

STATE OF NEW HAMPSHIRE
SUPREME COURT

APPEAL OF THOMAS F. DESTEPH

Docket No. 2012-0253

**INSURANCE DEPARTMENT'S OBJECTION TO
APPELLANT'S MOTION TO STAY**

The New Hampshire Insurance Department, by and through counsel, the Office of the Attorney General, hereby objects to the Appellant's Motion to Stay pending appeal of the Commissioner's February 23, 2012 order revoking the Appellant's insurance producer license because he was found to have defrauded one of his clients out of more than \$100,000.00. (Appellant's Appendix at 5-17, hereafter Applt. App.). Appellant makes two arguments for a stay. First, he argues that under the facts of his case, revocation will cause him irreparable harm or is otherwise unjust. Secondly, the Appellant argues that his due process rights were violated because he did not receive proper notice under RSA 541-A:31. (Appellant's Motion to Stay at ¶'s 2 and 4.) Neither argument has merit.

1. On February 23, 2012, the Commissioner of Insurance revoked the Appellant's insurance producer license pursuant to RSA 402-J:12, I(h).¹ The Commissioner accepted a hearing officer's Proposed Decision and Order, which provides a detailed and thorough analysis of the facts and the law that support the decision. Applt. App. at 5-17.

¹ 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.

STANDARD OF REVIEW

2. The Appellant bears a heavy burden. On the merits, the Commissioner's decision may be reversed only if he committed an error of law or if "the order is unjust or unreasonable." *Appeal of New Hampshire Fireworks, Inc.*, 151 N.H. 335 (2004). Appellant must satisfy the Court, except as to errors of law, by a "clear preponderance of the evidence."

3. For a stay pending appeal, the burden is even greater. RSA 541:18 states:

No appeal or other proceedings taken from an order of the commission shall suspend the operation of such order; provided, that the supreme court may order a suspension of such order pending the determination of such appeal or other proceeding whenever, in the opinion of the court, justice may require such suspension

The leading case interpreting this provision elaborates on it as follows:

In view of the fact that a presumption of reasonableness is accorded to administrative orders, we have been reluctant to exercise the discretion conferred by this statute unless the plaintiff has demonstrated two conditions are present. First, there must be a showing that the plaintiff will suffer irreparable harm, occasioned by circumstances beyond his control, if the order is given immediate effect. Second, it must be clear that the harm to the plaintiff outweighs the public interest in enforcing the order for the duration of the appeal.

Union Fidelity Life Insurance Co. v. Whaland, 114 N.H. 549, 550 (1974) (Kennison, CJ).

In response to the *Union Fidelity* argument that its ability to conduct its business would be greatly impaired by the Commissioner's decision to not renew its license, the Court said that the Plaintiff, whose conduct had caused the Commissioner to issue his order, should bear the weight of the decision. *Id.* at 551. In addition to meeting the heavy burden imposed by RSA 541:18, Plaintiff should make some showing on the merits. This is consistent with the *Rautenberg v. Munnis*, 107 N.H. 446 (1966) involving a motion to continue an appeal and remand to permit consideration of a request for a new trial. *See also, In re Public Service Co. of New Hampshire*,

116 B.R. 347, 348-49 (Bkrctc. D.N.H. 1990) (under federal law, applying modified tests for preliminary relief).

THE EQUITIES

4. Appellant makes an equitable argument that the Commissioner's decision to revoke his producer's license should be stayed in view of: (i) the needs of Appellant's two minor children for whom he is the sole source of support and his income is derived solely from his license; (ii) the needs of his clients for advice to execute retirement plans laid out by the Appellant; and (iii) Appellant's record for thirty-three years as a producer without a complaint filed against him with the Insurance Department, no violations of insurance regulations and no criminal record.

5. Countervailing the Appellant's argument for a stay is that he engaged in a fraudulent business practice within the meaning of RSA 402-J:12, I(h) by defrauding a customer of over \$100,000.00. The hearing officer, applying the doctrine of collateral estoppel, relied on the findings entered by a bankruptcy judge (Vaughn, J.) in Mr. DeSteph's Chapter 13 case that he had committed common law fraud on one of his clients, a Ms. Gembitsky, that he owed her \$124,030.00, that the indebtedness was not dischargeable in his bankruptcy, and that his misrepresentation to this customer continued over a five year period from 2003 to 2008. *Id.* at 10, 13. The bankruptcy court also characterized Mr. DeSteph's testimony as "completely lacking in credibility" and "utterly unconvincing." *Id.* at 14. The bankruptcy court also characterized a portion of Mr. DeSteph's testimony before the court as "absolutely ridiculous" and as "similarly unbelievable."

