STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF BUSINESS REGULATION
233 RICHMOND STREET
PROVIDENCE, RHODE ISLAND 02903

IN THE MATTER OF:	:	
SCOTT LYONS,	:	**DBR No.: 06-I-0065**
RESPONDENT.	:	

DECISION

Hearing Officer: Neena Sinha Savage, Esq.

Hearing Held: September 20, 2006

Appearances:

For Respondent: Christopher S. Gontarz, Esq.

For the Department: Elizabeth Kelleher Dwyer, Esq.

I. INTRODUCTION

On or around December 5, 2005, Respondent Scott Lyons ("Respondent") applied to the Department of Business Regulation ("Department") for an Insurance Producer License ("License") pursuant to R.I. Gen. Laws § 27-2.4-1 *et seq*. and was issued a License by the Department on January 5, 2006. After Respondent's License was issued, the Department became aware that on May 23, 2005 Respondent had entered into an Offer of Settlement with a Consent Order Making Findings and Imposing Remedial Sanctions ("Consent Order") while he was licensed by the Department's Securities Division. It is the Department's position that Respondent's License was mistakenly issued because under Department policy the terms and findings in the Consent Order

disqualified him from holding the License pursuant to R.I. Gen. Laws §§27-2.4-14(a)(8) and (9). On March 30, 2006, pursuant to R.I. Gen. Laws §§ 42-14-16, 42-35-9 and 27-2.4-1 *et seq.*, the Director of the Department ("Director") issued an Order to Show Cause, Notice of Hearing and Appointment of Hearing Officer ("Order to Show Cause") against Respondent requiring him to appear before the Department and to answer why the Department should not suspend or revoke his License. On April 11, 2006, a pre-hearing conference was held and schedules were established for discovery and a hearing on the merits. Both the Department and Counsel for Respondent submitted briefs in June 2006. On September 20, 2006, an evidentiary hearing on the merits was held with both Respondent and the Department appearing.

Based on the evidence presented at the hearing, the briefs submitted by the parties, and the applicable law, the Department has demonstrated that Respondent's License should be revoked pursuant to R.I. Gen. Laws § 27-2.4-14(a)(8).

II. JURISDICTION

The Department has jurisdiction over this matter pursuant to R.I. Gen. Laws §§ 27-2.4-1 *et seq.*, 42-14-1, *et seq*., and § 42-35-1, *et seq*.

III. ISSUES

The issue in this matter is whether Respondent's License should be revoked pursuant to R.I. Gen. Laws § 27-2.4-14(a)(8) and (9).

IV. MATERIAL FACTS AND TESTIMONY

The Department relied on two (2) exhibits, admitted into evidence without objection, to support its case for the suspension or revocation of Respondent's License. The Department's first exhibit is the Order to Show Cause dated March 30, 2006, requiring Respondent to appear before the Department and to answer why Respondent's License should not be revoked pursuant

to R.I. Gen Laws §§ 27-2.4-14(a)(8) and (9). (Ex. 1, Order to Show Cause, ¶8) The Order to Show Cause references the Consent Order, which was issued by the Securities Division of the Department against Respondent on May 23, 2005. (Ex. 1, Order to Show Cause, ¶1)

The Consent Order contains findings by the Director of the Department ("Director") that Respondent was licensed with the Department as a sales representative of Citigroup from October 19, 1993 to November 21, 2003 and was terminated on November 21, 2003 for executing trades without client approvals. (Ex. 1, Consent Order, ¶¶II(2)-II(3)) In addition, the Director found that Respondent misappropriated a total of $47,500 of the funds from two customers and converted these funds to his own use. (Ex. 1, Consent Order, ¶¶II(7)(a)-II(7)(b)) Respondent was also found to have placed the investments of two (2) customers into fee-based brokerage accounts that were unsuitable for these customers because they did not conduct a sufficient amount of trades to justify the fees charges. As a result, Citigroup reimbursed a total of $41,546.08 in excessive fees to these customers. (Ex. 1, Consent Order, ¶II(7)(c)) Additionally, Respondent was found to have sold to a customer a total of $20,000 of complex, risky derivative products that were unsuitable for this elderly, conservative investor. Subsequently, Citigroup settled with this customer for a total of $18,000. (Ex. 1, Consent Order, ¶II(7)(d))

The conduct by Respondent detailed in the Consent Order was found to constitute multiple violations of Rhode Island General Laws regarding unethical or dishonest practices in the securities industry, employing a scheme to defraud, engaging in fraudulent acts, unethical or dishonest practices by a sales representative, and violation of National Association of Securities Dealers ("NASD") conduct rules. (Ex. 1, Consent Order, ¶¶II(8)-II(11)) Based on these

findings, the Director barred Respondent from association with a broker-dealer or investment adviser in the State of Rhode Island. (Ex. 1, Consent Order, ¶III(2))

