

STATE OF NEW JERSEY
DEPARTMENT OF BANKING AND INSURANCE

AGENCY DOCKET NO. OTSC #E16-23
FINAL ORDER NO. E16-56

)
PROCEEDINGS BY THE COMMISSIONER)
OF BANKING AND INSURANCE, STATE OF)
NEW JERSEY TO FINE, SUSPEND AND/OR)
REVOKE THE INSURANCE PRODUCER)
LICENSE OF ZIA HASSAN SHAIKH,)
REFERENCE NO. 9584986)
_____)

ORDER DENYING
MOTION FOR
RECONSIDERATION AND
TO VACATE FINAL
ORDER E16-56

This matter comes before the Commissioner of the Department of Banking and Insurance (“Commissioner”) pursuant to a motion by Respondent, Zia Hassan Shaikh (“Respondent”), seeking the reconsideration of and/or to vacate the Department of Banking and Insurance’s (“Department”) Final Order No. E16-56 (“Final Order”), which revoked the Respondent’s nonresident insurance producer license and imposed civil monetary penalties and fees for violations of the New Jersey Producer Licensing Act of 2001, N.J.S.A. 17:22A-26 to -57 (“Producer Act”), and certain regulations promulgated thereunder, as alleged in the Department’s Order to Show Cause No. E16-23 (“OTSC”). The Respondent’s motion specifically requested that the revocation of his nonresident insurance producer license and the imposition of the civil monetary penalties and fees be vacated and that a hearing be scheduled on the allegations contained in the OTSC. For the reasons set forth below, the Respondent’s motion is DENIED.

PROCEDURAL HISTORY

On March 30, 2016, the Department issued the OTSC against the Respondent, which alleged that the Respondent violated various provisions of the insurance laws and regulations of this State. Specifically, the OTSC alleged that the Respondent issued or caused to be issued 3,550 postcard advertisements to New Jersey residents that were untrue, deceptive, or misleading. See OTSC at 4-5. In total, the one count OTSC charged the Respondent with 3,550 separate insurance law violations, one for each postcard advertisement. See Final Order at 6.

By letter dated April 4, 2016, the Department served upon the Respondent, via regular and certified mail, return receipt requested, a copy of the OTSC at 412 North Main Street, Unit 100, Buffalo, Wyoming 82834 (“Buffalo, Wyoming address”), which was on file with the Department as the Respondent’s last known business, mailing, and residential address. See Certification of Deputy Attorney General Aziz O. Nekoukar (“Nekoukar Cert.”) attached to the Department’s Letter Brief in Opposition (“Department’s Opposition”) at ¶2. The Respondent had previously, on April 22, 2015, submitted a change of address form via the National Producer Registry, whereby his business, mailing, and residential addresses were all changed to the Buffalo, Wyoming address. See Certification of Investigator Eugene Shannon (“Shannon Cert.”) attached to the Department’s Opposition at ¶2 and Ex. A. There has been no subsequent change of address forms filed by the Respondent since the April 2015 change of address form. Id. at ¶3.

The return receipt card for the certified mailing confirms that the OTSC was received on April 11, 2016, at the Buffalo, Wyoming address and was signed for by Erin Hogan, who is marked as an “agent” of the Respondent. See Nekoukar Cert. at Ex. B. The regular mail was returned and marked with a handwritten note that read “Return to Sender-Not at this address” on

or about April 18, 2016, seven days after the certified mail return receipt card was signed by the Respondent's agent.

Pursuant to N.J.A.C. 11:17D-2.1(d)1, the Respondent's Answer to the OTSC was due on or before May 2, 2016. The Respondent did not submit an answer to the OTSC prior to this date. Department's Opposition at 2.

On June 21, 2016, the Department issued the Final Order finding that although proper notice of the charges provided the Respondent with an opportunity to oppose the allegations, the Respondent failed to provide a written response to the charges contained in the OTSC within 20 days as provided by N.J.A.C. 11:17D-2.1(d). It further ordered that the Respondent waived his right to a hearing to contest the charges that were alleged in the OTSC and that the charges were then deemed admitted, pursuant to N.J.A.C. 11:17D-2.1(b). It was further ordered that, pursuant to N.J.S.A. 17:22A-40 and N.J.A.C. 11:17D-2.1(b)(2), the nonresident insurance producer license of the Respondent was revoked effective upon the execution of the Final Order. It was further ordered that, pursuant to N.J.S.A. 17:22A-45c, the Respondent is responsible for the payment of civil penalties totaling \$71,000 to the Commissioner, which consisted of a separate civil monetary penalty for each of the 3,550 separate postcard advertisements as set forth in the OTSC. Lastly, pursuant to N.J.S.A. 17:22A-45c, it was ordered that the Respondent is responsible for reimbursement to the Commissioner of the costs of investigation totaling \$1,388.30.

