

STATE OF NEW JERSEY  
DEPARTMENT OF BANKING AND INSURANCE

OAL DOCKET NO. BK1 02712-19  
AGENCY DOCKET NO. N/A

MARLENE CARIDE,	)	
COMMISSIONER,	)	
NEW JERSEY DEPARTMENT	)	
OF BANKING AND INSURANCE,	)	
	)	
Petitioner <sup>1</sup> ,	)	FINAL DECISION AND ORDER
	)	
v.	)	
	)	
DEAN I. ORLOFF,	)	
	)	
Respondent.	)	
	)	

This matter comes before the Commissioner of Banking and Insurance (“Commissioner”) pursuant to the authority of the Administrative Procedure Act at N.J.S.A. 52:14B-1 to -31, N.J.S.A. 17:1-15, the New Jersey Producer Licensing Act at N.J.S.A. 17:22A-26 to -48 (“Producer Act”), and all powers expressed or implied therein, for the purpose of reviewing the October 3, 2019 Initial Decision (“Initial Decision”) of Administrative Law Judge Tricia M. Caliguire (“ALJ”) wherein the ALJ upheld the denial of Dean I. Orloff’s (“Orloff”) application for licensure as an insurance producer in the State of New Jersey.

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<sup>1</sup> The caption incorrectly identifies Marlene Caride, Commissioner, Department of Banking and Insurance, as the Petitioner, and Dean I. Orloff, as the Respondent. As Orloff is appealing the Department’s denial of his licensure, he is the Petitioner in this matter and the Commissioner is the Respondent.

## **STATEMENT OF THE CASE AND PROCEDURAL HISTORY**

On or about August 16, 2018, Orloff filed an application for licensure as an insurance producer in the State of New Jersey. By letter dated November 27, 2018, the Department of Banking and Insurance ("Department") denied Orloff's application pursuant to N.J.S.A. 17:22A-40(a), based on Orloff's conduct underlying his permanent disbarment issued by the Supreme Court of New Jersey effective January 3, 2017, from the practice of law, which was based on Orloff's failure to communicate with a client, the knowing misappropriation and comingling of funds, the failure to promptly disburse funds to a client, and conduct involving dishonesty, fraud, deceit, or misrepresentations. In addition, the letter stated that this conduct, together with Orloff's permanent disbarment and the removal of his name from the New Jersey roll of attorneys was considered in the Department's decision to deny this application.

By letters dated December 17 and 18, 2018, Orloff appealed this decision and requested a hearing. On February 26, 2019, this matter was transmitted to the Office of Administrative Law ("OAL") as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

An initial prehearing conference was held on April 22, 2019 wherein a hearing was scheduled for September 23 and 24, 2019. On July 11, 2019, the parties requested an extension of time to respond to outstanding discovery until July 26, 2019, which was granted by the ALJ. On August 26, 2019, both parties filed cross-motions for summary decision. On September 16, 2019, both parties filed response briefs opposing the motion for summary decision of the other party. On September 26, 2019, both parties filed reply briefs.

The record was closed on September 26, 2019. On October 3, 2019, the ALJ issued the Initial Decision, wherein the ALJ granted the Department's motion for summary decision to

uphold the Department's denial of Orloff's application for licensure as an insurance producer in the State of New Jersey.

By letter dated October 8, 2019, the Department notified the Commissioner that it concurred with all findings in the Initial Decision and would not be filing exceptions pursuant to N.J.A.C. 1:1-18.4. By letter dated October 14, 2019, Orloff filed exceptions ("Orloff's Exceptions") to the ALJ's Initial Decision. By letter received on October 21, 2019, the Department requested an extension of time in which to provide its Reply to Orloff's Exceptions to October 28, 2019. By letter dated October 22, 2019, the Department's request was granted. The Department filed its Reply to Orloff's Exceptions ("Department's Reply") on October 28, 2019.

### **ALJ'S FINDINGS, ANALYSIS, AND CONCLUSIONS**

#### **Summary Decision Standard**

The ALJ noted that summary judgement is appropriate when "the evidence... is so one-sided that one party must prevail as a matter of law." Initial Decision at 5 (citing Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 541 (1995)). N.J.A.C. 1-1,12.5(b) provides that the decision sought by the movant "may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." Id. at 5. In addition, the procedure is applicable in both judicial and executive administrative proceedings. Id. at 4.

The ALJ indicated that in this instance, the underlying facts are undisputed and, in their cross-motions, both parties contend that their position should be affirmed as a matter of law. Id. at 5. Lastly, the ALJ noted that in reviewing the proffered evidence to determine the motion, the judge must be guided by the applicable evidentiary standard of proof that would apply at a trial on

the merits. Ibid. In this case, the burden rests with Orloff to show that the Department's decision is inconsistent with the law. Ibid.

### **Findings of Fact**

The ALJ found the following facts as undisputed. Between 2003 and 2005, while practicing as an attorney and associated with a law firm in Pennsylvania, Orloff handled a personal injury matter that was resolved through a settlement. Id. at 2. Those settlement funds were deposited into the law firm's trust account. Ibid. In 2010, approximately five years after leaving the law firm, and approximately one year after his last contact with the affected client, Orloff asked the law firm to transfer, to him, the remaining settlement funds, which totaled approximately \$6,500. Ibid. The law firm sent a check made out to Orloff and the client. Id. at 2-3. It is undisputed that, without contacting the client, Orloff signed both his and his client's names on the check and deposited the monies into his own escrow account. Id. at 3. On two separate occasions, in December 2010 and January 2011, Orloff used a portion of his client's money for personal expenses. Ibid. When the client contacted Orloff in March 2011, Orloff paid the client the entire amount owed without disclosing his misuse of the funds. Ibid. When the client learned of the unauthorized withdrawals from Orloff's escrow account, he brought a civil suit against Orloff. Ibid.

As a result of this conduct, Orloff was suspended from the practice of law in the Supreme Court of Pennsylvania, the United States District Court for the Eastern District of Pennsylvania, the United States Court of Appeals for the Third Circuit, and the United States District Court for the Middle District of Pennsylvania. Ibid. He was ultimately reinstated to practice law by each of the aforementioned courts. Ibid. On January 3, 2017, the Supreme Court of New Jersey permanently disbarred Orloff for several violations of New Jersey's Rules of Professional Conduct

("RPC"), including Orloff's failure to communicate with a client pursuant to RPC 1.4(b); the knowing misappropriation and commingling of funds pursuant to RPC 1.15(a); failure to promptly disburse funds to a client pursuant to RPC 1.15(b); conduct involving dishonesty, fraud, deceit, or misrepresentation pursuant to RPC 8.4(c); and, the principles set forth in In re Wilson, 81 N.J. 451 (1979)<sup>2</sup>. Id. at 3 (citing Certification of Joseph A. McDougal in Support of Motion for Summary Decision ("McDougal Cert."), Ex. E).

In July and August 2018, Orloff sat for the New Jersey insurance producer licensing examinations and applied for a New Jersey resident insurance producer license.<sup>3</sup> Id. at 3. In connection with this application, Orloff disclosed the conduct underlying the licensure actions by several state and federal courts and submitted corroborating documentation. Id. at 3-4.

