STATE OF NORTH DAKOTA

INSURANCE COMMISSIONER

In the Matter of	)	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**
Bruce Bradash	)	
	)	**File No. AG-16-651**
	)	**OAH File No. 20160344**

PROCEDURAL BACKGROUND

Bruce Bradash ("Mr. Bradash ") submitted an application for a nonresident individual insurance producer license to the North Dakota Insurance Department ("Department") on May 25, 2016. The Department denied Mr. Bradash's application on June 20, 2016. On June 30, 2016, the Department received a request from Mr. Bradash for a hearing relating to his license denial. On July 1, 2016, the Department requested that an administrative law judge ("ALJ") be assigned to conduct an administrative hearing and the Office of Administrative Hearings designated honorable Jeanne M. Steiner as the ALJ to conduct these proceedings and issue recommended findings of fact and recommended conclusions of law.

A prehearing conference was held on July 11, 2016. At that time, Mr. Bradash consented to a hearing on July 26, 2016, and requested to be able to appear at the hearing by telephone. The request was granted with no objection. The denial was initially based on N.D.C.C. §§ 26.1-26-15 and 26.1-26-42(6); however, the Department elected to proceed only on N.D.C.C. § 26.1-26-15. On July 11, 2016, the ALJ served a

Notice of Hearing confirming the agreed upon hearing date of July 26, 2016, and the issue on appeal.

The hearing was held as scheduled on July 26, 2016, in accordance with N.D.C.C. chapters 28-32 and 26.1-26. Mr. Bradash appeared by telephone, representing himself. The Department appeared through its attorney, Special Assistant Attorney General Sara Behrens ("Ms. Behrens"). The Department called Mr. Bradash and Kelvin Zimmer, Director, Producer Licensing Division, North Dakota Insurance Department. Mr. Bradash also testified on his own behalf. The Department's Exhibits 1-7 were admitted without objection. Claimant's Exhibits A-E were admitted without objection. The Department objected to Exhibit F because it was submitted as a Word document and it was unsigned. Mr. Bradash obtained a signature and faxed the document, which was substituted for Exhibit F and admitted with no objection. An Exhibit List is attached. The record of the hearing was closed on July 26, 2016. The hearing was recorded and a digital copy of the recorded hearing was provided to the Department by ALJ Steiner. The issue for hearing is as follows:

> Whether the North Dakota Insurance Department properly denied Bruce Bradash's nonresident individual insurance producer license in accordance with the provision of N.D.C.C. § 26.1-26-15.

The ALJ issued Recommended Findings of Fact, Recommended Conclusions of Law and a Recommended Order for consideration by the North Dakota Insurance Commissioner ("Commissioner") on July 29, 2016. By letter dated August 9, 2016, Ms. Behrens notified the Commissioner and Mr. Bradash, on behalf of the Department, that as counsel representing the Department she disagreed with certain Recommended Findings of Fact, with certain Recommended Conclusions of Law, and with the ALJ's

Recommended Order and that Ms. Behrens intended to offer her own proposed Findings of Fact, proposed Conclusions of Law and proposed Order. By Notice dated August 10, 2016, the Commissioner notified Ms. Behrens and Mr. Bradash that the Commissioner would accept proposed Findings of Fact, proposed Conclusions of Law and a proposed Order on or before August 30, 2016. On August 17, 2016, the Commissioner received Ms. Behrens' proposals, a brief in support of her proposals and an Affidavit of Mailing. Ms. Behrens' Affidavit of Mailing also indicates Ms. Behrens served the same documents on Mr. Bradash. The Commissioner did not receive proposals from Mr. Bradash or any response from Mr. Bradash to Ms. Behrens' brief in support of her proposals. Having thoroughly considered the record and all filings made subsequent to the time the hearing closed, the North Dakota Insurance Commissioner makes the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. On May 25, 2016, Mr. Bradash submitted an online application for a North Dakota nonresident individual insurance producer license. At the time he submitted his application, he did not hold a North Dakota individual insurance producer license.

2. Application question 2 states:

> Have you ever been named or involved as a party in an administrative proceeding, including FINRA sanction or arbitration proceeding regarding any professional or occupational license or registration? "Involved" means having a license censured, suspended, revoked, canceled, terminated; or, being assessed a fine, a cease and desist order, a prohibition order, a compliance order, placed on probation, sanctioned or surrendering a license to resolve an administrative action. ?Involved? also means being named as a party to an administrative or arbitration proceeding, which is related to a professional or occupational license, or registration. [sic] ?Involved? also means having a license, or

> registration application denied or the act of withdrawing an application to avoid a denial.[sic] INCLUDE any business so named because of your actions in your capacity as an owner, partner, officer or director, or member or manager of a Limited Liability Company. You may EXCLUDE terminations due solely to noncompliance with continuing education requirements or failure to pay a renewal fee. If you answer yes, you must attach to this application: a) a written statement identifying the type of license and explaining the circumstances of each incident, b) a copy of the Notice of Hearing or other document that states the charges or allegations, and c) a copy of the official document, which demonstrates the resolution of the charges or any final judgment.

3. Mr. Bradash answered "yes" to question 2 and submitted the Consent Order from Minnesota (Exhibit 2) and the letter of explanation (Exhibit 3).

4. The information supplied by Mr. Bradash showed that on March 3, 2011, he signed a document titled Consent to Entry of Order. The Consent Order contains an allegation that the continuing education ("CE") program provided to insurance producers by Excel Training, Inc., and Robert Huge ("Huge") was a fraudulent scheme to abbreviate CE courses. It further alleged that each gathering for which Huge and/or Excel provided a course completion certificate to Mr. Bradash took place on one day and lasted less than four hours. It alleged that on September 29, 2009, Mr. Bradash met with Huge for 3 hours but claimed 15 credit hours for each Huge/Excel course in question.

5. The Consent Order cited Minnesota Rules 2809.0010 and 2809.0060 for the insurance producer CE requirements that a classroom hour means a 50-minute hour and CE courses must be attended in their entirety to receive credit for the number of approved hours. It cited Minn. Stat. § 60K.56, subd. 8a (2008) which states a producer must not claim credit for CE hours not actually completed. The Consent Order

also stated the Minnesota Commerce Commissioner was prepared to take formal action against Mr. Bradash based on allegations that he had taken multiple severely abbreviated CE courses through Excel and Huge and claimed credit for 30 CE credit hours for these courses. It was alleged that, by using the CE credit hours that were not actually completed and earned to continue insurance producer licensure, Mr. Bradash had engaged in an untrustworthy and deceptive act in violation of Minn. Stat. §§ 45.027, subd. 7(a)(4) and 60K.56, subd. 8a (2008).

6. Under the Consent Order, Mr. Bradash waived his rights, admitted to the allegations in the Consent Order, and agreed to an informal disposition which resulted in a censure of his license, an order to cease and desist from further violations of the stated provisions of law, a $5,000 fine, a requirement to complete 30 CE hours to supplant the 30 hours improperly claimed, a requirement to provide proof of that completion, and within 30 days to provide a copy of the Consent Order to every state insurance regulatory authority in which he was licensed as an insurance producer and to every company with which he was currently appointed.

7. Mr. Bradash explained in his letter that in August 2011 he attended a CE class with a Minnesota state certified instructor (Huge) for about 4 hours and Huge gave certificates stating the course was credited for 15 hours. Mr. Bradash stated he only needed four hours to complete his CE requirement for renewal. Subsequently, Huge was reprimanded by the state and none of the CE credits by Huge were allowed for two years, which left Mr. Bradash short on CE credits hours. Mr. Bradash testified he received a "threatening letter," accepted responsibility and was allowed to make up his CE credits with no revocation or suspension of his Minnesota license. (Mr. Bradash's

letter of explanation contained an incorrect date, as it cited a class in August 2011, which would have been *after* the Consent Order.)

8. Mr. Kelvin Zimmer, Director of the Producer Licensing Division of the North Dakota Insurance Department, reviews the applications to be sure the individual applying meets the Insurance Commissioner's standard of being competent, trustworthy, and financially responsible in order to protect North Dakota insurance consumers. He and his staff reviewed the application of Mr. Bradash.

9. On June 30, 2016, the Insurance Department sent a letter to Mr. Bradash, indicating he answered "yes" to question 2 on the application and that he provided information related to an administrative action in Minnesota for falsifying CE credit hours in order to obtain a renewal license. The letter gave Mr. Bradash notice that his application was being denied based on N.D.C.C. §§ 26.1-26-15 and 26.1-26-42(6), stating the administrative action was evidence of his lack of trustworthiness and good personal reputation and was considered a dishonest practice under N.D.C.C. § 26.1-26-42(6).

10. Mr. Bradash timely requested a hearing and appealed the denial.

11. On July 11, 2016, during the prehearing conference, the Insurance Department indicated it would be proceeding with the denial only on the basis of N.D.C.C. § 26.1-26-15, not N.D.C.C. § 26.1-26-42(6).

12. At the hearing, Mr. Bradash appeared by telephone from Minnesota and testified that sometime before his license renewal in November 2010, he obtained CE credits from Robert Huge, who was licensed in Minnesota to teach CE courses and had been teaching for several years. Mr. Bradash took two of the classes: one lasted

approximately three hours and the other lasted approximately four hours. Huge provided the certificates of completion for 15 CE hours for each course and Minnesota accepted the CE hours. A year or two later, the State of Minnesota deemed all of Huge's classes were unacceptable.

13. Mr. Bradash testified licensing renewal is every two years, which occurred in November at that time but now occurs on the birthday of the one renewing the license. He testified he takes many CE hours and never knows until licensing renewal how many hours he has, but he is always over the required 30 hours. In 2011, Mr. Bradash was four hours short for his CE requirement because none of the Huge classes were accepted. Mr. Bradash received the Consent Order, signed it and agreed to the sanctions. He testified he was not required to take 30 additional CE hours but only had to make up the 4 CE hours he was short. He admitted he should have notified the Minnesota Commissioner of Commerce that he only completed 7 hours with Huge, not 30 as stated on the certificates.

14. Mr. Zimmer testified trustworthiness is crucial for licensing insurance producers to protect consumers without regard to borders and if an administrative action occurs out of state, it is reviewed on a case-by-case basis.

15. The Consent Order was effective May 13, 2011, and cites Minnesota Rules 2809.0010 and 2809.0060. Both rules remained in effect until June 30, 2010, in spite of being repealed in the 2009 Minnesota legislative session. https://www.revisor.leg.state.mn.us/rules/?id=2809

16. The Consent Order only specified one class in September 2009, lasting 3 hours for which 15 was claimed. However, it also made reference to Mr. Bradash taking

multiple abbreviated classes, claiming 15 for each and claiming 30 hours. The Consent Order contains internally inconsistent allegations.

17. The 2011 Consent Order is silent as to the number of hours Mr. Bradash submitted during the relevant reporting period that were acceptable.

18. The greater weight of the evidence established Mr. Bradash took two Huge classes sometime between November 2008 and the November 2010 license renewal—he attended one for three hours, and he attended the other for four hours, for a total of seven hours. Course completion certificates were submitted for 15 hours for each class, totaling 30 hours.

19. The greater weight of the evidence established that in 2011, none of the Huge credits were accepted by Minnesota, including the seven hours Mr. Bradash actually attended, but due to the CE hours that had been submitted that were accepted, Mr. Bradash was only four hours short on his CE requirement.

20. The greater weight of the evidence shows that only 4 of the 30 Huge credits that had been submitted were actually necessary to meet the CE requirements, and Mr. Bradash had actually attended 7 hours, nearly twice that amount. However, as stated, those hours were not accepted.

21. Mr. Bradash acknowledged during his testimony at the hearing that it was his responsibility to ensure that his CE hours are reported honestly and accurately.

22. Mr. Bradash acknowledged that the Minnesota Consent Order pertained to two continuing education classes he attended with Huge/Excel, and admitted that 15 hours of continuing education credit were submitted to the State of Minnesota for each of the two classes. Mr. Bradash admitted the two classes only lasted a total combined 7

hours, and he acknowledged that he was informed 15 hours would be submitted for each of the two classes in spite of one class only lasting 3 hours and one class only lasting 4 hours. Mr. Bradash admitted he sat for 7 hours total and he allowed 30 hours to be submitted on his behalf and he admitted the Minnesota Consent Order deemed his conduct to be a deceptive act, and he acknowledged he did not object to the 30 total CE credits being reported to the State of Minnesota on his behalf.

23. The greater weight of the evidence shows that on September 29, 2009, Mr. Bradash met with Huge/Excel for 3 hours of continuing education instruction and Mr. Bradash was informed that 15 hours of continuing education credit would be reported to the State of Minnesota on his behalf by Huge/Excel, and at some point in time prior to Mr. Bradash's 2011 Minnesota insurance producer license renewal, 15 hours of continuing education credit were reported to the State of Minnesota on Mr. Bradash's behalf.

24. It is undisputed that at no point in time did Mr. Bradash contact the State of Minnesota to notify that he only met with Huge/Excel for 3 hours of CE instruction despite Mr. Bradash's knowledge that Huge/Excel had submitted 15 hours of credit to the State of Minnesota on his behalf.

25. The greater weight of the evidence shows that sometime between his November 2008 and November 2010 license renewal Mr. Bradash attended 4 hours of continuing education instruction with Huge/Excel and Mr. Bradash was informed that 15 hours of continuing education credit would be submitted to the State of Minnesota on his behalf by Huge/Excel. At some point in time prior to Mr. Bradash's 2011 Minnesota

insurance producer license renewal, 15 hours of continuing education credit were reported to the state of Minnesota on Mr. Bradash's behalf.

26. It is undisputed that at no point in time did Mr. Bradash contact the State of Minnesota to notify that he only met with Huge/Excel for 4 hours of continuing education instruction despite Mr. Bradash's knowledge that Huge/Excel had submitted 15 hours of credit to the State of Minnesota on his behalf.

27. The greater weight of the evidence shows that on two separate occasions Mr. Bradash knowingly permitted Huge/Excel to submit 15 hours of continuing education on his behalf, and that Mr. Bradash made no attempt on either occasion to notify the State of Minnesota that he did not complete 15 hours of continuing education.

28. The greater weight of the evidence provides a factual basis for a denial of Mr. Bradash's application solely under N.D.C.C. § 26.1-26-15.

29. The Insurance Department has established by a greater weight of the evidence that the denial of Mr. Bradash's application in this case was proper.

CONCLUSIONS OF LAW

1. The Consent Order was effective May 13, 2011, and cites Minnesota Rules 2809.0010 and 2809.0060. Both rules remained in effect until June 30, 2010, in spite of being repealed in the 2009 Minnesota legislative session. The language of Minnesota Rules 2809.0010 and 2809.0060 were moved to Minn. Stat. §§ 45.25, subd 3, 45.30, subd. 1, and 45.30, subd. 4, effective July 1, 2010. https://www.revisor.leg.state.mn.us/rules/?id=2809. At the time of the conduct, Minnesota Rule 2809.0010, subpart 3, read: "'Classroom hour' means a 50-minute hour. Breaks may not be accumulated in order to dismiss the class early. Classes shall

not be offered by a provider to any one student for longer than eight hours in one day, excluding meal breaks." At the time of the conduct, Minnesota Rule 2809.0060, subpart 4 read, in part, "Continuing education courses must be attended in their entirety in order to receive credit for the number of approved hours." Minnesota Rule 2809.0060, subpart 1, read, in part, "The burden of demonstrating that courses impart appropriate and related knowledge is upon the person seeking approval or credit."

2. Minn. Stat. chapter 45 sets forth the general powers of the Department of Commerce and the Commissioner of Commerce. Minn. Stat. §§ 45.027, subd. 7(a)(4) (2008) authorizes the Commissioner to deny, suspend, or revoke the authority or license of a person subject to the duties and responsibilities entrusted to the commissioner, or censure that person if the commissioner finds:

> the person has engaged in an act or practice, whether or not the act or practice directly involves the business for which the person is licensed or authorized, which demonstrates that the applicant or licensee is untrustworthy, financially irresponsible, or otherwise incompetent or unqualified to act under the authority or license granted by the commissioner.

3. Minn. Stat. § 60K.56 (2008) specifically addresses continuing insurance education. Minn. Stat. § 60K.56, subd. 8a (2008) covers filing CE compliance reports and states:

> After completing the minimum education requirement, each person subject to this section shall file or cause to be filed a compliance report in accordance with the procedures adopted by the commissioner. A producer must not claim credit for continuing education not actually completed at the date of filing the report.