The Department's second exhibit contains six items: (i) a Cover Letter to Scott Lyons from Donna Arabian, dated December 7, 2005 informing Insurance Producer applicants of changes in the Department's licensing policy; (ii) a four-page Uniform Application for Individual Insurance Producer License ("Application") completed by Respondent, dated December 2, 2005, marked as received by the Life & Health Section of the Insurance Division of the Department on December 5, 2005, and in which Item No. 38 Respondent requests authority to be licensed as a Producer of Life insurance and Accident & Health or Sickness insurance and also which in Item No. 39, Question No. 2 Respondent indicates that he has been involved in a prior administrative proceeding involving a professional or occupational license; (iii) a one-page Promissor exam printout for Respondent's Accident and Health Producer exam taken on November 22, 2005; (iv) a one-page Promissor exam printout for Respondent's Life Producer exam taken on November 22, 2005; (v) a one-page certificate indicating that Respondent successfully completed the Life and Health Pre-Licensing Educational Program, dated November 19, 1993; and, (vi) an uncertified, eleven-page NASD Brokercheck Response to Request for Information ("NASD Report"), dated October 25, 2005, detailing the NASD's regulatory action, terminations, customer complaint, and investigation of Respondent and containing the barring of Respondent from associating with any NASD member in any capacity and a single customer complaint that resulted in a settlement to the customer by Smith Barney of $9,000. (Ex. 2, NASD Report, 10).

Respondent's Consent Order which bars Respondent from association with a broker-dealer or investment adviser in the State of Rhode Island effectively results in his inability to

engage in activities requiring securities licensure in the State of Rhode Island. That is, the NASD actually issues the licenses and the Department's Securities Division gives permission through registration to allow NASD-licensees to register with Rhode Island licensed broker-dealers and investment advisers.

The Department presented two witnesses, Donna Arabian and Joseph Torti. Ms. Arabian is the Administrative Officer for the Department's Insurance Division and Mr. Torti is the Department's Associate Director and Superintendent of Insurance. Under direct examination by counsel for the Department, Ms. Arabian testified that as part of her functions she accepts and reviews Applications. (Hr'g Tr. 17:17-17:19) Ms. Arabian testified that her initials were on the cover letter of December 7, 2005 to Respondent, but that she did not recall processing Respondent's Application. (Hr'g Tr. 18:4-18:18) Ms. Arabian testified further that when an Insurance Producer license applicant indicates that the response to Item 39, Question 2 of the Application is positive, the procedure is to forward the Application to the Department's legal department for review. (Hr'g Tr. 19:2-19:5)

Under cross-examination by counsel for Respondent, Ms. Arabian stated again that she could not recall if she had processed or approved Respondent's Application. (Hr'g Tr. 22:2-22:12) Ms. Arabian also testified that Mr. Torti made the inquiry about Respondent's Application and that she had not seen Respondent's May 18, 2005 Offer of Settlement. (Hr'g Tr. 23:9-23:22)

Under direct examination by counsel for the Department, Mr. Torti testified that when an Application is submitted which discloses a prior administrative action, the Department's policy is for the licensing aide to forward the application to the legal department through a supervisor. (Hr'g Tr. 28:14-28:19) However, Mr. Torti first learned that Respondent's Application had been

approved while speaking to the Associate Director of Securities, who mentioned to Mr. Torti that she had taken action against Respondent. (Hr'g Tr. 29:1-29:9) Under cross-examination, Mr. Torti testified that he believed Respondent's original NASD Report was sent to the Securities Division by mistake and then someone there checked the Department's licensing system and noticed that Respondent had been issued a License. (Hr'g Tr. 31:12-31:20) Mr. Torti testified that upon learning that the Insurance Division had granted Respondent a License, he reviewed Respondent's Application, background information, and the Consent Order dated May 23, 2005 and decided that Respondent did not qualify for a License due to Respondent's "dishonest, fraudulent practices, and demonstrating incompetence, untrustworthiness and financial irresponsibility." (Hr'g Tr. 30:1-30:20)

