THE STATE OF NEW HAMPSHIRE
INSURANCE DEPARTMENT

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Roger A. Sevigny
Commissioner

Alexander K. Feldvebel
Deputy Commissioner

STATE OF NEW HAMPSHIRE
INSURANCE DEPARTMENT

In Re: Bradford T. Atwood

Docket No.: Ins. No. 08-031-EP

ORDER ON HEARING

I. ADMINISTRATIVE BACKGROUND.

On September 19, 2008 a Hearing was held at the New Hampshire Insurance Department ("Department") pursuant to an Order to Show Cause and Notice of Hearing dated August 28, 2008 signed by Commissioner Roger Sevigny. This was sent to Attorney Atwood ("Respondent") by certified mail return receipt requested. Mr. John Talley appeared for the Department as Staff Advocate.

Attorney Atwood requested to participate in the Hearing telephonically. His request was granted.

Upon conclusion of the Hearing on September 19, 2008 the Department was given until Friday, September 26, 2008 to review Respondent's references to RSA 626:2 and Fisher v. Cooper 143 NH 585 as contained in his letter dated August 1, 2008 addressed to Mr. John Talley. The purpose of this extension was to provide the Department with time to review that information and determine if the Department desired to request a reopening of the Hearing for the purpose of presenting further argument or evidence relative to the statute and case as they relate to the central issue of the Hearing which was whether or not "knowingly" was the statutory threshold to be found before a violation could occur.

On September 26, 2008 the Department requested an extension to review RSA 626:2, Fisher v. Cooper and the issue of "knowingly" until October 3, 2008. This request was granted on September 26, 2008.

With the consent of both the Department and the Respondent, this Hearing Officer reopened the Hearing on Monday, October 20, 2008 for the sole purpose of introducing into the record various exhibits generated subsequent to September 19, 2008. With the consent of both parties only the Hearing Officer was present at the October 20, 2008 reopening of Hearing. Both parties were given a copy of all the exhibits so entered.

The Hearing was reopened for further argument on October 23, 2008 here at the Department. Attorney Atwood again participated telephonically. Mr. Talley represented the Department.

II. FINDINGS OF FACT.

Respondent testified that he has held an insurance producer's license since 1991. and has never failed to obtain a renewal license. When he first discovered that his license had expired on July 31, 2006 he immediately applied for reinstatement on April 21, 2008. He license was reinstated by the Department. On the Uniform Application for License Reinstatement Individual Insurance Producer License form at Background Information at question number 4 on page 2 he answered Yes to the following question, "Since your license has expired have you transacted the business of insurance in this state or been paid renewal commission on business in this state?" He testified that his failure to obtain a renewal license was other than a knowing failure to do so. The Department sends out a courtesy reminder to producers that their license is about to expire but is not required to do so by law.

III. CONCLUSIONS OF LAW.

Respondent argues that he cannot be found to have violated RSA 402-J:3, I and thus subject to penalty at RSA 402-J:12, I because he did not knowingly fail to obtain a renewal of his producers license. Failure to have a license while engaging in the insurance business and collecting commissions is prohibited at RSA 402-J:3, I. Respondent's argument that knowingly is the threshold for finding a violation of the licensing requirement of RSA 402-J: 3, I and thus subject to penalty under RSA 402-J:12, I is premised upon the manner in which the penalty section of RSA 402-J:12, I is structured. The penalty section of the statute provides,

> "I. The commissioner may place on probation, suspend, revoke, or refuse to issue or renew an insurance producer's license, or may levy a penalty in accordance with RSA 400-A:15, III or any combination of actions for any one or more of the following causes:
>
> > (b) Violating any insurance laws, or violating any rule, regulation, subpoena, or order of the commissioner or of another state's insurance commissioner."

RSA 400-A:15, III provides,

> "III. Any person who knowingly violates any rule, regulation, or order of the commissioner may, upon hearing, except where other penalty is expressly provided, be subject to such suspension or revocation of certificate of authority or license, or administrative fine not to exceed $2,500 in lieu of such suspension or revocation, as may be applicable under this title for violation of the provision

to which such rule, regulation or order relates."

