



**DEPARTMENT OF INSURANCE, FINANCIAL
INSTITUTIONS AND PROFESSIONAL REGISTRATION**

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

In re:) DIFP No. 101101673C
)
JAMES C. McCAIN, JR.) AHC No. 12-1831 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 ("Director" of the "Department"), 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 ("Department") whose duties, pursuant to Chapters 374 and 375, RSMo, include supervision, regulation and discipline of insurance producers.

2. The Department issued Respondent James C. McCain, Jr. an insurance producer license (License Number 0287172) on June 4, 1981, which is currently active.

3. On October 5, 2012, the Director filed a Complaint with the Administrative

Hearing Commission alleging cause existed to discipline McCain's insurance producer license on multiple grounds. *Director of Dep't of Ins., Fin. Insts. & Prof'l Regis'n v. James C. McCain, Jr.*, No. 12-1831 DI (Mo. Admin. Hrg. Comm'n). McCain never filed an answer to the Complaint.

4. On February 20, 2013, the Director filed a Motion for Partial Summary Decision as to Counts I, II, III, VIII and IX of the Complaint. The Commission gave McCain until March 11, 2013, to respond to the Motion, but he did not respond.

5. On April 30, 2013, the Commission issued its Order granting the Director's Motion for Partial Summary Decision, finding cause to discipline McCain's insurance producer license pursuant to § 375.141.1(2), (4), and (8).¹

6. After the Director dismissed the remaining counts in the Complaint without prejudice, the Commission issued its Decision on May 6, 2013, dismissing the remaining charges and incorporating by reference its April 30, 2013 Order.

7. In its April 30, 2013 Order, and as incorporated into the Commission's May 6, 2013 Decision, the Commission found and concluded, *inter alia*, the following:

- a. The Missouri Basic Property Insurance Inspection and Placement Program was created under Missouri law to offer property insurance to consumers who are entitled to insurance but are unable to obtain coverage through ordinary methods. Section 379.815.1 created the Missouri Property Insurance Placement Facility ("FAIR") to provide such insurance.
- b. The Commission found McCain's "basic scheme" to be as follows:
 - i. FAIR notified McCain and the property owner of the premium amount and deadline for payment. McCain informed the mortgagee, servicer, or other funding source that the premium due was more than the amount on the notice FAIR sent to him.

¹ All statutory references are to Revised Statutes of Missouri Supplement 2012 unless otherwise indicated.

- ii. The money in the escrow accounts maintained by mortgagees or servicers was the consumers' money, held by the mortgagee or servicer for, among other things, payment of insurance premiums for policies covering the mortgaged property.
 - iii. The mortgagee, servicer or other funding source would remit checks to McCain for the amount stated by McCain. The checks were made payable to "Missouri Property Insurance Placement Facility," "Missouri FAIR Plan," or some variation of those names.
 - iv. After he deposited those checks into his accounts, McCain would only remit a portion of the payment. Where FAIR agreed to accept installment payments, McCain would remit the first installment payment. If FAIR made no installment indication, McCain remitted only a portion of the annual premium due, with a request to change the payment schedule to installments.
 - v. McCain sometimes characterized the money he received, but did not remit to FAIR, as a "fee" for services performed. He spent this extra money on expenses of his business.
 - vi. In some cases, McCain's retention of premiums payable to FAIR resulted in lapse of insurance coverage for the consumers' properties.
 - vii. McCain admitted that he asked the funding sources for more money than was needed, yet kept a portion sent to him (and in some instances, what McCain was legally obligated to remit to FAIR), because his business was having cash flow problems.
 - viii. McCain, who did business under the fictitious name "Underwriters Service Agency," is liable for all of the actions of Underwriters or any of its employees and agents.
- c. Under Count I of the Complaint, McCain violated 20 CSR 700-1.140(1)(D) for failing to remit premium payments within 30 days of receipt and/or for retaining premium payments which resulted in a lapse due to nonpayment as to 14 consumers, and is therefore subject to discipline under § 375.141.1(2) for violating a Missouri insurance regulation.
- d. The Commission did not find violations of 20 CSR 700-1.140(1)(D) as to nine consumers under Count I.
- e. Under Count II, McCain violated § 375.051.2 because he did not exercise the high standard of care required of a fiduciary as to the Andersons. McCain's

check for the premium to FAIR for the Anderson consumers was dishonored because he previously spent the funds. Therefore, the Commission concluded cause exists under § 375.141.1(2) to discipline McCain's license for violating an insurance law.

