

STATE OF NEW JERSEY  
DEPARTMENT OF BANKING AND INSURANCE

OAL DOCKET NO.: BKI-05997-18  
AGENCY DOCKET NO.: OTSC #E17-115

MARLENE CARIDE,<sup>1</sup> )  
ACTING COMMISSIONER, )  
NEW JERSEY DEPARTMENT )  
OF BANKING AND INSURANCE, )  
 )  
Petitioner, )  
 )  
v. )  
 )  
RONALD M. PATETTA )  
 )  
Respondent )

FINAL DECISION AND ORDER  
AS TO COUNTS ONE  
THROUGH FOUR<sup>2</sup>

This matter comes before the Commissioner of the Department of Banking and Insurance (“Commissioner”) pursuant to the authority of N.J.S.A. 52:14B-1 to -31, N.J.S.A. 17:1-15, the New Jersey Producer Licensing Act of 2001, N.J.S.A. 17:22A-26 to -48 (“Producer Act”), and all powers expressed or implied therein, for the purposes of reviewing the June 2, 2021 Initial Decision (“Initial Decision”) of Administrative Law Judge Hon. Jacob S. Gertsman (“ALJ”). In the Initial Decision, the ALJ granted a Motion for Summary Decision brought by the Department

---

<sup>1</sup> At the time this case was filed on April 26, 2018, Marlene Caride had not been sworn in. Commissioner Caride was sworn in on June 27, 2018.

<sup>2</sup> Counts Five through Seven of Order to Show Cause #E17-115 are related to the Respondent’s real estate salesperson license and are not related to the Respondent’s insurance producer license. A Final Decision and Order as to Counts Five through Seven will be addressed by an Order issued separately by the New Jersey Real Estate Commission, as the regulator of that license. Because the Respondent’s New Jersey insurance producer license is inactive and his New Jersey Real Estate license was active, the New Jersey Real Estate Commission had primary interest in this matter pursuant to N.J.A.C. 1:1-17.8.

of Banking and Insurance (“Department”) on all Counts<sup>3</sup> alleged in the Department’s Order to Show Cause No. E17-115 (“OTSC”), and recommended revocation of the Respondent’s insurance producer license and \$10,000 in fines and \$950 for the costs of investigation as to the violations of the Producer Act.

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

On or about December 7, 2017 the Department issued the OTSC against Ronald M. Patetta (“Respondent”) seeking to revoke Respondent’s insurance producer license, and impose civil monetary penalties and costs of investigation for violations of the Producer Act. In the OTSC, the Department alleges that the Respondent engaged in the following activities in violation of the insurance laws of this State:

Count One: Patetta's conviction on charges of felony tax evasion constitutes violations of N.J.S.A. 17:22A-40(a)(6) and (16); and

Count Two: Patetta failed to notify the Commissioner within 30 days of his conviction for felony tax evasion, in violation of N.J.S.A. 17:22A-40(a)(2) and (18); and

Count Three: Patetta failed to obtain the written consent of the Commissioner before he engaged or participated in the business of insurance after he was convicted of felony tax evasion, in violation of 18 U.S.C. § 1033(e)(2) and N.J.S.A. 17:22A-40(a)(2) and (18); and

Count Four: Patetta failed to disclose that he was convicted of felony tax evasion or that he had voluntarily surrendered his insurance producer license on the insurance producer license renewal applications that he filed with the Department on October 27, 2014 and December 11, 2015, in violation of N.J.S.A. 17:22A-40(a)(1), (2), (3), (15), and (16).

On February 16, 2018, the Respondent filed an Answer to the OTSC, wherein the Respondent denied all of the allegations set forth in the OTSC and requested a hearing. The Department transmitted the matter as a contested case to the Office of Administrative Law

---

<sup>3</sup> As noted above, this Final Decision and Order relates solely to Counts One through Four.

(“OAL”) pursuant to N.J.S.A. 52:14B-1 to -31 and N.J.S.A. 52:14F-1 to -23, where it was filed on April 26, 2018.

After multiple status conferences and the completion of discovery, the Department filed a Motion for Summary Decision on May 17, 2019. Initial Decision at 3. The Respondent filed opposition to the Department’s motion on July 19, 2019, and the Department’s reply was filed on August 16, 2019. Ibid.

By order dated January 27, 2020, the ALJ granted a motion by Respondent’s counsel to be relieved as counsel for the Respondent. Ibid. On July 20, 2020, the Respondent notified the ALJ that he would be adopting the brief in opposition to the Department’s motion and proceeding pro se in this matter. Ibid. After additional status conferences, oral argument was held on October 8, 2020. Ibid. On November 4, 2020, the Respondent filed supplemental information regarding his ability to pay fines. Id. at 3, 24. The Department filed its response on December 1, 2020. Id. at 3.

On June 2, 2021, the ALJ issued an Initial Decision that granted summary decision to the Department on all counts of the OTSC. The ALJ recommended the revocation of the Respondent’s insurance producer license. Id. at 21, 26. The ALJ additionally recommended that the Respondent be fined \$10,000 for violations of the Producer Act and \$950 in costs of investigation. Id. at 26.

On June 16, 2021, the Respondent submitted Exceptions to the Initial Decision pursuant to N.J.A.C. 1:1-18.4(a). The Department, through its counsel Deputy Attorney General Telge N. Peiris, submitted a letter indicating that it was not filing exceptions.

