

STATE OF NEW JERSEY
DEPARTMENT OF BANKING AND INSURANCE

OAL DOCKET NO.: BKI-663-14
AGENCY DOCKET NO.: OTSC #E13-129

RICHARD J. BADOLATO, ACTING)
COMMISSIONER, NEW JERSEY)
DEPARTMENT OF BANKING AND)
INSURANCE,)

Petitioner,)

v.)

ANDREA L. TUIE AND RAPID)
RELEASE BAIL BONDS, INC.,)

Respondents.)

FINAL DECISION AND ORDER

This matter comes before the Commissioner of Banking and Insurance (“Commissioner”)¹ pursuant to the authority of N.J.S.A. 52:14B-1 et seq., N.J.S.A. 17:1-15, the New Jersey Producer Licensing Act of 2001, N.J.S.A. 17:22A-26 et seq. (“Producer Act”), and all powers expressed or implied therein, for the purposes of reviewing the November 18, 2014 Order Granting in Part and Denying in Part the Department of Banking and Insurance’s (“Department”) Motion for Summary Decision (“Partial Summary Decision” or “PSD”) and the March 17, 2016 Initial Decision (“Initial Decision”) of Administrative Law Judge Lisa James-Beavers (“ALJ”).

In the Partial Summary Decision, the ALJ granted summary decision to the Department and against Respondents Andrea L. Tuite (“Tuite”) and Rapid Release Bail Bonds, Inc. (“Rapid Release”) (collectively, the “Respondents”) on Count One and against Respondent Tuite on

¹ Pursuant to R. 4:34-7, Acting Commissioner, Richard J. Badolato, has been substituted as the current Commissioner in the caption.

Counts Three, Four, Five, and Seven as alleged in in the Department's Order to Show Cause No. E13-129 ("OTSC"). The ALJ additionally granted partial summary decision against Respondents Tuite and Rapid Release on Count Two of the OTSC and against Respondent Tuite on Count Six of OTSC.

In the Initial Decision, the ALJ recommended revocation of Respondent Tuite's insurance producer license, the suspension of Respondent Rapid Release's insurance producer license for a one-year period, and the imposition of civil monetary penalties in the amount of \$35,000 and costs of investigation in the amount of \$400 against the Respondents.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On December 10, 2013, the Department issued the OTSC against the Respondents seeking to revoke the Respondents' insurance producer licenses and impose civil monetary penalties and costs of investigation for alleged violations of the Producer Act. In the OTSC, the Department alleges that the Respondents engaged in the following activities in violation of the insurance laws of this State:

Count One – Respondents Tuite and Rapid Release engaged in fraudulent or dishonest practices by Tuite forging a Rapid Release Certificate of Surrender or Body Receipt and submitting same to the Administrator of the Matawan Borough Municipal Court, in violation of N.J.S.A. 17:22A-40a(2), (8) and (16), and N.J.A.C. 11:17A-4.10;

Count Two – Respondents Tuite and Rapid Release failed to respond to the Department's inquiry in writing, or by any other method, in violation of N.J.S.A. 17:22A-40a(2) and (8), and N.J.A.C. 11:17A-4.8;

Count Three – Respondent Tuite was indicted, pleaded guilty, and was convicted of fourth-degree felony forgery, in violation of N.J.S.A. 17:22A-40a(6);

Count Four – Respondent Tuite failed to notify the Commissioner within 30 days of her April 26, 2012 indictment for fourth-degree felony forgery, in violation of N.J.S.A. 17:22A-40a(2) and (18);

Count Five – Respondent Tuite failed to notify the Commissioner within 30 days of her March 22, 2013 conviction for fourth-degree felony forgery, in violation of N.J.S.A. 17:22A-40a(2) and (18);

Count Six – Respondent Tuite provided incorrect, misleading, incomplete, or materially untrue information in her insurance producer license renewal application when, on July 1, 2012, she answered “No” in response to the question of whether she was “currently charged with committing a crime which has not been previously reported to this insurance department,” in violation of N.J.S.A. 17:22A-40a(1), (2), (3), (8), (15), and (16)²; and

Count Seven – Respondent Tuite failed to notify the Department within thirty days of her change in residence, in violation of N.J.S.A. 17:22A-33f, N.J.S.A. 17:22A-40a(2), and N.J.A.C. 11:17-2.7(f)².

On December 10, 2013, the Department also issued Order to Show Cause No. E13-130 seeking to immediately suspend Respondent Tuite’s insurance producer license pending completion of the administrative proceedings. Respondent Tuite did not contest the allegations contained in this Order to Show Cause. See Certification of DAG Carl M. Bornmann at ¶4. On January 9, 2014, the Department issued Order No. E14-04 suspending Respondent Tuite’s insurance producer license pending completion of the administrative proceedings and entry of a Final Order.

On January 2, 2014³, the Respondents filed an Answer to the OTSC, wherein the Respondents Tuite and Rapid Release denied the allegations in Count One of the OTSC and

² The OTSC states that Tuite’s actions, as alleged in Count Six of the OTSC, were a violation of “N.J.S.A. 17:22A-40.” This appears to be a typographical error as the statute relating to the alleged violations is N.J.S.A. 17:22A-40a.

³ The PSD and Initial Decision state that Respondents filed an Answer to the OTSC on January 1, 2014. The Answer was actually filed on January 2, 2014.

admitted the allegations in Count Two of the OTSC. Further, Respondent Tuite admitted the allegations in Counts Three, Four, and Five of the OTSC, but denied the allegations in Counts Six and Seven of the OTSC. The Respondents also requested a hearing. The Department transmitted the matter as a contested case to the Office of Administrative Law ("OAL") on January 16, 2014, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

On September 12, 2014, the Department moved for summary decision against the Respondents. The Respondents filed their opposition on October 1, 2014, and on October 17, 2014, the Department filed its reply. On November 18, 2014, the ALJ granted in part and denied in part the Department's Motion for Summary Decision. Specifically, the Partial Summary Decision granted summary decision on Counts One, Three, Four, Five, and Seven of the OTSC and granted partial summary decision as to Counts Two and Six of the OTSC. The ALJ determined that as to Count Two of the OTSC, there was no genuine issue as to whether the Respondents violated N.J.A.C. 11:17A-4.8 and N.J.S.A. 17:22A-40a(2) because the Respondents admitted such violations in their Answer to the OTSC. However, the ALJ also determined that the Department failed to show that it was entitled to prevail as a matter of law with respect to whether the Respondents violated N.J.S.A. 17:22A-40a(8). Further, as to Count Six of the OTSC, the ALJ found that there was no genuine issue as to whether Respondent Tuite violated N.J.S.A. 17:22A-40a(1), (2), and (3); however, the ALJ determined that the Department failed to show that it was entitled to prevail, as a matter of law, with respect to whether Respondent Tuite violated N.J.S.A. 17:22A-40a(8), (15), and (16).

A hearing was conducted on July 22, 2015, during which Respondent Tuite and Kenneth Tuite, Respondent Tuite's husband and the 95% owner of Respondent Rapid Release, testified. Thereafter, on March 17, 2016, the ALJ confirmed in the Initial Decision that summary decision

was appropriate as to Counts One, Three, Four, Five, and Seven of the OTSC. Additionally, the ALJ found that partial summary decision was appropriate as to Count Two of the OTSC and the Respondents admitted violating N.J.S.A. 17:22A-40a(2) and N.J.A.C. 11:17A-4.8. The ALJ found, however, that the Department did not prove that the Respondents failure to respond to the Department's requests constituted untrustworthiness in the conduct of insurance business, in violation of N.J.S.A. 17:22A-40a(8). The ALJ also found that, as to Count Six of the OTSC, partial summary decision was appropriate and found that while the Department adduced enough evidence to support a finding that Respondent Tuite violated N.J.S.A. 17:22A-40a(1), (2), (3), (15), and (16), the Department failed to prove that Respondent Tuite violated N.J.S.A. 17:22A-40a(8) in connection with providing false answers on her insurance producer renewal licensing application.

In the Initial Decision, the ALJ recommended revocation of the Respondent Tuite's producer license, the suspension of Rapid Release's producer license for a period of one year, and the imposition of civil monetary penalties in the amount of \$35,000 and costs of investigation in the amount of \$400 against the Respondents.

ALJ'S FINDINGS OF FACT, LEGAL ANALYSIS, AND CONCLUSIONS

The ALJ found the following relevant facts in her grant of summary decision. Respondent Tuite is an owner, vice president, and secretary of Respondent Rapid Release, which is engaged in the business of issuing bail bonds in New Jersey. PSD at 2. Respondent Tuite was a licensed insurance producer from September 25, 2008, and had her license suspended on January 9, 2014, pending the outcome of this matter. Ibid.

Count One: Respondents Tuite and Rapid Release Forged a Certificate of Surrender and Submitted Same to a Court of Law

On October 10, 2011, Respondent Tuite submitted a Certificate of Surrender or Body Receipt (herein, "Certificate of Surrender") to the Matawan Borough Municipal Court in order to obtain the release of a \$750 bond in a criminal matter. Ibid. The Certificate of Surrender had the signature of a Neptune Township police officer in purported attestation of the fact that the defendant in the criminal matter was in the custody of the Neptune Township Police Department. Ibid. However, the police officer had not signed the Certificate of Surrender, and the defendant in the criminal matter was not in the custody of the Neptune Township Police Department. Ibid.

