 2017, the Division submitted a Motion in Support of Revocation of Respondent's license. Respondent timely filed its opposition to the Division's motion and a request to dismiss the case.

The Parties' Arguments

The Division argues that the facts alleged in the OTSC are undisputed. It contends that even though Plymouth Rock was repaid, the failure to remit premium immediately and then on later occasions indicates that Respondent improperly withheld, misappropriated or converted any monies or properties received in the course of doing insurance business and, for that reason, is subject to discipline under §162 R (a)(4). In support of its position it cites to four prior Division decisions. The Division argues as well that withholding premium demonstrated incompetence, untrustworthiness and financial irresponsibility in the business of insurance, conduct that supports discipline under §162 R (a)(8). It notes that the decisions it cites to support discipline under §162 R (a)(4) found that the respondents' actions also supported discipline pursuant to §162 R (a)(8).

The Division states that it no longer requests relief in the form of fines but seeks only revocation of Tarantino's license. It contends that revocation satisfies two principles: it is consistent with past Division decisions and it will protect the public and maintain consumer confidence.

Tarantino presents a more detailed account of the sole insurance transaction underlying the OTSC, a purchase by an overseas customer. He points out that Plymouth Rock issued the policy and that it was in effect for the full policy term. Tarantino does not dispute that a check he wrote was returned for insufficient funds, describing it as a seldom used account, noting that Plymouth Rock did not cash the check for over a month, and contending that the account was

drawn down because of an oversight. He characterizes the payment delay as a bookkeeping error, not the result of an intent to deprive Plymouth Rock of premium payments.

Tarantino argues that revocation is inappropriate because the transaction underlying the OTSC is not in the same category as actions that have merited revocation. He asserts that it involves a single incident of delay in remitting a premium payment, pointing out that the insurer was paid in full and the customer was insured at all times. Tarantino notes that §162 R (a)(4) lists three bases for disciplining a licensee: withholding, misappropriating or converting money or property. Both misappropriation and conversion, he asserts, involve the licensee's use of money for his or her personal use, while withholding implies no intent to possess the money. Tarantino argues that Division decisions explicitly distinguish withholding from misappropriation and conversion, and have revoked licenses of producers who misappropriate or convert customer payments and fail to place insurance. In this case, he contends, there was never any intent to withhold premium payments and at this time no payment has been withheld. For that reason, he asks that the OTSC be dismissed.

With respect to the Division's contention that his alleged conduct supports disciplinary action under §162 R (a)(8), Tarantino argues that there is no evidence that he engaged in fraudulent, coercive or dishonest practices, and that the Division's memorandum does not assert that he in fact did. To the extent that it alleges that he was incompetent, untrustworthy or financially irresponsible, Tarantino asserts that revocation is inappropriate. He characterizes his actions as "basically negligent" conduct that does not rise to the level of fraudulent or dishonest practices that might support the sole remedy requested by the Division, license revocation.

Further, Respondent notes, the Division has discretion to impose penalties other than revocation. He notes that the statutory remedies under §162 R (a) include placing a licensee on probation or suspending a license, both lesser remedies than revocation, and that the lesser remedies are appropriate when the alleged conduct is at the less serious end of the range of grounds for discipline. Tarantino argues that conduct that he characterizes as negligence should not be subject to the same penalty as conduct that is fraudulent or dishonest. He cites to a

number of cases in which alleged failure to remit premium was resolved through cease and desist orders and, in some cases, fines.¹

Tarantino argues, as well, that there is no indication that he poses a danger to the public by failing to place coverage or misappropriating premiums. He contends that neither of the actions against him cited by the Division involved any questions of customer trust. Some of the cases cited by the Division to support its position on revocation, he points out, have limited precedential value because they are predominantly cases in which the respondent failed to appear or contest the allegations. Other cases which resulted in license revocation involved individuals who had engaged in fraudulent, coercive or dishonest practices. Tarantino argues that a disciplinary action based on the delayed transmission of premium is within the class of cases that do not support the severe penalty of revocation. Because the Division has requested no relief other than revocation, Tarantino argues that the OTSC should be dismissed.

Analysis

The OTSC alleges that on a single occasion Tarantino failed to remit to Plymouth Rock premium that he had received from an applicant for an automobile insurance policy, thereby withholding money from the insurer. The Division contends that the alleged failure to remit premium supports disciplinary action pursuant to §162 R (a)(4) and §162 R (a)(8), and that the appropriate outcome is revocation of Tarantino's producer license. The OTSC is based on correspondence, dated November 1, 2016, from Plymouth Rock about the characterization of its termination of Tarantino's appointment as a Plymouth Rock agent.

Tarantino, in his answer to the OTSC, stated that he had fully reimbursed Plymouth Rock for the premium he had received from his customer. At the July 11 prehearing conference, he submitted documentation confirming that payment had been made on February 22, 2017.² The Division acknowledged that it had previously received that documentation and did not challenge it as evidence that Plymouth Rock had received the full premium for the policy. The record does not support the essential fact underlying the premise of the OTSC, that Tarantino failed to remit premium to Plymouth Rock.

¹ The citations are to descriptions of enforcement actions appearing on the Division's website.

²The Division, in its memorandum, refers to a payment date of March 20, 2017. The actual date, as stated in the confirmation number, was February 22, 2017.

The Division now argues that Tarantino's producer license should be revoked because, even though the premium was eventually paid in full, it was not remitted in timely fashion. The payment delays, it asserts, support disciplinary action under §162 R (a)(4). Tarantino does not dispute that there were issues associated with the transmittal of the policy premium to Plymouth Rock, but denies that he ever intended to withhold that premium, pointing out that the Division does not assert that he converted or misappropriated those funds for personal use. The Division's new theory, that a delay in transmitting payment should be viewed as the equivalent of withholding premium, is not persuasive. It cites to no statute that prescribes a timetable for transactions between an insurer and its appointed agent.