By letter dated June 24, 2016, the Department served upon the Respondent, via regular and certified mail, return receipt requested, a copy of the Final Order at the Buffalo, Wyoming address, the same address to which the OTSC was previously served. See Nekkoukar Cert. at Ex. C. The return receipt card confirms that the Final Order was received on July 5, 2016 at the

Buffalo, Wyoming address and was once again signed for by Erin Hogan, who is marked as an “agent” of the Respondent. See Nekoukar Cert. at Ex. D. There is no indication in the submissions regarding whether the regular mail was returned by the post office.

On or about July 24, 2016, the Respondent submitted the within Motion for Reconsideration and/or to Vacate the Final Order via letter dated July 21, 2016 (“Respondent’s Motion”),¹ in which the Respondent advised that he had only recently learned about the OTSC and Final Order, and that all of the Department’s “correspondence went to the 412 N. Main St Unit 100 Buffalo, WY 82834 address and it never got forwarded to my above address in New Jersey.” Respondent’s Motion at 1. The Respondent’s letter set forth that his New Jersey address is 4400 Route 9 South, Suite 1000, Freehold, New Jersey, 07728 (“Freehold, New Jersey address”). Ibid.

The Respondent further stated that he was first alerted to the Department’s investigation into his marketing campaign in the last quarter of 2012. Ibid. He asserted that his attorney, Brian Thorn of White Fleischner & Fino, LLP, whom the Respondent alleges he had retained to contact the Department in relation to this matter,² had contacted the attorney for UFS Marketing, which the Respondent claims was responsible for the mailed advertisements at issue in the OTSC and subsequent Final Order. Id. at 1-2. The Respondent also noted that his attorney, Mr. Thorn, is no longer employed by White Fleischner & Fino, LLP and his files are now being worked by attorney James P. Ricciardi, Jr. Id. at 2. The Respondent alleges that his attorney was not

¹ The Respondent’s Motion was addressed to Department’s Chief of Investigations, Virgil Downtin. It appears the same letter was also sent to Deputy Attorney General Ryan S. Schaffer (“DAG Schaffer”) on or about July 29, 2016.

² Although the Respondent stated that he retained counsel to represent him in this matter, there is no record of a letter of representation being received by the Department on behalf of the Respondent in relation to the OTSC. See Shannon Cert. at ¶ 4. Additionally, there is no record of any telephone calls ever taking place between the Department and counsel for the Respondent. Id. at ¶ 5.

contacted in relation to the OTSC and Final Order, and should his attorney have been contacted, the Final Order would not have been entered. Ibid.

The Respondent's letter further stated that he disputes the alleged violations of N.J.S.A. 17:22A-40a(2), (7), (8), and (16), N.J.S.A. 17B:30-4, and N.J.A.C. 11:2-23.4(a), which are contained in the OTSC and Final Order, and all "associated fees and fines," as he claims that "no wrong doing ever occurred." Ibid. In addition, the Respondent stated that he previously requested a copy of the "complaint letter originally received by [the Department] from the undisclosed Complainant,³ to know what the cause of this investigation is about," which was not provided to him. Ibid. Instead, he alleges that the Department has "made bald claims unsupported by evidence that the alleged mailer is misleading or even used by [him.]" Id. at 3. He asserts "that the revocation of [his] license is baseless and is severely impeding [his] ability to earn a living, causing severe interference with [his] prospective economic advantage . . . without finding of law pursuant to NJ Rule 1:7-4."⁴ Ibid. Further, he asserts that "[w]ith respect to the final order revoking my insurance licenses, this is totally unacceptable as I did nothing wrong."⁵ Ibid.

The Respondent requested that the Final Order, which revoked his nonresident insurance producer license, "be withdrawn and [his] ability to be an insurance producer in New Jersey

³ The Respondent alleges that the "undisclosed complainant has unclean hands and the doctrine is an equitable principle which requires a denial of relief to a party who is himself guilty of inequitable conduct in reference to the matter in controversy." Respondent's Motion at 3. (citations omitted). The Respondent additionally alleges that the "[c]omplainant(s) attempt to make frivolous claim in BAD FAITH to defraud me to my detriment." Ibid.

⁴ R. 1:7-4 deals with "Findings by the Court in Non-jury Trials and on Motions," and does not relate to the current matter as a Final Order was entered upon the failure of the Respondent to answer the allegations contained in the OTSC, rather than at a non-jury trial in the Superior Court of New Jersey.

