

THE STATE OF NEW HAMPSHIRE

INSURANCE DEPARTMENT

In re Daimen Fleming

No. 16-036-EP

PROPOSED DECISION AND ORDER

The New Hampshire Insurance Department (hereinafter “the Department”) issued a show cause order to Daimen Fleming (hereinafter “Respondent”), a New Hampshire non-resident, insurance producer, on December 20, 2016, notifying him of his February 2, 2017 administrative hearing at the Department in Concord, New Hampshire. In its show cause order the Department seeks permanent revocation of Mr. Fleming’s non-resident, insurance producer’s license. The Department also seeks an administrative fine of \$2500 for each violation found.

A hearing on the merits was held on February 2, 2017. Richard McCaffrey, Enforcement Counsel, represented the Department at the hearing. The Respondent did not attend the hearing. The hearing proceeded in the Respondent’s absence. The record closed after the hearing on February 2, 2017.

This proceeding is governed by RSA 541-A, the Administrative Procedure Act, as well as rules adopted by the Department, Ins. 200, Practices and Procedures. With regard to evidence received in this proceeding, all evidence must be relevant to the issues presented. See RSA 541-A:33, II; Ins. 203.01(d)(4). All evidence received in this proceeding has met this standard.

After considering the record, the Department has sustained its burden to permanently revoke the Respondent’s non-resident producer license. As such, the Respondent’s non-resident producer license is permanently **REVOKED**. As to the Department’s request for administrative fines for each violation, I propose that the Respondent should be fined in the amount of **\$9900**, as discussed in further detail below.

I. Allegations

The Department alleges that the Respondent violated RSA 402-J:12, I(j) and RSA 402-J:12, I(h) by forging another's name to an insurance application. The Department also alleges that the Respondent committed an unfair trade practice in violation of RSA 402-J:12, I(g) and RSA 417:4, I(f) while working as an insurance producer. In addition, the Department alleges that the Respondent violated RSA 402-J:12, I(i) by having his insurance producer license revoked in another state and RSA 402-J:17 by failing to report to the Department an administration action taken by another jurisdiction pertaining to his insurance producer license.¹

II. Burden and Standard of Proof

A. Standard for Revocation and Suspension of a License.

As to hearings in which the Department seeks to revoke an insurance producer's license, as here, the Department bears the initial burden of going forward. To meet its burden, the Department must establish a prima facie case with evidence for each violation. See Ins. 204:05 (b). The Respondent then bears the burden of persuasion to present evidence that the Department's position should not be upheld. See id.

The standard of proof for both the Department and the Respondent is proof by a "preponderance of the evidence," which means that what is sought to be proved by the evidence is more probable than not. Ins. 204:05 (a); (c).

The Respondent did not appear at his hearing and no one appeared on his behalf. As such, there has been no evidence or argument presented to me to dispute the Department's evidence.

B. Standard for Administrative Fines

As to hearings in which the Department seeks to impose administrative fines, the Department bears the overall burden of proof. See Ins. 204:05 (d). The standard of proof is proof by a preponderance of the evidence. See id.

¹ Prior to the hearing, the Department had also alleged, as a separate violation, that the Respondent had engaged in activities that violated insurance laws, contrary to RSA 402-J:12, I(b). However, at the hearing the Department's Enforcement Counsel, Attorney McCaffrey, stated he sought only to use this statute as a means for providing a penalty provision for a RSA 402-J:17 violation rather than alleging RSA 402-J:12, I(b) as a separate regulatory violation against the Respondent.

III. Failure to Appear

The Respondent did not attend his hearing on February 2, 2017. However, pursuant to RSA 400-A:19, VII, the validity of a hearing held in accordance with the Department's notice requirements shall not be affected by the failure of a person to attend a hearing.

The record reflects that the Department's notice to the Respondent was in accordance with its notice requirements. Pursuant to RSA 400-A:18, I, the Department's written notice of a hearing must: (1) be provided at least ten (10) days in advance; (2) include the date, time, and location of the hearing; and (3) specify the matters considered at the hearing. Pursuant to Ins. 204.09, delivery of all documents relating to a hearing shall be made by personal delivery or by first class mail, postage prepaid, in the United States mail "addressed to the party at the last address given to the department by the party."

