STATE OF NORTH DAKOTA

INSURANCE DEPARTMENT

IN THE MATTER OF:	)	**RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**
Robert Lewis Heier, doing business as Robert Lewis Dakota Bond & Tracking Services and Robert Lewis Maple Valley Contracting, NPN 16206441	)	**OAH File No. 20140175** **Case No. AG 14-465**

PROCEDURAL BACKGROUND

On April 15, 2014, the North Dakota Insurance Commissioner ("Commissioner") issued a Cease and Desist Order ("Order") to Robert Lewis Heier, doing business as Robert Lewis Dakota Bond & Tracking Services and Robert Lewis Maple Valley Contracting, NPN 16206441, Respondent, ("Heier") ordering Heier to immediately cease and desist from soliciting, transacting, or otherwise engaging in the business of insurance including bail bonds. The Order notified Heier of his right to ask for a hearing. On May 14, 2014, Heier made a timely Request for Hearing.

On May 14, 2014, the North Dakota Insurance Department ("the Department") made a request to the Office of Administrative Hearings for designation of an administrative law judge to conduct an administrative hearing and issue recommended findings of fact, conclusions of law, and a recommended order in the matter of Heier's appeal. On May 14, 2014, Administrative Law Judge Bonny M. Fetch ("ALJ Fetch") was so designated. On May 15, 2014, ALJ Fetch issued a Notice of Hearing, setting the hearing date for May 20, 2014, at the Office of Administrative Hearings in Bismarck, North Dakota. The issue specified for hearing was:

Whether Robert Lewis Heier acted as described in the April 15, 2014, Cease and Desist Order and thus, whether the Order should be vacated or made permanent.

The hearing was held on the date scheduled. Special Assistant Attorney General Jeffrey Ubben represented the Insurance Department. He called three witnesses to testify: Kelvin Zimmer ("Zimmer"), Director of Agent Licensing Division, North Dakota Insurance Department; Joe Dale Pittman ("Pittman"), Investigator, North Dakota Insurance Department fraud unit; and Tracy Frank ("Frank"), employee of Dakota Bond and Tracking Services. Attorney Sean Foss represented Heier. Heier appeared at the hearing but did not testify, nor did he call any witnesses.

At the hearing, the Department's Exhibits 1-9 were admitted into evidence. Heier's Exhibits A-D were admitted into evidence. The financial statement in Exhibit A was not proven to be true. Exhibit A was admitted for demonstrative purposes only, and not for the substantive truth of the matter.

The ALJ ordered counsel to submit written post-hearing briefs. The Insurance Department's Closing Statement was filed June 6, 2014. The Insurance Department Response to Issues Raised in Respondent's Request for Hearing was filed June 6, 2014. Respondent Heier's Post-Hearing Brief was filed June 18, 2014. The record of the hearing was closed as of June 18, 2014.

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

APPLICABLE LAW

1. N.D.C.C. ch. 26.1-26.6 regulates the licensing and conduct of bail bond agents. N.D.C.C. § 26.1-26.6-01 defines "bail bond agent" as follows:

> As used in this chapter, unless the context otherwise requires, "bail bond agent" means any person who has been licensed by the commissioner and appointed by an insurer by power of attorney to execute or countersign bail bonds for the insurer in connection with the judicial proceedings and charges and receives money for the services.

N.D.C.C. § 26.1-26.6-04 states:

> A person may not act in the capacity of a bail bond agent or perform any of the functions, duties, or powers prescribed for a bail bond agent under this chapter unless that person is qualified and licensed as provided in this chapter.... Violation of this section is a class B misdemeanor.

N.D.C.C. § 26.1-26.6-05(2) states:

> A bail bond agent or bail bond agency may not advertise as or hold itself out to be a surety company.

2. N.D.C.C. § 26.1-01-03.1 states, in pertinent part:

> The commissioner may issue an order to cease and desist and notice of opportunity for hearing when it appears that any person is engaged in an act or practice which violates or may lead to a violation of this title. Any party aggrieved by the commissioner's order may make written application for a hearing on the order within thirty days of the date of the order. The application for a hearing must briefly state the respects in which the applicant is aggrieved by the order and the grounds for relief to be relied upon at the hearing. A hearing must be held no later than ten days after an application for hearing is received unless a delay is requested by all persons named in the order. The commissioner, within thirty days after the hearing, shall issue an order vacating the cease and desist order or making the cease and desist order permanent, as the facts require.

