ORDER NO. E19-49

STATE OF NEW JERSEY
DEPARTMENT OF BANKING AND INSURANCE

OAL DOCKET NO.: BKI-09148-18
AGENCY DOCKET NO.: OTSC #E18-36
FINAL DECISION AND ORDER NO. E19-40

MARLENE CARIDE, COMMISSIONER, NEW JERSEY DEPARTMENT OF BANKING AND INSURANCE,	
Petitioner,	ORDER DENYING STAY PENDING APPEAL
v.	
AVELINO C. ANDRADE	
Respondent.	

This matter comes before the Commissioner of Banking and Insurance ("Commissioner") pursuant to the authority of N.J.S.A. 52:14B-1 to -31, N.J.S.A. 17:1-15, the New Jersey Producer Licensing Act of 2001, N.J.S.A. 17:22A-26 to -48 ("Producer Act"), and all powers expressed or implied therein, for the purposes of reviewing a motion by the Respondent Avelino C. Andrade ("Andrade") to stay Final Decision and Order No. E19-40 entered by the Commissioner on April 4, 2019 ("Final Order"). The Initial Decision of Administrative Law Judge Tricia M. Caliguire ("ALJ") decided January 24, 2019 ("Initial Decision") granted a motion for summary decision brought by the Department of Banking and Insurance ("Department"). In the Final Order, the Commissioner adopted and modified the Initial Decision as follows.

The Final Order adopted the Initial Decision as to Count One and held that by failing to remit a premium to an insurer, and allowing a client's policy to be terminated for failure to make payment, Andrade violated N.J.S.A. 17:22A-40(a)(2), (4), (8) and (16); N.J.A.C. 11:17A-4.10;

N.J.A.C. 11:17C-2.1(a); and N.J.A.C. 11:17C-2.2(a). Final Order at 9. As to Count Two, the Final Order adopted the Initial Decision's conclusion that by issuing six checks for the payment of premiums that were dishonored by the Respondent's bank for insufficient funds, Andrade violated N.J.S.A. 17:22A-40(a)(2), (4) and (8); N.J.A.C. 11:17A-4.10; N.J.A.C. 11:17C-2.1(a); and N.J.A.C. 11:17C-2.2(a). Id. at 10. The Final Order modified the Initial Decision to specifically find that Andrade also violated N.J.S.A. 17:22A-40(a)(16). Id. at 11. As to Count Three, the Final Order adopted the Initial Decision's conclusion that by issuing six checks for the payment of premiums from a non-trust account, commingling premium funds with other funds, and failing to maintain a trust account, Andrade violated N.J.S.A. 17:22A-40(a)(2) and (8); N.J.A.C. 11:17C-2.1(b); and N.J.A.C. 11:17C-2.3(a). Id. at 12. Finally, as to Count Four, the Final Order adopted the Initial Decision's conclusion that by failing to maintain copies of receipts for insurance premium payments, Andrade violated N.J.S.A. 17:22A-40(a)(2); N.J.A.C. 11:17C-2.5(a); and N.J.A.C. 11:17C-2.6(b). Ibid.

The Initial Decision recommended that a civil monetary penalty be imposed against the Respondent in the amount of $16,000[1] and that $400 be allowed for the costs of investigation pursuant to N.J.A.C. 17:22A-45(c). The Initial Decision also recommended suspending the Respondent's license until he established a trust account. The Final Order modified the monetary penalties and imposed a monetary penalty of $26,000, allocated as follows: $10,000 for Count One; $8,500 for Count Two; $5,000 for Count Three; and $2,500 for Count Four. Id. at 19-20. The Final Order also adopted the $400 award for the costs of investigation. Id. at 21. In addition, the Final Order modified the Initial Decision to suspend the Respondent's license for two years. Id. at 14.

[1] The Initial Decision did not specify how the monetary penalty should be allocated.

Respondent's Motion

On May 16, 2019, Respondent, through counsel, Glenn M. Race, Esq., filed the instant motion to stay the suspension of the Respondent's license pending an appeal, which was filed on May 17, 2019 ("Motion to Stay"). The Respondent argues that the suspension of his license would result in "financial catastrophe" for Respondent and his family. Motion to Stay at 1. The Respondent also argues that he would be unable to pay the fines without his license. Id. at 3.