### **ALJ’S FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS**

The ALJ noted that, pursuant to N.J.A.C. 1:1-12.5(b), a motion for summary decision requires analysis of whether “the papers and discovery which have been filed, together with

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.” Initial Decision at 12. Further, the ALJ stated that the New Jersey Supreme Court has explained that when deciding a motion for summary judgment under R. 4:46-2,

a determination whether there exists a “genuine issue” of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials present, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged dispute issue in favor of the non-moving party.

Initial Decision at 12. (citing Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995)).

Further, the ALJ stated that R. 4:46-2(c) provides further guidance regarding whether the Brill standard has been met in a case. Initial Decision at 12. R. 4:46-2(c) provides that:

[a]n issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact. Initial Decision at 12.

In light of this standard, the ALJ granted the Department’s Motion for Summary Decision.

The ALJ found that the Respondent was first granted a resident individual insurance producer license by the Department on August 5, 1993 and this license is currently inactive. Id. at 3, ¶1. On September 4, 1996, Patetta entered into a consent order with the Department for failing to disclose a conviction on a renewal application and was required to pay a fine of \$500 to the Department. Ibid., ¶ 2. On November 30, 2011, the Respondent was indicted on five counts of personal income tax evasion and five counts of willful subscription to a false tax return, for the years 2001, 2002, 2003, 2004, and 2005, in connection with income received from insurance employers that the Respondent did not report. Id. at 3-4, ¶3.

The ALJ further found that On December 20, 2011, Patetta submitted an application for the renewal of his resident producer license and disclosed to the Department that he was indicted on tax evasion charges by the Federal government. Id. at 4, ¶¶ 4-5. The Department renewed the Respondent's producer license effective January 1, 2012 through December 31, 2013. Ibid. at ¶6.

The ALJ found that on April 29, 2013, the Respondent pled guilty to one count of the Indictment and entered into a plea agreement with the U.S. Attorney's Office for the District of New Jersey. Id. at 4, ¶7. On December 16, 2013, the Court entered a Judgment of Conviction for Count Three of the Indictment, Attempt to Evade or Defeat Tax for 2003, in violation of 26 U.S.C. 7201. Ibid. at ¶8. Also, on December 16, 2013, the Respondent submitted an insurance producer request for license surrender/status change form seeking to surrender his New Jersey resident producer license. Ibid. at ¶9. On October 27, 2014, the Respondent submitted an application to renew his insurance producer license and indicated that he had not been convicted of a felony that he had not previously reported to the Department. Ibid. at ¶¶10-11. Based on the information provided by the Respondent, the Department processed his license renewal on October 27, 2014. Id. at 5, ¶ 12.

The ALJ further found that on December 11, 2015, the Respondent submitted an application to renew his insurance producer license and indicated that he had not been convicted of a felony that he had not previously reported to the Department. Ibid. at ¶¶13-14. Based on the information provided by the Respondent, the Department processed his license renewal on December 11, 2015. Ibid. at ¶ 15. The ALJ found that the Respondent's insurance producer license either expired, or went into inactive status on December 31, 2017. Ibid. at ¶16.

The ALJ found that the Respondent did not inform the Department of the Judgment of Conviction entered against him on December 16, 2013 when he submitted the surrender form to

the Department on that same day and failed to report the Judgment of Conviction to the Department. Id. at 9, ¶1-2. Further, the Respondent did not obtain a waiver under 18 U.S.C. § 1033 from the Department after the conviction was entered on December 16, 2013. Ibid. at ¶3.

As to Count One, the ALJ held that the Respondent's conviction for Attempt to Evade or Defeat Tax for 2003 violated N.J.S.A. 17:22A-40(a)(6) and (16) because the Respondent was convicted of a felony and engaged on a fraudulent act. Id. at 14, 21.

As to Count Two, the ALJ found that the Respondent did not inform the Department of the judgment of conviction entered on December 16, 2013 when he submitted the form to surrender his license. Id. at 14. He also failed to report his judgment of conviction on his subsequent renewal applications. Ibid. The ALJ found that the Respondent's argument that his conviction was "public knowledge" because his probation officer wrote the Real Estate Commission was "meritless." Id. at 15. The ALJ also found that the letter was sent by a third-party, the Respondent's probation officer, not the Respondent personally, and only mentions the guilty plea and not the conviction. Ibid. The ALJ found that "the statute plainly requires the Respondent to affirmatively notify the Department of the conviction, which he undisputedly failed to do." Ibid. Accordingly, the ALJ found that the Respondent violated N.J.S.A. 17:22A-40(a)(2) and (18). Id. at 15, 21.

As to Count Three, the ALJ found that the Respondent did not seek a waiver under 18 U.S.C. § 1033 after his conviction for Attempt to Evade or Defeat Tax for 2003. Initial Decision at 15. The ALJ rejected the argument that the Respondent was not aware he had to attain a waiver and was never told by the Department to do so. Ibid. The ALJ stated that the Respondent's "lack of awareness of the [the] statute does not relieve him of his obligation to comply with the waiver

requirement.” Ibid. Accordingly, the ALJ held that the Respondent violated 18 U.S.C. § 1033(e)(2)<sup>4</sup> and N.J.S.A. 17:22A-40(a)(2) and (18). Id. at 15, 21.