In their Answer to the OTSC, Tuite and Rapid Release denied the allegations in Count One. Id. at 4. Tuite, in her defense, stated that she "did not possess the requisite state of mind for the crime of forgery," which requires intent to defraud. Ibid. The ALJ stated that Tuite claimed she was given the Certificate of Surrender from a bounty hunter once the criminal defendant was in custody at the Middlesex County Jail, the Certificate of Surrender had "a sergeant's signature and department information for Neptune Township Police Department" on the bottom, and Tuite filled out the top of the Certificate of Surrender "assuming that the information at the bottom of [the Certificate of Surrender] was correct." Ibid. In her answers to the Department's requests for admissions, Tuite denied that she forged the Certificate of Surrender and stated that she made "a clerical error that made it appear to be a forged Certificate of Surrender" and that "my bounty hunter was the one who put the Neptune Police Officer's name" on the Certificate of Surrender. Ibid.

The ALJ found that Tuite was indicted for, pleaded guilty to, and was convicted of one count of fourth-degree forgery under N.J.S.A. 2C:21-1a for altering or changing the Certificate

of Surrender. Id. at 7. The ALJ stated that, pursuant to N.J.S.A. 2C:21-1a, “[a] person is guilty of forgery if, with purpose to defraud or injure anyone or with knowledge that he is facilitating a fraud or injury to be perpetrated by anyone, the actor: (1) Alters or changes any writing of another without his authorization[.]” Ibid. Pursuant to the definition, the ALJ noted that forgery is a fraudulent act, and therefore, the ALJ granted the Department summary decision as to Count One of the OTSC. Ibid.

The ALJ further noted that while Tuite denied that she forged the Certificate of Surrender, her conviction for forgery contradicts her statements. Ibid. As such, there is no genuine issue of material fact relating to Tuite committing a fraudulent act in altering the Certificate of Surrender and therefore, Tuite violated N.J.S.A. 17:22A-40a(2), (8), and (16). The ALJ further stated that Tuite’s actions in forging the Certificate of Surrender are also a violation of N.J.A.C. 11:17A-4.10. Ibid. Specifically, the ALJ noted that Tuite owed a fiduciary duty to her company when acting on its behalf and violated its trust when she forged the Certificate of Surrender in order to obtain a release of the bond. Ibid.

Additionally, the ALJ noted that Rapid Release contends that it should not be liable for Tuite’s negligent acts. Initial Decision at 7. However, the ALJ found that Rapid Release is vicariously liable for Tuite’s actions since Tuite was acting on behalf of Rapid Release (citing Commissioner v. Goncalves, OAL Dkt. No. BKI 3118-03, Initial Decision (12/03/03), Final Decision and Order (05/24/04), OAL Dkt. No. BKI 3301-05, On Remand, Initial Decision (11/17/05), Final Decision and Order (02/15/06) (finding agency vicariously liable for agent’s actions because the agency was “the licensee in whose name and under whose authority [the individual licensee] acted when she engaged in her fraudulent activities”)). PSD at 7.

Count Two: Respondents Tuite and Rapid Release Failed to Respond to the Department's Inquiry in Writing or Otherwise

The ALJ noted that in Tuite and Rapid Release's January 1, 2014 Answer to the OTSC the Respondents admitted the allegations contained in Count Two of the OTSC, which state that they failed to respond to the Department's inquiry in writing or by any other method. Id. at 8. Accordingly, the ALJ determined that the Department was entitled to partial summary decision with respect to the allegations contained in Count Two of the OTSC. PSD at 8 and Initial Decision at 8. Specifically, the ALJ found that there are no genuine issues regarding whether the Respondents violated N.J.S.A. 17:22A-40a(2) and N.J.A.C. 11:17A-4.8, as the Respondents admitted such violations in their Answer to the OTSC. PSD at 8. The ALJ stated it is not a valid excuse that Tuite relied on counsel to respond to the Department's requests⁴ (citing Commissioner v. Fiegoli OAL Docket No. BKI 8589-00, Initial Decision (04/08/02), Final Decision and Order (05/28/02) (finding that a licensee's "reliance on counsel, even if misplaced, does not absolve him of guilt for a failure to comply with the statutory requirements")). Ibid. The ALJ further found that Tuite should have followed-up with her lawyer to ensure compliance with the Department's requests. Ibid.

The ALJ found that the Department failed to show that it was entitled to summary decision with respect to whether the Respondents violated N.J.S.A. 17:22A-40a(8) (using fraudulent, coercive or dishonest practices or demonstrating incompetence, untrustworthiness or financial irresponsibility in the conduct of insurance business in this State or elsewhere). Ibid. The ALJ stated that, in particular, the Department failed to show that the failure of the

⁴ In the Partial Summary Decision, the ALJ stated "[t]hat Tuite relied on counsel to respond to the Department is a valid excuse." (emphasis added). Based upon the context of the paragraph in which this sentence was contained and the Fiegoli decision cited by the ALJ to emphasize her finding, the finding that Tuite's reliance on counsel was "a valid excuse" appears to be a typographical error and is being interpreted herein as a finding to the contrary. Nevertheless, as an application of law to facts, the Commissioner is well-within his authority to reject the finding as written in the Partial Summary Decision based upon the Department's precedent in this regard

Respondents to respond to the Department constituted “insurance business” within the meaning of N.J.S.A. 17:22A-40a(8). Ibid. The ALJ additionally noted that the term “insurance business” is not defined under the Producer Act, and the ALJ believed that a reasonable interpretation of the provision leads to the conclusion that the provision addresses conduct associated with the sale, solicitation, or negotiation of insurance and acts incidental thereto. PSD at 8 and Initial Decision at 8. As such, the ALJ found that the Department did not prove that failing to respond to its requests constituted untrustworthiness in the conduct of insurance business in violation of N.J.S.A. 17:22A-40a(8). Initial Decision at 9.

Counts Three, Four, and Five: Respondent Tuite was Indicted, Convicted, and Sentenced for the Crime of Fourth-Degree Felony Forgery and Failed to Notify the Department of her Indictment and Conviction

The ALJ found that Tuite was indicted on April 26, 2012, on one count of fourth-degree felony forgery. PSD at 2. The indictment alleged that Tuite altered or changed the Certificate of Surrender with the intent to defraud or injure, in violation of N.J.S.A. 2C:21-1a(1). Ibid.

On January 7, 2013, Tuite pleaded guilty, and on March 22, 2013, she was convicted of one count of fourth-degree forgery. Ibid. When accepting the plea, Tuite admitted, under oath, that she caused the police officer’s signature to be placed on the Certificate of Surrender. Initial Decision at 6. She was sentenced to one year of probation and ordered to pay \$155 in fines. PSD at 3. Tuite was placed on pre-trial intervention (“PTI”), and she served a probationary period, which included the payment of probation fees and fines. Initial Decision at 6.

Tuite failed to timely notify the Department of her indictment and conviction. PSD at 3. In a letter faxed to the Department on April 23, 2013, but dated April 10, 2013, Tuite stated that she told detectives who investigated the felony forgery count, that she “cut and pasted” the police

officer's name on the Certificate of Surrender. Ibid. However, in her answers to the Department's requests for admissions, the ALJ noted that Tuite denied this statement and claimed that "I said I told police that I took full responsibility and that I cut and pasted the name on the body of the receipt out of fear for my company and with the hopes that the criminal case would go away quietly." Id. at 4.

Tuite, in regards to Count Three of the OTSC, stated that she was pressured into pleading guilty to forgery, and that her attorney did not inform her of the legal consequences of her guilty plea. Ibid. Tuite, however, admitted the allegations in Counts Three, Four, and Five. Ibid.

The ALJ found that, as it relates to Count Three of the OTSC, there was no genuine issue as to whether Tuite violated N.J.S.A. 17:22A-40a(6) as a result of her conviction for fourth-degree forgery. Id. at 8. Further, the ALJ found that, as it relates to Counts Four and Five of the OTSC, there are no genuine issues as to whether Tuite violated N.J.S.A. 17:22A-40a(18), as Tuite admitted in her answer to the OTSC that she failed to timely notify the Department of her indictment and conviction. Id. at 9. The ALJ also found that this was a violation of N.J.S.A. 17:22A-40a(2). Ibid. As such, the ALJ found that the Department was entitled to summary decision as to Counts Three, Four, and Five of the OTSC. PSD at 9 and Initial Decision at 9. The ALJ also stated that Rapid Release is vicariously liable for the violations contained in Counts Three, Four, and Five of the OTSC⁵. Initial Decision at 9.

Count Six: Respondent Tuite Provided Misleading, Incomplete, or Materially Untrue Information on Her License Renewal Application

On July 1, 2012, Tuite submitted to the Department an application to renew her insurance producer license. PSD at 3. Tuite answered "no" to the question, "Have you been convicted of a

⁵ Although the ALJ found that Respondent Rapid Release was vicariously liable for the violations contained in Counts Three, Four, and Five of the OTSC, these Counts were only directed to Respondent Tuite and not Rapid Release.

crime, had a judgment withheld or deferred, or are you currently charged with committing a crime, which has not been previously reported to this insurance department?” Ibid. At the time of this application, Tuite had already been indicted on one count of felony forgery. Ibid.

