STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF BUSINESS REGULATION
1511 PONTIAC AVENUE, BLDG. 69-2
CRANSTON, RHODE ISLAND 02920

IN THE MATTER OF:	:	
Craig A. Martin,	:	**DBR No.: 15IN003**
Respondent.	:	

DECISION

I. INTRODUCTION

This matter arose pursuant to an Order to Show Cause, Notice of Hearing and Appointment of Hearing Officer ("Order to Show Cause") issued by the Department of Business Regulation ("Department") to Craig A. Martin ("Respondent") on April 23, 2015. A pre-hearing conference was held on May 6, 2015. On November 3, 2015, a hearing started after which the parties agreed to take depositions and to rely on an agreed statement of facts and the filing of briefs. Both parties were represented by attorneys with the record closing on January 18, 2017.

II. JURISDICTION

The administrative hearing was held pursuant to R.I. Gen. Laws § 42-14-1 *et seq*., R.I. Gen. Laws § 27-10-1 *et seq*., R.I. Gen. Laws § 42-35-1 *et seq*., and 230-RICR-100-00-2 Rules of Procedure for Administrative Hearings ("DBR2").

III. ISSUE

Whether the Respondent violated R.I. Gen. Laws § 27-10-1 *et seq*., and/or *Insurance Regulation* 43 Insurance Claim Adjusters ("IR43"), and if so, what should be the sanction.

IV. TESTIMONY AND MATERIAL FACTS

The parties agreed to the following facts:[1]

1. The Respondent is the holder of insurance claim adjuster's license number 1082927 with workers compensation and property/casualty lines of authority. Said license was first issued on February 18, 1993 and is presently active.

2. On April 15, 2002, Respondent, as principal of CA Martin, Inc., entered into a Consent Agreement in which he admitted that he had engaged in actions requiring a public adjuster license during a period of time when he did not hold an active license. Respondent paid an administrative penalty of $500. Exhibit One (1).

3. On October 25, 2002, Respondent entered into a Consent Order in which he acknowledged his failure to respond to the Department in a timely manner concerning consumer complaints. Respondent paid an administrative penalty of $3,000. Exhibit Two (2).

4. On November 25, 2013, Respondent entered into a Consent Order in which he acknowledged violating provisions of Insurance Regulation 43: by demanding payment of a percentage of the total value of the claim; by utilizing a contract that did not provide the provisions required by the regulation and by failing to provide a required disclosure contract. Respondent paid an administrative penalty of $4,500. Exhibit Three (3).

5. On February 28, 2013, Lori Lucas ("Lucas"), suffered a fire loss to her property in Rhode Island. Lucas maintained a policy of homeowners insurance with MetLife insuring said property against certain perils, including fire loss. Lucas entered into an Insurance Adjusting Agreement with Respondent to represent her interest in adjusting the fire loss. Lucas filed a DBR Complaint against Martin. Exhibit Four (4).

6. Metlife wrote a check to the Lucases on March 28, 2013 for $121,149.28. That check was not deposited until August 23, 2013. Exhibits Four (4) and Eleven (11), Lucas deposition Exhibit Four (4). In the five (5) months between those dates, the check was not deposited into an escrow account.

7. Metlife wrote a check to the Lucases on July 30, 2013 for for $19,297.93. That check was not deposited until August 23, 2013. Exhibits Four (4) and Eleven (11), Lucas deposition Exhibit Five (5). In the 23 days between those dates, the check was not deposited into an escrow account.

8. Respondent submitted an invoice to the Lucases dated April 24, 2013 on invoice number 213276, for 10% of $167,866.53 for the contents recovery, charging the Lucases $16,986.65. This reflected the amount claimed by Martin on the Lucas' behalf, not the amount recovered by the Lucases. Exhibit Eleven (11), Lucas deposition Exhibit Six (6)

[1] See Jointly Agreed Statement of Facts and agreed to exhibits.

9. Respondent submitted an invoice to the Lucases dated July 14, 2013 on invoice 214647, for 10% of $179,715.50 for the building recovery, charging the Lucases $17,971.55. This reflected the amount claimed by Martin on the Lucas' behalf, not the amount recovered by the Lucases. Exhibit Eleven (11), Lucas Deposition Exhibit Seven (7).

10. Lucas, by and through her attorney, notified DBR of her desire to withdraw the complaint against Respondent. Exhibit 13.

11. On July 17, 2014, Phanida Phivilay Bessette ("Bessette"), suffered a fire loss to her property in Rhode Island. Bessette maintained a policy of homeowners insurance with Liberty Mutual Insurance Co. insuring said property against certain perils, including fire loss. Bessette entered into an Insurance Adjusting Agreement with Respondent to represent her interest in adjusting the fire loss, on July 17, 2014, the same day of the fire. Bessette subsequently filed a complaint with DBR against Martin. Exhibit Nine (9).

