STATE OF NEW HAMPSHIRE

SUPREME COURT

No. 2012-0253

Appeal of Thomas F. DeSteph

v.

APPEAL PURSUANT TO RULE 10 FROM A DECISION OF THE NEW HAMPSHIRE INSURANCE DEPARTMENT

BRIEF FOR THE STATE OF NEW HAMPSHIRE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Rules

Other Authorities

COUNTERSTATEMENT OF THE ISSUE[1]

Whether or not the Insurance Commissioner's decision to revoke Appellant's insurance producer's license was a sustainable exercise of his discretion where Appellant defrauded a non-insurance client of $100,000 and thereby violated RSA 402-J:12, I(h), but otherwise had an unblemished record, was not charged or convicted of any crime, the fraud was not related to the insurance business and Appellant is the sole source of support for two young children.

[1] This is the only issue that Appellant preserved for appeal. Appellant presented four questions in his Appeal, as amended, but to the extent the Questions Presented raise other legal issues, the issues were not preserved for appellate review.

STATEMENT OF THE CASE AND FACTS

This is an appeal by Thomas F. DeSteph ("Appellant" or "DeSteph") from a decision of the Insurance Commissioner to revoke his insurance producer license after he was found to have defrauded one of his clients of $100,000 and thereby to have committed "fraudulent, coercive or dishonest business practices or demonstrating incompetence, untrustworthiness or financial irresponsibility" in violation of RSA 402-J:12, I(h).

On October 24, 2011, the New Hampshire Insurance Department issued an Order to Show Cause and Notice of Hearing alleging a violation of RSA 402-J:12, I(h) and ordering Appellant to show cause why his producer license should not be revoked. Cert. Rec. at 1.[2] In the Order to Show Cause, the Department relied on a May 26, 2010 Memorandum Opinion of the United States Bankruptcy Court for the District of New Hampshire in which the court (Vaughn, C.J.) ruled that DeSteph had defrauded a client, a Ms. Gembitsky, of $100,000 and that the related indebtedness was not dischargeable in DeSteph's bankruptcy. *Id.* at 3. The Department attached a copy of the Memorandum Opinion , incorporated it by reference and made it a part of the Order to Show Cause. *Id.* Under "Request for Administrative Penalties," the Department requested that the hearing officer revoke DeSteph's producer license and impose a fine in an amount not less than $2,500. *Id.*

The Insurance Commissioner appointed Jennifer Patterson as his designee to preside as Hearing Officer pursuant to RSA 400-A:19, I. *Id.* at 29.

[2] "Cert. Rec." refers to the Certified Record of New Hampshire Insurance Department filed on August 2, 2012.

On December 12, 2011, the Department held an adjudicative hearing on the Order to Show Cause. *Id.* at 154. Appellant appeared and was represented by his attorney, Richard Samuels. The Department was represented by its enforcement attorney, Richard McCaffrey. *Id.* The Department offered nine exhibits into evidence, to which there was no objection. (One of the exhibits was the Memorandum Opinion. *Id.* at 114.) Appellant offered four exhibits, one of which was admitted without objection while the other three were objected to and marked for identification. *Id.* at 154. DeSteph testified and was the only witness. The hearing lasted approximately two hours and fifteen minutes. *Id.*

Following the hearing, the parties submitted post-hearing memoranda. *Id.* at 140 and 148. Appellant, through counsel, made three points. The first point was that collateral estoppel did not bar testimony and consideration by the hearing officer of all relevant facts on the issue of whether the particular "fraudulent, coercive or dishonest practice" supports the exercise of the Commissioner's discretion to impose a particular punishment such as probation, suspension or revocation of his license. Therefore, the hearing officer should consider DeSteph's testimony during the hearing, his version of the facts contained in the Bankruptcy Court's Memorandum Opinion and the three exhibits offered, all on the question of license revocation. Second, he argued that DeSteph's testimony and the three exhibits established that "DeSteph's Belief That He Had Not [Defrauded] Gembitsky is Justified and not a Fabrication." *Id.* at 143. Third, he argued that revocation was not necessary or warranted given the facts of this case. The Department responded that in the circumstances presented here, collateral estoppel applied not only to re-litigation of the common law fraud claim, which DeSteph apparently conceded, but also to the facts and the testimony surrounding the relationship

between DeSteph and Gembitsky, which the bankruptcy court considered and ruled on. *Id.* at 151.