FINDINGS OF FACT

1. Robert Lewis Heier, Kathryn, North Dakota, doing business as Robert Lewis Dakota Bond & Tracking Services and Robert Lewis Maple Valley Contracting, NPN 16206441, is presently and has been at all times pertinent to this action a licensed North Dakota resident insurance producer with the line of authority for bail bonds. Heier has held a North Dakota

resident insurance producer license since April 27, 2011. *See* Exhibits 1 and 2. Heier's licensee summary and testimony of Kelvin Zimmer shows Heier has not held an appointment with any insurer nor has he been appointed by an insurer by power of attorney to execute or countersign bail bonds for an insurer at any time during his North Dakota licensure. *Id.*

2. The preponderance of the evidence presented at the hearing established that Heier has acted in the capacity of a bail bond agent and has performed the functions, duties, or powers prescribed for a bail bond agent under N.D.C.C. ch. 26.1-26.6 without being licensed and appointed with an insurer.

There was voluminous evidence that Heier posted bail bonds in active criminal cases in the State of North Dakota without an appointment by an insurer, or by power of attorney to execute or countersign bail bonds for the insurer in connection with judicial proceedings. *See* Exhibits 3, 4, 5, 6, and 7, and testimony of Zimmer. Exhibit 3 is a $10,000 bond Heier wrote for defendant D.W. in Burleigh County District Court; Exhibit 4 is a $2,500 bond Heier wrote for defendant R.J. in Ward County District Court; Exhibit 5 is a $40,000 bond Heier wrote for defendant D.G. in Ward County District Court; Exhibit 6 is a $1,500 bond Heier wrote for defendant B.Z.in Morton County District Court; and Exhibit 7 is a $400,000 bond written by Heier for defendant T.W. in LaMoure County District Court.

Additionally, Joe Dale Pittman testified at the hearing that during his investigation he found 31 cases to date where Heier had written a bail bond in a criminal case in North Dakota without being appointed by an insurer. *See also* testimony of Tracy Frank that Heier wrote "maybe 30" bonds. Heier did not refute the evidence.

3. Each of the cases referenced above constitute separate violations of North Dakota law. However, the violations in the D.G. (Exhibit 5) and T.W. (Exhibit 7) cases are particularly egregious.

In the D.G. case, Heier bonded out of jail a dangerous and violent man who had fled from law enforcement while illegally possessing a firearm. Heier wrote an illegal $40,000 bond to bail D.G. out of jail for the charges of Possession of Methamphetamine with Intent to Deliver, Possession of Drug Paraphernalia, Fleeing or Attempting to Elude a Police Officer, and Prohibited/Possess Firearm. Shortly after D.G. was illegally bonded out of jail by Heier, D.G. failed to appear for a preliminary hearing on the charges. As a result, a bench warrant was issued by the court for D.G.'s arrest and D.G. became the subject of an active search by law enforcement. Heier charged a $4,000 premium to write the $40,000 bond for D.G.

In the T.W. case, Heier wrote an illegal bond for T.W. in the amount of $400,000 for the charges of felony Arson, two counts of felony Burglary, and two counts of Theft of Property. Heier charged a premium of $40,000 for writing the illegal $400,000 bond to get T.W. out of jail.

4. The preponderance of the evidence presented at the hearing established that Heier's bail bond agency, Dakota Bond and Tracking Services, held itself out to be a surety on multiple occasions, in direct violation of N.D.C.C. § 26.1-26.6-05(2). Under that subsection:

> A bail bond agent or bail bond agency may not advertise as or hold itself out to be a surety company.

Exhibits 3, 4, 5, 6, and 7 all unquestionably show Heier held his bail bond agency, Dakota Bond and Tracking Services, out to be a surety company in each of those cases. The exhibits all contain the same general language and are individually modified to reflect the bond amount. For example, the bond in the D.G. case (Exhibit 5) reads in relevant part as follows:

> That we, Dakota Bond and Tracking Services, <u>as Surety</u> are held

> firmly bound unto the city, county, or state court in the sum of Forty Thousand dollars ($40,000) ... (emphasis added).

Similarly, the bond in the T.W. case (Exhibit 7) reads in relevant part as follows:

> That we, Dakota Bond and Tracking Services, as Surety are held firmly bound unto the city, county, or state court in the sum of **FOUR HUNDRED THOUSAND DOLLARS** ($400,000) ... (underline emphasis added).

5. Heier contends that he did not knowingly violate the law. However, that assertion was disproven by the evidence presented through a recorded interview of Tracy Frank conducted by Pittman during his investigation. *See* Exhibit 8. Frank testified she worked with Heier from the beginning of the bail bond business. Specifically, Frank stated during her interview with Pittman that Dakota Bond and Tracking had applied with Sun Surety three or four years ago but after paying the fees there would not be enough left to even pay for gas. *See* Exhibit 8. Frank also mentioned checking with American Surety out of Minnesota and stated there were "a bunch of them (surety companies)" and that they called all of them. *Id.* Essentially, Frank indicated during her recorded interview that Dakota Bond and Tracking decided not to become appointed with a surety company because of the expense involved in doing so.

