

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF COMMERCE

In the Matter of Insurance Agent License of Mark D. Clementson FINDINGS OF FACT CONCLUSIONS AND RECOMMENDATION

The above-entitled matter came on for a Prehearing Conference before Administrative Law Judge Richard C. Luis on September 15, 1995 at the Office of Administrative Hearings in Minneapolis. The record closed on September 15, 1995.

Philip H. M. Grove, Assistant Attorney General, 1200 NCL Tower, 445 Minnesota Street, St. Paul, MN 55101 appeared on behalf of the Minnesota Department of Commerce ("Department"). There was no appearance by or on behalf of Mark D. Clementson ("Licensee", "Respondent").

NOTICE

Notice is hereby given that, pursuant to Minn. Stat. § 14.61 the final decision of the Commissioner of Commerce shall not be made until this Report has been made available to the parties to the proceeding for at least ten days, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the Commissioner. Exceptions to this Report, if any, shall be filed with Commissioner Jim Ulland, Minnesota Department of Commerce, 133 East 7th Street, St. Paul, MN 55101.

STATEMENT OF ISSUE

Whether the insurance agent license of Mark D. Clementson should be suspended or revoked, or whether Clementson should be subject to a civil penalty, for the reasons stated in the Notice of and Order for Prehearing Conference and Order to Show Cause issued in this matter on August 3, 1995?

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. On August 3, 1995, a Notice of and Order for Prehearing Conference and Order to Show Cause in this matter was mailed to Mark D. Clementson at his last known address - 220 Fifth Street NE, Box 201, Milaca, MN 56363-0201. The Notice was sent by both Certified Mail (#15834) and First Class Mail.

2. On August 17, 1995, the Return Receipt of Certified Mail for "Article Number 15834" was received at the office of the sender, Assistant Attorney General Philip H. M. Grove. The Return Receipt bears the purported signature of "Mark Clementson" and a stamped "Date of Delivery" of August 15, 1995.

3. Neither the Administrative Law Judge nor Mr. Grove were contacted, orally or in writing, by Mr. Clementson or anyone on his behalf as of the intended time of the Prehearing Conference (1:30 p.m. on September 15, 1995).

4. On September 15, 1995, the Administrative Law Judge delayed the scheduled start of the Prehearing Conference by twenty minutes. The Prehearing Conference concluded at 2:15 p.m. There was no appearance by or on behalf of Mr. Clementson.

5. The Notice of and Order for Prehearing Conference and Order to Show Cause issued in this matter states, in relevant part:

"If Respondent fails to attend or otherwise appear at the prehearing conference in this matter after having been served with a copy of this Order, Respondent shall be deemed in default and the allegations or issues set forth herein may be deemed proved and Respondent's insurance agent license may be revoked or suspended, effective October 31, 1994, and/or a civil penalty may be imposed against Respondent without further proceedings."

6. The Notice of and Order for Prehearing Conference and Order to Show Cause issued on August 3, 1995 contains, among others, the following factual allegations:

a) The Respondent's Insurance Agent License expired on October 31, 1994 and has not been renewed. He was employed as an insurance agent at all times relevant here, through October 24, 1994;

b) In June or July of 1994, the Respondent received a cash payment of approximately \$202.00 from A.D., a customer of the insurance agency where Clementson was employed, that was intended to be a premium payment on an auto insurance policy issued through the agency. Mr. Clementson did not submit the funds to his employer and A.D.'s insurance was canceled;

c) On October 5, 1994, Mr. Clementson told his employer he had left the cash given him by A.D. at his sister's home inadvertently. When contacted, Clementson's sister denied any knowledge of the cash;

d) On October 14, 1994, the Respondent received \$300.00 in cash from customer W.R. for a premium payment on his homeowner's policy issued through Clementson's employer. This money was never submitted to the employer, who discovered the problem after W.R. notified the employer he had received a notice of nonpayment of the premium;

e) An internal audit conducted by Clementson's former employer on November 14, 1994 revealed other instances of mishandling of customer funds, involving customers J.C., G.C., M.B.K., D.S. and R.S.;

f) Mr. Clementson failed to obtain insurance coverage as committed or failed to complete the application process for coverage with respect to customer R.S. (a different person than the R.S. noted above) on at least two occasions; and

g) Mr. Clementson, after being served with a written Order from the Commissioner of Commerce to reply to allegations against him by June 28, 1995, failed to provide a response by that deadline.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Commerce have jurisdiction in this matter pursuant to Minn. Stat. §§ 14.50 and 60K.11.

2. The Notice of and Order for Prehearing Conference and Order to Show Cause issued on August 3, 1995 was proper and the Department of Commerce has complied with all relevant substantive and procedural requirements of law and rule.

3. Mark D. Clementson, having made no appearance at the Prehearing Conference, is in default, and it is appropriate to take as true the allegations of the Notice of and Order for Prehearing Conference and Order to Show Cause, pursuant to Minn. Rule 1400.6000.