The ALJ stated that in Tuite and Rapid Release’s Answer to the OTSC, Tuite denied the allegations in Count Six. Id. at 4. Specifically, Tuite denied that she intentionally provided false information on her license renewal application, and she stated that she “didn’t fully understand what it meant to be charged with a crime.” Ibid. Tuite further stated that she “was under the impression that it meant [being] convicted of a crime and [she] had not yet be convicted” and “[a]s a result, [she] accidentally, due to [her] misunderstanding of the question, answered the question no.” Ibid. Tuite further claimed that she made a mistake on her application because she “never studied law” and thus, did not know the difference between “conviction” and “charge.” Id. at 5.

The ALJ found that the question clearly asks whether she was convicted or charged, and therefore, the question distinguished “charge” from “conviction.” Id. at 10. Thus, Tuite could not have reasonably misunderstood the question. Ibid. The ALJ further noted that although Tuite may not have had a formal legal education, “she work[ed] as a bail bondsman, and should certainly know the difference between ‘charged’ and ‘convicted.’” Ibid.

The ALJ found that Tuite’s misrepresentation on her renewal application was a violation of N.J.S.A. 17:22A-40a(1) and (2). PSD at 10 and Initial Decision at 10. The ALJ further stated that there is no intent requirement in N.J.S.A. 17:22A-40a(1), and there is no genuine issue regarding whether Tuite provided incorrect and materially untrue information about her criminal history on her application. PSD at 10. The ALJ noted that there are several categories of “misrepresentation” including in innocent misrepresentation and a negligent misrepresentation

and neither requires an intent to deceive. Ibid. The ALJ stated that even if Tuite did not intend to deceive the Department through her application, she is still liable for misrepresentation under N.J.S.A. 17:22A-40a(3). PSD at 10 and Initial Decision at 10.

Additionally, the ALJ originally found that there is a genuine issue as to whether Tuite's actions, as alleged in Count Six of the OTSC, violated N.J.S.A. 17:22A-40a(15) and (16). PSD at 11-12. The ALJ reasoned that these two provisions require intent to deceive and there is a genuine issue regarding whether Tuite had intended to deceive the Department. Id. at 12. However, the ALJ later concluded that summary decision was appropriate as it related to these provisions. Initial Decision at 12. Specifically, the ALJ found that while Tuite disputed that she intentionally provided a false answer on her application and testified as to her mistaken belief, her testimony was not credible. Ibid. The ALJ additionally noted that at the time of the application, Tuite had already been charged and indicted on the forgery matter. Ibid. The ALJ stated that "[s]he was trying to hold on to her license as long as possible and intended to deceive the Department in violation of N.J.S.A. 17:22A-40a(16)." Ibid. Additionally, the ALJ found that "[u]nder N.J.S.A. 17:22A-40a(15), 'intentionally' modifies both the withholding of information and the making of a material misstatement in an application." Ibid. As such, the ALJ concluded that Tuite violated N.J.S.A. 17:22A-40a(15) and (16). Ibid.

However, the ALJ found that the Department did not show that Tuite's actions in providing a false answer on her license renewal application violated N.J.S.A. 17:22A-40a(8). PSD at 10 and Initial Decision at 11. The ALJ noted that while the Producer Act fails to define "insurance business," an interpretation of this provision is that its scope is limited to activities "in the conduct of insurance business' or during the sale, solicitation, or negotiation of insurance products, including accompanying actions." PSD at 10-11. Additionally, the ALJ stated that

such an interpretation is supported by the definition of “business of insurance” contained in N.J.A.C. 11:17D-1.2, which states that the term means “the writing of insurance or reinsuring of risks by an insurer, including all acts necessary or incidental to such writing or reinsurance.” Id. at 11, fn 2. The ALJ found that an application to conduct insurance business, by itself, is not “the conduct of insurance business.” PSD at 11 and Initial Decision at 11. While Tuite demonstrated incompetence and untrustworthiness by providing an incorrect or false answer on her application, the ALJ found that the Department failed to show that it was entitled to prevail as a matter of law on this issue. Ibid.

Count Seven: Respondent Tuite Failed to Notify the Department of Her Change of Address within 30 Days of the Change

The ALJ found that Tuite did not timely notify the Department of the change of her residential address from 1112 Indian Hill Road, Toms River, NJ to 2606 Inverness Lane, Toms River, NJ. Ibid. The ALJ stated that in Tuite and Rapid Release’s January 1, 2014 Answer to the OTSC, Tuite denied the allegations in Count Seven. Ibid. The ALJ stated that Tuite claims that she forgot to notify the Department about her change in address. Id. at 5.

The ALJ found that, as it relates to Count Seven of the OTSC, there was no genuine issue as to whether Tuite violated N.J.S.A. 17:22A-33f, N.J.S.A. 17:22A-40a(2), and N.J.A.C. 11:17-2.7(f)(2), as Tuite admitted that she failed to notify the Department within thirty days of her change of residence. PSD at 13 and Initial Decision at 12. Thus, the ALJ found that the Department was entitled to summary decision with respect to Count Seven of the OTSC. Ibid. The ALJ also stated that Rapid Release is vicariously liable for the violations contained in Count Seven of the OTSC⁶. Ibid.

⁶ Although the ALJ found that Respondent Rapid Release was vicariously liable for the violations contained in Count Seven of the OTSC, this Count was only directed to Respondent Tuite and not Rapid Release.

ALJ's Findings as to the Penalty against Respondents Tuite and Rapid Release

The ALJ stated that the Producer Act governs the conduct of licensed insurance producers and authorizes the Commissioner to revoke or suspend an insurance producer's license and to impose civil penalties for violations of the Producer Act. N.J.S.A. 17:22A-40a and -45c. PSD at 6-7. The ALJ stated that violations of the Producer Act include the following: providing incorrect, misleading, incomplete, or materially untrue information in the license application; violating any insurance law or regulation, subpoena, or order of the Commissioner; obtaining or attempting to obtain a license through misrepresentation or fraud; having been convicted of a felony or crime of the fourth degree or higher; using fraudulent, coercive, or dishonest practices, or demonstrating incompetence, untrustworthiness, or financial irresponsibility in the conduct of insurance business in this State or elsewhere; intentionally withholding material information or making a material statement in an application for a license; committing any fraudulent act; and failing to notify the Commissioner within 30 days of his conviction of any crime, indictment, or the filing of any formal criminal charges. N.J.S.A. 17:22A-40a(1), (2), (3), (6), (8), (15), (16) and (18). Id. at 6.

The ALJ further noted that pursuant to N.J.S.A. 17:22A-45c, the Commissioner may levy monetary penalties not exceeding \$5,000 for the first offense and \$10,000 for each subsequent offense. Ibid. Additionally, the Commissioner may also order the reimbursement of costs of investigation against any person who is found to have violated any provision of the Producer Act. Ibid. Further, "[t]he insurance producer license of a business entity may be suspended, revoked or refused if the [C]ommissioner finds, after hearing, that an individual licensee's violation was known or should have been known by one or more of the partners, officers or

managers acting on behalf of the business entity and the violation was neither reported to the [C]ommissioner nor corrective action taken.” N.J.S.A. 17:22A-40c. Ibid.

The ALJ made no finding as to penalties in the Partial Summary Decision and concluded that Tuite raised genuine issues with respect to certain violations alleged in Count Six of the OTSC. Id. at 13. The ALJ further determined that Tuite disputes certain facts underlying her conviction for forgery and argued that there were mitigating factors relevant to penalties. Ibid. However, the ALJ noted that the Supreme Court explained, in the context of attorney discipline hearings, that “a criminal conviction [is] conclusive evidence of guilt in disciplinary proceedings. In a given situation it may be necessary and appropriate to examine the underlying facts of the conviction. But the guilt will not be retried, except as it pertains to the severity of the discipline to be imposed.” In re Rosen, 88 N.J. 1, 3 (1981) (citing In re Mirabelli, 79 N.J. 597, 602 (1979); In re La Duca, 62 N.J. 133, 136 (1973)). Ibid. Therefore, although Tuite could not relitigate her conviction, she was able to present underlying facts of her conviction at a hearing in order to determine the appropriate penalties for her violations of the Producer Act. Ibid.

The ALJ stated, in the Initial Decision, that the testimony of Tuite and her husband, Kenneth Tuite, applied more to penalties than actual violations of the Producer Act. Initial Decision at 13. Specifically, Kenneth Tuite insisted that he did not know about his wife’s actions until after they occurred. Ibid. Tuite testimony consisted of her denying having forged the police officer’s signature on the Certificate of Surrender, despite pleading guilty and admitting to same before a municipal court judge. Ibid. While Tuite denied forging the Certificate of Surrender, the ALJ found that she clearly admitted, under oath, to the forgery, and because of this, she cannot, now, “come to another forum to fight for her insurance producer license and blame the bounty hunters for the forgery.” Ibid. Additionally, the ALJ noted that

“[h]er lack of candor in all these proceedings makes her unworthy of the license,” and therefore, the ALJ recommended that Tuite’s insurance producer license be revoked. Ibid.