Here, the Department's show cause order included the date, time, and location of the hearing and the specific regulatory matters that would be considered at the hearing. The Department sent this notice on December 20, 2016, more than ten days before the hearing, by both certified mail and first class mail (postage prepaid) by the U.S. Postal Service to the Respondent at 801 Maple Tree Lane, Orlando, Florida, 32828. According to U.S. Postal Service tracking information, as reflected in the Department's Exhibit 6, the certified mail the Department sent with its Show Cause Order & Notice of Hearing was delivered to the Respondent's address on December 24, 2016. After the Respondent did not claim this mail at the post office for several weeks, the U.S. Postal Service notified the Department that the certified mail it sent to the Respondent had to be returned because it was "unclaimed." Nonetheless, the Department's Show Cause Order and Notice of Hearing that was sent to the Respondent to the same address by first class, U.S. mail, postage prepaid was never returned to the Department by the U.S. Postal Service.

As to the address the Department used to provide notice of the hearing to the Respondent, that address was the one the Respondent had provided to the Department. Pursuant to RSA 402-J:7, VI, an insurance producer must update the Department within thirty (30) days of any change of address and pay the required change-of-address fee to the Department, according to RSA 400-A:29. The Respondent did not file a change of address with the Department and the only address the Department has on file for him is 801 Maple Tree Lane in Orlando, Florida. As discussed in Appeal of City of Concord, a government body may provide notice by first class mail without

violating due process rights of interested parties and such notice is presumed to have been received by those interested parties. See Appeal of City of Concord 161 N.H. 169, 173-174 (2010). Given the foregoing and the fact that the notice the Department sent to the Respondent by first class mail was never returned, the Department has satisfied the notice and delivery requirements set forth in RSA 402-A:18, I and Ins. 204.09. As such, the validity of the Respondent's hearing is not affected by his failure to appear. See RSA 400-A:19, VII.

IV. Factual Background

The record reveals the following relevant facts.

A. Kansas Summary Order, Department Exhibit #1

On August 30, 2016, the Kansas Insurance Department ("KID") issued a Summary Order revoking the Respondent's nonresident, insurance producer license. According to KID's Order, the Respondent had fifteen (15) days to request a hearing as to the matters addressed in the Summary Order. If the Respondent did not make such a request, the Summary Order would become a Final Order.

In its Order KID concluded that the Respondent had committed unfair trade practices by making false representations on insurance applications. Specifically, based on a July 22, 2016 Termination Letter from UnitedHealthcare Life Insurance Company and its affiliates ("UnitedHealthcare") to the Respondent, KID found that as an agent for UnitedHealthcare, the Respondent had electronically forged consumers' names on insurance applications. In its Order, KID stated that on August 11, 2016, it had requested a response from the Respondent as to allegations that he had signed consumers' names on insurance applications. However, the Respondent failed to provide any response to KID, and therefore, KID issued its Summary Order on August 30, 2016 revoking his license.²

B. UnitedHealthcare July 22, 2016 Termination Letter to Respondent, Department Exhibit # 2

On July 22, 2016, UnitedHealthcare sent a letter to the Respondent notifying him that his appointment as a producer with the company had been terminated. As the basis for this

² KID sent its Order to the Respondent by first class mail, postage prepaid to 801 Maple Tree Lane, Orlando, Florida 32828.

termination, UnitedHealthcare cited to its contractual arrangement with the Respondent that prohibited him from any of the following: submitting insurance applications on behalf of clients; completing or altering any part of a client's insurance application; or perpetrating any fraud relating to insurance transactions. As to the Respondent's termination, UnitedHealthcare explained that it had received a complaint from one of the Respondent's clients that he had signed her up for insurance plans that she did not want. In response to that complaint, UnitedHealthcare stated that its Special Investigation Unit ("SIU") had contacted the Respondent on June 23, 2016 to discuss the consumer's complaint. When UnitedHealthcare's SIU discussed the matter with the Respondent, the Respondent denied the consumer's allegations, stating that the consumer had requested the subject insurance policies. However, the Respondent did not have any documentation or telephone recordings of his conversations with the consumer to support his position. Instead, the Respondent informed SIU that he had sent the applications to the consumer so she could sign them electronically. It was at that time that SIU informed the Respondent that the IP address³ for the signature on the consumer's application matched the Respondent's IP address, to which the Respondent had no response. Subsequently, when asked by SIU to do so, the Respondent was unable to provide any documentation, such as emails or telephone recordings with the consumer, to support his position that he had provided the consumer with insurance plans that she had requested. As a result, SIU further investigated to determine if there were other instances in which the Respondent had submitted insurance applications on behalf of UnitedHealthcare consumers. In doing so, SIU reported that at least six (6) of the Respondent's clients had insurance applications submitted from the Respondent's IP address that were problematic and/or without authorization.

