THE STATE OF NEW HAMPSHIRE
INSURANCE DEPARTMENT

21 South Fruit Street Suite 14
Concord, New Hampshire 03301

Roger A. Sevigny
Commissioner

Alexander K. Feldvebel
Deputy Commissioner

STATE OF NEW HAMPSHIRE
INSURANCE DEPARTMENT

In Re: Leo M. Rush

Docket No.: Ins. No. 08-046-EP

ORDER ON HEARING

I. ADMINISTRATIVE BACKGROUND.

An Order to Show Cause and Notice of Hearing ("Order") was issued to Leo M. Rush ("Respondent") by the New Hampshire Insurance Department ("Department") dated November 14, 2008. The Order was signed by Roger Sevigny, Insurance Commissioner for the State of New Hampshire. The Hearing was scheduled for 10:00 a.m. on January 6, 2009 at the Department's offices at 21 South Fruit Street, Suite 14, Concord, New Hampshire. The Order appointed Attorney John Talley, Enforcement Examiner, as Staff Advocate for the Department.

By e-mail dated 12-4-08 this Hearing Officer informed Mr. Talley and Respondent, that I had been involved in an examination of Respondent's insurance agency back in the late 1980's or early 1990's and asked if either Mr. Talley or Respondent had any objection to me being the Hearing Officer. By e-mail dated 12-4-08 Mr. Talley had no objection and Respondent also replied on 12-4-08 that he had no objection to me being the Hearing Officer.

On December 11, 2008 the Department submitted a Motion To Amend Order to Show Cause to correct a scrivener's error. This was sent to Respondent on 12-11-08 to review and if he objected to the Motion to Amend he was informed to file his motion to object by December 22, 2008. On December 22, 2008 Respondent filed by fax his Answers to Order to Show Cause in which he addressed the Department's allegation in its Order to Show Cause and Notice of Hearing.

By e-mail dated 12-15-08 Respondent requested a postponement of the scheduled January 6, 2009 hearing date. Respondent alleged sufficient cause for the request. The Department by e-mail dated 12-15-08 had not objection to rescheduling the hearing and the hearing was rescheduled to January 15, 2009.

On December 18, 2008 Mr. Talley sent Respondent the documents he requested through discovery.

The hearing was continued until January 27, 2009 and then again until February 11, 2009.

By letter dated February 6, 2009 the Department substituted Mr. Richard P. McCaffrey, Compliance and Enforcement Counsel for Mr. Talley.

II. FINDINGS OF FACT.

The documentary and testimonial evidence of record establishes the following pertinent facts which form the basis for this Order On Hearing.

1. The Respondent has been a licensed insurance producer in New Hampshire since approximately 1986. Since then he has held non-resident producer licenses in other states as well.

2. Respondent incorporated Eastern Shores Casualty & Indemnity LTD ("Eastern Shores") with the NH Secretary of State's office effective May 30, 2007 pursuant to RSA 293-A. The registered off ice of Eastern Shores as listed on the Articles of Incorporation is 25 Old Lawrence Road, Pelham, NH 03076. This is also the residence of the Respondent. The principal purpose for which the corporation was established according to the Articles of Incorporation was to place surety bonds to association member. Respondent signed the Articles of Incorporation at Fifth paragraph as Incorporator and registered agent. Respondent testified that the purpose of incorporating Eastern Shores in New Hampshire was to be able to establish a checking account to handle a claim in the State of RI.

3. Eastern Shores did not file any forms or information to obtain a license pursuant to RSA 402:11 to conduct the business of insurance nor did it obtain liscensure pursuant to RSA 402:10. Respondent is Eastern Shores as he was the incorporator and holds the offices of President, Vice President, Treasurer and Secretary of the company.

4. On May 31, 2007 the Respondent, on behalf of Eastern Shores, filed an Application For Certificate of Authority with the State of Rhode Island Office of the Secretary of State, Corporations Division. The stated purpose of Eastern Shores in the application is to provide bonding outlets. The Respondent signed the application as Authorized Officer of the Corporation and affirmed that Eastern Shores was incorporated under the laws of the State of New Hampshire. Respondent was also listed on the application as the President, Vice President, Treasurer and Secretary of Eastern shores and all four (4) corporate titles list his address as25 Old Lawrence Road, Pelham, NH 03076. The principal place of business for Eastern Shores is shown as 25 Old Lawrence Road, Pelham, NH 03076.

