

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

PROTHONOTARY

2012 AUG -7 AM 7:37

Department of State

Commonwealth of Pennsylvania,
Bureau of Charitable Organizations

v.

Kenneth M. McDaniels,
Respondent

:
:
: Docket No. 0023-98-12
:
: File No. 12-98-04610
:
:

FINAL ADJUDICATION AND ORDER

Carol Aichele
Secretary of the Commonwealth

302 North Office Building
401 North Street
Harrisburg, PA 17120

HISTORY

This case comes 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.* On May 30, 2012, the Department of State (Department), Bureau of Charitable Organizations (Bureau) filed an order to show cause charging Respondent with several violations of the Act, 10 P.S. §§ 162.1 *et seq.*

The order to show cause filed on May 30, 2012, alleged that Respondent had violated 10 P.S. §162.15(a)(1), by and through 10 P.S. §162.13(a), in that Respondent misappropriated at least \$4,000 from the Plymouth Shawnee Indians (Indians), a charitable organization, in his role as treasurer. Further, the Commonwealth alleged that Respondent had violated 10 P.S. §162.15(a)(1), by and through 10 P.S. §162.21, in that Respondent, as treasurer, breached his fiduciary duty to Indians. The order to show cause directed Respondent to file a written answer to the charges within thirty days of the date the order to show cause was issued and notified Respondent that failure to file an answer within the time allowed may result in the factual allegations deemed admitted.

On July 10, 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

FINDINGS OF FACT

1. 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.*

2. Respondent's last known address is 326 East Railroad Street, Plymouth, PA 18651. (Order to show cause ¶ 4; Docket no. 0023-98-12)

3. At all relevant and material times, Respondent was the Treasurer of the Plymouth Shawnee Indians ("Indians"). (Order to show cause ¶ 2)

4. At all relevant and material times, the Plymouth Shawnee Indians were a charitable organization, as defined by the Act. (Order to show cause ¶ 3).

5. At all relevant and material times, Respondent had the authority to sign checks drawn on the Indians' accounts and to otherwise withdraw money. (Order to show cause ¶ 5)

6. Pursuant to section 162.21 of the Act, Respondent, as Treasurer, was deemed a fiduciary and was acting in a fiduciary capacity for Indians. (Order to show cause ¶ 6)

7. Between 2005 and 2010, Respondent misappropriated at least \$4,000 from Indians. (Order to show cause ¶ 7)

8. Respondent signed a statement to the Plymouth Borough Police Department admitting to the misappropriation. (Order to show cause; Exhibit A)

9. The misappropriated funds were for the Respondent's personal use and benefit. (Order to show cause ¶ 9)

10. The misappropriated funds were not applied in a manner consistent with Indians' charitable purposes. (Order to show cause ¶ 10)

11. On May 30, 2012, the Commonwealth filed an order to show cause in this matter. (Docket no. 0023-98-12)

12. 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, to Respondent at the following address: 326 East Railroad Street, Plymouth, PA 18651. (Motion to enter default and deem facts admitted (MDFA) at ¶ 2)

13. Respondent or an adult individual at that address received the order to show cause on May 31, 2012, as evidenced by Postal Form 3811, Article # 7196 9009 3500 2181 4959. (MDFA at ¶ 3; Exhibit B)

14. The order to show cause sent via first class mail, postage prepaid, was not returned to the Commonwealth. (MDFA at ¶ 4)

15. The order to show cause directed Respondent to file an answer thereto within thirty days of its date. (MDFA at ¶ 5)

16. Thirty days from the date of the order to show cause expired on June 29, 2012. (MDFA at ¶ 6)

17. Respondent did not file a response to the order to show cause or the motion to enter default and deem facts admitted. (Docket number 0023-98-12)

18. Respondent was served with all pleadings, orders and notices filed of record in this matter. (Docket number 0023-98-12)

CONCLUSIONS OF LAW

1. The Secretary has jurisdiction in this matter. (Section 4 of the Act, 10 P.S. §162.4). (Findings of Fact 1)

2. Respondent has received notice of the charges and an opportunity to be heard in this proceeding in accordance with Administrative Agency Law, 2 Pa.C.S. §504. (Findings of Fact 2, 11-18)

3. Respondent violated 10 P.S. §162.15(a)(1), by and through 10 P.S. §162.13(a), in that when Respondent misappropriated at least \$4,000 from Indians, for his personal use and benefit, he caused Indians to apply contributions in a manner not consistent with Indians' charitable purpose. (Findings of Fact 3-10)

4. Respondent violated 10 P.S. §162.15(a)(1), by and through 10 P.S. §162.21, in that Respondent, as Treasurer, breached the fiduciary duty he owed to Indians. (Findings of Fact 3-10)