- f. The Commission found that McCain is subject to discipline under § 375.141.1(2) as to Count III in that McCain charged an additional fee to two consumers without a written agreement or contrary to the terms of a written agreement, in violation of § 375.116 and 20 CSR 700-1.100.
- g. Regarding Count VIII, the Commission concluded that McCain improperly withheld (12 instances), misappropriated (23 instances), or converted money (21 instances) in the course of doing insurance business. McCain did not send in the full premiums to FAIR but rather only sent in a portion and used the remainder for other expenses. While under oath at the subpoena conference before the Director, McCain did not deny that he was "robbing Peter to pay Paul." The Commission concluded that McCain's license is subject to discipline under § 375.141.1(4).
- h. The Commission found that McCain demonstrated incompetence, untrustworthiness and financial irresponsibility and therefore, the Commission found that he is subject to discipline under § 375.141.1(8). Specifically, the Commission stated that:
 - i. "McCain's arrangement of padding his premium requests to the mortgagees and servicers, then remitting only a portion of the premium amounts due, evidences his unwillingness to function properly in his profession of insurance producer."
 - ii. "McCain's scheme was at its core, a dishonest and irresponsible ploy that betrayed the confidence of the consumers to whom he owed a responsibility of trust and honesty."

8. On June 11, 2013, the Commission certified its record of its proceedings to the Director pursuant to § 621.110.

9. Thereafter, the Director served McCain a Notice of Hearing, scheduling the disciplinary hearing for July 30, 2013, at the office of the Department, Room 530, 301 West High Street, Jefferson City, Missouri.

10. Carolyn H. Kerr served as the hearing officer. McCain appeared *pro se*. Mary S. Erickson appeared as counsel for the Department's Consumer Affairs Division ("Division").

Disciplinary Hearing Transcript ("Tr.") 5-6.

11. The Hearing Officer admitted the following exhibits offered by the Division: Exhibits 1 and 2, Notices of Hearing for the disciplinary hearing; Exhibit 3, the Commission's record of proceedings; Exhibit 4, Summary of the Commission's Finding of Cause to Discipline; and Exhibit 5, pages 64 to 65 of McCain's testimony under oath at the April 8, 2010 Subpoena Conference.

12. The Division called Carrie Couch, Chief of Investigations, as its witness. Couch testified that Exhibit 4 accurately reflected the Commission's findings and conclusions regarding Counts I, II, III, VIII and IX alleged by the Director in his Complaint and Motion for Summary Decision against McCain. *Tr.* 16-24.

13. Couch summarized the findings and conclusions of the Commission as illustrated in Exhibit 4 as follows:

- a. Count I: The Commission found cause to discipline under § 375.141.1(2) for McCain's violation of 20 CSR 700-1.140(1)(D) as to 14 consumers. The Commission did not find cause to discipline as to nine consumers.
- b. Count II: The Commission found cause to discipline under § 375.141.1(2) for McCain's violation § 375.051 regarding Michelle and Joyce Anderson.
- c. Count III: The Commission found cause to discipline under § 375.141.1(2) for McCain's violation of 20 CSR 700-1.100 regarding the Andersons and Djulan Harris.
- d. Count VIII: The Commission found cause to discipline McCain under § 375.141.1(4) for withholding, misappropriating or converting premiums in 23 instances. The Commission did not find cause as to one consumer.
- e. Count IX: The Commission found cause to discipline McCain under § 375.141.1(8) for demonstrating incompetence, untrustworthiness or financial irresponsibility regarding all alleged consumers except one.

Tr. 16 - 24; *Exhibit 3*, Commission's Certified Record (April 30, 2013 Order); *Exhibit 4*.