In regards to Rapid Release, the ALJ noted that Rapid Release is vicariously liable for Tuite’s violations of the Producer’s Act; however, “Tuite’s actions were individual.” Ibid. As such, the ALJ determined that no evidence was presented that proved that Kenneth Tuite or any other partners, officers or managers acting on behalf of Rapid Release knew or had reason to know of Tuite’s conduct, as alleged in the OTSC, at the time it occurred. Ibid. Specifically, the ALJ stated that the Department failed to prove that one or more of the partners acting on behalf of Rapid Release knew or should have known of Tuite committing forgery on the Certificate of Surrender. Id. at 13-14. However, the ALJ stated that they should have known about the failure to report Tuite’s indictment and conviction and the untrue information in her license application. Id. at 14. As such, the ALJ recommended that the insurance producer license of Rapid Release be suspended for a period of one year. Ibid. The ALJ also concluded that the Department proved that the monetary penalties, including costs of investigation, sought in the OTSC are appropriate against both Tuite and Rapid Release for the charges. Id. at 13.

EXCEPTIONS

By letter dated March 29, 2016, the Office of the Attorney General, on behalf of the Department, submitted timely Exceptions to the Initial Decision. The Respondents did not submit any Exceptions.

In its Exceptions, the Department concurs with the overall conclusions contained in the Initial Decision and the findings that Respondents Tuite and Rapid Release violated certain provisions of the Producer Act, as alleged in OTSC. However, the Department wished to modify and clarify several findings and issues as follows.

First, the Department states that the procedural history should be clarified in order to state that the record was closed on August 14, 2015. The Department contends that while the Initial Decision states that “A hearing was conducted on July 22, 2015. The record was closed with oral summations,” the record was actually closed on August 14, 2015, which is specifically stated in the ALJ’s August 7, 2015 letter to the parties. In that letter, the ALJ allowed both the Department and the Respondents to submit a letter regarding the appropriate sanctions for Respondent Rapid Release.

Further, the Department seeks to correct the ALJ’s finding of fact, wherein the ALJ states that Respondent Tuite “was able to get into PTI, so she served a probationary period and paid all of the probation fees and fines.” The Department contends that other than Tuite’s testimony during the July 22, 2015 regarding PTI, there was no evidence presented by any party that would show that Tuite was accepted into a PTI program. The Department states that it entered documents into evidence that supported the fact that on March 25, 2013, a Judgment of Conviction (“JOC”) was entered against Tuite for Forgery in the Fourth Degree. While the JOC mentions sentencing, the sentencing only involves fines and probation, and there is no indication that that Tuite was accepted into a PTI program. The Department further maintains that Tuite would not have been indicted, pleaded guilty, and had a JOC entered against her if she was admitted into a PTI program.

The Department also seeks to modify the Initial Decision as it maintains that the Respondents’ failure to respond to the Department’s inquiry, as alleged in Count Two of the OTSC, demonstrates unworthiness in the conduct of insurance business. The Department states that the Respondents, in their Answer to the OTSC, admitted all the allegations in Count Two, including a violation of N.J.S.A. 17:22A-40a(8). The Department maintains that, although the

ALJ found that “insurance business” under this provision only encompasses the sale, solicitation, or negotiation of insurance and acts incidental thereto, responding to a Department inquiry, which is required by all licensees, is an act incidental to the business of insurance. Specifically, the Department argues that a licensee must have a license in good standing in order to conduct insurance business and the Department’s inquiry concerned the licensee’s conduct in the area of insurance business.

Moreover, the Department stated that in Commissioner v. Dobrek, OAL Dkt. No. BKI 10817-12 and BKI 2360-13 (consolidated), Initial Decision (06/14/14), Final Decision and Order (01/15/15), the Commissioner found that N.J.S.A. 17:22A-40a(8) is not limited to the conduct of insurance business and a licensed producer may violate the Producer Act for conduct related to personal business. A producer may violate this provision through the use of fraudulent, coercive, or dishonest practices whether or not the action was performed in the business of insurance or otherwise. The Department argues that here, the Respondents’ conduct “is a dishonest and unworthy practice [and] was part of a pattern of concealment to prevent the Department from finding out about the felony conviction.” The Department further notes that the Respondents’ failure to respond “was a means for allowing them to continue to conduct insurance business, despite violating the Producer Licensing Act.”

Additionally, the Department seeks to modify the Initial Decision as it maintains that Tuite’s actions in providing a false answer on her producer licensing renewal application, as alleged in Count Six of the OTSC, demonstrated dishonesty in the conduct of insurance business. The Department states that “answering questions on an insurance renewal license application is . . . an act necessary and material to insurance business[,] enables one to conduct insurance business and is incidental to the writing of insurance business.” Further, by misrepresenting a

fact on her application, Tuite committed a dishonest practice, which subjects her to liability under N.J.S.A. 17:22A-40a(8). Commissioner v. Dobrek, supra.

Further, the Department seeks to modify the Initial Decision as the Department maintains that Kenneth Tuite, the majority owner, officer, and Designated Responsible Licensed Producer (“DRLP”) of Rapid Release, should have known of Tuite’s forgery. The Department maintains that Kenneth Tuite, as the DRLP, is responsible for Rapid Release’s compliance with the insurance laws, and Rapid Release is therefore, vicariously liable for Tuite’s actions because Tuite was acting on Rapid Release’s behalf. The Department states that the Certificate of Surrender that was forged by Tuite was on Rapid Release letterhead. Additionally, the Department notes that the ALJ found that Rapid Release had violated Count One of the OTSC, and stated that Rapid Release was liable for Tuite’s forgery act. As such, the Department argues that Rapid Release’s producer license should be revoked, pursuant to N.J.S.A. 17:22A-40c, rather than suspended.

Lastly, the Department seeks to modify the Initial Decision to include a penalty analysis as set forth in Kimmelman v. Henkels & McCoy, Inc., 108 N.J. 123 (1987). The Department believes that there are more aggravating factors than mitigating factors, which supports a conclusion that civil monetary penalties should be imposed against the Respondents in the amount of \$35,000⁷. Specifically, the Department is seeking civil monetary penalties against Respondents Tuite and Rapid Release, jointly and severally, in the amount of \$15,000 for the violations alleged in Counts One and Two of the OTSC. Additionally, the Department is seeking

⁷ While the Department argues for \$35,000 in civil monetary penalties against the Respondents, the Department, in its allocation of these fines, alleges a total of \$40,000 be imposed for the violations alleged in the OTSC.

civil monetary penalties against Respondent Tuite, individually, in the amount of \$20,000⁸ for the violations alleged in Counts Three, Four, Five, Six, and Seven. The Department requests that the proposed civil monetary penalties be allocated as follows: Count One: \$5,000 against Respondents Tuite and Rapid Release, jointly and severally; Count Two: \$10,000 against Respondents Tuite and Rapid Release, jointly and severally; Count Three: \$5,000 against Respondent Tuite, individually; Count Four: \$5,000 against Respondent Tuite, individually; Count Five: \$5,000 against Respondent Tuite, individually; Count Six: \$5,000 against Respondent Tuite, individually; and Count Seven; \$5,000 against Tuite, individually.

The Department seeks to adopt the total civil monetary penalties of \$35,000 for the violations contained in the OTSC and seeks to adopt the revocation of Tuite's insurance producer license and requests that the Initial Decision, which suspended Rapid Release's insurance producer license, be modified to order revocation.

LEGAL DISCUSSION

Motions for summary decisions are governed by N.J.A.C. 1:1-12.5, which mirrors the language of R. 4:46-2, the Superior Court rule governing motions for summary judgment. Pursuant to these rules, summary decision may be rendered if the papers and discovery, which have been filed, together with affidavits, show no genuine issue as to any material fact and the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). When a motion for summary decision is made and supported, the burden shifts to the adverse party, who must respond by affidavit, setting forth specific facts showing that genuine issues of material fact exist which are resolvable only by an evidentiary proceeding. Ibid. The judge, when deciding on a motion for summary decision, must "consider whether the competent evidential materials

⁸ The Department stated in its Exceptions that it is seeking \$20,000 in fines against Respondent Tuite, individually. However, in the allocation of these fines, the total amount of the combined monetary penalties equals \$25,000.

presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party.” Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995). Even if the non-moving party comes forward with some evidence, summary decision must be granted if the evidence is “so one-sided that [the moving party] must prevail as a matter of law.” Id. at 536.

The Department bears the burden of proving the allegations in an Order to Show Cause by a preponderance of the competent, relevant, and credible evidence. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). The evidence must be such as would lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Preponderance may be described as: “the greater weight of credible evidence in the case not necessarily dependent on the number of witnesses, but having the greater convincing power.” State v. Lewis, 678 N.J. 47 (1975).

OTSC—Allegations Against the Respondents

For all of the reasons set forth in the PSD and Initial Decision, I concur that summary decision is appropriate as to all Counts of the OTSC issued against the Respondents. As found by the ALJ, the Respondents failed to adduce evidence that creates a genuine issue as to any material fact and their defenses as pleaded fail as a matter of law.