Department's Response

On May 22, 2019, the Department, through counsel, DAG Nicholas Kant, filed a brief in response to the Respondent's motion ("Department Response Brief"). The Department argued that the Respondent did not demonstrate any of the requirements of Crowe v. DeGioia, 90 N.J. 126, 132 (1982) by clear and convincing evidence. The Department argued that the Respondent could not show a likelihood of success on the merits, the first Crowe factor, because the Respondent can obtain a reversal of the Final Decision and Order only if he convinces the Appellate Division that the administrative decision "is arbitrary, capricious or unreasonable or it is not wholly supported by substantial credible evidence in the record as a whole." Henry v. Rahway State Prison, 81 N.J. 573, 579-80 (1980), Department's Response Brief at 3. Further, the Department stated that the Respondent could not point to any error in the Final Order and admitted that his conduct "was in gross violation of Division rules." Id., quoting Motion to Stay at 2. Further, the Commissioner acted within her authority under the New Jersey Producer Licensing Act of 2001, N.J.S.A. 17:22A-26 to -48 ("Producer Act") regarding the penalties, and that such penalties were imposed after a lengthy review of aggravating and mitigating factors. Id. at 3-4.

The Department next argues that the Respondent could not demonstrate that irreparable harm would result if the stay is denied, the second Crowe factor. Department Response Brief at 5. The Department argues that the only harm that Respondent relied upon was financial in nature, and that such financial hardship does not rise to the level of irreparable injury required by the courts to grant injunctive relief under Crowe. Ibid.

Next, the Department argues that the Respondent does not meet the third Crowe factor, that when balancing the relative hardships, the harm to the movant from denying the stay outweighs the damage to the Department and public for the reasons set forth in the Final Order. Id. at 6. The Department argues that the need to protect the public outweighs the financial impact of the Final Order on the Respondent. Ibid.

Discussion

Upon review and for the reasons set forth below, Respondent's request for a stay of the Final Order is denied.

The movant has the burden of establishing by clear and convincing evidence that a stay should be granted. American Employers' Ins. Co. v. Elf Atochem N.A., Inc., 280 N.J. Super. 601, 611 n.8 (App. Div. 1995); Subcarrier Communications, Inc. v. Day, 299 N.J. Super. 634, 639 (App. Div. 1999) (citing American Employers' Ins. Co., 280 N.J. Super. at 611 n.8). Respondent has failed to recite facts or present evidence in the moving papers that demonstrate clear and convincing evidence that he has met each of the criteria that would entitle him to a stay.

A stay pending appeal of a final administrative decision is an extraordinary equitable remedy involving the most sensitive exercise of judicial discretion. See Crowe, 90 N.J. at 132; Zoning Bd. of Adjustment of Sparta, 198 N.J. Super. 370, 379 (1985). It is not a matter of right, even though irreparable injury may otherwise result. Yakus v. United States, 321 U.S. 414, 440

(1944). Because it is the exception rather than the rule, GTE Corp. v. Williams, 731 F.2d 676, 678 (10th Cir. 1984), the party seeking such relief must clearly carry the burden of persuasion as to all the prerequisites in most circumstances. United States v. Lambert, 695 F.2d 536, 539 (11th Cir. 1983).

The injunctive relief of a stay is appropriate only in instances where the party seeking this extraordinary measure demonstrates that each of the following conditions has been satisfied: 1) a reasonable probability of success on the merits of the underlying appeal; 2) on balance, the benefit of the relief to the movant will outweigh the harm such relief will cause other interested parties, including the public interest; and 3) irreparable injury will result if a stay is denied. Crowe, 90 N.J. at 132-34; Garden State Equal. v. Dow, 216 N.J. 314, 320-321; McNeil v. Legis. Apportionment Comm'n, 176 N.J. 484 (2003). The moving party has the burden to prove each of the Crowe factors by clear and convincing evidence. Brown v. City of Paterson, 424 N.J. Super. 176, 183 (App. Div. 2012). Here, Respondent has failed to carry his burden of establishing any of the necessary Crowe prerequisites for the issuance of a stay. Each of the prerequisites for the granting of a stay is addressed below.