5. On June 6, 2007 Respondent, through Gennaro Perotta the Attorney-In Fact for Eastern Shores, issued a Payment And Performance Bond to Goodman Construction Inc, ("Goodman") a Massachusetts company, in the amount of $5,807,629 for work to be performed by Goodman at the West Boylston Nursing Home Inc dba Oakland Rehabilitation and Skilled Nursing center ("West Boylston"). The header for this bond reads as follows: EASTERN SHORES CASUALTY AND INDEMNITY. The bond number was ES06050701. The Respondent testified that 'ES' stands for Eastern Shores. Eastern Shores issued an invoice for this bond to Goodman dated June 5, 2007 in the amount of $174,228.60. Respondent testified that this is the amount of premium for the bond. According to the bond terms and conditions on page 1 of the bond Eastern Shores assumed the risk of having to pay out up to $5,807,629 if Goodman failed to perform and fulfill its contractual obligations with West Boylston.

6. On July 1, 2007 Respondent, through Peter Rozantes the Attorney-In Fact for Eastern Shores, issued a Payment And Performance Bond to Finocchio Bros. Inc ("Finocchio") in the amount of $500,000 for work to be performed by Finocchio for the Town of Greenwich, Connecticut. According to the bond terms and conditions on page 1 of the bond Eastern Shores assumed the risk of having to pay out under that bond up to $500,000 if Finocchio failed to perform and fulfill its contractual obligations with the Town of Greenwich, CT. The header for this bond reads as follows: EASTERN SHORES CASUALTY AND INDEMNITY. The bond number was 07010701. The premium for this bond was $15,000 as evidence by a check that was made out to Finocchio on September 21, 2007 for return of premium but returned for insufficient funds. This bond, although issued on behalf of Finocchio by Eastern Shores, was not accepted by the Town of Greenwich, CT and hence the attempted return of premium.

7. On November 1, 2007 Respondent, through Peter Rozantes, the Attorney-In-Fact for Eastern Shores, issued a Payment And Performance Bond to Bilray Demolition Co. Inc. ("Bilray") in the amount of $24,500 for work to be performed by Bilray for the State of Rhode Island. The header for this bond reads as follows: EASTERN SHORES CASUALTY AND INDEMNITY. The bond number was 11010701. Eastern Shores assumed the risk of having to pay out under that bond up to $24,500 if Bilray failed to perform and fulfill its contractual obligations with the State of Rhode Island. Respondent testified that this bond was not accepted by the State of Rhode Island as Eastern Shores was not T-Listed.

8. On November 1, 2007 Respondent, through Peter Rozantes, the Attorney-In-Fact for Eastern Shores, issued another Payment And Performance Bond to Bilray Demolition Co. Inc. ("Bilray") in the amount of $32,500 for work to be performed by Bilray for the State of Rhode Island. The header for this bond reads as follows: EASTERN SHORES CASUALTY AND INDEMNITY. The bond number was 11010702. According to the bond terms and conditions on page 1 of the bond Eastern Shores assumed the risk of having to pay out under that bond up to $32,500 if Bilray failed to perform and fulfill its contractual obligations with the State of Rhode Island. Respondent testified that this bond was not accepted by the State of Rhode Island as Eastern Shores was not T-Listed.

9. On January 13, 2006, the Massachusetts Division of Insurance issued an Order to Show Cause ("Order") to Respondent. The material allegations of that Order were as follows:

a. Respondent, on behalf of Continental Surety Company Ltd ("Continental Surety") an off shore captive insurance company, issued two (2) Payment and Performance bonds in Massachusetts, one on November 21, 2001 to J.P. Equipment as the Principal, with Continental Surety as the surety and Amesbury Corporation as the Owner. The second bond was issued on November 21, 2001 and listed Amesbury Corporation as the Principal, Continental Surety as the surety and Amesbury as the Owner. The premium for the two (2) bonds was $11,080.00. Respondent gave part of the premium to Continental Surety and kept the remainder which he termed a fee. Continental Surety was not licensed to issue surety bonds in Massachusetts. Upon default Amesbury Corporation (bond #1) contacted Continental Surety to make good under the bond it issued. Continental Surety did not respond to this request.