On January 13, 2012, the hearing officer submitted her Proposed Decision and Order to the Insurance Commissioner pursuant to New Hampshire Administrative Rule Ins 204.26(a) and invited the parties to file exceptions and supporting memoranda of law for review by the Commissioner or to request oral argument. *Id.* at 165.

The Proposed Decision and Order

The hearing officer made detailed findings of fact based on the testimony of DeSteph, exhibits that were introduced without objection and the bankruptcy court's memorandum opinion.[3] Specifically, the hearing officer found that DeSteph was an insurance producer residing in Jaffrey, New Hampshire and was licensed to sell life, accident and health insurance in the State of New Hampshire as well as Connecticut and Massachusetts. *Id.*. He had worked in the insurance industry for 38 years and been a licensed producer for 33 years. He had no occupation or source of income other than as an insurance producer. He has never been the subject of a formal complaint involving his work in the insurance business and he has not been involved in litigation other than his divorce and the matters leading to the Commissioner's Order and Notice. *Id.*

DeSteph offered financial and investment planning advice to clients, including Ms. Gembitsky, whom he met in Connecticut in 2002. *Id.* at 157. He helped her transfer some of her 401(k) plans into annuities. In January, she gave DeSteph a check for

[3] The facts recited in the Findings of Fact section of the Proposed Decision and Order appear to be uncontested. *Id.* at 156-158 and footnote 4.

$100,000 made out to TDA Advantage Trust, which was a bank account that he used for business purposes. In March 2003, he executed a promissory note related to the $100,000 transfer. He never made any payments on the note. In April 2009, Gembitsky filed a complaint against DeSteph in the United States District Court for the District of New Hampshire seeking to recover on the promissory note based on a multi-count complaint that among other causes of action included statutory and common law fraud and breach of contract. On April 27, 2009, the District Court issued a temporary restraining order attaching assets of DeSteph and on April 29, 2009 held a hearing on a Motion for Preliminary Injunction, at which DeSteph appeared *pro* se. On May 7, 2009, the District Court issued an order granting the preliminary injunction against DeSteph, enjoining him from transferring assets other than to pay his ordinary expenses. *Id.*

DeSteph filed a Chapter 13 bankruptcy petition with the United States Bankruptcy Court for the District of New Hampshire on May 6, 2009. *Id.* The reason for filing was that 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 federal lawsuit. *Id.*

Gembitsky initiated an adversary proceeding in DeSteph's bankruptcy case, again asserting numerous claims, including statutory and common law fraud, breach of contract and denial of the dischargeability of any indebtedness to her. *Id.* at 158.

Starting on March 17, 2010, the bankruptcy court conducted an eight-or nine-day trial on the Gembitsky complaint. Gembitsky and DeSteph both testified and both were represented by counsel. DeSteph's attorney in the bankruptcy case did not cross-examine Gembitsky, but he had an opportunity to do so. On May 26, 2010, the court issued a 21-

page Memorandum Opinion.[4] The bankruptcy court found that DeSteph had committed fraud against Gembitsky and that her claim was not dischargeable in his bankruptcy. DeSteph did not appeal the bankruptcy court ruling. *Id.*

The major legal issue before the hearing officer was whether the issues in the license revocation proceeding were identical to those in the bankruptcy adversary proceeding and whether certain findings particularly with respect to DeSteph's interactions with Gembitsky, were essential to the judgment of the bankruptcy matter. DeSteph disputed the Department's claim that the issues in the two proceedings were identical whereas the Department argued that they were identical and that DeSteph was estopped from re-litigating them. *Id.* at 159.

After reviewing the law on collateral estoppel and the five-part test articulated by this court in *Petition of Kalar*, 162 N.H. 314, 320 (2011)[5] as to whether collateral estoppel applies in a particular case, the hearing officer found 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)." *Id.* at 161.

