

**BEFORE THE COMMISSIONER OF INSURANCE
OF THE STATE OF KANSAS**

In the Matter of)
The Kansas Resident)
Insurance Agent's License of)
J. Matthew Pennington)
NPN #6106774)

Docket No.: 4177-EO

FINAL ORDER

This matter came on for evidentiary hearing on February 10, 2011. Respondent J. Matthew Pennington appeared in person and by counsel, William P. Tretbar, and the Kansas Insurance Department ("KID") appeared by and through its staff attorney, Brenda J. Clary. The parties appeared again on March 9, 2011, Respondent and his attorney by telephone, for oral announcement of the presiding officer's order, at which time the presiding officer made certain findings and conclusions which are adopted and incorporated by this reference.

Findings of Fact

1. By Emergency Order, docket number 4177-EO, issued and served on Respondent in person on July 19, 2010, the Commissioner ordered Respondent's license suspended pending further order. The order specifies that Respondent "may not engage in the sale, solicitation, or negotiation of insurance in Kansas unless and until" the suspension is lifted by further order of the Commissioner.
2. On the same date, the Commissioner also served a Summary Order proposing to revoke Respondent's license based on substantially the same allegations as those supporting the Emergency Order, and Respondent, through counsel, timely requested a hearing on the Summary Order.
3. Subsequently, by agreement of the parties, the Presiding Officer ordered a stay of the hearing proceeding pending a decision by another agency on potential criminal charges related to the allegations of Respondent's misconduct in the business of insurance.
4. Respondent submitted written assurances that he was complying and would continue to comply with the order of suspension.
5. In its pleading, KID alleged that Respondent continued to contact consumers and solicit insurance business to be placed through his father and wife, who are both licensed agents, and Respondent's former agency, in violation of law and the Emergency Order.
6. At the hearing, KID called the following witnesses: Respondent, a consumer ("C.G."), and two representatives of Kansas Association of Independent Agents and Agency Services Corporation of Kansas ("KAIA/ASCK").

7. Respondent testified on his own behalf, and called James Pennington (“James”), Respondent’s father, and Rishanda Pennington (“Rishanda”), Respondent’s wife as witnesses. Both are agents affiliated with PIB Insurance Brokerage, Inc. (“PIB”), a licensed insurance agency, which is the successor entity to Respondent’s agency. Respondent testified he and his father are the officers and “owners” of the agency.
8. KID introduced an electronic mail message (“email”) and attachments from Respondent to C.G. as Exhibit 1, and it was admitted without objection. KID also introduced as Exhibit 2 correspondence between PIB and KAIA/ASCK, and it was admitted without objection.
9. ASCK acts as a wholesale agent for member agencies, and the affiliated agencies, with approval of a company, may contract as a subagent.
10. Respondent did not bring any business records or documentation, and he introduced no physical or documentary evidence.
11. Respondent is 39 years old and has an undergraduate degree in business with a master’s degree in finance and economics. He has ten years of experience as a licensed insurance agent.
12. Respondent testified that, since his license suspension, he has been limited to clerical and administrative duties with the agency. He gave the examples of paying bills and sending out quotes prepared by the agents.
13. Respondent testified, “A quote, if a quote’s been drawn up by one of the agents in the office, then I might mail that or e-mail that or fax that.” He later testified that James made calls to solicit business and answered the agency telephone 100 percent of the time, Rishanda prepared quotes for consumers who expressed an interest. He testified they would not prepare an unsolicited quote because they would not have enough information.
14. Respondent testified that he did not personally know C.G. but believed she may have been a former client. He further testified that Exhibit 1 looked very familiar to him, that it was “an e-mail delivery of quotes from the office to” the recipients. He thought he got the quotes from James and emailed them to the address he got from the notes.
15. Rishanda testified that she often works from home and emails quotes to Respondent to be sent out.
16. Despite having had a copy of Exhibit 1 available prior to the hearing, Respondent did not have notes or emails to corroborate his statements about either the individual email or the general practice of the agency. While the absence of corroborating evidence alone is not decisive, it must be noted
17. The email message highlights six features of the attached quotes for homeowners and auto policies, invites the recipients “to contact us at the office or reply back to me via e-mail,” and is signed “Matthew.”
18. C.G. testified that the quotes were unsolicited and Respondent later personally called her to follow up, as the message promised.