The Order at page 9 further relates that the Respondent had at times arranged for the placement of surety bonds with licensed insurance companies such as RLI, BCIC, Continental American, National Surety Specialist, Western Insurance and ACSTAR. Respondent also testified during this hearing that he would at times place surety business with ACSTAR. Page 9 further relates that if a risk could not get a bond through a licensed insurance company as listed above then Respondent would tell the risk that he could join an association which could issue a bond through a captive insurance company like Continental which is in effect a surety company of last resort.

b. Respondent, on behalf of Continental Surety, issued a Payment and Performance bond for $1,500,000 on May 12, 2000 to Charles T. Sanderson for work to be performed for the YMCA of Greater Worchester, MA. Sanderson paid an insurance premium for the bond a portion of which Respondent kept for himself which he termed a fee to put things together. Sanderson defaulted on the construction work and the YMCA requested Continental Surety to step in and complete the project as called for by the bond. Continental Surety failed to provide or pay for a contactor to perform the work under the bond.

c. Respondent in his *Amesburyport Corporation* deposition stated that he did not know if Continental had any money, nor if Continental maintained a bank account. Respondent in his *YMCA* deposition admitted to a list of 18 contactors for whom he placed surety business with Continental Surety for a five year period preceding January 3, 2001.

d. The Order further alleged that the "surety bonds" issued on behalf of Continental Surety by Respondent were at most an escrow agreement where the surety holds and disburses any collateral it receives for the issuance of the bond. In effect, if the collateral underlying the bond is worthless then there is nothing to disburse and the surety pays noting but still keeps the premium. The Order goes on to provide that (1) the Respondent negotiated, solicited, sold or aided in the transaction of surety bonds in violation of Massachusetts law on at least 22 occasions, (2) Continental Surety's bonds issued by Respondent were not surety bonds since Continental Surety did not guarantee the performance of the contract up to the face amount of the bond but was only obligated to disburse upon default of the bond the value of the collateral, if any, it held for the

issuance of the bond in the first place, (3) since the bonds issued by Continental Surety through the Respondent were not guarantees of performance but merely a promise by Continental Surety to pay upon default up to the value of the collateral, if any, pledged when the bonds were issued were misrepresentations contrary to the unfair trade practices act or fraud and. (4) a listing of Massachusetts Insurance Department Claims 4, 5, 6 and 7 against Respondent alleging fraud, dishonest practices, incompetence, untrustworthiness, financial irresponsibility, unfair and deceptive practices, and, misrepresentations of the terms of payment and performance bonds all based on paragraphs a – d herein.

e. Respondent entered into a Consent Agreement with the Massachusetts Insurance Department dated August 2, 2006. According to the Consent Agreement and without admitting to any wrongdoing, Respondent agreed to (1) cease and desist from the doing the conduct alleged in the Order to Show Cause, (2) agree that his insurance licensed be revoked and (3) dispose of any interests he may have in any licensed insurance company in Massachusetts.

f. Respondent testified that he did not mount a defense to the Order to Show Cause as it would be cost prohibitive to do so.

10. On December 28, 2007 the State of Rhode Island and Providence Plantations Department of Business Regulation issued Respondent an Order to Show Cause, Notice of Hearing and Appointment of Hearing Officer. The basis for the Order was (1) that Respondent did not report the action of the Massachusetts Insurance Department of August 2, 2006 to the Department of Business Regulation and (2) that Respondent is the sole office holder of Eastern Shores and that Eastern Shores had issued surety bonds in Rhode Island through a non licensed insurance company. The Rhode Island Cease and Desist Order regarding Eastern Shores also lists issuance of bonds through Eastern Shores in Rhode Island – other than the Bilray bonds at Findings of Fact #s 7and 8 above, one (1) on December 6, 2006 on behalf of Doylan Contacting Inc .to the city of Providence, Rhode Island and another on May 14, 2007 on behalf of Bilray Construction to the Town of Barrington, RI.

At a prehearing conference held on January 29, 2008 Mr. Rush, on behalf of Eastern Shores agreed to a Cease and Desist Order in which Eastern Shores would cease to provide guaranty or suretyship bonds in Rhode Island or from doing any other activity requiring licensure by the State of Rhode Island.

On February 11, 2008 Respondent entered into a Consent Order based upon the Order to Show Cause, Notice of Hearing and Appointment of Hearing Officer and agreed to surrender his Rhode Island nonresident insurance producer's license and cease and desist from doing any activity in the state which would require an insurance producers license.

11. Respondent entered into a Payment and Performance bond with Finocchio Bros. Inc. That bond was not accepted by the Town of Greenwich, Connecticut. As a result, Respondent owed Finocchio $15,000 as a return of premium paid by Finocchio. This return payment was attempted by check dated 9-21-07. The check was returned for insufficient funds. (Tab 12) Respondent also testified that in addition to owing Finocchio he also had one other outstanding payment obligation.

III. CONCLUSIONS OF LAW.

Respondent incorporated Eastern Shores in New Hampshire on May 30, 2007 for the purpose of providing surety bonds to association members. The registered office of Eastern Shores was 25 Old Lawrence Road, Pelham, NH 03076. This is also the residence of the Respondent. This stated purpose is within the definition of conducting insurance business as provided for at RSA 401:1, VII. This section of the statute reads as follows:

401:1 Purposes.