Lastly, as to Count Four, the ALJ found that the Respondent submitted renewal applications on October 27, 2014 and December 11, 2015. Id. at 15-16. He indicated on both of the renewal applications that he had not been convicted of a felony, which had not previously been reported to the Department. Ibid. Each time, the Department renewed his licenses based on the Respondent’s representations on his October 27, 2014 and December 11, 2015 renewal applications. Ibid. The ALJ held that the Respondent’s failure to disclose his conviction for tax evasion when he renewed his license in 2014 and 2015 constitutes providing “incorrect, misleading, incomplete, or materially untrue information in the applications.” Id. at 16. Further, the Respondent also intentionally withheld material information from the Department and made a material misstatement on an application for licensure. Ibid. Accordingly, the ALJ held that the Respondent violated N.J.S.A. 17:22A-40(a)(1), (2), (3), (15), and (16). Id. at 16, 21.

#### Penalties Recommended by the ALJ

As to the appropriate penalty, the ALJ noted that pursuant to the Producer Act, the Respondent’s license may be revoked. Id. at 19-20. Additionally, a penalty of not more than \$5,000 for the first violation, and a penalty of not more than \$10,000 for any subsequent violation, as well as reimbursement for the costs of investigation, may be imposed. Id. at 23, citing N.J.S.A. 17:22A-40(c). The ALJ noted that the Department retains its authority over the Respondent even though his license is no longer active. Id. at 20, citing N.J.S.A. 17:22A-40(d).

---

<sup>4</sup> The ALJ found that the Respondent violated 18 U.S.C. § 1033(c)(2). This appears to be a typographical error, as the OTSC charges a violation of 18 U.S.C. § 1033(e)(2).

The ALJ recommended that the Respondent's insurance producer license be revoked for violations contained in Counts One through Four of the OTSC. Id. at 21, 26.

As to monetary penalties, the ALJ noted that the Department requested a total of \$10,000 in fines and \$950 for the costs of investigation for the violations of the Producer Act. Id. at 24. Specifically, the ALJ noted that the Department sought \$0 for the violations at Count One; \$5,000 for the violation at Count Two; \$0 for the violation at Count Three; and \$2,500 each for the two violations in Count Four for a total of \$5,000 for Count Four. Id. at 23.

The ALJ applied the seven factors for determining monetary penalties set forth in Kimmelman v. Henkles & McCoy, Inc., 108 N.J. 123, 137-39 (1987). Id. at 24-26. These factors include: (1) the good faith or bad faith of the Respondent; (2) the Respondent's ability to pay; (3) the amount of profits obtained from the illegal activity; (4) injury to the public; (5) duration of the illegal activity or conspiracy; (6) existence of criminal actions; and (7) past violations. Id. at 24.

As to the first factor in Kimmelman, the good or bad faith of the Respondent, the ALJ stated that the Respondent demonstrated bad faith in failing to disclose his conviction to the Department on his October 27, 2014 and December 11, 2015 renewal applications. Ibid. The Respondent entered into a Consent Order with the Department in 1996 for the same violation, and should have been aware of this obligation. Ibid.

As to the second factor in Kimmelman, the ability to pay, the ALJ stated that after the oral argument, the ALJ directed the Respondent to submit proof of his income in support of his argument that he is unable to pay a civil monetary penalty. Ibid. On November 4, 2020, the Respondent submitted an e-mail which stated, "2020 YTD from Real Estate sales. \$25,360. Gross before allowable expenses and federal state and self employment taxes." Ibid. In response, the Department argued that the Respondent failed to provide income information in discovery. Id. at



24-25. Further, the Department argued, the Respondent's e-mail submission did not account for whether Respondent had any savings, assets, or income from prior years, did not establish an inability to pay, and was not a reflection of the Respondent's current financial status. Id. at 25. The ALJ agreed with the Department's arguments and stated that the Respondent did not establish an inability to pay. Ibid.

As to the third factor, the profits obtained, the ALJ stated that although the Respondent did not obtain a direct profit for the violations of Producer Act, his actions delayed any disciplinary action, which may have resulted in the revocation of his license. Ibid.

As to the fourth factor, injury to the public, the ALJ stated that the Department demonstrated injury to the public through the Respondent's disregard of important safeguards and protections for consumers. Ibid. Further, the Respondent's failure to be forthright with the Department on his October 27, 2014 and December 11, 2015 renewal applications is a violation of the fiduciary trust that is part of the insurance producer occupation. Ibid.

Regarding the fifth factor in Kimmelman, the duration of illegal activity, the ALJ found that the Respondent made misrepresentations in the renewal applications submitted to the Department on October 27, 2014 and December 11, 2015. Ibid. Taken together with the misrepresentations in the renewal applications the Respondent submitted to the Real Estate Commission on May 8, 2015, and on April 11, 2017, the unlawful conduct spans over three years. Ibid.

Regarding the sixth factor, the existence of criminal charges related to the matter, the ALJ noted while the Respondent was sentenced to a term of imprisonment for his conviction for felony tax fraud, "that does not alleviate his obligation to comply with the reporting requirements with the Department . . . as set forth in the Producer Act . . . ." Ibid.

