

14-1059

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

VINCENT J. KING,

Petitioner,

v.

C.A. No.: 13-AA-95

INSURANCE COMMISSIONER OF WEST VIRGINIA,
ERIE INSURANCE PROPERTY & CASUALTY COMPANY,
and GARLOW INSURANCE AGENCY INCORPORATED

Respondents.

DECISION ON APPEAL

The 1st day of August, 2014, came Petitioner, pro se; and came the Insurance Commissioner of West Virginia by his General Counsel, Andrew R. Pauley, and Associate Counsel, Jeffrey C. Black; and came Erie Insurance Property & Casualty Company (hereafter "Erie"), by two of its counsel, Jill Cranston Rice and Matthew J. Perry; and came Garlow Insurance Agency Incorporated (hereafter "Garlow") by its counsel, Scott L. Summers; all pursuant to notice of oral argument previously filed and served.¹ Now, the Court having heard those arguments, and further having reviewed *Petitioner's Brief in Support of Administrative Appeal*; as well as *Response by the West Virginia Offices of the Insurance Commissioner to Brief in Support of Petitioner's Appeal*; *Erie Insurance Property & Casualty Company's Response to Petitioner's Brief in Support of Appeal*; *Respondent Garlow Insurance Agency Incorporated's Response to Petitioners' Brief in Support of Administrative Appeal*; and *Petitioner's Reply in Support of Administrative Appeal*; and also having conducted its own research and analysis,

¹Neither Erie nor Garlow presented oral argument but the submissions of all parties have been reviewed and considered herein.

makes the following findings of fact, conclusions of law, and renders this *Decision On Appeal*.

THE COURT'S FINDINGS OF FACT

1. This appeal arises out of the *Findings of fact, Conclusions of Law and Final Order Denying Hearing Request of Petitioner* entered by the Commissioner on the 10th day of July, 2013. It is noted, however, that Petitioner does not appeal the denial of the requested hearing.² Instead, Petitioner appeals, inter alia, certain of the findings and conclusions based upon the record as it then existed.
2. The Petition for Appeal alleging that there was no basis in the record for those findings and conclusions was timely filed on the 9th day of August, 2013.³
3. Thereafter, by cover dated the 4th day of September, 2013, the Commissioner tendered "the lower level record".⁴ Included with the Court's copy were two post appeal affidavits also dated the 4th day of September, 2013.⁵ The affidavits, each signed by Investigator, Larry Rosen, obviously were not a part of the record on the date of the Commissioner's "final" Order, but were instead prepared after the filing of Petitioner's appeal noting that certain of the Commissioner's findings and conclusions were unsupported by the record. Current Associate Counsel, Jeffrey Black, acknowledges that the affidavits were made post-appeal but asserts that they were prepared from "extensive notes", contemporaneous with the events described therein, while the matter was still properly before the Commissioner

²Petition at page 6.

³There has not been any cross appeal by Respondents Erie or Garlow.

⁴The September 4, 2013, letter was signed by former Associate Counsel, Larry Conrad.

⁵Record at page 1036 -1040. The original of the cover letter to the Court indicates that

(OIC Response at f.n. 3. Page 6).⁶ No such notes appear in the record supplied, nor has the record been supplemented to include the same.⁷ Nor is there anything to indicate that the Commissioner reviewed such notes in rendering his decision if, indeed, they exist. Accordingly, the Court finds that the affidavits were not a part of the record appealed from and should properly be disregarded.

4. The Court has reviewed the record, in light of the statutory bases for mandated withdraw of approval (W.Va. Code 33-6-9), and finds that:
 - (a) The RPE violates Chapter 33;⁸
 - (b) The RPE contains misleading clauses;⁹
 - (c) Even the title, itself, “Rate Protection” Endorsement - is misleading;¹⁰
 - (d) Purchase of the RPE is being solicited by deceptive marketing;¹¹

copies to counsel, including Petitioner, were specifically “w/o enclosures”.