"VII. Insurance of the performance of contracts and to guarantee the fidelity and the faithful discharge of duties of persons holding positions of trust in private or public employment or responsibility, and may, if accepted and approved by the superior court, obligee or person competent to approve such bond, act as joint or sole surety upon the official bond or the bond, recognizance or other undertaking in civil and criminal procedure of any person or corporation to the United States, to the state, or to any county, city, town, judge of probate, or other court, sheriff, magistrate or other public officer, or to any corporation or association public or private; and also may act as joint or sole surety upon any bond or undertaking to any person or corporation or to the state conditioned upon the performance of any duty or trusts, or for the doing or not doing of anything in said bond specified, and upon bonds to indemnify against loss any person or persons who are responsible as surety or sureties upon a written instrument or otherwise for the performance by others of any office, employment, contract or trust. If by law 2 or more sureties are required upon any obligation upon which such company is authorized to act as surety, it may act as joint or sole surety thereon, and may be accepted as such by the court, justice, magistrate or other officer or person authorized to approve the sufficiency of such bond or undertaking. The insurance commissioner shall transmit forthwith to each register of probate, to the clerk of each district and municipal court, to each clerk of the superior court and the clerk of the supreme court, the names of all corporate surety companies as they become or cease to be qualified to do business in the state."

Since the purpose for incorporating Eastern Shores was to conduct the business of insurance as defined in RSA 401:1 then the appropriate filings and forms must be filled out as required by RSA 402:11 which reads as follows:

402:11 Information. – "Before a license is granted to the company it shall file with the commissioner a certified copy of its charter and bylaws, a certificate giving the amount of capital paid in in cash, and a full statement, under oath of its president and secretary, showing its financial standing and condition in accordance with blanks furnished by the commissioner, and such other information in relation to its condition as may be required by the commissioner."

Once the required filings are made and approved to the satisfaction of the insurance commissioner a license to operate as an insurance company is granted. It is

clear that once the trigger of RSA 401:1, VII is met no corporation can act as an insurance company unless properly licensed to do so. RSA 402:10 provides that, "No insurance company organized under the laws of this state shall do insurance business unless it has obtained a license from the insurance commissioner authorizing it to do so." I FIND that the Articles of Incorporation show that Eastern Shores was incorporated to conduct the business of insurance.

A central purpose in requiring liscensure as an insurance company when a corporation is to conduct the business of insurance in this state is to ensure that it have the requisite amount of surplus and financial stability to ensure that when claims are made under contracts it has issued that sufficient monies are available to make payment on those claims whether they be in this state or in another state. This purpose is found at RSA 402:11 where it provides in part that the company file with the insurance commissioner, "...a certificate giving the amount of capital paid in in cash, and a full statement, under oath of its president and secretary, showing its financial standing and condition in accordance with blanks furnished by the commissioner, and such other information in relation to its condition as may be required by the commissioner." It would be a total destruction of the concept of insurance if companies could conduct the business of insurance without proper licensure and regulatory oversight because any contracts it sold would not be backed by sufficient capital and surplus as determined by a regulatory agency and that claims made upon contracts it issues would only be paid when made to the extent that the corporation happened to have monies on hand to do so at any point in time.

Respondent testified that his purpose for incorporating Eastern Shores in New Hampshire was to handle a claim in Rhode Island and that to do so a checking account had to be established in that state and the incorporation of Eastern Shores was the chosen vehicle to do so. This testimony is completely contradicted by not only the purpose clause of the New Hampshire Articles of Incorporation at Fifth paragraph but also by the conduct of the Respondent and Eastern Shores after being incorporated in New Hampshire on May 30, 2007 as related hereinafter.

I FIND that the incorporation of Eastern Shores was to conduct the business of insurance by placing surety bonds to association members as provided for in the purpose clause of the Articles of Incorporation, Fifth paragraph. I further FIND that Respondent as incorporator of Eastern Shores never applied for licensure (RSA 402:10) as an insurance company but was required to do so under RSA 402:11 since it was incorporated to conduct the business of insurance as defined at RSA 401:1, VII.

On May 31, 2007, the day after Eastern Shores is incorporated in New Hampshire, the Respondent filed an Application for Certificate of Authority with the State of Rhode Island Office of the Secretary of State, Corporations Division. That application listed Respondent as the President, Vice President, Treasurer and Secretary of Eastern Shores. Eastern Shores' principal office is listed on the application as 25 Old Lawrence Road, Pelham, New Hampshire and it is further stated on the application that it was incorporated under the laws of New Hampshire on May 30, 2007. The stated

purpose of Eastern Shores in the application was to provide bonding outlets – again, conducting the business of insurance. This corroborates the purpose clause as found within the New Hampshire Articles of Incorporation at Fifth paragraph and again refutes Respondent's contention that his purpose for incorporating Eastern Shores in New Hampshire was to handle a claim in Rhode Island.