For the final factor in Kimmelman, previous relevant regulatory and statutory violations, the ALJ found that the Respondent entered into a Consent Order with the Department in 1996 for failing to disclose a conviction on an application to renew his insurance producer license and was subject to a \$500 fine. Id. at 26. The ALJ stated that “it is clear that the prior violation did not deter him from failing to follow the reporting requirements that are plainly set forth in the statute.” Ibid.

Based upon the above analysis, the ALJ recommended that a civil monetary penalty in the total amount of \$10,000 and \$950 for the cost of investigation for the violations of the Producer was appropriate. Ibid. The ALJ did not state how the penalty was to be allocated among Counts One through Four of the OTSC.

### **EXCEPTIONS**

Under N.J.A.C. 1:1-18.4(a), Parties’ Exceptions were due on or before June 16, 2021. The Respondent filed timely exceptions (“Respondent Exceptions”). The Department, through counsel, submitted a letter indicating that it was not filing exceptions.<sup>5</sup>

#### **Respondent Exceptions**

The Respondent argues that his probation officer, who is not an “uninterested third party” because she is an officer of the Court, notified “the commissions” of his conviction by letter dated June 13, 2013. Respondent Exceptions at 1. The Respondent states that he received a letter dated August 16, 2013, from Joseph McDougal (“McDougal”), which indicates that the Department acknowledged receipt of the notification under N.J.S.A. 17:22A-47. Ibid. The Respondent

---

<sup>5</sup> The Department filed its Reply to Respondent’s Exceptions past the five-day deadline in N.J.A.C. 1:1-18.4(d). Accordingly, the Department’s Reply will not be considered in this Final Order. The Respondent filed a sur-reply to the Department’s Reply on July 21, 2021. The applicable regulations do not consider additional filings, and this filing was not considered.

attached this letter and acknowledged it was new evidence. Ibid. The Respondent states that he spoke to McDougal on the telephone on August 28, 2013 and McDougal informed him that he did not have to do anything else, and if the Respondent was incarcerated, he must surrender his license, which the Respondent did. Id. at 1-2. The Respondent states that he believed that this fulfilled his obligation when he surrendered his license on December 16, 2013, the date of his conviction. Id. at 2.

The Respondent states that in October 2014 he contacted “the commissions and asked what I needed to reinstate my licenses.” Id. at 2. He indicates that he was told to “answer the questionnaires and complete [his] credits.” Ibid. He was not told to get a waiver under 18 U.S.C. § 1033. Ibid. He states that he relied upon the advice given to him, and followed the instructions. Ibid. He states that he answered “no” to the question regarding if he had been convicted of felony on the renewal questionnaires because he interpreted the wording on the question to mean that he had to report convictions the Department was not aware of, and he believed that there was not any new criminal activity of which the Department was unaware. Ibid.

The Respondent also asks that the Commissioner consider his record as an insurance producer. Ibid. He states that he always upheld his fiduciary duty and he always treated his clients with “utmost respect, honesty, and integrity.” Ibid. He states that he has not been accused of harming the general public. Ibid.

Lastly, the Respondent asks that the Commissioner consider that he is 66 years old, on social security, and has spent his life in the insurance and real estate industry. Ibid.

### **LEGAL DISCUSSION**

The Department bears the burden of proving the allegations in an Order to Show Cause by a preponderance of the competent, relevant, and credible evidence. Atkinson v. Parsekian, 37 N.J.

143 (1962); In re Polk, 90 N.J. 550 (1982). The evidence must be such as would lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Preponderance may be described as: “the greater weight of credible evidence in the case not necessarily dependent on the number of witnesses, but having the greater convincing power.” State v. Lewis, 678 N.J. 47 (1975).

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 provision 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.

Based upon the Summary Decision standard discussed above, I concur with the ALJ that the Respondent failed to adduce evidence that creates a genuine issue of material fact and that summary decision is appropriate as to the allegations related to Counts One through Four of the OTSC.

#### Allegations Against the Respondent

Counts One through Four of the OTSC charge the Respondent with violations of the Producer Act, which governs the licensure and conduct of New Jersey insurance producer licensees and empowers the Commissioner to suspend or revoke the license of, and to fine, an insurance producer for violations of its provisions. The relevant counts are discussed below.

#### Count One

Count One of the OTSC alleges that the Respondent's conviction on charges of felony tax evasion constitutes violations of N.J.S.A. 17:22A-40(a)(6) and (16), which prohibit being convicted of a felony or crime of the fourth degree or higher and committing any fraudulent act. The ALJ found that the Respondent's conviction for Attempt to Evade or Defeat Tax for 2003 violated the Producer Act because Defendant was convicted of a felony and engaged on a fraudulent act. Initial Decision at 14, 21.

The evidence is undisputed that on December 16, 2013 the Respondent was convicted of Attempt to Evade or Defeat Tax for 2003, in violation of 26 U.S.C. 7201. Id. at 4, ¶8. This is a felony conviction. Id. at 14, quoting 26 U.S.C. 7201.

I concur with the ALJ and ADOPT the finding that the Respondent's conviction of Attempt to Evade or Defeat Tax for 2003, in violation of 26 U.S.C. 7201 constitutes a violation of N.J.S.A. 17:22A-40(a)(6) (being convicted of a felony or crime of the fourth degree or higher) and (16) (committing any fraudulent act).

