



**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***

FINAL ORDER on HEARING

In Re: Thomas F. DeSteph d/b/a The DeSteph Agency

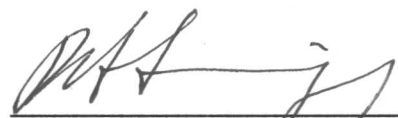
Docket No.: Ins 11-023-EP

Pursuant to the provisions of Ins 204.26(a)(4), the Proposed Order on Hearing issued on January 13, 2012 by Hearing Officer Jennifer Patterson is hereby ACCEPTED as a FINAL ORDER and DECISION.

This is the final action of the department. You have the right to request reconsideration of this final action within 30 days in accordance with RSA 541.

So ORDERED,

Date: February 23, 2012



Roger A. Sevigny, Commissioner

**STATE of NEW HAMPSHIRE
INSURANCE DEPARTMENT**

**In re: Thomas F. DeSteph d/b/a The DeSteph Agency
Docket No.: Ins 11-023-EP**

PROPOSED DECISION and ORDER

Procedural History

Respondent Thomas F. DeSteph d/b/a The DeSteph Agency ("Mr. DeSteph") is a licensed New Hampshire insurance producer. On October 24, 2011, the New Hampshire Insurance Department ("Department") issued an Order to Show Cause and Notice of Hearing ("Show Cause Order") alleging that Mr. DeSteph violated RSA 402-J:12, I(h) and ordering that he show cause why his producer license should not be revoked based on his having committed fraudulent, coercive, or dishonest business practices or demonstrating incompetence, untrustworthiness or financial irresponsibility. The Department also sought an administrative fine of not less than \$2,500 under RSA 400-A:15, III.

On December 12, 2011, the Department held an adjudicative hearing pursuant to RSA 400-A:17-24, RSA 541-A:30-38 and N.H. Code of Admin. Rules Ins Part 200 on the Show Cause Order. Mr. DeSteph appeared at the hearing, represented by his attorney, Richard Samuels. The Department was represented by its enforcement attorney, Richard McCaffrey. Other Department staff present were Carolyn Petersen, assisting attorney McCaffrey, and Karen Cassin, acting as clerk to the hearing officer.

At the hearing, attorney McCaffrey offered nine exhibits into evidence in a bound volume.¹ Attorney Samuels did not object to these exhibits, but argued that Exhibit 5, a U.S. District Court order, should not be given preclusive effect.² Attorney Samuels offered one exhibit as a full exhibit without objection, and three exhibits to which attorney McCaffrey objected but which were marked for identification pending the submission of legal arguments. Both attorneys asked questions of Mr. DeSteph, who was the only witness, and made closing arguments. The hearing lasted approximately two hours and fifteen minutes, and was recorded electronically. Following the hearing both parties filed memoranda making legal arguments.

¹ Exhibits in this volume are referenced by exhibit number and by cumulative page number, rather than the internal page number for the document.

² This issue is discussed in footnote 5.

Statutory Provisions

This case arises out of the producer licensing and general enforcement provisions of the Insurance Code. RSA 402-J:12, I provides that

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:

...

(h) Using fraudulent, coercive, or dishonest practices, or demonstrating incompetence, untrustworthiness or financial irresponsibility in the conduct of business in this state or elsewhere.

RSA 400-A:15, III provides that "[a]ny person who knowingly violates any statute, rule, regulation, or order of the commissioner may, upon hearing, . . . be subject to [an] administrative fine not to exceed \$2,500 per violation. . ."

Burden of Proof

In this administrative proceeding, the Department bears the burden of proving, by a preponderance of the evidence, that Mr. DeSteph's insurance producer license should be revoked and a fine imposed. N.H. Code of Admin. Rules, Ins 204.05.