Respondent testified under direct examination by Respondent's counsel that prior to submitting his Application he had spoken on the phone at least twice with someone at the Department to request the protocol for reinstituting a License that had lapsed. (Hr'g Tr. 35:15-35:23) Respondent eventually spoke with a female supervisor who informed him that he needed to re-take the insurance licensing exam and submit an Application. (Hr'g Tr. 36:15-36:18) Respondent testified that he answered all the questions on the Application truthfully, including information about the disciplinary action with the NASD. (Hr'g Tr. 37:5-37:11) Respondent testified that after he was issued his License on or around January 5, 2006, he accepted an offer to work with an insurance company as a producer in February 2006. (Hr'g Tr. 38:11-38:18)

Under questioning by the Hearing Officer, Respondent testified that he did not indicate to any individual he spoke with at the Department that he had entered into the Consent Order with the Department's Division of Securities. (Hr'g Tr. 41:13-41:19) Respondent also testified that he did not submit a certified copy of the NASD Report or the Consent Order with his December

5, 2005 application, nor did he have any substantive discussion about the content of the NASD Report with anyone at the Department. (Hr'g Tr. 42:20-43:7) Respondent also stated that in talking to Ms. Molly Champagne Seward of the Department's Insurance Division on December 2, 2005, Ms. Champagne Seward told him that the NASD report was sufficient for answering Question 39(2) of the Application. (Hr'g Tr. 43:8-43:20) In addition, Respondent testified that he did not provide a certified copy of the notice of hearing or other documents that stated the charges, allegations and resolution of the charges, the Consent Order, or any final judgment along with his Application. (Hr'g Tr. 44:6-44:21)

V. STATUTORY CONSTRUCTION/LEGISLATIVE INTENT

The Rhode Island Supreme Court has consistently held that it effectuates legislative intent by examining the statute in its entirety and giving words their plain and ordinary meaning. *In re Falstaff Brewing Corp.,* 637 A.2d 1047, 1049 (R.I. 1994). See *Parkway Towers Associates v. Godfrey*, 688 A.2d 1289 (R.I. 1997). The Rhode Island Supreme Court has also established that it will not interpret legislative enactments in a manner that renders them nugatory or that would produce an unreasonable result. See *Defenders of Animals v. Dept. of Environmental Management,* 553 A.2d 541 (R.I. 1989) (citing *Cocchini v. City of Providence*, 479 A.2d 108, 111 (R.I. 1984); *Beaudoin v. Petit,* 409 A.2d 536, 540 (1979); *Raymond Construction Co. v. Bisbano,* 326 A.2d 858, 861 (1974)). In cases where statutory language is ambiguous, the Rhode Island Supreme Court has consistently held that legislative intent must be considered. *Providence Journal Co. v. Rodgers*, 711 A.2d 1131, 1134 (R.I. 1998). The statutory provisions must be examined in their entirety and the meaning most consistent with the policies and purposes of the legislature must be effectuated. *Id.* It is also necessary to take into account the scope of the statute and the purpose sought to be accomplished through the enactment of the statute when determining

how it is to be construed. *New England Die Co., Inc. v. General Products Co., Inc.*, 168 A.2d 150 (R.I. 1961).

In examining R.I. Gen. Laws § 27-2.4-1 *et seq*., it is clear that the legislature intended to place express requirements upon insurance producer license applicants. These requirements include:

(1) R.I. Gen. Laws § 27-2.4-3 specifically bars the selling, soliciting or negotiation of insurance in Rhode Island unless the individual is licensed for that specific line of authority;

(2) Initial and annual license renewal fees via the submission of periodic renewal applications in R.I. Gen. Laws § 27-2.4-4;

(3) Specific jurisdiction to the Department to sanction unlicensed activities in R.I. Gen. Laws § 27-2.4-6 and criminal sanctions for unlicensed activity;

(4) Examination as part of the application process in R.I. Gen. Laws §27-2.4-7;

(5) Application for license which requires the applicant to "declare under penalty of refusal, suspension, or revocation of the license that the statements made in the application are true, correct, and complete in R.I. Gen. Laws § 27-2.4-8;

(6) Numerous basis upon which to deny, suspend or revoke a license or application in R.I. Gen. Laws § 27-2.4-14.

This comprehensive statutory scheme clearly reflects the legislative intent to ensure that the insurance industry is comprised of licensees who are competent, withstand the scrutiny of the process of application, and submit complete and accurate information under penalties of perjury. The application process is clearly intended to ensure that the licensed insurance producers do not

pose a threat to the public interest or may, once licensed, affect the integrity of the insurance industry marketplace.