### Count Two

Count Two of the OTSC alleges that the Respondent failed to notify the Commissioner within 30 days of his conviction for felony tax evasion, in violation of N.J.S.A. 17:22A-40(a)(2) and (18), which prohibit violating any insurance law or regulation and requires licensees to notify the Commissioner within 30 days of a conviction for any crime, indictment, or the filing of formal criminal charges.

The ALJ found that the Respondent did not inform the Department of the judgment of conviction entered on December 16, 2013 when he submitted the form to surrender his license. Initial Decision at 14. He also failed to report his judgment of conviction on his subsequent renewal applications. Id. at 15. The ALJ found that "the statute plainly requires the Respondent

to affirmatively notify the Department of the conviction, which he undisputedly failed to do.” Ibid. Accordingly, the ALJ found that the Respondent violated N.J.S.A. 17:22A-40(a)(2) and (18). Id. at 15, 21.

In his Exceptions, the Respondent argues that his probation officer, who is not an “uninterested third party” because she is an officer of the Court, notified “the commissions” of his conviction by letter dated June 13, 2013. Respondent Exceptions at 1. The Respondent states that he received a letter dated August 16, 2013, from McDougal which indicates that the Department acknowledged its receipt of the notification under N.J.S.A. 17:22A-47. Ibid. The Respondent attached this letter to his Exceptions and acknowledged it was new evidence. Ibid. The Respondent states that he spoke to McDougal on the telephone on August 28, 2013 and McDougal informed him that he did not have to do anything else, but if the Respondent was incarcerated, he must surrender his license, which the Respondent did. Id. at 1-2. The Respondent states that he believed that this fulfilled his obligation when he surrendered his license on December 16, 2013, the date of his conviction. Id. at 2.

The letter from McDougal is new evidence, and was not before the ALJ. Accordingly, it cannot be considered here. N.J.A.C. 1:1-18(c). I agree with the ALJ that the Respondent failed to notify the Department of his conviction within 30 days as required by N.J.S.A. 17:22A-40(a)(18). The letter from his probation officer that was sent to the Licensing Bureau of the New Jersey Real Estate Commission is dated June 13, 2013. This is more than 30 days after the Respondent pled guilty to one count of the Indictment and entered into a plea agreement with the U.S. Attorney’s Office for the District of New Jersey on April 29, 2013. Initial Decision at 4, ¶7. On December 16, 2013, the Court entered a Judgment of Conviction for Count Three of the Indictment, Attempt to Evade or Defeat Tax for 2003, in violation of 26 U.S.C. 7201. Ibid., ¶8. Although the

Respondent surrendered his insurance producer license that same day, he did not inform the Department of his conviction. Accordingly, I agree with the ALJ and find that the Respondent violated N.J.S.A. 17:22A-40(a)(2) (violating any insurance law or regulation) and (18) (failing to notify the Commissioner within 30 days of his conviction for any crime, indictment, or the filing of formal criminal charges).

### Count Three

Count Three of the OTSC alleges that the Respondent failed to obtain the written consent of the Commissioner before he engaged or participated in the business of insurance after he was convicted of felony tax evasion, in violation of 18 U.S.C. § 1033(e)(2) and N.J.S.A. 17:22A-40(a)(2) and (18), which prohibit violating any insurance law or regulation, and require certain persons to obtain the written consent to engage in the insurance business.

The ALJ found that the Respondent did not seek a waiver under 18 U.S.C. § 1033 after his conviction for Attempt to Evade or Defeat Tax for 2003. Id. at 15. The ALJ rejected the argument that the Respondent was not aware he had to attain a waiver and was never told by the Department to do so. Ibid. The ALJ stated that the Respondent's "lack of awareness of the [the] statute does not relieve him of his obligation to comply with the waiver requirement." Ibid. Accordingly, the ALJ held that the Respondent violated 18 U.S.C. § 1033(e)(2) and N.J.S.A. 17:22A-40(a)(2) and (18). Id. at 15, 21.

In his Exceptions, the Respondent states that in October 2014 he contacted "the commissions and asked what I needed to reinstate my licenses." Respondent Exceptions at 2. He indicates that he was told to "answer the questionnaires and complete [his] credits." Ibid. He was not told to get a waiver under 18 U.S.C. § 1033. Ibid. He states that he relied upon the advice given to him, and followed the instructions. Ibid.

I agree with the ALJ that the Respondent violated 18 U.S.C. § 1033(e)(2) and N.J.S.A. 17:22A-40(a)(2) and (18). Pursuant to 18 U.S.C. § 1033(e)(2), no person having been convicted of a felony involving dishonesty or 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.

The Respondent admits that did not obtain a waiver under 18 U.S.C. § 1033(e)(2) because he was unaware he had to do so. However, as an insurance producer, the Respondent is responsible for knowing and understanding the applicable insurance laws that regulate his license and profession. Commissioner v. Vinci, BKI 7510-16, Initial Decision, (03/30/2017), Final Decision and Order, (08/11/2017). Ignorance of the law is not an excuse.