C. The Respondent's Insurance Producer Licenses, Department Exhibits #3 and #4

The Respondent became licensed as a non-resident producer in New Hampshire on February 11, 2016. The lines of business he can sell with this license include life, accident, and health insurance policies. To date, his producer license is still active in New Hampshire.

On November 5, 2015, the Respondent became licensed to sell life and health insurance policies in Kansas as a non-resident, insurance producer. KID reported, as late as January 30,

³ An Internet Protocol address ("IP address") is the numeric address of a computer (or other device) on the internet. See Merriam-Webster Dictionary (2017).

2017, that the Respondent's insurance producer license had been revoked in Kansas since September 19, 2016.

V. Legal Analysis

A. Forgery Allegation, RSA 402-J:12, I(j)

RSA 402-J:12, I(j) provides that "[t]he 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: . . . (j) forging another's name to an application for insurance or to any document related to an insurance transaction."

UnitedHealthcare's investigation and July 22, 2016 letter establish that the Respondent violated RSA 402-J:12, I(j). As part of its investigation into a consumer complaint that the Respondent had provided insurance products to a consumer that she did not want, UnitedHealthcare learned that the consumer's signed, insurance application was submitted from the Respondent's IP address. Although the Respondent denied the consumer's allegations, he could not provide UnitedHealthcare with any documentation or recorded telephone calls to support his version of events that the consumer wanted the subject insurance products or that she had signed and submitted her application on her own accord. He also could not explain why her application was submitted from his IP address. Soon thereafter, UnitedHealthcare discovered that six (6) of the Respondent's other clients had similar complaints with applications that were problematic and submitted from the Respondent's IP address. Finally, the record reflects that the Respondent has not appeared before an administrative hearing either here or in Kansas to contest UnitedHealthcare's report or investigative findings.

The Department has sustained its burden of going forward as to whether the Respondent's producer license should be revoked based upon a violation of RSA 402-J:12, I(j). Since the Respondent failed to appear at his hearing, he has not met his burden of persuasion. The record reflects the Respondent violated RSA 402-J:12, I(j) by signing the name of at least one consumer to an insurance application without authority to do so. As such, I propose that his producer license be **REVOKED** for this violation. With regard to imposing a fine for this particular violation, the Department has requested the maximum penalty amount of \$2500.

Given the foregoing facts and nature of this violation, I propose that the Respondent's fine for violating RSA 402-J:12, I(j) should be **\$2500**.

B. Untrustworthy Allegation, RSA 402-J:12, I(h)

RSA 402-J:12, I(h) provides that "[t]he 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."

The UnitedHealthcare July 22, 2016 letter and investigation reflect that the Respondent used dishonest practices as an insurance producer in the business of insurance (1) by signing a consumer's name to an insurance application when he was not authorized to do so and (2) by failing to truthfully respond to UnitedHealthcare investigators when they investigated a consumer complaint against him relating to an insurance application. Specifically, after a consumer complained to UnitedHealthcare that the Respondent had signed her up for insurance plans that she did not want, the Respondent denied the claim. Instead, he informed UnitedHealthcare that the consumer had asked for the particular insurance products at issue and he had sent insurance applications to the consumer so she could sign and submit her insurance applications electronically. However, UnitedHealthcare's investigation revealed that the Respondent had electronically signed and submitted the consumer's application from his own computer. Upon further investigation, UnitedHealthcare discovered that the Respondent had also submitted at least six (6) other insurance applications of consumers who questioned his authority to do so.

The Department has sustained its burden of going forward as to whether the Respondent's producer license should be revoked based upon a violation of RSA 402-J:12, I(h). Since the Respondent failed to appear at his hearing, he has not met his burden of persuasion. The record reflects deceitful activities on the part of the Respondent in the conduct of business in violation of RSA 402-J:12, I(h). As such, I propose that his producer license be **REVOKED** for this violation. With regard to imposing a fine for this particular violation, the Department has

requested the maximum penalty amount of \$2500. Given the foregoing facts and nature of this violation, I propose that the Respondent's fine for violating RSA 402-J:12, I(h) should be **\$2500**.

