STATE OF MISSOURI

DEPARTMENT OF INSURANCE, FINANCIAL INSTITUTIONS AND PROFESSIONAL REGISTRATION

P.O. Box 690, Jefferson City, Mo. 65102-0690

In re:	)	DIFP Case No. 100428445C
	)	
KEVIN O'DWYER.	)	AHC Case No. 10-0851 DI

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF DISCIPLINE

Based on the competent and substantial evidence on the whole record, I, John M. Huff, Director of the Missouri Department of Insurance, Financial Institutions and Professional Registration, hereby issue the following findings of fact, conclusions of law and order of discipline:

Findings of Fact

1. John M. Huff is the duly appointed Director ("Director") of the Missouri Department of Insurance, Financial Institutions and Professional Registration (the "Department"), whose duties, pursuant to Chapter 374 and 375 RSMo, include supervision, regulation and discipline of individual insurance producers.

2. The Department issued Respondent Kevin O'Dwyer ("O'Dwyer") an individual insurance producer license on November 18, 2003. His license is current and active.

3. On May 12, 2010, the Director filed a Complaint with the Administrative Hearing Commission ("Commission"), alleging cause existed to discipline O'Dwyer's individual insurance producer license under §§ 375.141.1(2), (7), and (10) RSMo (Supp. 2012).[1]

4. On June 2, 2011, the Director filed a Motion for Summary Decision in this matter. O'Dwyer filed a response to the Motion on June 16, 2011, and the Director filed his reply on June 22, 2011.

5. On December 7, 2011, the Commission issued its Decision finding cause to discipline O'Dwyer's insurance producer license under § 375.141.1(2), (7) and (10). The Commission found the following facts:

a. The Director issued an insurance producer license to O'Dwyer on November 18, 2003. His license was current and active at all relevant times.

b. On October 23, 2008, the Department received a complaint from Gara Sloan that O'Dwyer signed the name of her husband, David Sloan, to an insurance application.

c. On November 24, 2008, Diana Brady, a special investigator with the Department's Consumer Affairs Division, mailed a letter to O'Dwyer at his address of record, requesting that O'Dwyer send, by December 15, 2008, a detailed letter of explanation regarding Gara Sloan's allegations.

d. Brady's letter was not returned as undeliverable.

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1 All statutory references in this Order are to RSMo (Supp. 2012) unless otherwise indicated. Although the original Complaint to the Commission referenced RSMo (Supp. 2009), § 375.141 has not been amended.

e. O'Dwyer did not respond to Brady's letter of November 24, 2008 and did not contact the Department in any way so as to demonstrate a reasonable justification for not responding.

f. On February 18, 2009, Brady mailed a second letter to O'Dwyer at his address of record, requesting that O'Dwyer send, by March 11, 2009, a detailed letter of explanation regarding Gara Sloan's allegations.

g. The letter was not returned as undeliverable.

h. O'Dwyer did not respond to Brady's letter of February 18, 2009 and did not contact the Department in any way so as to demonstrate a reasonable justification for not responding.

i. On September 22, 2009, O'Dwyer appeared at a subpoena conference at the Department's office in Jefferson City, Missouri, where he testified under oath.

j. At the subpoena conference, O'Dwyer admitted signing David Sloan's name to an application of insurance without authorization.

k. At the subpoena conference, O'Dwyer also admitted to calling himself and holding himself out to the public as "Kevin the Medicare Guy." He also stated he was a Medicare specialist and held himself out as a specialist in Medicare while selling insurance policies.

6. On January 9, 2012, the Commission certified its record of its proceedings to the Director pursuant to § 621.110.

7. The Director served upon O'Dwyer the Notice of Hearing setting the matter for a disciplinary hearing on January 9, 2012.

8. Upon O'Dwyer's request, the hearing officer rescheduled the hearing for February 28, 2012, and served an Amended Notice of Hearing upon the parties.