Because this matter involves the revocation of an insurance producer license, the purpose and scope of the statutory licensing and revocation process at issue pursuant to R.I. Gen. Laws § 27-2.4-14(a) must therefore, be analyzed in the context of this statutory scheme. The Department is empowered with numerous bases upon which to deny, revoke or suspend an application or license. The statute provides express requirements for an application in R.I. Gen. Laws § 27-2.4-8 and that license application may be denied based on the numerous subsections in R.I. Gen. Laws § 27-2.4-14. The Department was unable to properly evaluate Respondent's application in this matter because he did not comply with R.I. Gen. Laws § 27-2.4-8.[1] The statute requires applicants to submit true, correct, and complete information. Respondent failed to submit true, correct, and complete information to the Department even when specifically instructed to do so in the Application. Therefore, while the Department may have had numerous bases upon which to deny

---

[1] R.I. Gen. Laws § 27-2.4-8 states, in pertinent part:

> **§ 27-2.4-8 Application for license. –** (a) A person applying for a resident insurance producer license shall make application to the insurance commissioner on the uniform application and declare under penalty of refusal, suspension or revocation of the license that the statements made in the application are *true, correct and complete* to the best of the individual's knowledge and belief. Before approving the application, the insurance commissioner shall find that the individual:
>
> …
>
> (2) Has not committed any act that is a ground for denial, suspension or revocation set forth in § 27-2.4-14;
>
> …
>
> (c) The insurance commissioner may require any documents reasonably necessary to verify the information contained in an application.
>
> …

this license during the application process, it was unable to do so due to Respondent's failure to comply with R.I. Gen. Laws § 27-2.4-8.

R.I. Gen. Laws § 27-2.4-14(a)(1) specifically grants the Department authority to revoke a license based on the providing of incorrect, misleading, incomplete or materially untrue information in the license application. Here, the Respondent: engaged in certain activities which led to a Consent Order in the Securities Division of the Department which barred him from any licensed activities in the Securities context in Rhode Island; applied for a License six (6) months later; and, in his Application and in conversations with the Department did not provide any mention of the Consent Order. Not only did he not mention the Consent Order, he put an asterisk on his application and said it would be sent to the Department by the NASD. The NASD document provided is difficult to comprehend for those not well versed in the Securities federal and state statutory and regulatory schemes and does not provide great detail or context of the basis for any of the documented disciplinary events. For this reason, it was even more important for Respondent to provide this information to the Department as required in the Application as under the express statutory authority granted to the Department pursuant to R.I. Gen. Laws § 27-2.4-8(c).[2] Finally, Respondent's failure to provide a true, correct, and complete Application also reflects on his qualifications and ability to follow simple application instructions and it therefore follows, that assuming *arguendo* that this was an oversight, the undersigned has serious reservations about the Respondent's ability to comprehend, advise, sell, solicit, or negotiate insurance policies to members of the public.

With respect to the Department's assertion that Respondent's License should be revoked pursuant to R.I. Gen. Laws § 27-2.4-14(a)(8) and (9)[3], the Department is well within its statutory authority given the facts stated herein to assert those statutory provisions as a basis for revocation. Furthermore, assuming *arguendo* that Respondent had provided a true correct and complete application as required by R.I. Gen. Laws §§ 27-2.4-8, the Department has established that Respondent's License should be revoked pursuant to R.I. Gen. Laws § 27-2.4-14(a)(8) because the actions indicated in the Consent Order constitute evidence of "fraudulent, coercive, or dishonest practices or demonstrating incompetence, untrustworthiness or financial irresponsibility in this state or in another place." It is clearly within the purpose of the statutory scheme to protect the public from an individual, such as Respondent, who has misappropriated funds and found to have committed "multiple violations of Rhode Island General Laws regarding unethical or dishonest practices in the securities industry, employing a scheme to defraud, engaging in fraudulent acts, unethical or dishonest practices by a sales representative, and violation of National Association of Securities Dealers ("NASD") conduct rules." With respect to R.I. Gen. Laws § 27-2.4-14(a)(9)

[3] R.I. Gen. Laws § 27-2.4-14(a)(8)and (9) state:

> **§ 27-2.4-14 Licenses – Denial – Nonrenewal – Suspension or revocation. –** (a) The insurance commissioner may place on probation, suspend, revoke or refuse to issue or renew an insurance producer's license or may levy an administrative penalty in accordance with § 42-14-16 or any combination of actions, for any one or more of the following causes:
>
> **…**
>
> (8) Using fraudulent, coercive, or dishonest practices or demonstrating incompetence, untrustworthiness or financial irresponsibility in this state or in another place;
>
> (9) Having an insurance producer license, or its equivalent, denied, suspended or revoked in any other state, province, district or territory or administrative action under this section[.]

the issue of whether the Consent Order is "equivalent" to an insurance producer license need not be reached because the Department has clearly established that sufficient statutory and factual basis exist to revoke Respondent's License pursuant to R.I. Gen. Laws §§ 27-2.4-14(a) (8).