4. Under the Minnesota law, if a person fails to complete the CE or reporting requirements, no license may be renewed or continued in force for that person

beginning November 1 of the year due and that person may not act as an insurance producer until the person has demonstrated to the satisfaction of the commissioner that all requirements of this section have been complied with or that a waiver or extension has been obtained. Minn. Stat. § 60K.56, subd. 9d (2008).

5. A license to practice as an insurance producer in North Dakota is subject to the control and regulation of the state under the provisions of N.D.C.C. ch. 26.1-26 and any rules adopted by the Department pursuant to that chapter.

6. The Commissioner is statutorily responsible to license and regulate individual insurance producers under N.D.C.C. ch. 26.1-26 and may only issue a license if the statutory requirements set forth in this chapter are satisfied.

7. Words in a statute are given their plain, ordinary, and commonly understood meaning, unless defined by statute or unless a contrary intention plainly appears. Statutes are construed as a whole and are harmonized to give meaning to related provisions. If the language of a statute is clear and unambiguous, the letter is not to be disregarded under the pretext of pursuing its spirit. If the language of a statute is ambiguous, a court may resort to extrinsic aids, including legislative history, to resolve the ambiguity. A statute is ambiguous if it is susceptible to different, rational meanings. *Nodak Mut. Ins. Co. v. Bahr-Renner*, 2014 ND 39, ¶ 19, 842 N.W.2d 912.

8. No headnote, whether designating an entire title, chapter, section, subsection or subdivision, constitutes any part of a statute and may not be used to determine legislative intent. N.D.C.C. § 1-02-12.

9. Generally, the law is what the Legislature says, not what is unsaid. It must be presumed that the Legislature intended all that it said, and that it said all that it

intended to say. The Legislature must be presumed to have meant what it has plainly expressed. It must be presumed, also, that it made no mistake in expressing its purpose and intent. Where the language of a statute is plain and unambiguous, the court cannot indulge in speculation as to the probable or possible qualifications which might have been in the mind of the legislature, but the statute must be given effect according to its plain and obvious meaning, and cannot be extended beyond it. Usually, when the plain meaning of a statute is apparent, it is unwise and unnecessary to delve further. *Little v. Tracy,* 497 N.W.2d 700, 705 (N.D.1993).

10. Further, the mention of one thing implies the exclusion of another. As the maxim is applied to statutory interpretation, where a form of conduct, the manner of its performance and operation, and the persons and things to which it refers are designated, there is an inference that all omissions should be understood as exclusions. *State v. Dennis,* 2007 ND 87, ¶ 12, 733 N.W.2d 241

11. N.D.C.C. § 26.1-26-15 is not ambiguous. The meaning is clear and can be harmonized with the other statutes in Chapter 26.1-26. It simply states:

> An applicant for any license under this chapter must be deemed by the commissioner to be competent, trustworthy, financially responsible, and of good personal and business reputation.

12. The Commissioner determined the administrative action in Minnesota for falsifying CE credit hours in order to obtain a renewal license was evidence of Mr. Bradash's lack of trustworthiness and good personal reputation, and denied Mr. Bradash's license based on N.D.C.C. § 26.1-26-15.

13. If the Commissioner finds that the applicant has not met the requirements for licensing, the Commissioner shall refuse to issue the license. The Commissioner

shall, in writing, promptly notify the applicant and the appointing insurer, if applicable, of the refusal, stating the grounds for the refusal. N.D.C.C. § 26.1-26-39.

14. Minn. Stat. § 60K.56, subd. 8a (2008) covers filing CE compliance reports, and requires insurance producers to "file or cause to be filed" CE compliance reports and prohibits a producer from claiming "credit for continuing education not actually completed at the date of filing the report."

15. Anyone who sells, solicits, or negotiates insurance in North Dakota must be properly licensed by the Insurance Department. N.D.C.C. § 26.1-26-03. A license to practice as an insurance producer is subject to the control and regulation of the Insurance Commissioner. "A regulated privilege is not a right." *See North Dakota Dep't of Transp. v. DuPaul*, 487 N.W.2d 593, 598 (N.D. 1992). An individual will be granted the privilege to practice as an insurance producer only as prescribed by N.D.C.C. ch. 26.1-26.

16. Mr. Bradash does not currently hold a North Dakota nonresident insurance producer license that may be entitled to constitutional protection as a property right. *See Bland v. Comm'n on Med. Competency*, 557 N.W.2d 379, 381 (N.D. 1996).

17. As an applicant for a North Dakota nonresident insurance producer license, Mr. Bradash has the burden of proof to show, by the greater weight of the evidence, that he meets the statutory requirements of licensure. *See Layon v. North Dakota State Bar Bd.*, 458 N.W.2d 501 (N.D. 1990).

18. In order to be licensed as an insurance producer in North Dakota, an applicant must be deemed to be trustworthy and of good reputation, among other things. This is a requirement of licensure. N.D.C.C. § 26.1-26-15 states:

> An applicant for any license under this chapter must be deemed by the commissioner to be competent, trustworthy, financially responsible, and of good personal and business reputation.

19. The Commissioner determined the administrative action in Minnesota for falsifying CE credit hours in order to obtain a renewal license was evidence of Mr. Bradash's lack of trustworthiness and good personal reputation and denied Mr. Bradash's application as required by N.D.C.C. § 26.1-26-15.

20. Since 1999, the Administrative Law Judges with the North Dakota Office of Administrative Hearings, including the Honorable ALJ Jeanne M. Steiner, have consistently ruled that N.D.C.C. § 26.1-26-15 provides the statutory authority for the Commissioner to deny an insurance producer license. *See In the Matter of Thomas J. Day,* OAH Case No. 19990332 (unpublished decision from ALJ Allen C. Hoberg, a copy of which is attached to this Order); *In the Matter of Christopher Fischer,* OAH File No. 20090392 (unpublished decision from ALJ Bonny M. Fetch holding "[t]he language of N.D.C.C. § 26.1-26-15 is clear. The Commissioner is prohibited from granting a license to an applicant unless the applicant is deemed by the Commissioner to be competent, trustworthy, financially responsible, and of good personal and business reputation." A copy of this decision is attached to this Order.); *In the Matter of Michael Roche,* OAH File No. 20100066 (unpublished decision from ALJ Bonny M. Fetch holding that in order to be licensed as an individual insurance producer an applicant must be deemed to be trustworthy and of good personal reputation under N.D.C.C. § 26.1-26-15 and concluding that N.D.C.C. § 26.1-26-15 provides the Commissioner the legal authority to deny an individual an insurance producer's license. A copy of this decision is attached to this Order.); *In the Matter of Scott Lara,* OAH Case No. AG-12-338 (unpublished

decision from ALJ Bonny M. Fetch holding "N.D.C.C. § 26.1-26-15 requires that an applicant for an insurance producer license must be deemed by the Commissioner to be of good character prior to granting an applicant an insurance producer license" and concluding that N.D.C.C. § 26.1-26-15 provides the Commissioner the legal authority to deny an individual an insurance producer's license. A copy of this decision is attached to this Order.); *In the Matter of Andrew Bailor,* OAH File No. 20140067 (unpublished decision by ALJ Wade Mann holding the Commissioner properly denied Mr. Bailor's application based on lack of trustworthiness and personal reputation pursuant to N.D.C.C. § 26.1-26-15. A copy of this decision is attached to this Order.); *In the Matter of Jonathan Lundberg,* OAH File No. 20150505 (unpublished decision from ALJ Jeanne M. Steiner holding "[t]he Commissioner considered Mr. Lundberg's character and properly denied the application based on lack of trustworthiness and lack of good reputation" and that "[t]he Commissioner properly denied Mr. Lundberg's . . . application for a nonresident insurance producer license due to lack of trustworthiness and lack of good personal reputation as required by N.D.C.C. § 26.1-26-15." A copy of this decision is attached to this Order.).

21. Mr. Bradash failed to meet the requirements for licensure as required by N.D.C.C. § 26.1-26-15 by failing to demonstrate the requisite trustworthiness and good personal reputation. Therefore, the Commissioner has a basis in fact and law to deny Mr. Bradash a license.

22. Mr. Bradash's May 25, 2016, application for a nonresident individual insurance producer license was properly denied under N.D.C.C. § 26.1-26-15.

COMMISSIONER'S RATIONALE FOR NOT ADOPTING THE ALJ'S RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

There are three fundamental differences between the ALJ's findings and the Commissioner's findings: (1) The ALJ made a factual finding that Minnesota Rules 2809.0010 and 2809.0060 were repealed in 2009. However, the ALJ failed to recognize that the repeal was not effective until July 1, 2010 (2009 Minn. Sess. Law Serv. Ch. 63 (S.F. 1910)), and the material language of the rules, the definition of "classroom hour," was moved to Minn. Stat. § 45.25, subd. 3; (2) The ALJ did not include any finding of fact showing Mr. Bradash knowingly allowed a total of 30 hours of CE credit to be reported to the State of Minnesota on his behalf despite only sitting for a total of seven hours; and (3) The ALJ erroneously concluded that N.D.C.C. § 26.1-26-15 does not provide the Commissioner the authority to deny an application for a license.

Commissioner's Findings of Fact Rationale

Paragraph 1 of the Commissioner's findings of fact is an amendment of ALJ Steiner's paragraph 1 finding of fact. ALJ Steiner's finding of fact did not sufficiently address the evidence presented at the hearing. The Commissioner amended this finding of fact to clarify that Mr. Bradash did not hold a North Dakota individual insurance producer license at the time he submitted his application. This fact is material to denial of a license rather than revocation of a license.

Paragraphs 2 through 14 of the Commissioner's findings of fact were adopted from ALJ Steiner's recommended findings of fact paragraphs 2 through 14, respectively.

Paragraph 15 of the Commissioner's findings of fact is an amendment of ALJ Steiner's paragraph 15 recommended finding of fact. ALJ Steiner determined Minnesota Rules 2809.0010 and 2809.0060 had been repealed in 2009. The Commissioner

amended this finding of fact to correctly explain the status of the law as applicable to the finding. ALJ Steiner's recommended finding of fact made it appear that the rules cited in the finding of fact were not in effect at times relevant to the case. However, the repeal of Minnesota Rules 2809.0010 and 2809.0060 were not effective until July 1, 2010. See 2009 Minn. Sess. Law Serv. Ch. 63 (S.F. 1910). Further, the language of Minnesota Rules 2809.0010 and 2809.0060 were moved to Minn. Stat. §§ 45.25, subd. 3, 45.30, subd. 1 and 45.30, subd. 4, effective July 1, 2010.

The Commissioner's amendment to the findings makes it clear that the rules cited in ALJ Steiner's recommended findings were in effect at times relevant to this case and that the definition of "classroom hour" was moved to Minn. Stat. § 45.25, subd. 3 which provides: "Classroom hour" means a 50-minute hour. Breaks must not be accumulated in order to dismiss the class early. Classes must not be offered to any one student for longer than eight hours in one day, excluding breaks."

Paragraphs 16 through 20 of the Commissioner's findings of fact were adopted from ALJ Steiner's recommended findings of fact paragraphs 16 through 20, respectively.

Paragraphs 21 through 27 of the Commissioner's findings of fact are additional findings of fact that were not included in ALJ Steiner's recommended findings of fact. ALJ Steiner's findings of fact do not sufficiently consider this evidence presented at the hearing and are relevant and material to show Mr. Bradash knowingly, and on two separate occasions, allowed the State of Minnesota to record 15 hours of CE when he only attended 3 hours of class time and 15 hours of CE when he only attended 4 hours of class time.

Under direct exam at the July 26, 2016, hearing, Sara Behrens, counsel for the Department, asked the following questions and Mr. Bradash provided the following responses:

Sara:	So essentially then you attended approximately seven hours of class time and 30 hours were reported. Is that correct?
Bruce:	Correct.
Sara:	Okay. And you did in fact sign this Consent Order agreeing to the sanctions and that that's what occurred.
Bruce:	Yep.
Sara:	Okay. Did Minnesota inform you that they could prosecute you criminally?
Bruce:	Um, on the letter they sent originally?
Sara:	Correct.
Bruce:	I do not have that in front of me. Um, actually I do. I don't know. Whatever is in that, I guess I can't answer that question. I'm not sure.
Sara:	Okay.
Bruce:	I know it's a pretty threatening letter and again, this affected about 3,000 agents and some of them, my good friends, were in that class and we had the discussion and it was like, wow, do we want to fight this? You know, we shouldn't have turned in the 30, but we didn't turn in the 30, he turned in the 30. We should have objected to that obviously.
Sara:	So and he informed you at that class, I believe you stated, that he was going to report 15 hours for you. Correct?
Bruce:	Correct.
Sara:	Okay. And you didn't inform the state that that was incorrect.
Bruce:	No.
Sara:	Okay. But you knew that you didn't sit there for 30 hours.
Bruce:	Right. And I didn't think it was an issue because I didn't need 30 hours. I only needed less than the hours that I was actually in the class.
Sara:	But they were still reported.
Bruce:	Correct.
Sara:	Okay. And you understand that you have to sit for the 50 minutes to make an hour? Correct?
Bruce:	Yes.
Sara:	Okay. And that you can't report what you didn't attend?
Bruce:	I do now.
Sara:	Okay.

The Commissioner's findings of fact paragraphs 21 through 27 are established from Mr. Bradash's testimony and ALJ Steiner's recommended findings adopted by the Commissioner. The Commissioner found that Mr. Bradash's actions were those of an untrustworthy person and each act was sufficient to cause the Commissioner to be unable to deem Mr. Bradash as trustworthy, or of good personal reputation. The Commissioner's findings of fact came directly from Mr. Bradash's own testimony, and no evidence was entered into the record that is contrary to the Commissioner's findings of fact. Therefore, because there is no evidence in the record in the contrary to the Commissioner's findings of fact as outlined in paragraphs 21 through 27, the Commissioner's findings are supported by the greater weight of the evidence.

Paragraphs 28 and 29 of the Commissioner's findings of fact reject and amend ALJ Steiner's recommended findings of fact paragraphs 21 and 22, respectively. ALJ Steiner's findings of fact did not accurately address the evidence presented at the hearing. The Commissioner's findings of fact paragraphs 21 through 27 make it clear that the greater weight of the evidence does support a denial of Mr. Bradash's license.

Commissioner's Conclusions of Law Rationale

Paragraph 1 of the Commissioner's conclusions of law rejects and amends ALJ Steiner's paragraph 1 recommended conclusions of law. The Commissioner found that ALJ Steiner's conclusion of law in paragraph 1 is not in accordance with the law. The Commissioner amended this conclusion of law to correctly include the laws that were in effect at the time relevant to the facts of this case.

The Commissioner amended ALJ Steiner's conclusion to include the status of the law at the time relevant to the facts of this case. ALJ Steiner's recommended

conclusion of law made it appear that the rules cited in her recommendation were not in effect at times material to the case. The Commissioner's conclusion makes it clear that the rules cited in ALJ Steiner's recommended conclusion were in effect at times relevant to this case and the statute cited in the Commissioner's conclusion makes it clear that the statutes were a continuation of language contained in the rules cited in the Commissioner's conclusion.

Paragraphs 2 through 12 of the Commissioner's conclusions of law were adopted without change from ALJ Steiner's recommended conclusions of law paragraphs 2 through 12, respectively.

The Commissioner rejected paragraph 13 of ALJ Steiner's conclusion of law in full. The Commissioner found that ALJ Steiner's conclusion of law in paragraph 13 is not in accordance with the law.

ALJ Steiner interpreted N.D.C.C. § 26.1-26-15 to require a companion provision from N.D.C.C. § 26.1-26-42 in order to provide a basis for application denial. ALJ Steiner found that N.D.C.C. § 26.1-26-15 does not provide an independent basis for license denial.