12. Bessette tried to contact Respondent numerous times after the fire relating to her claims, relating to her authorization to stay in a hotel until her home was repaired, and relating to requests from her mortgage company. *Id.*

13. Liberty Mutual wrote checks for Bessette's claims dated July 29, 2014, one in the amounts of $22,269.84 and another for over $50,000. The Respondent gave Bessette the checks on October 9, 2014. Exhibits Nine (9) and 12, Bessette deposition. In the two (2) plus months between those two (2) dates, the checks were not deposited into an escrow account.

14. Bessette entered into a Release and Settlement Agreement with Respondent, dated January 11, 2015. Exhibit 14.

The Order to Show Cause also referenced another complaint that the parties did not reference in the agreed statement of facts. Based on the complaint filed, on May 16, 2014, Sunny Adefiyiju ("Adefiyiju"), suffered a fire loss to his property in Rhode Island. He subsequently filed a complaint with the Department explaining that he entered into an Insurance Adjusting Agreement with the Respondent to represent his interest in adjusting the fire loss the same day of the fire while emergency personnel was present. See Exhibit Seven (7) (Adefiyiju Complaint). That complaint was withdrawn by Adefiyiju on March 1, 2016. Exhibit 15.

V. ORDER ON MOTION TO AMEND

A. Introduction

On October 18, 2016, the Department moved to amend the Order to Show Cause to include information about the Respondent's settlement with Adefiyiju. The Respondent objected to the amendment in its entirety.

B. Arguments

The Department argued that Super. R. Civ. Pro. 15(a) allows a pleading to be amended before a responsive pleading is served and the motion was filed prior to the Respondent filing any responsive pleading. The Department argued that permission to amend shall be fairly given when justice requires and allowed with great liberality absent a showing by the objector of extreme prejudice. The Department argued that it moved to amend the pleading as soon as it became aware of the Respondent's settlement agreement with Adefiyiju so that there is no prejudice.

The Respondent argued that allowing the motion to amend would be highly prejudicial and that terms of settlements are generally not admissible into evidence.

C. Super. R. Civ. P. 15

Super. R. Civ. P 15(a) provides in part as follows:

> (a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend the pleading at any time within twenty (20) days after the pleading is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

D. Discussion

Section 2.11 of DBR2 provides that any party may file motions that are permissible under DBR2 or the Super. R. Civ. Pro. Thus, the determination of whether to grant the Department's

motion to amend turns on the applicability of Super R. Civ. Pro. 15.

It is the objector's burden to show that granting the motion creates substantial prejudice to the opposing party. In *Wachsberger v. Pepper et al.*, 583 A.2d 77 (R.I. 1980), the Court found that there was no evidence to suggest that the defendants would be prejudiced by the plaintiff amending her complaint since the trial had not commenced and there were no allegations that witnesses were lost and the amendment related to fraud which had been alleged in the original complaint. In addition, the Court noted that the trial justice had found that the additional allegations in the amended complaint were unsubstantiated in the record; however, the Court noted that the only question before the trial justice was a motion to amend and the sufficiency of the amended complaint was to be determined later if questioned.

Here, the settlement agreement in question is related to a complaint filed with the Department concerning the Respondent and the motion to amend was filed prior to the Respondent filing an answer. The parties agreed that after the filing of briefs to notify the undersigned if either would require a hearing for further testimony. The undersigned had not ruled on the motion to amend, but the Respondent did not ask for a ruling prior to deciding to rest and representing that no further testimony was needed. The Respondent was on notice of the proposed amendment and argued against allowing the motion and the substance of the proposed amendment. *Infra.*

E. Conclusion

Because the rules allow liberal amendments unless there is undue prejudice to the objector, the Department's motion to amend (paragraphs 17 through 21) is granted.

VI. DISCUSSION

A. Legislative Intent

The Rhode Island Supreme Court has consistently held that it effectuates legislative intent

by examining a statute in its entirety and giving words their plain and ordinary meaning. *In re Falstaff Brewing Corp.,* 637 A.2d 1047 (R.I. 1994). If a statute is clear and unambiguous, "the Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings." *Oliveira v. Lombardi*, 794 A.2d 453, 457 (R.I. 2002) (citation omitted). The 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. DEM,* 553 A.2d 541 (R.I. 1989) (citation omitted). In cases where a statute may contain ambiguous language, the Rhode Island Supreme Court has consistently held that the 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.*