The hearing officer also addressed the issue as to whether additional evidence and exhibits proffered by Appellant should be considered on issues relating to the "pre-litigation interactions with Ms. Gembitsky." The issue was whether those facts had been

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[4] The Memorandum Opinion is the Department's Exhibit 9 and is in the Certified Record at 114.

[5] "[C]ollateral estoppel may preclude the re-litigation 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 issues; and (5) a finding at issue was essential to the first judgment. *Kalar* at 320.

"actually litigated" before the bankruptcy court. The hearing officer determined that the specific issues were similar to the testimony considered and rejected by the bankruptcy court as not credible and that considering evidence that previously was explicitly rejected would constitute re-litigation and thereby undercut the finality of the court's decision. Thus, the hearing officer ruled that the testimony on the pre-2009 interactions between DeSteph and Gembitsky was barred by collateral estoppel. *Id.* at 162-63.

In evaluating whether to recommend revocation, the hearing officer did consider DeSteph's testimony "on matters not ruled on by the bankruptcy court" as well as his attorney's arguments to determine whether there were "aggravating or mitigating factors" as to what penalty should be imposed. After weighing the arguments that revocation was not an appropriate sanction, she concluded that the findings of the bankruptcy court, along with the hearing testimony, demonstrated that it was not in the best interest of the New Hampshire consumers to allow DeSteph to retain his insurance producer license and she recommended revocation as well as a fine of $2,500. *Id.* at 163-64.

Post Hearing Proceedings

In response to the Commissioner's invitation to the parties to file exceptions and supporting memoranda or to request oral argument, DeSteph, through counsel, submitted a Statement of Exceptions, and the Department submitted a Reply. In his Statement of Exceptions, DeSteph did not contest the hearing officer's proposed rulings that the criteria for the applicability of collateral estoppel had been met or that based on the bankruptcy court's findings, DeSteph had engaged in fraudulent business practices within the meaning of RSA 402-J:12, I(h). *Id.* at 161 and 167. Nor did Appellant contest the

hearing officer's ruling that certain testimony was barred by collateral estoppel or that she would not consider three of Appellant's exhibits or the related offer of proof made at the conclusion of the hearing. *Id.* at 163 and 167.

Instead, he argued that the particular conduct "does not support the sanction of revocation, which is a matter within the discretion of the commissioner." *Id.* at 167. He argued, as he did at the hearing, that DeSteph had never been the subject of a formal complaint in the insurance business or involved in litigation other than his divorce; that he had never been charged with a crime; and that this was an isolated incident occurring nine years ago. He also took issue with the hearing officer's statement that DeSteph's "unwillingness or inability to understand the connection between his behavior and the consequences he now faces strengthens the case for license revocation." He argued that this was using DeSteph's own defense to support revocation.

The Commissioner, on February 23, 2012 accepted the Proposed Decision and Order and entered it as a Final Order on Hearing. *Id.* at 173.

Appellant, *pro se,* on March 22, 2012 filed a Motion for Rehearing. *Id.* at 187. The only basis that Appellant argued for a rehearing was that the punishment of license revocation was not "in reasonable proportion to the violation," citing articles 18 and 33 of the New Hampshire Constitution, and that revocation is "cruel and unreasonable" under the circumstances. The circumstances that Appellant submitted were the same as those argued both in writing and orally before the hearing officer. He also argued that he had not had the help of effective counsel in his hearing before the bankruptcy court. *Id.*

On March 30, 2012, the Commissioner entered an Order on Motion for Rehearing where he denied the motion on the basis that the grounds presented did not support a

conclusion that the final order was unlawful or unreasonable. He also denied DeSteph's request for a stay. *Id.* at 194.

Appellant filed an Appeal with this court on April 9, 2012. On May 10, 2012, he filed Motion for Addendum to add a fourth issue to the Questions Presented for Review. This court granted the motion on June 20, 2012.