The ALJ's conclusion of law that N.D.C.C. § 26.1-26-15 does not provide the Commissioner the legal authority to deny an applicant is erroneous. The plain language of N.D.C.C. § 26.1-26-15 clearly states the Commissioner must deem an applicant to be competent, trustworthy, financially responsible, and of good personal and business reputation. The statute makes no mention of a requirement that an additional finding under N.D.C.C. § 26.1-26-42 is necessary. Rather, N.D.C.C. § 26.1-26-15 sets forth a requirement for any license under N.D.C.C. ch. 26.1-26 and a requirement prior to the

Commissioner granting an applicant a license. Should that requirement not be met, the remedy is found in N.D.C.C. § 26.1-26-39 which provides: "If the commissioner finds that the applicant has not met the requirements for licensing, the commissioner shall refuse to issue the license.".

The Department's longstanding interpretation of N.D.C.C. § 26.1-26-15 is consistent with the previous ALJ decisions cited in paragraph 22 of the Commissioner's conclusions of law.

The Department's interpretation is given deferential consideration in determining what the Legislature's intent was and, ultimately, the proper interpretation of the statute. "The administrative construction of a statute by the agency administering the law is entitled to deference if that interpretation does not contradict clear and unambiguous statutory language." *Western Gas Resources*, 489 N.W.2d at 872.

Moreover, if the ALJ's interpretation of N.D.C.C. § 26.1-26-15 were to prevail, the Department would be put in the position of licensing individuals the Commissioner deems to be untrustworthy, incompetent, financially irresponsible and of poor personal and business reputation. The ALJ's interpretation leaves the Department without a remedy if an applicant fails to meet the requirements of N.D.C.C. § 26.1-26-15 and has not violated one of the specific provisions of N.D.C.C. § 26.1-26-42 that applies to applicants. Under the ALJ's interpretation the Commissioner's determination of untrustworthiness is meaningless and the N.D.C.C. § 26.1-26-15 is rendered meaningless.

The ALJ's interpretation would result in the Department being required to license an applicant that discloses an egregious administrative violation, such as providing false

information to a state regulator in another state. The Department would be required to issues a license despite the Commissioner finding that the applicant has demonstrated untrustworthiness, incompetence, financial irresponsibility or poor reputation. This would be an absurd and illogical result. Further, this would create a situation where it is a higher burden for the Department to deny a license to an applicant than it would be to revoke an existing license. Applicants do not hold licenses and thus have no property right established. The law rationally requires that it should be a lower burden for the Department to deny a license than take a license from an individual.

In addition, N.D.C.C. § 26.1-26-15 is a "must" requirement rather than a discretionary "may" requirement such as in N.D.C.C. § 26.1-26-42. ALJ Steiner's interpretation requires a link between the nondiscretionary statute, N.D.C.C. § 26.1-26-15, and the discretionary statute, N.D.C.C. § 26.1-26-42. ALJ Steiner's interpretation does not give entire effect to the statute, but instead renders the language of N.D.C.C. § 26.1-26-15 meaningless. If the Commissioner is not able to deny a license under N.D.C.C. § 26.1-26-15, then the requirement of an applicant being deemed by the Commissioner as competent, financially responsible, and of good personal and business reputation is meaningless in the decision to grant a license.

The North Dakota Supreme Court has consistently said it will construe statutes to avoid absurd or illogical results and that a court may resort to extrinsic aids to interpret a statute and avoid an absurd result. *Mertz v. City of Elgin, Grant Cty.*, 2011 ND 148, ¶ 7, 800 N.W.2d 710, 713. As outlined above, interpreting N.D.C.C. § 26.1-26-15 in the manner in which the ALJ interprets it would result in the Commissioner only being able to revoke licensed insurance producers for fraudulent, coercive, dishonest, incompetent,

untrustworthy, or financially irresponsible behavior and leave the Commissioner powerless when faced with an applicant possessing similar characteristics. This is an absurd and illogical result.

Paragraph 13 of the Commissioner's conclusions of law were adopted without change from ALJ Steiner's recommended conclusions of law paragraph 14.

The Commissioner rejected the ALJ's conclusions of law in paragraphs 15 through 18 in full. The Commissioner found that the ALJ's conclusions of law in paragraphs 15 through 18 are not in accordance with the law. As discussed more fully above in the Commissioner's rationale for rejecting ALJ Steiner's recommended conclusion of law paragraph 13, the Commissioner denied Mr. Bradash's license application based solely on N.D.C.C. § 26.1-26-15, which provides the Commissioner the authority to deny an application for licensure.

Paragraphs 14 through 22 of the Commissioner's conclusions of law are additional conclusions of law that were not included in ALJ Steiner's recommended conclusions of law.

Paragraphs 14 through 22 were included to clarify that N.D.C.C. § 26.1-26-15 provides the Commissioner the authority to deny an applicant if the Commissioner does not deem the applicant trustworthy, competent, financially responsible and of good reputation. As discussed more fully above in the Commissioner's rationale for rejecting ALJ Steiner's recommended conclusion of law paragraph 13, ALJ Steiner's conclusion that N.D.C.C. § 26.1-26-15 alone does not provide the authority to deny a license is not in accordance with the law.

Paragraph 14 of the Commissioner's conclusions of law establishes that Minnesota law required the insurance producer to file, or cause to be filed, compliance reports and prohibited producers from claiming CE not actually completed.

Paragraph 15 of the Commissioner's conclusions of law establishes that a producer's license is a regulated privilege.

Paragraph 16 of the Commissioner's conclusions of law establishes that only producers that currently hold a producer license are entitled to a constitutional property right protection of the license.

Paragraph 17 of the Commissioner's conclusions of law establishes that the burden is on the applicant to show the applicant meets the minimum statutory requirements for a regulated license.

Paragraph 18 of the Commissioner's conclusions of law is a citation to the minimum character requirements of an applicant for a producer license.

Paragraph 19 of the Commissioner's conclusion of law establishes that because the Commissioner was unable to deem Mr. Bradash as trustworthy and of good personal reputation, the Commissioner was unable to approve Mr. Bradash's application.

Paragraph 20 of the Commissioner's conclusions of law establishes that the Office of Administrative Hearings has consistently interpreted N.D.C.C. § 26.1-26-15 to give the Commissioner the authority to deny an application for licensure.

Paragraph 21 of the Commissioner's conclusions of law establishes that the Commissioner acted properly in denying Mr. Bradash's license because Mr. Bradash

did not meet the minimum character requirements for licensing as set forth by N.D.C.C. § 26.1-26-15.

Paragraph 22 of the Commissioner's conclusions of law establishes that the Commissioner acted properly in denying Mr. Bradash's license because Mr. Bradash did not meet the minimum character requirements for licensing as set forth by N.D.C.C. § 26.1-26-15.

ORDER

The evidence of record has been considered and appraised. The facts, as established by the greater weight of the evidence, establish both an appropriate factual and a legal basis exists for denying Mr. Bradash's application for a North Dakota nonresident individual insurance producer license under N.D.C.C. § 26.1-26-15. Mr. Bradash's application for a nonresident insurance producer license is accordingly DENIED.

DATED at Bismarck, North Dakota, this 21st day of September, 2016.

Adam Hamm
Commissioner
North Dakota Insurance Department
600 East Boulevard Avenue, Dept. 401
Bismarck, North Dakota 58505
Telephone: (701) 328-2440

EXHIBIT LIST							
Matter	Bruce Bradash Denial Nonresident Insurance Producer License OAH File No. 20160344						
Hearing	July 26, 2016 ID= Insurance Department BB= Bruce Bradash						
No.	Description	Mkd	Idd	Ofd	W/D	Adm	Note
1	Bruce Bradash North Dakota nonresident insurance producer application-May 25, 2016	X		ID		X	3 pages
2	Minnesota Consent Order	X		ID		X	5 pages
3	Bradash Explanation Letter	X		ID		X	1 Page
4	June 20, 2016 Denial Letter	X		ID		X	1 Page
5	Request for Hearing	X		ID		X	1 Page
6	December 16, 2015 Denial Letter	X		ID		X	1 Page
7	Jeff Ubben Notes of Phone Conversation	X		ID		X	1 Page
A	Bradash Explanation Letter (same as Exhibit 3)	X		BB		X	1 Page
B	Letter from Thomas Steffl, dated July 12, 2016	X		BB		X	1 Page
C	Letter from David Paradeau, dated July 10, 2016	X		BB		X	1 Page
D	Memo from Brian Emswiler, dated July 11, 2016	X		BB		X	1 Page
E	Letter from Brian Ness, dated July 15, 2016	X		BB		X	1 Page
F	Letter from Carla Anderson, dated July 17, 2016	X		BB		X	1 Page

STATE OF NORTH DAKOTA

COMMISSIONER OF INSURANCE

IN THE MATTER OF:	)	
	)	**RECOMMENDED**
Thomas J. Day	)	**FINDINGS OF FACT,**
	)	**CONCLUSIONS OF LAW,**
Application for Nonresident	)	**AND ORDER**
Insurance Agent License	)	

On July 16, 1999, the North Dakota Department of Insurance ("Department") requested the designation of an administrative law judge ("ALJ") from the Office of Administrative Hearings to conduct a hearing and to issue recommended findings of fact and conclusions of law, as well as a recommended order, in regard to this matter. (The request was dated July 9, 1999, but was received by OAH on July 16, 1999.) On July 21, 1999, ALJ Allen C. Hoberg was designated to preside.

Although there was some confusion (or disagreement) with regard to the application and whether Mr. Day was applying for reinstatement of a previous license or was submitting an application for a new license, it now seems clear that this matter involves the application of Thomas J. Day for a nonresident insurance agent license with the Department. Because Mr. Day has never been issued a nonresident insurance agent license by the Department, the application is properly treated as a new application for license. Day was previously licensed by the Department as a resident insurance agent. His resident insurance agent license was revoked by the Commissioner of Insurance ("Commissioner") on April 30, 1990.

On July 12, 1999, the Department issued a Notice of Hearing in regard to this matter. The notice scheduled a July 28, 1999, hearing, beginning at 9:00 a.m. On July 21, 1999, the

Department issued an Amended Notice of Hearing changing only the starting time of the hearing from 9:00 a.m. to 10:30 a.m. The hearing was held as scheduled on July 28, in the Meeting Room of the Kelly Inn, 4207 13th Avenue SW, Fargo, North Dakota. Thomas Day was present at the hearing. Mr. Day was represented at the hearing by Mr. Douglas W. Nesheim, Fargo. Mr. Day testified and Mr. Nesheim also called the Reverend Paul S. Brunsberg as a witness for Day. Mr. Nesheim offered six exhibits (exhibits 1-6). All but one exhibit were admitted. Exhibit 3 was not admitted but was submitted under an offer of proof. The Department was represented at the hearing by Special Assistant Attorney General Susan J. Anderson. Ms. Anderson called one witness, Laurie A. Wolf, the Director of Agent Licensing and Investigation for the Department. Ms. Anderson offered four exhibits (exhibits 7-10), all of which were admitted. The ALJ took official notice of Mr. Day's March 3, 1999, application for licensure as a nonresident agent, received by the Department on March 22, 1999 (NAIC Midwest Zone Uniform Application for Individual Resident/Nonresident License), with attachments (the "application"), as well as the Department's notice and amended notice.

At the close of the evidentiary portion of the hearing, the ALJ asked counsel to file simultaneous closing briefs, to be received by him no later than August 20, 1999. The ALJ received Mr. Nesheim's brief on August 18, 1999. He received Ms. Anderson's brief on August 20, 1999.

Based on the evidence presented at the hearing and the briefs of counsel, the ALJ makes the following recommended findings of fact and conclusions of law.

FINDINGS OF FACT

1. Thomas J. Day's North Dakota resident agent licensed was revoked by the Commissioner on April 30, 1990, under a Consent Order signed by the Commissioner and by

Mr. Day that same day. Exhibit 7. As part of that Consent Order, Day agreed to pay a civil penalty in the amount of $10,000.00.

2. The 1990 Consent Order resulted from actions by Day which were violations of the North Dakota insurance laws. Essentially, Day admitted in the Consent Order to participating in a rebating scheme, unlawful sharing of commissions, selling of insurance without holding the required company appointments, lying on life insurance applications, and forging another agent's name to applications for life insurance. *See* the Consent Order, exhibit 7, for the specific actions that resulted in violations of law admitted by Day. Day also testified about these actions to some extent at the hearing.

3. Laurie Wolf, then as a Department investigator, participated in the investigation of Day, including an on-site investigation, that resulted in the Consent Order. Ms. Wolf has been with the Department approximately 10½ years as an investigator, a senior investigator, and now a director.

4. Ms. Wolf testified that since she has been with the Department, both with regard to the length of time that the violations were occurring and the involvement of numbers of insurance consumers with the violations, she has never seen such egregious violations of the insurance laws in North Dakota as those admitted by Day in the1990 Consent Order.

5. Day was not convicted of any crime related to the violations that resulted in the 1990 Consent Order. He has never been convicted of any crime. *See* Part III, Background Information, on the application.

6. Day is currently a licensed resident insurance agent in the State of Minnesota, having been so licensed since March or April of 1998. Since his licensure in Minnesota, no actions by the licensing authority have been taken against his license.

7. Other than his own testimony and what can be inferred from other facts in evidence, the only evidence about Day's character or rehabilitation was the testimony of Reverend Brunsberg. Rev. Brunsberg has extensive experience in counseling people, both as an addiction counselor and as a pastor. Rev. Brunsberg has known Day only since 1990. Rev. Brunsberg testified that he believes that now Thomas Day would be the most honest of insurance salesmen. He said that Day is fully aware of his past actions and their significance, knew that he needed to change, and did change. He said that Day has considerable remorse about his past actions and the effect that they had on others and on him.

8. At the hearing, Day expressed considerable remorse about his past actions. He also said that he believes he has suffered enough financially and otherwise from those actions and believes that he can now be an honest and good insurance agent. He acknowledged that he made a very good living previously as an insurance agent and has now been struggling financially for about nine years. He said that now he would be the most unlikely person to violate the insurance laws.

9. Day's application is now deemed by the Department to be a complete application.

10. The Department sent to Day through Mr. Nesheim a May 19, 1999, letter denying him a nonresident agent's license. Exhibit 8. The letter, which was signed by Ms. Wolf, bases the denial of licensure for Day in part on Day's answers to questions in the application, but primarily on the application of N.D.C.C. §§ 26.1-26-42(6), (11), and (12), and 26.1-26-15 to Day's situation. The Wolf letter notes Day's past insurance laws violations, notes that the actions resulting in the violations were directly related to the business of insurance, and states that Day had failed to show that he has a good business reputation in light of his past conduct.

11. On June 16, 1999, Day requested a hearing on the denial. Exhibit 9.

CONCLUSIONS OF LAW

1. N.D.C.C. § 26.1-26-15 states as follows:

> 26.1-26-15. License requirement – Character. An applicant for any license under this chapter must be deemed by the commissioner to be competent, trustworthy, financially responsible, and of good personal and business reputation.

2. N.D.C.C. § 26.2-26-42 states, in part, as follows:

> 26.1-26-42. License suspension, revocation, or refusal – Grounds. The commissioner may suspend, revoke or refuse to continue or refuse to issue any license issued under this chapter if, after notice to the licensee and hearing, the commissioner finds as to the licensee any of the following conditions:
>
> ***
>
> 6. In the conduct of affairs under the license, the licensee has used fraudulent, coercive, or dishonest practices, or has shown oneself to be incompetent, untrustworthy, or financially irresponsible.
>
> ***
>
> 11. The licensee has been found guilty of any unfair trade practice defined in this title or fraud.
>
> 12. A violation of or noncompliance with any insurance laws of this state, or a violation of or noncompliance with any lawful rules or orders of the commissioner or of a commissioner of another state.

3. As the applicant for a new nonresident insurance agent's license, Day has the burden of proof, *i.e.*, of persuasion. He must show, by the greater weight of the evidence, that he meets the statutory requirements for licensure.

4. Because Day has never been convicted of any crime, the provisions of N.D.C.C. §§ 12.1-33-02.1 and 26.1-26-42(5) do not apply to his application, except perhaps by analogy, an analogy which is not necessary or appropriate to make. Therefore, there is no evidence of rehabilitation from a crime. Moreover, any evidence of rehabilitation is irrelevant in this regard.

