

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF STATE
BEFORE THE SECRETARY OF THE COMMONWEALTH

FILED
2009-09-15
09:00 AM
HARRISBURG, PA

Commonwealth of Pennsylvania
Bureau of Charitable Organizations

vs.

Thumbs-Up Telemarketing, Inc.,
Respondent

:
:
:
:
:
:
:
:

Docket No. 0009-98-12
File No. 12-98-01821

FINAL ADJUDICATION AND ORDER

Carol Aichele
Secretary of the Commonwealth

302 North Office Building
Harrisburg, PA 17120
(717) 787-7630

HISTORY

This matter comes before the Secretary of the Commonwealth (Secretary) from an order to show cause filed March 7, 2012, alleging that Thumbs-Up Telemarketing, Inc. (Respondent), a professional solicitor not currently registered in the Commonwealth of Pennsylvania, is subject to administrative sanctions under the Solicitation of Funds for Charitable Purposes Act ("Act").¹ The order to show cause alleges that Respondent violated the Act at 10 P.S. §162.15(a)(1), by and through 10 P.S. §162.17(b)(3), by failing to pay the administrative fine assessed to Respondent for providing professional solicitor services without being registered with the Bureau and in violation of a cease and desist order.

On April 24, 2012, the Commonwealth filed a motion to enter default and deem facts admitted in accordance with the General Rules of Administrative Practice and Procedure at 1 Pa. Code § 35.37.

Respondent did not submit a reply to either pleading. The Secretary now issues this adjudication and order in final disposition of this matter.

¹ Act of December 19, 1990, P.L. 1200, No. 202, *as amended*, 10 P.S. § 162.1 *et seq.*

FINDINGS OF FACTS

1. Thumbs-Up Telemarketing, Inc. (Respondent) is a professional solicitor as defined by the Solicitation of Funds for Charitable Purposes Act (Act) and as such is required to be registered with the Bureau. (Order to show cause ¶¶ 1 and 3)

2. Respondent's last known address is 13545 Barrett Parkway Drive, Suite 101, St. Louis, MO 63021. (Order to show cause ¶ 2)

3. Respondent is not currently registered as a professional solicitor with the Bureau. (Order to show cause ¶ 4)

4. Respondent has never been registered as a professional solicitor with the Bureau. (Order to show cause ¶ 5)

5. On or about October 17, 1996, the Secretary of the Commonwealth issued a Cease and Desist Order against Respondent. (Order to show cause ¶ 6)

6. That Cease and Desist Order remains in effect. (Order to show cause ¶ 7)

7. On or about October 19, 2011, Respondent submitted a registration statement for professional solicitor – BCO-155. (Bureau records; Order to show cause, Exhibit A)

8. The registration statement indicated that the company acted as a professional solicitor by soliciting contributions in Pennsylvania in the absence of registration and in violation of a cease and desist order. (Order to show cause attached Exhibit A)

9. On or about October 24, 2011, Respondent was assessed a one thousand dollar (\$1,000.00) administrative fine for providing professional solicitor services prior to being registered with the Bureau and in violation of a cease and desist order. (Order to show cause ¶ 8, Exhibit A)

10. Respondent was notified of the assessed administrative fine by letter dated October 24, 2011. (Order to show cause ¶ 9, Exhibit A)

11. The Bureau's letter required Respondent to pay the administrative fine within thirty (30) days. (Order to show cause ¶ 11)

12. As of February 29, 2012, Respondent has not paid the administrative fine assessed by the Bureau on October 24, 2011. (Order to show cause ¶ 12)

13. On March 7, 2012, the Commonwealth filed an order to show cause in this matter. (Docket number 0009-98-12)

14. Pursuant to the Certificate of Service attached to the order to show cause, the Commonwealth served the order to show cause upon Respondent by mailing one copy via certified mail, return receipt requested and another copy via first class mail, postage prepaid, on March 8, 2012, to Respondent at the following address: 13545 Barrett Parkway Drive, Suite 101, St. Louis, MO 63021. (Motion to enter default and deem facts admitted ¶ 1-2; Docket number 0009-98-12)

15. Respondent received the order to show cause on March 12, 2012, as evidenced by an electronic receipt for Certified Mail item number 7196 9009 3500 2185 1268. (Motion to enter default and deem facts admitted ¶ 3, Exhibit B)