SUMMARY OF THE ARGUMENT

The only issue preserved for appeal in his Motion for Rehearing is whether the Insurance Commissioner's decision to revoke Appellant's producer license was a sustainable exercise of his discretion. The record, especially the hearing officer's thoughtful and detailed review of the legal issues and her consideration of various mitigating or aggravating factors, shows that the Commissioner was well within the scope of his discretion. The simple and compelling fact that underpins and supports the Commissioner's decision is that the United States Bankruptcy Court for the District of New Hampshire, after a multi-day trial, ruled in a 21-page Memorandum Opinion that Appellant had defrauded a client of $100,000 and that the resulting indebtedness was not dischargeable in his bankruptcy.

The hearing officer properly found in the circumstances of this case that the criteria for collateral estoppel had been met and that based on the bankruptcy court's findings, Appellant had engaged in fraudulent business practices within the meaning of RSA 402-J:12, I(h). Appellant conceded this in arguments submitted by his attorney after the adjudicative hearing. Similarly, the hearing officer properly ruled that Appellant's proffered testimony on his interactions and relationship with his former client had been considered and rejected by the bankruptcy court (because it was not credible) and Appellant was collaterally estopped from re-litigating those issues. Appellant did not object to this ruling in his Statement of Exceptions. Finally, the hearing officer carefully weighed various "mitigating or aggravating factors" before recommending revocation on the basis that it would not be in the best interest of public consumers to allow Appellant to retain his license.

Other legal issues that Appellant seeks to raise on appeal such as applicability of collateral estoppel, standard of proof, unconstitutionality of RSA 402-J:12, I(h) as vague or a violation of his substantive due process and the adequacy of notice under RSA 541-A:31 were not preserved for appeal. In addition, with the exception of the collateral estoppel issue, those issues were not even raised at the adjudicative hearing. Even if the legal issues had been raised at the adjudicative hearing and had been preserved for appeal, they are without legal merit or factual support.

Given the substantial deference to be accorded decisions of administrative agencies pursuant to RSA 541:6, especially when determining appropriate punishments for violations of administrative rules and regulations, the Commissioner's decision to revoke Appellant's producer license was clearly supported by the record, well within the scope of the Commissioner's discretion and should be sustained by this court.

ARGUMENT

I. STANDARD OF REVIEW

Because it is an appeal from an administrative agency decision pursuant to RSA 541:6, the statutory standard of review is highly deferential. The burden of proof is on the Appellant to show that the Commissioner's decision was "clearly unreasonable or unlawful." RSA 541:13. The hearing officer's findings of fact are "deemed *prima facie*, lawful and reasonable." *Id.*; *Appeal of Town of Litchfield*, 147 N.H. 415, 416 (2002). The Commissioner's decision shall not be set aside or vacated except for errors of law or the court is satisfied "by a clear preponderance of the evidence . . . that such order is unjust or unreasonable." RSA 541:13; *Appeal of Young*, 146 N.H. 216, 217 (2001).

Where severity of sanctions is the issue, the court will not substitute its judgment for that of the Commissioner in all but exceptional cases. *Appeal of AlphaDirections, Inc.*, 152 N.H. 477, 486 (2005); *Appeal of Metropolitan Prop. & Liabil. Ins. Co.*, 120 N.H. 733, 736 (1980).

Absent a transcript, the Supreme Court will assume that the evidence was sufficient to support the result reached by the administrative agency. Sup. Ct. R. 10.2. *Thompson v. D'Errico*, 163 N.H. 20, 22 (2011); *Bean v. Red Oak Prop. Mgmt.*, 151 N.H. 248, 250 (2004).

II. THE RECORD CLEARLY SUPPORTS THE COMMISSIONER'S DECISION TO REVOKE APPELLANT'S PRODUCER LICENSE, WHICH IS THE ONLY ISSUE PROPERLY PRESERVED FOR APPELLATE REVIEW

A. The Commissioner's decision to revoke Appellant's license was reasonable and a sustainable exercise of his discretion.

The hearing officer carefully considered not only the legal issues but also all the arguments for and against license revocation, arguments that Appellant now seeks to present to this court for a reconsideration of the Commissioner's decision. Appellant made his points at the hearing, in his Post-Hearing Memorandum, in his Statement of Exceptions, and in his Motion for Rehearing. The hearing officer summarized them as follows:

> 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 a hardship since his insurance business is his only means of support.