Respondent and Eastern Shores through its Attorney-in-Fact, Gennaro Perotta, issued a Payment and Performance bond to Goodman Construction Inc. on June 6, 2007. (See Finding of Fact paragraph #5 for details of this transaction).

Respondent and Eastern Shores through its Attorney-in-Fact, Peter Rozantes, issued a Payment and Performance bond to Finocchio Bros. Inc. on July 1, 2007. (See Finding of Fact paragraph #6 for details of this transaction).

Respondent and Eastern Shores through its Attorney-in-Fact, Peter Rozantes, issued a Payment and Performance Bond to Bilray Demolition Co. Inc. on November 1, 2007. (See Finding of Fact paragraph #7 for details of this transaction).

Respondent and Eastern Shores through its Attorney-in-Fact, Peter Rozantes, issued another Payment and Performance bond to Bilray Demolition Co. Inc. on November 1, 2007. (See Findings of Fact paragraph #8 for details of this transaction).

The Respondent testified that none of the bonds at Findings of Fact paragraphs 5, 6, 7, and 8 were accepted by the Owner of the bond, i.e., the party who would benefit from the bond when there was a default by the contactor. Further, in Respondent's Answers to Order to Show Cause he answered among other things that,

a. No business was ever conducted in New Hampshire therefore the company did not need a license.
b. The address of Eastern Shores was my home address used for the sake of convenience.
c. [Goodman bond] In this instance both the principal and the obligee were in Massachusetts. In any case the bond was not issued or accepted.
d. [The invoice for the Goodman bond] This incident took place entirely out of state.
e. No mailing were sent from the 25 Old Lawrence Road address and therefore no business was conducted in New Hampshire by Eastern Shores.

In reading Respondent's Answers to Order to Show Cause the resounding theme is that since no business was conducted in New Hampshire then no license was required and thus no violation of New Hampshire law occurred. I FIND Respondent's argument is misplaced at best. Liscensure by the Department is absolute once a corporation is formed to issue insurance contracts whether in state or out of state. There is no exception to liscensure in the statute because the company will conduct its insurance business out of state. Once a corporation is formed to conduct the business of insurance whether in state

or out of state or both it must be licensed to do so by the Department. If every company could conduct the insurance business in every state other than which it is incorporated and unlicensed and thus unregulated then this would make payments on any contacts issued by such company a happenstance at best and totally dependent upon what monies the corporation has in reserve to make such payments. Regulation of the insurance business makes certain that in every state in which a company operates to include the state in which it is incorporated that there is oversight by a state regulator in which the corporation is formed so that the company has the financial stability and resources to engage the public and offer insurance contracts both in state and out of state and that the company will be there to pay when a claim is made under policies it offers or sells.

Respondent also argued that since no mailing was done from Eastern Shores offices at 25 Old Lawrence Road Pelham, NH then it did not have to be licensed. RSA 402-B:2 provides,

"**406-B:2 Insurance Business Defined.** – Any of the following acts in this state effected by mail or otherwise by or on behalf of an unlicensed insurer is deemed to constitute the transaction or doing of an insurance business in this state. The venue of an act committed by mail is at the point where the matter transmitted by mail is delivered and takes effect. Unless otherwise indicated, the term ""insurer" as used in this section includes all corporations, associations, partnerships and individuals, engaged as principals in the business of insurance and also includes interinsurance exchanges and mutual benefit societies. The word ""commissioner" shall mean the insurance commissioner.

I. The making of or proposing to make, as an insurer, an insurance contract.

II. The making of or proposing to make, as guarantor or surety, any contract of guaranty or suretyship as a vocation and not merely incidental to any other legitimate business or activity of the guarantor or surety.

III. The taking or receiving of any application for insurance.

IV. The receiving or collection of any premium, commission, membership fees, assessments, dues or other consideration for any insurance or any part thereof.

V. The issuance or delivery of contracts or certificates of insurance to residents of this state or to persons authorized to do business in this state.