⁶Mr. Black was substituted for Mr. Conrad by Notice filed simultaneous with the *Response By The West Virginia Offices of the Insurance Commissioner to Brief in Support of Petitioner’s Appeal*, on February 14, 2014.

⁷Petitioner noted at oral argument that, even as of that late date, none had been produced. Likewise, no privilege log or redaction list has been supplied.

⁸According to the testimony of Cody Cook, Erie V.P., RPE trumps any discount, including the mandated Age 55 provisions of W.Va. Code 33-20-18. (Record at pages 551-553).

⁹Erie’s RPE begins: “Your policy premium will remain the same unless one or more of the changes listed in paragraphs 1. or 2. below occur: ...”. (Record at page 625). The Record reflects that the RPE actually results in an immediate change in premium regardless of changes that may also be triggered by any of the subsequent events listed. (Record at pages 404, 485-487)

¹⁰The Court concurs with Petitioner that the obvious connotation to be taken from the name “Rate **Protection**” Endorsement is that it shields the insured from rate increases. Less obvious is the fact that it likewise prevents decreases (or that traditional rates are have been trending downward). Record at pages 474-476, 478-479 and 808.

¹¹The Court has reviewed the Agent Marketing Aid (Record at page 720) and compared it to the brochure intended for the consumer (Record at page 718), together with Vice President

(e) The benefits provided by the RPE are unreasonable in relation to the premium charged;¹²

(f) The RPE, as it presently exists, is not in the public interest.¹³

Any one of those reasons would mandate withdraw of approval but in this instance each and every one of them apply.

5. When initially seeking approval for use, Erie represented to the Commissioner that its RPE would be strictly “optional”¹⁴ and would be “rate neutral”¹⁵ whereas the greater weight of the evidence here is to the contrary. While Erie asserts its belief that Garlow has a general business practice of first offering the RPE¹⁶, there is no direct evidence to refute Petitioner’s contention that RPE was added to his

Cook’s testimony with respect thereto (Record at pages 468-470, 481-483, 489-490, 490-491 and 534-535) and finds the distinctions to be dispositive of this issue. See Conclusion No. 8 *infra*.

¹²Petitioner has pointed out that RPE resulted in a 40% increase in his personal liability rate (compare Annual Continuation Notice and Amended Declarations at Record pages 1003 and 1006). The Record also indicates that, overall, RPE has resulted in a net gain to ERIE (Record at pages 454 - 457). The Court has not found any cost-benefit analysis or any other entry in the Record to support the Commissioner’s finding that the benefits provided by RPE are reasonable in relation to the increased liability premium charged.

¹³Compare with historical Preferred Tier decreases which would otherwise be applied at Record Page 808.

¹⁴Record at Pages 618 and 728.

¹⁵Record at pages 195, 733 and 740. For significance of representations made to the Commissioner at the time of filing, see *Joy Technologies Inc v. Liberty Mut. Ins. Co.*, 187 W.Va. 742, 421 S.E.2d 493 (1992). For testimony regarding representations made here see 496-498.

¹⁶Petitioner’s Request for Hearing before the Commissioner also sought the issuance of subpoenas both for Sue Stanley, the agent who conducted the transaction, and for Phil Garlow, owner of Garlow Insurance Agency, Inc. Both the subpoenas and the hearing were denied. There is no testimony by either witness in the record.

policy without his consent and the Garlow Activity Log entries¹⁷ support Petitioner's specific account rather than Garlow's putative standard operating procedure.¹⁸ With respect to the initial representation that RPE would be "rate neutral", the only evidence before the Commission during administrative review, and now before the Court in this appeal, is that RPE had been a profit center in each of the states in which it had previously been implemented and the same has been true, thus far, in the State of West Virginia.¹⁹

6. Therefore, Erie's initial filing for approval was misleading and the Commissioner's finding to the contrary²⁰ is clearly wrong. For the same reason, the Commissioner's corollary finding that Erie properly disclosed its intentions concerning the use of its RPE product²¹ is also clearly wrong.
7. The Commissioner found that "it is unfair and premature to attempt to extrapolate information concerning rates filed on a prospective nature to Mr. King's specific situation without having enough credible data to ascertain trends and effects on

¹⁷Record at pages 1009 and 1010.