By letter dated November 27, 2019, the Department notified Orloff that his application for licensure was denied based on Orloff's activity, "as described in the Order issued by the Supreme Court of New Jersey, permanent disbarment, and the removal of [his name from the New Jersey roll of attorneys[.]]" Id. at 4 (citing McDougal Cert., Ex. L).

#### **Conclusions of Law**

The ALJ noted that the Producer Act sets forth the qualifications and procedures for the licensing of insurance producers. Id. at 5 (citing N.J.S.A. 17:22A-27). As a condition of licensure,

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<sup>2</sup> The Court in In re Wilson held that "maintenance of public confidence...requires the strictest discipline in misappropriation cases" and is so important that mitigating factors will rarely override the requirement of disbarment because if public confidence is destroyed, "the bench and bar will be crippled institutions". 81 N.J. 451, 461 (1979).

<sup>3</sup> The ALJ noted that Orloff asserted that he passed two licensing examinations. The Department disputed this statement, as Orloff provided no supporting documentation. The ALJ further noted that since it is unlikely that Orloff would have appealed the Department's decision to deny his application for licensure had he not passed the examinations, and proof of passing the examinations is required of applicants, the ALJ assumed that Orloff did pass. Initial Decision at 3, fn. 1.

the Commissioner is required, pursuant to N.J.S.A. 17:22A-32, to find that an applicant has not committed any act that is a ground for denial, suspension or revocation set forth in N.J.S.A. 17:22A-40. Id. at 5. Moreover, the ALJ indicated that pursuant to N.J.S.A. 17:22A-40(a)(16), one of the grounds for the denial, suspension or revocation of an insurance producer license is the commission of a fraudulent act. Ibid. The ALJ noted that the Legislature has tasked the Commissioner with implementing the Producer Act, and to do so, the Commissioner has adopted rules that govern the grant of licenses to first-time applicants and those seeking the renewal of their license. Id. at 6 (citing N.J.A.C. 11:17-2.3(a)(1), (2) and (4); N.J.A.C. 11:17-2.14(a)). The ALJ noted that the crux of Orloff's argument is that without an adequate inquiry into his current fitness, he will never be eligible for licensure as an insurance producer based on his permanent disbarment from the practice of law because that will never change. Id. at 6.

As it relates to Orloff's argument that the Department failed to specify the reason for the denial and/or that its denial was not supported by substantial evidence, pursuant to N.J.A.C. 11:17-2.14(a), the ALJ noted that the Department's position is that Orloff's denial was not arbitrary, capricious or unreasonable as it was grounded in substantial evidence. Id. at 7. Similarly, the ALJ noted that Orloff ignored the specific grounds for denial set forth in the Producer Act, including the commission of a fraudulent act. In addition, the ALJ noted that Orloff admitted that he committed a fraudulent act that led to the loss of his license to practice law. Ibid.

The ALJ further noted that to determine whether an agency decision is supported by substantial evidence and is not arbitrary, unreasonable or capricious, there must be a clear statement from the administrative agency as to the basis for its decision. Id. at 7 (citing In re Crowley, 193 N.J. Super. 197, 214 (App. Div. 1984); St. Vincent's Hospital v. Finley, 154 N.J. Super. 24, 29-30 (App. Div. 1977)). In this case, the ALJ found that the Department clearly stated



that Orloff's application was denied due to the conduct underlying his initial disbarment, his permanent disbarment in the State of New Jersey, and the removal of his name from the New Jersey roll of attorneys, which was substantial and uncontroverted. Id. at 7 (citing McDougal Cert., Ex. L). The ALJ concluded that the Department gave a clear statement for the basis of its decision to deny Orloff's application which was supported by substantial credible evidence. Id. at 7-8.

As it relates to Orloff's argument that this denial was not based on the factors set forth in N.J.A.C. 11:17E-1.4(i)<sup>4</sup> and/or the Department should have used the criteria described by the court in In re Culen, 2006 N.J. Super Unpub. Lexis 174 (March 26, 2009), the ALJ noted Orloff's contention that the Department failed to conduct any such inquiry into his current fitness to hold the insurance producer license for which he applied. Ibid. The ALJ indicated that both N.J.A.C. 11:17E-1.4(i) and In re Culen examine factors set forth in the Rehabilitated Convicted Offenders Act ("RCOA") at N.J.S.A. 2A:168A-1.<sup>5</sup> Id. at 8. Orloff argued that as a "prohibited person"<sup>6</sup>, the Department failed to apply each and every factor required and is "completely devoid of any

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<sup>4</sup> Pursuant to 18 U.S.C. §1033, no person having been convicted of a felony involving dishonesty of a breach of trust shall engage in the business of insurance without having first obtained the written consent of the Commissioner and his or her designee. In order to satisfy this requirement, said person must apply for a waiver in the State of New Jersey under N.J.A.C. 11:17E-1.1 to -1.7.

<sup>5</sup> These factors include the nature and duties of the license for which the person is applying; the nature and seriousness of the offense; the circumstances under which the offense occurred; the date of the offense; the age of the person at the time the offense occurred; whether the offense was isolated; and social conditions that may have contributed to the offense; evidence of rehabilitation; evidence of a pardon or expungement; payment of restitution and other fines imposed by the court and other factors the Commissioner deems appropriate. N.J.S.A. 2A:168A-2.

<sup>6</sup> The ALJ noted that "prohibited person" is defined under N.J.A.C. 11:17E-1.2 as "anyone convicted of a felony involving dishonesty or breach of trust who is prohibited from being employed by an insurer in the business of insurance pursuant to 18 U.S.C. 1033." Initial Decision at 8, fn. 3.

consideration of each and every factor required to be considered" with respect to applications from ex-offenders. Ibid.

The ALJ noted that applicable law requires the Department to make an inquiry into an applicant's current fitness for licensure, specifically, an applicant is required to explain prior conduct that may impact his or her character, fitness or financial responsibility. Ibid. The ALJ found that Orloff misappropriated client funds during a time of personal instability calls into question his character, fitness and financial responsibility. Ibid. Further, the ALJ noted Orloff's contention that, while his circumstances are not "specifically contemplated" by the statutes at issue, he engaged in a breach of trust that warrants that the same criteria be used to review his application. Id. at 9. The ALJ concluded that the law is clear and that the correct laws were applied in this instance as Orloff was never convicted of a crime and never had an insurance producer license to lose. Therefore, the ALJ found that the Department's decision was proper under N.J.S.A. 17:22A-32(a)(2) and N.J.S.A. 17-22A-40(a)(16). Ibid.

The ALJ also noted that Orloff makes two Constitutional arguments. Specifically, Orloff contended that because the Producer Act does not grant him the same opportunity to show that he has been rehabilitated as it gives former felons, he is being denied due process and equal protection as guaranteed under the United States and New Jersey Constitution. Ibid.

