

NOTICE
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2015 IL App (5th) 140518-U

NO. 5-14-0518

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

RODNEY A. MISIAK,

Plaintiff-Appellant,

v.

ANDREW BORON, Director of the
Department of Insurance, and THE
DEPARTMENT OF INSURANCE,

Defendants-Appellees.

) Appeal from the
) Circuit Court of
) Madison County.
)
) No. 13-MR-295
)
)
) Honorable
) Donald M. Flack,
) Judge, presiding.

JUSTICE CATES delivered the judgment of the court.
Presiding Justice Schwarm and Justice Stewart concurred in the judgment.

ORDER

- ¶ 1 *Held:* The decision of the Director of the Department of Insurance to revoke plaintiff's insurance producer's license and assess the costs of the hearing against him is affirmed; the decision of the Director of the Department of Insurance to impose a civil forfeiture of \$10,000 against plaintiff is reversed and vacated.
- ¶ 2 Defendant, Director Andrew Boron (Director), on behalf of the Illinois Department of Insurance (Department), issued an order revoking the Illinois insurance producer's license of plaintiff Rodney A. Misiak (Misiak). Misiak requested a hearing to review the decision of the Director. Subsequently, the hearing officer recommended that:

(1) the Director's previous order revoking Misiak's license be sustained; (2) Misiak be assessed a civil forfeiture in the amount of \$10,000; and (3) the costs of the hearing, in the amount of \$748, be assessed against Misiak. Thereafter, the Director issued an order adopting, in full, the hearing officer's findings of fact, conclusions of law and recommendations. Misiak sought administrative review in the circuit court of Madison County. The trial court affirmed the decision of the Department. Misiak now appeals claiming that the order of revocation of his insurance producer's license, the civil forfeiture, and the costs of the hearing imposed against him were error. For the following reasons, we affirm the Director's decision to revoke Misiak's insurance producer's license and assess the costs of the hearing against him, but reverse and vacate the decision of the Director to impose a \$10,000 civil forfeiture.

¶ 3

BACKGROUND

¶ 4 On August 2, 2012, the Director issued an order of revocation against Misiak's insurance producer's license pursuant to section 500-70 of the Illinois Insurance Code (Code) (215 ILCS 5/500-70 (West 2012)). This order was issued in part because of a letter received by the Department of Insurance Regulatory Unit on May 30, 2012, from Misiak's counsel. The letter stated that Misiak had been convicted of four counts of felony domestic battery. Misiak had already been the subject of an investigation that began around October of 2008. That investigation was initiated because the Department had received a letter from Golden Rule Insurance Company (Golden Rule), indicating that Misiak had been terminated for cause, and that his field underwriting techniques were under investigation. (Insurers in Illinois are required to notify the Director when an

insurer terminates the "employment, contract, or other insurance business relationship with a producer." 215 ILCS 5/500-85 (West 2012).) Up until the notification that Misiak had pled guilty to the four felonies, however, the Department had taken no disciplinary action against Misiak.

¶ 5 After receiving the letter regarding Misiak's plea of guilty to the felonies, the Department resumed its investigation. Upon confirming that Misiak had been convicted of four counts of felony domestic battery, the Director determined that the felonies served as grounds for revocation of Misiak's license pursuant to section 500-70(a)(6) of the Code (215 ILCS 5/500-70(a)(6) (West 2012)). The allegations made regarding Misiak's conduct while working for Golden Rule were also deemed sufficient to revoke Misiak's license under section 500-70(a)(8) of the Code (215 ILCS 5/500-70(a)(8) (West 2012)). The Director chose to revoke Misiak's insurance producer's license, but did not impose a civil penalty against Misiak, even though the statute allowed for imposition of such a fine. See 215 ILCS 5/500-70(a) (West 2012).

¶ 6 On August 27, 2012, the order of revocation was stayed until a hearing was held to determine the reasonableness of the Director's action pursuant to section 500-70(b) (215 ILCS 5/500-70(b) (West 2012)). On July 25, 2013, an administrative hearing was conducted. Thomas Anderson (Anderson), an investigator for the Department, Lynne Condellone (Condellone), a consumer complainant, Bonnie Brunton (Brunton), an investigator with Golden Rule Insurance Company, and Misiak were the only witnesses who testified at the hearing.

