

Superintendent of Financial Services

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

AND REGARDING a hearing concerning the suspension or revocation of the life insurance agent licence of Azucena Garcia

DECISION AND ORDER

Introduction:

A Notice of Opportunity for Hearing dated April 1, 2011 (the Notice) informed Ms Garcia of allegations against her and the opportunity for a hearing before an Advisory Board. The Notice advised Ms Garcia that if a hearing was not requested, the Superintendent would make a decision based on information in the possession of the Financial Services Commission of Ontario (the Commission). Ms Garcia was also advised that such decision could include suspension or revocation of her licence as a life insurance agent. A hearing was requested and an Advisory Board hearing was conducted on August 22, 2011.

The allegations are set out in Appendix 1.

The report of the Advisory Board is attached to this decision.

Findings of Fact

The Advisory Board found the first allegation to be established, stating that “the Commission has proven that [Ms] Garcia failed to maintain her errors and omissions insurance for two periods”. The Advisory Board found the second allegation to be established stating that “the Commission has proven that [Ms] Garcia borrowed money from clients on at least three occasions”. The Advisory Board did not find the third allegation to be established. I hereby adopt the findings of the Advisory Board.

Recommendation of the Advisory Board

The Advisory Board recommended:

1. "Ms Garcia's licence as an insurance agent be suspended for a period of 12 months;
2. Ms Garcia select a course dealing with professional ethics, responsibilities, and compliance and seek approval from the Superintendent of Financial Services of the course chosen;
3. Ms Garcia pay for the course.
4. Ms Garcia provide evidence of satisfactory completion of the course to the Superintendent of Financial Services."

The Advisory Board noted previous cases that it considered in making its recommendations. The Advisory Board noted that it was recommending a suspension of nine months for the findings related to errors and omissions insurance and three months for the findings related to borrowing from clients.

The Advisory Board set out the factors it considered in making its recommendations. These included considering Ms Garcia's explanation that she was experiencing financial hardship and had not conducted any business during the period that her insurance coverage had lapsed. The Advisory Board noted that this was not an adequate explanation.

The Advisory Board noted that the amounts borrowed were less than in other disciplinary cases, and that the larger amount borrowed occurred a decade ago in circumstances that did not appear to have recurred. Accordingly the Advisory Board concluded that "[Ms] Garcia probably can be trusted to not enter into similar loan transactions involving clients."

Decision:

The Advisory Board has found the first and second allegations to be established. The Advisory Board's recommendations suggest that Ms Garcia can be rehabilitated as an agent by a course related to her professional responsibilities and period of suspension.

I note that the Advisory Board has made reference to the case when recommending a period of suspension of nine months for the findings related to errors and omissions insurance. I note that the Board made reference to the case, the case and the case when recommending a period of suspension of three months and licence conditions, for the findings of untrustworthiness.

The purpose of penalties is to correct behaviour of the agent and to set an example for the industry. Considering that Ms Garcia did not maintain errors and omissions insurance on two occasions and her failure to obtain errors and omission insurance promptly in response to the follow up by Commission staff, I agree that the period of suspension with respect to errors and omissions insurance should be a period of nine months. This is neither the least nor the harshest penalty that has been imposed for such findings.

Unlike the explicit requirement to maintain errors and omissions insurance set out in Regulation 347/04, there is no explicit prohibition against borrowing money from clients. However there is always the risk that loans made to agents under financial duress may not be repaid. In addition, clients' personal information is being misused for a purpose other than making insurance recommendations.

The two cases cited, the _____ case and the _____ case, involve substantial amounts of money in which clients were not repaid. The penalties ordered in these two cases differed due to the circumstances. In this case, the amounts borrowed are relatively small and the passage of time has obscured some of the details. Since the purpose of penalties is to correct the behaviour of the agent and to set an example for the industry, I believe that a meaningful penalty is required to avoid creating the impression that smaller loans from clients are deemed more acceptable than larger ones. There is no reasonable way to make such a distinction on quantum.

In assessing an appropriate penalty, I have also considered what weight to place on repayment of loans. It is my view that a repayment is a mitigating factor that should be considered in assessing whether an agent is capable of rehabilitation. I also considered that Ms Garcia received both a recent loan as well as a loan about ten years ago. Accordingly it is not appropriate to consider the passage of time as a mitigating factor. I also considered that in the absence of a specific prohibition, it is possible that Ms Garcia might not be aware that such behaviour would be considered a demonstration of untrustworthiness. If an agent's behaviour is egregious, it would not be appropriate to give some benefit of the doubt in this regard.

However, in this case, I believe that some benefit of the doubt is appropriate and that the penalty imposed should be at the minimum level appropriate to achieve the objective of being considered a meaningful penalty in the industry as well by Ms Garcia. I believe that a suspension of three months reflects that objective. While the Advisory Board did not explicitly state its reasoning for the reduction in penalty from that imposed in the _____ case, its recommendation is consistent with the

reasoning which I have stated.

Professional education is not a penalty since continuing education is required by law for life insurance agents. I understand that the Advisory Board has identified a need for correction of Ms Garcia's behaviour as a means to mitigate risk and accordingly and am prepared to order completion of a course dealing with professional ethics, responsibilities and compliance acceptable to the Superintendent.

ORDER

I hereby order the following suspension and conditions on Ms Azucena Garcia's licence as an insurance agent:

1. Ms Garcia's licence as an insurance agent be suspended for a period of twelve months commencing January 1, 2012.
2. Ms Garcia select a course dealing with professional ethics, responsibilities and compliance and seek approval from the Superintendent of Financial Services of the course chosen by February 1, 2012.
3. Ms Garcia pay for the course.
4. Ms Garcia provide evidence of satisfactory completion of the course to the Superintendent of Financial Services by January 1, 2013. Such course shall be in addition to the continuing education required by Regulation 347/04.

Dated at Toronto, this sixteenth day of November 2011

Grant Swanson
Executive Director, Licensing and Market Conduct
by delegated Authority from
Superintendent of Financial Services

Schedule 1

The following allegations were set out in the Notice:

1. Garcia has failed to maintain appropriate errors and omissions insurance, as is required by Section 13 of Regulation 347/04.
2. Garcia has demonstrated untrustworthiness to transact the insurance agency business for which the licence was granted, in breach of section 8(d) of Regulation 347/04
3. As a result of the above violations, she is not suitable to maintain her licence, pursuant to section 4(1) (i) of the Regulation.