RSA 400-A:15, III quoted immediately above was amended effective June 6, 2008. The amended RSA 400-A:15, III effective June 6, 2008 provides as follows:

> "III. Any person who knowingly violates any statute, rule, regulation, or order of the commissioner may, upon hearing, except where other penalty is expressly provided, be subject to such suspension or revocation of certificate of authority or license, or administrative fine, not to exceed $2,500 per violation, as may be applicable under this title for violation of the statute or provision to which the rule, regulation, or order relates."

Respondent's producers license expired on July 31, 2006. He failed to obtain his renewal license. While being unlicensed he engaged in the insurance business and collected commissions. He applied for reinstatement of his license on April 21, 2008 and was reinstated. Respondent argues that since the Order to Show Cause was dated August 28, 2008 then RSA 400-A:15, III effective June 6, 2008 is the controlling version of the statute. I find that the version of RSA 400-A:15, III in effect before June 6, 2008 to be controlling as this was the period of time in which the Respondent's license had expired and during which time he received insurance commissions. Having said that, even if the version of RSA 400-A:15, III effective on and after June 6, 2008 were controlling it would not make a difference for the reasons stated hereinafter.

Respondent argues that by referencing RSA 400-A:15, III at RSA 402-J:12, I for a violation of subsection (b) the Department must prove that he knowingly failed to obtain his renewal license in violation of RSA 402-J:3, I. In effect then, the inclusion of RSA 400-A:15, III at RSA 402-J:12, I requires that in order to violate RSA 402-J:3, I he must have done so knowingly rather than through mistake, inadvertence, etc.

First of all, there is evidence that the legislature could have required that for there to be a violation of RSA 402-J:3, I as provided for in RSA 402-J:12, I(b) there had to be a knowing failure to obtain a renewal license and thereafter continue to conduct the business of insurance. Looking to the provisions of RSA 402-J:12, I it is clear that the legislature knew it could have made knowingly a condition for violating subsection (b) of the statute but chose not to do so. This is evident at subsection (e) and more importantly at subsection (l) which provide respectively,

> "(e) **Intentionally** misrepresenting the terms of an actual or proposed insurance contract or application of insurance." (emphasis supplied)

> "(l) **Knowingly** accepting insurance business from an individual who is not licensed." (emphasis supplied)

RSA 402-J also contains other indicators that the legislature understood there were other higher thresholds that could be used for a violation of statutory provisions and it could

have placed a higher standard for violating subsection (b) of the statute but choose not to do so. These indicators are found at,

> RSA 402-J:12, III, " … that an individual's licensee's violation was **known or should have been known** by one or more of the partners, officers, or managers …" (emphasis supplied)
>
> RSA 402-J:15, I, " … or the insurer **has knowledge** the producer was found by a court , government body, or self regulatory organization …" (emphasis supplied)
>
> RSA 402-J:15, V. (a), "In the absence of **actual malice**, …" (emphasis supplied)

Had the legislature desired to make knowingly the threshold for violating RSA 402-J:3, I as penalized at RSA 402-J:12, I it could have inserted the operative word "knowingly" into subsection (b). Had the drafters of the statute determined that all subsections (a) though (l) should be governed by a threshold of knowingly then they would have been no reason for the drafters to only begin subsection (l) with the word knowingly nor would there have been reason to use the word intentionally as the threshold for a violation of subsection (e). Consequently, the drafters opted for a lesser threshold than knowingly in order for there to be a violation punishable under subsection (b). Therefore, reading the statue as a whole, the acts complained of in the Order to Show Cause do not have be committed knowingly before there can be a violation punishable under RSA 402-J:12, I (b).

Further, great harm can befall an insurance consumer just as readily from the negligence of a producer as from a knowing act of a producer. It would make no logical sense that only intentional acts, i.e. knowingly, unless otherwise designated within the statute, could be the subject matter of adverse administrative action while those resulting from negligence would not be subject to administrative action when the harm could easily be the same or greater for a negligent action or omission.