¶ 7 Anderson, the investigator who had confirmed Misiak's criminal convictions and who had been assigned the Golden Rule inquiry in 2008, testified on behalf of the Department. Anderson testified that Misiak was charged with, and pled guilty to, four counts of domestic battery.¹ Anderson identified several exhibits concerning Misiak's domestic battery convictions, all of which were admitted into evidence.

¶ 8 Anderson, along with Condellone and Brunton, also testified for the Department concerning Misiak's conduct while working as an insurance producer with Golden Rule and the Assurant Health insurance company. One of the allegations against Misiak was that he was switching consumers from Assurant Health to Golden Rule in order to increase his commissions, a procedure called "churning." Hundreds of pages of documents were generated during Anderson's investigation, and attempts were made to contact many of Misiak's customers. The few customers Anderson was able to speak with complained that Misiak had placed their electronic signatures onto policies without their consent and some of the policy information had been completed improperly. Contained within Anderson's investigative file was an email, however, from Assurant Health that indicated an internal investigation had been conducted and that the results "ha[d] not supported the allegations but refuted them." Misiak's counsel objected to

¹Domestic battery, when charged pursuant to 720 ILCS 5/12-3.2(a)(2), is a misdemeanor under Illinois law. Misiak, however, previously pled guilty to a count of domestic battery in 2005, which enhanced the penalty for these charges to a Class 4 felony. 720 ILCS 5/12-3.2(b).

much of the evidence tendered by Anderson, claiming the documentation was incomplete and that Anderson's testimony contained hearsay statements. On cross-examination by Misiak's counsel, Anderson admitted that he only attempted to speak with Golden Rule policyholders, and did not attempt to contact any of Misiak's other customers.

¶ 9 Condellone, one of Misiak's clients, testified that Misiak mishandled her applications for insurance with Assurant Health and Golden Rule by failing to disclose prior medical conditions that she suffered from, which affected her ability to obtain insurance. She testified that Golden Rule had declined her application for insurance, while Assurant Health had accepted both she and her son.

¶ 10 Brunton, an investigator with Golden Rule, testified that she began an investigation into Misiak's insurance practices because he had received two similar consumer complaints in a short period of time. As a part of her investigation, she reviewed 62 policies written for Golden Rule by Misiak. Based upon her review, Brunton became concerned that Misiak was churning policies. She sent questionnaires to 62 customers, but only 16 responded. Five customers responded favorably, indicating they had no issues with Misiak. The 11 remaining policyholders reported that they had not, personally, placed their electronic signatures on the applications for insurance, but a large majority indicated that they had authorized Misiak to sign for them. Brunton testified, over objection, that this practice violated Golden Rule's policies and procedures. Brunton further testified, over objection, that a few of the policyholders complained to her that Misiak had filled out their applications improperly, and/or that the customers did not get the plan they had signed up for.

¶ 11 Misiak testified that since 2006, he had worked with several insurance companies, including Assurant Health and Golden Rule. As of the date of the hearing, Misiak had written approximately 5,000 policies, and had only had problems with Golden Rule. According to Misiak, most of his work came from referrals online, and he had very few personal meetings with clients. Misiak stated that his experience with Golden Rule was different than what he was accustomed to with other companies' underwriting procedures. Misiak had received a packet of information from Golden Rule, but no training was provided by the company on their policies and procedures. Misiak believed the main problem with Golden Rule was that it charged consumers within 24 to 48 hours after an electronic signature application had been submitted. The industry standard that he was familiar with was to charge a customer 10 days after a consumer had been approved for insurance. Misiak admitted that he probably had not explained Golden Rule's charging procedures to his clients as well as he could have. Other than this issue, Misiak denied mishandling insurance applications, and further denied signing up consumers for insurance without their authorization. He explained that he had moved customers from Assurant Health to Golden Rule because the premiums were lower. Misiak had explanations in response to the various consumer complaints made against him, and had written Anderson years earlier denying any misconduct. These letters were contained in Anderson's file and Anderson had admitted receiving this correspondence from Misiak.