Count One: Respondents Tuite and Rapid Release Forged a Certificate of Surrender and Submitted Same to a Court of Law

Count One of the OTSC alleges that Tuite and Rapid Release altered a Rapid Release Certificate of Surrender by signing and/or cutting and pasting a Neptune Township Police sergeant’s name and badge number and submitted same to the Administrator of the Matawan Borough Municipal Court in order to obtain a release of a \$750 bond, in violation of N.J.S.A.

17:22A-40a(2), (8), and (16), and N.J.A.C. 11:17A-4.10. I concur with the ALJ that the Department proved the allegations in Count One of the OTSC, and I FIND that the Respondents' actions, as alleged in Count One of the OTSC, constitute violations of N.J.S.A. 17:22A-40a(2) (violating any insurance law), (8) (fraudulent or dishonest practices, or demonstrate untrustworthiness or financial irresponsibility), and (16) (commit a fraudulent act); and N.J.A.C. 11:17A-4.10 (An insurance producer acts in a fiduciary capacity in the conduct of his or her insurance business).

**Count Two: Respondents Tuite and Rapid Release Failed to
Respond to the Department's Inquiry in Writing or Otherwise**

Count Two of the OTSC alleges that on May 1, 2013, the Department requested that the Respondents provide a written response regarding the allegations contained in the OTSC pursuant to N.J.S.A. 17:22A-45a; however, the Respondents failed to respond to the Department's inquiry in any manner, in violation of N.J.S.A. 17:22A-40a(2) and (8); and N.J.A.C. 11:17A-4.8. I concur with the ALJ that the Department proved the allegations in Count Two of the OTSC, and I FIND that the Respondents' actions, as alleged in Count Two of the OTSC, constitute violations of N.J.S.A. 17:22A-40a(2) (violating any insurance law); and N.J.A.C. 11:17A-4.8 ("An insurance producer shall reply, in writing, to any inquiry of the Department relative to the business of insurance within the time requested in said inquiry. . . .").

However, I disagree with the ALJ that the Department failed to prove that the Respondents' actions, as alleged in Count Two of the OTSC, constitute a violation of N.J.S.A. 17:22A-40a(8), which prohibits the use of "fraudulent, coercive or dishonest practices, or demonstrating incompetence, untrustworthiness or financial irresponsibility in the conduct of insurance business. . . ." Specifically, the ALJ stated that the Department did not show that the term "insurance business" should be expanded to encompass anything other than the sale,

solicitation, or negotiation of insurance or acts incidental thereto. Initial Decision at 8-9. However, pursuant to N.J.A.C. 11:17A-4.8, all insurance producers are to respond to the Department's inquiries in order to maintain their license and be permitted to engage in the insurance business. In the present matter, the Department's inquiry related to the Respondents' fraudulent actions in the course of insurance business. Therefore, this is a requirement for all persons licensed by the Department to engage in the business of insurance. Further, the Respondents admitted to this violation in their Answer to the OTSC.

Additionally, prior Commissioners have consistently ruled that the Producer Act can apply to conduct related to personal business. See Commissioner v. Prime Ins. Syndicate, Bickford, et al, OAL Dkt. No. 1168-05, First Order and Initial Decision on Motion for Summary Decision, (01/12/06), Final Decision and Order on First Partial Summary Decision (02/27/06), Second Order and Initial Decision on Motion for Summary Decision (05/12/06), Final Decision and Order on Second Partial Summary Decision (06/26/06) (Bickford, an insurance producer, had her producer license revoked and she was fined \$5,000 for Producer Act violations for fraudulently failing to disclose her own personal driving record on an application for automobile insurance); Commissioner v. Nasir, OAL Dkt. No. BKI 2335-03, Initial Decision (03/01/05), after App. Div. remand, Final Decision (3/26/08) (license revocation and \$17,000 fine ordered for making false statements to an insurance carrier in support of personal benefits claim); and Commissioner v. Pino, OAL Dkt. No. BKI 8070-02, Initial Decision (09/11/03), Final Decision and Order (10/30/03) (producer's theft of monies from cemetery association in his personal capacity as secretary/treasurer of the association constituted violations of Producer Act warranting revocation). Further, the Commissioner has previously found that

N.J.S.A. 17:22A-40a(8) is not limited to the conduct of insurance business, and . . . a producer may violate this section through

fraudulent, coercive or dishonest practices whether in the business of insurance or not, and through the demonstration of incompetence, untrustworthiness or financial irresponsibility in the conduct of insurance business.

Commissioner v. Dobrek, supra. Here, the Respondents' failure to respond and cooperate with the Department's investigation was a demonstration of dishonest and untrustworthy conduct. The Respondents attempted to conceal their wrongdoing from the Department in order to continue to engage in the insurance business, even after Respondent Tuite was indicted and convicted of felony forgery.

In light of the foregoing and the factual conclusions determined by the ALJ, I MODIFY the Initial Decision and FIND that the Respondents' conduct, as alleged in Count Two of the OTSC, is also a violation of N.J.S.A. 17:22A-40a(8).

Count Three: Respondent Tuite's Conviction of Fourth-Degree Felony Forgery

Count Three of the OTSC alleges that Respondent Tuite was indicted, convicted, and sentenced by the State of New Jersey, Monmouth County Superior Court, on the felony charge of fourth-degree forgery, in violation of N.J.S.A. 17:22A-40a(6). I concur with the ALJ that the Department proved the allegations in Count Three of the OTSC, and I FIND that Respondent Tuite's actions, as alleged in Count Three of the OTSC, constitute a violation of N.J.S.A. 17:22A-40a(6) (having been convicted of a felony or crime of the fourth degree or higher).

However, I disagree with the ALJ's factual finding that Respondent Tuite was accepted into a PTI program for her fraudulent activity. There was no documentary evidence submitted by either party to support this conclusion, and there is no information in the record that suggests that this occurred. The only reference to PTI is from Tuite's testimony at the July 22, 2015 hearing. Initial Decision at 4. In fact, a JOC was entered against Tuite on March 23, 2013. Initial Decision at 16. The JOC discusses her sentence, which only involves fines and probation,

and there is no reference to PTI in the transcript from Tuite's plea. See Certification of Daxesh Patel ("Patel Cert.") at Exhibit 6, and Supplement Certification of DAG Carl M. Bornmann at Exhibit 1. Additionally, PTI is an acronym for "Pre-Trial Intervention." See: <http://www.judiciary.state.nj.us/criminal/crpti.html>. It is a pre-trial diversionary program for first time offenders that if accepted, replaces the traditional criminal prosecution of the defendant and results in no criminal record. Ibid.

Pursuant to N.J.A.C. 1:1-18.6(b), the Department may modify or reject "findings of fact not related to issues of credibility of lay witness testimony." Additionally, the Department "may not reject or modify any finding of fact as to issues of credibility of lay witness testimony unless it first determines from a review of the record that the findings are arbitrary, capricious or unreasonable, or are not supported by sufficient, competent, and credible evidence in the record." N.J.A.C. 1:1-18.6(c). As there is no documentary evidence in the record beyond Tuite's bald assertion to support the ALJ's factual finding that Tuite was accepted into a PTI program and as the ALJ determined, in the Initial Decision, that Tuite's testimony was not credible, I REJECT the ALJ's factual finding and FIND that Tuite was not accepted into a PTI program as part of her sentence for fourth-degree felony forgery.

**Counts Four and Five: Respondent Tuite's Failure to Notify
the Commissioner of Indictment and Conviction for Fourth-Degree Felony Forgery**

Count Four of the OTSC alleges that Respondent Tuite failed to notify the Commissioner within 30 days of her April 26, 2012 indictment for fourth-degree forgery, in violation of N.J.S.A. 17:22A-40a(2) and (18). Count Five of the OTSC alleges that Respondent Tuite failed to notify the Commissioner within 30 days of her March 22, 2013 conviction for fourth-degree forgery, in violation of N.J.S.A. 17:22A-40a(2) and (18). I concur with the ALJ that the Department proved the allegations in Counts Four and Five of the OTSC, and I FIND that the

Respondent Tuite's actions, as alleged in Count Four and Five of the OTSC, constitute violations of N.J.S.A. 17:22A-40a(2) (violating any insurance law), and (18) (failing to notify the commissioner within 30 days of the conviction of any crime, indictment or the filing of any formal criminal charges).

**Count Six: Respondent Tuite Misrepresented Information
in her Insurance Producer License Renewal Application**

Count Six of the OTSC alleges that on July 1, 2012, Respondent Tuite answered "No" on her insurance producer renewal licensing application in response to the question of whether she was "currently charged with committing a crime which has not been previously reported to this insurance department" when she had already been charged for fourth-degree felony forgery, in violation of N.J.S.A. 17:22A-40(1), (2), (3), (8), (15), and (16). I concur with the ALJ that the Department proved the allegations in Count Six of the OTSC, and I FIND that Respondent Tuite's actions, as alleged in Count Six of the OTSC, constitute violations of N.J.S.A. 17:22A-40a(1) ("[p]roviding incorrect, misleading, incomplete or materially untrue information in a license application"), (2) (violating any insurance law), (3) ("[o]btaining or attempting to obtain a license through misrepresentation or fraud"), (15) ("[i]ntentionally withholding material information or making a material misstatement in an application for a license") and (16) (commit a fraudulent act).