Summary of the Parties' Positions

The Department asserts that Mr. DeSteph's insurance producer license should be revoked based on findings made in a May 26, 2010 memorandum opinion issued by the United State Bankruptcy Court for the District of New Hampshire in an adversarial proceeding arising out of Mr. DeSteph's May 2009 chapter 13 bankruptcy filing. In the opinion, the bankruptcy court found that Mr. DeSteph had defrauded Nancy Gembitsky, the plaintiff in the adversarial proceeding. The court awarded Ms. Gembitsky monetary damages and denied Mr. DeSteph a discharge of Ms. Gembitsky's claim. Mr. DeSteph did not appeal the bankruptcy court's ruling.

The Department asserts that Mr. DeSteph is barred by collateral estoppel from relitigating the issues decided by the bankruptcy court, and that the bankruptcy court's findings and rulings are sufficient to establish, as a matter of law, that he used fraudulent business practices and demonstrated untrustworthiness within the meaning of RSA 402-J:12, I(h).

Mr. DeSteph disputes the Department's claim of collateral estoppel. He asserts that the issues in the two proceedings are not identical and that the hearing officer

should consider anew Mr. DeSteph's testimony regarding his interactions with Ms. Gembitsky, as well as three documents that have already been considered by the bankruptcy court.³

Further, Mr. DeSteph argues that even if he is collaterally estopped from arguing that he did not commit fraud, license revocation under RSA 402-J:12 and the imposition of a penalty under RSA 400-A:15 rest in the Department's discretion and require consideration of any mitigating or aggravating circumstances as well as overall fairness. In other words, Mr. DeSteph asserts that imposition of a particular sanction is not automatic, and asks that the hearing officer consider the evidence submitted at the hearing in addition to the bankruptcy court's findings.

Findings of Fact

Mr. DeSteph is an insurance producer residing in Jaffrey, New Hampshire and licensed to sell life, accident and health insurance in the state. NHID Exhibit 1 at 1-2. Mr. DeSteph has worked in the insurance industry for 38 years and has been a licensed producer for 33 years. DeSteph testimony. In 1988 or 1989 he moved from Connecticut to his family's summer home in New Hampshire, but continued to have ties to Connecticut. DeSteph testimony.

Mr. DeSteph has in the past been licensed as a producer in other states, including Connecticut, Florida, Massachusetts, New Jersey and Wisconsin. NHID Exhibit 3. At present he is licensed only in Connecticut, Massachusetts and New Hampshire. Id., DeSteph testimony. Mr. DeSteph has no occupation or source of income other than his work as an insurance producer. DeSteph testimony. He has never been the subject of a formal complaint involving his work in the insurance business, and has not been involved in litigation other than his divorce and the matters detailed below regarding Ms. Gembitsky. DeSteph testimony.

The DeSteph Agency, a trade name registered with the New Hampshire Secretary of State's Office, held an insurance producer license at one time, but that license expired in 2006 and was not renewed. NHID Exhibits 2 and 4; DeSteph testimony.

Mr. DeSteph and Ms. Gembitsky met in Connecticut during the fall of 2002 when they were introduced to each other through a mutual friend. NHID Exhibit 9 at 82.⁴ At that time, Mr. DeSteph conducted business as The DeSteph Agency and kept a banking account for business purposes known as the TDA Advantage Trust. Id.

³ These documents were marked for identification but not admitted as full exhibits.

⁴ This paragraph and the following three paragraphs are taken from the "Background" section of the bankruptcy court's order, and the hearing officer views them as uncontested even apart from the issue of collateral estoppel. NHID Exhibit 9 at 83 (noting that "[a]ll other facts, including the reasons behind the \$100,000 transfer and the Note, remain in dispute." (emphasis added)).

Mr. DeSteph offered financial and investment planning advice to clients including Ms. Gembitsky. Upon such advice, Mr. DeSteph helped Ms. Gembitsky transfer some of her 401(k) plans into annuities issued by Allianz Life Insurance Company of North America and American International Group, Inc. Id.

In January 2003, Ms. Gembitsky gave Mr. DeSteph a check for \$100,000 made out to TDA Advantage Trust. Subsequently in March 2003, Mr. DeSteph executed a promissory note related to the \$100,000 transfer. Id. Mr. DeSteph never made any payments on the note. NHID Exhibit 9 at 83.