¶ 12 Also at the hearing, in support of his good character, Misiak introduced several letters from members of the community who had known him for many years. A few of the letters were from people who knew Misiak as a result of his work with student

athletes. These athletes often needed assistance obtaining health insurance because the smaller schools did not provide the insurance they needed. The head athletic trainer at Lindenwood University-Belleville wrote that Misiak had "provided consultation to a large portion of [their] 800 student athletes." The trainer went on to say that Misiak's participation with the student-athletes made him, "in [their] eyes, an irreplaceable part of the Lindenwood-University-Belleville Sports Medicine Team." The former athletic director for McKendree College also wrote a letter of support.

¶ 13 Addressing the felony convictions, Misiak testified that he was reacting to his fiancé threatening him with a fireplace poker in one hand, while holding their baby in the other. Misiak put up his right arm, grabbed the child with his left hand, and shoved his fiancé away. After shoving his fiancé, Misiak then ran into the baby's room, put the child in the baby swinger, closed the door to the bedroom, and argued with his fiancé, who was located on the other side of the door. This lasted for three to five minutes. After the argument subsided, Misiak went to take a shower. When Misiak came out of the shower, he noticed flashing lights outside of his home. There were also two police officers in the house. Ultimately, Misiak was arrested and charged with four counts of domestic battery, to which he pled guilty. He promptly notified the Department of his felony convictions.

¶ 14 Misiak admitted that he had been convicted of misdemeanor domestic battery in 2005 as a result of an altercation with the same woman. Misiak testified, however, that he had not had any issues since these two incidents, nor had he had any issues of this nature with anyone other than the mother of his child.

¶ 15 At the conclusion of the evidence, the hearing officer took the matter under advisement. On September 30, 2013, the hearing officer issued his recommendation that Misiak's license be revoked because the factors in aggravation of Misiak's conduct outweighed those that had been considered in Misiak's favor. The hearing officer further recommended that Misiak be assessed a civil forfeiture in the amount of \$10,000, and the costs of the hearing based on the fact that he had been convicted of felony domestic battery and had engaged in a pattern of fraudulent and dishonest business practices. The hearing officer concluded that Misiak had incorrectly filled out applications, and had submitted applications without the consent of consumers or without their proper signatures.

¶ 16 On October 9, 2013, the Director adopted the findings of fact, conclusions of law and recommendations of the hearing officer in their entirety, and entered an order sustaining the revocation of Misiak's insurance producer's license, ordering the imposition of a \$10,000 forfeiture, and \$748 in costs associated with the hearing.

¶ 17 Misiak was required to file a motion for a rehearing or a motion for the reopening of a hearing within 10 days of the date the Director's order was mailed. Misiak's motion was not timely filed, and was therefore denied by the Department. Misiak then filed a complaint for administrative review in the circuit court of Madison County. The trial court entered an order affirming the decision of the Department. This appeal followed.

¶ 18 **STANDARD OF REVIEW**

¶ 19 In administrative review cases, judicial review extends to all questions of law and fact presented by the entire record, and the reviewing court may not consider new or

additional evidence. 735 ILCS 5/3-110 (West 2014). Accordingly, it is the administrative agency's decision that is reviewed, not the determination of the circuit court. *Ahmad v. Board of Education of the City of Chicago*, 365 Ill. App. 3d 155, 162 (2006). The standard of review to be applied to an administrative decision depends upon whether the question presented is one of fact, law, or a mixed question of fact and law. *Exelon Corp. v. Department of Revenue*, 234 Ill. 2d 266, 272 (2009). According to the Administrative Review Law, a court sitting in review assumes that the findings and conclusions of the administrative agency on questions of fact are *prima facie* true and correct. 735 ILCS 5/3-110 (West 2014). Thus, when reviewing an administrative agency's factual findings, the court will not reweigh the evidence or substitute its judgment for that of the agency. *Exelon Corp.*, 234 Ill. 2d at 272. Instead, the court will only disturb an administrative agency's factual findings when such findings are against the manifest weight of the evidence. *Kouzoukas v. Retirement Board of the Policemen's Annuity & Benefit Fund of the City of Chicago*, 234 Ill. 2d 446, 463 (2009). On the other hand, an administrative agency's conclusion on a question of law is reviewed *de novo*. *Exelon Corp.*, 234 Ill. 2d at 273.