6. The hearing officer concluded, after a thoughtful and persuasive analysis of the applicability to the collateral estoppel doctrine, that the bankruptcy court's findings were

sufficient to satisfy the Department's burden of proving that Mr. DeSteph used "fraudulent, coercive, or dishonest practices, or demonstrating incompetence, trustworthiness, or financial irresponsibility in the conduct of business in this state or elsewhere" within the meaning of RSA 402-J:12, I(h). *Id.* at 15. The hearing officer went on to note that "she agrees with Mr. DeSteph" that even after such a finding, the decision to actually revoke a license rests within the discretion of the Insurance Commissioner under RSA 402-J:12, I.

7. Appellant made the same equity arguments before the hearing officer as he makes in his Motion to Stay. The record demonstrates that the hearing officer took those considerations into account in recommending revocation. Specifically:

Attorney Samuels argued that revocation was not an appropriate sanction because (a) the conduct 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 found none of those arguments to be persuasive. *See* discussion of Mitigating or Aggregating Factors. *Id.* at 15-16. The statute authorizes revocation for fraud in the conduct of business generally, not just in the insurance business. Appellant was engaged in the business of acting as an investment advisor to Ms. Gembitsky. The hearing officer also observed that a single incident "if egregious enough may well be enough to revoke a license. Engaging in fraud involving more than \$100,000.00 is precisely the type of behavior that justifies revocation." The hearing officer noted that Appellant's personal circumstances of hardship do not constitute a mitigating factor. In short, the findings of the bankruptcy court, along with the hearing testimony, demonstrated to the hearing officer "that it would not be in the

best interest of New Hampshire consumers to allow Mr. DeSteph to retain his insurance producer license.” *Id.* at 16.

8. Appellant raised these same issues in his Statement of Exceptions of Proposed Decision and Order in which he argued that revocation was “unnecessary” and therefore “inappropriate.” Notably, he did not argue that a finding of fraud was insufficient to constitute a “fraudulent practice” in the conduct of non-insurance related business under the statute. Instead, he argued that the particular conduct in which he had engaged did not support the sanction of revocation, “. . . which is a matter within the discretion of the Commissioner.” *Id.* at 18. Appellant argued these issues a third time in his Motion for Rehearing. *Id.* at 23-24.

9. Appellant has not demonstrated to this court, any more than he demonstrated to the Commissioner, that revocation of his license is “unjust or unreasonable” or that the equities are in his favor, especially when one of the considerations is protecting the public from a producer who defrauded a client. Absent such a showing, this court should not enter any preliminary relief to stay the decision of the Commissioner.

LEGAL ARGUMENT

10. Appellant also argues for a stay on the basis that his due process rights were violated because he was not properly noticed under RSA 541-A:31 in the Order to Show Cause “. . . that his ability to perform his duties as a producer were being reviewed.” He also argues that “since Mr. DeSteph was not noticed that his ability to assist clients with their policies was being reviewed, it violates his right to Due Process and his license should not have revoked.” Appellant’s Motion to Stay at 3.

11. The first paragraph of the Order to Show Cause contradicts Appellant’s assertion. It orders Mr. DeSteph “to show cause why the Insurance Commissioner should not

revoke his New Hampshire Insurance producer license and impose the maximum fine allowed by law.” Section VI repeats the notice when it says that the Insurance Department requests that the hearing officer “revoke the New Hampshire Mr. DeSteph’s producer license [sic].” Applt. App. at 1 and 3. The Order to Show Cause could not be more clear. It also conforms with RSA 541-A:31, III.

12. Furthermore, Appellant did not raise any issue of notice or of a due process violation in his Motion for Rehearing. *Id.* at 23. RSA 541:4 says:

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.

The statutory provision is supported by case law. *In re Coffey*, 144 N.H. 531 (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). *Appeal of Richards*, 134 N.H. 148 (1991); *Appeal of Campaign for Ratepayers Rights*, 145 N.H. 671 (2001) (cert. denied 121 S.Ct. 2012-2521, 533 U.S. 916, 150 L.Ed. 2d. 694). Appellant cannot now raise on appeal an issue of inadequate notice.

13. In the absence of a showing irreparable harm and that the harm to him outweighs the public interest, and in the absence of some showing on the merits, Appellant is not entitled to a stay pending appeal.

WHEREFORE, the New Hampshire Insurance Department respectfully requests that the

Court:

- A. Issue an order denying the Appellant's Motion to Stay; and
- B. Grant such further relief as may be just.

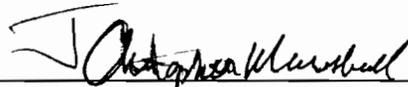
Respectfully submitted,

NEW HAMPSHIRE INSURANCE
DEPARTMENT

By its attorney,

MICHAEL A. DELANEY
ATTORNEY GENERAL

April 26, 2012



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Objection has been mailed this 26th day of April 2012 to Thomas F. DeSteph, *pro se*, 1 Dustin Lane, Jaffrey NH 03452.



J. Christopher Marshall