VI. Directly or indirectly acting as an agent for or otherwise representing or aiding on behalf of another any person or insurer in the solicitation, negotiation, procurement, or effectuation of insurance or renewals thereof, or in the dissemination of information as to coverage or rates, or forwarding of applications, or delivery of policies or contracts, or inspection of risks, a fixing of rates or investigation or adjustment of claims or losses or in the transaction of matters subsequent to effectuation of the contract and arising out of it, or in any other manner representing or assisting a person or insurer in the transaction of insurance with respect to subjects of insurance resident, located or to be performed in this state. The provisions of this section shall not operate to prohibit full-time salaried employees of a corporate insured from acting in the capacity of an insurance manager or buyer in placing insurance in behalf of such employer.

VII. The doing of any kind of insurance business specifically recognized as constituting the doing of an insurance business within the meaning of the statutes relating

to insurance.

VIII. The doing or proposing to do any insurance business in substance equivalent to any of the foregoing in a manner designed to evade the provisions of the statutes.

IX. Any other transactions of business in this state by an insurer."

Respondent reads the first opening sentence of this statute way to narrowly and further, stops his augment at the point of mailing as stated in the stature rather than reading the statute as a whole. He argues that since there was no mailing by Eastern Shores from Pelham, NH – as all business was conducted out of state, then he was not engaged in an act by an unlicensed insurer. The bonds issued by Eastern Shores to several contractors out of state clearly show that they were issued by a NH corporation as evidenced in the header to each bond. A surety bond is insurance and there is no dispute that Respondent as Eastern shores through it's Attorney-in-Fact issued bonds to out of state contractors. It is the fact of a NH corporation engaging in the business of insurance out of state that comes within the purview of the statute and constitutes doing the business of insurance. I FIND Respondent's argument to be misplaced and not in accordance with RSA 406-B:2. I FIND that Respondent was a New Hampshire corporation conducting business as an unlicensed insurer as defined in RSA 406-B:2 by issuing bonds to several contractors as discussed in the Findings of Fact at paragraph #s 5, 6, 7, and 8..

Respondent further argues that since none of the issued bonds were accepted by the Owner then there has been no meeting of the minds and thus no insurance contract was ever in effect. Respondent testified that but for the bonds being rejected by the Owner they would have gone into effect. Respondent misconstrues the nature of the interaction between himself and the contractor who is the principal under the bond. Respondent testified that he meets with clients for bonds at diners. During the meeting he would have to be soliciting and negotiating for a surety contract with the client for Eastern Shores which would thereafter accept or reject the application for the bond. If accepted then the Attorney-in-Fact for Eastern Shores would sign the bond. Respondent testified that it was the Attorney-in-Fact that was the producer. This is incorrect as it is Respondent who engaged in the solicitation and negation of a bond through Eastern Shores. I FIND that it is the Respondent who is the producer for the bonds at Findings of Fact 5, 6, 7, and 8 not the Attorney-in-Fact.

Respondent and the contractor enter into negotiations for the purchase and issuance of a bond – usually a Payment and Performance bond. There is a meeting of the minds here in that a bond is issued by Eastern Shores to the contractor, for a particular job, and the contractor pays an insurance premium for the bond to Respondent who then transmits part of the premium to Eastern Shores and keeps a portion for himself. Whether or the bond is thereafter accepted by the Owner of the bond – the party who benefits from the bond when the contractor defaults, is irrelevant since the Owner is not a party to formation of the bond contract between Respondent and the contractor but is merely an outside party to the contract who would benefit from the contract if the contractor defaults and does not perform and execute the job for which the bond was issued. I FIND Respondent's argument to have no merit. I FIND that there was a

meeting of the minds when Respondent and the contractor agreed to the terms of the bond and the bond was issued to the contractor to be presented to the Owner – the party with whom the contractor had a contract to do a particular job. I further FIND that Respondent did engage in the solicitation and negotiation for purchasing a bond through Eastern Shores.

Respondent is no stranger when it comes to issuing Payment and Performance bonds to contractors when the company issuing the bonds is unlicensed insurance company in the state in which the bonds are issued (See Findings of Fact #9) This is the crux of the Massachusetts Order to Show Cause at Findings of Fact #9. It is understood that Respondent in the Consent Agreement dated August 2, 2006 entered into the agreement between himself and the Massachusetts Insurance Department and did so with the proviso that he was doing so without admitting to any wrongdoing. Nevertheless he did agree to the revocation of his license in that state. This is not an unusual proviso and does not operate to make the allegations in the Order to Show cause a moot point. Rather, the allegations in the Order to Show Cause are relevant to show a course of conduct in Massachusetts all of which were at least sufficient enough to cause Respondent to agree to the most severe administrative action – revocation of liscensure.