DISCUSSION

I. STATUTORY AND REGULATORY PROVISIONS

This case comes before the 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.* In counts one and two of the order to show cause, the Bureau charged Respondent with violation of section 15(a)(1) of the Act, 10 P.S. § 162.15(a)(1), by failing to comply with sections 13(a) and 21 of the Act, 10 P.S. §§162.13(a) and 162.21. Further, the Secretary is authorized to enforce the Act against Respondent pursuant to section 17(a)(1) of the Act, 10 P.S. § 162.17(a)(1), while section 17(b)(3) of the Act, 10 P.S. §162.17(b)(3) authorizes the imposition of an administrative fine for each act or omission which constitutes a violation of the Act. The pertinent provisions are as follows:

§162.13. Limitation on activities of charitable organizations; disclosure requirements

(a) Solicitation limitation.--A charitable organization may only solicit contributions for the charitable purpose expressed in solicitation for contributions or the registration statement of the charitable organization and may only apply contributions in a manner substantially consistent with that purpose.

* * *

§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.

* * *

(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:

* * *

(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.

* * *

§162.21. Charitable organizations deemed fiduciary

Every person soliciting, collecting or expending contributions for charitable purposes and every officer, director, trustee and employee of any such person concerned with the solicitation, collection or expenditure of such contribution shall be deemed to be a fiduciary and acting in a fiduciary capacity.

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 his 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, as evidenced by the United States Postal Service Form 3811, 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 reasonable notice of the action and allegations against him. 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 he failed to request a hearing he would be deemed to have waived his 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 be 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.

III. ANALYSIS AND SANCTION

In count one, Respondent is charged with violating 10 P.S. §162.15(a)(1), by and through 10 P.S. §162.13(a), by misappropriating at least \$4,000 from the Indians for his personal use and benefit. In doing so, it is alleged that he caused the charity to apply contributions in a manner inconsistent with Indians' charitable purpose. The facts deemed admitted establish that, on October 20, 2010, Respondent signed a statement to the Plymouth Borough Police Department in which he admitted that he misappropriated money from Indians, and used the money for home repair and improvements to his personal residence. This clearly indicates that the misappropriated contributions were applied in a manner that was inconsistent with the charitable purpose of the Plymouth Shawnee Indians. Therefore, count one of the order to show cause is sustained.

In count two, Respondent is charged with violating 10 P.S. § 162.15(a)(1), by and through 10 P.S. §162.21, in that, as Treasurer, he breached his fiduciary duty to Indians. A fiduciary has a duty and obligation to act for a beneficiary in situations that require trust, integrity and honesty. In his role as Treasurer of the organization, Respondent had the authority to sign checks drawn on the Indians' account. This ability created a fiduciary relationship between Respondent and the Indians. Respondent violated this duty when he admitted to taking advantage of his role as treasurer by misappropriating money from Indians for his personal use and benefit. These facts establish a violation of 10 P.S. §162.15(a)(1), by and through 10 P.S. §

162.17(a)(2), and Respondent is thus subject to disciplinary action on count two, as well as count one.

When the Secretary finds that a person has violated any of the provisions of the Act, the Secretary is authorized to enforce the Act against such person pursuant to section 17(a)(1) of the Act, 10 P.S. § 162.17(a)(1), and to levy administrative fines according to section 17(b)(3) of the Act, 10 P.S. § 162.17(b)(3). Therefore, 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 :
 : Docket No. 0023-98-12
v. :
 : File No. 12-98-04610
Kenneth McDaniels, :
Respondent :

ORDER

AND NOW, this 7th day of August, 2012, upon consideration of the foregoing findings of fact, conclusions of law and discussion, it is hereby **ORDERED** that:

(1) Kenneth McDaniels shall **CEASE and DESIST** from all manner of fundraising and solicitation activities in this Commonwealth, until such time as all penalties imposed below are paid in full.

(2) An **administrative fine** in the amount of **\$2,000.00** shall be imposed upon Kenneth McDaniels. 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 H. Brown, Assistant Counsel
Pennsylvania Department of State
Office of Chief Counsel
301 North Office Building
Harrisburg, PA 17120

Appeal of this decision to the Commonwealth Court may be taken pursuant to 10 P.S. §162.17(c) and 2 Pa.C.S. §702 within 30 days of the date of mailing shown 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

For the Commonwealth:

Eric Spada, Esquire
GOVERNOR'S OFFICE OF GENERAL COUNSEL
DEPARTMENT OF STATE OFFICE OF CHIEF COUNSEL
PROSECUTION DIVISION
P.O. Box 2649
Harrisburg, PA 17105-2649

For Respondent:

Kenneth McDaniels
326 East Railroad Street
Plymouth, PA 18651

Date of mailing:

August 7, 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