Likelihood of Success on the Merits

First, the Respondent fails to establish that there is a reasonable probability that he will prevail on the merits of its appeal. Appellate courts will only reverse the decision of an administrative agency if it is arbitrary, capricious, or unreasonable, or if it is not wholly supported by substantial credible evidence in the record. L.M. v. Div. of Med. Assistance and Health. Serv., 140 N.J. 480, 489 (1995).

A presumption of reasonableness attaches to the Commissioner's Final Order and the burden is placed on Respondent to show otherwise. Maple Hill Farms, Inc. v. Div. of N.J. Real

Estate Com., 67 N.J. Super. 223, 227 (App. Div. 1961). The Respondent can obtain a reversal of the Final Order only if he convinces the Appellate Division that the administrative decision "is arbitrary, capricious or unreasonable or it is not wholly supported by substantial credible evidence in the record as a whole." Henry v. Rahway State Prison, 81 N.J. 571, 579-580 (1980). In the context of actions by an administrative agency, "arbitrary and capricious" means "willful and unreasoning action, without consideration and in disregard of circumstances." Bayshore Sewerage Co. v. Department of Envtl. Pro., 122 N.J. Super. 184 (App. Div. 1974), (quoting Worthington v. Fauver, 88 N.J. 183, 204-205 (1982)). Action that is "exercised honestly and upon due consideration," is not arbitrary and capricious, even if there is room for another option and "even though it may be believed that an erroneous conclusion has been reached." Id. at 199. The Respondent has failed to meet this standard.

The Respondent has put forth no factual or legal basis to demonstrate that the determinations made in the Final Order were arbitrary, capricious, or unreasonable, or not supported by substantial credible evidence in the record. Overall, the Respondent fails to point to any error in the Final Order, does not cite any law or fact as misapplied, and instead only argues that the two-year suspension will cause financial hardship. Thus, the Respondent fails to demonstrate a reasonable likelihood of success on the merits of the appeal.

Moreover, the Respondent has put forth no basis to demonstrate that the suspension of his license for two years is unreasonable. The Producer Act empowers the Commissioner to suspend or revoke an insurance producer's license for violations of its provisions. N.J.S.A. 17:22A-40(a). As discussed in the Final Order, 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). In addition, a licensed producer is better placed than a member of the public to defraud an insurer. Accordingly, a producer is held to a high standard of conduct and should fully understand and appreciate the effect of irresponsible dealing on the industry and on the public. Our strong public policy is to instill public confidence in both insurance professionals and the industry as a whole. Courts have recognized that the insurance industry is strongly affected with the public interest and the Commissioner is charged with the duty to protect the public welfare. Nationwide Mutual Ins. Co. Inc., 80 N.J. at 559.

As found in the Final Order, the Respondent commingled funds for years, issued checks for six clients' premiums that were dishonored for insufficient funds, and failed to act in accordance with his fiduciary duties to his clients. Final Order at 13. Most egregiously, Respondent withheld a portion of his client's insurance premium, ignored correspondence from the company that her premium was due, and then allowed her automobile policy to lapse for nonpayment, which constituted withholding or misappropriating a premium. Final Order at 9. Andrade's withholding of the premium resulted in the client receiving a summons and fine for driving without insurance and the suspension of her vehicle registration. Id. at 14. Based on this misconduct, the suspension of the Respondent's license for two years was reasonable, necessary, and appropriate to protect the public and to deter similar misconduct by the Respondent and other licensed producers.

Further, this was not the first time Respondent violated the State's insurance regulations. In 1996, Andrade entered into Consent Order No. E96-259 with the Department wherein the Respondent agreed to pay a penalty of $7,500 and admitted that between 1988-1991, he replaced eight existing life insurance policies with new life insurance policies underwritten by the same

insurance company without providing the insureds the required disclosure forms, in violation of N.J.S.A. 17:22A-17a(20) (demonstrated unworthiness, lack of integrity, bad faith, dishonesty, financial irresponsibility or incompetency to transact business as an insurance producer)[2] and N.J.A.C. 11:4-2.4(b) (required an agent to present to the applicant a Notice Regarding Replacement of Life Insurance). Final Order at 19.