5. However, character evidence of an applicant can be considered. *See* title to N.D.C.C. § 26.1-26-15. Evidence of an applicant's rehabilitation may be considered as evidence of his character. Again, there is no evidence of Day being rehabilitated from a criminal offense. The only evidence of Day being rehabilitated is evidence of rehabilitation from his past wrongful actions, those indicated in the 1990 Consent Order. The evidence of such rehabilitation presented at the hearing is that of statements made at the hearing by Day and Rev. Brunsberg, as well as some evidence of rehabilitation found in exhibits 4, 5, and 6. However, this rehabilitation evidence relates mostly to general character, personally, and does not relate much to Day's competency, trustworthiness, and financial responsibility, or business reputation, as an insurance agent, or as to other business situations in which he may have been involved. *See* N.D.C.C. § 26.1-26-15. An administrative adjudicator would be entitled to give the general or personal rehabilitation evidence little weight under the circumstances. It is not conclusive evidence of Day's fitness to hold an insurance agent license in North Dakota, especially considering the circumstances of his previous licensure in North Dakota, *i.e.*, the violations of the law by Day in 1990.

6. While under license as a resident insurance agent in North Dakota, Day agreed that he violated N.D.C.C. § 26.1-26-42(6), (7), (11), and (12), amongst other sections of the North Dakota Insurance laws. Therefore, because of these specific previous violations, the Commissioner has bases in law today, under N.D.C.C. § 26.1-26-42, to refuse to issue a new license to Day. The actions of Day that resulted in the violations of the 1990 Consent Order related directly to his conduct in the business of insurance and are specifically mentioned in N.D.C.C. § 26.1-26-42 as a basis for refusal of license. These violations were egregious violations of the insurance laws.

7. Moreover, today, under N.D.C.C. § 26.1-26-15, the Commissioner may consider the past actions that resulted in the 1990 violations of N.D.C.C. § 26.1-26-42. Considering these past actions, there is not enough evidence presented by Day of his character, generally, but especially specifically about him as a business person or a business person involved as an insurance agent, to counteract the effect these past violations have on a determination under N.D.C.C. § 26.1-26-15. Even without consideration of those past actions, Day presented little in the way of evidence about him being currently of good business reputation or of good business reputation as an insurance agent. Regarding Minnesota, the evidence only shows that he is currently licensed and has had no administrative actions taken against him in Minnesota since his licensure there.

8. Day does not currently have a nonresident insurance license in North Dakota, nor any valid insurance license, that may be entitled to constitutional protection as a property right. *See Bland v. Commission on Medical Competency*, 557 N.W.2d 379 (N.D. 1996): but *see N.D. Department of Transportation V. DuPaul*, 487 N.W.2d 593 (N.D. 1992).

9. Essentially, under both N.D.C.C. §§ 26.1-26-15 and 26.1-26-42, before an applicant for an insurance agent license may be granted a license, he must show that he is and has been competent, trustworthy, and financially responsible. In the not too distant past, Day has shown that he is not competent, trustworthy, and financially responsible in the conduct of his affairs as a resident insurance agent. The evidence at this hearing does not show that Day is now competent, trustworthy, and financially responsible in the conduct of his affairs, especially not so in the conduct of his business affairs as an insurance agent. Further, under N.D.C.C. § 26.1-26-15, Day has not shown that he is a person of good business and personal reputation. His business

reputation has not been shown to be anything other than what it was at the time of the1990 violations, *i.e.*, a bad reputation.

10. Day has not met his burden of proof, overcoming the effect of his previous violations of law, to establish, by the greater weight of the evidence, that he has met the statutory requirements for licensure as a nonresident insurance agent.

RECOMMENDED ORDER

The greater weight of the evidence shows that Thomas J. Day has not met the requirements of the provisions of law to be licensed as a nonresident insurance agent in North Dakota. The ALJ recommends that the Commissioner issue an order to deny his application.

Dated at Bismarck, North Dakota, this 31st day of August, 1999.

State of North Dakota
Glenn Pomeroy
Commissioner of Insurance

By: _____
Allen C. Hoberg
Administrative Law Judge
Office of Administrative Hearings
1707 North 9th Street - Lower Level
Bismarck, North Dakota 58501-1882
Telephone: (701) 328-3260

STATE OF NORTH DAKOTA

COMMISSIONNER OF INSURANCE

IN THE MATTER OF:	)	
	)	
Thomas J. Day	)	**ORDER**
	)	
Application for Nonresident Insurance Agent License	)	
	)	

The evidence of record has been considered and appraised. IT IS ORDERED that the recommended findings of fact and conclusions of law of the administrative law judge are adopted as the Commissioner's findings of fact and conclusions of law in this matter; IT IS FURTHER ORDERED that the recommended order of the administrative law judge is adopted as the Commissioner's final order in this matter. The application for a nonresident insurance agent license of Thomas J. Day is DENIED.

Dated at Bismarck, North Dakota this 20th day of September.

State of North Dakota
Glenn Pomeroy

Glenn Pomeroy
Commissioner of Insurance

STATE OF NORTH DAKOTA

INSURANCE DEPARTMENT

IN THE MATTER OF:	)	**RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**
Christopher Fischer	)	
	)	**OAH File No. 20090392**

STATEMENT OF THE CASE AND ISSUES

On November 2, 2009, Christopher Fischer ("Fischer") of Appleton, Wisconsin, applied to the North Dakota Insurance Department ("Insurance Department") for a nonresident individual insurance producer license. *See* Exhibit 1. On November 19, 2009, the Insurance Department sent a letter to Fischer, notifying him his application was denied. *See* Exhibit 2. On December 8, 2009, Fischer sent an email to Melissa Hauer at the Insurance Department, requesting a hearing to appeal the denial of his application. *See* Exhibit A.

On December 8, 2009, Melissa Hauer, Special Assistant Attorney General, General Counsel for the Insurance Department, requested the designation of an administrative law judge from the Office of Administrative Hearings to conduct a hearing and to issue recommended findings of fact and conclusions of law, as well as a recommended order, in regard to Fischer's appeal. The undersigned Administrative Law Judge Bonny M. Fetch ("ALJ Fetch") was so designated.

On December 11, 2009, ALJ Fetch issued a Notice of Hearing. The hearing was held as scheduled on December 22, 2009, by telephone conference. Melissa Hauer represented the North Dakota Insurance Department. She called two witnesses, Christopher Fischer and

Rebecca Ternes, Deputy Commissioner of the North Dakota Insurance Department. Fischer appeared without legal counsel. He testified on his own behalf and called his wife, Lori Fischer, as a witness. Exhibits 1-8, offered by the Insurance Department, were admitted into evidence. Fischer did not offer any exhibits. Following the hearing, ALJ Fetch marked Fischer's request for a hearing as Exhibit A and entered it into the record. A list of the exhibits is attached to this decision. Ms. Hauer filed a post-hearing brief and Fischer filed a post-hearing statement. The record of this matter closed on January 29, 2010.

The issue to be considered and decided upon the hearing is whether a nonresident individual insurance producer license should be issued to Christopher Fischer, *i.e.*, whether he meets the requirements for licensure under North Dakota Century Code chapter 26.1-26.

Based on the evidence presented at the hearing and the post-hearing brief of Melissa Hauer and written statement of Christopher Fischer, the undersigned Administrative Law Judge makes the following recommended findings of fact, conclusions of law, and order for consideration of Adam W. Hamm, North Dakota Insurance Commissioner.

FINDINGS OF FACT

1. Christopher Fischer, age 34, resides in Appleton, Wisconsin. *See* Exhibit 1. He is employed with United HealthCare Insurance Company, Green Bay, Wisconsin, as a telephone sales representative. *Id.* He holds a Wisconsin resident insurance producer license and nonresident insurance producer licenses from several other states.

2. Rebecca Ternes, Deputy Commissioner, North Dakota Insurance Department, testified that licensing insurance producers is a form of consumer protection and that each state has its own laws, administrative rules, and standards for licensing. In North Dakota, the

Insurance Commissioner has the responsibility to evaluate the qualifications of applicants for licensure as insurance producers and makes the decision whether to grant or deny licensure.

3. Fischer applied to the North Dakota Insurance Department for a nonresident individual insurance producer license on November 2, 2009. *See* Exhibit 1. He testified that his employer contracts with ILSA, who applied for him to sell to North Dakota clients. *See also* Exhibit 1. He testified that he takes calls from clients only, and does not go into clients' homes. He explained that if he is not licensed in North Dakota, any calls from North Dakota clients must be passed on to other agents who are licensed. He stated he is paid based on the calls he takes, and he loses the bonus for calls which must be passed on to other agents. He did not provide evidence of any other impact to his employment for failure to secure a North Dakota license.

4. Fischer has a criminal conviction for domestic abuse of his wife in 2003. *See* Exhibits 3 and 4. The court record shows that Lori Fischer ("Lori") appeared at the Appleton Police Department on September 2, 2003, to report a domestic disturbance. *See* Exhibit 3. Lori was "quite upset, visibly shaking and crying." *Id.* Lori told police that she had been physically and verbally abused by her husband ("Christopher") for the prior 12 years and within the two weeks from the incident she had told her husband she wanted a divorce and she had moved to her mother's house. *Id.* When Lori went to see her children on September 2, 2003, her husband was upset and when she refused to spend the night with him he began arguing with her, told her she had abandoned the family, and said if she walked out of the house "it would end in a bloody mess." *Id.* Christopher tried to prevent Lori from leaving the house, smashed the driver's side window of her car with a flashlight, and blocked her from entering her mother's driveway with his van, motioning to her to "drive through him." *Id.* Lori told police she was scared and left the scene to go to the police department. *Id.* Lori told police that in the past, Christopher had held a

knife to her throat, threatened her friends at work, accused her of cheating and abandoning her parental responsibilities, and called her names such as "stupid cunt, ass, bitch." *Id.* Fischer pled guilty to the crime of Disorderly Conduct (non-violent), Domestic Abuse. *See* Exhibit 4.

Lori also reported to police on September 2, 2003, that Christopher had been physically abusive towards their minor son, JMF. *See* Exhibit 3. Lori reported an incident which happened the day before, which was confirmed by JMF. *Id.* In that incident, Christopher and JMF were playing pool when Christopher became upset with JMF and began choking JMF, slamming him against the wall and then onto the floor where Christopher pinned JMF down while kneeling on his chest. *Id.* Based on the report and investigation of this incident, Fischer was charged with Felony Physical Abuse of a Child and Misdemeanor Battery in 2005. *See* Exhibits 5 and 6. Upon a Deferred Prosecution Agreement, Fischer pled guilty to Felony Physical Abuse of a Child (JMF). *See* Exhibit 7. In accordance with the Deferred Prosecution Agreement, the charge was dismissed on December 6, 2007. *See* Exhibit 8.

Fischer argues that this last crime did not technically lead to a conviction because of the deferred adjudication agreement and he successfully completed the conditions of that agreement. Nonetheless, in his testimony at the hearing, Fischer did not deny that he was charged with felony battery of his son and that he pled guilty to that charge. Even though the charge was dismissed because he completed the conditions of the deferred adjudication agreement, that does not wipe out the fact that he committed physical abuse of his minor son. It does not mean his actions should be disregarded in considering his character under the statutory license requirements.

5. Fischer admitted in his testimony at the hearing to being verbally abusive to his wife, accusing her of cheating, hitting his son, and using a belt on his children. He also admitted

that his wife has sought domestic violence and child abuse restraining orders against him.

However, when Ms. Hauer asked if he pushed his son down by the throat and choked him, as reported in the police investigation report supporting the child abuse charge, Fischer replied "not to my recall." When asked if he had slammed his son against the wall, he replied "if [his son] was acting up, he [Fischer] may have." When asked if he ever choked his wife, he replied he "may have, thirteen years ago." When asked if he ever held a knife to his wife's throat, as reported in the police report that led to the domestic violence conviction, he replied "not to my recollection." Fischer's testimony in this regard is not credible as these are notable and highly emotional events which one would certainly remember.

In her testimony, Lori Fischer acknowledged the events of the September 2, 2003, incident and that she had also reported other incidents in the past. She testified that Fischer has not been charged with a crime since 2005 and that "everything's fine." That vague statement is given little weight. Neither offered any testimony whether Fischer continues to abuse his wife or his children. The burden is Fischer's to show evidence of good character. The only testimony in that regard was his own, which is self-serving and not entirely credible, and his wife's, which was vague and not forthcoming as to whether she continues to be abused. Fischer did not provide any credible evidence to show he has a good personal reputation.

Fischer's actions in committing domestic violence against his wife and physical abuse of his son, and his failure to acknowledge those actions demonstrate a lack of trustworthiness and good personal reputation.

CONCLUSIONS OF LAW

1. Anyone who sells, solicits, or negotiates insurance in North Dakota must be properly licensed by the Insurance Department. N.D.C.C. § 26.1-26-03. A license to practice as

an insurance producer is subject to the control and regulation of the state. "A regulated privilege is not a right." *See* North Dakota Dep't of Transp. v. DuPaul, 487 N.W.2d 593, 598 (N.D. 1992). An individual will be granted the privilege to practice as an insurance producer only as prescribed by N.D.C.C. §§ 26.1-26-15 and 26.1-26-42.

2. Fischer does not currently have a North Dakota nonresident individual insurance producer license that may be entitled to constitutional protection as a property right. *See* Bland v. Comm'n on Med. Competency, 557 N.W.2d 379, 381 (N.D. 1996).

3. As an applicant for a North Dakota nonresident individual insurance producer license, Fischer has the burden of proof to show, by the greater weight of the evidence, that he meets the statutory requirements for licensure. *See* Layon V. North Dakota State Bar Bd., 458 N.W.2d 501 (N.D. 1990).

4. In order to be licensed as an individual insurance producer, an applicant must be deemed to be trustworthy and of good personal reputation, among other things. N.D.C.C. § 26.1-26-15 states as follows:

> **26.1-26-15. License requirement - Character.** An applicant for any license under this chapter must be deemed by the commissioner to be competent, trustworthy, financially responsible, and of good personal and business reputation.

The language of N.D.C.C. § 26.1-26-15 is clear. The Commissioner is prohibited from granting a license to an applicant unless the applicant is deemed by the Commissioner to be competent, trustworthy, financially responsible, and of good personal and business reputation. Fischer's actions in committing domestic violence against his wife and physical abuse of his son, and his failure to take full responsibility for those actions demonstrate a lack of trustworthiness and good personal reputation. Fischer failed to overcome the evidence of his past which shows that he is not trustworthy and is not of good personal reputation.

5. N.D.C.C. § 26.1-26-42 states, in part, as follows:

> **26.1-26-42. License suspension, revocation or refusal - Grounds.** The commissioner may suspend, revoke, place on probation, or refuse to continue or refuse to issue any license issued under this chapter if, after notice to the licensee and hearing, the commissioner finds as to the licensee any of the following conditions:
> . . . .
>
> 5. The applicant or licensee has been convicted of a felony or convicted of an offense, as defined by section 12.1-01-04, determined by the commissioner to have a direct bearing upon a person's ability to serve the public as an insurance producer, insurance consultant, or surplus lines insurance producer, or the commissioner finds, after conviction of an offense, that the person is not sufficiently rehabilitated under section 12.1-33-02.1.

Subsection 5 contains two separate and distinct clauses, and thus, provides a basis for refusal to issue a license under two separate and distinct circumstances.

Under the first circumstance in subsection 5, an applicant may be denied a license when the applicant has been convicted of a felony or offense that has a direct bearing on the applicant's ability to serve the public as an insurance producer. The language in N.D.C.C. § 26.1-26-42(5) is plain and unambiguous. It is undisputed that Fischer violated N.D.C.C. § 26.1-26-42(5). Fischer's crimes were serious and he did not deny that he committed acts that led to the criminal charges. He pled guilty in both cases. The violations were egregious and show his lack of trustworthiness and good personal reputation. These are offenses within the meaning of N.D.C.C. § 26.1-26-42(5).

Section 26.1-26-42 provides that the Commissioner "may" refuse to issue a license if any of the conditions in subsection 5 are met. "May" is a discretionary term. *See* Bernhardt v. Bernhardt, 1997 ND 80, ¶ 9, 561 N.W.2d 656 (stating "[t]he use of the word 'may' is permissive and indicates it is a matter of discretion"); Jones v. N.D. State Bd. of Med. Exam'rs, 2005 ND 22, ¶ 13, 691 N.W.2d 251 (stating "the word 'may' ordinarily creates a directory, non-mandatory

duty"); Hagel v. Hagel, 2006 ND 181, ¶ 7, 721 N.W.2d 1 (stating "the word 'may' is usually employed to imply permissive, optional, or discretional, and not mandatory, action or conduct"). The Commissioner could, in his discretion, issue a license to Fischer if the Commissioner determines it is appropriate to do so, even considering the undisputed testimony that Fischer has violated N.D.C.C. § 26.1-26-42(5) and even despite the seriousness of Fischer's past egregious conduct.