Cert. Rec. at 183.

The hearing officer dealt with each of these arguments. First, she noted quite properly that the statute authorized revocation for fraud "in the conduct of business" generally and not just in the insurance business. (Although she did not note it, the fraud did occur in the course of DeSteph offering financial and investment planning advice, a position of trust. *Id.* at 157. DeSteph was able to convince Gembitsky to rely on him and the bankruptcy court found that her reliance was justifiable. *Id.* at 127.)

Second, the statute does not require criminal conviction. The absence of a conviction, as opposed to the presence of one, is hardly determinative or even a weighty consideration in a license revocation proceeding.

Third, the hearing officer reasoned that: "a single incident, if egregious enough, may well be enough to revoke a license." *Id.* at 184. The hearing officer found that a fraud involving more than $100,000 is precisely the type of behavior that justifies revocation. She noted that the incident was not as distant in time as Appellant argued. The fraud, as found by the bankruptcy court, did not end when the money transferred in January 2003, but continued at least until 2008 because of DeSteph's refusal to make payments under the note, his representations to Gembitsky that profits were being recycled back into the business, and Gembitsky's expectation that she would be repaid once the five years was up. *Id.*

On the fourth point, the hearing officer reasoned that DeSteph's personal circumstances of hardship did not constitute a mitigating factor where he himself had caused them. *Id.* at 164. Case law is supportive of this observation. *Union Fidelity Life Ins. Co. v. Whaland*, 114 N.H. 549, 551 (1964) (Kenison, C.J.) (plaintiff, whose conduct has caused the commissioner to issue his order, should bear the weight of the decision); *Cumberland Farms v. New Hampshire Milk Control Board*, 104 N.H. 364, 367 (1963) (the irreparable harm claimed by the plaintiff results in a course of conduct which it has chosen to follow).

In addition to evaluating the arguments submitted by Appellant, the hearing officer stated that she was struck by DeSteph's "somewhat bizarre" refusal to acknowledge the findings contained in the bankruptcy court decision. He testified that he

had not read the court's decision thoroughly, stating that: "I believe I read some of it." *Id.* at 164. Characterizing the testimony as "shocking," the hearing officer said it "raised a question of DeSteph's competency." Appellant takes great exception to this comment in his brief where, among other things, he described it as "absurd," "an unethical act of irresponsibility," "published only to cause as much pain, hardship and damage . . . as possible,." "unscrupulous" and "slanderous." However, the record shows that the statement was a reaction to DeSteph's testimony, not a finding on which the hearing officer based her recommendation. Competency was not a factor in the revocation hearing. Fraud was the issue. In addition, this court does not have a transcript in order to place the testimony in context. *Bean v. Red Oak Prop. Mgmt.*, 151 N.H. 248 (2004).

Finally, the hearing officer took into account the public interest when she concluded by saying that the bankruptcy court's findings taken in conjunction with the testimony demonstrate that it would not be in the best interest of New Hampshire consumers to allow DeSteph to retain his license. *Id.* at 184.

B. Where the issue is the appropriateness of an administratively imposed punishment, this court is especially deferential to the agency.

The supreme court will set aside an administratively imposed punishment only "if it is so harsh or excessive as to be unreasonable or to constitute an unsustainable exercise of discretion." *Appeal of AlphaDirections, Inc.*, 152 N.H. 477, 486 (2005) (fine of $42,500 was not arbitrary for a consultant without a license received seventeen payments for insurance consulting work). In addition, because appropriate sanctions must necessarily be tailored to particular cases, the court is "disinclined to substitute our judgment for that of the commissioner in all but exceptional cases." *Id.*; *Appeal of*

Metropolitan Prop. & Liabil. Ins. Co., 120 N.H. 733, 736 (1980) (penalty of sixty days suspension may be somewhat harsh, but not an abuse of discretion in light of violations). *Appeal of Blizzard*, 163 N.H. 326 (decided March 9, 2012) (suspension of boating license for three years after licensee convicted of negligent homicide in boating accident upheld despite lack of specific regulations relating to time limits).