However, I disagree with the ALJ that the Department failed to prove that Respondent Tuite's actions, as alleged in Count Six of the OTSC, constitute a violation of N.J.S.A. 17:22A-40a(8), which prohibits the use of "fraudulent, coercive or dishonest practices, or demonstrating incompetence, untrustworthiness or financial irresponsibility in the conduct of insurance business. . . ." The ALJ found that the submission of Tuite's application for licensure, which contained false information, did not occur in the conduct of insurance business. Specifically, the

ALJ found that “an application to conduct insurance business is not in itself ‘the conduct of insurance business.’” Initial Decision at 11. However, answering questions on an insurance renewal application is an act that is a statutory requirement to being licensed to transact the business of insurance, and thus is necessary and material to conducting insurance business in this State. Additionally, as discussed above, the Commissioner in previously decisions has determined that N.J.S.A. 17:22A-40a(8) can apply to conduct related to personal business. See Commissioner v. Prime Ins. Syndicate, Bickford, et al, supra, Commissioner v. Nasir, supra; Commissioner v. Pino, supra; and New Jersey Dep’t of Ins. v. Rosenblatt, supra. Further, Tuite’s misrepresentation on her insurance application is an intentional and dishonest practice, which subjects her to liability under N.J.S.A. 17:22A-40a(8). See Commissioner v. Dobrek, supra.

In light of the foregoing and the factual conclusions determined by the ALJ, I MODIFY the Initial Decision and FIND that Respondent Tuite’s conduct, as alleged in Count Six of the OTSC, is also a violation of N.J.S.A. 17:22A-40a(8).

**Count Seven: Respondent Tuite Failed to Notify
the Department regarding a Change of Residential Address**

Count Seven of the OTSC alleges that Respondent Tuite failed to notify the Department within 30 days of her change in residence, in violation of N.J.S.A. 17:22A-33(f), N.J.S.A. 17:22A-40a(2), and N.J.A.C. 11:17-2.7(f)2. I concur with the ALJ that the Department proved the allegations in Counts Seven of the OTSC, and I FIND that the Respondent Tuite’s actions, as alleged in Count Seven of the OTSC, constitute violations of N.J.S.A. 17:22A-33f (“[l]icensees shall inform the commissioner by any means acceptable to the commissioner of a change of address within 30 days of the change”), and N.J.S.A. 17:22A-40a(2) (violating any insurance law). It should be noted that N.J.A.C. 11:17-2.7 was recodified without substantive change to N.J.A.C. 11:17-2.8, effective July 20, 2015. See 46 N.J.R. 1671(a), 47 N.J.R. 1872(a). In light

of this and the fact that the OTSC was issued prior to the effective date of this recodification, the OTSC in this matter should be conformed to reflect the correct regulatory citation of N.J.A.C. 11:17-2.8(f)2, which requires all licensees to provide the Department with notification of any change in business mailing or location address, residence address, phone numbers, and email addresses within 30 days of the change. I agree with the ALJ's determination that Respondent Tuite failed to provide the Department with her updated address within 30 days of the change, in violation of N.J.A.C. 11:17-2.8(f)2 and I AMEND the OTSC and Initial Decision accordingly.

Respondent Rapid Release's Vicarious Liability

Additionally, I disagree with the ALJ that Respondent Rapid Release is vicariously liable for Tuite's violations in Counts Three, Four, Five, Six, and Seven of the OTSC. Specifically, the ALJ noted in the Initial Decision that "Rapid Release is vicariously liable for all of these violations" in relation to Counts Three, Four, and Five. Initial Decision at 9. The ALJ further stated that "Again, Rapid Release is vicariously liable for all of these violations" following her analysis of Count Seven. Id. at 12. While Rapid Release is liable for Tuite's actions relating to Counts One and Two of the OTSC, the remaining Counts were individual and thus, were individually issued against Tuite in the OTSC. As such, I MODIFY the Initial Decision and FIND that Rapid Release is not vicariously liable for the violations contained in Counts Three, Four, Five, Six, and Seven of the OTSC; however, Rapid Release is liable for the violations contained in Counts One and Two of the OTSC.

Penalty against Respondents Tuite and Rapid Release

Revocation of Respondents' Producer Licenses

With respect to the appropriate action to take against the Respondents' insurance producer licenses, I find that the record is more than sufficient to support license revocation and,

in fact, compels the revocation of both of the Respondents' producer licenses. As such, I concur with the ALJ's recommendation that the Respondent Tuite's insurance producer license be revoked. However, for the reasons set forth below, I MODIFY the Initial Decision to provide that Respondent Rapid Release's insurance producer license also be revoked, rather than suspended for one year as recommended by the ALJ.

A licensee's honesty, trustworthiness, and integrity are of paramount concern, since an insurance producer acts as a fiduciary to both the consumers and insurers they represent. The nature and duty of an insurance producer "calls for precision, accuracy and forthrightness." Fortunato v. Thomas, 95 N.J.A.R. (INS) 73 (1993). Additionally, a licensed producer is better placed than a member of the public to defraud an insurer. Strawbridge v. New York Life Ins. Co., 504 F.Supp. 824 (1980). As such, a producer is held to a high standard of conduct, and should fully understand and appreciate the effect of fraudulent or irresponsible dealing on the industry and on the public.

As the public, in general, is adversely affected in a significant way by insurance fraud, New Jersey views insurance fraud as a serious problem to be confronted aggressively and it has a particularly strong public policy against the proliferation of insurance fraud. Palisades Safety and Ins. Ass'n v. Bastien, 175 N.J. 144, 150 (2003). In decisions by prior Commissioners in similar cases, revocation has consistently been imposed upon licensees who have personally engaged in fraudulent acts, as both insureds and insurers must place their trust in the information insurance producers convey to them. See Commissioner v. Hohn, OAL Dkt. No. BKI 12444-11, Initial Decision (11/01/12), Final Decision and Order (03/18/13). Moreover, the Commissioner has consistently held that misconduct involving "misappropriation of premium monies, bad faith

and dishonestly compels license revocation.” Commissioner v. Strandkov, OAL Dkt. No. BKI 03451-07, Initial Decision (09/25/08), Final Decision and Order (02/04/09).

Our strong policy is to instill public confidence in both insurance professionals and the industry as a whole. In re Parkwood Co., 98 N.J. Super. 263 (App. Div. 1963). Courts have long recognized that the insurance industry is strongly affected by the public interest and the Commissioner is charged with the duty to protect the public welfare. See Sheeran v. Nationwide Mutual Insurance Company, 80 N.J. 548, 559 (1979). As evidenced by prior decisions, only the existence of extraordinary mitigating factors can form a basis for withholding the sanction of license revocation in cases involving direct personal conduct on the part of a licensee that constitutes fraud. See Commissioner v. Dobrek and Mr. Lucky Bail Bonds, Inc., OAL Dkt. No. BKI 00361-05, Initial Decision (12/26/06), Final Decision and Order (03/26/07); Commissioner v. Nicolo, OAL Dkt. No. BKI 10722-04, Initial Decision, (05/31/06), Final Decision and Order (10/12/06); and Commissioner v. Goncalves, *supra*.

I agree with the ALJ’s findings that Respondent Tuite’s activities were clear and demand the revocation of her insurance producer license. As the decisions cited above demonstrate, revocation is appropriate in almost all cases wherein a licensed insurance producer has engaged in fraud, bad faith, and dishonesty. Here, Tuite submitted a forged Certificate of Surrender to a New Jersey Municipal Court in order to obtain a release of a \$750 bond posted by Respondent Rapid Release. PSD at 2. While Tuite now claims that she did not forge the Neptune Township police officer’s name to the Certificate of Surrender and it was a bounty hunter that altered it, on January 7, 2013, she pleaded guilty to the charge of fourth-degree felony forgery for the same action and was subsequently sentenced for that crime. Ibid. Additionally, in a letter to the Department, dated April 10, 2013, Tuite stated that she “took full responsibility of it and said I

cut and pasted it.” See Patel Cert. at Exhibit 10. Tuite then failed to inform the Commissioner of her indictment and conviction for the crime and even submitted her license renewal application to the Department on July 1, 2012, wherein she intentionally misrepresented to the Department that she was not charged with any crime. Id. at 3. At that time, Tuite was clearly aware that she was charged with a crime and that crime had not been disclosed to the Department. Moreover, Tuite failed to inform the Department of her change in address and did not cooperate with the Department’s investigation, both of which she admits. Id. at 8 and 13.

Tuite’s misrepresentations on her license renewal application and her other violations allowed her to continue to engage in the insurance business without being detected by the Department, until her license was suspended on January 9, 2014. There are no exceptional, extraordinary, or rare mitigating factors that could justify any other penalty but the revocation of Tuite’s insurance producer’s license. Accordingly, based upon my review of the record and the ALJ’s Partial Summary Decision and Initial Decision, I am compelled to agree with the ALJ’s determination that the revocation of the Respondent Tuite’s producer license is necessary and appropriate.