B. Standard of Review for an Administrative Hearing

It is well settled that in formal or informal adjudications modeled on the Federal Administrative Procedures Act, the initial burdens of production and persuasion rest with the moving party. 2 Richard J. Pierce, Administrative Law Treatise § 10.7 (2002). Unless otherwise specified, a preponderance of the evidence is generally required in order to prevail. *Id.* See *Lyons v. Rhode Island Pub. Employees Council 94*, 559 A.2d 130, 134 (R.I. 1989) (preponderance standard is the "normal" standard in civil cases). This means that for each element to be proven, the fact-finder must believe that the facts asserted by the proponent are more probably true than false. *Id.* When there is no direct evidence on a particular issue, a fair preponderance of the evidence may be supported by circumstantial evidence. *Narragansett Electric Co. v. Carbone*, 898 A.2d 87 (R.I. 2006).

C. Relevant Statutes and Regulations

The Department relied on R.I. Gen. Laws § 27-10-7 which was in effect during the time of the three (3) complaints. It provided in part as follows:

> Term of license -- Renewal -- Suspension or revocation. --
> The insurance commissioner shall promulgate rules and regulations mandating the term of licensure for any claim adjuster license. No license shall remain in force for a period in excess of four (4) years. Nothing in this section shall be construed to limit the authority of the insurance commissioner to sooner suspend or revoke any claim adjuster license. Any action for suspension or revocation of any claim adjuster license shall be in accordance with the Administrative Procedures Act, chapter 35 of title 42, upon proof that the license was obtained by fraud or misrepresentation, or that the interests of the insurer or the interests of the public are not properly served under the license, or for cause. No claim adjuster license shall be issued by the commissioner to a person whose license has been suspended or revoked within three (3) years from the date of that revocation or suspension.

R.I. Gen. Laws § 27-10-7 was amended by P.L. 2014, ch. 107, § 1 and P.L. 2014, ch. 195, § 1 which were identical amendments and took effect on January 1, 2015. R.I. Gen. Laws § 27-10-7 was replaced with the current R.I. Gen. Laws § 27-10-12 which is applicable to license denial, non-renewal, or revocation.

Section 11 of IR43[2] provides in part as follows:

> Conduct – Public Adjusters
> In addition to the requirements of Section 9 above, all Company and Independent Adjusters must also comply with the following:
> ***
> (G) A public adjuster contract may not contain any contract term that:
> (1) Allows the public adjuster's percentage fee to be collected when money is due from an insurance company, but not paid, or that allows a public adjuster to collect the entire fee from the first check issued by an insurance company, rather than as percentage of each check issued by an insurance company;
> ***
> (M) A public adjuster who receives, accepts or holds any funds on behalf of an insured, towards the settlement of a claim for loss or damage, shall deposit the funds in a non-interest bearing escrow or trust account in a financial institution that is insured by an agency of the federal government in the public adjuster's home state or where the loss occurred.

[2] IR43 was amended on January 1, 2015. The prior version of IR43 was in effect at the time of the three (3) complaints. However, there is no substantive changes in the amendments. Section Ten (10) became Section Eleven (11). Section Eleven (11) became Section Twelve (12). For convenience, this decision will refer to the current numbering.

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(O) A public adjuster is obligated, under his or her license, to serve with objectivity and complete loyalty to the interest of his client alone; and to render to the insured such information, counsel and service, as within the knowledge, understanding and opinion in good faith of the licensee, as will best serve the insured's insurance claim needs and interest.

(P) A public adjuster shall not solicit, or attempt to solicit, an insured during the progress of a loss-producing occurrence, as defined in the insured's insurance contract.

Section 12 if IR43 provides in part as follows:

License Denial, Non-Renewal or Revocation

(A) The Department may place on probation, suspend, revoke or refuse to issue or renew an adjuster's license or may levy a civil penalty in accordance with R.I.G.L. § 42-14-16 for any one or more of the following causes:

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(8) Using fraudulent, coercive or dishonest practices; or demonstrating incompetence, untrustworthiness or financial irresponsibility in this state or elsewhere.

R.I. Gen. Laws § 42-14-16 provides in part as follows:

Insurance – Administrative penalties.

(a) Whenever the director shall have cause to believe that a violation of title 27 and/or chapters 14, 14.5, 62 or 128.1 of title 42 or the regulations promulgated thereunder has occurred by a licensee, or any person or entity conducting any activities requiring licensure under title 27, the director may, in accordance with the requirements of the Administrative Procedures Act, chapter 35 of this title:

(1) Revoke or suspend a license;

(2) Levy an administrative penalty in an amount not less than one hundred dollars ($100) nor more than fifty thousand dollars ($50,000).

D. Arguments

The parties' arguments are referenced in the analysis below.