In April 2009 Ms. Gembitsky filed a complaint against Mr. DeSteph in the United States District Court for the District of New Hampshire seeking to recover on the promissory note based on a number of theories including statutory and common law fraud, unfair trade practices, breach of contract, conversion, constructive trust and negligent misrepresentation. NHID Exhibit 5 at 24 (District Court Order).⁵

On April 27, 2009, Ms. Gembitsky was granted a temporary restraining order attaching assets of Mr. DeSteph, and on April 29, 2009, the court held a preliminary injunction hearing at which Mr. DeSteph appeared *pro se*. Id. at 25.

On May 6, 2009, Mr. DeSteph filed a Chapter 13 bankruptcy petition with the United State Bankruptcy Court for the District of New Hampshire. NHID Exhibit 6 at 42. Mr. DeSteph filed the bankruptcy petition because he was afraid that he would not be able to provide for himself and his two daughters if his assets were encumbered due to the lawsuit. DeSteph testimony.

On May 7, 2009, the District Court issued an order granting Ms. Gembitsky's request for a preliminary injunction; the order prohibited Mr. DeSteph from using, transferring or encumbering any assets other than those needed to keep his first mortgage current and pay for other ordinary expenses. NHID Exhibit 5 at 38.

On May 8, 2009, Mr. DeSteph filed a Suggestion of Bankruptcy with the District Court suggesting that Ms. Gembitsky's action was subject to the automatic stay under the Bankruptcy Code.⁶ NHID Exhibit 6 at 41-42.

⁵ Mr. DeSteph asserts that he is not estopped from relitigating the findings of the District Court order, as it is not a final order on the merits. The hearing officer agrees with Mr. DeSteph that the factual and legal findings in the District Court order do not have collateral estoppel effect, and does not view these findings as conclusive. However, the hearing officer does accept the District Court order as evidence of the nature of Ms. Gembitsky's claims in the District Court action, and the procedural history of that case.

⁶ This filing is dated May 6, 2009, but bears the District Court's date and time stamp of 11:26 a.m. on May 8, 2009. To the extent the date of filing is disputed, the hearing officer concludes based on the evidence presented at the hearing that the stamp accurately reflects the date and time of filing.

On May 18, 2009, Ms. Gembitsky initiated an adversarial proceeding in Mr. DeSteph's bankruptcy case by filing a complaint for damages and objection to discharge. NHID Exhibit 8 at 56-75. The complaint asserted claims including statutory and common-law fraud, unfair trade practices, breach of contract, conversion, constructive trust and negligent misrepresentation. *Id.* All of the claims centered around the \$100,000 check and promissory note. The complaint included three exhibits: a copy of a handwritten note, NHID Exhibit 8 at 78; a copy of the \$100,000 check, NHID Exhibit 8 at 79; and a copy of the promissory note, NHID Exhibit 8 at 80.

On May 28, 2009, Mr. DeSteph filed his Chapter 13 Plan with the bankruptcy court. NHID Exhibit 7 at 45. In the plan, Mr. DeSteph proposed to avoid Ms. Gembitsky's claim, secured by the preliminary injunction, as preferential. NHID Exhibit 7 at 47.

On March 17, 2010, the bankruptcy court held an eight- or nine-day trial on Ms. Gembitsky's complaint. DeSteph testimony. Mr. DeSteph and Ms. Gembitsky both testified and were both represented by counsel. DeSteph testimony. Mr. DeSteph's attorney did not cross-examine Ms. Gembitsky, but had the opportunity to do so. DeSteph testimony. On May 26, 2010 the court issued its memorandum opinion. NHID Exhibit 9 at 81-101. Mr. DeSteph did not appeal. DeSteph testimony.

The bankruptcy court found, among other things, that Mr. DeSteph had committed fraud against Ms. Gembitsky and that her claim was not dischargeable in bankruptcy. NHID Exhibit 9 at 95.⁷ The court ordered Mr. DeSteph to pay Ms. Gembitsky \$124,030 (plus interest accruing as of January 10, 2008) and to turn over to her a 2003 Chrysler Town & Country van. NHID Exhibit 9 at 101.