C. Unfair Trade Practice Allegations, RSA 402-J:12, I(g) and RSA 417

RSA 402-J:12, I(g) provides that "[t]he 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: . . . (g) having admitted or been found to have committed any insurance unfair trade practice or fraud."

Unfair trade practices are defined in RSA 417:4. Such practices include misrepresentations in the sale of insurance that employ any scheme or method to defraud others. See RSA 417:4, I(f). In light of his deceitful activities pertaining to at least one consumer's insurance application, as illustrated in UnitedHealthcare's investigation, I find that the Respondent committed an unfair trade practice in the sale of insurance in violation of RSA 402-J:12, I(g).

Although the Department has alleged an additional unfair trade violation pursuant to RSA 417, I do not find that violation for the following reasons. First, RSA 417:3 states that "[n]o person shall engage in this state in any trade practice which is defined in this chapter or determined pursuant to this chapter as an unfair method of competition or an unfair or deceptive act or practice in the business of insurance." Unfair trade violations under RSA 417 are prohibited by any "person," which includes "any individual, corporation, association, partnership, reciprocal exchange, inter-insurer, Lloyd's insurers, fraternal benefit society and any other legal entity, engaged in the business of insurance, including agents, brokers, and adjusters." RSA 417:2.

Thus, while RSA 417 prohibits unfair trade practices *within the state* in a very broad sweep as to "persons," RSA 402-J:12, I(g) specifically prohibits unfair trade practices by producers in the business of insurance regardless of where those unfair trade practices occur. Here, there are no allegations or facts in the record that the Respondent engaged in any unfair trade practices within New Hampshire. In sum, on the record before me, the Respondent violated RSA 402-J:12, I(g) but not RSA 417:3.

The Department has sustained its burden of going forward as to whether the Respondent's producer license should be revoked based upon a violation of RSA 402-J:12, I(g).

Since the Respondent failed to appear at his hearing, he has not met his burden of persuasion. As such, I propose that his producer license be **REVOKED** for this violation. With regard to imposing a fine for this particular violation, the Department has requested the maximum penalty amount of \$2500. Given the foregoing facts and nature of this violation, I propose that the Respondent's fine for violating RSA 402-J:12, I(g) should be **\$2500**.

D. License Revocation by another State Allegation, RSA 402-J:12, I(i)

RSA 402-J:12, I(i) provides that "[t]he 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: . . . (i) having an insurance producer license, or its equivalent, denied, suspended, or revoked in any other state, province, district, or territory."

In 2016, during the time in which Kansas revoked the Respondent's producer license, the Respondent held a non-resident, producer license in New Hampshire and that license is currently active. KID reported, as late as January 30, 2017, that the Respondent's insurance producer license in Kansas had been revoked since September 19, 2016. According to the record, the Respondent did not notify the Department as to the action taken by KID. Rather, according to the Department, the Department became aware of the Kansas proceedings and investigation by UnitedHealthcare through the national database that state regulators use to regulate producer licenses.

The Department has sustained its burden of going forward as to whether the Respondent's producer license should be revoked based upon a violation of RSA 402-J:12, I(i). Since the Respondent failed to appear at his hearing, he has not met his burden of persuasion. I find that the KID's revocation of the Respondent's producer license in September 2016 is a violation of RSA 402-J:12, I(i), and propose that the Respondent's producer license be **REVOKED** for this violation. With regard to imposing a fine for this particular violation, the Department has requested the maximum penalty amount of \$2500. However, given the nature of this violation, I propose that the Respondent's fine for violating RSA 402-J:12, I(i) should be **\$1200**.

E. Failure to Report Allegation, RSA 402-J:17

RSA 402-J:17, I provides that a “producer shall report to the commissioner any administrative action taken against the producer in another jurisdiction or by any other governmental agency within 30 days of the final disposition of the matter.”

The record reflects that Kansas took an administrative action against the Respondent in August 2016. In doing so, Kansas concluded that the Respondent violated Kansas insurance regulations and revoked his license. Although it had been at least five months since KID’s Order and the Respondent’s hearing at the Department on February 2, 2017, the Respondent never notified the Department about the administrative action in Kansas. Rather, the Department became aware of the Kansas proceedings and investigation by UnitedHealthcare through the national database that contains regulatory information about insurance producers.

