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BEFORE THE DIRECTOR OF THE DEPARTMENT OF INSURANCE

STATE OF IDAHO

In the Matter of:	)	Docket No. 18-2333-06
	)	
KENNETH D. SLOAN	)	ORDER DENYING REQUEST FOR
Producer License No. AL112852	)	RECONSIDERATION AND
(also pleaded as AG125398)	)	CORRECTING CLERICAL ERRORS
	)	

I.

The Findings of Fact, Conclusions of Law and Preliminary Order (Preliminary Order hereafter) was issued on February 8, 2007. On February 22, 2007, the Department of Insurance of the State of Idaho (Department hereafter) filed its Request for Reconsideration, and the same was timely under applicable law.

II.

The Department has advanced two arguments in support of reconsideration, and the first of these is based upon public policy. The Department aptly and accurately sets forth the public policy in this jurisdiction regarding the conduct of insurance producer licensees, which may be summarized by stating that such producers must act honestly and in good faith in the conduct of their affairs with the Department, with consumers and with insurance carriers. Indeed, it is not even necessary to look beyond Title 41 of the Idaho Code, and particularly Sec. 41-1016, to determine this bedrock principle.

And there is no reasonable doubt that Kenneth D. Sloan (Sloan hereafter) failed to act honestly and in good faith with the Department, with consumers and with at least one carrier at times pertinent in this case. All that has been covered extensively in the Preliminary Order and will not be repeated here. However, the difficulty arises when the time arrives to determine what to do about Sloan's bad acts in the context of all the evidence and factors in play.

Idaho Code Sec. 41-1016 provides a litany of improper conduct that can result in the imposition of sanctions. There are fourteen specific recitations or categories of reasons listed in Sec. 41-1016 that allow sanctions. Conflated, it comes down to the simple proposition that sanctions may be imposed where a producer has been dishonest, has failed to comply with statutory mandates, has been involved in certain types of criminal activity or has been disciplined in another jurisdiction. Further, there are three types of possible administrative penalties that may be utilized, namely administrative "fines" up to $1000, license suspension up to one year and full license revocation, keeping in mind that a "fine" may or may not be used in conjunction with a suspension or revocation. Still, there are two characteristics about Sec. 41-1016 that warrant further discussion.

First, this statute does not distinguish, in terms of relative severity, between the various improper acts identified. Yet it is not difficult to imagine instances where distinctions would have to be made in particular cases. For instance, one basis for sanctions is having had a license application denied in another state, while another basis is having forged someone else's name on an insurance application. If John Doe had applied for a license in Nevada and had it denied because he failed to submit it with the appropriate fee, that would obviously be far

different than Jane Smith having forged two customers' names on a policy application while Smith personally collected and pocketed a big premium.

Second, the Idaho Legislature must have had a specific purpose in mind when it opted to provide a *range* of sanctions. Idaho Code Sec. 41-1016(1) does not state that dishonesty must always result in a $50 "fine" and nothing more, though that would be within the statute, anymore than it says that a ten-day suspension in an adjoining state must always culminate in a full revocation of an Idaho license, though that too would fall within the code section in question. On the contrary, the only rational conclusion is that the legislature, in establishing a broad spectrum of possible sanctions, determined, also as a matter of public policy, that each case where some sanction is appropriate should be evaluated upon its own individual merits, provided that no sanction falls outside statutory parameters.

Returning to Sloan, it has already been noted as loudly as mere written words will allow that his case is deemed by the hearing officer to present a razor-thin call and that Sloan came as precipitously close to license revocation as conceivably possible. The Department considers the disposition in the Preliminary Order to be too modest. Conversely, while Sloan has not evidently filed a Request for Reconsideration, the actual disposition was vastly more stringent and stinging than anything suggested by Sloan or his counsel; and it is highly dubious Sloan is very happy with the factual findings or the disposition either. Folks could debate until the Apocalypse whether something more or less would have been appropriate in the Sloan disposition; but when it comes right down to it, about all that can be said is that, though reasonable minds could differ on what should have been accomplished, an angst-filled deliberation resulted in something less that outright revocation but which was stern, hefty and hopefully deterring nonetheless.