At the hearing in this matter, Mr. DeSteph testified that he has been repaying Ms. Gembitsky in installments in accordance with his bankruptcy plan. He did not know the amount of the installments or what she had been paid in total. He also testified that, by agreement, he did not turn over the van to Ms. Gembitsky but instead paid her \$2000 and kept it. DeSteph testimony.

Collateral Estoppel Standard

The doctrine of collateral estoppel "bars a party to a prior action . . . from relitigating any issue or fact actually litigated and determined in the prior action." Petition of Kalar, 162 N.H. 314, 320 (2011). One major purpose of the doctrine is "to avoid repetitive litigation so that at some point litigation over a particular controversy must come to an end." Cook v. Sullivan, 149 N.H. 774, 777 (2003). The New Hampshire Supreme Court uses a five-part test to decide whether collateral estoppel applies in a particular case:

⁷ The court's specific findings and their effect in this proceeding are discussed further below.

[C]ollateral estoppel may preclude the relitigation of findings . . . when: (1) the issue subject to estoppel is identical in each action; (2) the first action resolved the issue finally on the merits; (3) the party to be estopped appeared in the first action or was in privity with someone who did; (4) the party to be estopped had a full and fair opportunity to litigate the issue; and (5) the finding at issue was essential to the first judgment.

Kalar, 162 N.H. at 320-21. The second, third and fourth factors of the collateral estoppel standard are clearly met in this case. There is no dispute that the bankruptcy court issued a decision on the merits which Mr. DeSteph did not appeal, that Mr. DeSteph was a party to the adversarial proceeding, and that he was represented by counsel in a multi-day trial, affording him the opportunity to fully litigate the issues.

The parties' arguments center on whether the issues in this license revocation proceeding are identical to those of the bankruptcy proceeding, and whether certain findings, particularly with respect to Mr. DeSteph's interactions with Ms. Gembitsky, were essential to the judgment in the bankruptcy matter. Mr. DeSteph disputes the Department's claim that the issues in the two proceedings are identical. The Department argues that the issues are identical and that Mr. DeSteph is estopped from relitigating them.

Application of Collateral Estoppel Standard

As a matter of law, determining the preclusive effect of a prior decision may require a detailed analysis of the cause of action and elements of proof of the earlier case. For example, in Stewart v. Bader, the New Hampshire Supreme Court was presented with the question of whether the defendant's conviction for first-degree murder carried within it a conclusive finding that the defendant's treatment of the victim was "wanton and malicious" for purposes of a finding of civil liability. Stewart v. Bader, 154 N.H. 75 (2006). The Court concluded that the jury's findings in the criminal case did have that preclusive effect, and barred the defendant from relitigating this issue in the civil case:

Here, there is no disputed issue of material fact regarding the defendant's conduct. The defendant was convicted in his criminal trial of first-degree murder. The jury found him guilty of "purposely caus[ing] the death of Vicki Bader." In this context, "purposely" means that his "conscious object [was] the death of another" and that his acts to further that object "were deliberate and premeditated." RSA 630:1-a, II (1996). We hold that this conduct, as a matter of law, was wanton,

malicious and oppressive and therefore justified an award of liberal compensatory damages.

Id. at 87. As in Bader, resolving the collateral estoppel issue requires a detailed examination of the earlier decision and the nature of the claims litigated in the bankruptcy adversarial proceeding.

Here, the critical finding was one of fraud. The bankruptcy court articulated the standard for New Hampshire common law fraud as follows:

Under New Hampshire law, in order to succeed on a claim of fraud, the party seeking to prove fraud must establish that the other party **made a misrepresentation with knowledge of its falsity** or with conscious indifference to its truth with the intention to cause another to rely upon it. In addition, the party seeking to prove fraud must demonstrate **justifiable reliance**.