14. McCain testified on his own behalf, in relevant part, as follows:
- a. McCain testified repeatedly that his obligation was to the consumers, that he acted honorably and honestly with them, and that they are still his customers. *Tr.* 29 – 30; *et seq.* For example, McCain testified: “I will be a producer to respect the people that come to me for my service. That’s my obligations. That’s my wholehearted obligation.” *Tr.* at 31.
 - b. “Now you can discipline me for doing right by my consumer or discipline me for doing right – wrong by these statutes. . . . Now I violated these here, but I didn’t violate the people.” *Id.* at 30 – 31.
 - c. McCain asserted that Missouri Property Insurance (referred to by the Commission as FAIR) seized his bank account and the premium he did not pay. *Id.* at 32. McCain seemed to claim that by seizing his account, FAIR took money that belonged to him: “That’s where they took it from, put me at a hardship for paying my customers’ premium outside of these little regulations, which I’m sorry that I done.” *Id.* at 35.
 - d. Regarding the broker service agreements,² McCain stated that his customers knew there was a broker’s fee being charged because it would be defined on the invoice. “And all the regulation and all the wrong that you consider I have done, the most important thing to me is the consumer, and they always will be.” *Id.* at 36 – 37.
 - e. McCain responded to the hearing officer’s request for recommendation regarding disciplinary action as follows: “I think the disciplinary action that should be taken is as already served to me for the time I have been disciplined up until this point for the charges that were brought against me.” *Id.* at 45.

15. At the hearing, the Division, through Chief of Investigations Carrie Couch, recommended that McCain’s insurance producer license be revoked due to the numerosity and severity of McCain’s violations. *Tr.* 25.

16. After a briefing schedule issued by the Hearing Officer, the Consumer Affairs Division filed its Proposed Findings of Fact, Conclusions of Law and Order of Discipline on September 16, 2013.

17. On October 21, 2013, McCain filed a “Response to the Finding” and

² Such agreements are now known as producer service agreements. 20 CSR 700-1.100.

“Summarization and Understanding.” In this document, McCain responded to the Commission’s findings as outlined in its April 30, 2013 Order, as follows:

- a. McCain admitted that (1) he failed to pay premium within 30 days, and (2) he had insufficient funds in his account to cover the premium payment he made to FAIR on behalf of the Andersons.
- b. McCain’s response does not present admissible evidence or explain why it would be appropriate for him and his agency: to deposit checks for premiums made payable to the Missouri FAIR Plan into his accounts; only send a portion of the payment to FAIR when no installment agreement existed; use the premium he withheld from FAIR to run his business; or to allow policies to lapse. (See Commission’s April 30, 2013 Order, Findings ¶s 5-13.)
- c. Although McCain claimed that he had “verbal[] and written understanding” for charging a fee and that the agency retained the service fee and the payment was sent to FAIR, the Commission found that, except for one consumer, McCain’s consumers did not execute a Missouri Producer Service Agreement. *Tr.* 39-43. (See Commission’s April 30, 2013 Order, Finding ¶ 12.)

18. On November 7, 2013, the Consumer Affairs Division filed its Reply to Respondent McCain’s October 21, 2013 filing.

19. The Director hereby adopts and incorporates the Commission’s April 30, 2013 Order and May 6, 2013 Decision and does hereby find in accordance with the same. *Director of Dept. of Ins., Fin. Insts. & Prof. Regis’n v. James C. McCain, Jr.*, No. 12-1831 DI (Mo. Admin. Hearing Comm’n).

Conclusions of Law

20. 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.

21. Where an agency seeks to discipline a license, the Commission finds the predicate facts as to whether cause exists for the discipline, and then the agency exercises final decision-making authority concerning the discipline to be imposed. *State Bd. of Regis'n for the Healing Arts v. Trueblood*, 368 S.W.3d 259, 267-68 (Mo. App. W.D. 2012).

22. 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.

23. Section 375.141 provides, in 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:

* * *

(2) Violating any insurance laws, or violating any regulation, subpoena or order of the director or of another insurance commissioner in any other state;

* * *

(4) Improperly withholding, misappropriating or converting any moneys or properties received in the course of doing insurance business;

* * *

(8) Using fraudulent, coercive, or dishonest practices, or demonstrating incompetence, untrustworthiness or financial irresponsibility in the conduct of business in this state or elsewhere[.]

