

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
INSURANCE DIVISION**

In the Matter of the Petition of) Case Nos. INS 08-06-001
)
)
MARK E. GELLINGER, Licensee) **PROPOSED ORDER**

HISTORY OF THE CASE

On June 9, 2008, the Insurance Division (Division) issued a Notice of Proposed Action to Mark E. Gellinger (Licensee), proposing to suspend Licensee's insurance producer license.¹ Licensee requested a hearing on the Notice, and the matter was referred to the Office of Administrative Hearings (OAH) on July 2, 2008. The hearing was originally set for October 1, 2008.² On August 11, 2008, a prehearing conference was held to reset the hearing date and to discuss other aspects of the case. Hearing was rescheduled for October 23, 2008.

On October 9, 2008, I signed a Protective Order in the case to assure the confidentiality of the information provided by the Oregon Department of Revenue in this case.

Hearing was held at the scheduled time in Salem, Oregon, with ALJ Rick Barber presiding. Licensee appeared and testified. The Division was represented by Judith Anderson of the Department of Justice. Mark Noble of the Department of Revenue (Revenue) testified for the Division. The record closed at the end of the hearing on October 23, 2008.

ISSUE

Whether the Division must suspend Licensee's insurance producer license at the request of the Department of Revenue. ORS 305.385.

EVIDENTIARY RULINGS

Exhibits A1 through A7 were admitted into evidence without objection. In addition to the exhibits, there are Procedural documents that are part of the documentary

¹ The initial Notice mistakenly stated that the license would be revoked. The Division issued a modified Notice, but did not change the date or the caption of the Notice. I have included *both* versions of the Notice as part of Document P1. The one including the word "revoke" on page 1 is superseded and not at issue.

² The hearing was rescheduled to give Licensee a chance to find an attorney.

record of this case. The Division's list of Procedural documents includes P1 through P5. To their list I add two additional pages of P1 (the revised Notice) and P6, the Protective Order.

FINDINGS OF FACT

1. On September 15, 2006, Licensee was issued an insurance producer's license to sell life and health products. His license is active. The license expires on December 31, 2008. (Ex. A1).

2. Licensee was previously self-employed as a dentist from 1984 to 2005. For several years he did not file required tax returns for personal income tax, withholding taxes, and Tri-Met tax, and he did not pay the taxes involved. (Test. of Licensee).

3. On February 21, 2007, Revenue issued Dstraint Warrants and Writs of Execution to Licensee, seeking to obtain the missing filings and the taxes owed. (Ex. A3). Licensee received the documents and understood them. Licensee has not contested his failure to file the returns or his failure to pay the taxes. (Test. of Licensee). Representatives of Revenue have contacted Licensee on several occasions on the phone, and have attempted to visit him personally to discuss the matter. Attempts to collect the taxes have included garnishments of banks and other possible debtors of Licensee, but have not been successful in collecting the debt. (Test. of Noble).

4. On March 10, 2008, Revenue sent a Notice of Intent to Suspend License to Licensee, informing him of the amount of taxes owed to the State of Oregon, giving him 15 days to pay the amount or make arrangements to pay the amount, and informing him that failing to do so would lead to the suspension of his insurance producer's license. The document was received by Licensee on March 11, 2008. (Ex. A5). In April 2008, Licensee spoke with a person at Revenue about resolving the issues, but has not talked to that person since April and has not made the filings or paid the amounts owed.

5. On May 19, 2008, Revenue sent a notice to the Division, requesting that Licensee's producer license be suspended pursuant to ORS 305.385.

6. On June 9, 2008, the Division sent a Notice of Proposed Action to Licensee, informing him of the suspension of his license pursuant to ORS 305.385. The initial notice mistakenly indicated the Division was seeking revocation of his license; a new notice was provided to Licensee revising the language to remove the revocation issue. (P1).

CONCLUSION

The Division must suspend Licensee's insurance producer license at the request of the Department of Revenue. ORS 305.385.

OPINION

The Division seeks to suspend Licensee's producer license at the request of the Revenue. On May 19, 2008, Revenue requested suspension of the license pursuant to ORS 305.385, which states in part:

(1) Upon request of the Department of Revenue, an agency issuing or renewing a license to conduct a business, trade or profession shall annually, on or before March 1, supply the department with a list of specified licenses issued or renewed by the agency during the preceding calendar year.