Rehabilitation does not apply in the first circumstance in subsection 5, whereby an applicant may be disqualified for licensure when the applicant has been convicted of a felony or offense that has "a direct bearing upon [the] person's ability to serve the public as an insurance producer." N.D.C.C. § 26.1-26-42(5). With regard to "direct bearing" convictions, the Legislature did not include rehabilitation language.

Under the second circumstance in subsection 5, an applicant may be denied a license following conviction for offenses which do not have a direct bearing on the applicant's ability to serve the public as an insurance producer and for which the applicant has not demonstrated sufficient rehabilitation. Under N.D.C.C. § 12.1-33-02.1(2), there are several factors which a state agency must consider in determining whether a person is sufficiently rehabilitated. Those factors are:

a. The nature of the offense and whether it has a direct bearing upon the qualifications, functions, or duties of the specific occupation, trade, or profession.
b. Information pertaining to the degree of rehabilitation of the convicted person.
c. The time elapsed since the conviction or release. Completion of a period five years after final discharge or release from any term of probation, parole or other form of community corrections, or imprisonment, without subsequent conviction shall be deemed prima facie evidence of sufficient rehabilitation.

Fischer was convicted on the domestic violence charge on January 24, 2006, and he only completed the deferred adjudication requirements in December 2007, both of which are less than five years ago. That alone is enough to consider he is not sufficiently rehabilitated. Besides the time factor, Fischer failed to produce any convincing, credible information that he is sufficiently rehabilitated. His own testimony was non-committal and evasive as it pertained to his taking responsibility for admitting his actions concerning domestic violence against his wife and child abuse of his son. To the extent it may even be argued, Fischer failed to provide evidence of sufficient rehabilitation and he has thus failed to overcome the disqualification for licensure under this subsection.

8. Fischer does not have a right to a North Dakota nonresident individual insurance producer license under North Dakota law. Because of Fischer's past conduct violating N.D.C.C. § 26.1-26-42(5) and not meeting the requirements of N.D.C.C. § 26.1-26-15, the Commissioner has a basis in law to refuse to issue a license to him.

ADMINISTRATIVE LAW JUDGE'S COMMENTARY

Fischer claims that he lives in Wisconsin and has no plans to physically sell insurance in North Dakota. He argues that he should be granted a license or, if the Commissioner has reservations concerning his rehabilitation, a conditional license limiting him to only being able to conduct sales by telephone for a period of time. Fischer misses the point.

The purpose of the licensure law is for protection of the public. The Commissioner has a statutory responsibility to ensure that a license is granted only to persons who are competent, trustworthy, financially responsible, and of good personal and business reputation. N.D.C.C. § 26.1-26-15. Fischer did not show he has a good personal reputation. His attempts to whitewash his past were not successful. His violations were egregious and should not be disregarded. His

argument that he is not located in North Dakota and he conducts business by telesales is not relevant. If he is granted a license in North Dakota, he would not be prevented from coming to the state and conducting business in people's homes.

According to Deputy Commissioner Rebecca Ternes, a primary mission of the Insurance Department is to protect the public from dishonest and untrustworthy persons, and the licensure process is one way of ensuring that.

RECOMMENDED ORDER

The greater weight of the evidence shows that Christopher Fischer violated the provisions of N.D.C.C. § 26.1-26-42(5) and does not meet the requirements of N.D.C.C. § 26.1-26-15. The Administrative Law Judge recommends that Christopher Fischer's application for a North Dakota nonresident individual insurance producer license be denied.

Dated at Bismarck, North Dakota, this 25 day of February 2010.

State of North Dakota
Insurance Department

By: Bonny M. Fetch

Bonny M. Fetch
Administrative Law Judge
Office of Administrative Hearings
1707 North 9th Street
Bismarck, North Dakota 58501-1853
Telephone: (701) 328-3260

STATE OF NORTH DAKOTA

INSURANCE DEPARTMENT

IN THE MATTER OF:	)	
	)	**ORDER**
Christopher Fischer	)	
	)	**OAH File No. 20090392**
	)	

The evidence of record has been considered and appraised. IT IS ORDERED that the recommended findings of fact and conclusions of law of the administrative law judge are adopted as the North Dakota Insurance Commissioner's findings of fact and conclusions of law in this matter. IT IS FURTHER ORDERED that the recommended order of the administrative law judge is adopted as the North Dakota Insurance Commissioner's final order in this matter. Christopher Fischer's application for a North Dakota nonresident individual insurance producer license is DENIED.

Dated at Bismarck, North Dakota this 26th day of February, 2010.

State of North Dakota
Insurance Department

Adam Hamm
Insurance Commissioner

STATE OF NORTH DAKOTA

INSURANCE DEPARTMENT

IN THE MATTER OF:	)	**RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**
Michael Roche	)	
	)	**OAH File No. 20100066**

STATEMENT OF THE CASE AND ISSUES

On December 23, 2009, Michael Roche ("Roche") of Fitchburg, Wisconsin, applied to the North Dakota Insurance Department ("Insurance Department") for a nonresident individual insurance producer license. *See* Exhibit 1. On January 28, 2010, the Insurance Department sent a letter to Roche, notifying him his application was denied. *See* Exhibit 2. On February 23, 2010, Fischer sent a letter to Melissa Hauer at the Insurance Department, requesting a hearing to appeal the denial of his application. *See* Exhibit B.

On February 24, 2010, Melissa Hauer, special assistant attorney general, general counsel for the Insurance Department, requested the designation of an administrative law judge from the Office of Administrative Hearings to conduct a hearing and to issue recommended findings of fact and conclusions of law, as well as a recommended order, in regard to Roche's appeal. The undersigned Administrative Law Judge Bonny M. Fetch ("ALJ Fetch") was so designated.

On February 26, 2010, ALJ Fetch issued a Notice of Hearing. The hearing was held as scheduled on March 24, 2010, by telephone conference. Melissa Hauer represented the North Dakota Insurance Department. She called two witnesses, Michael Roche and Rebecca Ternes, deputy commissioner of the North Dakota Insurance Department. Roche appeared without legal

counsel. He testified on his own behalf but presented no other witnesses. Exhibits 1-11, offered by the Insurance Department, were admitted into evidence. Roche's Exhibit A, a list of states in which he is currently licensed, was admitted. Following the hearing, ALJ Fetch marked Roche's request for a hearing as Exhibit B and entered it into the record. Ms. Hauer filed a post-hearing brief and Fischer filed a post-hearing statement. The record was closed as of April 23, 2010.

The issue to be considered and decided upon the hearing is whether a nonresident individual insurance producer license should be issued to Michael Roche, *i.e.*, whether he meets the requirements for licensure under North Dakota Century Code chapter 26.1-26.

Based on the evidence presented at the hearing and the post-hearing brief of Melissa Hauer and written statement of Michael Roche, the undersigned administrative law judge makes the following recommended findings of fact, conclusions of law, and order for consideration of Adam W. Hamm, North Dakota Insurance Commissioner.

FINDINGS OF FACT

1. Michael Roche, age 46, resides in Fitchburg, Wisconsin. *See* Exhibit 1. He is employed with CUNA Mutual Insurance, Madison, Wisconsin. *Id.* He holds a Wisconsin resident insurance producer license and nonresident insurance producer licenses in Illinois, New York, Minnesota, Iowa, and Montana. *See* Exhibit A.

2. Rebecca Ternes ("Ternes"), deputy commissioner, North Dakota Insurance Department, testified that licensing insurance producers is a form of consumer protection and that each state has its own laws, administrative rules, and standards for licensing. In North Dakota, the Insurance Commissioner has the responsibility to evaluate the qualifications of applicants for licensure as insurance producers and makes the decision whether to grant or deny licensure. Where there are issues of concern in an application, it is brought to a meeting for

review and discussion. A paramount concern in the decision whether to grant or deny a license is protection of consumers and the assurance that individuals who sell insurance are competent and trustworthy.

3. Roche applied to the North Dakota Insurance Department for a nonresident individual insurance producer license on December 23, 2009. *See* Exhibit 1. On his application, he disclosed that he had a criminal conviction and that other states had taken action regarding his license. *Id.* Ternes testified that because of those disclosures, Roche's application was brought to a meeting for review and discussion.

4. Roche has a criminal conviction for an incident which happened on June 1, 1991, in Lodi, Wisconsin. He was charged with having sexual contact with an unconscious person and sexual intercourse with a person without consent of that person. *See* Exhibit 3. The charges were amended on December 4, 1991, to having sexual intercourse with a person without consent of that person. *Id.* Roche pled no contest and was found guilty. *Id.* He was convicted on the charge of having sexual intercourse with a person without consent of that person, a Class D felony. *Id.* He was sentenced to serve 60 days in jail and was placed on probation for three years. *Id.* He was also ordered to undergo drug, alcohol, and psychological evaluations and follow any treatment plan. *Id.* He satisfactorily completed the terms of his probation and was discharged from probation on January 3, 1995. *Id.* He was required to register as a sex offender in the state of Wisconsin until December 4, 2009. *Id.* Roche testified the documents in Exhibit 3 contain an accurate description of what he did and he did not disagree with any of it.

Roche testified he is not the person he was twenty years ago. At the time of his conviction, he stated there were two things his life revolved around, being with friends and drinking. The day the incident happened, he had been out all day with his friends drinking. He

claims his life has changed significantly since then. He has been married ten years and has two children, ages 11 and 8. He stated he has a glass of wine on a rare occasion, but does not have the drinking problem he had earlier. He stated he takes his responsibilities to his wife and children seriously. Roche admitted his past crime and earlier problem behaviors, and stated he was asking for an opportunity to prove himself.

5. After his conviction, Roche applied for insurance producer licenses in several states, but he failed to disclose his criminal background in those applications. He did not deny that he failed to disclose his criminal background, but testified he acted on advice from a superior who had been in the insurance business for 15 years. He testified that he went to his boss and asked him how to answer the question, and his boss told him they were only concerned with crimes of embezzlement or taking people's money unlawfully and he advised Roche to answer "no." Roche testified he answered "no" because he trusted his boss and because his felony conviction was not for that type of crime. He blamed his actions on the bad information he received from his boss. Roche did not produce any testimony that he attempted to otherwise elicit information or clarification which might have assisted him in answering the question truthfully.

6. It was established, by a preponderance of the evidence presented at the hearing, that Roche failed to disclose his criminal history on multiple applications for a nonresident insurance producer license.

Roche applied for a nonresident insurance producer license in the state of Washington in 2003, and did not answer the criminal background question truthfully. His license was revoked because he knowingly made a false or misleading material statement by failing to disclose his criminal background. *See* Exhibit 4. Roche applied in the state of Tennessee in August 2002

and was granted a nonresident insurance producer license. His license was revoked in December 2003 when the state learned of Roche's felony conviction which he had failed to disclose on his application. *See* Exhibit 5. The state of Ohio also revoked his license for the same reason. *See* Exhibit 6. Further, he had failed to report to Ohio the revocations by Washington and Tennessee. Insurance producers have an obligation to report to state regulators any administrative actions taken against their license in other jurisdictions. *See* N.D.C.C. § 26.2-26-45.1.

Roche applied for a license in Iowa and Minnesota, and failed to disclose his criminal history in those applications. Those states fined him for failing to make the disclosure, but allowed him to keep his license. *See* Exhibits 7 and 8.

Roche applied for a license in Arkansas on January 17, 2003, and did not disclose his criminal history on the application. He reported to the Arkansas Insurance Department on June 2, 2003, that he had failed to disclose the criminal conviction "due to an oversight in the licensing department at [his] company." *See* Exhibit 9. Arkansas suspended Roche's license on July 23, 2003, and he requested a hearing which was postponed indefinitely at Roche's request so he could find employment. *Id.* On October 13, 2005, Roche requested a hearing. *Id.* Based upon evidence presented at the hearing, Roche's suspension was rescinded and his license was reinstated upon payment of fees. *Id.* Roche testified he does not have that territory anymore so he chose not to pay the fee and his license was terminated.

Roche's employment with Ameritas Life Insurance Corporation was also terminated on June 23, 2003, because he had "falsified state insurance licensing applications because of his failure to disclose his 1991 conviction of sexual assault (a felony) in the State of Wisconsin." *See* Exhibit 9.

Roche applied for a license in the state of New York on November 26, 2001, and failed to disclose his criminal history. When the state discovered it, Roche was informed his license would be revoked unless he paid a fine of $1,000. *See* Exhibit 10. Roche chose to pay the fine.

He applied for a license in Indiana on October 17, 2006. His application was denied due to his criminal history. *See* Exhibit 11. He requested a hearing and was granted a license subject to a probationary period of three years. *Id.*

7. Roche's failure to disclose his criminal history on multiple applications for a nonresident insurance producer license because he reportedly received bad information from his boss is not a valid excuse. The criminal background question is clear and unambiguous. The North Dakota application asks, "Have you ever been convicted of a crime, had a judgment withheld or deferred, or are you currently charged with committing a crime?" *See* Exhibit 1. The question on applications in other states is similar. For example, the state of Washington application asks, "Have you ever been convicted of a felony?" *See* Exhibit 4. The state of Tennessee application asks, "Have you ever been convicted of, or are you currently charged with, committing a crime, whether adjudication was withheld?" *See* Exhibit 5. Roche answered "no" to those questions on the Washington and Tennessee applications. *See* Exhibits 4 and 5. Roche did not produce any testimony that he attempted to elicit information or clarification from any regulating authority or person other than his boss which might have assisted him in answering the question truthfully. At best, his actions were careless and evidence poor judgment. At worst, they were intentionally deceptive. In any case, they were untruthful.

As stated earlier, the question is clear on its face and Roche should have been able to answer it without advice from anyone else. The fact that he sought advice as to how to answer it suggests he knew how to answer it but was afraid of the consequences. In any event, if he had

any doubt or question as to how to respond to the question, the appropriate source to consult would have been the state regulatory authorities.

CONCLUSIONS OF LAW

1. Anyone who sells, solicits, or negotiates insurance in North Dakota must be properly licensed by the Insurance Department. N.D.C.C. § 26.1-26-03. A license to practice as an insurance producer is subject to the control and regulation of the state. "A regulated privilege is not a right." *See North Dakota Dep't of Transp. v. DuPaul*, 487 N.W.2d 593, 598 (N.D. 1992). An individual will be granted the privilege to practice as an insurance producer only as prescribed by N.D.C.C. §§ 26.1-26-15 and 26.1-26-42.

2. Roche does not currently have a North Dakota nonresident individual insurance producer license that may be entitled to constitutional protection as a property right. *See Bland v. Comm'n on Med. Competency*, 557 N.W.2d 379, 381 (N.D. 1996).

3. As an applicant for a North Dakota nonresident individual insurance producer license, Roche has the burden of proof to show, by the greater weight of the evidence, that he meets the statutory requirements for licensure. *See Layon V. North Dakota State Bar Bd.*, 458 N.W.2d 501 (N.D. 1990).

4. In order to be licensed as an individual insurance producer, an applicant must be deemed to be trustworthy and of good personal reputation, among other things. N.D.C.C. § 26.1-26-15 states as follows:

> **26.1-26-15. License requirement - Character.** An applicant for any license under this chapter must be deemed by the commissioner to be competent, trustworthy, financially responsible, and of good personal and business reputation.

The evidence shows that Roche does not meet the requirements of N.D.C.C. § 26.1-26-15 to be granted a nonresident insurance producer license.