In seeking reconsideration, the Department points to no additional, proven misconduct by Sloan that the hearing officer missed and that has not previously been recorded in the Preliminary Order. Acknowledging all the decidedly serious, negative factors detailed in that Preliminary Order, there was also careful weighing of several in mitigation.

While Sloan stole the BLC list, there is insufficient evidence he ever used it in any illegal fashion, apart from bare possession. BLC suffered no actual harm as a result. While Sloan lied about Brown's role in the affair, the is no proof she was harmed thereby. While he clearly misrepresented a SHIBA/Department of Insurance affiliation, there is not one scintilla of evidence any person relied to their detriment or took any action whatsoever because of these misrepresentations. While Sloan provided inaccurate information on his licence application and while that is patently bad in and of itself, the underlying felony he should have disclosed was ancient and would not, if reported, likely have precluded licensing in the first place. While Sloan failed to report a misdemeanor DUI as required by statute, there was no testimony that, had it been reported, anything adverse to Sloan would have transpired as a consequence. Of more than a little significance, Sloan has been licensed in either Oregon or Idaho for several years, and there is not the slightest suggestion of any disciplinary problems, unsavory activities or defalcations in either state outside the present matter. There was no evidence to contradict or dilute the testimony Sloan and Carr gave to the effect that Sloan is an able and knowledgeable individual when it comes to the specialty of long-term care insurance products. After his tenure with BLC, Sloan became affiliated with New York Life, an old, respected and well-established insurer; and there was no evidence New York Life has anything negative to say about Sloan or his abilities. Verily, Carr is New York Life's Area One Vice President for Insurance and

Financial Advisors, and Carr gave a glowing account of Sloan, including specific references to Sloan's professional knowledge and abilities, his trustworthiness and his good moral character. Tr. IV, pp. 273-281. Finally, although the hearing officer finds some of the bad acts Sloan committed in the circumstances of the instant case to have been despicable and others plain sloppy, there was also the sense conveyed that Sloan is more or less an expert in a special niche of the insurance business and that he exhibits mature enough correlative intellectual and communicative talents to remain of value to the insurance community and its customers.

All these considerations bundled together, as must be done pursuant to the public policy reflected in Idaho Code Sec. 41-1016, the question became and remains one of what sanction is proper under the range of sanctions available. While second and third and fourth guessing are always possible – and while the hearing officer is about as dissatisfied in many ways as both the Department and Sloan – the underlying consideration is whether the sanctions chosen are more probably than not sufficient to protect public consumers one the one hand and, on the other, are reasonable in view of what is available under the applicable statute. Push come to shove, it was not concluded in the Preliminary Order and is not concluded here that full revocation and nothing less is appropriate, given all the mitigating factors just discussed. That noted, it was and is again determined that significant sanctions must be imposed to secure Sloan's rapt attention and thereby to protect the public by causing him to realize he must refrain from any untoward conduct now and henceforth.

It is decided the disposition of the Preliminary Order is to be left as is. Sloan is to be deprived of the use of his license for 120 consecutive days, longer if he does not pay his "fines." This will cause him both tangible and significant economic loss and less measurable but still

meaningful discomfort before his peers and any carriers with which he is presently or may come to be associated. He is to be "fined" $4250.00, and that has to hurt and should remind him to walk the straight and narrow. These things are real baggage he will be obliged to carry with him for a long time to come. He is certainly wise enough to appreciate he is now on the Department's radar and will there remain, for the next several years, likely. He had to pay two attorneys their fees to defend him in this action; and, though the amount thereof is unknown, it too must be significant and should serve as an additional reminder to stay in line. Lastly, although the recommendation of this hearing officer would not be absolutely binding upon some future hearing officer, this one has strongly urged any future one to revoke Sloan's license if he comes before the Department on disciplinary matters again; and it is a safe wager Sloan realizes the Department will not be shy about presenting the Preliminary Order in this case to the hearing officer in any future proceeding.

The Department also advances a secondary argument in support of its Request for Reconsideration. It suggests there is presumptive evidence that Sloan purposefully waited about one year to use the BLC list after he wrongfully acquired it following his termination by BLC in March 2005. In the Preliminary Order, it was noted the evidence was insufficient to show Sloan ever made much, if any, use of this list; and, as mentioned above, the non-use thereof is one of the mitigating factors in Sloan's favor. By this second argument, the Department seeks to erase this particular mitigating factor.