* * * * *

(4)(a) *If the department determines that any licensee or provider has neglected or refused to file any return or to pay any tax and that such person has not filed in good faith a petition before the department contesting the tax, and the department has been unable to obtain payment of the tax through other methods of collection, the Director of the Department of Revenue may, notwithstanding ORS 118.525, 314.835 or 314.840 or any similar provision of law, notify the agency and the person in writing*

(b) Upon receipt of such notice, the agency shall refuse to reissue, renew or extend any license, contract or agreement until the agency receives a certificate issued by the department that the person is in good standing with respect to any returns due and taxes payable to the department as of the date of the certificate.

(c) *Upon the written request of the director and after a hearing and notice to the licensee as required under any applicable provision of law, the agency shall suspend the person's license if the agency finds that the returns and taxes have not been filed or paid and that the licensee has not filed in good faith a petition before the department contesting the tax and the department has been unable to obtain payment of the tax through other methods of collection.* For the purpose of the agency's findings, the written representation to that effect by the department to the agency shall constitute prima facie evidence of the person's failure to file returns or pay the tax. The department shall have the right to intervene in any license suspension proceeding.

(d) Any license suspended under this subsection shall not be reissued or renewed until the agency receives a certificate issued by the department that the licensee is in good standing with respect to any returns due and taxes payable to the department as of the date of the certificate.

(Emphasis added).

The language of the statute leaves the Division with no discretion in this matter. If the Division receives a notice from Revenue, and if the criteria of the statute are met, then the producer's license must be suspended. My review in this case is to determine whether the criteria of the statute have been met.

The returns and taxes have not been filed or paid. The first criterion of the statute is for the Division to determine if the returns and taxes have been filed or paid. By statute, a written representation from Revenue is sufficient to prove this factor. That representation has been made in this case, and Licensee has admitted that he has failed to file the returns and pay the taxes.

Licensee has not contested the tax. Licensee testified that he had not contested the taxes with Revenue or in any other forum, so there is no good faith contest of the tax.

Revenue has been unable to obtain payment. The evidence shows the efforts and attempts Revenue has made to collect the unpaid taxes and obtain the appropriate filings from Licensee. Representatives of Revenue have contacted Licensee on several occasions on the phone, and have attempted to visit him personally to discuss the matter. Attempts to collect the taxes have included garnishments of banks and other possible debtors of Licensee, but have not been successful in collecting the debt.

I conclude that the criteria set forth in the statute have been met, and that the Division is required by ORS 305.385 to suspend Licensee's insurance producer license until it receives a certificate of good standing from Revenue, as contemplated in subsection (d) of that statute.

PROPOSED ORDER

Therefore, I propose:

That the Notice of Proposed Action (as revised to remove references to revocation) be **AFFIRMED**.

DATED this 5th day of November



Rick Barber, Administrative Law Judge
Office of Administrative Hearings

NOTICE OF OPPORTUNITY FOR ADMINISTRATIVE REVIEW

NOTICE: Pursuant to ORS 183.460, the parties are entitled to file written exceptions to this proposed order and to present written argument concerning those exceptions to the Director. Written exceptions must be received by the Department of Consumer and Business Services within 30 days following the date of service of this proposed order. Mail exceptions to:

Mitchel D. Curzon
Chief Enforcement Officer
Oregon Insurance Division
PO Box 14480
Salem, OR 97309-0405

CERTIFICATE OF SERVICE

On 5th day of November 2008, I mailed the foregoing Proposed Order in Reference No. **0806001**.

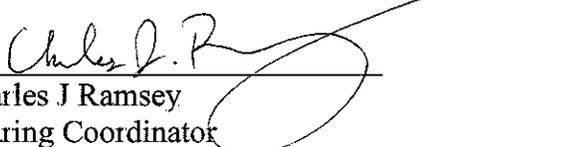
BY FIRST CLASS MAIL:

Mark E Gellinger
1669 Oak Street
Lake Oswego, OR 97034-4747

Judith Anderson AAG
General Counsel Division
Assistant Attorney General, DOJ
1162 Court Street NE
Salem OR 97301-4096

VIA ELECTRONIC MAIL:

Mitchel Curzon
Chief Enforcement Officer
Insurance Division
Department of Consumer and Business Services



Charles J Ramsey
Hearing Coordinator