NHID Exhibit 9 at 91 (quotations omitted, emphasis added).

The court found that Ms. Gembitsky had met her burden of proof with respect to all three elements of her fraud claim. First, the court concluded that Mr. DeSteph made four representations to Ms. Gembitsky with respect to the \$100,000 transfer and the promissory note:

(1) That Gembitsky would be investing in a limited partnership; (2) that Gembitsky would receive 6.15% interest per month on her investment; (3) that Gembitsky would be repaid her \$100,000 in January 2008; and (4) that Gembitsky would share in the profits of the TDA Advantage Trust.

NHID Exhibit 9 at 91.

Second, and most critically for the case at hand, the bankruptcy court found that Mr. DeSteph made these four representations with knowledge of their falsity. As a matter of law, the court found, "there can be no fraud if the maker represents a future intent to do something, unless the maker never intended to perform." NHID Exhibit 9 at 93.

The bankruptcy court concluded, based on the testimony and evidence before it, that Mr. DeSteph "never intended to perform." Id. Specifically, the court found that:

No part of Gembitsky's \$100,000 was ever invested into a limited partnership known as the TDA Advantage Trust. DeSteph deposited

Gembitsky's check on January 14, 2003 into the TDA Advantage Trust. When he did that, he comingled her funds with funds he used to pay premiums on behalf of another client. . . . Furthermore, the TDA Advantage Trust Account was without sufficient funds to cover the total amount of checks that had been written on the account until DeSteph deposited Gembitsky's check into the account . . . (Specifically, some of Gembitsky's money was used to pay Allianz on behalf of another client). Within a week of receiving and depositing Gembitsky's check, DeSteph transferred funds from the TDA Advantage Trust Account to his business account at the DeSteph Agency. Right away, DeSteph was using Gembitsky's money for purposes other than what he had promised her. The evidence clearly shows that at the time DeSteph represented to Gembitsky that he would invest her \$100,000, he never intended to follow through with his intention.

Id. The court went on to find that Mr. DeSteph's misrepresentations "continued up until 2008. DeSteph never made a single payment to Gembitsky . . . and each time Gembitsky requested documentation or inquired into her payments, DeSteph provided an excuse as to his non-action." NHID Exhibit 9 at 94.

The court concluded that Mr. DeSteph's false representations "induced Gembitsky to give DeSteph a check for \$100,000." Id. Third and finally, the court found that Ms. Gembitsky "justifiably relied on DeSteph's initial statements and his continuous misleading statements to her detriment." Id.

The hearing officer finds that, given the legal standard for fraud, the bankruptcy court's detailed factual findings regarding the falsity of Mr. DeSteph's representations to Ms. Gembitsky were essential to the court's finding of fraud. See Stewart v. Bader, 154 N.H. 75 (2006). These detailed findings, in particular that Mr. DeSteph never invested Ms. Gembitsky's money in a limited partnership, that he comingled her funds with those of other clients, and that he immediately transferred the funds into his own business account, demonstrate "fraudulent, coercive, or dishonest practices, or . . . incompetence, untrustworthiness or financial irresponsibility" within the meaning of RSA 402-J:12, I(h). Thus, the finding of fraud for purposes of the adversarial proceeding in bankruptcy, and the required finding for purposes of license revocation and imposition of an administrative fine are identical.

The hearing officer finds that all five criteria for collateral estoppel have been met and that based on the bankruptcy court's findings, Mr. DeSteph has engaged in fraudulent business practices within the meaning of RSA 402-J:12, I(h).

Whether to Consider Additional Evidence (Scope of Relitigation)

At the December 12 hearing, Mr. DeSteph's counsel sought to offer testimony and exhibits to which counsel for the Department objected on the grounds that it would constitute relitigation of issues or facts decided by the bankruptcy court. Specifically, Mr. DeSteph sought to explain and recharacterize his pre-2009 interactions with Ms. Gembitsky. Determining whether to consider this evidence requires an inquiry into whether these facts were "actually litigated" before the bankruptcy court. Petition of Kalar, 162 N.H. 314, 320 (2011). If so, Mr. DeSteph is collaterally estopped from relitigating them.