Regarding Orloff's deprivation of property without due process, the ALJ found that Orloff must show that he has a secured interest in a specific benefit. Id. at 10 (citing Bd. of Regents v. Roth, 408 U.S. 564, 576 (1972)). The ALJ found that Orloff did not explain how the Department has interfered with a secured right. Id. at 10. The ALJ noted the Department's assertion that the expectation of obtaining an insurance producer license is not a property interest in a license. Id. at 10 (citing Graham v. N.J. Real Estate Comm., 217 N.J. Super. 130, 135 (1987) (a protected right



in a professional license comes into existence only after a license has been obtained)). Because Orloff never had, and therefore never lost, a license to sell insurance, the ALJ found that he cannot substantiate a claim for deprivation of due process. Id. at 10.

Regarding Orloff's equal protection claim, the ALJ stated that Orloff must show that the government agency imposed a burden, or conferred a benefit, on one class of persons to the exclusion of others, and/or interfered with a fundamental right. Id. at 10 (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28-29 (1973)). The ALJ noted Orloff's argument that he is part of a class of disbarred attorneys who has suffered discrimination. Further, Orloff argued that the conduct which resulted in a finding that Orloff was not eligible for an insurance producer license would have made him eligible for consideration for licensure, despite that conduct, had he only been a member of the class of convicted felons. Id. at 11. The ALJ found that Orloff's argument fails for two reasons: (1) disbarred attorneys are not a suspect class and (2) there is no fundamental constitutional right to the professional license at issue. Ibid.

The ALJ further noted that disbarred attorneys are not the only persons who may have engaged in conduct impacting their fitness to hold an insurance license and would therefore be denied an insurance producers license. Id. at 11, fn. 6. The ALJ found that the relevant regulatory and statutory provisions simply allow former felons to request a waiver from the prohibition that would otherwise keep them from being employed in the business of insurance. Ibid. In addition, the ALJ found that the Commissioner is authorized to deny applications for these waivers pursuant to N.J.A.C. 11:17E-1.4(a)(2). Ibid.

In conclusion, the ALJ found that the Department's decision to deny Orloff's application for a New Jersey insurance producer license was explained in detail, was based on substantial and uncontroverted evidence, was based on an evaluation conducted under the proper statutory and

regulatory criteria and did not violate Orloff's rights to due process and equal protection under the New Jersey and U.S. Constitutions. Ibid. The ALJ ordered the Department's motion for summary decision be granted and denied Orloff's cross-motion. Ibid.

### **EXCEPTIONS**

Orloff filed exceptions to the Initial Decision dated October 14, 2019. On October 28, 2019, the Department filed its Reply to Orloff's Exceptions.

### **Orloff's Exceptions**

Orloff excepts to several of the ALJ's findings of fact and conclusions of law. First, Orloff<sup>7</sup> asserts that the ALJ incorrectly interpreted Orloff's argument. Orloff's Exceptions at 1. Orloff contends he was not stating that he is a member of a suspect class because he is a disbarred attorney, rather, that he is similarly situated to ex-offenders seeking waivers to obtain licensure as an insurance producer. Ibid.

In addition, Orloff provides a list of nine specific factual findings that were "omitted from the Initial Decision" and requests modification in this Final Decision and Order for the inclusion of those findings. Id. at 1-2. The factual information Orloff contends were omitted from the Initial Decision are as follows:

- a) The only misconduct in which Orloff engaged while practicing law for nearly twenty-five years took place in the Commonwealth of Pennsylvania and was the subject of the disciplinary actions taken against him by multiple jurisdictions as referenced above.
- b) Orloff's disbarment by every jurisdiction other than the Supreme Court of Pennsylvania was the result of the imposition of reciprocal discipline as the misconduct at issue took place exclusively within the Commonwealth of Pennsylvania while Orloff was engaged in the practice of law in that jurisdiction.

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<sup>7</sup> Throughout Orloff's exceptions, Orloff refers to himself as the "Respondent" in this matter. As addressed above in fn. 1, this is incorrect. In order to avoid confusion, this Final Decision will refer to him as "Orloff", and not as the "Respondent".

- c) The documents produced by Orloff in support of his license applications included information about his past misconduct as well as rehabilitation and reinstatement to the bars of all but three of the seven jurisdictions from which he had been suspended or disbarred.
- d) Each of the four bars that ultimately reinstated Orloff to the practice of law conducted their own extensive investigations and inquiries into the Orloff's then current fitness to once again practice law and ultimately determined that Orloff was fit to be reinstated to the practice law.
- e) There was nothing within the stated basis of the Department's decision to deny licensure that took into consideration Orloff's then current fitness (as of November 27, 2018) to hold the producer licenses for which he applied. Rather, the denial was based entirely upon the prior offenses in which Orloff has engaged and his status as a disbarred New Jersey attorney.
- f) There is nothing contained within the Department's written license denial citing any consideration of the multiple bar reinstatement evidence that had been supplied by Orloff, which detailed the exhaustive inquiries conducted by the Supreme Court of Pennsylvania (the jurisdiction in which Orloff's original transgressions took place); the Eastern and Middle Districts of the Federal District Court of Pennsylvania; and/or the Third Circuit Court of Appeals into Orloff's fitness to be reinstated to the practice of law in each of these jurisdiction which reinstatements were granted by those Courts.
- g) Orloff has been forthright and transparent regarding his prior misconduct and rehabilitation in the producer license application process.
- h) The Initial Decision omits substantial factual information submitted by Orloff as to his rehabilitation which was not specifically referenced in the Department's denial of Orloff's insurance producer license application.
- i) The evidence of rehabilitation omitted from the Initial Decision includes Orloff's participation in volunteer work as guardian ad litem in the Philadelphia Court system and as a program leader in the End Violence Project with incarcerated men at the State Correctional Institution - Chester, in Chester, Pennsylvania.

[Orloff Exceptions at 1-2.]

In addition, Orloff provides a list of nineteen documents that he submitted to the ALJ, but that were not itemized in the Initial Decision. *Id.* at 2-3. The documents are as follows:

- Order and Report of Suspension issued in Pennsylvania (dated August 14, 2014);

- Temporary Work Authority issued by the Department of Banking and Insurance (dated October 14, 2014)
- Order to Suspend issued by the Federal District Court for the Eastern District of Pennsylvania (dated October 21, 2014)
- NIPR New Jersey Producer License Denial (dated February 11, 2015)<sup>8</sup>
- Suspension Order issued by the Third Circuit Court of Appeals (dated April 9, 2015);
- Decision issued by the New Jersey Disciplinary Review Board (dated October 6, 2016);
- Order for Disbarment issued by the New Jersey Supreme Court (dated January 4, 2017);
- Order of Suspension issued by the United States Supreme Court (dated March 20, 2017);
- Order to Disbar issued by the Federal District Court for the Middle District of Pennsylvania (dated April 17, 2017);
- Report and Recommendation issued by the Disciplinary Board for the Supreme Court of Pennsylvania (dated May 18, 2017);
- Order of Reinstatement issued by the Pennsylvania Supreme Court (dated June 22, 2017);
- Rule to Show Cause issued by the United States District Court for the District of New Jersey (dated June 26, 2017);
- Order to Reinstate issued by the Federal District Court for the Middle District of Pennsylvania (dated July 13, 2017);
- Report and Recommendation for Reinstatement issued by the Third Circuit Court of Appeals (dated September 11, 2017);
- Reinstatement Order issued by the Third Circuit Court of Appeals (dated October 13, 2017);
- Report and Recommendation of the Federal District Court for the Eastern District of Pennsylvania (dated November 17, 2017);
- Order of Reinstatement issued by the Federal District Court for the Eastern District of Pennsylvania (dated February 12, 2018);
- A letter submitted by the Juliana Planning Group LLC (dated August 17, 2018); and,
- A letter of explanation (dated August 21, 2018).