E. Whether the Respondent Violated R.I. Gen. Laws § 27-10-7 and IR43

1. Bessette Complaint

In a deposition, Bessette testified under oath and was subject to examination by both parties. The Respondent filed a response to Bessette's complaint but did not testify on his behalf.

a. Holding Funds

The Respondent agreed that the checks from Bessette's insurer were held for over two (2) months and not deposited in an escrow account, but argued that there were professional and

personal reasons for the delay and that he failed to fully communicate with Bessette and to tell her that he had the checks. The Respondent argued that the regulation does not provide a time frame with which the funds must be deposited so it is fair to assume that it must be a reasonable period of time. The Respondent held the checks for over two (2) months. The regulation provides that the checks "shall" be deposited. Bessette testified that it was only after she threatened to call the Better Business Bureau that the Respondent turned over the checks and she only knew about the checks because her insurance company told her about them. The Respondent argued that he did not misappropriate the funds nor was Bessette harmed by the holding of the funds. However, a proof of harm is not a requirement to show a violation of the regulation; rather, the regulation only requires that the check shall be deposited in a non-interest bearing account. The Respondent's representations (he did not testify) do not excuse non-compliance with the regulation. This is not a question of few days delay, but rather a delay of over two (2) months. The holding of checks was a violation of Section 11(M) of IR43.

b. Loyalty to his Client

The Respondent agreed that Bessette tried to contact him numerous times during his representation. Bessette specifically testified regarding her problems in reaching the Respondent once she had signed the adjusting contract.[3] Bessette testified that she did not see the list of items that she lost until after it was submitted to her insurance company by Respondent. By his own admissions (in the agreed facts and in his brief), the Respondent failed to communicate with Bessette. The Respondent argued that he was trying to negotiate for the undisputed items, but without showing the loss list to Bessette, he had no idea whether there were some big ticket items that he argued would have been disputed. He could not negotiate disputed and undisputed items

[3] For example, see Exhibit Nine (9) (Bessette complaint) which includes numerous text messages between Bessette and Respondent where Bessette indicated she has not heard from him and he is not returning telephone calls or texts.

without knowing what items Bessette would have included on the list. The Respondent admitted his error in not communicating to Bessette the procedure for supplementing losses to address Bessette's big-ticket items which were not listed. By such actions, the Respondent did not act with complete loyalty to his client and did not render to Bessette, information as to best serve the insured's claim needs and interest. The Respondent also argued that he did properly serve Bessette's interests as his client because Bessette indicated in her testimony, among other things, that she was satisfied with the recovery amount. The regulation does not take into account whether a client was satisfied overall, but rather details certain things that must or must not be done during representation. Such actions were in violation of Section 11(O) of IR43.

c. Solicitation

The parties agreed that Bessette entered into the insurance adjusting agreement on the same day of the fire. However, the Respondent argued in his brief that said insurance agreement mistakenly listed the date of the fire instead of the following day since the agreement was executed in the early hours. Bessette testified that Clean Care Company arrived at her house within ten (10) minutes of calling 911. Bessette testified that the firefighters were on the premises until 1:00 a.m. or so (after the fire broke out 9:00 p.m. or 10:00 p.m.). Bessette testified in her deposition that the Clean Care Company introduced her to the Respondent. The Respondent's response indicated that Clean Care introduced him to Bessette while the boarding up of the house was progressing, but after firefighters and investigators left the premises. Bessette testified that the Respondent came on the scene about the same time, almost instantaneously, as Clean Care. She testified that in fact, she had noticed him before being introduced to him by Clean Care as he had been chit-chatting with her fiancé and son and offering her fiancé a cigarette so initially she thought he was a neighbor until Clean Care introduced him. She testified she signed the adjusting agreement after

Clean Care finished boarding up the house.

It is clear that the Respondent showed up at the fire with the purpose of offering his services to the property owners suffering a fire. Indeed, he talked to the family prior to being introduced as an adjuster by Clean Care. The regulation prohibits solicitation and attempts to solicit an "insured during the progress of a loss-producing occurrence." The Respondent tried to evade this prohibition by arguing that the house was being boarded up when he was introduced to the insured. The evidence was that the firefighters were there until 1:00 a.m. or beyond. While the Respondent admitted he signed the agreement on the same day of the fire, he argued that it was really early morning hours. With the firefighters being there to at least 1:00 a.m. and the house being boarded up, it is a stretch to say that the loss-producing occurrence was not still in progress.[4] The regulation applies to a progress of a loss-producing occurrence. Here the progress of the loss-producing occurrence is the fire, the putting out of the fire, and the clean-up that night which based on Bessette's testimony occurred while the firefighters were still there. Finally, the Respondent cannot argue against his own agreement that the adjusting agreement was signed on the same date as the fire. Such actions were in violation of Section 11(P) of IR43.