⁵ The Respondent additionally advised that he is currently involved as a "Pro Se Plaintiff" in a contested divorce matter in Ocean County, NJ and two Federal lawsuits. Respondent's Motion at 3. The Respondent stated that the first Federal lawsuit is a class action suit and the other "is an individual action [the Respondent] filed in the United States District Court for the District of New Jersey, Trenton Vicinage." Ibid. The Respondent provided that due to the "[S]tate divorce matter, and the two Federal lawsuits, [he] cannot divulge any information at this time otherwise it would compromise [his] divorce litigation and Federal litigation." Ibid.

restored without any lapses.” He further noted that he wants “[t]he fraudulent complaint against [him] withdrawn, and any investigation should be directed at UFS marketing and its owners and officers.” Id. at 4.

The Department, in a letter brief dated August 4, 2016, opposed the Respondent’s Motion, arguing that the Respondent was properly served with the OTSC at the last known address on file with the Department, and he failed to timely respond and thus, the principals of due process have been satisfied. Department’s Opposition at 2. Specifically, the Department argues that DAG Schaffer sent the OTSC to the address that the Respondent provided on a change of address form less than one year earlier. Ibid. Further, the Department argues that the OTSC was signed for and received by the Respondent’s agent, which confirms that the Respondent had proper notice of the issuance of the OTSC and “undermines the Respondent’s contentions that he was denied procedural due process.” Id. at 2-3.

The Department argued that N.J.A.C. 1:1-7.1(a) provides that service of any paper is satisfactory when served by certified mail, return receipt requested, or when served by ordinary mail. Id. at 3. The Department argued that the OTSC in this matter was served via both regular and certified mail, return receipt requested, and the Respondent failed to timely respond. Ibid. Additionally, the Department argued that the Department served of the OTSC upon the Respondent in conformance to N.J.A.C. 1:1-7.1(b), which provides that papers must be served “upon all parties appearing pro se.” Ibid. The Department stated that although the Respondent contends that he had retained counsel in this matter, there is no record that the Department was ever contacted by an attorney on behalf of the Respondent. Ibid.

On or about August 3, 2016, the Respondent filed a Notice of Appeal of the Final Order to the Superior Court of New Jersey, Appellate Division (“Appellate Division”) under Docket

No. A-005252-15T1, which effectively deprived the Commissioner of jurisdiction to further act on the present matter, which was then under appeal. See Manalapan Realty v. Township Committee, 140 N.J. 366, 376 (1995).

By letter dated August 10, 2016, the Respondent filed a Reply to the Department's Opposition ("Respondent's Reply"). In addition to reiterating the previous statements that he made in the Respondent's Motion, the Respondent acknowledged that he is "now a self represented Pro se party, due to [his] former attorney Brian Thorn who is well known to the Petitioner, Department of Banking and Insurance, has left the law firm of WHITE FLEISCHNER & FINO, LLP." Respondent's Reply at 1. Further, the Respondent contends that he advised the Department⁶ in the Respondent's Motion "to use the 4400 Rt 9 Ste 1000 Freehold, NJ 07728 address, to prevent any further accidental miscommunications to occur,⁷ [and] they deliberately mailed new correspondence to the 412 N.Main St unit 100 Buffalo, WY 82834 again to create a respondent non-responsive situation; this is egregious behavior."⁸ Id. at 2. Lastly, the Respondent's Reply contains quotes from various United States Supreme Court and New Jersey Supreme Court decisions, in addition to law review articles, that relate to the legal concepts of

⁶ The Respondent's Reply states that he advised the Department's Chief of Investigations, Virgil Downtin, in his July 21, 2016 correspondence (Respondent's Motion) and DAG Schaffer in his July 29, 2016, correspondence to use the Freehold, New Jersey address relating to further correspondence. It is unclear if both of these letters contained the same information as a copy of the July 29, 2016 correspondence is not included in the papers filed in this matter.

⁷ The Respondent's Motion does not inform the Department to forward all correspondence to his Freehold, New Jersey address. It provides only that the OTSC and Final Decision were mailed to the Buffalo, Wyoming address and never got forwarded to the Freehold, New Jersey address he indicated in the Respondent's Motion. See Respondent's Motion at 1.

⁸ It is unclear what new correspondence was allegedly directed to the Respondent at the Buffalo, Wyoming address. The Department's Opposition indicates that the Respondent was carbon copied on the Department's Opposition via "Cert. Mail, R.R.R. and Regular Mail," but does not indicate to which address the Department's Opposition was sent. Moreover, the Respondent does not address how he received this correspondence should it have been mailed to the Buffalo, Wyoming address. It should be noted that the Department's Opposition was dated August 4, 2016, and the Respondent's Reply was dated August 10, 2016.

due process and collateral estoppel. However, the Respondent does not address how these decisions relate to the present matter.