VI. DISCUSSION

In the instant case, the undersigned finds that Respondent's License should be revoked under the statutory framework and the relevant case law as set forth below.

A. Statutory Requirements for Insurance Producer Licensure.

R.I. Gen. Laws § 27-2.4-8(a) states that when applying for a License, the applicant "*shall* make application to the insurance commissioner on the uniform application and declare under penalty of refusal, suspension or *revocation* of the license that the statements made in the application are true, correct and *complete* to the best of the individual's knowledge and belief." [Emphasis added.] R.I. Gen. Laws § 27-2.4-14(a)(1) also provides that the insurance commissioner may place on probation, suspend, *revoke* or refuse to issue or renew a License for providing incorrect, misleading, *incomplete* or materially untrue information in the Application. [Emphasis added.] The use of the verb "may" in § 27-2.4-14(a) indicates that the revocation of Respondent's License by the Department is discretionary and requires an evaluation of the facts and circumstances of the context of each Application.

Respondent's December 5, 2005 Application was incomplete with regard to Item No. 39, Question Nos. (2)(a), (b) and (c) and Respondent therefore did not comport with the requirements of § 27-2.4-8(a). (Ex. 2, Application, 3) Item No. 39, Question No. 2 asks:

> 2. Have you or any business in which you were an owner, partner, officer, or director ever been

> involved in an administrative proceeding regarding any professional or occupational license?
>
> "Involved" means having a license censured, suspended, revoked, canceled, terminated, or being assessed a fine, placed on probation *or surrendering a license to resolve an administrative action.* "Involved" also means being named as a party to an administrative or arbitration proceeding which is related to a professional or occupational license. "Involved" also means having a license application denied or the act of withdrawing an application to avoid a denial. …
>
> If you answer yes, you must attach to this application:
>
> *a)* *a written statement* identifying the *type of license* and *explaining the circumstances of each incident,*
> b) *a certified copy of the Notice of Hearing* or *other document* that *states the charges and allegations, and*
> c) a *certified copy of the official document* which demonstrates the resolution of the charges or any final judgment.

(Ex. 2, Application, 3) [Emphasis added.]

Respondent answered the above questions by putting an asterisk next to Question 39(2)(b) and writing "Copy attached. Certified copy will be sent to you from NASD." (Ex. 2, Application, 3) Respondent's Application did not include any response to Questions 39(2)(a), (b), and (c): a written statement identifying the incidents involved with his securities license, any document relating to the May 23, 2005 Consent Order between the Respondent and the Department, nor did Respondent indicate to any individual he spoke with at the Department that he had entered into the Consent Order with the Department's Division of Securities. (Hr'g Tr. 41:13-41:19) Without any documents or other indication to the Department of the Consent Order against Respondent, it was only when the NASD Report was mistakenly forwarded to the

Securities Division that the Department was able to determine that Respondent been issued a License in error. (Hr'g Tr. 31:12-31:20)

The omission from Respondent's Application of the Department's Consent Order against Respondent and any other document relating to the Consent Order is evidence that Respondent did not comply with R.I. Gen. Laws § 27-2.4-8(a). R.I. Gen. Laws § 27-2.4-8(a) states that the applicant "*shall* make application to the insurance commissioner on the uniform application and declare under penalty of refusal, suspension or *revocation* of the license that the statements made in the application are true, correct and *complete* to the best of the individual's knowledge and belief." [Emphasis added.] Respondent did not provide complete responses to Question 39(2)(a), (b), and (c). Furthermore, in Question 40 of the Application which comprises the "Applicants [sic] Certification and Attestation" Respondent certified, under penalty of perjury, that he was "aware that submitting false information or omitting pertinent material information in connection with this application is grounds for license revocation or denial of the license and may subject me to civil or criminal penalties." (Ex. 2, Application, 4) The fact that the Department became aware of these omissions from Respondent's Application some time after the issuance of his License is not relevant. Given the facts in the Consent Order, it is apparent that Respondent was deliberately avoiding full disclosure with the hope that the Department (which had barred him from securities activity in Rhode Island only six (6) months earlier) would not find out about the Consent Order and issue him a license. Additionally, Item No. 39, Question Nos. 2(a), (b), and (c) of the Application clearly request as much information as possible and Respondent in his conversations and his written submissions failed to mention the recent actions that had occurred within the same agency. (Ex. 2, Application, 3) Furthermore, R.I. Gen. Laws § 27-2.4-8(a)(2) states that "[b]efore approving the application, the insurance

commissioner shall find that the individual…[h]as not committed any act that is a ground for denial, suspension or revocation set forth in § 27-2.4-14." Respondent's failure to comply with R.I. Gen. Laws § 27-2.4-8(a) by providing a "true, correct, and complete" application prevented the Insurance Commissioner from being able to determine whether there the acts described in the Consent Order were a basis for denial under R.I. Gen. Laws § 27-2.4-14. Therefore, it is Respondent's failure to comply with R.I. Gen. Laws § 27-2.4-8 which puts the Department of being in the more difficult administrative position of revoking a license after issuance.