2. Lucas Complaint

In a deposition, Lucas testified under oath and was subject to examination by both parties. The Respondent filed a response to Lucas's complaint but did not testify on his behalf.

a. Contract Re Fee

The Respondent admitted in the joint agreement of facts to mistakenly invoicing for the total amount claimed, rather than amount issued. His invoice was in violation of Section 11(G)(1) of IR43.

[4] Arguably the Respondent was attempting to solicit prior to his introduction as an adjuster by ingratiating himself with the family by chit-chatting and offering cigarettes during the fire and before being introduced as an adjuster to Bessette. However, a finding does not need to be made whether that is attempted solicitation as his actual introduction to Bessette as an adjuster was during the progress of a loss-producing event.

b. Holding Funds

The Respondent admitted to holding one insurance company check for 23 days prior to depositing the check and holding another insurance company check for over five (5) months prior to depositing it. The Respondent argued that the regulation does not provide a time frame with which the funds must be deposited so it is fair to assume that it must be a reasonable period of time. The Respondent held one check for over three (3) weeks and the other for over five (5) months. The regulation provides that the checks "shall" be deposited. The Respondent argued that there were professional reasons for the delay. The Respondent argued that he did not misappropriate the funds nor was Lucas harmed by the holding of the funds.[5] However, a proof of harm is not the requirement to show a violation of the regulation; rather, the regulation only requires that the check shall be deposited in a non-interest bearing account. In his response to the Lucas complaint, the Respondent indicated the delay was due to an incorrect payee on the check and an issue with the scope of work and the fact that Lucas was going to act as her own general contractor. Exhibit Five (5). The Respondent's representations the reasons do not explain or excuse non-compliance with the regulation which merely requires to deposit the check in a non-interest bearing escrow account. This is not a question of few days delay, but rather over five (5) months for one (1) check. The holding of checks was a violation of Section 11(M) of IR43.

c. Loyalty to client

Lucas testified that were some items that she had not been reimbursed for (furnace, chimney, oil tank bulkhead), and she did not believe Respondent put in for those items. In her deposition, she was shown the Respondent's insurance claim list and the claim list apparently had

[5] It should be noted that in Lucas' complaint, she felt that the delay by Martin in negotiating the check for five (5) months caused financial harm as the insurance company refused to further cover a trailer rental. This issue was not addressed by the parties' agreed facts or by testimony so it cannot be said that there was no financial harm by the holding of the checks.

those items; though, she testified she thought the claim list referred to the stairs and not the bulkhead. One would think that the Respondent would have communicated to Lucas about these claims which were raised in her complaint sooner than a deposition. However, the issue of loyalty does not only turn on whether the claims were submitted since there are other factors regarding loyalty. These include the failure to deposit the checks, the failure to communicate, and the delays. The fire occurred on February 28, 2013 and a check issued in March, 2013 which she signed in April, 2013. However, the Respondent instructed Lucas not to clean up the property as there might be supplemental inspections, but this delay went on throughout the summer. Indeed, work on the house did not start until the Fall, 2013. The Respondent did not testify so that he could dispute the reasons for the delay. The only conclusion from Lucas' testimony is that the Respondent was not diligent in performing his duties causing a delay in starting the repairs to the house. Such actions were in violation of Section 11(O) of IR43.

d. Solicitation

The Respondent admitted that his insurance adjusting agreement with Lucas was entered into the day of the fire. Lucas testified that she got to her house about 2:30 p.m. to 2:45 p.m. and the fire department was still there and she could see the remnants of the smoke. She testified that the Respondent was there and she saw him while she went to her car. She testified that she asked the police officer (as the police were still on scene) who he was and was told he probably was an insurance adjuster. She testified that he introduced himself to her about 4:00 p.m. She testified that she signed the agreement at 5:00 p.m. or earlier. She testified that the fire marshal was still there when she signed the agreement. The Respondent did not dispute these facts. Based on the evidence, the agreement was signed during the progress of loss-producing occurrence. Such actions were in violation of Section 11(P) of IR43.