Accordingly, I concur with the ALJ and find that the Respondent violated 18 U.S.C. § 1033(e)(2), N.J.S.A. 17:22A-40(a)(2) (violating any insurance law or regulation), and (18) (failing to obtain the written consent pursuant to 18 U.S.C. § 1033).

#### Count Four

Count Four of the OTSC alleges that the Respondent failed to disclose that he was convicted of felony tax evasion or that he had voluntarily surrendered his insurance producer license on the insurance producer license renewal applications that he filed with the Department on October 27, 2014 and December 11, 2015, in violation of N.J.S.A. 17:22A-40(a)(1), (2), (3), (15), and (16), which prohibit licensees from providing incorrect, misleading, incomplete or materially untrue information in the license application; violating any insurance law or regulation; obtaining or attempting to obtain a license through misrepresentation or fraud; intentionally withholding material information or making a material misstatement in an application for a license;



and committing any fraudulent act.

The ALJ found that found that the Respondent submitted renewal applications on October 27, 2014 and December 11, 2015. Initial Decision at 15-16. The Respondent indicated on both of the renewal applications that he had not been convicted of a felony, which had not previously been reported to the Department. Ibid. The ALJ held that the Respondent's failure to disclose his conviction for tax evasion when he renewed his license in 2014 and 2015 constitutes providing "incorrect, misleading, incomplete, or materially untrue information in the applications." Id. at 16. Further, the Respondent also intentionally withheld material information from the Department and made a material misstatement on an application for licensure. Ibid. Accordingly, the ALJ held that the Respondent violated N.J.S.A. 17:22A-40(a)(1), (2), (3), (15), and (16). Id. at 16, 21.

The evidence also shows that on December 16, 2013 the Respondent submitted an insurance producer request for license surrender/status change form seeking to surrender his New Jersey resident producer license. Ibid. at ¶9. However, a year after surrendering his license, on October 27, 2014, the Respondent submitted an application to renew his insurance producer license. Id. at 4, ¶10. It was improper for the Respondent to renew a license that he had surrendered the previous year.

The Respondent argues in his Exceptions that he answered "no" to the question regarding if he had been convicted of felony on the renewal questionnaires because he interpreted the wording on the question to mean that he had to report convictions the Department was not aware of, and he believed that there was not any criminal activity of which the Department was unaware. Respondent Exceptions at 2.

I concur with the ALJ that the Respondent provided incorrect and misleading information on the applications he submitted to the Department to renew his insurance producer license on

October 27, 2014 and December 11, 2015. On each application, he failed to disclose that he had been convicted of a felony. Further, it was improper for the Respondent to submit an application to renew his license on October 27, 2014 when he had surrendered his license the previous year. That the Respondent interpreted the question on his renewal application incorrectly does not relieve him of his duty to be honest and forthright with the Department. Accordingly, I concur with the ALJ and find that the Respondent violated N.J.S.A. 17:22A-40(a)(1) (providing incorrect, misleading, incomplete or materially untrue information in the license application), (2) (violating any insurance law or regulation), (3) (obtaining or attempting to obtain a license through misrepresentation or fraud), (15) (intentionally withholding material information or making a material misstatement in an application for a license), and (16) (committing any fraudulent act).

### **PENALTY AGAINST THE RESPONDENT**

#### **Revocation of Respondent's Insurance Producer License**

With respect to the appropriate action to take against the Respondent's insurance producer license, I find that the record is more than sufficient to support license revocation and compels the revocation of the Respondent's license. Accordingly, I adopt the ALJ's recommendation that the Respondent's insurance producer license be revoked.

The Commissioner is charged with the duty to protect the public welfare and to instill public confidence in both insurance producers and the industry as a whole. Commissioner v. Fonseca, OAL Dkt. No. BKI 11979-10, Initial Decision (08/15/11), Final Decision and Order (12/28/11) (citing In re Parkwood, 98 NJ. Super. 263 (App. Div. 1967)). Accordingly, the public's confidence in a licensee's honesty, trustworthiness, and integrity are of paramount concern. Ibid. The nature and duty of an insurance producer "calls for precision, accuracy and forthrightness." Fortunato v. Thomas, 95 N.J.A.R. (INS) 73 (1993). A producer is held to a high standard of

conduct and should fully understand and appreciate the effect of irresponsible conduct on the insurance industry and on the public.

I find that revocation of the Respondent's insurance producer license is warranted. On December 16, 2013, the Respondent was convicted of Attempt to Evade or Defeat Tax for 2003, in violation of 26 U.S.C. 7201. He failed to inform the Department of this conviction within 30 days as required by N.J.S.A. 17:22A-40(a)(18). Although he surrendered his insurance producer license on the day he was convicted, he improperly renewed this license a year later and failed to inform the Department on his renewal application that he had been convicted of a felony.

Revocation has previously been imposed on licensed producers who fail to inform the Department of convictions and submit misleading applications to renew their licenses. See Commissioner v. Citron, OAL Dkt No. BKI 17272-15, Initial Decision (12/21/18), Final Decision and Order (05/06/19) (license revocation for failing to inform the Department of administrative and criminal actions against him and failing to disclose an indictment on his renewal application).

For these reasons and based upon my review of the record and the Initial Decision, I ADOPT the ALJ's recommendation and ORDER the revocation of the Respondent's insurance producer license. I find that revocation of the Respondent's insurance producer license is necessary and appropriate as this licensure penalty serves the need of protecting the public and maintaining public faith in the insurance industry.