4. The Respondent has improperly withheld, misappropriated or converted to his own use money belonging to policy holders within the meaning of Minn. Stat. § 60K.11, subd. 1 (xi).

5. The Respondent has engaged in acts demonstrating that he is untrustworthy, financially irresponsible or otherwise incompetent or unqualified to act as an insurance agent within the meaning of Minn. Stat. § 60K.11, subd. 1 (iii).

6. The Respondent has engaged in fraudulent, deceptive or dishonest practices within the meaning of Minn. Stat. § 60K.11, subd. 1 (x).

7. The Respondent has engaged in fraudulent or dishonest business practices in connection with an insurance business, which under Minn. Stat. § 72A.20, subd. 18 (b) constitute unfair and deceptive acts and practices. Violation or failure to comply with the provisions of Minn. Stat. § 72A.20 violates Minn. Stat. § 60K.11, subd. 1 (v).

8. The Respondent failed to comply with a request for information from the Department within the time specified in violation of Minn. Stat. § 45.027, subd. 1 (a). Violation or failure to comply with the provisions of Minn. Stat. § 45.027 violates Minn. Stat. § 60K.11, subd. 1 (v).

9. Violations of Minn. Stat. § 60K.11, subd. 1, as specified in Conclusions 4-8, constitute grounds under Minn. Stat. § 60K.11, subd. 2 for the Commissioner of Commerce to issue an Order requiring a Licensee to show cause why any or all of the following should not occur: (1) license revocation or suspension; (2) censuring of a licensee; or (3) the imposition of a civil penalty.

The Notice of and Order for Prehearing Conference and Order to Show Cause issued in this matter reads, in relevant part:

“The hearing in this matter will be held for the purpose of determining whether the allegations contained herein are true, and if so, whether the Commissioner should revoke or suspend Respondent’s insurance agent license effective October 31, 1994, and/or impose a civil penalty, pursuant to Minn. Stat. § 45.027, subds. 6 and 7 (1994), and §60K.11 (1994). Respondent shall appear at this hearing to show cause why Respondent should not be subject to discipline and/or a civil penalty as set forth above”.

10. Minn. Stat. § 60K.11, subd. 4 reads:

“If a license lapses, is surrendered, withdrawn, terminated, or otherwise becomes ineffective, the commissioner may institute a proceeding under this subdivision within two years after the license was last effective and enter a revocation or suspension order as of the last date on which the license was in effect, or impose a civil penalty as provided for in section 45.027, subdivision. 6.”

Minn. Stat. § 45.027, subd. 6 authorizes the Commissioner of Commerce to impose a civil penalty, not to exceed \$2,000.00 per violation, on a person who violates any law, rule or order related to the duties and responsibilities entrusted to the Commissioner.

11. It is appropriate that the result of taking as true the allegations of the Notice of and Order for Prehearing Conference and Order to Show Cause is that the insurance agent license of Mark D. Clementson be revoked, effective October 31, 1994, the date on which it expired, or the imposition of a civil penalty up to \$2,000.00 for each violation of law specified in the Notice of and Order for Prehearing Conference and Order to Show Cause.

12. The taking of disciplinary action against the insurance agent license of Mark D. Clementson is in the public interest.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED: that the Commissioner of Commerce revoke the insurance agent license of Mark D. Clementson, effective October 31, 1994.

Dated this 27th day of September, 1995

RICHARD C. LUIS
Administrative Law Judge

Reported: Taped

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the Agency is required to serve its final decision upon each party and the Administrative Law Judge by First Class Mail.

MEMORANDUM

Under subdivision 4 of Minn. Stat. § 60K.11, the Commissioner can either revoke or suspend a lapsed insurance agent license or impose the civil penalties authorized by Minn. Stat. § 45.027, subd. 6. See Conclusion 10. He cannot do both. If Mr. Clementson was still an active licensee, the Commissioner would have the option to revoke (or suspend) the license and to impose a monetary penalty. However, the potential disciplinary actions against a lapsed license are less severe. It is noted that Minn. Stat. § 60K.11, subd. 4 is the statute acknowledged to be applicable in this circumstance by counsel for the Department at the hearing. A revocation of licensure would be in the public interest to protect the public to the greatest degree authorized by law from Mr. Clementson's obvious financial responsibility.

The Notice issued to the Respondent alleges a wider range of discretion in discipline for the Commissioner, implying authority to take action against the license and to impose a civil penalty, in apparent conflict with the above-noted (and quoted) Minn. Stat. § 60K.11, subd. 4. In such a case, the statute controls. The fact the Notice overstated the potential consequences against Mr. Clementson's license and against the licensee personally does not render the Notice defective. If anything, the Respondent should have been prompted to treat attendance at the Prehearing Conference as a matter of utmost importance. However, the Respondent, who was notified of the Prehearing Conference properly, chose not to appear or to contact the Administrative Law Judge or counsel for the other party to the case. Under these circumstances, he is in default and must bear the consequences as detailed above.

RCL