3. Adefiyiju Complaint

a. Solicitation

Adefiyiju's complaint stated that his house caught fire and the Respondent arrived at about the same time as the fire department[6] and a firefighter suggested talking to Respondent. Adefiyiju's complaint stated that he entered into the adjusting agreement with the Respondent while the firefighters were still working on the house. See Exhibit Eight (8). In the Respondent's response, he wrote that he only spoke to Adefiyiju once the fire was cleared and the house was being boarded up and there was no other activity. See Exhibit Nine (9). Based on the complaint and response, the Respondent entered in the adjusting agreement during the progress of the loss-producing occurrence. See discussion above. Such an action was in violation of Section 11(P) of IR43.

b. Proposed amendments to Order to Show Cause

In December, 2014, Lucas withdrew her complaint so that she and the Respondent could discuss settlement. See Exhibit 13. In December, 2014, the Respondent and Bessette entered into a settlement agreement. See Exhibit 14. Bessette's agreement did not bar her from cooperating with the Department. In 2015, the Department initiated this action based on the complaints from Lucas, Bessette, and Adefiyiju. After the hearing commenced on November 3, 2015, the parties agreed to continue the hearing to contact the consumers and decide whether to take depositions of the complainants or to have them testify before the hearing officer. It was agreed that the parties would provide the hearing officer with a status report by November 30, 2015 whether depositions were scheduled with the consumers or when the consumers might be available for hearing.

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[6] In Respondent's response to the Lucas complaint, he indicated that he is member of the emergency paging system so that he was notified of the Lucases' fire. Presumably that happened here (as well as for Bessette) which is why the evidence for all complaints is that Respondent arrived on the scene during the fire.

In February/March, 2016, the Respondent settled with Adefiyiju and as part of that settlement, Adefiyiju agreed not to cooperate with the Department unless compelled by a Court order. Adefiyiju was scheduled for a deposition in this matter on February 22, 2016 and did not appear. See exhibits attached to the Department's motion to amend Order to Show Cause. It can be inferred that he did not appear because a condition of his settlement with the Respondent was not to cooperate with the Department.

The Respondent objected to the Department's motion to amend to include Adefiyiju's complaint. The Respondent argued that the complaint is based on hearsay and is not the type commonly relied upon based on a reasonably prudent person. However, the Adefiyiju complaint was already included in the Department's initial Order to Show Cause (paragraph eight (8) referencing fire of May 16, 2014). While R.I. Gen. Laws § 42-35-10(3) permits cross-examination, said statute does not bar evidence which has not been subject to cross-examination. Indeed, hearsay is allowed under the relaxed rules of evidence in an administrative hearing. R.I. Gen. Laws § 42-35-10. Adefiyiju submitted a complaint and the Respondent replied. Indeed, the Respondent chose not to testify about the complaint. There are no reasons not to make a decision regarding the complaint based on available evidence. *Supra.*

What the Department seeks to include by way of amendment is that Respondent violated IR43, Section 12(A)(8) by having Adefiyiju enter in said settlement whereby he would not cooperate with the Department. The Department argued that the Respondent sought to suppress evidence by way of this settlement which is a fraudulent, coercive, or dishonest practice.

The Respondent argued that the Rhode Island Supreme Court has ruled that offers of settlement and evidence of settlement negotiations are generally not admissible into evidence since such exclusion facilitates an atmosphere of compromise and promotes an alternative to litigation.

Such is true in Adefiyiju and the Respondent's settlement. They avoided litigation by settling. However, the Department is seeking to amend its Order to Show Cause because the settlement provided that Adefiyiju would not cooperate with the Department during its investigation. The Department argued that the Respondent is suppressing evidence which has been found to be illegal and against public policy.

In this matter, the parties had agreed to contact the complainants regarding either testifying at hearing or by deposition. This inclusion of evidence about settlement is not for a trial where allowing evidence of a potential settlement or other settlement(s) could influence or bias the jury. Instead, the evidence here is that in the midst of an action where the consumers were to be contacted about testifying or being deposed, the Respondent agreed to settle the matter so that Adefiyiju's testimony would be barred. The issue is not that the Respondent settled this matter with Adefiyiju. The issue is that such settlement barred testimony by Adefiyiju. Presumably, the Respondent felt that any testimony to Adefiyiju would not be to the Respondent's benefit and could not be countered by the Respondent testifying.

The bar on cooperation is particularly troubling as not only had a prosecution started, but a hearing had started. It was the Respondent who raised the issue that none of the consumers were testifying at hearing. The Department initially was going to rely on the three (3) complaints and the Respondent's responses. See recording of the November 3, 2015 hearing. However, the parties agreed to continue the matter so that testimony could be arranged. After that, the Respondent entered into the settlement with Adefiyiju.

The Respondent argued that Adefiyiju's lack of cooperation with the Department's investigation, and subsequent withdrawal of the complaint, suggests that Adefiyiju was satisfied with the terms of the arrangement. It maybe that Adefiyiju was satisfied with his settlement, but

the settlement barred him from testifying in a hearing related to the issue of whether Respondent should continue to be licensed and if such licensing is in the public interest. The fact that Respondent chose to include that bar when he did supports a finding that he is untrustworthy and dishonest in violation of R.I. Gen. Laws § 27-10-7 and Section 12(A)(8) of IR43.