However, I disagree with the ALJ’s recommendation that Respondent Rapid Release’s insurance producer license only be suspended for a one-year period. N.J.S.A. 17:22A-40c allows the Commissioner to suspend, revoke, or refuse to renew the insurance producer license of a business entity where “an individual licensee’s violation was known or should have been known by one or more of the partners, officers or managers acting on behalf of the business entity and the violation was neither reported to the [C]ommissioner nor corrective action taken.” The ALJ found that the Department failed to prove that one or more of the partners, acting on behalf of Rapid Release, knew or should have known of the forgery committed by Tuite. Initial Decision

at 13-14. However, Rapid Release is vicariously liable for Tuite's actions in forging the Certificate of Surrender because she was acting on Rapid Release's behalf. See Commissioner v. Goncalves, supra. The Certificate of Surrender that was forged was on Rapid Release's letterhead. See Patel Cert. at Exhibit 4. Further, Rapid Release admitted to and the ALJ found that Rapid Release committed the violations as alleged in Count One of the OTSC, which alleges that Tuite forged the Certificate of Surrender and provided it to a court of law in order to obtain a release of bond. PSD at 7.

Additionally, Kenneth Tuite stated in his testimony that he is the 95 % owner of Rapid Release, and he admitted that he found out about the incidents after they had occurred. Initial Decision at 3. Tuite also stated in her April 10, 2013 letter to the Department that she typed Kenneth Tuite's name on the motions to the municipal court, and she and Kenneth Tuite met with detectives, prior to her indictment, who questioned them both about the forgery. See Patel Cert. at Exhibit 10.

There can be no denying that Kenneth Tuite, the majority owner and DRLP of Rapid Release, had knowledge of Tuite's actions in forging the Certificate of Surrender. At the very least, he clearly knew about the forgery shortly after the fact, and yet, he still failed to inform the Department of Tuite's forgery and subsequent indictment and conviction, pursuant to N.J.S.A. 17:22A-40c. Additionally, Rapid Release still kept Tuite as an employee after the forgery had taken place. Tuite admitted to the Department in her April 10, 2013 letter, that her "association with the company is that I am a bail bondsman and whatever my husband needs me to do, sometimes clerical as well. I help wherever I can." Patel Cert. Exhibit 10. She further testified at the July 22, 2015 hearing that after her conviction for forgery, she continued working for Rapid Release, but only answering phones. Initial Decision at 5. Additionally, the violations

contained in the OTSC are not Rapid Release's first violations, and a consent judgment, Order No. E11-78, was entered against Kenneth Tuite and Rapid Release on October 6, 2011.

In light of the foregoing and based upon my review of the record, I am compelled to MODIFY the Initial Decision and FIND that that the revocation of the Respondent Rapid Release's producer license is necessary and appropriate.

Civil Monetary Penalties against Respondents

Under Kimmelman, supra, certain factors are to be examined when assessing administrative monetary penalties such as those that may be imposed pursuant to N.J.S.A. 17:22A-45 upon insurance producers (up to \$5,000 for the first violation and up to \$10,000 for any subsequent violations). These factors include: (1) the good faith or bad faith of the violator; (2) the violator's ability to pay; (3) the amount of profit obtained from the illegal activity; (4) injury to the public; (5) duration of the illegal conduct; (6) existence of criminal actions and whether a large civil penalty may be unduly punitive if other sanctions have been imposed; and (7) past violations. Kimmelman, supra, 108 N.J. at 137-39.

The record herein indicates the following with respect to these factors. The Respondents demonstrated bad faith by forging a police officer's signature to a Certificate of Surrender and submitting it to a court of law for the purpose of having the court rely upon the document and release the bond. It should be noted that "fraud is in and of itself wrongful conduct." Commissioner v. Fonseca, OAL Dkt. No. BK1 11979-10, Initial Decision (08/15/11), Final Decision and Order (12/28/11). The Respondents were aware that the Certificate of Surrender had been altered when it was submitted to the municipal court and failed to correct it thereafter, even though the Respondents claim it was a mistake. Further, Tuite failed to notify the Department of her indictment and conviction on the forgery charge. Tuite additionally attempted

to conceal her wrongdoing by misrepresenting her criminal charges to the Department on her license renewal application, refusing to respond to the Department's request for information, and failing to provide her correct address to the Department. The ALJ determined that Tuite's excuse that she did not know the difference between "charged" and "convicted" on her license renewal application was not credible as Tuite works in the bail bond industry and would need to have a remedial knowledge of legal terminology in criminal cases. Additionally, the question clearly asked the applicant to list both charges and convictions and Tuite responded "No," when she clearly knew that to be false. This factor weighs in favor of a significant monetary penalty.

As to the second Kimmelman factor, the Respondents have not provided any indication that they have a limited ability to pay a civil monetary penalty. Respondents who claim an inability to pay civil penalties bear the burden of proving their incapacity. Goldman v. Shah, OAL Dkt. No. BKI 11903-05, Initial Decision (04/15/08), Final Decision and Order (09/02/08). An insurance producer's ability to pay is only a single factor to be considered in determining an appropriate fine and does not obviate the need for the imposition of an otherwise appropriate monetary penalty. Moreover, the Commissioner has issued substantial fines against insurance producers despite their arguments regarding their inability to pay. See Commissioner v. Fonseca, supra (issuing a \$100,500 civil penalty despite the producer arguing that he was unable to pay); See also Commissioner v. Erwin, OAL Dkt. No. BKI 4573-06, Initial Decision, (07/09/07), Final Decision and Order (09/17/07) (fine of \$100,000 imposed despite evidence of the Respondent's inability to pay); and Commissioner v. Malek, OAL Dkt. Nos. BKI 4520-05 and BKI 486-05, Initial Decision (12/06/05), Final Decision and Order (01/18/06) (fine increased from \$2,500 to \$20,000 even though the producer argued an inability to pay fines in addition to restitution).

The third Kimmelman factor addresses the amount of profits obtained from the illegal activity. The greater the profits an individual is likely to obtain from illegal conduct, the greater the penalty must be if penalties are to be an effective deterrent. Kimmelman, supra, 108 N.J. at 138. In the present action, the Respondents retained at least \$750 from returned bail bond funds. The Respondents were able to obtain these funds by forging and submitting fraudulent documents to a municipal court and then attempted to conceal their fraud from the Department. Additionally, the Respondents profited by concealment of Tuite's criminal conviction because this enabled her to continue to conduct the business of insurance in this State. This factor weighs in favor of a significant monetary penalty.

The fourth Kimmelman factor addresses the injury to the public. Licensed producers act in a fiduciary capacity. In re Parkwood Co., supra, 98 N.J. Super. at 268. Moreover, the Commissioner is charged with the duty to protect the public welfare and to instill public confidence in both insurance producers and the insurance industry. "When insurance producers breach their fiduciary duties and engage in fraudulent practices and unfair trade practices, the affected insurance consumers are financially harmed and the public's confidence in the insurance industry as a whole is eroded." Commissioner v. Fonseca, supra. Here, the Respondents exploited a court of law and obtained funds based upon forged documents. When a licensed insurance producer commits fraudulent or dishonest acts, it destroys the public's trust in insurance producers and the insurance industry as a whole. Moreover, during the course of this proceeding, Respondent Tuite has made material misrepresentations and has been found not be credible by the ALJ. The public is harmed when licensed professionals fail to maintain the level of honesty and trustworthiness demanded under the laws of this State.

The fifth Kimmelman factor to be examined is the duration of the illegal activity. The Respondents' actions occurred from at least October 2011 through May 2013, for a period of approximately one year and eight months. The Certificate of Surrender was submitted to the court on October 10, 2011. PSD at 2. Tuite was indicted on April 26, 2012 and misrepresented her criminal charges to the Departments in her July 1, 2012 license renewal application. Id. at 2-3. Tuite was convicted of fourth-degree forgery on January 7, 2013 and refused to cooperate with the Department's investigation in May 2013. Ibid. Tuite additionally failed to inform the Department of her change of address since at least 2011. Such a long period of time shows a pattern of behavior and accordingly, weighs heavily in favor of a substantial monetary penalty.

The existence of criminal actions and whether a civil penalty may be unduly punitive if other sanctions have been imposed is the sixth factor. The Supreme Court held in Kimmelman that a lack of criminal punishment weighs in favor of a more significant civil penalty because the defendant cannot argue that he or she has already paid a price for his or her unlawful conduct. Kimmelman, supra, 108 N.J. at 139. Many of the allegations contained in the OTSC stem from criminal charges issued against Tuite, her subsequent conviction, and Tuite's failure to report the criminal indictment and conviction to the Department. Respondent Tuite was sentenced to probation and assessed fines of only \$155 in the criminal action. See Patel Cert. at Exhibit 6. Consequently, the addition of necessary and statutorily permitted licensure penalties is not unduly punitive.

The last Kimmelman factor deals with whether the producer had previously violated the Producer Act and if past penalties have been insufficient to deter future violations. Here, the Department and Rapid Release entered into consent judgment, Order No. E11-78, on September

22, 2011. The consent judgment stipulated that Rapid Release failed to return a fee for services that were rendered without first securing a written service fee agreement.