In its decision, the bankruptcy court detailed the two parties' versions of events separately, then made its own factual findings (entitled "What the Court Believes Actually Occurred") after weighing the credibility of the witnesses. NHID Exhibit 9 at 83-87. Among other things, Mr. DeSteph testified in the bankruptcy court trial that he was involved in a "romantic relationship" with Ms. Gembitsky, that she "showed a willingness to help" with his divorce litigation, and that he believed she was also willing to "assist him financially." NHID Exhibit 9 at 85. According to Mr. DeSteph's testimony in the bankruptcy matter, Ms. Gembitsky wrote him the \$100,000 check as part of a "joint venture," but also said he could use the money to pay himself a salary and to cover costs associated with his custody litigation and other incidental expenses. Id. When the romantic relationship ended, Mr. DeSteph testified, Ms. Gembitsky created the promissory note and asked Mr. DeSteph to sign it. Id. Despite the terms of the note, Mr. DeSteph's testimony was that Ms. Gembitsky told him "that he could make payments on the Note if and when he could. He was never able to make any payments." Id.

The bankruptcy court rejected Mr. DeSteph's testimony in its entirety, finding that it "was completely lacking in credibility" and "utterly unconvincing." In particular, the court found that Mr. DeSteph was acting as an investment advisor to Ms. Gembitsky, rather than in a personal capacity or as part of a "joint venture." The court found that Mr. DeSteph had successfully assisted Ms. Gembitsky with two previous investments prior to the time she wrote the \$100,000 check, which caused her to be justified in her reliance on his representations that she would eventually receive a return on her investment in the TDA Advantage Trust. NHID Exhibit 9 at 94-95. The court found Mr. DeSteph's insinuation that Ms. Gembitsky was the one who insisted on the inclusion of the term "limited partnership" on the memo line of the check "absolutely ridiculous," and dismissed as "[s]imilarly unbelievable" his testimony that Ms. Gembitsky simply "gave him \$100,000 to use for his custody battle and to draw salary for the DeSteph Agency in which Gembitsky held no interest." NHID Exhibit 9 at 86.

At the December 12 hearing, Mr. DeSteph gave some limited testimony and his attorney made an offer of proof regarding further testimony on issues relating to his

pre-litigation interactions with Ms. Gembitsky. This evidence was similar to the testimony considered and rejected by the bankruptcy court (the parties were romantically involved, the check was related to a joint venture, Mr. DeSteph believed he was going into business with Ms. Gembitsky, etc.). The hearing officer agrees with the Department that considering evidence that was explicitly rejected by the bankruptcy court would constitute relitigation, undercutting the finality of the court's decision. See Cook v. Sullivan, 149 N.H. 774, 777 (2003).

The hearing officer finds that testimony on the issue of the pre-2009 interactions between Mr. DeSteph and Ms. Gembitsky is barred by collateral estoppel. The hearing officer will not, therefore, consider Mr. DeSteph's testimony on these interactions, the three additional exhibits or the related offer of proof made at the conclusion of the hearing.

Mitigating or Aggravating Factors

The bankruptcy court's findings are sufficient to satisfy the Department's burden of proving that Mr. DeSteph used "fraudulent, coercive, or dishonest practices, or demonstrating incompetence, untrustworthiness or financial irresponsibility in the conduct of business in this state or elsewhere," within the meaning of RSA 402-J:12, I(h). However, the hearing officer agrees with Mr. DeSteph that even upon such a finding, the decision to revoke a license or to impose an administrative fine rests within the Insurance Commissioner's discretion (the "commissioner *may* place on probation, suspend, revoke, or refuse to issue or renew an insurance producer's license, or *may* levy a penalty . . .). RSA 402-J:12, I (emphasis added).

