

“USPS”) Priority Mail tracking information; Ex. C – OTSC with a certificate of service dated November 22, 2023).¹

2. The OTSC contained the allegations against the Respondent and notification of the obligation to file an answer or otherwise respond to the allegations within 21 days. (Ex. C). The OTSC stated that, if a responsive and timely answer was not filed, the Commission may act. (Ex. C). In particular, the Respondent was notified that the Commission would enter a Final Decision and Order that assumes the truth of the allegations in the OTSC and that the Commission may take action against the Respondent’s certification, including granting, in full, the action contemplated in the OTSC. (Ex. C). The Respondent failed to file a response to the OTSC in a timely manner. (Ex. E – Motion).

3. The Motion was mailed by the Division to the Respondent by USPS Priority Mail on January 9, 2024, to the same last known address. (Ex. A – OTSC cover letter). By operation of law, the Commission may presume that the Respondent received the Motion, as discussed below.

4. The cover letter of the Motion, dated January 9, 2024, stated that the Motion was enclosed. (Ex. A). The undersigned takes administrative notice that the OTSC was attached as an exhibit to the Motion. The Respondent failed to respond to the Motion and the OTSC. (Ex. E).

III. Allegations Contained in the OTSC

¹ The Division conducted a search for the Respondent’s address in CLEAR, which is a database provided by Thomson Reuters that collects information from various sources, including cell phone records, credit reporting agencies, motor vehicle registration information, criminal history records, and other sources, and mailed the OTSC to the Respondent’s forwarding address, which caused a delay in delivery of the OTSC. (Ex. A - OTSC with a certificate of service dated November 1, 2023).

1. In July 2021, pursuant to St. 2020, c. 253, § 102, an Act Relative to Justice, Equity, and Accountability in Law Enforcement in the Commonwealth, the Respondent was certified as a law enforcement officer.
2. On February 23, 2023, the Respondent resigned from his position at the Stoneham Police Department. (Ex. C).
3. On September 20, 2023, the Respondent pleaded guilty to two counts of wire fraud, in violation of 18 U.S.C. § 1343. See United States v. Robert A. Kennedy, No. 1:23-cr-10122-DJC-1 (D. Mass. Apr. 27, 2023). Wire fraud is classified as a felony under federal law. See 18 U.S.C. § 3559(a). The allegations concerned Kennedy’s conduct during the period of October 2022 to April 2023.²

IV. Legal Basis for Commission Disciplinary Action

1. Pursuant to M.G.L. c. 6E, § 3(a):
The [C]ommission shall have all powers necessary or convenient to carry out and effectuate its purposes, including, but not limited to, the power to:
(1) act as the primary civil enforcement agency for violations of [Chapter 6E]; . . .
(4) deny an application or limit, condition, restrict, revoke or suspend a certification, or fine a person certified for any cause that the [C]ommission deems reasonable; . . .
(23) restrict, suspend or revoke certifications issued under [Chapter 6E]; [and]
(24) conduct adjudicatory proceedings in accordance with [C]hapter 30A;
2. Under M.G.L. c. 6E, § 1, a “conviction” is “an adjudication of a criminal matter resulting in any outcome except wherein the matter is dismissed or the accused is found to be not guilty, including, but not limited, to an adjudication of guilt with or without the imposition of a sentence, a plea of guilty, a plea of nolo contendere, an admission to sufficient facts, a continuance without a finding or probation” for purposes of the sections of M.G.L. c. 6E cited herein.

² On January 4, 2024, the court placed the Respondent on probation for a term of 2 years, with special conditions, and imposed restitution in the amount of \$14,275, a special assessment of \$200, and forfeiture. (Ex. F - USDC Massachusetts Docket Report).

3. Pursuant to M.G.L. c. 6E, § 10(a)(i), “[t]he [C]ommission shall, after a hearing, revoke an officer’s certification if the [C]ommission finds by clear and convincing evidence that . . . the officer is convicted of a felony.”

4. Pursuant to M.G.L. c. 6E, § 10(g), “[t]he [C]ommission shall publish any revocation order and findings” and “shall provide all revocation information to the [N]ational [D]ecertification [I]ndex.”

V. Notice

The Respondent was notified at his last known address by the OTSC that, if he did not file an answer or otherwise respond to the allegations in the OTSC in a responsive and timely manner, the Commission could enter a Final Decision and Order that assumes the truth of the allegations in the OTSC. In addition, the notice informed him that the Commission may take particular action against his certification, including granting in full the relief contemplated in the OTSC. These advisories were sufficient to place him on notice of the consequences of any default. See Lawless v. Board of Registration in Pharmacy, 466 Mass. 1010, 1010 n.1, 1011 (2013) (concluding that pharmacist had “ample notice,” where he was informed that “failure to appear at any hearing would result in entry of default and that, in the event of default, the board could enter a final decision accepting as true the allegations contained in the show cause order”); see also University Hosp., Inc. v. Massachusetts Comm’n Against Discrimination, 396 Mass. 533, 539 (1986) (holding that default provision did not violate due process, as it “afford[ed] the respondent reasonable procedural safeguards for notice and opportunity to be heard”). Despite being afforded the opportunity to do so, the Respondent has failed to file an answer, request an adjudicatory hearing, or otherwise respond.