9. At the February 28, 2012 hearing, Mary S. Erickson presided as hearing officer. O'Dwyer appeared *pro se*. Andy Heitmann appeared as counsel for the Department's Consumer Affairs Division.

10. At the hearing, the hearing officer took judicial notice of the Commission's record of proceedings and admitted it as Exhibit 1. The hearing officer also admitted the Notice of Hearing and the Amended Notice of Hearing as Exhibits 2 and 3, respectively.

11. Carrie Couch, Chief of Investigations, testified on behalf of the Consumer Affairs Division. Couch testified that "[b]ased on the forgery aspect and the failure to respond and the Unfair Trade Practice Act violation, the Consumer Affairs Division believes that Mr. O'Dwyer's license should be either suspended or revoked." *Disciplinary Hearing Transcript, ("Tr.") pp. 19-20.*

12. On cross-examination, Couch admitted that no one has called in and said O'Dwyer has been representing the Medicare name. Couch further testified that there have been no new complaints against O'Dwyer since 2009. *Tr. 22.*

13. O'Dwyer testified on his own behalf, in relevant part, as follows:

a. O'Dwyer had a close relationship with consumer Sloan. Sloan "was in a rush trying to get something better" for her husband's insurance. "So when I did forgery, it wasn't in any – the copy of the name, it wasn't in any kind of deceitful – she knew I was trying to get her husband, who's disabled, to try to get her a better plan. There was no malicious intent." *Tr. 25.*

b. O'Dwyer admitted that he does receive the documents the Division mails to him and if "suddenly I got a hearing thing [subpoena], and I immediately called." *Tr. 26.* Based on his testimony, the Director finds that O'Dwyer will respond when he receives a subpoena or a document **which appears serious to O'Dwyer**. During the hearing, O'Dwyer did not claim that he did not receive the Division's inquiries. Nor did O'Dwyer in any way deny that he failed to respond to the inquiries.

c. O'Dwyer did not deny that he called himself "Kevin the Medicare Guy" as found by the Commission. Rather, O'Dwyer testified: "So when I say I'm Medicare guy, it's just a silly thing that I do Medicare stuff and long-term care." *Tr. 27.*

d. O'Dwyer values his license and asked for probation, a fine or a class to address the matter. *Tr. 27-28.*

14. The Director hereby adopts and incorporates the Commission's December 7, 2011 Decision and does hereby find in accordance with same. *Director of Dep't. of Ins., Fin. Insts. & Prof. Regis'n vs. Kevin O'Dwyer*, No. 10-0851 DI (Mo. Admin. Hearing Comm'n, December 7, 2011).

15. After the disciplinary hearing, the hearing officer issued a briefing schedule to the parties. The Consumer Affairs Division filed its proposed findings of fact, conclusions of law and order of discipline. O'Dwyer submitted a letter asking that he be given a fine or ethics classes as discipline.

Conclusions of Law

16. Section 621.110 outlines the procedure after the Commission finds cause to discipline a license. That statute provides, in relevant part:

> Upon a finding in any cause charged by the complaint for which the license may be suspended or revoked as provided in the statutes and regulations relating to the profession or vocation of the licensee . . ., the commission shall deliver or transmit by mail to the agency which issued the license the record and a transcript of the proceedings before the commission together with the commission's findings of fact and conclusions of law. The commission may make recommendations as to appropriate disciplinary action but any such recommendations shall not be binding upon the agency. . . . Within thirty days after receipt of the record of the proceedings before the commission and the findings of fact, conclusions of law, and recommendations, if any, of the commission, the agency shall set the matter for hearing upon the issue of appropriate disciplinary action and shall notify the licensee of the time and place of the hearing[.] . . . The licensee may appear at said hearing and be represented by counsel. The agency may receive evidence relevant to said issue from the licensee or any other source. After such hearing the agency may order any disciplinary measure it deems appropriate and which is authorized by law.