As the Respondent's Notice of Appeal deprived the Commissioner of jurisdiction to further act on the present matter, the Commissioner did not review the Respondent's Motion and accompanying documents until after the Respondent's Notice of Appeal was dismissed by the Appellate Division.

On or about August 29, 2016, the Respondent filed a motion with the Appellate Division to proceed as indigent and waive the filing fees in relation to his aforementioned Notice of Appeal, which was denied by the Appellate Division on or about September 8, 2016. The Appellate Division, in a letter dated September 12, 2016, informed the Respondent that his motion to proceed as indigent was denied and if he wished to proceed with his Notice of Appeal, he must submit the required filing fee. The Appellate Division additionally informed the Respondent that if the required filing fee was not received within 15 days, his Notice of Appeal would be dismissed.

In a letter dated October 12, 2016 ("October 12, 2016 Letter"), the Respondent advised the Department that his Notice of Appeal "was dismissed do to [his] ability to pay the \$250 filing fee and the motion to same was denied." October 12, 2016 Letter at 1. The Respondent further reiterated that he was no longer represented by counsel and that "no correspondence on the April 4, 2016 OTSC and subsequent final order were received by the firm as my attorney of record." Ibid. The Respondent further noted that he "vehemently" denies the allegations contained in the OTSC and is "requesting that these orders, revocation of licenses, fines and penalties be rescinded and a new date for an administrative hearing be scheduled to address the allegations filed by your department." Id. at 2.

Deputy Attorney General William B. Puskas, Jr. (“DAG Puskas”), on behalf of the Department, informed the Respondent, in a letter dated October 24, 2016, (“October 24, 2016 Letter”), that although the Respondent’s August 29, 2016 motion to proceed as indigent in the Appellate Division was denied, the Respondent’s Notice of Appeal remained open on the Appellate Division Docket. See October 24, 2016 Letter at 1. Additionally, DAG Puskas advised the Respondent that because his Notice of Appeal was still open in the Appellate Division, the Commissioner was deprived of jurisdiction to act further in this matter. Ibid.

The Appellate Division entered an Order Dismissing the Respondent’s Appeal on November 10, 2016. In the Order, the Appellate Division stated that the Respondent had requested that his Notice of Appeal be withdrawn. See Appellate Division’s November 10, 2016 Order Dismissing Appeal.

In a November 21, 2016, letter to DAG Puskas (“November 21, 2016 Letter”), the Respondent advised that he had withdrawn his appeal in order to be provided with the opportunity for an administrative hearing per the Respondent’s Motion. November 21, 2016 Letter. The Respondent provided that he would like “an administrative hearing to address the allegations made by the NJ Department of Insurance be scheduled either later this week or early next week.” Ibid.

In response to the Respondent’s November 21, 2016 Letter, the Department, in a letter dated December 21, 2016, resubmitted the Department’s Opposition to the Respondent’s Motion, which was previously submitted on or about August 4, 2016.

The Respondent then submitted a letter to the Department, dated January 4, 2017, (“January 4, 2017 Letter”), wherein he advised that his Notice of Appeal in the Appellate Division was voluntarily withdrawn. January 4, 2017 Letter at 1. He further renewed his

“request for the administrative hearing to proceed in opposition to the letter . . . dated December 19, 2016.” Ibid. The Respondent reiterated that his producer license was revoked and penalties and fines of over \$71,000 were entered against him without notice to his prior counsel. Ibid. The Respondent further stated that he “was never given good service at neither my 4400 Rt 9 South Suite 1000 Freehold, NJ 07728 or the 412 N. Main st Buffalo, WY 82834 addresses, notwithstanding . . . that ANY PARTY REPRESENTED BY COUNSEL cannot be communicated with directly.” Ibid. Additionally, the Respondent reiterated his request that “these orders, revocation of licenses, fines and penalties be rescinded and a new date for an administrative hearing be scheduled to address the allegations filed by your department.” Id. at 2.

LEGAL DISCUSSION

The Respondent has failed to satisfy the legal standard necessary to reconsider and/or vacate a judgment and, therefore, the Respondent’s request that the Final Order, including the revocation of his non-residence insurance producer license, civil monetary penalties, and costs, be reconsidered and/or vacated and an administrative hearing be scheduled is DENIED.