¹⁸Even the latent interview affidavits (Finding No. 3 above) do not suggest any effort to interview the agent directly involved, or any other Garlow/Erie customer, and the Court has otherwise searched in vain for any basis in the record to support the Commissioner's finding that the lack of consent in this case was a "simple misunderstanding" (Commissioner's Finding No. 12).

¹⁹Record at Pages 446-460.

²⁰Commissioner's Finding No. 11.

²¹Commissioner's Finding No. 18.

rates”²². The only evidence contained in the record in that regard is the testimony of Mr. Cook, who believed that, to be statistically accurate, would require 3 - 5 years of data, but that the data here reflected a net gain in premium.²³ Unequivocally, on the date of the Commissioner’s *Findings of Fact, Conclusions of Law and Final Order Denying Hearing Request of Petitioner*, RPE had been approved, even in West Virginia, more than three years.²⁴ Therefore, the aforesaid finding that “it is unfair and premature to attempt to extrapolate information...” is wholly contrary to the record evidence, and is clearly wrong.

8. In terms of marketing, the record consists of just two documents, one directed to Erie’s agents²⁵ and the other to the consumer²⁶. The Agent Marketing Aid touts the “key selling points” and also “how the endorsement benefits you” (the agent), including that “[s]table pricing minimizes shopping, [i]ncreases retention, [creates a] more stable loss ratio, and [i]ncrease[s] referrals”.²⁷ The Consumer Brochure begins by stating that “...the cost of just about everything is on the rise these days”

²²Commissioner’s Finding No. 29. Conversely, at oral argument, counsel for the Commissioner complained that Plaintiff sought to “unwind something that’s been in effect four or five years and affected thousands of policyholders in this state” (transcript of hearing at 41).

²³Record at pages 459-460.

²⁴Approval effective July 1, 2010 (Commissioner’s Finding No. 5 and Record at page 441); Commissioner’s decision rendered herein July 10, 2013 (Order at page 20).

²⁵Record at page 720.

²⁶Record at page 718.

²⁷Record at page 720.

and offers an opportunity to lock insurance rates²⁸ but, deceptively, neither the Agent Marketing Aid nor the Consumer Brochure discloses that RPE also prevents rate decreases²⁹, that Erie's traditional preferred rates have been trending down³⁰, or that RPE precludes application of statutorily required discounts³¹. The Commissioner's finding that there was "no deceptive marketing shown"³² is clearly wrong.

9. In rendering his Conclusions of Law, the Commissioner attempted to determine the "spirit and intent" of the Legislature and to read certain statutes "*in pari materia*".³³ This Court finds that those are judicial functions and that, in reaching Conclusion Nos. 10, 11 and 12, the Commissioner exceeded his authority.
10. Petitioner has also appealed the Commissioner's Conclusion No. 7. It has not been briefed by any of the Respondents. At oral argument, Petitioner made mention of Respondents' unison silence, but counsel for the Commissioner again declined to address it.³⁴ The Court finds that its content was personal opinion and not the proper basis of a Conclusion of Law.

²⁸Record at page 718.

²⁹Record at pages 551-553.

³⁰Record at page 808.

³¹Record at pages 551-553.

³²Commissioner's Finding No. 12. See also footnote 11 *supra*.

³³Conclusions of Law Nos. 10, 11 and 12.

THE COURT'S CONCLUSIONS OF LAW

11. The West Virginia Supreme Court has stated:

... Inherent in the Commissioner's statutory duty to oversee policy provisions is his/her corresponding obligation to reject those policies that do not comply with West Virginia Insurance Law. Specifically, W.Va. Code §33-6-9 (1957) directs that

[t]he commissioner shall disapprove any such form of policy, application, rider or endorsement or withdraw any previous approval thereof:

(a) If it is in any respect in violation of or does not comply with this chapter.