In the Massachusetts Order to Show cause the Massachusetts Insurance Department alleged that the bonds issued were not true surety bonds but only an escrow agreement where the surety – in that case Continental Surety, would hold and disburse the value, if any, of the collateral, if any, it received from the contactor as part of the condition for issuing the bond, and would in turn only be obligated to disburse to the Owner of the bond upon default by the contractor any monies up to the value of the collateral, if any. If the collateral is worthless then the surety pays nothing to the Owner upon default of the contractor. (See Tab 10, Massachusetts Order to Show Cause, starting on page 17, paragraph 31 through 38 and ending on page 18) This is a correct factual interpretation and is adopted in this Hearing Order.

Respondent issued several Performance and Payment bonds on behalf of Eastern Shores to out of state contractors. (See Findings of Fact #s 5, 6, 7, and 8). Respondent testified that all these bonds were issued by Eastern Shores which is a New Hampshire corporation and the bond forms are the same for all four. The bonds at Tabs 6, 7, and 8 at page 2 under Conditions at paragraph 5 state as follows: "It is further understood and agreed that the limit of liability of the Surety (Eastern Shores – ed.) all other limits and conditions not withstanding, shall be the value of the collateral assigned to it by the principal." While the bond at Tab #3 did not contain a page two, but since the Respondent testified that all were issued by Eastern Shores on Eastern Shores forms, then the language on page 2 at Conditions at paragraph 5 of the bonds at Tabs 6, 7, and 8 must be the same as would be on the missing page 2 of the bond at Tab #3. The language quoted immediately above is the <u>exact</u> language as the paragraph 5 wording that is discussed at page 18 paragraph 33 of the Massachusetts Order to Show Cause. This is most troubling as the Respondent was on previous notice that the language of paragraph 5, Conditions (Massachusetts Order) defeats the purpose of a surety contract in the first place and makes it only meaningful up to the value of the collateral, if any, securing the

bond assuming any collateral was obtained in the first place but Respondent nevertheless continued in this course of conduct through Eastern Shores as alleged in the Department's Order. A Payment and Performance bond is a type of surety bond purchased by the Principal – in these instances a contractor, from a surety company which is usually a licensed insurance company, in which the surety guarantees that it will guaranty the performance of the contractor up to the face amount of the bond – stated on page one (1) of the bonds at Findings of Fact 5, 6, 7, and 8. If the contactor defaults on the performance of the contract with the Owner, for example a city or town, then the surety usually either arranges for completion of the contract or will pay for the completion of the contract up to the face amount stated on the face of the bond. The whole premise behind a surety bond is thus to ensure that if the Principal on the bond – the contractor, defaults in the performance of the job for which it has contracted, then the Owner can call upon the bond and make claim upon the surety up to the face value of the bond. Further, the Owner of the bond agrees to enter into the contract with the contractor in no small part based upon the assurance that there is a company behind the bond subject to all the financial safe guards associated with regulatory licensure – an insurance company, and that therefore there are sufficient monies available up to the face of the bond to complete the project should the contractor default in its construction contract. It is not up to the Owner of the bond to valuate the collateral upon which the bond is issued but rather it has every expectation that the surety – Respondent and Eastern Shores, did so when it entered into the contract with the contractor.

I FIND that a bond that does not guarantee the performance of the contract up to the face amount of the bond is not a surety bond and thus misrepresents to the Owner of the bond the very purpose for accepting the bond in the first place. Further, even though the language of Conditions at page 2 paragraph #5 of the bonds modify the concept of suretyship as discussed above, in doing so this completely takes what is being offered the Owner out of the generally accepted concept of surety bonds and this paragraph on its face eliminates the opening language, for example at Tab #3, where it states on the first page, "That we, Goodman Construction Inc, Hereinafter called the Contractor and Principal, and Eastern Shores Casualty and Indemnity, a corporation hereinafter called the surety, are held firmly bound unto West Boylston … called the owner, in the sum of … $5,807,620." (emphasis supplied – ed) Since this would be a nullity by operation of paragraph 5 then there is a deception in what is being offered on behalf of the contractor – the Principal to the Owner since the Owner is clearly relying on the face amount of the bond to respond up to that amount when the contractor defaults upon the job contracted between the Principal and the Owner. Respondent knew back in 2006 that paragraph 5 at Conditions makes the contact of suretyship upon which the Owner relies in part when awarding the contract to the Principal – the contractor, only meaningful up to the value, if any, of the collateral, if any, backing the issuance of the bond to the contractor in the first place. In effect the bonds issued by Eastern Shores are nothing more than an escrow agreement in which the surety upon default of the contractor will only disburse to the Owner the value, if any, of the collateral, if any, that it receives and holds for issuance of the bond. This is the same conclusion in the Massachusetts Order at paragraph 34 on page 18.