It is well-settled that the Commissioner has the inherent power to reopen and reconsider his decisions as well as correct his own judgments. Duvin v. State, 76 N.J. 203 (1978). While not controlling on administrative agencies, the Rules of Court applicable in Superior Court matters have been used to guide similar issues that arise in administrative proceedings, recognizing that administrative agencies possess the power, comparable to the courts pursuant to R. 4:50-1, to reopen judgments and final decisions in the interests of justice, with good cause shown. Beese v. First National Stores, 52 N.J. 196 (1968); Stone v. Dugan Brothers of N.J., 1 N.J. Super. 13 (App. Div. 1948). The power of an administrative agency head to reopen or

modify a Final Order must be exercised reasonably, and the application to do so must be made with reasonable diligence. Duvin, supra, 76 N.J. at 207 (citing Skulski v. Nolan, 68 N.J. 179 (1975)).

Motions for Reconsideration

Motions for Reconsideration are granted only where: “(1) the [c]ourt has expressed its decision based upon a palpably incorrect or irrational basis, or (2) it is obvious that the [c]ourt either did not consider, or failed to appreciate the significance of probative, competent evidence.” Fusco v. Bd. of Educ. of the City of Newark, 349 N.J. Super. 455, 462 (App. Div. 2001), certif. denied, 174 N.J. 544 (2002) (citing D’Atria v. D’Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990)); R. 4:49-2; accord Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996).

With these rules in mind, I herein find that the Respondent has not established grounds to be relieved from the Final Order. The Respondent has failed to demonstrate that the Final Order was based upon a palpably incorrect or irrational basis or that there was a failure to consider, or appreciate the significance of probative, competent evidence. The Respondent simply argues that the OTSC and Final Order were mailed to his address in Buffalo, Wyoming, rather than to his address in Freehold, New Jersey or to his previous counsel. In addition, the Respondent admits to utilizing a “marketing campaign” through the services of UFS Marketing in relation to the postcard advertisements, which are the subject of the OTSC, and additionally, only sets forth a general denial regarding his wrongdoing in relation to same. See Respondent’s Motion at 1. Further, the Respondent claims, without providing any additional proof to support his contentions, that the “original complainant” had unclean hands and the Department is retaliating against him. See January 4, 2017 letter at 2.

These arguments do not justify reconsideration of the Final Order. Specifically, the Respondent, pursuant to N.J.S.A. 17B:30-4⁹ and N.J.A.C. 11:2-23.4(a),¹⁰ is required to ensure that his advertisements are truthful and not misleading. The Respondent argues that he used a “marketing campaign” through UFS Marketing in order to create and/or mail the postcard advertisements; however his use of another company to create and/or mail said advertisements does not absolve him of his responsibility to ensure that the postcard advertisements were truthful and not misleading pursuant to the statutes and regulations of this State. Here, the Respondent hired a company to create and/or mail advertisements to 3,550 New Jersey residents whom he had no reason to suspect held any annuities. Thus, the Respondent failed to ensure that the advertisements that were circulated on his behalf complied with the statutes and regulations of this State. Further, regardless of the complainant’s motivation for advising the Department of the Respondent’s misleading postcard advertisements, the Department has a duty to protect the public and particularly, insurance consumers, from false and misleading information being circulated to them from licensed insurance producers in this State.

Motions to Vacate Default Judgment

R. 4:50-1 provides the following guidance in determining whether to provide relief from a Final Order:

On motion with briefs, and upon such terms that are just, the court may relieve a party . . . from a final judgment or order for the

⁹ N.J.S.A. 17B:30-4 provides that “[n]o person shall make, publish, disseminate, circulate, or place before the public, or cause, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in a newspaper, magazine or other publication, or in the form of a notice, circular, pamphlet, letter or poster, or over any radio or television station, or in any other way, an advertisement, announcement or statement containing any assertion, representation or statement with respect to the business of insurance and annuities or with respect to any person in the conduct of his insurance and annuity business, which is untrue, deceptive or misleading.”

¹⁰ N.J.A.C. 11:2-23.4(a) provides that “[a]dvertisements shall be truthful and not misleading in fact or by implication. Words or phrases the meaning of which is clear only by implication or by familiarity with insurance terminology shall not be used. The form and content of an advertisement of a policy shall be sufficiently complete and clear so as to avoid deception. The advertisement shall not have the capacity or tendency to mislead or deceive.”

following reasons: (a) mistake, inadvertence, surprise, or excusable neglect; (b) newly discovered evidence which would probably alter the judgment or order and which by due diligence could not have been discovered in time to move for a new trial under R. 4:49; (c) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (d) the judgment or order is void; (e) the judgment or order has been satisfied, released or discharged, or a prior judgment or order upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or order should have prospective application; or (f) any other reason justifying relief from the operation of the judgment or order.