16. The order to show cause sent via first class mail, postage prepaid, was not returned to the Commonwealth. (Motion to enter default and deem facts admitted ¶ 4)

17. The order to show cause directed Respondent to file an answer thereto within thirty (30) days of its date. (Motion to enter default and deem facts admitted ¶ 5)

18. Thirty days from the date of the order to show cause expired on April 11, 2012. (Motion to enter default and deem facts admitted ¶ 6)

19. On April 24, 2012, Respondent was served with a copy of the motion to enter default and deem facts admitted. (Motion to enter default, Certificate of service; docket number 0009-98-12)

20. Respondent did not file a response to the order to show cause or the motion to enter default and deem facts admitted. (Docket number 0009-98-12)

21. Respondent was served with all pleadings, orders and notices filed of record in this matter. (Docket number 0009-98-12)

CONCLUSIONS OF LAW

1. The Secretary has jurisdiction in this matter. (Findings of Fact 1, 5, 7-8)
2. Respondent has been afforded actual notice of the charges against it and an opportunity to be heard in this proceeding in accordance with the Administrative Agency Law, 2 Pa.C.S. §504. (Findings of Fact 2, 13-21)
3. There is good cause to grant the Commonwealth's motion to deem facts admitted because Respondent failed to file a written answer to the order to show cause. (Findings of fact 21)
4. Respondent violated the Act at 10 P.S. §162.15(a)(1) by and through 10 P.S. §162.17(b)(3) by failing to pay an administrative fine assessed to Respondent for providing professional solicitor services without being registered with the Bureau and soliciting in violation of a cease and desist order. (Findings of Fact 1, 3-12)

DISCUSSION

I. STATUTORY AND REGULATORY PROVISIONS

This matter is before the Secretary of the Commonwealth (Secretary) pursuant to the Solicitation of Funds for Charitable Purposes Act, Act of December 19, 1990, P.L. 1200, No. 202, *as amended* ("Act"), 10 P.S. §§ 162.1, *et seq.* The order to show cause issued in this matter comprises one count, alleging that Respondent violated the Act at 10 P.S. 162.15(a)(1) by and through 10 P.S. §162.17(b)(3), which provide in pertinent part as follows:

§ 162.15 Prohibited Acts

(a) General Rule. – Regardless of a person's intent or the lack of injury, the following acts and practices are prohibited in the planning, conduct or execution of any solicitation or charitable sales promotion:

(1) Operating in violation of, or failing to comply with, any of the requirements of this act, regulations of the department or an order of the secretary, or soliciting contributions after registration with the department has expired or has been suspended or revoked or soliciting contributions prior to the solicitation notice and contract having been approved by the department.

* * *

§ 162.17 Administrative enforcement and penalties

(a) General rule. - The secretary may refuse to register or revoke or suspend the registration of any charitable organization, professional fundraising counsel or professional solicitor whenever he finds that a charitable organization, professional fundraising counsel or professional solicitor, or an agent, servant or employee thereof:

(1) Has violated or is operating in violation of any of the provisions of this act, the regulations of the department, or an order issued by the secretary.

(2) Has refused or failed or any of its principal officers has refused or failed, after notice, to produce any records of such organization or to disclose any information required to be disclosed under this act or the regulations of the department.

(3) Has made a material false statement in an application, statement or report required to be filed under this act.

(b) Additional actions. – When the secretary finds that the registration of any person may be refused, suspended or revoked under the terms of subsection (a), the secretary may:

(1) Revoke a grant of exemption to any of the provisions of this act.

(2) Issue an order directing that the person cease and desist specified fundraising activities.

(3) Impose an administrative fine not to exceed \$1,000 for each act or omission which constitutes a violation of this act and an additional penalty, not to exceed \$100 for each day during which such violation continues. Registration will be automatically suspended upon final affirmation of an administrative fine until the fine is paid or until the normal expiration date of the registration. No registration shall be renewed until the fine is paid.

(4) Place the registrant on probation for such period of time and subject to such conditions as he may decide.

(c) Administrative procedures. —All actions of the secretary shall be taken subject to the right of notice, hearing and adjudication and the right of appeal therefrom in accordance with Title 2 of the Pennsylvania Consolidated Statutes (relating to administrative law and procedure).