I FIND this to be a dishonest practice under RSA 402-J:12,I, (h). I further FIND that Respondent had prior knowledge through the Massachusetts Order to Show Cause which was the basis for agreeing to revocation of his license in that state that the practice discussed above was dishonest as evidence by the language of the Continental Surety bond language but nevertheless Respondent incorporated that exact language into the Eastern Shores bond form at Conditions, page 2, at paragraph #5 and continued on with this business practice.

Respondent attempted to return $15,000 in premium to Finocchio Bros when the bond issued by Respondent to Finocchio was not accepted by the Owner. Respondent testified that the check was issued to Finocchio prematurely as there were not sufficient funds in the account when the check was written. Early on this Hearing Order discussed , among other things, part of the rational for requiring liscensure of a company that conducts the business of insurance. This was in regards to ensuring that the company issuing insurance policies have the financial resources as required by the licensing authority to pay claims as they arise. Respondent could not cover the check when it was issued. This was for only $15,000. Looking at the bonds issued by Eastern Shores, irrespective of the qualifying language of Conditions at page 2, paragraph 5, the face amount of the bonds were $5,807,629, $555,000, $24,500 and $32,500. It seems inconceivable that Respondent could ever pay the amount of the bonds immediately above upon default of the contractor to which it issued the bonds when it did not have the capital to pay even a relatively minor return premium payment of $15,000. Or, is it that due to the Conditions clause at paragraph 5 of the Eastern Shores bond form that Respondent knew he would not have to pay these face amounts if there was no collateral or the collateral was less than the face amount of the bond by operation of Conditions paragraph #5. This was surely the case with the two (2) Massachusetts bonds which were the subject matter of the Order since Respondent had to know that when Continental Surety was called upon to fulfill its obligations under those bonds it did not do so. Surely the Respondent was on notice of this situation as it was clearly the same addressed in the Massachusetts Order to Show Cause. A logical conclusion is that irrespective of what had transpired in Massachusetts concerning the above it would be business as usual for Eastern Shores, the New Hampshire corporation, as it conducts the business of insurance in other states.

I FIND Respondent's conduct above financially irresponsible and dishonest in that it shows an indifference to the insurance consuming public for so basic an insurance obligation when it cannot do the simple task of returning a premium for a policy not taken and Principal under the bond has to either wait until more policies are sold or recoup monies paid to others (Respondent's testimony) in order to have sufficient funds to cover that return premium payment. How then could Respondent ever expect to pay the face amount of the bonds at Findings of Fact 5, 6, 7, and 8 if Conditions paragraph #5 were null and void? Respondent also testified that in addition to owing monies to Finocchio he was also in the process of paying off another individual and that this debt would be paid in full shortly after the date of the hearing.

In reviewing the testimonial and documentary evidence of record I have considered each of Respondent's arguments as found in his Answers to Order to Show Cause and his testimony at the hearing in the preparation of this Order. The Department has also alleged – it appears to be in the alternative, other allegations which I have not specifically addressed as I consider the Findings of Fact and Conclusions of Law above to be dispositive of the subject matter s raised in the Department's Order to Show Cause.

Therefore, as Hearing Officer and as specifically discussed with findings made in the Conclusions of Law, in summation, I FIND that Respondent as Eastern Shores a New Hampshire corporation was formed for the purpose of conducting the business of insurance (RSA 401:1 VII) and did not file the required forms (RSA 402:11) in order to be licensed as an insurance company as required. (RSA 402:10). Respondent further conducted insurance business as an unlicensed insurer as defined in RSA 406-B:2. I also FIND that the bonds issued by Respondent given the caveat at Conditions, page 2, paragraph 5, defeat the insurance purpose of a surety bond in the first place and Respondent had knowledge of such due to the administrative action taken by the Massachusetts Insurance Department which predated the incorporation of Eastern Shores in New Hampshire and the issuance of the several bonds by Eastern Shores as discussed in the Findings of Fact but nevertheless Respondent continued with course of conduct and it is a dishonest practice under RSA 402-J:12, I, (h). I FIND that Respondent's conduct in regards to returning a premium payment to Finocchio Bros in the sum of $15,000 as well as another instance in which Respondent testified that he still has another obligation outstanding that would be paid off shortly after the date of the hearing to both be evidence of financially irresponsibility under RSA 402-J:12, I, (h).

ORDER.

Therefore, as Hearing Officer, I find Respondent in violation of several New Hampshire Insurance statues as discussed above and the Respondent's producer's license is immediately revoked.

April 29, 2009
Date

Donald L Belanger
Donald L. Belanger, Hearing Officer