In considering subparagraph (a) in the rule, the New Jersey Supreme Court has noted that: “The four identified categories . . . when read together, as they must be, reveal an intent by the drafters to encompass situations in which a party, through no fault of its own, has engaged in erroneous conduct or reached a mistaken judgment on a material point at issue in the litigation.” DEG, LLC v. Township of Fairfield, 198 N.J. 242, 262 (2009). Moreover, the mistakes contemplated under the rule are intended to provide relief to a party from litigation errors that a party could not have protected against. Id. at 263. “A party who simply misunderstands or fails to predict the legal consequences of his deliberate acts cannot later, once the lesson is learned, turn back the clock to undo those mistakes.” Ibid. Additionally, “[e]xcusable neglect may be found when the default was attributable to an honest mistake that is compatible with due diligence or reasonable prudence.” US Bank Nat. Ass’n v. Guillaume, 209 N.J. 449, 468 (2012) (citing Mancini v. EDS, et al, 132 N.J. 330 (1993)). Moreover, R. 4:50-1(f) authorizes relief from judgments “only when truly exceptional circumstances are present.” Id. at 395 (quoting Manning Eng’g, Inc. v. Hudson County Park Com’n, 74 N.J. 113, 120 (1997)).

Generally, an application to vacate a default judgment is “viewed with great liberality and every reasonable ground for indulgence is tolerated to the end that a just result is reached.” Marder v. Realty Construction Co., 84 N.J. Super. 313, 319 (App. Div.), aff’d 43 N.J. 508

(1964). See also Morristown Housing Authority v. Little, 135 N.J. 274, 283-284 (1994); Mancini, supra, 132 N.J. at 332. Nevertheless, a default judgment will not be disturbed unless the failure to answer or otherwise appear and defend was excusable under the circumstances and unless the defendant has a meritorious defense; either to the cause of action itself, or, if liability is not disputed, to the quantum of damages assessed. Guillaume, supra, 209 N.J. at 468-69. Specifically, “[a] just, sufficient and valid defense to the original cause of action stated in clear and unmistakable terms is a prerequisite to opening a judgment.” Schulwitz v. Shuster, 27 N.J. Super. 554, 561 (App. Div. 1953).

As discussed in full below, the Respondent has failed to demonstrate excusable neglect or that his failure to file an answer to the allegations contained in the OTSC constitutes “exceptional circumstances” and has failed to set forth a meritorious defense to warrant relief from the provisions of the default Final Order.

As mentioned above, the Respondent’s contention in relation to vacating the Final Order is that the Department erroneously served the OTSC and subsequent Final Order by (1) serving the OTSC and Final Order upon him at his Buffalo, Wyoming address rather than at his Freehold, New Jersey address; and (2) that even though the Respondent claims that the Department knew that he was represented by counsel, the Department failed to serve a copy of the OTSC and Final Order upon his counsel.

Here, the address to which the Department served the OTSC and subsequent Final Order was the last known address that the Respondent had on file with the Department. In fact, less than one year before the OTSC was served upon the Respondent at his Buffalo, Wyoming address, the Respondent, on April 22, 2015, submitted a change of address form via the National Insurance Producer Registry, whereby his business, mailing, and residential addresses were all

changed to the Buffalo, Wyoming address. A review of the Respondent's "Name and Address Change History Report" from the National Association of Insurance Commissioners, which was provided by the Department in relation to the Respondent's Motion, shows that the Respondent's Freehold, New Jersey address was last reported on or about April 5, 2013, three years prior to the issuance of the OTSC. See Name and Address Change History Report attached to Shannon Cert. as Ex. A. Additionally, the Respondent's Buffalo, Wyoming address was first reported on or about September 9, 2014, with the last address change date of April 22, 2015, when the Respondent submitted a change of address form via the National Insurance Producer Registry. Ibid.

Moreover, pursuant to N.J.A.C. 11:17-2.8(f)1,

[a]ll licensees shall provide the Department with a complete and current business mailing address, and, if different, a street or location address, phone number and, if applicable, email address. Individual licensees shall also provide the Department with a complete and current residence address, phone number and, if applicable, email address.

Further, N.J.A.C.11:17-2.8(f)2 provides that

[a]ll licensees shall provide . . . any change of business mailing or location address, residence address, phone numbers and email addresses within 30 days of the change and maintain a proof of proper notification for five years or until receipt of a license or other documentation from the Department showing the new address.