(b) If it contains or incorporates by reference any inconsistent, ambiguous, or misleading causes, or exceptions and conditions which deceptively affect the risk purported to be assumed in the general coverage of the contract.

(c) If it has any title, heading, or other indication of its provisions which is misleading;

(d) If the purchase of such policy is being solicited by deceptive advertising.

(e) If the benefits provided therein are unreasonable in relation to the premium charged.

(f) If the benefits provided therein are not sufficiently broad to be in the public interest.

(emphasis by the Court). Thus it is apparent that the Legislature has vested the Commissioner with sufficient authority to reject policy provisions which do not clearly and accurately inform the insured as to the coverage provided by such

³⁴Transcript of oral argument at pages 33 and 35 -54.

policy.

Despite the Commissioner's regulatory powers, we are mindful from the policy language at issue in this case, that two marginally viable practices continue to accompany the incorporation of insurance policy exclusions ... Therefore, we urge the Commissioner to review proffered policies of insurance to ensure that coverage exclusions are not so incognito as to be deceptive or misleading as to the true scope of coverage available to the insured.

Second, the Commissioner is obligated to uphold the law of this State and to reject any policy, endorsement, and the like '[i]f it is in any respect in violation of or does not comply with this chapter. W.Va. Code 33-6-9(a). ...

Mitchell v. Broadnax, 208 W.Va. 36, 557 S.E.2d 882 at 885, (2000), limited on other grounds, *Findley v. State Farm Mut. Ins. Co.*, 213 W.Va. 80, 576 S.E.2d 807 (2002).

12. W.Va. Code 33-20-18 is unequivocal

(a) Any rates, rating schedules or rating manuals for the liability, personal injury protection and collision coverages of a motor vehicle insurance policy submitted to or filed with the Insurance Commissioner shall provide for an appropriate reduction in premium charges as to such coverages when the principal operator or spouse on the covered vehicle is an insured who is fifty-five of age or older

Erie's RPE violates W.Va. Code 33-20-18.

13. Administrative Findings are to be accorded deference **except** where the reviewing Court finds them to be clearly wrong, Syl. Pt. 1, *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996). (emphasis added here), and such findings will be overturned when there is no substantial evidence to support them, Syl. Pt. 3, *Chesapeake and Potomac Telephone Company of West Virginia v. Public Service Commission of West Virginia*, 171 W.Va. 494, 300 S.E.2d 607 (1982). Any order of an administrative body based upon a findings of fact which is contrary to the evidence or is based upon mistake of law, will be reversed. *Billings v. Civil*

Service Comm'r, 154 W.Va. 688, 178 S.E.2d 801 (1971).

14. An administrative body is vested with only that power specifically granted to it by the Legislature. In other words, “[a]n administrative agency is but a creature of statute, and has no greater authority than [that] conferred under the governing statutes”. *State ex rel Hoover v. Berger*, 199 W.Va. 12, 16, 483 S.E.2d 12 (1997) (citations omitted). Accord Syl. Pt. 3, *Appalachian Reg'l Health Care, Inc. v. West Virginia Human Rights Comm'n*, 180 W.Va. 303, 376 S.E.2d 317 (1988). (“Administrative agencies and their executive officers are creatures of statute and delegates of the Legislature. Their power is dependent upon statute, so they must find within the statute warrant for the exercise of any authority which they claim. They have no general or common-law powers but only such as have been conferred upon them by law expressly or by implication. Syl. Pt. 3, *Mountaineer Disposal Service, Inc v. Dyer*, 156 W.Va. 766, 197 S.E.2d 111 (1973).”). Here, the Commissioner’s duty is to enforce Chapter 33 (W.Va. Code 33-2-3) whereas determination as to Legislative intent and his reading of statutes *in pari materia*, exceeded his statutory powers.
15. “... An agency’s intrusion, however slight and seemingly innocuous, into processes that are regarded as exclusively judicial in nature exceeds the scope of that agency’s legislative grant of authority and violates the separation of powers doctrine. Simply stated, where there is a direct and fundamental encroachment by one branch of government into the traditional powers of another branch of government, this violates the separation of powers doctrine contained in Section