[Orloff's Exceptions at 2-3.]

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<sup>8</sup> The NIPR Report submitted by Orloff to the ALJ, as part of Exhibit D of Orloff's Brief in Support for his Motion for Summary Decision at ORLOFF19-20, is dated March 7, 2019.

Lastly, Orloff provides a list of eight specific conclusions of law made by the ALJ to which he excepts and proposes his conclusions. Id. at 3-4. The conclusions of law to which Orloff excepts and his proposed conclusions are as follows:

- a) The Department gave a clear statement of the basis for its decision to deny Orloff's application. Initial Decision at 7-8. Proposed Conclusion: The Department failed to give a clear statement of the basis for its decision to deny Orloff's application.
- b) I further conclude that the decision was supported by substantial credible evidence. Initial Decision at 8. Proposed Conclusion: The decision was not supported by substantial credible evidence.
- c) The Department used the correct standards in evaluating Orloff's application for licensure. Initial Decision at 9. Proposed Conclusion: The Department failed to use the correct standards in evaluating Orloff's application for licensure.
- d) The decision of DOBI was proper under N.J.S.A. 17:22A-32A(a)(2) and N.J.S.A. 17:22A-40(a)(16). [No citation provided.] Proposed Conclusion: The decision of DOBI was improper under N.J.S.A. 17:22A-32A(a)(2) and N.J.S.A. 17:22A-40(a)(16).
- e) I conclude that Orloff cannot substantiate a claim for deprivation of due process. Initial Decision at 10. Proposed Conclusion: Orloff has stated a claim for deprivation of due process.
- f) I conclude that Orloff cannot substantiate a claim for denial of equal protection. Initial Decision at 11. Proposed Conclusion: Orloff has stated a claim for denial of equal protection.
- g) "The applicable law requires DOBI to make an inquiry into an applicant's current fitness for licensure; to this end, an applicant is required to explain prior conduct that may impact character, fitness or financial responsibility. N.J.S.A. 17:22A-32A(a)(2) and N.J.S.A. 17:22A-40(a)(16). The fact that Orloff misappropriated client funds during a time of personal financial instability calls into question his character, fitness and financial responsibility." [No citation provided.] Proposed Conclusion: The applicable law requires DOBI to make an inquiry into an applicant's current fitness for licensure; to this end, while taking into account an applicant's prior fraudulent and/or dishonest conduct, must also consider evidence of that applicant's rehabilitation prior to granting or denying licensure.
- h) "Orloff's argument fails for two reasons: disbarred attorneys are not a suspect class and there is no fundamental constitutional right to a professional license...It is therefore not necessary to consider Orloff's claim that there is no legitimate state interest in evaluating the fitness of disbarred attorneys to hold insurance licenses differently from the manner in which DOBI evaluates other persons who have committed acts of untrustworthiness and fraud." Initial

Decision at 11. Proposed Conclusion: DOBI's refusal to review Orloff's current fitness to be licensed in the same manner of review afforded ex-offenders and those seeking reinstatement after having committed acts involving fraud and/or dishonesty violates his federal and state due process and equal protection rights.

[Orloff's Exceptions at 3-4.]

Orloff states that the denial of his insurance producer application impedes his employment opportunity in the insurance industry, and contrary to the ALJ's legal determinations, involves a constitutionally protected right subject to Federal and State due process and equal protection analysis because the Department failed to apply the factors set forth under N.J.A.C. 11:17E-1.4(i) and N.J.A.C. 11:17D-2.17. Id. at 5. Orloff asserts that under Barone v. Dept. of Human Services, Div. of Medical Assistance and Health Services, 107 N.J. 355 (1987), a three-tier equal protection analysis is required. As the instant matter does not implicate a suspect class or a fundamental right, the statutes at issue must be "rationally related to the achievement of a legitimate state interest". Orloff's Exceptions at 5 (citing Barone, 107 N.J. at 365). Orloff argues that here, the Department's explanation for excluding Orloff from the same analysis applied to ex-offenders under N.J.A.C. 11:17E-1.4(i) is because he has never been convicted of a crime for which these statutes were designed to address. Orloff's Exceptions at 6. Similarly, Orloff states that the Department's explanation for excluding Orloff from the same analysis applied to those seeking reinstatement under N.J.A.C. 11:17D-2.17 is because he never held a license to begin with. Ibid.

Citing the dissenting opinion in Barone, Orloff argues that the "benefit" of which he is being deprived is the equal application of the "current fitness" test set forth in N.J.A.C. 11:17E-1.4(i) and N.J.A.C. 11:17D-2.17. Ibid. Orloff highlights relevant portions of the regulations at issue: N.J.A.C. 11:17-2.14 (the Department shall specify the reason for denial of licensure),



N.J.A.C. 11:17D-2.17 (sets forth the requirements for reinstatement of licensure after revocation or suspension, including the submission of an affidavit detailing whether restitution has been made and what improvements the applicant has made to their reputation during period of revocation; the submission of a report from a probation officer if the applicant was convicted of a crime; and that the Commissioner shall review the application to determine if reinstatement is warranted), and N.J.A.C. 11:17E-1.4(i) (sets forth the factors to be considered in the determination of granting a waiver for license to participate in the business of insurance for ex-offenders convicted of crimes involving fraud or dishonesty). Id. at 7-8.

Orloff provides that he is similarly situated to these two groups: those convicted of a crime involving fraud or dishonest under N.J.A.C. 11:17E-1.4(i) and those seeking reinstatement after committing fraudulent or dishonest acts under N.J.A.C. 11:17D-2.17. Id. at 8. Orloff contends that the Initial Decision incorrectly suggests that Orloff is appealing his licensure denial based solely on the fact he is similarly situated to those contemplated under N.J.A.C. 11:17E-1.4(i). Ibid. Rather, Orloff asserts that he is also appealing his licensure denial on the grounds that the Department failed to consider those same factors applied to individuals seeking reinstatement after periods of suspension and revocation under N.J.A.C. 11:17D-2.17. Ibid. Orloff emphasizes that those seeking reinstatement must apply for licensure as though they were applying for licensure as an initial applicant, therefore, an applicant seeking reinstatement should be subject to the same standards of fitness as individuals like Orloff. Ibid. Orloff states that there is no articulable rational basis for excluding him from consideration under either N.J.A.C. 11:17E-1.4(i) and N.J.A.C. 11:17D-2.17.