For these reasons, I have determined that the Respondent has failed to demonstrate a reasonable probability of success on the merits of his appeal.

Balancing the Benefits and the Harm of a Stay
to Other Parties, Including the Public Interest

A balancing of the benefits and the harms of granting the request for a stay of the Final Order weighs heavily against granting the stay. In order to obtain a stay, the Respondent must show that the opposing party will not be substantially harmed and that the public interest will be served, or that a "balancing of the equities" weighs in favor of the relief sought by the Respondent. Crowe, 90 N.J. at 134; Morris City. Transfer Station v. Frank's Sanitation Serv., 260 N.J. Super. 570, 574-77 (App. Div. 1992). As noted in the Final Order, the Department has a paramount interest in protecting the public from unscrupulous insurance practices. Courts have long recognized that the insurance industry is strongly affected with the public interest and that the Commissioner is charged with the duty to protect the public welfare. See Sheeran v. Nationwide Mut. Ins. Co., 80 N.J. 548, 559 (1979). A producer'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).

[2] This violation is currently codified as N.J.S.A. 17:22A-40(a)(8). N.J.S.A. 17:22A-1 to -25 was the predecessor of the Producer Act.

When a case presents an issue of "significant public importance," a court must consider the public interest in addition to the traditional Crowe factors. Garden State Equal., 216 N.J. at 321 (citing McNeil v. Legis. Apportionment Comm'n, 176 N.J. at 484 (2003)). Courts have long recognized that the insurance industry is strongly affected with the public interest and that the Commissioner is charged with the duty to protect the public welfare. See e.g., Sheeran, 80 N.J. at 559.

The Respondent argues that he "has been nothing but contrite and understanding of the import of these proceedings[.]" Motion to Stay at 2. However, the Respondent does not address how the opposing party will not be harmed, or that granting the stay would be in the public interest. The Respondent fails to demonstrate how his interest is outweighed by the Department's interest in protecting the public and ensuring confidence in the insurance industry, consistent with the Commissioner's authority to regulate the market place. The penalties imposed by the Final Order demonstrate the appropriate level of opprobrium for such conduct and serve as a deterrent to the Respondents and other licensees engaging in such misconduct. Moreover, as noted in the Final Order, the suspension of the Respondent's license furthers the Department's statutory obligation to protect the public. Final Order at 13-14. I believe that these considerations demonstrate that the public interest is best served by allowing the Final Order to remain in effect. Thus, when all these facts are considered, I find that the Respondent has failed to demonstrate that on balance the benefits of relief will outweigh the harm of granting the stay to other parties, including the public interest.

Irreparable Harm

Irreparable harm is harm which "cannot be adequately compensated in damages or where there exists no certain pecuniary standard for the measurement of the damage." Board of Educ. of

Union Beach, 96 N.J. Super. 371, 390 (Super. Ct. 1967). "Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough." Zoning Bd. of Adjustment of Sparta, 198 N.J. Super. at 381 (quoting Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958)).

The Respondent argues that, if a stay is not granted, the Respondent will suffer irreparable harm in that the Respondent and his family will suffer "financial catastrophe." Motion to Stay at 1. The only harm that the Respondent offers is monetary in nature and therefore does not satisfy the standards in Crowe. Consequently, the Respondent has failed to establish that he will suffer irreparable harm if a stay is not granted.

Conclusion

For the reasons set forth above, I find that the Respondent has failed to satisfy the burden of proof to demonstrate by clear and convincing evidence that any of the Crowe prerequisites for a stay are present here. Therefore, the Respondent's Motion to Stay Final Decision and Order No. E19-40 is DENIED.

5/24/19
Date

Marlene Caride
Commissioner

JD Andrade order deny mtn to stay/Final Orders-Insurance