While the Department states that it requested that a total of \$35,000 in fines be imposed against the Respondents for violations of the Producer's Act and the ALJ recommended fines be ordered in this amount, the Department failed to account for its requested \$5,000 penalty for Count Five, of the OTSC. In its Brief in Support of the Department's Motion for Summary Judgment and the Department's Exceptions, the Department requests that the following penalties be imposed: Count One: \$5,000 against Respondents Tuite and Rapid Release; Count Two: \$10,000 against Respondents Tuite and Rapid Release; Count Three: \$5,000 against Respondent Tuite; Counts Four and Five: \$5,000 "for each count" against Respondent Tuite; Count Six: \$5,000 against Respondent Tuite; and Count Seven: \$5,000 against Respondent Tuite. As such, the total amount of fines sought by the Department is \$40,000, not the \$35,000 recommended by the ALJ in the Initial Decision.

However, in light of the foregoing and the above Kimmelman analysis and based on the violations I have concluded that Respondents committed, I MODIFY the Initial Decision and FIND the following. In regards to Count One of the OTSC, I FIND that a civil monetary penalty in the amount of \$5,000 be imposed against Respondents Tuite and Rapid Release, jointly and severally.

Additionally, as to Count Two of the OTSC, I disagree with the Department's request that a penalty of \$10,000 be imposed against Respondents Tuite and Rapid Release. While the Respondents admitted to their failure to respond to the Department's inquiry regarding the forged Certificate of Surrender and Tuite's subsequent conviction, I FIND that in the light of the previous decisions by prior Commissioners, a monetary penalty of \$10,000 is excessive for the

violation alleged in Count Two of the OTSC. See Commissioner v. Brown and Guaranteed Bail Bonds, OAL Dkt. No. BKI 10377-13, Initial Decision (09/15/15), Final Decision and Order (12/14/15) (imposing a monetary penalty of \$5,000 for the Respondents' failure to respond and provide documents to the Department's specific document request); Commissioner v. Secure Title, Inc. and Hilderbrandt, OAL Dkt. No. BKI 16461-13, Partial Summary Decision (07/02/14), Initial Decision (10/20/14), Final Decision and Order (06/04/15) (imposing a monetary penalty of \$1,000 per each failure to respond to the Department's two written inquiries); Commissioner v. Gundy, OAL Dkt. No. BKI 9338-11, Initial Decision (05/24/12) (imposing a fine of \$2,500 for the failure to respond to the Department's request for certain information pertaining to the Respondent's prior guilty pleas); Commissioner v. AMF Ins. Servs., Inc. and Feliz, OAL Dkt. No. BKI 85-05, Initial Decision (12/16/05), Final Decision and Order (03/13/06) (imposing a monetary penalty of \$5,000 for failing to provide fully responsive answers to letters sent by the Department). Therefore, in regards to Count Two of the OTSC, I MODIFY the Initial Decision and FIND that a \$5,000 civil monetary penalty be imposed against Respondents Tuite and Rapid Release, jointly and severally.

Further, as to Count Three of the OTSC, I disagree with the Department's request that a penalty of \$5,000 be imposed against Respondent Tuite. Count Three alleges that Tuite was convicted of fourth-degree felony forgery for her actions in forging a Certificate of Surrender. While there is no doubt that Tuite was convicted of a felony in the fourth degree, her actions that formed a basis for the underlying felony conviction were already addressed in Count One of the OTSC and a monetary penalty has been assessed, as set forth above. As such, I FIND that no fine shall be imposed against Tuite as it relates to Count Three of the OTSC. See Commissioner v. Garden State Brokers, Inc. and Del Bosco, OAL Dkt. No. BKI 3857-06, Initial Decision

(09/21/09), Final Decision and Order (12/18/09) (instituting a monetary penalty for the underlying criminal actions of the respondent rather than for the criminal conviction itself); Commissioner v. Stone, OAL Dkt. No. BKI 6301-07, Initial Decision (06/18/08), Final Decision (09/15/08) (fines imposed on all counts alleged in the order to show cause except for count one, which related to the respondent's specific criminal conviction); Commissioner v. Malek, *supra* (finding that no additional monetary penalty be imposed for the respondent's criminal conviction).

In regards to Counts Four and Five of the OTSC, I concur with the monetary penalties sought by the Department in its Motion for Summary Decision and therefore, I MODIFY the Initial Decision and FIND that a civil monetary penalty in the amount of \$5,000 be imposed against Respondent Tuite, individually, for each count for a total combined monetary penalty of \$10,000.

Additionally, in regards to Count Six of the OTSC, I concur with the Department's requested monetary penalty and therefore, I MODIFY the Initial Decision and FIND that a civil monetary penalty in the amount of \$5,000 be imposed against Respondent Tuite, individually, for Count Six of the OTSC.

Finally, as to Count Seven of the OTSC, I disagree with the Department's request that a penalty of \$5,000 be imposed against Respondent Tuite. While Respondent Tuite failed to advise the Department of her new address, I FIND that in the light of the previous decisions by prior Commissioners, a monetary penalty of \$5,000 is excessive for the violation alleged in Count Six of the OTSC. See Commissioner v. Peduto and American Bail Bond Assocs., OAL Dkt. No. BKI 4255-12, Initial Decision (01/11/13), Final Decision and Order (02/25/13) (imposing a monetary penalty of \$2,500 for the respondents' failure to advise the Department of

their new business and resident addresses); Commissioner v. Fischer and Marrick Corp., OAL Dkt. No. BKI 05377-05, Initial Decision (06/06/12), Final Decision and Order (10/19/12) (imposing a monetary penalty of \$250 per each failure to notify the Department of the Respondent's change in business address, for a total monetary penalty of \$500); and Commissioner v. Battista and Lay, OAL Dkt. No. BKI 4940-07, Initial Decision (03/06/08), Final Decision and Order (09/02/08) (imposing a \$300 monetary penalty for the respondent's failure to notify the Department of changes to his home and business address). Therefore, in regards to Count Seven of the OTSC, I MODIFY the Initial Decision and FIND that a \$1,000 civil monetary penalty be imposed against Respondents Tuite, individually.

In light of the above, I MODIFY the Initial Decision and FIND that the Respondents shall pay civil monetary penalties in the total amount of \$26,000. I further MODIFY the Initial Decision to reflect the proper allocation of civil monetary penalties and FIND that the following be imposed: Count One: \$5,000 and Count Two: \$5,000, for a total of \$10,000 against Respondents Tuite and Rapid Release, jointly and severally; and Count Three: no monetary penalty, Count Four: \$5,000, Count Five: \$5,000, Count Six, \$5,000, and Count Seven: \$1,000, for a total of \$16,000 against Respondent Tuite, individually. These penalties are reasonable and justified and less than what the Department is entitled to seek under the Producer Act.

Pursuant to N.J.S.A. 17:22A-45c, it is appropriate to impose reimbursement of the costs of investigation. As such, I concur with the recommendations of the ALJ that the Respondents shall pay costs of investigation in the amount of \$400, jointly and severally.

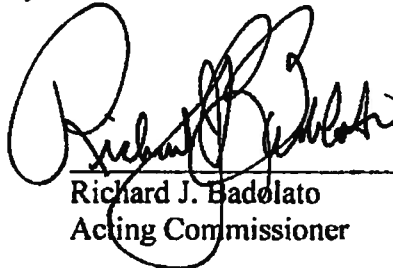
CONCLUSION

Having carefully reviewed the Partial Summary Decision, Initial Decision, the Exceptions, and the entire record herein, I hereby ADOPT the Findings and Conclusions as set

forth in the Partial Summary Decision and Initial Decision except as modified herein. Specifically, I ADOPT the ALJ's conclusion and hold that the Respondents have violated the Producer Act as charged in the OTSC and have failed to present any legally or factually viable defenses to the violations of the Producer Act.

I also ADOPT the ALJ's recommendation and hereby ORDER the revocation of the Respondent Tuite's insurance producer license. Further, I MODIFY the Initial Decision and ORDER that Respondent Rapid Release's insurance producer license also be revoked. I additionally ADOPT the ALJ's recommendations and ORDER the Respondents to pay costs of investigation in the amount of \$400, jointly and severally. I further MODIFY the ALJ's recommendations as to the imposition of civil monetary penalties and ORDER that fines totaling \$26,000 be imposed for the violations of the Producer Act contained herein. I further MODIFY the Initial Decision as it relates to the allocation of these penalties. Therefore, I impose the following fines: Count One: \$5,000 and Count Two: \$5,000, for a total of \$10,000 against Respondents Tuite and Rapid Release, jointly and severally; and Count Three: no monetary penalty, Count Four: \$5,000, Count Five: \$5,000, Count Six: \$5,000, and Count Seven: \$1,000, for a total of \$16,000 against Respondent Tuite, individually. Lastly, I MODIFY the Initial Decision to reflect that the record was closed in this matter on August 14, 2015, as set forth in the Department's Exceptions.

It is so ORDERED on this 16th day of June, 2016


Richard J. Badolato
Acting Commissioner