Appellant had a full and fair hearing, first before the bankruptcy court on the fraud and dischargeability issues, and then before the hearing officer on license revocation. He was represented by counsel in both proceedings. The record, in the form of the exhibits and the proposed Decision and Order, support the Commissioner's decision. Conversely, Appellant has not shown by clear and convincing evidence that the decision was unjust or unreasonable.

C. Because he did not raise them in his motion for rehearing, Appellant did not preserve and the court should not consider any legal issue other than reasonableness of the sanction.

RSA 541:4 says that no ground not set forth in the Motion for Rehearing shall be given consideration by this Court on appeal. Specifically:

> No appeal from any order or decision of the commission shall be taken unless the appellant shall have made application for rehearing as herein provided, and when such application shall have been made, no ground not set forth therein shall be urged, relied on, or given any consideration by the court, unless the court for good cause shown shall allow the appellant to specify additional grounds.

RSA 541:4 (emphasis added).

Case law supports and explains this provision as an absolute prohibition against consideration of any issue not preserved in a motion for rehearing. *See, e.g., Appeal of Walsh*, 156 N.H. 347, 352 (2007) (where taxpayers failed to move for reconsideration

with respect to three issues that they had appealed and did not show a good cause to justify failure, claims were not properly preserved for purposes of appeal). *Appeal of Campaign for Ratepayers Rights*, 145 N.H. 671, 674 (2001) (motion for rehearing must contain every ground upon which it is claimed that the decision and order complained of is unlawful or unreasonable). *Appeal of Coffey*, 144 N.H. 531, 533-34 (1999) (employee did not preserve for appellate review question whether Department of Labor violated his state due process rights where employee did not specifically invoke state constitutional provisions in his motion for rehearing to the Department and he did not articulate his constitutional claim in the hearing before the Department).

Specifically, in his Motion for Rehearing, Appellant did not raise any of the potential legal issues implicated in questions 1, 3 and 4 of the Questions Presented for Review in Appellant's Motion for Addendum. *See* Appellant's Brief at 2. Appellant did not raise any issue of the applicability of collateral estoppel or burden of proof (question 1). He did not raise any challenge to the unconstitutionality or vagueness of RSA 402-J:12, I(h) (question 3), nor did he raise any issue of the adequacy of notice under RSA 541-A:31 (question 4). Therefore, the first, third and fourth questions raised in this Appeal, to the extent that they raise legal issues, are precluded from consideration under RSA 541:4 and applicable case law.

In his Motion for Rehearing, Appellant did argue that Articles 18 and 33 of the New Hampshire Constitution demand that punishment be "in reasonable proportion to the violation." He also argued that license revocation was "cruel and unreasonable," citing the same factors that the hearing officer addressed in making her recommendation. Cert. Rec. at 187. Thus, he raised the issue of the reasonableness of the sanction and thereby

preserved it for appellate review. However, Articles 18 and 33 relate to criminal punishment, not administrative proceedings. *State v. Enderson*, 148 N.H. 252, 259 (2002) (New Hampshire Constitution provides as much protection against disproportionate punishment as the Eighth Amendment to the Federal Constitution and to be violative of the Constitution a sentence must be so excessive as to be grossly disproportional to the crime). The Commissioner's decision to revoke an insurance license does not implicate a legal issue under Articles 18 and 33.

Appellant states the issues somewhat differently in issue #2 of his Questions Presented when he asked: "Whether the Department erred, abused its discretion and violated New Hampshire Constitution Articles 18 and 33 when it revoked Mr. DeSteph's license (property) 'in light of settled penalties for similar violations.'" Appellant's Brief at 2 and 15. He argues that in the case of *Elizabeth W. Kelly* Ins. 08-028-EP, the Department suspended a license for 120 days of a licensee convicted of felony fraud. The Order on Hearing in the *Kelly* matter, which is available on the Department's website, shows the extensive reasoning and considerations taken into account in a case with fundamentally different facts. In that case, the Department pointed out that license revocation under RSA 402-J:12, I(f) and (h) is discretionary and took into account certain mitigating factors such as the licensee's cooperation with law enforcement, her cooperation with the Department, her admission of guilt and her acceptance of responsibility. Furthermore, the amount involved was less than $3,500, not $100,000. If anything, the *Kelly* case, along with the hundreds of other enforcement actions reported on the website from the last six years, shows that the Commissioner needs the latitude

and discretion to enforce the insurance rules and regulations as he finds necessary and appropriate.