#### **Monetary Penalty Against the Respondent**

The Commissioner has broad discretion in determining sanctions for violations of the laws she is charged with administering. In re Scioscia, 216 N.J. Super. 644, 660 (App. Div. 1987). The penalties set forth in the Producer Act "are expressions by the Legislature that serve a distinct remedial purpose." Commissioner v. Strandskov, OAL Dkt. No. BKI 03451-07, Initial Decision

(09/25/08), Final Decision and Order (02/04/09). The Commissioner may levy penalties against any person violating the Producer Act, not exceeding \$5,000 for the first offense and not exceeding \$10,000 for each subsequent offense. N.J.S.A. 17:22A-45(c). In addition, the Commissioner may order reimbursement of the costs of investigation and prosecution for violations of the Producer Act. Ibid.

As noted by the ALJ, pursuant to Kimmelman, certain factors are to be examined when assessing administrative monetary penalties such as those that may be imposed under N.J.S.A. 45:15-17. No one Kimmelman factor is dispositive for or against fines and penalties. See Kimmelman, 108 N.J. at 139 (“[t]he weight to be given to each of these factors by a trial court in determining . . . the amount of any penalty, will depend on the facts of each case”).

The first Kimmelman factor addresses the good faith or bad faith of the Respondent. The ALJ found that the Respondent demonstrated bad faith in failing to disclose his conviction to the Department on his October 27, 2014 and December 11, 2015 renewal applications. Final Decision at 24. The Respondent entered into a Consent Order with the Department in 1996 for the same violation, and should have been aware of this obligation. Ibid. The Respondent also demonstrated bad faith when he applied to renew his producer license on October 27, 2014, when he had previously surrendered his license on December 13, 2013. Accordingly, this factor weighs in favor of a monetary penalty.

The second factor in Kimmelman is the Respondent’s ability to pay. Respondents who claim an inability to pay civil penalties bear the burden of proving their incapacity. Commissioner v. Shah, OAL Dkt. No. BKI 11903-05, Initial Decision (04/15/08), Final Decision and Order (09/02/08). An insurance producer’s ability to pay is only a single factor to be considered in determining an appropriate fine and does not obviate the need for the imposition of an otherwise

appropriate monetary penalty. Moreover, the Commissioner has issued substantial fines against insurance producers despite their arguments regarding their inability to pay. See Commissioner v. Fonseca, OAL Dkt. No. BKI 11979-10, Initial Decision (08/15/11), Final Decision and Order (12/28/11). (issuing a \$100,500 civil penalty despite the producer arguing that he was unable to pay); See also Commissioner v. Erwin, OAL Dkt. No. BKI 4573-06, Initial Decision, (07/09/07), Final Decision and Order (09/17/07) (fine of \$100,000 imposed despite evidence of the Respondent's inability to pay); and Commissioner v. Malek, OAL Dkt. Nos. BKI 4520-05 and BKI 486-05, Initial Decision (12/06/05), Final Decision and Order (01/18/06) (fine increased from \$2,500 to \$20,000 even though the producer argued an inability to pay fines in addition to restitution). The ALJ stated that after the oral argument, the ALJ directed the Respondent to submit proof of his income in support of his argument that he is unable to pay a civil monetary penalty. Initial Decision at 24. On November 4, 2020, the Respondent submitted an e-mail which stated, "2020 YTD from Real Estate sales. \$25360. Gross before allowable expenses and federal state and self employment taxes." Ibid. In response, the Department argued that this submission did not account for whether Respondent has any savings, assets, or income from prior years, did not establish an inability to pay, and was not a reflection of the Respondent's current financial status. Id. at 24-25. The ALJ agreed with the Department's arguments and stated that the Respondent did not establish an inability to pay. Id. at 25. I concur that the Respondent has not met that burden and therefore this factor weighs in favor of the imposition of a monetary penalty.

The third Kimmelman factor relates to the profits obtained. The greater the profits an individual is likely to obtain from illegal conduct, the greater the penalty must be if penalties are to be an effective deterrent. Kimmelman, 108 N.J. at 138. The ALJ stated that although the Respondent did not obtain a direct profit for the violations of Producer Act, his actions delayed

any disciplinary action, which may have resulted in the revocation of his license. Final Decision at 25. Kimmelman does not limit consideration to actual profits, but warrants the consideration of the profits that the Respondents would have likely made if their acts in violation of the insurance laws of this State were successful. Kimmelman, 108 N.J. at 138. Accordingly, I concur with the ALJ that this factor also weighs in favor of a monetary penalty.

The fourth Kimmelman factor addresses the injury to the public. 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). The ALJ stated that the Department demonstrated injury to the public through the Respondent’s disregard of important safeguards and protections for consumers. Final Decision at 25. Further, the Respondent’s failure to be forthright with the Department on his October 27, 2014 and December 11, 2015 renewal applications is a violation of the fiduciary trust that is part of the insurance producer occupation. Ibid. I concur with the ALJ that this factor weighs in favor of a monetary penalty.