The Respondent's argument that by incorporating the reference to RSA 400-A:15, III into RSA 402-J:12, I it in effect introduces knowingly into the statute as the threshold for finding a violation of RSA 402-J:3, I and subsequent penalty at RSA 402-J:12 I, (b) is misplaced for the reasons stated above as well as the following. RSA 402-J:12, I provides, in part,

> "I. The commissioner … may levy a penalty in accordance with RSA 400-A: 15, III …"

The operative word is penalty. Penalty is not defined in the statute. Webster's New World Dictionary, Third College Edition, defines penalty at subsection 2 as "the disadvantage, suffering, handicap, etc. imposed upon an offender or one who does not fulfill a contract or obligation, as **a fine or forfeit**; …" (emphasis supplied). Penalty is thus a fine or forfeit – a monetary amount. RSA 402-J:12, I could have been constructed

to include a specific dollar amount as the penalty for violating subsections (a) through (m) but it was not so constructed Instead, the statute by the clear meaning of the words chosen incorporates the $2,500 penalty amount of RSA 400-A:15, III as the penalty amount for violations of subsections (a) through (m) and that is all that it does.

Since I find that knowingly is not the trigger for violating RSA 402-J:3, I and RSA 402-J:12, I (b) as gleaned from a reading of the statute as a whole and related above, it would then be illogical to find that the legislature choose to incorporate by reference a threshold of knowingly for violating subsection (b) by reference to RSA 400-A:15, III at RSA 402-J:12, I. when it could have done so explicitly within subsection (b) by the mere addition of the word knowingly as was done at subsection (l). I find that the incorporation of RSA 400-A:15, III into RSA 402-J:12, I is merely for the purpose of providing a specific monetary penalty for violations of RSA 402-J:12, I subsections (a) through (m).

Further, even accepting as argument, that this reference to RSA 400-A:15, III did establish knowingly as a threshold it would only be for the imposition of a monetary penalty and this would lead to an absurd result. The operative word is "or" within RSA 402-J:12, I. Since RSA 402-J:12, I provides for the penalties of probation, suspension, revocation or refusal to issue or renew a license or levy a penalty in accordance with RSA 400-A:15, III it would be illogical to insert knowingly as the threshold for the monetary penalty only as it would result in the more severe penalties of suspension, revocation or refusal to issue or renew a license more easily imposed since knowingly would only apply to the administrative fine and thus suspension, revocation or refusal to issue or renew a license would then be subject to a lesser threshold of mistake, inadvertence, negligence, etc. I find this argument illogical and thus unpersuasive.

In addition, RSA 402-J:12 is the penalty section of RSA 402-J. Thus, the statute has its own penalty section. RSA 400-A:15, III, before it can be applied in total, has the caveat " … except where other penalty is expressly provided, …" Since there is a penalty section within RSA 402-J it is logical then that the threshold of knowingly in sentence one of RSA 400-A:15, III would only apply where the statute violated has no penalty section at all. Since this is not the case with RSA 402-J then only the monetary penalty amount within RSA 400-A:15, III is incorporated into RSA 402-J:12.

Since I find that there does not have to be a knowingly failure to be in violation of RSA 402-J:12 (b) I need not address Respondents reference to RSA 626:2 or Fischer v. Hooper, 143 N.H. 585 (1999).

Respondent's argument that he failed to get a license renewal notice from the Department thus causing his license to lapse is not relevant since the Department does this as a courtesy and is not required to do so by law. The responsibility for proper and continuous liscensure rests with the producer.

Respondent testified that he has held an insurance producer's license since 1991. He has never failed to obtain a renewal license. When he first discovered that his license

had expired on July 31, 2006 he immediately applied for reinstatement on April 21, 2008. His license was reinstated by the Department. On the Uniform Application for License Reinstatement Individual Insurance Producer License form at Background Information at question number 4 on page 2 he was forthcoming in telling the Department that during the time his license was expired he had transacted insurance business and had been paid commissions on that business. These are all mitigating factors.

Since I find that knowingly is not the threshold for a producer to be found in violation of RSA 402-J:3, I for the reasons set forth above. Respondent conducted the business of insurance and received commissions thereon without being licensed as required. Further, I find that the Order To Show Cause And Notice Of Hearing sufficiently appraised the Respondent of the nature of the allegations against him, the proposed action(s) that could result and the reasons for the Department's proposed action.

ORDER.

Therefore, as Hearing Officer, I find that Respondent violated RSA 402-J:3, I. An administrative penalty of $750 is assessed for this violation in accordance with RSA 402-J:12, I .

January 7 2009
Date

Donald L Belanger
Donald L. Belanger, Hearing Officer