The language of N.D.C.C. § 26.1-26-15 is clear. The Commissioner is prohibited from granting a license to an applicant unless the applicant is deemed by the Commissioner to be competent, trustworthy, financially responsible, and of good personal and business reputation. Roche failed to disclose his past criminal history and thereby falsified his applications for nonresident insurance producer licenses in multiple states. The ALJ agrees with the Insurance Department's argument that, "A person selling or answering questions about insurance must be careful enough about the truth that he will accurately disclose to consumers the costs, potential benefits, and exclusions," and, "Because of the conviction and Roche's failure to disclose it on multiple recent applications, one cannot be confident that he does not pose a risk to insurance consumers or that permitting him to practice in the insurance field is in the public interest." *See* Brief at p. 9. One who cannot be relied upon to tell the truth or to accurately provide information in important matters, such as a license application, is not trustworthy. The courts have held that lack of trustworthiness "in itself authorizes revocation, suspension, or refusal of an insurance agent's license." *Ballew v. Ainsworth*, 670 S.W.2d 94, 100 (Mo. App. 1984); *Stith v. Lakin*, 129 S.W.3d 912 (M.O. 2004). Roche committed a felony for which he served time in jail and was placed on three years' probation. He was also required to register as a sex offender in the state of Wisconsin until December 2009. Roche's intentional failure to disclose his criminal history on multiple applications for nonresident insurance producer licenses in various states demonstrates a lack of trustworthiness and good personal reputation. Further, his attempt to place the blame on his boss for giving him bad advice shows that he does not accept responsibility for his actions, which also reflects poorly on his trustworthiness and personal reputation.

5. N.D.C.C. § 26.1-26-42 states, in part, as follows:

> **26.1-26-42. License suspension, revocation or refusal - Grounds.** The commissioner may suspend, revoke, place on probation, or refuse to continue or

refuse to issue any license issued under this chapter if, after notice to the licensee and hearing, the commissioner finds as to the licensee any of the following conditions:

1. A materially untrue statement in the license application.

2. An acquisition or attempt to acquire a license through misrepresentation or fraud.

. . .

5. The applicant or licensee has been convicted of a felony or convicted of an offense, as defined by section 12.1-01-04, determined by the commissioner to have a direct bearing upon a person's ability to serve the public as an insurance producer, insurance consultant, or surplus lines insurance producer, or the commissioner finds, after conviction of an offense, that the person is not sufficiently rehabilitated under section 12.1-33-02.1.

6. In the conduct of affairs under the license, the licensee has used fraudulent, coercive, or dishonest practices, or has shown oneself to be incompetent, untrustworthy, or financially irresponsible.

. . .

13. The licensee's license has been suspended or revoked in any other state, province, district, or territory for any reason or purpose other than noncompliance with continuing education programs, or noncompliance with mandatory filing requirements imposed upon a licensee by the state, province, district, or territory provided the filing does not directly affect the public interest, safety, or welfare.

Roche violated subsection 1 when he made materially untrue statements in his license applications to other states by not truthfully disclosing his felony conviction. He violated subsection 2 when he acquired licenses through misrepresentation by not disclosing his criminal background.

Subsection 5 contains two separate and distinct clauses, and thus provides a basis for refusal to issue a license under two separate and distinct circumstances. Under the first circumstance in subsection 5, an applicant may be disqualified for licensure when the applicant

has been convicted of a felony or offense that has "a direct bearing upon [the] person's ability to serve the public as an insurance producer." Roche's crime, having sexual intercourse with a person without the consent of that person, was serious and he did not deny that he committed the acts which led to the criminal charges. He pled "no contest." Deputy Commissioner Ternes testified that the crime for which Roche was convicted is considered by the Insurance Department to have a direct bearing on his ability to serve the public because it is imperative that insurance producers have a high level of trust in order to go into people's homes and handle premium payments. Rehabilitation does not apply in the first circumstance in subsection 5. With regard to "direct bearing" convictions, the legislature did not include rehabilitation language. Rehabilitation only applies to offenses that do not have a direct bearing on the applicant's ability to serve the public as an insurance producer.

Under the second circumstance in subsection 5, an applicant may be denied a license following conviction for offenses which do not have a direct bearing on the applicant's ability to serve the public as an insurance producer and for which the applicant has not demonstrated sufficient rehabilitation. Under N.D.C.C. § 12.1-33-02.1(2), there are several factors which a state agency must consider in determining whether a person is sufficiently rehabilitated. Those factors are:

a. The nature of the offense and whether it has a direct bearing upon the qualifications, functions, or duties of the specific occupation, trade, or profession.

b. Information pertaining to the degree of rehabilitation of the convicted person.

c. The time elapsed since the conviction or release. Completion of a period five years after final discharge or release from any term of probation, parole or other form of community corrections, or imprisonment, without subsequent conviction shall be deemed prima facie evidence of sufficient rehabilitation.

In the first instance, the nature of the offense Roche committed was extremely egregious. He committed sexual assault, a felony. It has already been determined that Roche's crime has a direct bearing on his ability to serve the public as an insurance producer. Roche was not released from all the terms of corrections until December 2009. He completed his probation in 1995, but he was required to register as a sex offender until December 2009. That alone is enough to consider that Roche is not sufficiently rehabilitated. Besides the nature of the offense and the time factor, Roche failed to produce any convincing, credible evidence that he is sufficiently rehabilitated. Roche's claim that he is a different person now is not sufficient evidence to show that he has rehabilitated himself, especially in light of his ongoing attempts to hide his criminal history by failing to disclose it on numerous license applications.[1] To the extent it may even be argued, Roche failed to provide evidence of sufficient rehabilitation, and he has thus failed to overcome the disqualification for licensure under this subsection. The plain language of N.D.C.C. § 26.1-26-42(5) grants the Commissioner the authority to deny a license for criminal convictions.

Roche does not meet the requirements of subsection 6 of N.D.C.C. § 26.1-26-42 because he was dishonest in completing license applications by failing to disclose his criminal history. Additionally, his application could have been denied under subsection 13 due to the fact that his license has been suspended or revoked in another state for a reason or purpose other than noncompliance with continuing education programs.

The Commissioner has statutory authority to refuse to issue a license to Roche under any or all of the subsections of N.D.C.C. § 26.1-26-42 cited above.

[1] Roche offered several letters as character references. The letters were not admitted as they were hearsay. He did not call anyone to testify on his behalf.

5. Section 26.1-26-42 provides that the Commissioner "may" refuse to issue a license if any of the conditions in that section are met. "May" is a discretionary term. *See Bernhardt v. Bernhardt*, 1997 ND 80, ¶ 9, 561 N.W.2d 656 (stating "[t]he use of the word 'may' is permissive and indicates it is a matter of discretion"); *Jones v. N.D. State Bd. of Med. Exam'rs*, 2005 ND 22, ¶ 13, 691 N.W.2d 251 (stating "the word 'may' ordinarily creates a directory, non-mandatory duty"); *Hagel v. Hagel*, 2006 ND 181, ¶ 7, 721 N.W.2d 1 (stating "the word 'may' is usually employed to imply permissive, optional, or discretional, and not mandatory, action or conduct"). The Commissioner could, in his discretion, issue a license to Roche if the Commissioner determines it is appropriate to do so, even considering the undisputed testimony that Roche has violated multiple subsections of N.D.C.C. § 26.1-26-42 and even despite the seriousness of Roche's past egregious conduct. However, the Commissioner is not required to issue a license to Roche.

Great deference is given to agency licensing decisions. *North Dakota State Bd. of Medical Examiners - Investigative Panel B v. Hsu*, 2007 ND 9, 726 N.W.2d 216; *Frokjer v. North Dakota Bd. of Dental Examiners*, 2009 ND 79, 764 N.W.2d 657.

The agency's decision to refuse to issue a license to Roche must be accorded great deference. The legislature has vested the Commissioner with the authority to license insurance producers and the responsibility to protect consumers by ensuring that individuals who sell insurance are competent and trustworthy.

6. Roche does not have a right to a North Dakota nonresident individual insurance producer license under North Dakota law. Because of Roche's past conduct, which evidences violations of multiple subsections of N.D.C.C. § 26.1-26-42 and not meeting the requirements of N.D.C.C. § 26.1-26-15, the Commissioner has a basis in law to refuse to issue a license to him.

RECOMMENDED ORDER

The greater weight of the evidence shows that Michael Roche violated multiple subsections of N.D.C.C. § 26.1-26-42 and does not meet the requirements of N.D.C.C. § 26.1-26-15. The administrative law judge recommends that Michael Roche's application for a North Dakota nonresident individual insurance producer license be denied.

Dated at Bismarck, North Dakota, this 20 day of May, 2010.

State of North Dakota
Insurance Department

By: Bonny M. Fetch

Bonny M. Fetch
Administrative Law Judge
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1707 North 9th Street
Bismarck, North Dakota 58501-1853
Telephone: (701) 328-3260

STATE OF NORTH DAKOTA

INSURANCE DEPARTMENT

IN THE MATTER OF:	)	
	)	**ORDER**
Michael Roche	)	
	)	**OAH File No. 20100066**
	)	

The evidence of record has been considered and appraised. IT IS ORDERED that the recommended findings of fact and conclusions of law of the administrative law judge are adopted as the North Dakota Insurance Commissioner's findings of fact and conclusions of law in this matter. IT IS FURTHER ORDERED that the recommended order of the administrative law judge is adopted as the North Dakota Insurance Commissioner's final order in this matter. Michael Roche's application for a North Dakota nonresident individual insurance producer license is DENIED.

Dated at Bismarck, North Dakota this 27th day of May, 2010.

State of North Dakota
Insurance Department

Adam Hamm
Insurance Commissioner

STATE OF NORTH DAKOTA

INSURANCE COMMISSIONER

IN THE MATTER OF:	)	**RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**
Scott Lara	)	
	)	**OAH File No. 20120027**
	)	**Case No. AG-12-338**

PROCEDURAL BACKGROUND

On December 9, 2011, the North Dakota Insurance Department (Department) received an application for a resident individual insurance producer license submitted by Scott S. Lara (Lara), DOB May 16, 1962. On January 19, 2012, the Department sent a letter to Lara notifying him of the denial of his application for an insurance producer's license due to his criminal convictions and failure to disclose his criminal convictions on his insurance producer application. On January 24, 2012, the Department received Lara's request for a hearing relating to his license denial.

On January 26, 2012, the Department requested an administrative law judge (ALJ) be assigned to conduct the hearing. On January 27, 2012, the North Dakota Office of Administrative Hearings designated the Honorable Bonny M. Fetch to conduct these proceedings. On January 31, 2012, the ALJ set the hearing date for February 17, 2012. On February 3, 2012, the Department requested the ALJ conduct a prehearing conference. On February 6, 2012, the ALJ scheduled a prehearing conference to be held February 9, 2012. At the prehearing conference, Lara and the Department agreed to waive the 30-day hearing

requirement, and by Order dated February 9, 2012, the ALJ indefinitely continued the February 17, 2012, hearing date to allow time for prehearing motions. On February 10, 2012, the Department filed a Motion for Summary Judgment. Lara timely responded to the Department's Motion for Summary Judgment on February 19, 2012.

In a letter dated February 28, 2012, the ALJ requested both parties submit supplemental information regarding Lara's criminal convictions by March 14, 2012. Specifically, the ALJ sought the following clarification, "According to Exhibits 7 and 8, the Court in Illinois entered an Order of Conditional Discharge on all convictions on May 27, 2009. I need to know what this means in the state of Illinois and how such a disposition affects Mr. Lara's application for a North Dakota resident insurance producer's license. Is his record cleared or does a record of the convictions remain?" On March 14, 2012, the Department submitted supplemental information in support of the Department's Motion for Summary Judgment. Lara also timely submitted supplemental information in opposition to the Department's Motion for Summary Judgment.

In an Order dated March 20, 2012, the ALJ granted the Department's Motion for Summary Judgment and instructed the Department to submit proposed Findings of Fact and Conclusions of Law for consideration by April 4, 2012. In accordance with the ALJ'S Order, Lara was instructed to file his proposed findings by April 18, 2012. Lara sent an email to the ALJ on April 19, 2012, but failed to submit any proposed findings of his own. As such, he failed to contest the Department's proposed Findings of Fact and Conclusions of Law. The record of this matter was closed on April 20, 2012.

Having thoroughly considered the record, the undersigned ALJ adopts the Department's proposed Findings of Fact, Conclusions of Law, and Recommended Order.

The following facts serve as the "Findings of Fact" for purposes of the requirement of N.D.C.C. § 28-32-39(1) that the agency make and state concisely and explicitly its findings of fact. Following are the recommended Findings of Fact, Conclusions of Law and Recommended Order for consideration of the Insurance Commissioner.

FINDINGS OF FACT

1. Lara is not currently licensed as an individual insurance producer in North Dakota. *See* Department's Motion for Summary Judgment (SJ) Exs. 1, 8.

2. On December 9, 2011, Lara submitted an application to the Department for an individual insurance producer license. *See* SJ Ex. 1.

3. On January 19, 2012, the Department denied Lara's application and informed Lara he could request a hearing. *See* SJ Ex. 8.

4. The Department's denial letter to Lara explained that his application was denied due to the nature of his felony convictions and for making a materially untrue statement on his application by failing to disclose his felony convictions. *See* SJ Ex. 8.

5. Lara timely requested a hearing. *See* Lara letter dated January 22, 2012.

6. On February 6, 2012, at a prehearing conference, Lara waived the 30-day hearing requirement.

7. On February 10, 2012, Lara was served with the Department's Motion for Summary Judgment as a matter of law.

8. On February 26, 2009, Lara was ordered to be transferred from North Dakota to the custody of the State of Illinois due to a warrant issued for his arrest. *See* SJ Exs. 3, 4.

9. On February 21, 2007, Lara was indicted in Will County, Illinois, on two counts of Aggravated Driving While Under the Influence, each a Class 2 felony. *See* SJ Exs. 5, 7.

10. On February 21, 2007, Lara was indicted in Will County, Illinois, on three counts of Aggravated Battery of Will County, Illinois, correctional officers, each a Class 2 felony. *See* Exs. 5, 7.

11. On May 27, 2009, Lara pled guilty and was convicted of one count of Aggravated Driving Under the Influence. *See* SJ Ex. 6.

12. On May 27, 2009, Lara pled guilty and was convicted of three counts of Aggravated Battery. *See* SJ Ex. 6.

13. On May 27, 2009, Lara was sentenced to a 24-month conditional discharge after serving at least 140 days in custody. *See* SJ Ex. 6.

14. Background question #1 on the North Dakota insurance producer license application requests applicants answer the question, "Have you ever been convicted of a crime, had a judgment withheld or deferred, or are you currently charged with committing a crime?" *See* SJ Ex. 1.

15. Lara answered "no" to background question #1 on the North Dakota insurance producer license application. *See* SJ Ex. 1.

16. Lara failed to disclose his May 27, 2009, conviction of Aggravated Driving Under the Influence on his December 9, 2011, application for an insurance producer license. *See* SJ Ex. 1.

17. Lara failed to disclose his May 27, 2009, conviction of three counts of Aggravated Battery on his December 9, 2011, application for an insurance producer license. *See* SJ Ex. 1.

CONCLUSIONS OF LAW

1. There is no genuine issue of material fact presented here. No evidentiary hearing need be held where there is no fact issue to be resolved. N.D. Admin. Code § 98-02-03-01. Summary judgment is appropriate where there is no genuine issue of material fact. Rule 56, N.D.R.Civ. P.; Union State Bank of Woell, 434 N.W.2d 712, 716 (N.D.1989).

2. Marked as Exhibits 3 through 7 and submitted with the Department's Motion for Summary Judgment are certified copies of court records relating to Lara's criminal convictions, which were not disputed by Lara.

3. A license to practice as an insurance producer is subject to the control and regulation of the state under the provisions of N.D.C.C. chapter 26.1-26 and any rules adopted by the Department pursuant to that chapter.

4. Lara does not currently have an insurance producer license that may be entitled to constitutional protection as a property right. *See Bland v. Comm'n. on Med. Competency,* 557 N.W.2d 379, 381 (N.D. 1996). "A regulated privilege is not a right." *North Dakota Dep't. of Transp. v. DuPaul,* 487 N.W.2d 593,598 (N.D. 1992).

5. An individual applicant may be granted the regulated privilege to practice as an insurance producer by the Commissioner only as authorized under N.D.C.C. title 26.1 generally, and the Commissioner is statutorily responsible to license and regulate individual insurance producers under N.D.C.C. chapter 26.1-26.

6. The primary purpose of the Department's licensing of insurance producers is to protect the public from incompetence and lack of integrity by ensuring that individuals and entities that sell, solicit, or negotiate insurance have met the requirements to do those activities. *See* SJ Ex. 2, Affidavit of Kelvin Zimmer, Director, Producer Licensing Division.

