

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).

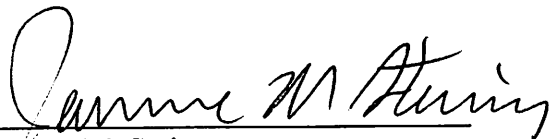
RECOMMENDED ORDER

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
2911 North 14th Street, Suite 303
Bismarck, North Dakota 58503
Telephone: (701) 328-3200