19. Respondent essentially asks the Commissioner to believe that James and Rishanda provided him with quotes, and at least in the case of Exhibit 1 with an email address, sometimes even by email, and his only role was to email the quotes to the prospective purchaser. This is simply not credible. The practice Respondent's witnesses describe would serve no functional purpose other than to present a quote as if it originated with Respondent. Either Respondent was more involved than he admits or the agency continued to trade on Respondent's identity as an agent.

20. Respondent testified he believed that the subject of his license suspension came up several times in his communications with KAIA/ASCK. Both representatives of KAIA/ASCK testified that Respondent had never told them, and the agency failed to respond to an inquiry about Respondent's status or provide an agency profile.

21. At best, Respondent and James evaded the truth when the circumstances should have prompted them to say that Respondent's license was suspended. While failure to volunteer the status of his license is not a violation of the order of suspension, this pattern reflects adversely on the credibility of their testimony.

22. Respondent and his father both testified that Respondent had clerical and administrative duties with the agency and that Respondent designed and maintained the agency website. James acknowledged that the website states that the agency offers a number of insurance carriers and sells a number of lines of insurance despite the fact that the agency is not authorized to submit business to any companies other than MetLife and Progressive and sells only personal lines (i.e., homeowner's and noncommercial automobile insurance). Specifically, he agreed that the website indicates the agency represents certain carriers (e.g., Berkshire Hathaway, Zurich, Swiss Re, and EMC) that it does not. Again, while this fact is not directly relevant to establish violations of the Commissioner's order, it does support a finding that Respondent has published an advertisement about the business of insurance that is untrue, deceptive, or misleading, and that misrepresentation reflects adversely on the credibility of Respondent's statements.

23. Respondent retained the agency telephone number he used as a State Farm agent, thereby intentionally creating circumstances under which the public would be confused to Respondent's advantage.

Conclusions of Law

24. A person may not sell, solicit or negotiate any insurance within this state without a license issued in accordance with the Uniform Insurance Agents Licensing Act. K.S.A. 2010 Supp. 40-4905(a).

25. Furthermore, "No person whose license as an agent or broker had been suspended or revoked shall be employed by any insurance company doing business in this state either directly, indirectly, as an independent contractor or otherwise to negotiate or effect contracts of insurance . . . or perform any act toward the solicitation

of or transaction of any business of insurance during the period of such suspension or revocation.” K.S.A. 2010 Supp. 40-4909(g).

26. “Negotiate” means the act of conferring directly with or offering advice directly to any purchaser or prospective purchaser . . . concerning any of the substantive benefits, terms or conditions” of an insurance contract. K.S.A. 2010 Supp. 40-4902(s). “Solicit” includes “any attempt to sell insurance or asking or urging a person to apply for a particular kind of insurance from any particular insurance company.” K.S.A. 2010 Supp. 40-4902(v).

27. The email from Respondent to C.G. offers advice directly to the prospective purchaser on the substantive benefits and terms of the quoted policies. Even if it merely highlights features, the very act of selecting those features constitutes an opinion that they are important to the prospective purchaser’s needs. Further, it is clearly an attempt to sell those policies. Finally, the email invites the prospective purchaser to contact Respondent with corrections or questions. The email establishes one solicitation in violation of the order of suspension, and Respondent’s characterization of the agency’s typical practice makes clear that the email was not an isolated lapse.

28. Respondent contends he did nothing but forward a quote prepared by a licensed agent, which he understood unlicensed staff may do. Even assuming his role was thus limited, pursuant to K.S.A. 2010 Supp. 40-4909(g), Respondent’s activities are more restricted during a period of suspension of his license than those of an unlicensed person. The duties Respondent freely admits are acts toward the solicitation of or transaction of insurance business, which Respondent is not permitted to perform during suspension of his license.

29. Unfair method methods of competition and unfair or deceptive acts or practices in the business of insurance are prohibited by the trade practices act, K.S.A. 40-2401 *et seq.*, and include the following:

“Making, publishing, disseminating, circulating or placing before the public, or causing, 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 misrepresentation or statement with respect to the business of insurance or with respect to any person in the conduct of such person’s insurance business, which is untrue, deceptive or misleading” K.S.A. 40-2404(2).