¶ 20 A mixed question of fact and law concerns the legal effect of a given set of facts. *Exelon Corp.*, 234 Ill. 2d at 273. In other words, a mixed question of fact and law is presented where the issue is whether the rule of law as applied to the established facts is or is not violated. *Id.* An administrative agency's conclusion on a mixed question of fact and law is reviewed under the clearly erroneous standard. *Kouzoukas*, 234 Ill. 2d at 463.

"An administrative decision is clearly erroneous where the reviewing court is left with the

definite and firm conviction that a mistake has been made." *Id.* at 464. Finally, this court has the authority to affirm the decision of an administrative agency on any basis in the record. *Younge v. Board of Education of the City of Chicago*, 338 Ill. App. 3d 522, 530 (2003).

¶ 21 In this case, the Director's decision to revoke Misiak's license on the basis of his domestic battery convictions presents a mixed question of fact and law as it involves the legal effect of a set of facts, *i.e.*, the circumstances of his domestic violence convictions *vis-à-vis* the revocation of Misiak's insurance producer's license. The same is true regarding the Director's decision to revoke Misiak's license on the basis of his conduct as an insurance producer. Thus, this case presents a mixed question of fact and law to which the clearly erroneous standard of review is applied. As such, the Director's decision will be affirmed unless this court is left with the definite and firm conviction that a mistake has been committed. *Outcom, Inc. v. Illinois Department of Transportation*, 233 Ill. 2d 324, 337 (2009).

¶ 22 Further, an administrative agency's decision to impose a penalty will be affirmed unless its decision amounts to an abuse of discretion. *Siddiqui v. Illinois Department of Professional Regulation*, 307 Ill. App. 3d 753, 763 (1999). An administrative agency abuses its discretion when it imposes a penalty that is overly harsh in view of the mitigating circumstances or is unrelated to the purpose of the statute. *Id.*

¶ 23 ANALYSIS

¶ 24 Misiak contends on appeal that the Department erred in revoking his insurance producer's license. Misiak asserts that the Department failed to consider certain

mitigating factors related to his domestic battery convictions. For example, Misiak argues that the Department failed to consider that the felony charges arose from a personal relationship, and did not involve members of the general public. Misiak also contends that the hearing officer improperly admitted hearsay evidence and testimony concerning Misiak's conduct as an insurance producer, and gave greater weight to the testimony of Condellone and Brunton.

¶ 25 The Department counters that all of the factors for review of a felony conviction were properly considered, and, as such, the Department's determination that Misiak's license should be revoked was appropriate. Additionally, the Department argues that the hearing officer did not abuse his discretion when making evidentiary rulings, and that even if the hearing officer abused his discretion, Misiak has forfeited his right to raise such issues or, alternatively, has failed to show unfair prejudice as a result of the hearing officer's decisions.

¶ 26 Our analysis begins with the consideration of Misiak's felony convictions. Under section 70 of the Illinois Insurance Code, when an insurance producer is convicted of a felony, the Director may suspend, revoke, place on probation, or refuse to renew the license of an insurance producer. See 215 ILCS 5/500-70(a) (West 2012). Section 70 also allows for the imposition of a civil penalty. 215 ILCS 5/500-70(a), (d) (West 2012). Upon a finding of a felony conviction, the Director has the latitude to take any combination of the aforesaid actions. See 215 ILCS 5/500-70(a), (d) (West 2012).

¶ 27 Misiak argues that his conviction was related to a personal matter. Essentially, Misiak attempts to minimize the severity of his conduct by claiming that the charges

arose from a dispute with his then fiancé, as opposed to a member of the general public. The facts, as described by Misiak, however, do not reveal an inconsequential argument. The charging documents surrounding this quarrel allege that Misiak struck, bit, shoved, and kicked his fiancé in the home. These acts, without a doubt, are violent in nature, and, clearly constitute domestic violence. The Illinois Administrative Code requires consideration of the nature and severity of the criminal conduct that occurred. We cannot agree with Misiak that the Department's decision to revoke his insurance producer's license was clearly erroneous in light of the violent acts that formed the basis for his conviction.