The fifth Kimmelman factor to be examined is the duration of the illegal activity. The Court in Kimmelman found that greater penalties are necessary to incentivize wrongdoers to cease their illegal conduct. Kimmelman, 108 N.J. at 139. The longer the illegal conduct, the more significant civil penalties should be assessed. Ibid. The ALJ found that the Respondent made misrepresentations in the renewal applications submitted to the Department on October 27, 2014 and December 11, 2015. Final Decision at 25. Taken together with the misrepresentations in the

renewal applications the Respondent submitted to the Real Estate Commission on May 8, 2015, and on April 11, 2017, the unlawful conduct spans over three years. Ibid. I agree with the ALJ that this factor also weighs in favor of a monetary penalty.

The existence of criminal punishment and whether a civil penalty may be unduly punitive if other sanctions have been imposed is the sixth factor under the Kimmelman analysis. The Supreme Court held in Kimmelman that a lack of criminal punishment weighs in favor of a more significant civil penalty because the defendant cannot argue that he or she has already paid a price for his or her unlawful conduct. Kimmelman, 108 N.J. at 139. Regarding this factor, the ALJ noted while the Respondent was sentenced to a term of imprisonment for his conviction for felony tax fraud, “that does not alleviate his obligation to comply with the reporting requirements with the Department . . . as set forth in the Producer Act . . . .” Final Decision at 25. I concur with the ALJ that this factor weighs in favor of a monetary penalty.

The final factor examined in Kimmelman is previous relevant regulatory and statutory violations of the Respondent. The ALJ found that the Respondent entered into a Consent Order with the Department in 1996 for failing to disclose a conviction on an application to renew his insurance producer license and was subject to a \$500 fine. Id. at 26. The ALJ stated that “it is clear that the prior violation did not deter him from failing to follow the reporting requirements that are plainly set forth in the statute.” Ibid. I concur with the ALJ that this factor weighs in favor of a monetary penalty.

In light of the above Kimmelman analysis and based on the violations of the Producer Act, I ADOPT the recommendation of the ALJ that a civil monetary penalty in the amount of \$10,000 for the violations of the Producer Act is appropriate. Because the ALJ did not indicate how the

fine was to be allocated among Counts One through Four, I MODIFY the ALJ's decision to allocate the fine as follows:

Count One: \$1,000 for being convicted of felony tax evasion in violation of N.J.S.A. 17:22A-40(a)(6) and (16).

Count Two: \$2,000 for failing to notify the Commissioner within 30 days of his conviction for felony tax evasion, in violation of N.J.S.A. 17:22A-40(a)(2) and (18).

Count Three: \$2,000 for failing to obtain the written consent of the Commissioner before engaging or participating in the business of insurance after the Respondent was convicted of felony tax evasion, in violation of 18 U.S.C. § 1033(e)(2) and N.J.S.A. 17:22A-40(a)(2) and (18).

Count Four: \$2,500 for failing to disclose that he was convicted of felony tax evasion or that he had voluntarily surrendered his insurance producer license on the insurance producer license for each renewal applications that he filed with the Department on October 27, 2014 and December 11, 2015, in violation of N.J.S.A. 17:22A-40(a)(1), (2), (3), (15), and (16), for a total penalty of \$5,000 as to this Count.

These penalties are necessary and appropriate under the above Kimmelman analysis given the Respondent's conduct. The Respondent was convicted of felony tax evasion, failed to report this conviction to the Department and did not obtain written permission to engage in the insurance business. Moreover, these penalties demonstrate the appropriate level of opprobrium for such misconduct, and will serve to deter future misconduct by the Respondent and the industry as a whole. I note it is far less than the Department could have requested under N.J.S.A. 17:22A-45, which allows the imposition of up to \$5,000 for the first violation and up to \$10,000 for any subsequent violations of the Producer Act.



Pursuant to N.J.S.A. 17:22A-45(c), it also is appropriate to impose reimbursement of the costs of investigation. The ALJ recommended that the Respondent pay costs of investigation in the amount of \$950. This amount is consistent with the amount in the Certification of Investigator Matthew Gervasio. Gervasio Cert., ¶¶ 26-29, Ex. K attached thereto. Accordingly, I ADOPT the amount and ORDER the Respondent to reimburse the Department for the costs of investigation in the amount of \$950.

**CONCLUSION**

Having carefully reviewed the Initial Decision, the Respondent’s Exceptions, and the entire record herein, I hereby ADOPT the findings and conclusions as set forth in the Initial Decision, except as modified herein, and hold that the Respondent violated the Producer Act and as charged in Counts One through Four of the OTSC. Further, I ADOPT the conclusion that the Department’s Motion for Summary Decision should be granted for Counts One through Four set forth in the OTSC.

I also ADOPT the ALJ’s recommendation and hereby ORDER the revocation of the Respondent’s insurance producer license. I ADOPT the recommendation of the ALJ and hereby ORDER that fines totaling \$10,000 be imposed against the Respondent for the violations contained herein. I MODIFY the Initial Decision as it relates to the allocation of these penalties. The civil monetary penalty shall be allocated as follows: Count One: \$1,000, Count Two: \$2,000, Count Three: \$2,000, and Count Four: \$5,000. Lastly, I ADOPT the ALJ’s recommendation and ORDER that the Respondent reimburse the Department \$950 for the costs of investigation.

It is so ORDERED on this 27 day of September, 2021.



---

Marlene Caride  
Commissioner