1, Article V, of the West Virginia Constitution.” *State of West Virginia ex rel State Farm Mut. Ins. Co., v. Marks*, 230 W.Va. 517, 741 S.E.2d 75 (2012). Here, the Commissioner’s effort to interpret the intent of the Legislature, and to read statutes *in pari materia*, constituted an unconstitutional invasion of the power of the courts.³⁵

16. The Court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:
- (1) In violation of constitutional or statutory provisions; or
 - (2) In excess of statutory authority or jurisdiction of the agency; or
 - (3) Made upon unlawful procedures; or
 - (4) Affected by other error of law; or
 - (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
 - (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

W.Va. Code 29A-5-4. Here, the rights of the Petitioner (not to mention others) were prejudiced because of the administrative findings, conclusions, decision and

³⁵Although the Commissioner views himself as a “quasi-judicial officer” (*Response by the West Virginia Offices of the Insurance Commissioner to Brief in Support of Petitioner’s Appeal* at page 38 and transcript of oral argument at page 38), *Marks* held to the contrary. Moreover, even if authority were to be assumed, it was procedural error to “interpret” a statute which the Commissioner had first determined “evinces plain meaning” (Commissioner’s Conclusion No. 11). *State Farm Mut. Auto. Ins. Co. v. Rutherford*, 229 W.Va. 73, 726 S.E.3d 41 (2011).

order, under Nos. (1), (2) and (5) above.³⁶

DECISION

Ordinarily, the undersigned would be inclined to remand this matter for further proceedings at the administrative level but, at oral argument, counsel for the Commissioner made clear that the Commissioner's overriding concern is the perceived ramifications of a private citizen challenging the acts of an insurer³⁷, more so than the merits of any such challenge.³⁸ That concern is obviously a constant and would endure any remand.³⁹ Remand, therefore, would be an exercise in futility and Petitioner would simply re-file his appeal here.⁴⁰ Accordingly, this

³⁶By judicial review statute specific to the Insurance Code, "The court or judge shall, without a jury, hear and determine the matter-upon the record of proceedings before the commissioner, ... and may enter an order revising or reversing the order of the commissioner, or may affirm such order, or remand the action to the commissioner for further proceedings. ... The judgment of the circuit court may be reviewed on appeal by the supreme court of appeals in the same manner as other civil cases to which the State is a party". W.Va. Code 33-2-14.

³⁷Transcript of oral argument at page 36.

³⁸In resisting the instant appeal, the Commissioner relies on the trilogy of decisions in *State ex rel Citifinancial v. Madden*, 223 W.Va. 229, 672 S.E.2d 365 (2009), *West Virginia Employer's Mutual Insurance Company d/b/a BrickStreet Mutual Insurance Company v. Bunch*, 231 W.Va. 321, 745 S.E.2d 212 (2013) and *Lightner v. Riley*, ___ W.Va. ___, 760 S.E.2d 142 (2014) (see transcript of oral argument beginning at page 35). None of them address the issue here. In *Citi* and *Burch*, the insured failed to exhaust administrative remedies. In *Lightner* the insured did seek administrative relief but failed to provide evidence requested by the Commissioner. Here, Petitioner pursued administrative remedies, specifically requesting issuance of subpoenas so as to provide additional evidence, but both hearing and subpoenas were denied, and no request by the Commissioner had been refused. This is an appeal of right, pursuant to both W.Va. Code 29A-5-4(a) and 33-2-14, and thus does not intrude on the Commissioner's authority which, in this case, has already been fully exhausted.

³⁹The Commissioner, himself, previously determined that a hearing would serve no useful purpose. Commissioner's Conclusion No. 25.