¶ 28 The remainder of Misiak's arguments as they pertain to the applicability of the standards set forth in section 2403.30 are without merit. The record reveals that the hearing officer took into consideration each of the factors set forth in section 2403.30 of the Illinois Administrative Code. Accordingly, we cannot say that the Director's decision to sustain the revocation of Misiak's license on the basis of his felony convictions was clearly erroroneous. Therefore, the Department's decision to revoke Misiak's insurance producer's license under section 500-70(a)(6) for a felony conviction is affirmed.

¶ 29 Although our decision to affirm the Director's decision to revoke Misiak's license on the basis of his felony convictions is dispositive of the licensing issue, we will briefly address the Director's decision to revoke Misiak's license under section 500-70(a)(8) because Misiak argues that the Director erred in imposing a civil forfeiture of \$10,000, as well as the hearing costs against him. The Department has not addressed this issue before this court.

¶ 30 In this case, the Director determined that Misiak demonstrated incompetence, untrustworthiness and financial irresponsibility in completing insurance applications on behalf of customers, and in obtaining their signatures on applications. These findings are not supported by sufficient evidence in the record. Rather, the record reveals that Misiak had been employed as an insurance producer since 2002, and had sold over 5,000 insurance policies by the time of the hearing. Of those 5,000 insurance policies, only a handful of complaints had been made, all of which involved the same company, Golden Rule. The most recent complaint stemmed from an insurance application that had been completed in 2008, and there was no evidence of any complaint since that time. Only one customer, Condellone, testified about Misiak's conduct during the hearing, and that complaint pertained to Misiak's failure to correctly record information on the insurance application. Other complaints were introduced through the testimony of Anderson and Brunton, which were admitted over hearsay objections, and remain contested before this court. The record also contains evidence demonstrating that Misiak was indeed qualified to sell insurance. Former colleagues wrote letters on behalf of Misiak stating that he treated his customers in a professional and ethical manner. Additionally, the former athletic director of a well-respected local university wrote on Misiak's behalf, indicating that Misiak was entrusted to manage a comprehensive student-athlete insurance program, and that customer service was greatly enhanced due to his efforts. Also, it is noteworthy that the Department did not discipline Misiak as a result of the Golden Rule letter and Anderson's subsequent investigation until it learned of the felony convictions. Based upon the evidence in the record, we conclude the hearing officer's recommendation to

impose a \$10,000 civil forfeiture was an abuse of discretion under these circumstances. The hearing officer gave no explanation for the additional imposition of this penalty. Clearly, when the Director initially became aware of the felony convictions, and had the Department's investigation before him, he ordered only a revocation of Misiak's insurance producer's license. While we recognize our limited role in the review of this administrative decision, our deference "does not mean, however, *** that all administrative decisions are sacred and not within reach of the courts." (Internal quotation marks omitted.) *Gruwell v. Department of Financial & Professional Regulation*, 406 Ill. App. 3d 283, 295 (2010). In our view, the imposition of a \$10,000 penalty was overly harsh and an abuse of discretion in light of the mitigating circumstances. Therefore, we vacate the civil forfeiture imposed in the amount of \$10,000.

¶ 31 The final issue Misiak's complains of is the assessment of costs for the hearing in the amount of \$748. In this regard, the Director has the authority to assess the costs of a hearing against any party. See 50 Ill. Adm. Code 2402.270 (2002). We cannot find, under the circumstances, that the imposition of costs was an abuse of discretion in this instance.

¶ 32 For the reasons stated above, we affirm that portion of the order as affirmed by the circuit court revoking Misiak's insurance producer's license. We further affirm the assessment of \$748 in hearing costs against Misiak. Finally, we reverse and vacate that portion of the order requiring Misiak to pay a civil forfeiture in the amount of \$10,000.

¶ 33 Affirmed in part; reversed and vacated in part.