The motion to enter default and deem facts admitted is in accordance with the General Rules of Administrative Practice and Procedure. The relevant provision of the General Rules of Administrative Practice and Procedure states as follows:

§ 35.37 Answers to order to show cause

Any person upon whom an order to show cause has been served . . . shall, if directed to do so, respond to the same by filing within the time specified in the order an answer in writing. The answer shall be drawn so as specifically to admit or deny the allegations or charges which may be in order, set forth the facts upon which respondent relies, and state concisely the matters of law relied upon.

. . . A respondent failing to file an answer within the time allowed shall be deemed in default, and relevant facts stated in the Order to show cause may be deemed admitted.

1 Pa. Code § 35.37.

II. DUE PROCESS

“It is well established that the requirements of due process of law apply to administrative proceedings.” First National Bank of Pike County v. Department of Banking and Bank of Matamoras, Intervening, 300 A.2d 823, 824 (Pa. Cmwlth. 1973) (citation omitted). “Due process requires that a person be provided notice and an opportunity to be heard prior to an adjudication, affecting that person’s rights.” Goetz v. Department of Environmental Resources, 613 A.2d 65, 67 (Pa. Cmwlth. 1992) (citation omitted), appeal denied, 625 A.2d 1196 (Pa. 1993).

“Notice of administrative action which is mailed to the interested party’s last known address has been found to be reasonable notice.” Kobylski v. Commonwealth of Pennsylvania, Milk Marketing Board, 516 A.2d 75, 77 (Pa. Cmwlth. 1986), citing Yarbrough v. Department of Public Welfare, 478 A.2d 956 (Pa. Cmwlth. 1984).

A copy of the order to show cause was mailed to Respondent at its last known address by certified mail, return receipt requested and by first class mail, postage prepaid. The order to show cause sent via certified mail was signed for by an individual at that address (William Woeul), as evidenced by the electronic receipt from the United States Postal Service, attached as Exhibit B in the motion to enter default and deem facts admitted. Additionally, the order to show cause mailed by first class mail has not been returned to the Commonwealth. Therefore, the Secretary finds that Respondent received actual notice of the action and allegations against it. The order to show cause clearly and specifically stated the charges against Respondent. The order to show cause directed Respondent to file an answer or risk disciplinary action without a hearing. The order to show cause explained the procedures to request a hearing. Further, the order to show cause warned Respondent that if it failed to request a hearing it would be deemed to have waived its right to a hearing and final judgment might be entered without a hearing. Due process does not confer an absolute right to be heard, but only that a party is provided with an opportunity to be heard. Goetz, 613 A.2d at 67. The Secretary finds that Respondent was given an opportunity to be heard and failed to take advantage of that opportunity. Therefore, the Secretary of the Commonwealth deems the factual allegations contained in the order to show cause admitted, and grants the motion to enter default and deem facts admitted against Respondent.

IV. ANALYSIS AND SANCTION

In the sole count of the order to show cause, the Commonwealth alleges that Respondent violated the Act at 10 P.S. § 162.15(a)(1), which generally prohibits solicitors from operating in violation of, or failing to comply with, any of the requirements of the Act. This includes soliciting contributions without registration with the department as a professional solicitor and soliciting contributions prior to the solicitation notice and contract having been approved by the department.² The Commonwealth specifically charges Respondent with violating the Act at 10 P.S. §162.17(b)(3) by failing to pay an administrative fine of \$1,000 assessed to Respondent. The fine was based on Respondent providing professional solicitor services prior to being registered with the Bureau. The facts deemed admitted establish that a Cease and Desist Order has been in effect against Respondent since October 17, 1996. When Respondent submitted a registration statement for professional solicitor on September 30, 2011, the registration statement indicated that the company had acted as a professional solicitor by soliciting contributions in Pennsylvania in the absence of registration and in violation of cease and desist order. Therefore, on October 24, 2011, Respondent was assessed a \$1,000.00 administrative fine for providing professional solicitor services prior to being registered with the Bureau. To date, Respondent has not paid this administrative fine. Therefore, Respondent violated the Act at 10 P.S. §162.15(a)(1)

² § 162.9 Registration of professional solicitors; contract and disclosure requirements; bonds; records; books
(a) Registration and approval required.—No person shall act as a professional solicitor before obtaining department approval of a registration statement pursuant to subsection (d) or after the expiration, suspension or revocation of such registration.