17. Where an agency seeks to discipline a license, the Commission "finds the predicate facts as whether cause exists" for the discipline, and then the agency "exercises final decisionmaking authority concerning the discipline to be imposed." *Tendai v. Board of Regis'n for the Healing Arts,* 161 S.W.3d 358, 364-65 (Mo. banc 2005), *overruled on other grounds, Albanna v. Board of Regis'n for the Healing Arts,* 293 S.W.3d 423, 428 n.2 (Mo. banc 2009).

18. Section 374.051.2, relating to a proceeding to revoke or suspend a license, states, in relevant part:

> 2. If a proceeding is instituted to revoke or suspend a license of any person under sections 374.755, 374.787, and 375.141, the director shall refer the matter to the administrative hearing commission by directing the filing of a complaint. The administrative hearing commission shall conduct hearings and make findings of fact and

conclusions of law in such cases. The director shall have the burden of proving cause for discipline. If cause is found, the administrative hearing commission shall submit its findings of fact and conclusions of law to the director, who may determine appropriate discipline.

19. Section 375.141 states, in pertinent part:

> 1. The director may suspend, revoke, refuse to issue or refuse to renew an insurance producer license for any one or more of the following causes:
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> * * *
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> (2) Violating any insurance laws, or violating any regulation, subpoena or order of the director or of another insurance commissioner in any other state;
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> * * *
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> (7) Having admitted or been found to have committed any insurance unfair trade practice or fraud;
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> * * *
>
> (10) Signing the name of another to an application for insurance or to any document related to an insurance transaction without authorization[.]

20. Title 20 CSR 100-4.100(2)(A) states:

> Upon receipt of any inquiry from the division, every person shall mail to the division an adequate response to the inquiry within twenty (20) days from the date the division mails the inquiry. An envelope's postmark shall determine the date of mailing. When the requested response is not produced by the person within twenty (20) days, this nonproduction shall be deemed a violation of this rule, unless the person can demonstrate that there is reasonable justification for that delay.

21. The Director has the discretion to discipline O'Dwyer's insurance producer license, including the discretion to revoke such license. §§ 374.051.2, 375.141, and 621.110.

22. The principal purpose of § 375.141 is not to punish licensees, but to protect the public. *Ballew v. Ainsworth*, 670 S.W.2d 94, 100 (Mo. App. E.D. 1984).

23. The Commission found that O'Dwyer's violations of Missouri's insurance laws arose from separate conduct: (1) forgery of a signature; (2) failure to respond to two inquiries from the Consumer Affairs Division; and (3) holding himself out to the public as "Kevin the Medicare Guy" or as a Medicare specialist. Each of these acts is serious on its own and could warrant revocation. However, cumulatively, these acts support the conclusion that it is in the interest of the protection of the citizens of this state to revoke O'Dwyer's license.

24. Therefore, based on the nature of the aforementioned conduct, sufficient grounds exist to revoke O'Dwyer's insurance producer license for cause under § 375.141.1(2), (7), and (10).

25. This Order is in the public interest.

ORDER

Based on the foregoing findings and conclusions, the insurance producer license of Kevin O'Dwyer, License No. 0320621, is hereby **REVOKED**.

SO ORDERED, SIGNED AND OFFICIAL SEAL AFFIXED THIS 12TH DAY OF DECEMBER, 2012.

John M. Huff, Director
Missouri Department of Insurance,
Financial Institutions and
Professional Registration

CERTIFICATE OF SERVICE

I hereby certify that on this 12 day of December, 2012, a copy of the foregoing Findings of Fact, Conclusions of Law and Order of Discipline, was served by certified mail through the United States Postal Service, postage prepaid, signature required, to the following:

Kevin O'Dwyer
6324 North Chatham Dr.
Kansas City, MO 64151

Certified No. 7009 3410 0001 9255 5894

And by hand-delivery to:

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