The Department has sustained its burden of going forward as to whether the Respondent’s producer license should be revoked based upon this violation. Since the Respondent failed to appear at his hearing, he has not met his burden of persuasion. In light of the foregoing, I find that the Respondent failed to report the administrative action in Kansas to the Department, which is a violation of RSA 402-J:17, I, and propose that his producer license be **REVOKED** for this violation. With regard to imposing a fine for this particular violation, the Department has requested the maximum penalty of \$2500. However, given the nature of this violation, I propose that the Respondent’s fine for this violation should be **\$1200**.

F. Collateral Estoppel

Finally, with regard to the Department’s allegations of forgery, untrustworthiness, and unfair trade practice violations by the Respondent, the Department has asserted that I should rule in its favor based upon collateral estoppel grounds, citing to KID’s Summary Order. As discussed above, given the evidence in this case the Department has met its burden to prove these violations without the need to rely upon collateral estoppel. Ordinarily, that would end the matter. However, as this may provide guidance in future cases, I provide the following legal analysis with regard to the Department’s collateral estoppel argument.

Collateral estoppel bars a party in a prior action from relitigating any issue or fact determined in the prior action. See Petition of Kalar, 162 N.H. 314, 320 (2011). The party asserting collateral estoppel bears the burden of proving that this doctrine applies. See Gray v.

Kelly, 161 N.H. 160, 164 (2010). Although typically asserted as an affirmative defense, collateral estoppel may be asserted by agencies “offensively” in the context of administrative licensing proceedings to establish licensing violations. See, e.g., In re Breau, 132 N.H. 351 (1989) (upholding revocation of a teacher’s license by the Board of Education based upon a licensing proceeding by a Canadian administrative agency); Bruzga’s case, 142 N.H. 743 (1998) (holding that offensive collateral estoppel may be applied in attorney discipline proceedings). In New Hampshire, a party alleging collateral estoppel must establish the following five (5) elements: (1) the finding subject to estoppel is identical in each action; (2) the first issue resolved as a final decision on the merits; (3) the party to be estopped appeared in the first action or was in privity with a party who appeared; (4) the party to be estopped had a full and fair opportunity to be heard in the first action; and (5) the finding at issue was an essential finding in the first action. See Petition of Kalar, 162 N.H. at 320-321.

Assuming without deciding that elements one, three, four, and five have been met, element two, which requires a final decision on the merits in the first action, warrants further discussion. According to KID’s Licensing Department, as reflected in the Department’s Exhibit 3, the Respondent’s producer license was revoked in Kansas on September 19, 2016. As such, KID’s Summary Order on August 30, 2016, that revoked the Respondent’s license for committing unfair trade practices by forging consumers’ names on insurance applications became a Final Order on or about September 19, 2016. That is consistent with KID’s Summary Order which stated that its decision would become a final order from if the Respondent did not request a hearing within fifteen (15) days. What is not clear, however, is the extent of the Respondent’s appellate rights to judicial review of this decision in Kansas and whether the Respondent sought an appeal from KID’s Final Order.

As the Court explained recently in Gray v. Kelly with regard to collateral estoppel, although a judgment is effective as soon as it is rendered, filing a timely appeal prevents a judgment becoming final. See Gray v. Kelly, 161 N.H. 160, 168 (2010). Here, in its Summary Order, KID instructed the Respondent as to how he should serve KID if the Respondent filed “a Petition for Judicial Review, pursuant to K.S.A. 77-613(e).” However, beyond that information, I do not know the extent or the timing of the appeal process in Kansas as to KID’s orders or whether the Respondent failed to timely appeal KID’s Order. Without that information and given the timing of this hearing less than five (5) months after KID’s administrative order in

September 2016, I cannot determine whether KID's Final Order as to the Respondent is a "final" order for collateral estoppel purposes. As such, I decline to rule upon the issues involved in this hearing on collateral estoppel grounds.

VI. Proposed Findings of Fact & Law

The Department submitted proposed findings of fact and law on January 31, 2017. To the extent such proposed findings of fact and law are consistent with this Order, they are granted. All others are denied.

VII. Conclusion

Based on the foregoing, I propose that the Respondent's producer license should be permanently **REVOKED** as a result of each of his violations, as specified above. In addition, I propose that a total fine be levied in the sum of **\$9900**, as discussed herein, for all of the Respondent's insurance regulatory violations.

Date: March 6, 2017

Heather Silverstein

Heather Silverstein, Hearing Officer