* * *

(e) Contract filing.—No less than ten working days prior to the commencement of each solicitation campaign, event or services, a professional solicitor shall file with the department a copy of the contract described in subsection (f) and a written solicitation notice. No solicitation or services pursuant to the contract shall begin before the department has approved the contract pursuant to subsection (g). The solicitation notice shall be accompanied by a fee of \$25 and shall be signed and sworn to by the authorized contracting officer for the professional solicitor. If more than one event or campaign is conducted under a contract, then a solicitation notice addendum must be filed no less than ten working days prior to the commencement of each additional event or campaign.

* * *

by and through 10 P.S. §162.17(b)(3), and the Secretary may impose any or all of the sanctions under 10 P.S. §162.17(b).

The Secretary of the Commonwealth finds that Respondent has violated the Act by failing to pay an administrative fine assessed by the Bureau. That fine was levied for Respondent acting as a professional solicitor by soliciting contributions in Pennsylvania in the absence of registration and in violation of a cease and desist order, as indicated by the registration statement submitted by Respondent. To date, Respondent remains unregistered as a professional solicitor. The obligations that Respondent failed to perform are critical requirements to which a professional solicitor must adhere under the Act. Based on the foregoing findings of facts, conclusions of law and discussion, and in the absence of mitigation, the following order shall issue:

**COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF STATE
BEFORE THE SECRETARY OF THE COMMONWEALTH**

Commonwealth of Pennsylvania	:	
Bureau of Charitable Organizations	:	
	:	
vs.	:	Docket No. 0009-98-12
	:	File No. 12-98-01821
Thumbs-Up Telemarketing, Inc.,	:	
Respondent	:	

ORDER

AND NOW, this 15th day of May, 2012, upon consideration of the foregoing findings of fact, conclusions of law and discussion, it is hereby ordered as follows:

1. An **administrative fine** in the amount of **\$1,000.00** shall be imposed upon the Thumbs-Up Telemarketing, Inc. in accordance with 10 P.S. § 162.17(b)(3). This amount shall be remitted by certified check or U.S. Postal Service money order made payable to "Commonwealth of Pennsylvania" within thirty days of the effective date of this order and mailed to:

Martha Brown, Assistant Counsel
Pennsylvania Department of State
Office of Chief Counsel
301 North Office Building
Harrisburg, PA 17120

2. Respondent shall be **prohibited from registering** as a professional solicitor in the Commonwealth of Pennsylvania unless and until such time as all penalties are paid, including the \$1,000 fine assessed by this order (above) and the previous administrative fine of **\$1,000.00**, assessed on October 24, 2011.

3. Thumbs-Up Telemarketing, Inc., its successors, agents or affiliates, shall **CEASE and DESIST** from all manner of solicitation activities in this Commonwealth, until such time as all information requested by the Bureau has been provided, all penalties imposed have been paid in full and Thumbs-Up Telemarketing, Inc. comes into full compliance with all provisions of the Act, including proper registration.

Appeal may be taken pursuant to section 17(c) of the Act, 10 P.S. §162.17(c), and 2 Pa. C.S. §702, within 30 days of the date of mailing of this Adjudication and Order as indicated below.

This order shall take effect thirty days from the date it is deposited in the mail.

BY ORDER:



Carol Aichele
Secretary of the Commonwealth

Respondent:

Thumbs-Up Telemarketing, Inc.
13545 Barrett Parkway Drive
Suite 101
St. Louis, MO 63021

For the Commonwealth

Eric Spada, Esquire
Prosecuting Attorney
Commonwealth of Pennsylvania
Department of State
212 North Office Building
Harrisburg, PA 17120

Date of Mailing:

May 15, 2012

NOTICE

The attached Adjudication and Order represents the final agency decision in this matter. It may be appealed to the Commonwealth Court of Pennsylvania by the filing of a Petition for Review with that Court within 30 days after the entry of the order in accordance with the Pennsylvania Rules of Appellate Procedure. See Chapter 15 of the Pennsylvania Rules of Appellate Procedure entitled "Judicial Review of Governmental Determinations," Pa. R.A.P 1501 – 1561. Please note: An order is entered on the date it is mailed. If you take an appeal to the Commonwealth Court, you must serve the Secretary of the Commonwealth with a copy of your Petition for Review. The agency contact for receiving service of such an appeal is:

Pennsylvania Department of State
Office of Chief Counsel
Legal Counsel, Bureau of Charitable Organizations
401 North Street
Room 301
Harrisburg, PA 17120