D. Although not properly before this court, the other legal issues that Appellant seeks to raise are not supported by the record or applicable law.

The first question Appellant seeks to present is whether the Department erred in revoking DeSteph's license by using "Collateral Estoppels [sic] that relied on Preponderance of Evidence determining the discharge of a creditor . . . in a bankruptcy proceeding." Collateral estoppel was a key issue in the adjudicative hearing and the hearing officer dealt with it at length. DeSteph apparently asserted at the hearing that the fraud he was found to have committed for the bankruptcy court was not identical to the fraudulent business practice under RSA 402-J:12, I(h). Cert. Rec. at 175. Secondly, DeSteph argued that even if he is collaterally estopped from arguing that he did not commit fraud, his testimony and exhibits should be considered on the issue of imposition of a penalty. *Id.* at 176. The hearing officer ruled that the particular finding of fraud for purposes of a bankruptcy dischargeability action and the finding for purposes of license revocation were identical and that all five criteria for collateral estoppel had been met as articulated in *Petition of Kalar*, 162 N.H. 314, 320 (2011). DeSteph, when represented by counsel, conceded this point. In his post-hearing memorandum, DeSteph said: "the doctrine of collateral estoppel would indeed apply to re-litigation of the fraud claim asserted by Gembitsky. But that is not DeSteph's objective . . . the very different issue in this proceeding is whether DeSteph's conduct is sufficiently egregious to require or even support license revocation. As such, the hearing officer should consider the facts alleged

not only by Gembitsky but also by DeSteph." Cert. Rec. at 141-42. Similarly, in his Statement of Exceptions, when represented by counsel, DeSteph stated:

> Mr. DeSteph does not argue that a finding of fraud is insufficient to constitute "fraudulent . . . practices" in the conduct of non-insurance related business within the meaning of RSA 402-J:12, I(h). Rather, he argues that the particular conduct does not support the sanction of revocation, which is a matter within the discretion of the Commissioner.

Thus, the collateral estoppel issue that emerged after the hearing was solely a question of the admissibility of certain testimony that DeSteph sought to introduce on the question of the appropriateness of the sanction. On this issue, the hearing officer also ruled that the three exhibits DeSteph sought to introduce and testimony explaining his interactions with Gembitsky was evidence ". . . 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."), would constitute re-litigation and was barred by collateral estoppel. As the hearing officer reasoned, the bankruptcy court detailed the two parties' versions of events and made its own factual findings after weighing the credibility of the witnesses. The bankruptcy court rejected DeSteph's testimony in its entirety, finding that it was "completely lacking in credibility" and "utterly unconvincing." The bankruptcy court characterized one of DeSteph's insinuations as "absolutely ridiculous" and another statement as "[s]imilarly unbelieveable."[6] *Id.* at 182 and 85, 86. Since collateral estoppel applied to factual issues previously litigated, the hearing officer correctly ruled that DeSteph was estopped from re-litigating these issues.

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[6] The Magistrate Judge (Muirhead, J.) who heard Appellant testify at the preliminary injunction hearing, also found that "His story was neither credible nor persuasive . . . ." *Id.* at 65.

The hearing officer did rule, however, that she would consider DeSteph's testimony "on matters not ruled on by the bankruptcy court as well as his attorney's arguments on appropriate sanctions." *Id.* at 183. Thus, on the critical issue of sanctions, the hearing officer considered DeSteph's testimony.