In her testimony at the hearing, Frank contradicted what she had told Pittman during the recorded interview. However, Frank's testimony was not credible. She acknowledged that she is a convicted felon, having been convicted in 2004 on a felony NSF charge and in 2006 on a felony forgery charge. She is an employee of Dakota Bond and Tracking Services, and has much to lose if Heier ceases to do business as a bail bond agent. In Frank's responses to Pittman during the investigation, she gave specific names of surety companies, indicating the information given at that time was true. Frank's responses during the interview with Pittman are more

believable than her later testimony, establishing that Heier was aware from the outset that he was required to be appointed by a surety company in order to issue bail bonds.

6. In his brief, Heier contends the Commissioner's Order incorrectly identifies Robert Heier as "Robert Lewis" on multiple occasions and asks that the Department be directed to change any references to "Robert Lewis" to "Robert Lewis Heier." The evidence shows that Heier applied for an insurance producer license under the name Robert Lewis Heier, D/B/A Trade Name: Robert Lewis Dakota Bond & Tracking Serives (sp) and Robert Lewis Maple Valley Contracting. *See* Exhibit 1. The Department used that name when officially licensing Heier. *See* Exhibit 2. That is the business entity name the Department used in the Cease and Desist Order, although correcting the spelling of "Services."

CONCLUSIONS OF LAW

1. It was established that Heier acted in the capacity of a bail bond agent and performed the functions, duties, or powers prescribed for a bail bond agent under N.D.C.C. ch. 26.1-26.6 without being appointed with an insurer. This evidence validates the Commissioner's belief that the Heier has engaged in, is engaging in, or is about to engage in, an act or practice that violates Title 26.1.

2. The preponderance of the evidence presented at the hearing established that Heier's bail bond agency, Dakota Bond and Tracking Services, held itself out to be a surety on multiple occasions in direct violation of N.D.C.C. § 26.1-26.6-05(2).

3. Heier claimed that his bail bond agency had never failed to pay on a bond. This point is irrelevant, as ability to pay is not an element of N.D.C.C. § 26.1-26.6-05(2). What is relevant is that the evidence presented at the hearing shows that Heier's bail bond agency, Dakota Bond and Tracking Services, held itself out to be a surety company in direct violation of

N.D.C.C. § 26.1-26.6-05(2). This evidence validates the Commissioner's belief that Heier has engaged in, is engaging in, or is about to engage in, an act or practice that violates Title 26.1.

4. Heier claims that he did not knowingly violate the law, and argues the appropriate remedy in this case should not be a Cease and Desist Order. However, the law does not require the Department to prove Heier knowingly violated N.D.C.C. §§ 26.1-26.6-01, 26.1-26.6-04 and 26.1-26.6-05(2).

5. The cease and desist power granted by the Legislature to the Commissioner allows the Commissioner to exercise his discretion in determining whether a Cease and Desist Order is an appropriate regulatory sanction to effectively regulate the business of insurance. While the cease and desist statute allows for a hearing to review the merit of the allegations made in the Cease and Desist Order to determine whether the Order is authorized by law and justified in fact, the law does not grant an administrative tribunal the ability to review the Commissioner's decision to issue a Cease and Desist Order once it has been determined by the administrative tribunal that the Order is authorized by law and justified in fact.

The North Dakota Supreme Court held in the case of *Larsen v. Comm'n on Med. Competency*, "[g]enerally, if authorized by law and justified in fact, imposition of a regulatory sanction by an administrative agency is discretionary." *Steen v. North Dakota Dep't of Human Serv.*, 1997 ND 52, ¶ 24, 562 N.W.2d 83 (citing *Sletten v. Briggs*, 448 N.W.2d 607, 611 (N.D.1989), *cert. denied,* 493 U.S. 1080, 110 S.Ct. 1135, 107 L.Ed.2d 1041 (1990)); *see also Matter of Prettyman*, 410 N.W.2d 533, 537 (N.D.1987) (citing *Wisdom v. North Dakota Real Estate Comm'n*, 403 N.W.2d 19, 22 (N.D.1987)) (holding the North Dakota Real Estate Commission did not abuse its discretion in reprimanding Wisdom); *Panhandle Coop. Ass'n v. E.P.A.*, 771 F.2d 1149, 1152 (8th Cir.1985) (recognizing "[t]he assessment of a penalty is

particularly delegated to the administrative agency. Its choice of sanction is not to be overturned unless 'it is unwarranted in law' or 'without justification in fact.' ") (citing *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 185-86, 93 S.Ct. 1455, 36 L.Ed.2d 142 (1973)). *Larsen v. Comm'n on Med. Competency*, 1998 ND 193, ¶ 32, 585 N.W.2d 801, 808.

6. Heier asserts that the Department should be estopped from suspending or revoking Heier's license as it should have known he was acting as a bail bond agent without appointment with a surety company and because Heier claims he did not know he was acting without proper appointment and relied upon the Department's issuance and renewal of his bail bond agent license.