Orloff notes that while the Department could still find him ineligible for licensure after considering the factors that he demands, the Department's stated reason for the denial of his

application is clearly arbitrary and capricious, as it is impossible to determine how much consideration was given to his efforts at rehabilitation. Id. at 8. Orloff argues that a specific factor by factor consideration would be necessary to overcome the appearance of arbitrariness or capriciousness. Id. at 9. Furthermore, Orloff asserts that neither the Department nor the ALJ has provided a rational basis as to why Orloff's application has not been considered under the criteria set forth under either N.J.A.C. 11:17D-2.17 or N.J.A.C. 11:17E-1.4(i); and he asserts that this is because no rational basis exists. Id. at 9-10.

In addition, Orloff states that the conclusion of the Initial Decision is both factually and legally flawed in that it is based on a conclusory statement that appears to be its foundation and premise.<sup>9</sup> Orloff asserts that these two statutory provisions read together are fundamentally flawed, as why would an applicant's current fitness be determined by the Department only evaluating past conduct and ignoring present circumstances when provisions are in place to analyze and review the current circumstances of the applicants as they apply. Id. at 10. Orloff argues that to do so would provide convicted criminals and those seeking reinstatement of an insurance producer's license the right to a detailed and enumerated analyses of their current fitness to hold a license while depriving the same to Orloff. Ibid.

Orloff asserts that his appeal on the basis of the unconstitutionality of these statutory provisions will be "intensely unpopular among the bureaucratic machinery designed to uphold the status quo", however, Orloff states that it is constitutionally repugnant to permit disbarred and/or suspended attorneys any less right to consideration than convicted felons or those seeking

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<sup>9</sup> "The applicable law requires DOBI to make an inquiry into an applicant's current fitness for licensure; to this end, an applicant is required to explain prior conduct that may impact character, fitness or financial responsibility. N.J.S.A. 17:22A-32(a)(2) and N.J.S.A. 17:22A-40(a)(16). The fact that Orloff misappropriated client funds during a time of personal financial instability calls into question his character, fitness and financial responsibility." Initial Decision at 8.

reinstatement of an insurance producers license. Id. at 11. Orloff also states that he is of the opinion that the rigor of the bar reinstatement process, where his license to practice law has been reinstated, is more thorough and competent in determining Orloff's current fitness, as it places him in a "much higher level of trust with the public" as an attorney than that of an insurance producer. Ibid. Again, Orloff asserts this is because no rational basis for this distinction exists. Ibid.

Orloff notes the ALJ's speculation that had evidence of Orloff's rehabilitation been considered by the Department, it may have found him eligible for licensure. Id. at 11 (citing Initial Decision at 9). Orloff goes on to point out that the ALJ "was more than willing to further speculate as to the grounds for Orloff's future disqualification from licensure" and emphasizes footnote 5 of the Initial Decision.<sup>10</sup> Orloff asserts that the ALJ explicitly rejects the Supreme Court's ruling in In re Wilson. Further, Orloff states that the ALJ "blithely dismissed the role of the Courts...and, by extension, the role of OAL Judges by abdicating the responsibility" to rule on the constitutionality of statutes enacted by the Legislature. Id. at 12.

Orloff reiterates that the ALJ misunderstood Orloff's equal protection argument by finding disbarred attorneys are not members of a suspect class. Rather, Orloff asserts that a "rational basis test" applies in this matter, and that the ALJ has "completely ignored her duty to review whether the statutory provisions at issue are rationally related to any legitimate governmental purpose". Id. at 12.

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<sup>10</sup> Footnote 5 states: "It may be that the reasons given by the Supreme Court of New Jersey when permanently disbarred Orloff would still be enough for [the Department] to deny Orloff an insurance producer license, even after conducting an inquiry such as found in N.J.A.C. 11:17E-1.4." Initial Decision at 9.

In closing, Orloff cites Dunston v. Dep't. of Law & Public Safety, Div. of Gaming Enforcement<sup>11</sup> to bolster his argument that the denial of his licensure without consideration of factors analogous to those enumerated in the RCOA violates both the expressed and implied legislative policy of considering the rehabilitation of individuals who have previously committed acts involving fraud and dishonesty. Id. at 13. Dunston had committed acts involving fraud and/or dishonesty that did not result in a criminal conviction, however, Dunston's casino license was subsequently denied renewal based on this conduct, pursuant to N.J.S.A. 5:12-86(g)<sup>12</sup>. Ibid. The Appellate Court reversed Dunston's denial and remanded the matter back to the Casino Control Commission for entry of an order approving the license renewal based on the grounds that Dunston was able to demonstrate rehabilitation pursuant to N.J.S.A. 5:12-90(h)<sup>13</sup>. Id. at 14 (citing Dunston, 240 N.J. Super. at 61-62). Orloff argues that based on this finding, application of rehabilitation to individuals who had committed, but had not been convicted of, crimes involving fraud and/or dishonesty was surely a legitimate concern of the New Jersey legislature." Id. at 14.

To conclude, Orloff asserts that the Department's denial of his licenses application, without, at the very least, affording him both the express and implied legislative policy of remedial effect of his rehabilitation provides additional grounds and further support for all previously stated grounds for reversal of the denial of Orloff's insurance producer application. Ibid.

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<sup>11</sup> Orloff incorrectly cites Dunston v. Dep't. of Law & Public Safety, Div. of Gaming Enforcement at 240 N.J. 535 (1990), the correct citation is 240 N.J. 53 (1990).

<sup>12</sup> N.J.S.A. 5:12-86(g) provides that the Casino Control Commission may disqualify an applicant for licensure for acts that would constitute enumerated violations of New Jersey's criminal code, even if the conduct did not result in a criminal conviction.

<sup>13</sup> N.J.S.A. 5:15-90(h) provides that an applicant for casino licensure will not be denied on the basis of the commission of any acts that would constitute a violation of N.J.S.A. 5:12-86(g) provided that the applicant has affirmatively demonstrated rehabilitation, as evidenced by factors enumerated therein and analogous to those enumerated in the RCOA.

### **Department's Reply**

As it relates to the findings of fact that Orloff argues should have been included in the Initial Decision, the Department argues that the ALJ found all relevant facts and that the Initial Decision does not need to include every single fact concerning Orloff in the Initial Decision. Department's Reply at 2. Further, the Department asserts that these "facts" are actually argumentative. Ibid. In addition, the Department states that the ALJ considered Orloff's argument that he had been rehabilitated, but acknowledges that his past misconduct calls into question his current character and fitness to hold an insurance producer license. Id. at 3 (citing Initial Decision at 8-9).