30. K.S.A. 2010 Supp. 40-4909(a) provides, in relevant part:

“The commissioner may deny, suspend, revoke or refuse renewal of any license issued under this act if the commissioner finds that the applicant or license holder has. . .

(2) Violated:

(A) Any provision of chapter 40 of the Kansas Statutes Annotated, and amendments thereto, or any rule and regulation promulgated thereunder; [or]

(B) any subpoena or order of the commissioner; . . .

(7) Admitted to or been found to have committed any insurance unfair trade practice in violation of K.S.A. 40-2404 and amendments thereto.

(8) Used any fraudulent, coercive, or dishonest practice, or demonstrated any incompetence, untrustworthiness or financial irresponsibility in the conduct of business in this state or elsewhere.” K.S.A. 2009 Supp. 40-4909(a).

31. In lieu of taking any action under K.S.A. 2010 Supp. 40-4909(a), the Commissioner may impose an administrative penalty or censure the licensee. K.S.A. 2010 Supp. 40-4909(h).

32. The Commissioner may suspend, revoke or refuse renewal of any license issued under [the Uniform Insurance Agents Licensing Act, K.S.A. 2010 Supp. 40-4901 *et seq.*] if the commissioner finds that the interests of the insurer or the insurable interests of the public are not properly served under such license.” K.S.A. 2010 Supp. 40-4909(b).

33. Pursuant to K.S.A. 2010 Supp. 40-4909(a)(2)(A), the Commissioner may revoke Respondent’s agent license for violation of K.S.A. 40-4905(a) and/or K.S.A. 40-2404(2).

34. Pursuant to K.S.A. 2010 Supp. 40-4909(a)(2)(A), the Commissioner may revoke Respondent’s agent license for violation of the Emergency Order.

35. In addition, the Commissioner may revoke Respondent’s agent license because the interests of insurers and the insurable interests of the public are not being served under Respondent’s license.

36. Because the factual findings demonstrate that grounds exist to support revocation, the Commissioner has discretion to revoke Respondent’s license or impose some other administrative penalty. Pursuant to K.S.A. 77-526(c), a final order must contain policy reasons for an action taken as an exercise of a state agency’s discretion.

37. In this case, Respondent is a well-educated, experienced agent. The Emergency Order is based on evidence that Respondent converted or misappropriated property and used dishonest practices in the business of insurance. Respondent’s conduct is not an isolated violation but an ongoing practice. This leads inevitably to the conclusion that Respondent’s violations are knowing and intentional and that Respondent’s use of form to obscure function was calculated.

38. Based on the above findings and conclusions, Respondent's license must be revoked, and Respondent must be barred from active participation in the insurance business of PIB Insurance Brokerage, Inc.

IT IS THEREFORE ORDERED that Respondent's Kansas resident insurance agent's license is **REVOKED**, and Respondent shall cease and desist from engaging in any act toward the solicitation of or transaction of any business of insurance from and after the effective date of this order.

In the event Respondent files a Petition for Judicial Review, pursuant to K.S.A. 77-613(e), the agency officer to be served on behalf of the Kansas Insurance Department is

Zachary J.C. Anshutz, General Counsel
Kansas Insurance Department
420 S.W. 9th Street
Topeka, Kansas 66612

IT IS SO ORDERED THIS 23rd DAY OF MARCH 2011, IN THE CITY OF TOPEKA, COUNTY OF SHAWNEE, STATE OF KANSAS.



/s/ Robert Tomlinson
Robert M. Tomlinson
Assistant Commissioner of Insurance

On behalf of
Sandy Praeger
Commissioner of Insurance
Pursuant to K.S.A. 77-547

Prepared by:

/s/ Brenda J. Clary
Brenda J. Clary
KID Staff Attorney

Approved by:

/s/ William P. Tretbar
William P. Tretbar
Attorney for Respondent

Certificate of Service

The undersigned hereby certifies that the above Final Order was served via the United States Postal Service, first-class postage prepaid and email, this __23rd__ day of March, 2011, addressed to the following:

William P. Tretbar
Fleeson, Gooing, Coulson & Kitch, LLC
Post Office Box 997
Wichita, KS 67201-0997
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Counsel for Respondent

And by hand delivery to:

Brenda J. Clary
Staff Attorney
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Counsel for KID

_s/ Jana L. Beethe _____
Jana L. Beethe
Legal Assistant