4. R.I. Gen. Laws § 27-10-7

The Department argued that the holding of the License by Respondent is not in the best interest of Rhode Island consumer. *DiPaolo v. Marques*, 2010 R.I. Super. LEXIS 158 found that R.I. Gen. Laws § 27-10-7 indicated a clear legislative intent that only trustworthy individuals should be licensed as insurance adjusters. While this status was repealed subsequent to the events of this action, IR43 also includes untrustworthiness and dishonesty, etc. as grounds to revoke an adjuster's license. See Section 12(A)(8).

The actions by Respondent detailed above in the Bessette, Lucas, and Adefiyiju's complaints such as the entering into adjusting agreements during the progress of a loss-occurring event, failure to keep in contact with his clients, holding onto checks, failing to submit claims, and charging more than allowed are not in the best interests of the consumers.

F. Conclusion

Based on the forgoing relating to the three (3) complaints, the Respondent charged more than the allowed ten (10) percent of insurance settlement for his fee, executed three (3) insurance adjusting agreement with an insured during a loss-producing occurrence, twice failed to deposit funds held on behalf of the insured into a non-interest bearing escrow or trust account, and failed to disclose material information about the insured's claim. In engaging in such actions, the Respondent violated IR43, Section 11(G) (improper charge); 11(M) (failing to deposit checks); 11(O) (lack of loyalty); and 11(P) (thrice soliciting during loss producing occurrence). These

actions by the Respondent also violate R.I. Gen. Laws § 27-10-7 as the interests of the public are not served under this license.

In terms of the Adefiyiju settlement, the Respondent violated R.I. Gen. Laws § 27-10-7 and Section 12(A)(8) of IR43.

G. The Appropriate Sanction

The Department argued that Respondent's License should be revoked because he has continuously and repeatedly violated statutory and regulatory requirements and has not shown signs of improvement over time, and has admitted to violations of Rhode Island's insurance laws and regulations three (3) prior times.

The Respondent argued that these issues should be considered in the scope of his 22-year career and that he is often dealing with emotional clients that have been through a traumatic experience which is ripe for controversy and dispute. He argued that while some violations may have occurred, they do not rise to the level of revocation.

Prior to this action the Respondent was twice disciplined in 2002 and once in 2013. In the 2013 consent order, the Respondent agreed to comply with all regulations and statutes governing the actions of insurance adjuster. Thus, by his recent violations, Respondent has also failed to comply with the 2013 consent order. The Respondent's 2013 consent order was signed by the Respondent prior to Bessette and Adefiyiju's losses. The 2013 consent order addressed the Respondent's violations of overcharging, using an insurance form that violated regulatory requirements, and not providing regulatory disclosures. In the three (3) complaints that are at issue here, the Respondent in all matters had the insured sign contracts during loss-producing occurrences. He failed to communicate with his clients and did not provide the loyalty required. He held onto checks and failed to deposit them as required.

Section 2.16 of DBR2 provides as follows:

> Penalties
>
> A. In determining the appropriate penalty to impose on a Party found to be in violation of a statute(s) or regulation(s), the Hearing Officer shall look to past precedence of the Department for guidance and may consider any mitigating or aggravating circumstances.
>
> 1. Mitigating circumstances may include, but shall not be limited to, the following: the Party's licensing history, i.e. the absence of prior disciplinary actions; the Party's acceptance of responsibility for any violations; the Party's cooperation with the Department; and the Party's willingness to give a full, trustworthy, honest explanation of the matter at issue.
>
> 2. Aggravating circumstances may include, but shall not be limited to, the following: the Party's prior disciplinary history; the Party's lack of cooperation and/or candor with the Department; the seriousness of the violation; whether the Party's act undermines the regulatory scheme at issue; whether there has been harm to the public; and whether the Party's act demonstrates dishonesty, untrustworthiness, or incompetency.
>
> B. The finding of mitigating factors will not necessarily lead to a reduction in the penalty imposed if the circumstances of the violations found by the Hearing Officer are such that they do not warrant a reduction in penalty.

In *DiPaolo*, the Department revoked a licensee's motor vehicles appraiser and insurance adjuster licenses due the licensee's statutory violations when acting as an adjuster as well as his violation of a prior consent order (entered into approximately six (6) years prior). The Court spoke of the requirement to license trustworthy individuals.

The Respondent has prior disciplinary actions. The most serious being from 2013 with multiple violations. In this matter, he violated several regulatory requirements in representing three (3) different consumers. These violations also make him in violation of the 2013 consent order. His pattern of behavior repeatedly demonstrates that he does not and will not comply with the statute and regulations while acting as a public adjuster. In 2013, he signed a consent order arising of another complaint, but was already committing more violations with the Lucas matter and then in 2014 continued to commit violations in the Bessette and Adefiyiju matters.