Therefore, the Respondent, as a nonresident insurance producer, who is licensed by the Department, was responsible to provide the Department with his updated business, mailing, and residential addresses. Further, the Respondent was required to advise and report to the Department any change to his business, mailing, and residential address, which is on file with the Department, within 30 days of the date of the change. Here, if the Buffalo, Wyoming address is

not currently the Respondent's business, mailing, and residential address, the Respondent failed to update his current addresses with the Department, in violation of the insurance laws and regulations of this State.

Additionally, the Respondent's Motion, and subsequent Reply and letters only provide that the OTSC and Final Order were not forwarded to his Freehold, New Jersey address by the recipient who marked that the mailings were received as the Respondent's agent. It is unclear from the Respondent's filings whether the Buffalo, Wyoming address is still considered the Respondent's current business, mailing, or residential addresses. The Respondent additionally fails to explain that if the Buffalo, Wyoming address is still the Respondent's business, mailing, and residential address, how he was unable to obtain correspondence directed to said address, when correspondence directed at the Buffalo, Wyoming address would directly relate to the practice of his insurance business. Moreover, the Respondent fails to explain in his filings how he received a copy of both the OTSC and Final Order if both were "never forwarded to [his] above address in New Jersey." See Respondent's Motion at 1.

Further, the Department correctly served the Respondent directly pursuant to the Uniform Administrative Procedure Rules and the insurance regulations of this State. Specifically, while the Respondent argues that the OTSC and subsequent Final Order should have been sent to his former counsel rather than to the Respondent directly, the Department has certified that there had been no letter of representation filed on behalf of the Respondent in this matter and further, that no attorney representing the Respondent has ever contacted the Department in relation to same. While the Respondent alleges that he hired counsel to represent him, he has not provided any documentation demonstrating same or that said counsel submitted a letter of representation or contacted the Department on the Respondent's behalf. Further, neither the Respondent's alleged

counsel nor his replacement has contacted the Department since the Respondent filed his Motion for Reconsideration and/or to Vacate the Final Order. The Respondent has continued to represent himself as a pro se party through the pendency of this matter.

Furthermore, N.J.A.C. 1:1-7.1(a) provides that [s]ervice shall be made in person; by certified mail, return receipt requested [or] by ordinary mail. . . .” Further, pursuant to N.J.A.C. 1:1-7.1(b), “[a]ny paper filed shall be served in the manner provided by (a) above upon . . . all parties appearing pro se. . . .” Moreover, N.J.A.C. 11:17-2.8(f)3 provides that “[a]ny legal process issued pursuant to the statutory authority of the Commissioner including, but not limited to, subpoenas, orders and orders to show cause may be served by sending the documents to the business mailing or residence address of the licensee then on file with the Department.” Lastly, N.J.A.C. 11:17D-2.1(a)1 provides that “[b]efore an administrative penalty is imposed, the Department shall direct a notice by certified mail or personal delivery to the last known business or mailing address of the alleged violator. . . .” As the Department had no knowledge that the Respondent was allegedly represented by counsel, the Department proceeded properly by serving the OTSC and Final Order upon the Respondent only pursuant to N.J.A.C. 1:1-7.1(b), N.J.A.C. 11:17-2.8(f)3, and N.J.A.C. 11:17D-2.1(a)1. Additionally, even if it was known that the Respondent was represented by counsel in this matter, N.J.A.C. 11:17D-2.1(a)1 still requires the Department to serve the OTSC directly upon the Respondent.

Further, N.J.A.C. 11:17-2.8(f)3 requires the service of an OTSC on the Respondent directly to his last known business, mailing, or residential address, which in this case was the Buffalo, Wyoming address. The Department therefore fully complied with N.J.A.C. 1:1-7.1(a), N.J.A.C. 1:1-7.1(b), N.J.A.C. 11:17-2.8(f)3, and N.J.A.C. 11:17D-2.1(a)1, by serving the OTSC and the Final Order via regular and certified mail, return receipt requested, upon the Respondent

at his last known business, mailing, and residential address, all of which listed the Buffalo, Wyoming address per the Respondent's 2015 address update to the Department. There is no dispute that those mailings were received because the Department has provided return receipt cards that show that the certified mail receipts in relation to both the OTSC and Final Order were signed by Erin Hogan, who indicated she is the agent of the Respondent. In totality, these facts constitute good service of both the OTSC and the Final Order.