The law clearly states that a bail bond agent must be appointed by an insurer.

N.D.C.C. § 26.1-26.6-01 defines "bail bond agent" as follows:

> As used in this chapter, unless the context otherwise requires, "bail bond agent" means any person who has been licensed by the commissioner **and appointed by an insurer** by power of attorney to execute or countersign bail bonds for the insurer in connection with the judicial proceedings and charges and receives money for the services. (Emphasis added.)

Heier's claim that he did not know he was violating the law is not a defense in this matter. The law cited above is plain and clear. The North Dakota Supreme Court has repeatedly held that ignorance of the law is not a defense. Every person generally is charged with knowledge of the provisions of statutes and regulations and must take notice thereof. *See Berg v. Hogan*, 322 N.W.2d 448, 452 n. 1 (N.D.1982); *Lumpkin v. Streifel,* 308 N.W.2d 878, 880 (N.D.1981). Ignorance of the law or a regulation is no excuse or defense. *Berg, at 452; Lumpkin*, at 880. Violation of a statutory or regulatory duty is evidence of negligence. *Praus v. Mack,* 2001 ND 80, ¶ 35, 626 N.W.2d 239; *Wolf v. Estate of Seright,* 1997 ND 240, ¶ 8, 573 N.W.2d 161.

Gonzalez v. Tounjian, 2003 ND 121, 665 N.W.2d 705, 713. Heier's estoppel argument is without merit.

7. Pursuant to N.D.C.C. § 26.1-01-03.1, the Insurance Commissioner has authority to issue a Cease and Desist Order and notice of opportunity for hearing when it appears that any person is engaged in an act or practice which violates or may lead to a violation of Title 26.1 of the North Dakota Century Code.

8. The Department's use of Heier's business entity name under which he was officially licensed in the Cease and Desist Order was proper. Heier has within his power the ability to file a request to change the name of his business. This is immaterial in the outcome of this matter.

9. Heier argues in his post-hearing brief that the Cease and Desist Order violates Heier's due process rights. The parties thoroughly briefed the due process issue. The administrative law judge agrees with the facts and law which are thoroughly explained in the Insurance Department's Rebuttal to Respondent's Post-Hearing Brief, and those will not be repeated here.

Next, Heier suggests the statute in N.D.C.C. § 26.1-01-03.1 is unconstitutional. A statute is presumed valid until determined otherwise by an appropriate court. N.D.C.C. § 1-02-06.1. The courts have held that an administrative agency has no authority to decide the constitutionality of the statutes under which they operate. *First Bank of Buffalo v. Conrad*, 350 N.W.2d 580, 584 (N.D. 1984); *Johnson v. Elkin*, 263 N.W.2d 123, 126 (N.D. 1978). The Commissioner followed the statute in N.D.C.C. § 26.1-01-03.1 in issuing the Cease and Desist Order. Heier was not deprived of due process.

10. It was established, by a preponderance of the evidence, that Heier acted in the

capacity of a bail bond agent and performed the functions, duties, or powers prescribed for a bail bond agent under N.D.C.C. ch. 26.1-26.6 without being appointed with an insurer. It was further established, by a preponderance of the evidence, that Heier's bail bond agency, Dakota Bond and Tracking Services, held itself out to be a surety on multiple occasions in direct violation of N.D.C.C. § 26.1-26.6-05(2). The Commissioner has a duty to protect consumers from such acts.

11. Heier indicates in his post-hearing brief that the Cease and Desist Order is excessive punishment as no interested parties have suffered any damages and he has entered into an agreement in principal for appointment as a bail bond agent with a surety company in an effort to rectify the situation.

The provisions of N.D.C.C. § 26.1-01-03.1 bestow authority to enjoin past, present, and threatened future conduct. An agency cease and desist order may be warranted even assuming the offending entity has improved its practices, where the cease and desist order would prevent future abuses. *See Hecht Co. v. Bowles,* 321 U.S. 321, 327, 64 S. Ct. 587, 591, 88 L.Ed. 754 (1944), cited in *First State Bank of Wayne County v. Federal Deposit Insurance Corporation,* 770, F 2d 81, 83 (6th Cir. 1985).

12. Heier engaged in practices that violated multiple provisions of law found in Title 26.1 of the North Dakota Century Code. The Commissioner's Cease and Desist Order is authorized by N.D.C.C. § 26.1-01-03.1 and justified in fact. Commissioner Hamm's April 15, 2014, Cease and Desist Order should be made permanent.

RECOMMENDED ORDER

The facts require that the Commissioner's Cease and Desist Order dated April 14, 2014, be made permanent, as established by a preponderance of the evidence and by application of law.

Dated at Bismarck, North Dakota, this 22nd day of September 2014.

State of North Dakota
Insurance Department

By: Bonny M. Fetch

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