The record does not support the Division's contention that the transmittal of the policy premiums to Plymouth Rock supports discipline pursuant to §162 R (a)(8). The Division does not characterize the events as evidence of fraudulent, coercive or dishonest practices, but apparently considers that they demonstrate incompetence, untrustworthiness or financial irresponsibility. I am not persuaded that a single problem transaction is sufficient to support such a finding. The Division attempts to bolster its position by references to prior actions against Tarantino, both of which were settled without a hearing.³ The OTSC sought revocation solely because of the single transaction with Plymouth Rock. Matters that were settled in the past provide no support for expanding the reason for revocation stated in the OTSC.

The Division refers to a number of past enforcement decisions to support its position that revocation is the appropriate remedy in this case. In each of those cases, revocation was based on a record of multiple actions that supported that decision. Two involved multiple acceptances of premium payments from consumers and subsequent failure to place the insurance on their behalf, thus exposing those consumers to substantial risk.⁴ One revoked the license of an exclusive representative producer who consistently failed to comply with the timetable prescribed by Commonwealth Automobile Reinsurers' rules for remitting premium payments

³ In both cases, Tarantino did not admit to the Division's allegations but agreed to cease and desist from the alleged conduct and to pay a fine. The Division, in its memorandum, incorrectly treats the settlement agreements as evidence that Tarantino has violated "this law" before. The Division's assertion that the 2004 matter also involved failure to pay premium is inconsistent with the allegations in the settlement agreement.

⁴ *Division of Insurance v. Rowan*, Docket No.E2066-02. Rowan had also pleaded guilty to insurance fraud, issued false certificates of insurance, and engaged in other practices that placed consumers at risk and fully supported revocation. *Division of Insurance v. Fravel*, Docket No. E2010-13. As with Rowan, Fravel had accepted premium payments on at least 17 occasions and failed to transfer them to insurers. It appears that the policies were issued but then cancelled for non-payment.

and submitted checks drawn on insufficient funds.⁵ In the single case in which, as in this proceeding, the OTSC was based on an insurer's report on the reasons for termination of its appointed agent, the respondent had accepted premium payments from consumers, failed to transfer the entire amount to the insurer, and admitted to converting the retained funds.⁶ Decisions in administrative actions based on conversion of consumer payments, because that action may have profound consequences for consumers, have consistently found that revocation is an appropriate outcome. The Division, however, did not allege that Tarantino converted any consumer payments.

The Division argues that revocation is required to ensure consumer confidence. The OTSC is not based on any consumer complaint or concerns; the documents indicate that Tarantino's customer received a policy and that it was not cancelled for failure to pay premium. The OTSC arises from Plymouth Rock's complaint about a single incident associated with its relationship with its appointed agent. Similarly, it contends that revocation is necessary to maintain consumer confidence, again asserting that the failure to remit premium is a major violation of the public trust. In this case, the Division asserted in the OTSC that Tarantino failed to transmit a premium payment to an insurer; documentation submitted by the Respondent demonstrates that in fact the premium was paid. Those facts do not support the Division's argument that Tarantino violated the public trust.

The Division notes language in *Division of Insurance v. Neale*, Docket No. E2004-24, stating the principle that the continuum of sanctions permitted under §162 R (a) recognizes the uniqueness of each case and allows sanctions to be tailored to particular facts and circumstances. I find that the record in this case does not support the sole sanction sought by the Division, revocation of Tarantino's producer license.⁷ For that reason, the Division's Motion to Revoke Tarantino's License is denied.⁸

⁵ *Division of Insurance v. Garcia*, Docket No. E2006-11. The Division initially settled the matter, filing the OTSC only after Garcia paid a fine with a dishonored check. Garcia did not answer the OTSC.

⁶ *Division of Insurance v. Sandberg*, E2009-05. Sandberg did not answer the OTSC or otherwise appear.

⁷ According to the OTSC, Tarantino's producer license expired in November 2016 and was not renewed. At the prehearing conference, Tarantino stated that he had subsequently renewed his license. Because the consequences of revocation of an active license are likely to be more severe than revocation of an expired license, it is particularly important that the grounds for taking such action be precisely stated and carefully documented.

⁸ The Division proposed no alternative that it would find acceptable. See, *Division of insurance v. McDermott*, Docket No. E94-3, in which it initially requested revocation but later asserted that suspension would be appropriate.

Tarantino, in its memorandum opposing the Division's Motion, asks that this matter be dismissed. 801 CMR 1.01 (7)(g) addresses motions to dismiss. Subsection 1 permits a Respondent, after the Petitioner's presentation of its evidence, to move to dismiss on the ground that upon the evidence or the law, the Petitioner has not established its case. Tarantino argues that the documentation confirming transmittal to Plymouth Rock of the consumer's full premium payment demonstrates that Petitioner did not establish the single ground for its case, an alleged failure to pay premium to an insurer. He further argues that the prior Division decisions in enforcement cases cited by Petitioner do not support its request for license revocation. On the record in this matter, I am dismissing the OTSC pursuant to 801 CMR 1.01 (7)(g)1.

Order

The Petitioner's Motion to Revoke License is denied. The Respondent's request to dismiss the Order to Show Cause is allowed.

This decision has been filed this 9th day of July, 2018 in the office of the Commissioner of Insurance.

Jean F. Farrington, Esq.
Presiding Officer

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