Additionally, even though the regular mail, in relation to the service of the OTSC, was returned with a handwritten note that read "Return to Sender-Not at this address," there is no documentation provided by the parties to indicate that the regular mail was ever returned in relation to service of the Final Order, which was sent to the same Buffalo, Wyoming address as the OTSC. In addition, and as previously noted, the Respondent has not indicated whether the Buffalo, Wyoming address, which is the Respondent's last reported business, mailing, and residential address on file with the Department pursuant to N.J.A.C. 11:17-2.8(f)1, is still currently the Respondent's business, mailing, and residential address or how he was able to obtain a copy of the OTSC and Final Order if the Buffalo, Wyoming address is no longer his address. The Respondent's only contention is that the OTSC and Final Order were not forwarded to his Freehold, New Jersey address. It was not the Department's responsibility to forward the mailings to that Freehold address, and it appears that the Respondent chose to use that address and service for receipt of his business mail. Any failure by the Respondent to update his business, mailing, and residential address to the Freehold, New Jersey address if appropriate in accordance with N.J.A.C. 11:17-2.8(f)2, and Respondent's failure to assure that his mail - especially relating to his insurance business - is forwarded to him for his review, do not demonstrate excusable neglect. As a nonresident insurance producer, licensed by the

Department, the Respondent was required to be aware of the insurance laws and regulations of this State, which includes his responsibility to update and maintain current business, mailing, and residential addresses with the Department, and he failed to do so.¹¹

For the reasons set forth above, the Respondent fails to satisfy the standard set forth in R. 4:50-1(a) and (f). See Baumann v. Marinaro, 95 N.J. 380, 394 (1984). (citing In re T, 95 N.J. Super. 228, 235 (App. Div. 1967)). Specifically, the Respondent has not demonstrated that his failure to answer was excusable under the circumstances. Additionally, the Respondent has not established a meritorious defense to the allegations contained in the OTSC. The Respondent admits that he engaged in a “marketing campaign” through the services of UFS Marketing in relation to the postcard advertisements, which are the subject of the OTSC and Final Decision. See Respondent’s Motion at 1. The Respondent additionally offers only a general denial as to his wrongdoing by stating that “this is totally unacceptable as [he] did nothing wrong.” Id. at 3. The Respondent, however, provides no documentation to support this claim but alleges that “hundreds of other licensed producers across New Jersey” utilized the postcard advertisement services from UFS Marketing. Id. at 1. Further, and as noted above, the Respondent is required to ensure that his advertisements are truthful and not misleading. His use of another company to create and/or mail the postcard advertisements in this matter does not absolve him of his responsibility to ensure that the advertisements circulated on his behalf are in compliance with the statutes and regulations of this State. In the present matter, the Respondent had no reason to suspect that the New Jersey Residents that received one of the 3,550 postcard advertisements held any annuities, including orphaned annuities. The Respondent’s argument that “hundreds of

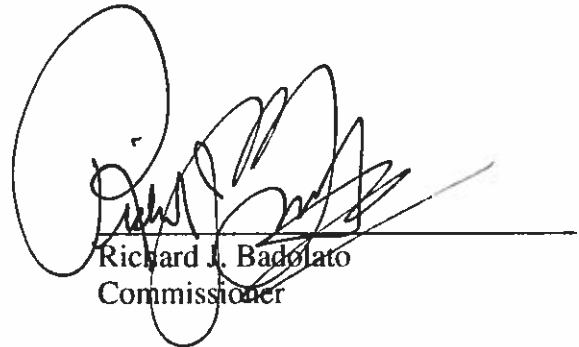
¹¹ I would also note that if the Freehold, New Jersey address is actually the Respondent’s business and/or mailing address, then there is a strong basis to upon which to conclude that the Respondent should actually have changed his licensure status to “resident insurance producer,” and any failure to do so could constitute additional insurance law violations.

other licensed producers across New Jersey” utilized the postcard advertisements from UFS Marketing also does not relieve him of his responsibilities under the statutes and regulations of this State. Regardless of how many other licensed insurance producers used the same marketing scheme through UFS Marketing, the Respondent failed to ensure that the advertisements created and/or mailed by UFS Marketing were truthful and not misleading, in violation of his obligations under both N.J.S.A. 17B:30-4 and N.J.A.C. 11:2-23.4(a). Thus, the Respondent fails to set forth “[a] just, sufficient and valid defense to the original cause of action stated in clear and unmistakable terms.” Shuster, supra, 24 N.J. Super. at 561.

CONCLUSION

As set forth above, the Respondent has not demonstrated good cause to support the entry of an order reconsidering and/or vacating Final Order No. E16-56. Accordingly, the Respondent’s Motion is DENIED.

3/10/17
Date



Richard J. Badolato
Commissioner

AV Shaikh Recon-Vacate Denial/Orders