7. N.D.C.C. § 26.1-26-15 requires that an applicant for an insurance producer license must be deemed by the Commissioner to be of good character prior to granting an applicant an insurance producer license. The good character requirement of N.D.C.C. § 26.1-26-15 is material to the Commissioner's decision to grant or deny an insurance producer license.

8. N.D.C.C. § 26.1-26-15 requires that an applicant for an insurance producer license must be deemed by the Commissioner to be competent, trustworthy, financially responsible, and of good personal and business reputation. N.D.C.C. § 26.1-26-42 authorizes the Commissioner to refuse to issue an insurance producer license to any applicant who makes a materially untrue statement on the license application or attempts to acquire a license through misrepresentation or fraud. By answering "no" to background question #1 on his insurance producer application and failing to disclose his criminal convictions for Aggravated Driving Under the Influence and three counts of Aggravated Battery on his insurance producer license application, Lara made a materially untrue statement on his license application and attempted to acquire an insurance producer license through misrepresentation of his criminal history. The Commissioner properly denied Lara's application due to Lara's materially untrue statement on the application.

9. N.D.C.C. § 26.1-26-42 authorizes the Commissioner to refuse to issue an insurance producer license to any applicant convicted of a felony or an offense, as defined by N.D.C.C. § 12.1-01-04, determined by the Commissioner to have a direct bearing upon a person's ability to serve the public as an insurance producer. The Commissioner properly denied Lara's application for an insurance producer license due to his felony convictions on three counts of Aggravated Battery, crimes that have a direct bearing on a person's ability to serve the public as an insurance producer. The Insurance Department has a duty to uphold statutes that are meant

to protect the unsuspecting public from a person with a violent criminal background. Because Lara's aggravated felony convictions bear directly on his ability to serve the public, the rehabilitation exception under N.D.C.C. § 26.1-26-42(5) is inapplicable to Lara's license denial.

10. Despite Lara's claim that his conditional discharge means his record is cleared and the convictions no longer exist, the evidence shows his criminal convictions for Aggravated DUI and three counts of Aggravated Battery remain on his criminal record. *See* SJ Exs. 6, 7, and Supplemental Brief of Insurance Department in Support of Motion for Summary Judgment.

11. Lara has failed to meet his burden of proof to demonstrate he is currently competent, trustworthy, financially responsible, and of good personal and business reputation. N.D.C.C. § 26.1-26-15 imposes character requirements on insurance producer license applicants which Lara was unable to satisfy. The Commissioner properly concluded that Lara is not competent, trustworthy, financially responsible, and of good personal and business reputation due to Lara's criminal convictions and his failure to truthfully disclose his criminal history.

12. Because of Lara's past criminal conduct, the Commissioner now has, and continues to have, bases in law to refuse to issue a license to Lara.

RECOMMENDED ORDER

The evidence of record has been considered and appraised. The facts, as established by undisputed evidence, establish ample grounds for denying Lara's application for a North Dakota resident individual insurance producer license under applicable law.

IT IS ORDERED that Scott Lara's application for a North Dakota resident individual insurance producer license is **DENIED**.

Dated at Bismarck, North Dakota, this 26th day of April, 2012.

State of North Dakota
Insurance Commissioner

By: Bonny M. Fetch

Bonny M. Fetch
Administrative Law Judge
Office of Administrative Hearings
2911 North 14th Street, Suite 303
Bismarck, ND 58503
Telephone: (701) 328-3200

STATE OF NORTH DAKOTA

INSURANCE COMMISSIONER

IN THE MATTER OF:	)	
	)	**ORDER**
Scott Lara	)	
	)	**OAH File No. 20120027**
	)	**Case No. AG-12-338**

The evidence of record has been considered and appraised. **IT IS ORDERED** that the Recommended Findings of Fact and Conclusions of Law of the Administrative Law Judge are adopted as the North Dakota Insurance Commissioner's Findings of Fact and Conclusions of Law in this matter. **IT IS FURTHER ORDERED** that the Recommended Order of the Administrative Law Judge is adopted as the North Dakota Insurance Commissioner's final Order in this matter. Scott Lara's application for a North Dakota resident individual insurance producer license is **DENIED**.

Dated at Bismarck, North Dakota, this 1st day of May 2012.

Adam Hamm
Commissioner
North Dakota Insurance Department
600 East Boulevard Avenue, Dept. 401
Bismarck, North Dakota 58505
Telephone: (701) 328-2440

STATE OF NORTH DAKOTA

INSURANCE COMMISSIONER

IN THE MATTER OF:	)	**RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**
Andrew Bailor	)	
	)	**OAH File No. 20140067**

PROCEDURAL BACKGROUND

Andrew Bailor ("Mr. Bailor") submitted an application for a nonresident individual insurance producer license to the North Dakota Insurance Department ("Department") on October 7, 2013. The Department denied Mr. Bailor's application on January 22, 2014. On February 24, 2014, the Department received a request dated February 18, 2013 (sic) from Mr. Bailor for a hearing relating to his license denial. *See* Andrew Bailor's February 18, 2013 (sic) letter. On February 27, 2014, the Department requested that an administrative law judge ("ALJ") be assigned to conduct an administrative hearing.

On February 28, 2014, the North Dakota Office of Administrative Hearings designated Administrative Law Judge Wade C. Mann to conduct these proceedings. A prehearing conference was held on March 7, 2014, and at that time a hearing date of March 24, 2014, was agreed upon by the parties. On March 11, 2014, the ALJ served a Notice of Hearing confirming the agreed upon hearing date of March 24, 2014, and the issue on appeal.

The hearing was held as scheduled on March 24, 2014, by telephone conference. The Department appeared through its attorney, Special Assistant Attorney General Adrienne Riehl. Special Assistant Attorney General Jeffrey Ubben was in attendance but did not participate. The

Department called two witnesses, Kelvin Zimmer, Director of the Producer Licensing Division, and Andrew Bailor. Mr. Bailor appeared without counsel. He provided testimony but called no other witnesses. The Department's Exhibits 1 and 2 were admitted into the record without objection. Mr. Bailor's Exhibits A and B were admitted over a limited objection by the Department requesting that the exhibits be given limited weight. Exhibit C was admitted into the record without objection. The record of the hearing was closed on March 24, 2014.

Having thoroughly considered the record, the undersigned ALJ makes the following recommended Findings of Fact, Conclusions of Law and Recommended Order for consideration of the Insurance Commissioner.

FINDINGS OF FACT

1. On May 20, 2009, Mr. Bailor was stopped by law enforcement in Indiana for DWI. He fled at a high rate of speed the wrong way causing a head-on collision and serious bodily injury to the driver of the other vehicle and requiring hospitalization of the driver/victim. Exhibit 1.

2. Mr. Bailor eventually pled guilty to a class C felony in Indiana for the May 20, 2009, criminal offense of operating a vehicle while intoxicated causing serious bodily injury. Exhibit 1.

3. Mr. Bailor first applied for a nonresident individual insurance producer license in North Dakota on September 23, 2009. Exhibit 2.

4. On October 26, 2009, the Department sent Mr. Bailor a letter regarding a conditional license. Exhibit. 2. In that letter, the Department noted that Mr. Bailor had disclosed that he had two criminal convictions for possession of marijuana, possession of paraphernalia, illegal consumption/possession, and driving while intoxicated. *Id.* The Department indicated in

the letter that "[p]rovided the disclosure described above is accurate, the Department will agree to offer you a conditional license." *Id* While Mr. Bailor had disclosed the referenced convictions, he did not disclose the criminal charges against him arising out of the May 20, 2009, offense.

5. The October 26, 2009, letter further provided that "[i]n consideration of your execution of this agreement and in consideration of the Department agreeing not to deny a license to you, the Department will issue a nonresident individual insurance producer license with the following conditions." One of the agreed upon conditions was that "[d]uring the time of the probation, you must report to the Department within 15 days after any criminal charge is filed against you, the criminal charge, and any criminal conviction in any jurisdiction except for minor traffic offenses." Exhibit 2. Mr. Bailor was aware that he had criminal charges pending against him in addition to the criminal convictions he had disclosed on this application. He admits that he should have disclosed the criminal charges against him arising out of the May 20, 2009, incident to the Department but did not do so.

6. The Department issued Mr. Bailor a conditional license with a two year probationary period on November 9, 2009, despite the concerns relating to the prior convictions that he had disclosed. The Department was not aware of the pending criminal charges against Mr. Bailor when it issued the conditional license.

7. Mr. Bailor was sentenced to eight years in prison with four years suspended after pleading guilty to a Class C Felony arising out of the May 20, 2009, offense. Exhibit 1. He served one year in prison, three months on work release and seven months on home detention. *Id.*

8. Mr. Bailor did not comply with the terms of the conditional license because he failed to disclose at any time to the Department, the felony criminal charges filed against him arising out of the May 20, 2009, offense.

9. Mr. Bailor's conditional license expired on October 3, 2011, while he was serving his sentence for the May 20, 2009, offense.

10. Mr. Bailor is not currently licensed as an individual insurance producer in North Dakota. He does have an insurance producer license in the State of Indiana subject to a two year probationary period from the date of issuance. Exhibit A.

11. The Department received an application for a nonresident individual insurance producer license submitted by Mr. Bailor on October 7, 2013. The Department denied the application based on N.D.C.C. §§ 26.1-26-15 and 26.1-26-42(5).

12. Mr. Bailor admits that he did all of the things that the Department alleges. He admits and has stipulated to the Department's characterization of his criminal history. Exhibit 1. He agrees that he did not disclose the May 20, 2009, felony offense to the Department despite the fact that he had an obligation to truthfully report his criminal history on his application and that his conditional license required him to do so. He was struggling with drugs and alcohol at the time, along with injuries from the accident that he caused but admits he should have been forthcoming. Mr. Bailor understands what he did was wrong and accepts responsibility for his actions.

13. Mr. Bailor acknowledges that he has a drug and alcohol addiction that he will battle for the rest of his life and that he has made mistakes due in large part to drugs and alcohol. He does not want his addictions and past actions to define him and asserts that he intends to win

his battle against addiction. He has been taking meaningful steps to address his addictions including counseling and involvement with his church among other things.

14. By all accounts, Mr. Bailor appears to be making positive strides in battling his addictions and rehabilitating himself. However, as Mr. Bailor acknowledged, it is very difficult to judge the credibility and sincerity of a witness appearing telephonically, especially with respect to the matters to which Mr. Bailor was testifying. His testimony is self-serving, but he appears to be sincere in his statements and efforts to rehabilitate himself and control his addictions. Mr. Bailor essentially said all of the right things at the hearing with respect to accepting responsibility for what he has done and his intentions going forward. Time will ultimately tell if his attestations are in fact sincere.

15. The Department appreciates Mr. Bailor's efforts in battling his addictions and accepting responsibility for his actions but is concerned that it is premature at this time to determine whether he has rehabilitated himself to the level that he can be deemed competent, trustworthy, financially responsible, and of good personal and business reputation.

CONCLUSIONS OF LAW

1. A license to practice as an insurance producer in North Dakota is subject to the control and regulation of the state under the provisions of N.D.C.C. chapter 26.1-26 and any rules adopted by the Department pursuant to that chapter.

2. The Commissioner is statutorily responsible to license and regulate individual insurance producers under N.D.C.C. chapter 26.1-26 and may only issue a license if the statutory requirements set forth in this chapter are satisfied.

3. The primary purpose of the Department's licensing of insurance producers is to protect the public from incompetence and lack of integrity by ensuring that individuals and

entities that sell, solicit, or negotiate insurance have met the requirements to do those activities. The Department's role is to ensure consumer protection. *See* testimony of Kelvin Zimmer, Director, Producer Licensing Division.

4. N.D.C.C. § 26.1-26-15 requires that an applicant for an insurance producer license "must be deemed by the commissioner to be competent, trustworthy, financially responsible, and of good personal and business reputation." The character requirement of N.D.C.C. § 26.1-26-15 is material to the Commissioner's decision to grant or deny an insurance producer license and applies the same to both resident and non-resident applicants. Mr. Bailor has a number of criminal convictions that are set forth in the parties' Stipulation to Criminal History. Exhibit 1. The offenses include the Class C felony operating a vehicle while intoxicated causing serious bodily injury that he did not disclose to the Department despite admittedly being obligated to do so. The number of convictions combined with the fact that Mr. Bailor admittedly failed to disclose to the Department the most serious offense on his initial application call into question his trustworthiness and personal reputation. It is appropriate for the Commissioner to consider these facts in considering whether to grant or deny a license. Taking these facts into consideration, the Commission properly denied Mr. Bailor's October 7, 2013, application in accordance with N.D.C.C. § 26.1-26-15.

5. N.D.C.C. § 26.1-26-42(5) authorizes the Commissioner to refuse to issue an insurance producer license to any applicant if "[t]he applicant or licensee has been convicted of a felony or convicted of an offense, as defined by section 12.1-01-04, determined by the commissioner to have a direct bearing upon a person's ability to serve the public as an insurance producer, insurance consultant, or surplus lines insurance producer, or the commissioner finds, after conviction of an offense, that the person is not sufficiently rehabilitated under section 12.1-

33-02.1." The Commissioner properly determined that Mr. Bailor's felony conviction for operating a vehicle while intoxicated causing serious bodily injury could have a direct bearing on his ability to serve the public as an insurance producer. Mr. Bailor has demonstrated progress toward rehabilitation but the facts support the Department's position that it is premature to conclude that Mr. Bailor has been sufficiently rehabilitated. N.D.C.C. § 12.1-33-02.1(2)(c) provides in part that "[c]ompletion of a period of five years after final discharge or release from any term of probation ... shall be deemed prima facie evidence of sufficient rehabilitation." Mr. Bailor was released from probation in September of 2013. He submitted his application one month later on October 7, 2013.

6. As an applicant for a North Dakota nonresident individual insurance producer license, Mr. Bailor has the burden of proof to show, by the greater weight of the evidence, that he meets the statutory requirements for licensure. *See Layon v. North Dakota State Bar Bd.*, 458 N.W.2d 501 (N.D. 1990). Mr. Bailor failed in his burden to show that he meets the statutory requirements for licensure. He does not dispute the Department's allegations but feels that his past actions do not and should not define him. While he has accepted responsibility for his actions and appears to be headed in the right direction, he has not established by the greater weight of the evidence that he is fully rehabilitated or that the Commissioner's denial of his application was improper or unlawful in any respect. Mr. Bailor's past convictions along with his failure to disclose the felony charges from his May 20, 2009, criminal offense of operating a vehicle while intoxicated causing serious bodily injury on his initial application, and his failure to disclose pleading guilty to the charges in violation of his conditional license agreement are legitimate bases in law to deny Mr. Bailor's application for a nonresident individual insurance producer license.

RECOMMENDED ORDER

The evidence of record has been considered and appraised. The facts, as established by the greater weight of the evidence, establish grounds for denying Andrew Bailor's application for a North Dakota nonresident individual insurance producer license under applicable law.

The Administrative Law Judge recommends that Andrew Bailor's application for a North Dakota nonresident individual insurance producer license be denied

Dated at Bismarck, North Dakota, this 1st day of April 2014.

State of North Dakota
Insurance Commissioner

By: _____

Wade C. Mann
Administrative Law Judge
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Bismarck, North Dakota 58503
Telephone: (701) 328-3200

STATE OF NORTH DAKOTA

INSURANCE COMMISSIONER

IN THE MATTER OF:	)	
	)	**ORDER**
Andrew Bailor	)	
	)	**OAH File No. 20140067**

The evidence of record has been considered and appraised. **IT IS ORDERED** that the Recommended Findings of Fact and Conclusions of Law of the Administrative Law Judge are adopted as the North Dakota Insurance Commissioner's Findings of Fact and Conclusions of Law in this matter. **IT IS FURTHER ORDERED** that the Recommended Order of the Administrative Law Judge is adopted as the North Dakota Insurance Commissioner's final Order in this matter. Andrew Bailor's application for a North Dakota nonresident individual insurance producer license is **DENIED**.

Dated at Bismarck, North Dakota, this 4 day of April, 2014.