As it relates to the conclusions of law to which Orloff excepts to, the Department asserts that the proper criteria were used to evaluate Orloff's application, and that based on that proper criteria, his application was denied. Id. at 3. Regarding Orloff's argument that the RCOA factors and the factors set forth in N.J.A.C. 11:17E-1.4 should be applied to him because "there is no reason to apply differing standards to ex-offenders and Orloff", the Department asserts that courts must look to the plain meaning of the statute or regulation and not engage in conjecture that will subvert its plain meaning. Id. at 4 (citing US Bank, N.A. v. Hough, 210 NJ 187, 199 (2012)). The Department notes Orloff's admission that "he does not fit into the two categories of individuals explicitly earmarked for rehabilitation" and argues that this cannot be interpreted to mean that the Legislature intended for individuals like Orloff to be affirmatively excluded from such considerations. Id. at 4 (citing Orloff's Exceptions at 13). The Department concludes that a plain reading of the RCOA and N.J.A.C. 11:17E-1.4 are clear, that is, these provisions do not apply to Orloff. Id. at 4.

Orloff argues that N.J.A.C. 11:17D-2.7, which applies to individuals seeking reinstatement of a license that has been revoked or suspended, should apply to Orloff, as he is similarly situated

to a revoked licensee. Ibid. The Department contends that this assertion has no basis in the law, as Orloff never had a license. Ibid. Thus, the Department states that the ALJ correctly concluded that the Department used the proper criteria as set forth in N.J.S.A. 17:22A-32(a)(2) and N.J.S.A. 17:22A-40(a)(16) in considering Orloff's application. Id. at 5.

The Department further contends that the ALJ correctly found Orloff's due process claim was without merit as Orloff failed to show that he had been deprived of an interest in property without due process. Id. at 5 (citing Initial Decision at 9-10). Orloff never held an insurance producer license in the State of New Jersey, thus he does not have any property interest in an insurance producer license. Ibid. The Department asserts that the ALJ correctly found Orloff's equal protection claim was without merit. Id. at 5 (citing Initial Decision 10-11). The Department asserts that to prevail on an equal protection claim under the Federal and State equal protection clauses, Orloff must show that he is a member of a suspect class. Id. at 6 (citing Doe v. Portiz, 142 N.J. 1 (1992)). The Department states that the ALJ correctly concluded that "disbarred attorneys are not a suspect class and there is no fundamental constitutional right to a professional license". Id. at 6 (citing Initial Decision at 10-11).

In conclusion, with respect to the other arguments raised in Orloff's exceptions, the Department asserts that N.J.A.C. 1:1-18.4(c) "clearly prohibits a party from presenting any evidence not previously presented in a filed exception". Id. at 6. The Department states that any arguments or case law that are not part of the record and was not before the ALJ should not be considered. Id. at 6-7. Finally, the Department argues that notwithstanding the prohibition of newly introduced evidence as set forth in N.J.S.A. 1:1-18.4, none of the additional case law or arguments presented by Orloff in his exceptions should have any effect on the ALJ's conclusions.



Id. at 7. In conclusion, the Department states that the ALJ's conclusions should be affirmed in their entirety. Ibid.

### **DETERMINATION AND ORDER**

After having carefully reviewed the Initial Decision, the exceptions and responses thereto, and the entire record herein, I ADOPT the findings and determinations made by the ALJ in the Initial Decision.

#### **Summary Decision Standard**

As noted by the ALJ, N.J.A.C. 1:1-12.5(b) provides the standard to determine whether summary decision should be granted in a contested case. Specifically, the rule states that a summary decision may be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." Ibid. The rule also provides that "when a motion for summary decision is made and supported, an adverse party, in order to prevail must, by responding affidavit, set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." Ibid.

Therefore, I concur with the ALJ's finding that summary decision is the appropriate remedy. Based on a review of the record and the documentary evidence presented, I concur and ADOPT the ALJ's findings that Orloff failed to adduce evidence that creates a genuine issue as to any material fact challenged and that grant of summary decision to the Department is appropriate in this matter.

#### **The Standard Applicable to Orloff's Application**

The standard to review Orloff's application is set forth in N.J.S.A. 17:22A-32(a)(2), which states that any applicant for an insurance producer license may not have committed any act that is

a ground for denial, suspension or revocation set forth under N.J.S.A. 17:22A-40. Pursuant to N.J.S.A. 17:22A-40(a)(16), the Commissioner may refuse to issue an insurance producer's license to individuals who have committed a fraudulent act.

Here, it is undisputed that while licensed as an attorney, Orloff committed an act that is the grounds for the denial of his application pursuant to N.J.S.A. 17:22A-32(a)(2) N.J.S.A. 17:22A-40. Specifically, Orloff misappropriated client funds. In February 2010, in his capacity as an attorney, Orloff requested that his former law firm disburse \$6,500 in settlement funds for a client, to him, for deposit into his own attorney escrow account. Initial Decision at 2. The firm sent Orloff a check made payable to Orloff and his client. Id. at 3. Without contacting his client, Orloff admits to endorsing both his name and his client's name onto the check without permission to do so and depositing the check into his escrow account. Ibid. Over the course of the next year, Orloff was not contacted by his client, nor did Orloff make any effort to try and contact or locate the client for disbursement of his or her funds. December 18, 2019 Letter from Orloff at 2. In December 2010 and January 2011, Orloff admits to finding himself in financial difficulty and knowingly and intentionally making two withdrawals totaling \$3,000 of his client's funds from his attorney escrow account to Orloff's personal account. Ibid. In March 2011, Orloff was contacted by his client, and, at that point, Orloff replenished the funds he misappropriated and paid the client the entire amount owed. Ibid. Orloff did not disclose to his client that he had made the two withdrawals without his knowledge or consent. Ibid. Upon learning of the unauthorized withdrawals, the client filed a civil suit against Orloff, which was later settled. Initial Decision at 3.

On September 18, 2016, the Supreme Court of New Jersey deemed that Orloff's conduct, based on his unethical conduct in the Commonwealth of Pennsylvania, constituted violations of

New Jersey's RPC's, including: failure to communicate with a client pursuant to RPC 1.4(b); the knowing misappropriation and commingling of funds pursuant to RPC 1.15(a); failure to promptly disburse funds to a client pursuant to RPC 1.15(b); and conduct involving dishonesty, fraud, deceit, or misrepresentation pursuant to RPC 8.4(c). In re Orloff, 227 N.J. 321 (2017). It is on the basis of this conduct that the Department denied Orloff's application, and not solely due to disbarment in New Jersey resulting from such conduct. Indeed, attorneys and insurance producers are held to a high standard of conduct. Comm'r of the New Jersey Dep't of Banking & Ins. v. Pino, 2003 N.J. AGEN Lexis 555 (Sept. 11, 2003). "Both insurance producers and attorneys are held to high standards of integrity and trustworthiness. Id. at 15. The Supreme Court has also held that the knowing misappropriation of client funds will generally result in disbarment and that mitigating factors would rarely override the requirement of disbarment. In re Wilson, 81 N.J. 451, 453 (1979). Orloff has violated the rules guiding the legal profession by knowingly misappropriating and commingling of client funds and failing to promptly disburse funds to a client.

#### **The Standards Proposed by Orloff Do Not Apply to His Application**

Orloff argues that although he was not criminally convicted for the fraudulent conduct underlying his permanent disbarment from the practice of law in the State of New Jersey and is not required to seek a waiver pursuant to 18 U.S.C. §1033, the factors set forth in N.J.A.C. 11:17E-1.4(i) and the RCOA should be considered as it relates to his application.

