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FSCO File No. AB064-2009

Superintendent of Financial Services

Regarding a hearing concerning the suspension or revocation of the life insurance agent licence of Warren Rutgers

AND the Insurance Act, R.S.O. 1990, c.1.8, as amended, particularly Part XIV

Amended DECISION

Introduction:

Pursuant to a Notice of Hearing dated April 24, 2009, an Advisory Board was duly appointed under section 393 (9) of the Act. The hearing was conducted on June 15, 2009.

The allegations were set out in Schedule "1" as attached.

The report of the Advisory Board is attached.

Findings of Fact:

The Advisory Board found that Mr. Rutgers failed to maintain appropriate errors and omissions insurance and that he had no satisfactory explanation for failing to respond to the Financial Services Commission of Ontario (the Commission). I hereby adopt the findings of fact of the Advisory Board.

Recommendation of the Advisory Board

The Advisory Board recommended that Mr. Rutgers' licence be "suspended immediately until further order, provided that Mr. Rutgers be permitted to apply to lift the suspension upon filing proof of his completion of the Advocis Code of Professional Conduct course, filing proof of appropriate errors and omissions insurance and filing the written agreement of a fully licence life insurance agent to act in a supervisory role during the first twenty four months of any lifting of the suspension."

The Advisory Board set out the factors it considered in recommending this

penalty. These included Mr. Rutgers' failure to maintain errors and omissions insurance, his initial promise to surrender his licence and his failure to do so, and his failure to communicate with the Commission over a period of approximately six months. The Advisory Board also stated "the refusal or neglect of Mr. Rutgers to participate in the Pre-Hearing Conference suggests a certain cavalier attitude on his part."

The Advisory Board did not note any mitigating factors.

Decision:

The Advisory Board has found that Mr. Rutgers failed to maintain errors and omissions insurance and failed to respond to the Commission.

Maintenance of errors and omissions insurance is necessary to protect the public. Errors and omissions insurance coverage is provided on a "claims made" basis, and accordingly claims can be made regardless if the agent is or is not currently doing business. These claims would only be covered if an insurance policy is in force. Errors and omissions insurance is required by Regulation 347/04. The absence of this coverage places Mr. Rutgers' clients at risk in the event of a claim.

Agents are required to attest on their licence applications to having errors and omissions insurance and to maintain it. Accordingly this requirement is plainly acknowledged by agents when they apply for their licences.

The system of regulation requires agents to respond to their regulators. This requirement is both necessary for an efficient and effective regulatory system that can be maintained at a reasonable cost to the industry while at the same time serving its purpose of protecting the public. Responding to a regulator is also an acknowledgment of the authority of the regulator. Accordingly the Insurance Act requires persons who hold licences to facilitate an examination.

The Advisory Board report notes that Mr. Rutgers had advised the Commission that he would be surrendering his licence and failed to do so. In spite of follow up by Commission staff about errors and omissions insurance and the fact that it was plain from the Notice that the failure to have errors and omissions insurance was the subject of the hearing, there is no indication that Mr. Rutgers took steps to obtain the insurance that he is required to have. If Mr. Rutgers had such insurance it would not have been necessary for the Advisory Board to make a recommendation in this regard.

A few previous cases have some similarities - a failure to maintain errors

and omissions insurance as well as a failure to facilitate an examination. Penalties ordered have ranged from licence revocation to licence suspension. Generally where there was a finding of lack of suitability as a result of the failure to maintain errors and omissions insurance and the failure to facilitate an examination, revocation of the agent's licence has been ordered. In other circumstances, a period of suspension has been ordered.

The Advisory Board has not concluded that Mr. Rutgers is unsuitable to be a life insurance agent, and accordingly it recommended a period of suspension rather than revocation of his licence.