The Department commences by recalling Sloan's misrepresentations concerning a SHIBA affiliation and then goes on to assert there is no evidence in the record that Sloan made any of these misrepresentations *before* March 2006. Next, while conceding Sloan denied he ever

used the BLC list, the Department observes that Sloan did say he once at least though about possibly using it and that this thought crossed his mind about a year after leaving BLC, which would make it about March 2006. Tr. IV, pp. 403-405. From these two points, it is right to conclude, by the Department's reckoning, that Sloan must have used the list after all and that he did so in March 2006. Of course, he could not have done so long after that because the list was seized from him by search warrant on April 11, 2006. Tr. I, p. 193; Exs. 8 & 8A.

This secondary argument is unpersuasive. This is for two reasons.

Initially, there is a disconnect between Sloan's SHIBA misrepresentation activities and the BLC list. True, certain witnesses and at least one exhibit generally stand for the proposition that Sloan referenced a list at the same time he spoke with certain people, suggesting he was somehow affiliated with SHIBA. However, there is no evidence that the list he referenced in the SHIBA-related matters was the BLC list or something(s) else entirely. Baumann testified that Sloan had contacted Baumann's parents, that Baumann subsequently asked Sloan how he came to know their identities and that Sloan said he had gotten their names from ". . . a list that was provided to him by SHIBA." Tr. III, p. 54. Similarly, a woman named Martin, who did not testify at the hearing but whose statement is in evidence as Ex. 9G, indicated Sloan told her he had learned of her name via a lengthy list Sloan had acquired from SHIBA. Now, there never was any list *from* SHIBA, and Sloan fabricated when he said he had precisely such a thing; but the fact remains there is nothing to prove that, if Sloan even used a list at all when he contacted the people in the SHIBA side of this case, it was the BLC list. Perhaps Sloan told Baumann and Martin he had a list when he in actuality did not get their names from a list *per se.* Perhaps he had a list from some source other than SHIBA or BLC, maybe even something he created

himself from whatever data. Who knows? It is all speculation. It is wished there were more evidence here, but what paucity there be is not enough to conclude Sloan was using *the* BLC list when he spoke with the folks we now reference as being involved in the SHIBA side of this case.

Additionally, Exs. 10 and 10A have been reexamined to see if there is some correlation between Sloan's sales efforts, the time around March 2006 and the BLC list. This was a wasted exercise. Ex. 10A is useless here because it reflects names of people Sloan contacted after leaving BLC, says which of those people (or their spouses) were on the BLC list and provides other information as well, but it contains no dates. Ex. 10 does have some dates, although many contacts do not have corresponding date information. More problematically, Ex. 10's dates, when there are any at all, are merely policy dates, from which it is difficult to tell when actual initial contact was made with someone who later became a policyholder. Most problematically, even assuming policy dates correspond closely with initial contact dates, taken together Exs. 10 and 10A only show a possible four people who were on the BLC list and who were likely contacted in or around March 2006 (Eunice Bortholthaus, 4/16/06; Charles Coffey, 3/24/06 and Bonnie and Lonnie Gorrell, 3/28/06). Recalling that the BLC list has 3243 names, per Glennon's testimony, and even recalling further that at least 1600 of those names should have still been useful at times in question, a scant four is meaningless.

Given the matters discussed above, the Department's Request for Reconsideration is DENIED.

III.

The Preliminary Order contains typographical errors and is a good testament that the undersigned is a poor keyboard operator. Hence, with apologies, it is desired to make the following corrections to the text of the Preliminary Order:

1. P. 3, text line 16 reads "presumable" and should read "presumably."

2. P. 8, text line 2 reads "simple" and should read "simply."

3. P. 10, text line 10 reads "some one" and should read "someone."

4. P. 10, text line 16 reads "According" and should read "Accordingly."

5. P. 13, text line 10 reads "leaves" and should read "leave."

6. P. 14, text line 10 reads "he" and should read "her.'

7. P. 31, text line 7 reads "representation" and should read "representations."

DATED this 1st day of March 2007.

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Certificate of Service

I hereby certify that on this 1st day of March 2007, I caused to be served the following documents on the following persons:

The original hereof by regular United States Mail, postage prepaid to:

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