As discussed above, pursuant to 18 U.S.C. §1033, no person having been convicted of a felony involving dishonesty of a breach of trust shall engage in the business of insurance without having first obtained the written consent of the Commissioner and his or her designee. In order to satisfy this requirement, said person must apply for a waiver pursuant to N.J.A.C. 11:17E-1.1 to -1.7. N.J.A.C. 11:17E-1.4(i) provides that in determining whether to grant said waiver, the

Commissioner must consider the factors set forth in the RCOA at N.J.S.A. 2A:168A-1. These factors include the nature and duties of the license for which the person is applying; the nature and seriousness of the offense; the circumstances under which the offense occurred; the date of the offense; the age of the person at the time the offense occurred; whether the offense was isolated; social conditions that may have contributed to the offense; evidence of rehabilitation; evidence of a pardon or expungement; payment of restitution and other fines imposed by the court, and other factors the Commissioner deems appropriate. N.J.S.A. 2A:168A-2.

In this matter, Orloff is not required to seek a waiver pursuant to 18 USC §1033 and the RCOA is not applicable because Orloff was not convicted of a felony involving a breach of trust or dishonesty. Therefore, this is not the standard that is used by the Department in considering his application for licensure. The ALJ held accordingly, finding that Orloff's proposed application of our current laws and regulations would require statutory revisions by the Legislature and not a matter to be determined by OAL. Initial Decision at 9. I concur with the ALJ and ADOPT the ALJ's findings.

I note, as stated in the November 27, 2018 letter issued by the Department's Licensing and Insurance Education Section ("Denial Letter"), the Department appropriately elected to deny Orloff's application pursuant to N.J.S.A. 17:22A-40(a), which bars the issuance of licenses to individuals who have committed a fraudulent act. Denial Letter at 1. Furthermore, the Department stated that Orloff's conduct underlying his permanent disbarment issued by the Supreme Court of New Jersey effective January 3, 2017, which was based on Orloff's failure to communicate with a client, the knowing misappropriation and comingling of funds, the failure to promptly disburse funds to a client, and conduct involving dishonesty, fraud, deceit, or misrepresentations, together with his permanent disbarment and the removal of his name from the New Jersey roll of attorneys

was considered in the Department's decision to deny this application. Ibid. The Denial Letter was issued by the Department's Licensing and Insurance Education Section, which is responsible for reviewing applications for licensees and determine whether the individual is suitable for the nature and duties of the license for which the person is applying. Further, in this case, the documentary evidence provided establishes that the Department has considered the nature and seriousness of Orloff's offenses, as it is clearly the stated basis of its denial. Ibid. In contemplating the nature and seriousness of Orloff's offenses, Orloff submitted a Letter of Explanation on August 21, 2018 wherein Orloff details the the circumstances under which the offense occurred, the date of the offense, the age of the person at the time the offense occurred, whether the offense was isolated, the social conditions that may have contributed to the offense, evidence of rehabilitation, and the payment of restitution. McDougal Cert., ¶5, Ex. E. The Letter of Explanation and Exhibits provided by Orloff, and considered by McDougal, discusses each of the factors Orloff argues should apply in consideration of his application. After review and consideration of this documentation, the Department's Licensing and Insurance Education Section decided to deny Orloff's request of licensure. McDougal Cert., ¶16, Ex. L. In conclusion, Orloff's argument that proper consideration was not given to his application is without merit.

Furthermore, I agree with the Department's assertion that courts must look to the plain meaning of the statute or regulation and not engage in conjecture that will subvert its plain meaning. Department's Reply at 4. The RCOA is intended to address the rehabilitation of convicted offenders. N.J.S.A. 2A:168A-1. Orloff admits that he is not a convicted felon applying for a waiver pursuant to 18 U.S.C. §1033. Therefore, the RCOA and the factors set forth in N.J.A.C. 11:17E-1.4(i) are not the applicable standard in this instance.

Similarly, Orloff argues that N.J.A.C. 11:17D-2.17, which applies to individuals seeking reinstatement of licenses have been revoked or suspended, should apply to himself as he is similarly situated to an individual whose license has been revoked. Orloff's Exceptions at 8. Orloff cites specific provisions of N.J.A.C. 11:17D-2.17(c)(4) (referring to the consideration of restitution), (7) (referring to a written statement from the applicant demonstrating improvement to their reputation during revocation); N.J.A.C. 11:17D-2.17(d) (the submission of a report from a probation officer if the applicant is convicted of a crime) and N.J.A.C. 11:17D-2.17(e) (the Commissioner shall review the application to determine if reinstatement is warranted). Again, I concur with the ALJ and find that because Orloff never had a license, the Department used the proper criteria as set forth in N.J.S.A. 17:22A-32(a)(2) and N.J.S.A. 17:22A-40(a)(16) in considering Orloff's application. Further, I note that as stated above and in the Denial Letter, upon review of the documentation provided by Orloff to the Department, including submissions related to these factors, the Department denied Orloff's application for licensure. Therefore, I conclude that, Orloff's argument that proper consideration under N.J.A.C. 11:17D-2.17 was not given to his application is without merit.

#### **Orloff's Exceptions**

In his exceptions, Orloff provides a list of nine factual findings that were "omitted" from the Initial Decision. Orloff's Exceptions at 1-2, see fn. 8. The Department argues that the ALJ found all relevant facts and that the Initial Decision need not include every single fact introduced. Department's Reply at 2. I agree. Further, Orloff fails to state how his proposed facts are relevant. Moreover, in several instances, the "facts" cited by Orloff are argument.

Similarly, Orloff provides a list of nineteen documents "submitted by the Respondent and not itemized in the Initial Decision". Orloff Exceptions at 2-3, see fn. 9. The Department argues



that the ALJ acknowledges the submission of this evidence and states that the ALJ considered Orloff's rehabilitation by acknowledging that his past misconduct may call into question his character, fitness and financial responsibility. Department's Reply at 3 (citing Initial Decision at 8-9). Pursuant to N.J.A.C. 1:1-18.3, a written initial decision shall contain several elements, which may be "combined and need not be addressed separately". In this matter, the ALJ cites to Orloff's August 26, 2019 Brief in Support for Motion of Summary Decision ("Orloff's August 26, 2019 Brief") and the Department's August 23, 2019 Brief in Support for Motion of Summary Decision ("Department's August 23, 2019 Brief") in rendering legal conclusions in this matter. Initial Decision at 3, 4, 6-11. Orloff's August 26, 2019 Brief includes Exhibits A through E and the Department's August 23, 2019 Brief includes Exhibits A through D and the annexation of the McDougal Cert. and associated Exhibits A through N. Orloff's Exhibits A and D, annexed to Orloff's August 26, 2019 Brief, contains each of the documents itemized in Orloff's exceptions. Orloff does not request the itemization of any other documents provided with his submission in Exhibits A, B, C, or E or the itemization of exhibits submitted by the Department. In addition, the Department's submission also includes many of the itemized documentation Orloff indicates in his exceptions. As N.J.A.C. 1:1-18.3 states that the elements set forth need not be addressed separately, I conclude that separate itemization of the documents cited is necessary under N.J.A.C. 1:1-18.3(c)(11).