The Advisory Board recommended a period of suspension that would be lifted by order once Mr. Rutgers complied with certain conditions. One condition is to provide evidence of errors and omissions insurance. Errors and omissions insurance can be purchased at any time, and accordingly could result in a period of suspension measured in hours or at most a few days. Another condition is that Mr. Rutgers be subject to supervision of another agent for a period of twenty four months following the completion of his period of suspension. This condition has an indeterminate effect on the period of suspension since it depends both on whether he knows other agents who might be willing to be his supervisor and how quickly Mr. Rutgers files an acceptable supervision agreement with the Superintendent. The third condition to complete a specific professional education course depends on actions of a third party offering the course, as well as Mr. Rutgers participation in that course, and accordingly the period of suspension could vary as a result of the actions of the course provider. I believe that there needs to be more certainty surrounding the minimum the period of suspension, as well to avoid the possibility that the specific course recommended by the Advisory Board ceases to be offered or is offered on an infrequent schedule.

Since the Advisory Board has noted that Mr. Rutgers has not placed any policies of insurance since October 2008, leaving a decision to Mr. Rutgers to obtain insurance and request that his licence suspension be lifted has the effect of exposing Mr. Rutgers' clients to risk because of the nature of a claims made policy as well as saving him the cost of insurance until he is ready to begin selling insurance again. Accordingly, I believe that it is necessary to order that Mr. Rutgers provide evidence of errors and omissions insurance satisfactory to the Superintendent no later than July 31, 2009.

The nexus between the period of supervision and the failure to maintain errors and omissions insurance is not well explained in the Advisory Board report. If the Advisory Board had concerns about Mr. Rutgers suitability as an insurance agent and considered a period of supervision necessary

to mitigate risk in lieu of recommending revocation of his licence, they did not so state. Since a period of supervision is a means to mitigate risk, it is necessary to be able to draw a direct connection to the risk being mitigated. Accordingly I am not prepared to order a period of supervision.

The purpose of penalties is to correct behaviour of the agent and to set an example for the industry. Considering that Mr. Rutgers did not maintain errors and omissions insurance as he attested to in his licence application, his failure to obtain errors and omission insurance in spite of the follow up by Commission staff, his apparent failure to obtain errors and omissions insurance by the time of the hearing when this was the subject of the hearing, his proposal to surrender his licence and his failure to do so, and his failure to respond to Commission staff, I believe that the minimum period of suspension should be a period of nine months. This is neither the least nor the harshest penalty that has been imposed.

The Advisory Board has recommended the completion of the Advocis Code of Professional Conduct course. Professional education is not a penalty since continuing education is required by law for life insurance agents. I am reluctant to order the completion of a specific course since there is no assurance when it might be offered, whether it continue to be offered and whether there are equivalent alternatives. However, I understand that the Advisory Board has identified a need for correction of Mr. Rutgers behaviour as a means to mitigate risk and accordingly and prepared to order completion of a course dealing with professional ethics, responsibilities and compliance acceptable to the Superintendent.

I hereby order that the life insurance agent licence of Mr. Warren Rutgers be suspended commencing August 1, 2009 until all the following conditions are met, and for a minimum period of nine months:

1. Mr. Rutgers provide evidence of errors and omissions insurance acceptable to the Superintendent of Financial Services by July 31, 2009.
2. Mr. Rutgers select a course dealing with professional ethics, responsibilities and compliance and seek approval from the Superintendent of Financial Services of the course chosen by September 30, 2009.
3. Mr. Rutgers pay for the course.
4. Mr. Rutgers provide evidence of satisfactory completion of the course to the Superintendent of Financial Services by July 31, 2010.

To ensure there is no misunderstanding, failure to comply with any of the dates set out in the preceding conditions would result in the conditions not being met and the suspension would not be lifted.

Original decision dated at Toronto, this 3rd day of July 2009.



Executive Director,
Licensing and Market Conduct Division
by delegated authority from
the Superintendent of Financial Services

SCHEDULE 1

The allegation referred to in the Notice of Opportunity for Hearing is as follows:

1. Rutgers demonstrated his untrustworthiness to transact the business of insurance per section 8(d) of Regulation 347/04 by:
 - a. Failing to maintain errors and omissions insurance as is required by regulation 13 of regulation 347/04
 - b. He is not amenable to regulation and repeated efforts have been made to contact Rutgers to which he has not responded.