24. Title 20 CSR 700-1.140(1)(D) states:

Insurance producers shall remit all premium payments associated with a personal insurance policy to those persons entitled to them as soon as is reasonably possible after their receipt by the licensee, but in no event later than thirty (30) days after the date of receipt, provided, however, that premiums may be remitted at a later point in time if the licensee is so authorized under a written agreement between the licensee and the person legally entitled to the premiums. In no event, however, shall a licensee retain premium payments if to do so will result in the failure to obtain or continue coverage on behalf of an insured or prospective insured.

25. Section 375.051.2 states:

Any insurance producer who shall act on behalf of any applicant for insurance or insured within this state, or who shall, on behalf of any applicant for insurance or insured, seek to place insurance coverage, deliver policies or renewal receipts and collect premiums thereon, or who shall receive or collect moneys from any source or on any account whatsoever, shall be held responsible in a trust or fiduciary capacity to the

applicant for insurance or insured for any money so collected or received by him or her.

26. Section 375.116 provides, in relevant part:

3. No insurance producer shall have any right to compensation other than commissions deductible from premiums on insurance policies or contracts from any applicant for insurance or insured for or on account of the negotiation or procurement of, or other service in connection with, any contract of insurance made or negotiated in this state or for any other services on account of insurance policies or contracts, including adjustment of claims arising therefrom, unless the right to compensation is based upon a written agreement between the insurance producer and the insured specifying or clearly defining the amount or extent of the compensation. Nothing contained in this section shall affect the right of any insurance producer to recover from the insured the amount of any premium or premiums for insurance effectuated by or through the insurance producer.

4. No insurance producer shall, in connection with the negotiation, procurement, issuance, delivery or transfer in this state of any contract of insurance made or negotiated in this state, directly or indirectly, charge or receive from the applicant for insurance or insured therein any greater sum than the rate of premium fixed therefor and shown on the policy by the insurance company, unless the insurance producer has a right to compensation for services created in the manner specified in subsection 3 of this section.

27. Title 20 CSR 700-1.100 states:

(1) A producer service agreement may be used to establish compensation. The form set forth in Exhibit A is approved for use as specified in section 375.116, RSMo. Substantially equivalent forms may be used where they contain other provisions and do not affect the content as provided in Exhibit A. The producer service agreement, which is included herein, must be a separate document from any other form or contract.

(2) Each producer service agreement may cover multiple contracts of insurance negotiated or procured for the same insured or prospective insured where the insurance producer's compensation falls within the requirements of section 375.116.3, RSMo. Each insurance producer shall retain one (1) copy of the producer service agreement in the producer's office for three (3) years and deliver one (1) copy to the insured.

(3) The producer service agreement shall contain a list of the policies it covers.

28. As part of a contested case, the Commission determines if cause exists for the Director to discipline an insurance producer's license. §§ 621.110 and 374.051.2.

29. After a disciplinary hearing, before the Director or his designee, at which the licensee may present evidence regarding "the issue of appropriate disciplinary action," the Director issues a decision exercising his discretion regarding the appropriate level of discipline – up to and including a decision to revoke such license. §§ 374.051.2, 375.141.1 and .4, and 621.110, RSMo. Therefore, once the Commission found cause to discipline McCain's insurance producer license pursuant to § 375.141.1(2), (4), and (8), the question before the Director becomes determining the appropriate level of discipline to impose on McCain's insurance producer license.

30. 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).

Cause for Discipline

31. The Commission found that McCain violated Missouri's insurance statutes and regulations on multiple occasions. McCain withheld, misappropriated or converted consumers' premiums. The Commission also concluded that McCain's actions demonstrated incompetence, untrustworthiness and financial irresponsibility. Specifically, the Commission concluded:

- a. "McCain's arrangement of padding his premium requests to the mortgagees and servicers, then remitting only a portion of the premium amounts due, evidences his unwillingness to function properly in his profession of insurance producer."

- b. "McCain's scheme was at its core, a dishonest and irresponsible ploy that betrayed the confidence of the consumers to whom he owed a responsibility of trust and honesty."

Commission's April 30, 2013 Order, p. 43. *Director of Dept. of Ins., Fin. Insts. & Prof. Regis'n v. James C. McCain, Jr.*, No. 12-1831 DI (Mo. Admin. Hearing Comm'n).