In his exceptions, Orloff provides a list of eight specific conclusions of law made by the ALJ, quoting directly from the Initial Decision, and provides proposed conclusions of law which he maintains are supported by his arguments. Orloff Exceptions at 3-4, see fn. 10. Orloff's exceptions relating the ALJ's conclusions of law raise the same issues already raised with and addressed by the ALJ in the Initial Decision. Further, each of these issues has been addressed in

this Final Decision and Order. Therefore, no proposed conclusion submitted by Orloff has been adopted in this Final Decision and Order and I concur with and ADOPT the ALJ's conclusions of law.

With respect to the the Department's assertion that N.J.A.C. 1:1-18.4(c) "clearly prohibits a party from presenting any evidence not previously presented in a filed exception", thus any arguments or case law presented by Orloff in his exceptions are not part of the record and not before the ALJ should not be considered, I agree that new evidence presented through exceptions is prohibited. However, a review of Orloff's exceptions does not appear to introduce new evidence that is barred. As set forth above, however, because the arguments Orloff presents are not supported by the law, I find that they do not provide a basis upon which I should reject or modify the factual findings and legal conclusions made by the ALJ in the Initial Decision.

#### **Orloff's Constitutional Arguments**

In his submissions and again in his exceptions, Orloff argues that the Department's failure to apply the factors set forth under N.J.A.C. 11:17E-1.4(i) and N.J.A.C. 11:17D-2.17 to his insurance producer application violates his right to due process and equal protection under the United States and New Jersey Constitution.

As it relates to Orloff's due process argument, Orloff states that the right to an employment opportunity is protected against arbitrary governmental interference, therefore, the denial of his insurance producer license application impedes his employment opportunities in the insurance industry. The ALJ found that Orloff must show that he has a secured interest in a specific benefit. Initial Decision at 10 (citation omitted). The precedent in New Jersey is clear, the expectation of obtaining an insurance producer license is not a property interest in a license. Graham v. N.J. Real Estate Comm., 217 N.J. Super. 130, 135 (1987) (a protected right in a professional license comes

into existence only after a license has been obtained)). Because Orloff never had, and therefore never lost, a license to sell insurance, I concur and ADOPT the ALJ's findings that Orloff cannot substantiate a claim for deprivation of due process.

As it relates to Orloff's equal protection argument, Orloff states that the denial of his application for licensure deprives him of a benefit of a "current fitness" analysis applied to convicted felons or those seeking reinstatement of revoked or suspended licenses in violation of his right to equal protection. The ALJ found that Orloff must show that the government agency imposed a burden, or conferred a benefit, on one class of persons to the exclusion of others, and/or interfered with a fundamental right. Initial Decision at 10 (citation omitted). The ALJ noted Orloff's argument is that he is part of a class of disbarred attorneys who has suffered discrimination. Further, Orloff argued that the conduct which resulted in a finding that he was not eligible for an insurance producer license would have made him eligible for consideration for licensure, despite that conduct, had he only been a member of the class of convicted felons. Id. at 11. The ALJ found that Orloff's argument fails for two reasons: (1) disbarred attorneys are not a suspect class and (2) there is no fundamental constitutional right to the professional license at issue. Ibid. In his exceptions, Orloff states that the ALJ mischaracterized his argument that he is a member of a suspect class on the grounds that he is a disbarred attorney, rather, that he is similarly situated to ex-offenders seeking waivers to obtain licensure as an insurance producer. Orloff's Exceptions at 1. Orloff continues to rely in large part on a dissenting opinion in Barone, which does not have persuasive authority here, that a rational basis test applies, and that the regulations at issue must be rationally related to the achievement of a legitimate State interest. Id. at 5-6. As discussed at length, Orloff is seeking an insurance producer license in the State of New Jersey. The Producer Act states that that the Commissioner may refuse to issue an insurance producer's

license to individuals who have committed a fraudulent act. The commission of a fraudulent act relates adversely to the license sought as the insurance industry is strongly affected with a public interest, and the Commissioner is charged with the duty to protect the public welfare and to instill public confidence in both insurance producers and the insurance industry.

Licensed insurance producers act in a fiduciary capacity. In re Parkwood Co., 98 N.J. Super. 268, 268 (App. Div. 1963). Specifically, an insurance producer collects money from insureds and acts as a fiduciary to both the consumers and the insurers they represent. Commissioner v. Andrade, OAL Dkt. No. BKI 09148-18, Initial Decision (01/24/2019), Final Decision and Order (04/04/2019). Insurance premiums held on behalf of an insurer are trust funds to be received, held, and disbursed in a fiduciary capacity. Bohlinger v. Ward & Co., 34 N.J. Super. 583 (App. Div. 1955), *aff'd*, 20 N.J. 331 (1956). In this matter, it is clear that the commission of a fraudulent act relates adversely to the license sought, as the courts have long recognized that the insurance industry is strongly affected with a public interest, and that the Commissioner is charged with the duty to protect the public welfare and to instill public confidence in both insurance producers and the insurance industry.

“When insurance producers breach their fiduciary duties and engage in fraudulent practices and unfair trade practices, the affected insurance consumers are financially harmed and the public’s confidence in the insurance industry as a whole is eroded.” Commissioner v. Fonseca, OAL Dkt. No. BKI 11979-10, Initial Decision (08/15/11), Final Decision and Order (12/28/11). See, Sheeran v. Nationwide Mutual Ins. Co., 80 N.J. 548, 559 (1979). Since insurance agents act in a fiduciary capacity, the qualities of trustworthiness, integrity and competency are of significant importance to the occupation and of paramount concern, since an insurance producer collects monies from insureds. A licensed insurance producer is better placed than a member of the public

to defraud an insured. As such, a producer is held to a high standard of conduct and should fully understand and appreciate the effect of fraudulent or irresponsible dealing on the industry and on the public. This is clearly the rational basis that Orloff seeks. Therefore, Orloff's assertion that the Department's failure to apply the factors set forth under N.J.A.C. 11:17E-1.4(i) and N.J.A.C. 11:17D-2.17 to his application is a violation of his equal protection rights is unsupported.

Lastly, Orloff asserts that Dunston v. Dep't. of Law & Public Safety, Div. of Gaming Enforcement, 240 N.J. Super. 53 (1990) provides precedent instructive in this case. However, the instant matter is distinguishable from that presented in Dunston in a number of significant ways. Most importantly, the license at issue in Dunston was for an employee to clean a casino floor from 12:00AM to 8:00PM. In the instant matter, the license sought by Orloff is for an insurance producer. As discussed above, insurance producer licensees represent the insurance industry in a fiduciary capacity and are therefore, held to a higher standard. To state that the two positions are analogous demonstrates the applicant's gross misunderstanding of the duties bestowed upon him by licensure.