Therefore, the hearing officer will consider Mr. DeSteph's testimony on matters not ruled on by the bankruptcy court, as well as his attorney's arguments on appropriate sanctions, to determine whether there are aggravating or mitigating factors with respect to the issue of what, if any, penalty should be imposed. The bankruptcy court's finding that Mr. DeSteph's testimony in that proceeding was not credible does not have preclusive effect as to his testimony on other issues.

Attorney Samuels argued that revocation was not an appropriate sanction because (a) the conduct that was found to constitute fraud did not occur within Mr. DeSteph's insurance business; (b) the conduct was not the subject of criminal charges and Mr. DeSteph has no criminal record; (c) the conduct involved a single incident that occurred nearly nine years ago; and (d) license revocation would cause Mr. DeSteph hardship as his insurance business is his only means of support.

The hearing officer does not find any of these arguments persuasive. RSA 402-J:12, I(h) does not specify that an insurance producer's license may be revoked only for fraud in the insurance business; rather, the statute contemplates revocation based

on fraud "in the conduct of business" generally. The bankruptcy court found that the fraud occurred in the course of Mr. DeSteph's business as an investment advisor to Ms. Gembitsky. This satisfies the statutory requirement. Similarly, RSA 402-J:12, I(h) does not require a criminal conviction for fraud, and the Department has not alleged that Mr. DeSteph engaged in criminal conduct.

Nor is the "single incident" argument compelling. A single incident, if egregious enough, may well be enough to revoke a license. Engaging in fraud involving more than \$100,000 is precisely the type of behavior that justifies revocation. Nor is the incident as distant in time as Mr. DeSteph suggests. The bankruptcy court found that this particular fraud, far from ending nine years ago, continued at least until 2008, due to Mr. DeSteph's refusal to make any payments under the promissory note, his representations that profits were being cycled back into the business, and Ms. Gembitsky's expectation that she would be repaid once the five years was up.

Finally, Mr. DeSteph's personal circumstances of hardship do not constitute a mitigating factor, where he himself caused them, and his behavior continues to contribute to them. Notably absent from Mr. DeSteph's testimony was any acceptance of personal responsibility for the harm he has caused Ms. Gembitsky.

The hearing officer was also struck by Mr. DeSteph's somewhat bizarre refusal to acknowledge the findings contained in the bankruptcy court decision. Mr. DeSteph must surely have understood the importance of this document given that it was attached to the Show Cause order and formed the basis for the Department's action against him. Nevertheless, Mr. DeSteph testified that he had not read the court's decision thoroughly, stating that "I believe I've read some of it." Frankly, this testimony was shocking and raises the question of Mr. DeSteph's competence to assist consumers in reading insurance policies and other complex documents. He knew the December 12 hearing was crucial to his continued ability to conduct his business, yet he failed to acquaint himself with the document on which the license revocation issue would turn. In the hearing officer's view Mr. DeSteph's unwillingness or inability to understand the connection between his behavior and the consequences he now faces situation strengthens the case for license revocation.

Conclusion

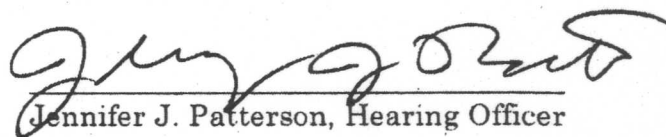
The findings of the bankruptcy court, taken in conjunction with the hearing testimony, demonstrate that it would not be in the best interest of New Hampshire consumers to allow Mr. DeSteph to retain his insurance producer license. Accordingly, and based on the findings and analysis above, the hearing officer recommends that Mr. DeSteph's license be revoked pursuant to RSA 402-J:12, I(h) and that he be ordered to pay a fine of \$2,500 pursuant to RSA 400-A:15, III.

Further Action

Pursuant to Ins 204.26(a), this proposed decision is hereby submitted to the Insurance Commissioner and the parties. Any party wishing to file exceptions and supporting memoranda of law for review by the Commissioner, or to request oral argument before the Commissioner, must do so within 20 days of the date of this proposed decision.

SO ORDERED.

Dated: January 13, 2012


Jennifer J. Patterson, Hearing Officer