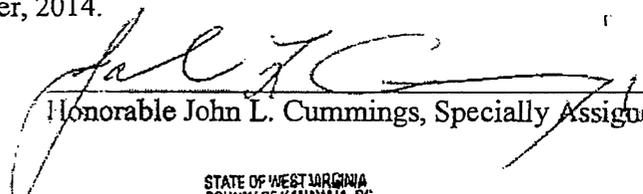
⁴⁰Upon the Court raising the possibility at oral argument, even counsel for the Commissioner resisted remand (transcript of oral argument at pages 42 and 53), and counsel for

Court having reviewed the same evidence, and having found that Erie's RPE violates Chapter 33; contains misleading clauses; that the title itself is misleading; that it is being solicited by deceptive marketing; that its benefits are unreasonable in relation to the premium charged; and is not in the public's interest; but the Commissioner having failed to withdraw approval as he was statutorily required to do, the Order appealed from is hereby **REVERSED** and continued approval of the RPE is **OVERRULED**. The Court leaves to the discretion of the Commissioner an orderly process by which policies currently subject to RPE are otherwise renewed and converted to traditional rating also previously approved.⁴¹ Alternatively, nothing herein precludes Erie from again seeking approval, with proper fiscal disclosure, deletion of the misleading clauses and title, neutral rating, proper consumer advertising and agent training, all as the Commissioner in full compliance with West Virginia law might allow, on a strictly voluntary basis by the consumer.

The Clerk is requested to send a copy of this Order to all who have appeared herein.

Any objection by the Commissioner is preserved.

Entered this 11th day of September, 2014.


Honorable John L. Cummings, Specially Assigned

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. SATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS
DAY OF Sept 2014
Cathy S. Satson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

Respondents Erie and Garlow stood silent (transcript of oral argument at page 54).

⁴¹Record at Page 481.

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

2014 SEP 18 AM 11:43
C.P.
CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

VINCENT J. KING,
Petitioner,

Civil Action No. 13-AA-95
Honorable John L. Cummings,
Specially Assigned

v.

INSURANCE COMMISSIONER OF WEST VIRGINIA,
ERIE INSURANCE PROPERTY & CASUALTY COMPANY,
and GARLOW INSURANCE AGENCY INCORPORATED,

Respondents.

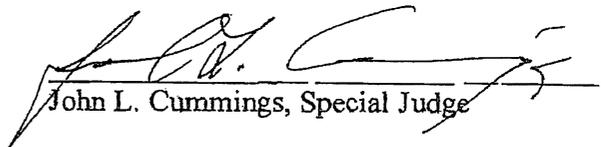
AGREED ORDER STAYING DECISION ON APPEAL

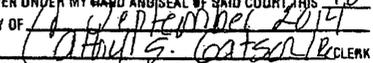
NOW COME the Parties, by their respective counsel, and jointly move the Court for an Order staying this Court's Decision on Appeal pending appellate review and final disposition of this case by the Supreme Court of Appeals of West Virginia, conditioned on the filing of the Notice of Appeal by Friday, October 10, 2014.

The parties being in agreement and it appearing proper so to do, it is hereby ORDERED that this Court's Decision on Appeal filed on September 12, 2014 is hereby STAYED pending appellate review and final disposition, conditioned on the filing of the Notice of Appeal by Friday, October 10, 2014.

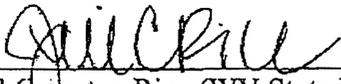
The Clerk of this Court is directed to forward certified copies of this Order once entered to all counsel of record.

ENTERED: September 18, 2014.


John L. Cummings, Special Judge

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 18th
DAY OF September 2014

CATHY S. GATSON, CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

Prepared by:

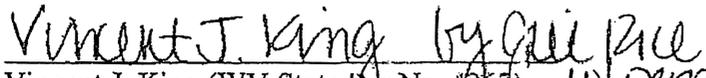


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