Respondent's counsel has asserted that at the time of Respondent's Application, "Respondent fully disclosed as part of his application the previous action that DBR had taken against him." (Resp't Mem. 1) However, this assertion is not true according to the Application submitted and Respondent's own testimony at hearing when he testified that he did not indicate to any individual he spoke with at the Department that he had entered into the Consent Order with the Department's Division of Securities. (Hr'g Tr. 44:6-44:21) This omission, by Respondent's own admission, is further evidence of Respondent's incompetence, at best, and untrustworthiness or dishonesty, at worse and lends further support for the revocation of the License pursuant to R.I. Gen. Laws § 27-2.4-14(a)(8). Respondent's admission that he did not discuss the Consent Order with the Department is on the record for the first time at hearing. Therefore, while the Department had cause to revoke the License pursuant to R.I. Gen. Laws § 27-2.4-14(a)(1), it did not have the benefit of Respondent's admission at the time this administrative action was initiated which explains why the Department was not in a position to assert R.I. Gen. Laws § 27-2.4-14(a)(1) as a basis for revocation of the License. Furthermore, the seriousness of the findings in the Consent Order further substantiate and bolster the basis for revocation under R.I. Gen. Laws § 27-2.4-14(a)(8) which addresses keeping individuals who

have used "fraudulent…dishonest practices or demonstrating incompetence, untrustworthiness or financial irresponsibility" from engaging in licensed activities as an insurance producer.

B. Respondent's Assertion That State Cannot Deprive Him of a Protected Property Interest in His Insurance Producer License Without Due Process Lacks Merit

Respondent asserts that because he has a valid property interest in his License, the Department should not be permitted to re-visit the issuance of the License. It is well established that Respondent should not be deprived of the property interest in his License without due process. Due process requires a determination of the Respondent's property interest in the license; an evaluation of the risk that the procedures used to deprive Respondent of his property interest would do so erroneously; a determination of the government's interest in issuing the license on behalf of the public; and a balancing of these interests by determining if the property deprivation has been preceded by adequate notice and whether Respondent has been provided a hearing appropriate to the nature of his case. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985); *Mathews v. Eldridge*, 424 U.S. 319 (1976); *In re Cross*, 617 A.2d 97 (R.I. 1992).

In *Mathews*, the U.S. Supreme Court sets forth three distinct factors to consider for due process:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 335. Providing adequate notice of the pending action and a subsequent hearing appropriate to the nature of the case are the essence of due process when seeking to deprive an

individual of a significant property interest. *Cleveland Bd. of Educ.*, 470 U.S. at 542. The court in *Cross* states that an administrative hearing following "the show cause format that placed the burden upon [the defendant] to disprove the assertions in the complaint, was not inherently unconstitutional for lack of due process." 617 A.2d at 102.

Here, Respondent asserts that he has a protected property interest in his License. (Resp't Mem. 2) (citing *In re Cross*, 617 A.2d at 100). The Hearing Officer takes administrative notice of the fact that from the date the Department issued Respondent's License in error, Respondent has had the ability to utilize the License and benefit from any property interest provided therein. The Department agrees that Respondent has a protected property interest in his License and the undersigned concurs with Respondent's assertion. (Department's Mem. 2) The procedures used by the Department in any contested case, including the revocation or suspension of a License, are governed by statute and the Department's regulations, afford adequate opportunity for hearing after reasonable notice, and follow the rules of evidence as applied in civil cases in the superior courts of this state. R.I. Gen. Laws §§ 42-35-9, 42-35-10; Department of Business Regulation Central Management Regulation 2, *Rules of Procedure for Administrative Hearings*, (2004) http://www.dbr.state.ri.us/documents/rules/central_management/Admin_Hearings.pdf.

Respondent was provided adequate notice and preparation time for all proceedings: the Department issued the Order to Show Cause on March 30, 2006; a pre-hearing conference was held on April 11, 2006; the response to Respondent's request for discovery was provided on May 15, 2006; the Memorandum of the Department was provided to Respondent on June 19, 2006; and the hearing was held on September 20, 2006. Since approximately three (3) months passed between the submission of the Memorandum of the Department and the hearing, the undersigned

concludes that Respondent was given adequate notice and preparation time in the Department's action against him.