32. The Director specifically adopts the Commission's conclusions of law in its Order and makes the following additional conclusions of law based upon the evidence presented at the disciplinary hearing and in McCain's Response to the Finding.

33. By establishing the procedural and legal guideposts for this proceeding, §§ 621.110 and 374.051.2, do not allow for the re-adjudication of the facts and conclusions of the Administrative Hearing Commission. Thus, McCain's agreement, disagreement or attempts to offer new explanations or evidence as to the facts and conclusions of the Commission, as he did during the hearing and in his "Response to the Finding" and "Summarization and Understanding," filed on October 21, 2013, are misplaced. The Commission has the exclusive function of conducting the contested case on the Complaint and making findings of fact and conclusions of law as to the cause for discipline.

34. The Director does not and will not readjudicate the facts or the conclusions of law as found by the Commission. The Commission's findings of fact and conclusions of law finding cause for discipline of McCain's license are set forth in its April 30, 2013 Order and incorporated in the Commission's May 6, 2013 Decision, which the Hearing Officer admitted into evidence as part of Exhibit 3. *Tr.* 7-8.

35. McCain's denials at this stage do not change the Commission's conclusion that McCain is subject to discipline under § 375.141.1(8) because his conduct demonstrated

incompetence, untrustworthiness and financial irresponsibility.

36. McCain's contention that he has already been disciplined is not supported by the evidence. The formal proceedings instituted against him were not discipline, but rather, the procedural process to determine if he is subject to discipline. After the finding of cause by the Commission, it is within the Director's discretion, after the disciplinary hearing, to order appropriate discipline.

37. McCain's unsupported attempts to contradict or challenge the facts and conclusions of the Commission do not present evidence as required under § 621.110 as to the issue of appropriate discipline.

38. The Director concludes that McCain's numerous and serious violations of Missouri's insurance laws are not offset by his conclusory and self-serving testimony that while he violated the laws, he did not violate his consumers with whom he acted honorably and honestly. The evidence, as well as the Commission's Findings and Conclusions, do not demonstrate that he acted honorably and honestly with the consumers, the mortgagees/servicers, and FAIR. Furthermore, McCain's unsupported assertions reflect that he has neither taken responsibility for his actions, acknowledged the violations of Missouri's insurance laws that he and his agency committed, nor appreciated the significance of those violations.

39. Furthermore, McCain's statements during the hearing and in his October 21, 2013 response support revocation as the appropriate discipline because they fundamentally reveal that McCain, as a licensed insurance producer, does not know the legal requirements for accepting service fees in connection with insurance policies. Indeed, the Commission set forth in detail the

provisions and circumstances for when and how a producer may charge a "service fee,"³ and, yet, McCain still does not grasp the statutory and regulatory requirements.

40. McCain's actions support the conclusion that it is in the interest of the protection of the citizens of this state to revoke McCain's license.

41. The nature, numerosity, and severity of the aforementioned conduct, McCain's continued failure to acknowledge or understand his non-compliance with Missouri's insurance laws, and his placement of blame on others besides himself, demonstrate the propriety of revoking McCain's Missouri individual insurance producer license pursuant to § 375.141.1(2), (4), and (8).

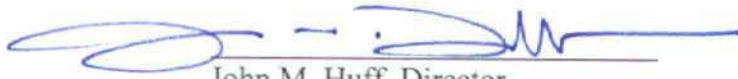
42. This Order is in the public interest.

ORDER

Based on the foregoing findings and conclusions, and the evidence presented, the resident individual insurance producer license of **JAMES C. MCCAIN, JR.** (License No. 0287172) is hereby **REVOKED**.

SO ORDERED, SIGNED AND OFFICIAL SEAL AFFIXED THIS 30TH DAY OF DECEMBER, 2013.




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

³ Tr. 39-40; see also the Commission's April 30, 2013 Order.

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of December, 2014, a copy of the foregoing Findings of Fact, Conclusions of Law and Order of Discipline was served by certified mail, No. 7009-0080-0000-1907-7165, to the following:

James C. McCain, Jr.
615 Rock Hill Road
St. Louis, MO 63119

And by hand-delivery to:

Mary E. Erickson
Counsel for Consumer Affairs Division



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