Adam Hamm
Commissioner
North Dakota Insurance Department
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Bismarck, North Dakota 58505
Telephone: (701) 328-2440

STATE OF NORTH DAKOTA

INSURANCE COMMISSIONER

IN THE MATTER OF:	)	RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
Jonathan Lundberg	)	OAH File No. 20150505

PROCEDURAL BACKGROUND

Jonathan Lundberg ("Mr. Lundberg") submitted an application for a nonresident individual insurance producer license to the North Dakota Insurance Department ("Department") on August 17, 2015. The Department denied Mr. Lundberg's application on September 24, 2015. On October 9, 2015, the Department received a request from Mr. Lundberg for a hearing relating to his license denial. On October 13, 2015, the Department requested that an administrative law judge ("ALJ") be assigned to conduct an administrative hearing.

On October 14, 2015, the North Dakota Office of Administrative Hearings designated Administrative Law Judge Jeanne M. Steiner to conduct these proceedings and issue recommended findings of fact and conclusions of law. A prehearing conference was held on October 15, 2015. At that time, Mr. Lundberg waived the ten day written notice requirement under N.D.C.C. § 26.1-26-40 and consented to a hearing on October 23, 2015. It was agreed Mr. Lundberg and his witnesses would appear at the hearing by telephone and service would be accepted by electronic mail, in light of the short time frames. On October 16, 2015, the ALJ served a Notice of Hearing confirming the agreed upon hearing date of October 23, 2015, and the issue on appeal.

The hearing was held as scheduled on October 23, 2015. The Department appeared through its attorney, Special Assistant Attorney General Sara Behrens. The Department called Kelvin Zimmer, Director of the Producer Licensing Division, and Jonathan Lundberg. Mr. Lundberg appeared without counsel, by telephone. He provided testimony and called Danny Lundberg, his father, as a witness. The Department's Exhibits 1-8 were admitted without objection. Certified documents for Exhibits 4-8 were substituted at the hearing for Exhibits 4-8 that were originally submitted by the Department. Mr. Lundberg's Exhibits A, B, and C were admitted over objection by the Department. An Exhibit List is attached. The record of the hearing was closed on October 23, 2015. The issue for hearing was amended at the hearing to correct typographical errors and is as follows:

> Whether the North Dakota Insurance Department properly denied Jonathan Lundberg's application for a North Dakota non-resident individual insurance producer license in accordance with the provisions of N.D.C.C. §§ 26.1-26-15 and 26.1-26-42(5).

Having thoroughly considered the record, the undersigned ALJ makes the following recommended Findings of Fact, Conclusions of Law and Recommended Order for consideration by the Insurance Commissioner.

RECOMMENDED FINDINGS OF FACT

1. Police reports reflect that in March 2006, at age eighteen, Mr. Lundberg admitted his habit of downloading and uploading child pornography, admitted he had been looking at child pornography since he was a child and admitted he had been on several internet chat rooms with people involving child pornography.

2. Mr. Lundberg was charged with four counts of possession and dissemination of pornographic works depicting minors.

3. On June 4, 2007, Mr. Lundberg was found guilty by the court and convicted of one count of possession of pornographic works depicting minors, a felony conviction. The conviction was not the result of a guilty plea or a plea agreement.

4. On November 20, 2007, Mr. Lundberg was sentenced: the imposition of a prison sentence was stayed and he was placed on probation for five years.

5. On November 28, 2012, Mr. Lundberg was discharged from probation because the case had reached expiration of sentence.

6. On November 29, 2012, the felony conviction was deemed a misdemeanor pursuant to Minn. Stat. § 601.13, which states the felony conviction is deemed to be a misdemeanor if the imposition of the prison sentence is stayed, the defendant is placed on probation, and the defendant is thereafter discharged without a prison sentence. The law also states in that case, the conviction is deemed to be for a misdemeanor for purposes of determining the penalty for a subsequent offense.

7. On August 17, 2015, Mr. Lundberg submitted an application for a nonresident individual insurance producer license to the North Dakota Insurance Department ("Department"). In that application, and in a statement by letter dated August 6, 2015, Mr. Lundberg admitted to a prior criminal conviction. He also provided recommendation letters written in 2013 from Mr. Steve Jahnke and Mr. Michael Miller, advocating for the licensure of Mr. Lundberg as an insurance agent in the state of Minnesota. Mr. Lundberg succeeded in his licensure efforts in Minnesota.

8. On September 24, 2015, the Department notified Mr. Lundberg by letter sent certified mail that his application had been denied based on N.D.C.C. §§ 26.1-26-15 and 26.1-26-42(5). In that letter, the Department noted that Mr. Lundberg had disclosed his 2007 felony

conviction for possession of pornographic images, which was subsequently deemed to be a misdemeanor offense. The letter advised Mr. Lundberg that his criminal conviction was evidence of his lack of trustworthiness and good personal reputation and it had been determined that the conviction had a negative bearing on Mr. Lundberg's ability to serve the public as an insurance producer, insurance consultant, or surplus lines insurance producer. The letter did not state the denial was based on insufficient rehabilitation.

9. Mr. Lundberg appealed and a hearing was held on October 23, 2015.

10. At the hearing, Mr. Kelvin Zimmer, Director of the Producer Licensing Division of the North Dakota Department of Insurance, testified that if the application for a nonresident individual insurance producer license had been approved, Mr. Lundberg would be able to go into the homes of prospective customers and solicit, sell, or negotiate insurance.

11. Mr. Zimmer explained the basis for denying Mr. Lundberg's application for lack of trustworthiness. He said it was not only based on the conviction, but on the totality of the circumstances, including the police reports, the complaints, the statements made by Mr. Lundberg, the type of conviction, and Mr. Lundberg's lack of total candor in the application process. When Mr. Lundberg applied, he disclosed the conviction; however, he did not provide full disclosure. For example, he provided the complaint in Exhibit 4, which contained only two counts against him. The Department learned the complaint had been amended twice, as evidenced in Exhibits 5 and 6 (obtained from the district court) and ultimately Mr. Lundberg had four counts against him. Mr. Lundberg also only provided the first page of Exhibit 7. The second page of Exhibit 7 contained the conditions of probation, which included registering as a sex offender, supplying a DNA sample, undergoing a psycho-sexual evaluation and having

restricted computer access. Mr. Zimmer testified Mr. Lundberg's application was denied for failing to meet the character requirements of trustworthiness and good personal reputation.

12. Mr. Zimmer testified the Commissioner also concluded that Mr. Lundberg's conviction had a direct bearing on Mr. Lundberg's ability to serve the public as an insurance producer and the effect was negative. When asked to explain how the conviction had a direct bearing on the ability to sell insurance, he related it to being untrustworthy, and not wanting a person with a conviction of possession of child pornography in the home of a family member.

13. Mr. Zimmer testified the Department inquired as to evidence of rehabilitation, and considered Exhibit C, which Mr. Lundberg submitted in conjunction with the application. Exhibit C is a discharge summary dated May 5, 2011, from Paul Goossens, MA, LP. Mr. Goossens' record documents that Mr. Lundberg had a course of therapy from 2008-2011, but recommended Mr. Lundberg continue in therapy in his home community. Although the denial letter does not mention it, Mr. Zimmer testified the denial was also based on insufficient rehabilitation.

14. Mr. Lundberg testified and admitted to possessing child pornography, admitted it involved very young children up to late teens and admitted the police report indicating he had over 900 files was accurate. However, he claimed the offending behavior happened around age 18 and only happened over a six month period. He denied he had been looking at child pornography since he was a child, claiming the police report was not accurate in that regard.

15. Mr. Lundberg testified he was receiving counseling even before he was arrested. However, he also admitted he continued to offend even while he was being counseled, prior to being arrested. He testified at the hearing that he was a victim of physical, mental, and sexual abuse by his peer group, something he had not disclosed to the Department prior to the hearing

testimony. He claimed he continued counseling as suggested by Mr. Goossens, but did not provide any proof of it. He asserted his issues with what he termed his "sexual deviancy" were dealt with in the past and he no longer needs counseling.

16. Finally, Mr. Lundberg said he has been working in the insurance industry for four years, in a trustworthy, competent manner that exhibits financial aptitude.

17. Mr. Lundberg called Mr. Danny Lundberg, his father, as a witness. Mr. Danny Lundberg testified he has a Masters in Divinity and worked as a pastor for 22 years, and has had his own insurance company since 2009; he hired his son to work in his insurance agency and he trusts his son. Mr. Danny Lundberg advocated for his son's licensure in North Dakota, saying his son is a different person now than he was when he was involved in child pornography, and his son deserves a chance; he should not get a life sentence based on what he might do.

18. Understandably, Mr. Lundberg and his father do not want Mr. Lundberg's history to negatively impact the Department's decision on his North Dakota application. However, the Commissioner has the right and the duty to take Mr. Lundberg's character into account in deciding whether to approve or deny the application. The Commissioner considered Mr. Lundberg's character and properly denied the application based on lack of trustworthiness and lack of good reputation. A registered sex offender who has a history of involvement in child pornography does not constitute a good reputation. The conviction, the police reports, the complaints, the statements made by Mr. Lundberg, the nature of the conviction, and Mr. Lundberg's lack of total candor in the application process supported the Commissioner's denial for lack of trustworthiness.

19. The Commissioner has a duty to protect the public by regulating the insurance industry and those working within it. The evidence established licensed agents can go into

private homes to conduct business. Mr. Lundberg is a registered sex offender and his conviction for possessing child pornography creates a legitimate safety concern, raising questions of his ability to be trusted in situations involving children. As a licensed agent, Mr. Lundberg could have access to children in the homes of prospective clients. The Department's determination that his conviction has a direct bearing on his ability to serve the public as an insurance producer, insurance consultant, or surplus lines insurance producer is supported by the evidence.

20. In consideration of rehabilitation, the fact that Mr. Lundberg's probation ended in November 2012, and he was not sent to prison, does not, by itself, demonstrate sufficient rehabilitation. Additionally, the fact the felony child pornography conviction was reduced to a misdemeanor, does not change or reduce Mr. Lundberg's behavior that resulted in the conviction. Mr. Lundberg attempted to minimize his involvement in child pornography, saying it was limited to a six month period and denying he started the habit as a child, as indicated by the police report. He also claimed that he has dealt with what he called his sexual deviance, he no longer needs counseling, and testified he followed Mr. Goossens' recommendation for continued therapy. However, he provided no documented, reliable evidence to establish these claims. Thus, evidence of sufficient rehabilitation is lacking. However, Mr. Lundberg was not given notice in advance of the hearing that insufficiency of rehabilitation was a basis for denial. Without proper notice, it cannot now be used as a basis for denial.

21. The greater weight of the evidence established the denial of Mr. Lundberg's application was proper because he did not meet the character requirements and the crime for which he was convicted has a direct bearing upon his ability to serve the public as an insurance producer.

CONCLUSIONS OF LAW

1. A license to practice as an insurance producer in North Dakota is subject to the control and regulation of the state under the provisions of N.D.C.C. chapter 26.1-26 and any rules adopted by the Department pursuant to that chapter.

2. The Commissioner is statutorily responsible to license and regulate individual insurance producers under N.D.C.C. chapter 26.1-26 and may only issue a license if the statutory requirements set forth in this chapter are satisfied.

3. N.D.C.C. § 26.1-26-15 requires that an applicant for an insurance producer license "must be deemed by the commissioner to be competent, trustworthy, financially responsible, and of good personal and business reputation." In this context, "trustworthy" is broader than being honest or truthful, and encompasses a confidence in reliability that one will be ethical and principled, above suspicion. The character requirement of N.D.C.C. § 26.1-26-15 is material to the Commissioner's decision to grant or deny an insurance producer license. Mr. Lundberg had a felony conviction for possession of child pornography. Although that conviction was ultimately reduced to a misdemeanor, the conviction demonstrates evidence of a disregard for the law. The conviction, along with the police reports, the complaints, the statements made by Mr. Lundberg, the type of conviction, and Mr. Lundberg's lack of total candor in the application process, provide evidence of lack of trustworthiness. As a registered sex offender who was involved in child pornography, Mr. Lundberg does not have a good personal reputation. The Commissioner properly considered this evidence in deciding whether to grant or deny the application.

4. N.D.C.C. § 26.1-26-42(5) authorizes the Commissioner to refuse to issue an insurance producer license to any applicant if, after notice to the licensee and hearing, the

commissioner finds as to the licensee any of the following conditions: "[t]he applicant or licensee has been convicted of a felony or convicted of an offense, as defined by section 12.1-01-04, determined by the commissioner to have a direct bearing upon a person's ability to serve the public as an insurance producer, insurance consultant, or surplus lines insurance producer, or the commissioner finds, after conviction of an offense, that the person is not sufficiently rehabilitated under section 12.1-33-02.1."

5. N.D.C.C. § 12.1-33-02.1 states "A person may not be disqualified to practice, pursue, or engage in any occupation, trade, or profession for which a license, permit, certificate, or registration is required from any state agency, board, commission, or department solely because of prior conviction of an offense. However, a person may be denied a license, permit, certificate, or registration because of prior conviction of an offense if it is determined that such person has not been sufficiently rehabilitated, or that the offense has a direct bearing upon a person's ability to serve the public in the specific occupation, trade, or profession."

6. The evidence established that Mr. Lundberg's conviction has a direct bearing on his ability to serve the public as an insurance producer, insurance consultant, or surplus lines insurance producer. Licensed agents can go into private homes. Mr. Lundberg's conviction and sex offender registration raises issues of safety concerns and the ability to be trusted in situations involving children.

7. N.D.C.C. § 12.1-33-02.1(2)(c) provides in part that "[c]ompletion of a period of five years after final discharge or release from any term of probation ... shall be deemed prima facie evidence of sufficient rehabilitation." Mr. Lundberg was discharged from probation in November 2012. The last period of documented counseling was in 2011, with a recommendation that he continue. Although Mr. Lundberg asserts he continued counseling,

dealt with what he called his sexual deviancy and no longer needs counseling, he provided no evidence to support these claims. The evidence does not establish sufficient rehabilitation. However, the Department did not give notice to Mr. Lundberg in the denial letter or prior to the hearing that the denial was based on insufficient rehabilitation.

8. The Commissioner properly denied Mr. Lundberg's August 17, 2015, application for a nonresident individual insurance producer license due to lack of trustworthiness and lack of good personal reputation as required by N.D.C.C. § 26.1-26-15.

9. The Commissioner properly denied Mr. Lundberg's August 17, 2015, application for a nonresident individual insurance producer license because Mr. Lundberg's conviction has a direct bearing on his ability to serve the public as an insurance producer, insurance consultant, or surplus lines insurance producer under N.D.C.C. § 26.1-26-42(5).

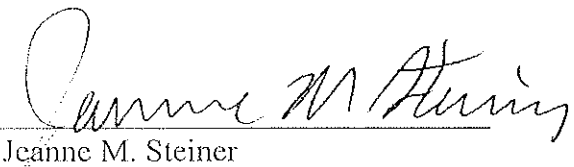
RECOMMENDED ORDER

The evidence of record has been considered and appraised. The facts, as established by the greater weight of the evidence, establish grounds for denying Jonathan Lundberg's application for a North Dakota nonresident individual insurance producer license under applicable law.

The Administrative Law Judge recommends that Jonathan Lundberg's application for a North Dakota nonresident individual insurance producer license be denied.

Dated at Bismarck, North Dakota, this 14 day of December 2015.

State of North Dakota
Insurance Commissioner

By: 

Jeanne M. Steiner
Administrative Law Judge
Office of Administrative Hearings
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Bismarck, North Dakota 58503
Telephone: (701) 328-3200

STATE OF NORTH DAKOTA

INSURANCE COMMISSIONER

IN THE MATTER OF:	)	
	)	**ORDER**
Jonathan Lundberg	)	
	)	**OAH File No. 20150505**

The evidence of record has been considered and appraised. **IT IS ORDERED** that the Recommended Findings of Fact and Conclusions of Law of the Administrative Law Judge are adopted as the North Dakota Insurance Commissioner's Findings of Fact and Conclusions of Law in this matter. **IT IS FURTHER ORDERED** that the Recommended Order of the Administrative Law Judge is adopted as the North Dakota Insurance Commissioner's final Order in this matter. Jonathan Lundberg's application for a North Dakota nonresident individual insurance producer license is **DENIED**.

Dated at Bismarck, North Dakota, this 17th day of December 2015.

Adam Hamm
Commissioner
North Dakota Insurance Department
600 East Boulevard Avenue, Dept. 401
Bismarck, North Dakota 58505
Telephone: (701) 328-2440