The hearing conducted by the Department on September 20, 2006 was a full evidentiary hearing on the merits. Respondent was represented by counsel and was allowed to cross-examine two witnesses from the Department regarding the processing of his License Application and the decision to revoke his License. All evidence was admitted without objection. Respondent was entitled to be heard before a neutral hearing official. Any administrator is presumed to be neutral unless proven to be otherwise. *In re Cross*, 619 A.2d at 100. (citing *Gorman v. Univ. of Rhode Island*, 837 F.2d 7, 15 (1st Cir. 1988)). In the current action, no evidence or testimony was presented at the September 20, 2006 hearing challenging the neutrality of the Hearing Officer. Given the adequate nature of the procedures used to provide the notice and hearing afforded Respondent in the Department's action against him, the undersigned concludes that the probable value of additional or substitute procedural safeguards would have been minimal.

The government's interest in the Department's action against Respondent is to protect the public through the implementation and enforcement of state laws mandating the regulation and licensing of insurance within the state. R.I. Gen. Laws. §§ 42-14-2(1)(a), 42-14-17; Department of Business Regulation Mission Statement (2007), http://www.dbr.state.ri.us/mission/. Respondent's prior misappropriation of funds from clients and his placement of client funds in financially irresponsible investments provides clear evidence of conduct that is not in the public's interest. (Ex. 1, Consent Order, ¶II7(a)-II7(d)) Balancing this evidence against the Department's interest in protecting the public, the undersigned has determined that Respondent's continued licensure as an insurance producer represents an unreasonable risk to the public and

that Respondent has been provided adequate due process prior to the deprivation of the License and any protected property interest therein.

C. Respondent's Assertion that the Doctrine of Res Judicata Bars the Current Action Lacks Merit

The doctrine of *res judicata* does not preclude consideration of Respondent's Consent Order in the Department's action to revoke his License. Rhode Island courts have held that consent orders are subject to *res judicata*, but application of the doctrine follows the "transaction rule" where the grouping of facts which constitute a transaction is determined pragmatically. *ElGarbri v. Lekas*, 681 A.2d at 276 (R.I. 1996); *C.D. Burnes Co. v. Guilbault*, 559 A.2d at 640 (R.I. 1989).

In *ElGarbri*, the Rhode Island Supreme Court held "that the preclusive effect of the *res judicata* doctrine should be applied to 'all or any part of the transaction, or series of connected transactions, out of which the action arose.'" 681 A.2d at 276 (R.I. 1996) (citing Restatement (Second) of Judgments § 24.1 (1982)). A transaction is to be determined "pragmatically," considering "whether the facts are related in time, space, origin, or motivation . . .." Restatement (Second) of Judgments § 24.2 (1982)). In *C.D. Burnes Co.*, the Rhode Island Supreme Court held that a consent agreement between the parties has the full force and effect of a decree and is *res judicata*. 559 A.2d at 640 (citing *Belanger v. Weaving Corporation of America*, 387 A.2d at 693-94 (R.I. 1978)).

The Department's current action against Respondent arises from a transaction which is separate from the one addressed by the Consent Order, i.e., the current action against Respondent is not related in time, origin, or motivation to that addressed by the Consent Order. See Restatement (Second) of Judgments § 24.2 (1982). The Consent Order between Respondent and

the Department was entered into on May 23, 2005. Respondent's Application was received by the Department on December 5, 2005. These two (2) transactions are separated in time by approximately six (6) months. Also, Respondent's motivation was to acquire a different type of license than the securities license he held previously. Respondent has stated that "[t]here was no provision in the [Consent] Order relative to Respondent acting as an insurance producer." (Resp't Mem. 5) However, the Department must consider each application according to the statutory requirements upon its submission and *at that time* determine whether the applicant "[h]as not committed any act that is a ground for denial, suspension or revocation set forth in § 27-2.4-14." R.I. Gen. Laws § 27-2.4-8(a)(2). [Emphasis added]. Because Respondent's License Application to the Department initiated a transaction that pragmatically was separate and distinct from that which resulted in the revocation of Respondent's securities license, the doctrine of *res judicata* does not act to bar the current action.

VI. FINDINGS OF FACT

1. On May 23, 2005, the Securities Division of the Department issued a Consent Order against Respondent barring Respondent from association with a licensed broker dealer or investment advisor in Rhode Island and fined him $25,000.