To the extent Appellant attacked the standard of proof that applied in the bankruptcy proceeding, it appears that he is mistaken. The bankruptcy court ruled that under New Hampshire law, Ms. Gembitsky must prove fraud by "clear and convincing evidence. *Id.* at 16. The court ruled that she met that higher standard. Proof of the elements of a dischargeability exception is by preponderance of the evidence. *Id.* at 25. (citations omitted)

Appellant also seeks to raise, as Question Presented 3, an attack on the constitutionality of RSA 402-J:12, I(h) as being "too vague to be legal under substantive due process or void for vagueness." RSA ch. 402-J is a New Hampshire enactment of a Producer License Model Act promulgated by the National Association of Insurance Commissioners (NAIC). II NAIC Model Laws, Regulations and Guidelines, 218-1 (2011). The Model Act has been adopted in at least 38 states and the District of Columbia. *Id.* ST 218-1. In the one case where a licensee contended that the phrase "fraudulent or dishonest practices" was unconstitutionally vague, an appellate court reversed and summarily ruled that in the context of the Illinois Insurance Code and the specific order in that case, the statutory term was not vague. *Patchett v. Baylor*, 62 Ill. 2d, 426, 434, 343 N.E. 2d 484, 488 (1976). Besides, Appellant's argument appears to be that license revocation for any transgression not related to the "insurance business" is a

violation of substantive due process. Appellant offers no support or authority for such a sweeping pronouncement. Appellant's Brief at 17.

The fourth question that Appellant seeks to raise is whether the notice he received pursuant to RSA 541-A:31 adequately apprised him "that his ability to assist his clients was being reviewed." Appellant's Brief at 2. Appellant appears to be complaining that the Order to Show Cause was inadequate in apprising him that his competency might be called into question through the hearing officer's comment to that effect. Appellant's Brief at 18-19. However, as noted above, there is no indication that the hearing officer actually considered competency in recommending revocation. She was "struck" by Appellant's refusal to acknowledge the findings in the Memorandum Opinion. She found it "shocking" that he said he had not read the bankruptcy court opinion thoroughly, which "raises the question" of DeSteph's competence. The basis for license revocation, however, was fraud, not competence. Besides, even if DeSteph's testimony had put into question his competence, he could hardly expect the Department to give notice in advance of an issue that first arose at the hearing from Appellant's own testimony. The critical issues of whether the bankruptcy court's finding of fraud constitutes a violation of RSA 402-J:12, I(h) and whether Appellant's license should be revoked were properly noticed under RSA 541-A:31.

Much of the factual argument and all of the exhibits that Appellant submits in his brief should not be taken into account by this court because they are not part of the record. Appellant's Brief at 5-14. RSA 541:14; *Appeal of Butch Boucher*, 120 N.H. 38, 41 (1980) ("We . . . decline to consider evidence that should have been put before the board."). The exhibits were neither admitted nor offered into evidence at the hearing.

This was not an oversight. Appellant explains in his brief that the exhibits were "presented" in the bankruptcy adversary action ". . . but at the hearing, against Mr. DeSteph's wishes, Mr. Samuels would not submit the documents, later suggesting it would not have helped." Appellant's Brief at 5, footnote 1. Much of the factual argument, which refers to the exhibits, is a rehash of DeSteph's version of his relationship with Gembitsky, a version he submitted at the bankruptcy court, which rejected it. *Id.* at 118-119. The hearing officer barred the testimony as undercutting the bankruptcy court's decision. *Id.* at 163.

CONCLUSION

The only issue Appellant preserved for appeal was whether revocation of his producer license was just and reasonable and a sustainable exercise of the Commissioner's discretion. Appellant's otherwise clean record and his personal financial condition do not outweigh the fact that he defrauded a client of over $100,000 and that this egregious act continued over a number of years. The record clearly supports the Commissioner's decision and his finding that it would not be in the best interest of New Hampshire consumers for DeSteph to retain his license. Under the highly deferential standard that this court has adopted for the consideration of administrative decisions, especially those involving the severity of sanctions, this court should sustain it.

ORAL ARGUMENT

The court ordered that the case will be submitted to the full court without oral argument.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF INSURANCE

By its attorney,

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October 5, 2012

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CERTIFICATION

I hereby certify that two (2) copies of the foregoing were mailed this 5th day of October 2012, postage prepaid, to Thomas F. DeSteph, 1 Dustin Lane, Jaffrey NH 03452, *pro se*.

J. Christopher Marshall

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