While the Respondent has been licensed for 22 years, he has a history of licensing

violations. His actions demonstrate that he is incapable of complying with statutory and regulatory requirements. It is not in the public interest to have such an individual licensed based on his licensing history. As a result, Respondent's License should be revoked. See also *Rocha v. State PUC*, 694 A.2d 722 (R.I. 1997).

The Department argued that the Respondent's settlement with Adefiyiju is grounds to revoke the License since the Respondent paid the consumer valuable consideration to suppress his evidence. The Department argued that the Respondent's prior discipline as well as the Adefiyiju are grounds to revoke Respondent's License. In the midst of a hearing when the parties agreed to bring in the complainants to testify by deposition or hearing, the Respondent settled with Adefiyiju and specifically made a condition of that settlement for the complainant not to cooperate with the Department. As a result, no deposition was taken of Adefiyiju. The undersigned appreciates the purposes of settlement is to resolve issues and prevent litigation; however, in this matter the settlement served to ensure that a witness against the Respondent would not be available to testify for the Department on a matter of public interest (the licensing of ajdusters). Such an action by the Respondent is very troubling and demonstrates dishonesty and untrustworthiness.

Based on the forgoing, there are two (2) grounds to revoke the Respondent's License. First, his prior discipline and his continual statutory and regulatory violations as found in the handling of the Bessette, Lucas, and Adefiyiju complaints and his violation of the 2013 consent order. Second, the Respondent's prior discipline and his settlement to bar Adefiyiju from cooperating with the Department in the midst of a hearing. Either ground supports the revocation of License. See *Rocha.*

VII. FINDINGS OF FACT

1. On or about April 23, 2015, an Order to Show Cause, Notice of Hearing and Appointment of Hearing Officer was issued to the Respondent by the Department. The Order to Show Cause was amended by the Department's motion to amend dated October 18, 2016.

2. A hearing was held on November 3, 2015 with the parties then agreeing to decide the matter by deposition testimony and agreed statement of facts and briefs. The record closed on January 18, 2017.

3. The facts contained in Section IV and VI are reincorporated by reference herein.

VIII. CONCLUSIONS OF LAW

Based on the testimony and facts presented:

1. The Department has jurisdiction over this matter pursuant to R.I. Gen. Laws § 27-10-1 *et seq*., R.I. Gen. Laws § 42-14-1 *et seq*., and R.I. Gen. Laws § 42-35-1 *et seq*.

2. The Respondent violated R.I. Gen. Laws § 27-10-7 and Sections 11(G), (M), (O), and (P) and 12(A)(8) of IR43

IX. RECOMMENDATION

Based on the forgoing, pursuant to R.I. Gen. Laws § 27-10-1 *et seq*. and R.I. Gen. Laws § 42-14-16, the undersigned recommends that the Respondent's License be revoked.

Dated: 3/13/17

Catherine R. Warren, Esquire
Hearing Officer

ORDER

I have read the Hearing Officer's Decision and Recommendation in this matter, and I hereby take the following action with regard to the Decision and Recommendation:

__X__ ADOPT
_____ REJECT
_____ MODIFY

Dated: 3/17/17

Scottye Lindsey
Director

NOTICE OF APPELLATE RIGHTS

THIS ORDER CONSTITUTES A FINAL ORDER OF THE DEPARTMENT OF BUSINESS REGULATION PURSUANT TO R.I. GEN. LAWS § 42-35-12. PURSUANT TO R.I. GEN. LAWS § 42-35-15, THIS ORDER MAY BE APPEALED TO THE SUPERIOR COURT SITTING IN AND FOR THE COUNTY OF PROVIDENCE WITHIN THIRTY (30) DAYS OF THE MAILING DATE OF THIS DECISION. SUCH APPEAL, IF TAKEN, MUST BE COMPLETED BY FILING A PETITION FOR REVIEW IN SUPERIOR COURT. THE FILING OF THE COMPLAINT DOES NOT ITSELF STAY ENFORCEMENT OF THIS ORDER. THE AGENCY MAY GRANT, OR THE REVIEWING COURT MAY ORDER, A STAY UPON THE APPROPRIATE TERMS.

CERTIFICATION

I hereby certify that on this 17 day of March, 2017, that a copy of the within decision was sent by first class mail, postage prepaid and electronic delivery to Jimmy Burchfield, Esquire, D'Amico Burchfield, 536 Atwells Avenue, Providence, RI 02909 and by electronic delivery to Matthew Gendron, Esquire, and Elizabeth Kelleher Dwyer, Deputy Director, Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue. Cranston, R.I.

Chandra West