2. (a) On December 5, 2005, the Department received Respondent's Application seeking to be licensed as an Insurance Producer pursuant to R.I. Gen. Laws § 27-2.4-1 *et seq.*

   (b) Respondent's Application was incomplete in that it made no mention of nor contained any document pertaining to the May 23, 2005 Consent Order.

   (c) Respondent did not indicate to any individual he spoke with at the Department that he had entered into the May 23, 2005 Consent Order.

3. On or around January 5, 2006, the Department issued the License to Respondent.

4. Some time after Respondent was issued his License, the Department became aware that it had issued the May 23, 2005 Consent Order against Respondent and thereupon determined that Respondent did not qualify for licensure pursuant to R.I. Gen. Laws §§ 27-2.4-14(a)(8) and (9).

5. On March 30, 2006 the Department issued an Order to Show Cause, Notice of Hearing and Appointment of Hearing Officer requiring Respondent to appear before the Department and to answer why Respondent's License should not be suspended or revoked.

6. On September 20, 2006 a full evidentiary hearing on this matter was held.

7. Respondent's failure to comply with R.I. Gen. Laws § 27-2.4-8 in submitting a true, correct, and complete application and the contradictory and incorrect testimony regarding the application is evidence of incompetence and inability to follow detailed instructions necessary for qualification for licensure as an insurance producer.

8. The conduct indicated in the Consent Order substantiates "[u]sing fraudulent, coercive, or dishonest practices or demonstrating incompetence, untrustworthiness or financial irresponsibility."

9. All other facts stated in Section IV entitled "Material Facts and Testimony" are fully incorporated herein as findings of fact.

VII. CONCLUSIONS OF LAW

1. The Department has jurisdiction over this matter pursuant to R.I. Gen. Laws §§ 27-2.4-1 *et seq.*, 42-14-1, *et seq*., and 42-35-1, *et seq*.

2. Respondent failed to comply with R.I. Gen. Laws § 27-2.4-8 when he did not submit a true, correct, and complete application.

3. The Respondent's failure to submit a true, correct, and complete application prevented the Insurance Commissioner from evaluating the Application as required in R.I. Gen. Laws § 27-2.4-8(a)(2) whether the Respondent "has not committed any act that is a ground for denial, suspension or revocation set forth in § 27-2.4-14" before issuing the License.

4. The Department has established that Respondent's License should be revoked pursuant to R.I. Gen. Laws § 27-2.4-14(a)(8) because Respondent's conduct as reflected in the Consent Order indicates that Respondent was "[u]sing fraudulent, coercive, or dishonest practices or demonstrating incompetence, untrustworthiness or financial irresponsibility in this state[.]"

7. Because there exist sufficient statutory basis upon which to revoke Respondent's License, the issue of determining whether revocation is appropriate pursuant to R.I. Gen. Laws § 27-2.4-14(a)(9) need not be reached.

8. Respondent has been afforded due process in the revocation of his License and in the deprivation of any property interest therein.

9. The doctrine of *res judicata* does not bar the Department from considering the May 23, 2005 Consent Order when evaluating Respondent's qualifications for licensure pursuant to R.I. Gen. Laws §§ 27-2.4-14.

VIII. RECOMMENDATION

Based on the above analysis, the Hearing Officer recommends that Respondent's insurance producer License be revoked.

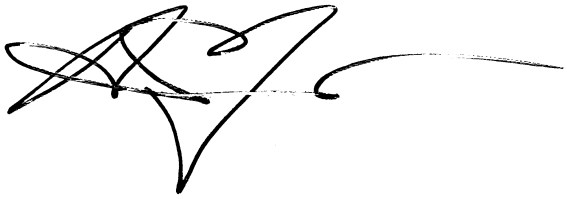
Dated: July 2, 2007

Neena Sinha Savage
Hearing Officer

I have read the Hearing Officer's Decision and Recommendation in this matter, and I hereby

____x____ ADOPT
_____ REJECT
_____ MODIFY

the Decision and Recommendation.



Dated: July 3, 2007

A. Michael Marques
Director

THIS DECISION CONSTITUTES A FINAL DECISION OF THE DEPARTMENT OF BUSINESS REGULATION PURSUANT TO RHODE ISLAND GENERAL LAWS TITLE 42, CHAPTER 35. AS SUCH, THIS DECISION MAY BE APPEALED TO THE SUPERIOR COURT SITTING IN AND FOR THE COUNTY OF PROVIDENCE WITHIN THIRTY (30) DAYS OF THE DATE OF THIS DECISION. SUCH APPEAL, IF TAKEN, MAY BE COMPLETED BY FILING A PETITION FOR REVIEW IN SAID COURT.