On January 9, 2024, the Division moved for Default Judgment and Final Decision and served the Motion, with exhibits A through D attached, by USPS Priority Mail with tracking information to the Respondent's last known address, as indicated by a CLEAR search conducted by the Division. (Ex. E).

The Commission provided sufficient notice by delivering the OTSC and the Motion using USPS Priority Mail. Under Massachusetts case law, there is a presumption that the addressee receives properly deposited mail. See Espinal's Case, 98 Mass. App. Ct. 152-53, 156 (2020), citing Eveland v. Lawson, 240 Mass. 99, 103 (1921) ("The depositing of a letter in the post office, properly addressed, postage prepaid, to a person at his place of business or residence, is prima facie evidence that it was received in the ordinary course of mails."); see also Commonwealth v. Crosscup, 369 Mass. 228, 239 (1975) ("Proper mailing of a letter is 'prima facie evidence' in civil cases of its receipt by the addressee." (citations omitted)). Further, nothing in Chapter 6E prohibits the Division from relying on the certification that it mailed the Motion via USPS Priority Mail delivery. See Espinal's Case, 98 Mass. App. Ct. at 157 (stating that "on other occasions when the Legislature intended to impose a requirement for notice by certified mail, return receipt requested, it has done so explicitly"). The undersigned may presume that the Respondent received the Motion that was sent through USPS Priority Mail at his last known address.

VI. Exhibits

In ruling on this matter, the undersigned has considered the Motion filed by the Division and the following exhibits:

Exhibit A: OTSC, with a certificate of service dated November 1, 2023.

Exhibit B: OTSC USPS Priority Mail tracking, dated December 12, 2023.

- Exhibit C: OTSC, with a certificate of service dated November 22, 2023.
- Exhibit D: OTSC USPS Priority Mail tracking, dated November 25, 2023.
- Exhibit E: Motion for Default and Final Decision, dated January 9, 2024.
- Exhibit F: United States District Court for the District of Massachusetts Docket

Report.

The undersigned takes administrative notice of all papers filed in this case, as well as Chapter 6E and Commission regulations. See M.G.L. c. 30A, § 11(5).

VII. Discussion

Pursuant to M.G.L. c. 30A, § 10(2), agencies are specifically authorized to “make informal disposition of any adjudicatory proceeding . . . by default.” Lawless, 466 Mass. at 1011, 1012 (affirming that agency “ha[d] authority, in an appropriate circumstance, to dispose of an adjudicatory proceeding by default,” citing M.G.L. c. 30A, § 10; and concluding that agency’s decision to do so was not shown to be improper, where the party failed to appear after the first day of hearing). Pursuant to 801 CMR 1.01(7)(a), a party may request by motion that the Hearing Officer “issue any order or take any action not inconsistent with [the] law or 801 CMR 1.00.” Thus, the Commission is empowered to enter a Default Judgment as its Final Decision and Order in this matter.

In University Hospital, 396 Mass. at 538-39, the Supreme Judicial Court rejected the notion that due process standards were violated by an agency rule that provided sanctions for a party’s default upon receiving interrogatories. The court found the rule to “afford . . . reasonable procedural safeguards for notice and an opportunity to be heard,” noting that a respondent is given clear notice of the consequences, and has opportunities to object, to obtain an extension of time, to petition for a default to be vacated, and to seek judicial review of the entire proceedings.

Id. (providing additional details). In the case before the Commission, the OTSC and the Motion (both sent by USPS with tracking) provided the Respondent with notice of the consequences of a failure to appear or defend in this matter, as well as an opportunity to object.

The Respondent could have sought more time to respond under 801 CMR 1.01(4)(e), (7)(a).

Therefore, the entry of a default judgment by the Commission is both legal and proper.

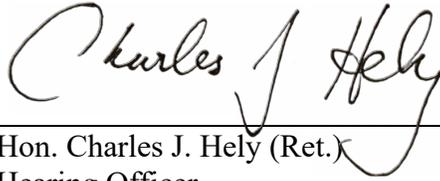
By reason of the Respondent's default, and upon consideration of the Division's Motion, the undersigned recommends that the Commission grant the Motion. See Lawless, 466 Mass. at 1011, 1012; University Hosp., 396 Mass. at 539; Productora e Importadora de Papel, S.A. de C.V. v. Fleming, 376 Mass. 826, 833-35 (1978) (recognizing that a default establishes the truth of factual allegations). In addition, the undersigned recommends that the Commission find that the allegations in the OTSC and the violations of the statutes and regulations stated therein are deemed admitted and established. The Respondent was afforded an opportunity for a full and fair hearing as required by M.G.L. c. 30A, §§ 10, 11(1) and 801 CMR 1.01(4)(c).

VIII. Conclusion

The Division's Motion should be granted for the reasons stated above. The undersigned recommends that the Commission find the allegations to be supported, make this Initial Decision final, and proceed to determine what discipline is appropriate. In accordance with the provisions of 555 CMR 1.10(4)(e)(2)(b), the Respondent has 30 days to file written objections to the Initial Decision with the Commission.

SO ORDERED.

PEACE OFFICER STANDARDS AND TRAINING COMMISSION



Hon. Charles J. Hely (Ret.)
Hearing Officer

Dated: January 30, 2024

Notice to: Robert Kennedy, Respondent
Shaun Martinez, Esq., Commission Enforcement Counsel
Stoneham Police Department