

STATE OF NORTH DAKOTA
INSURANCE COMMISSIONER

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| IN THE MATTER OF: |) | RECOMMENDED |
| |) | FINDINGS OF FACT, |
| |) | CONCLUSIONS OF LAW, |
| Abbey McNamee |) | AND ORDER |
| |) | |
| |) | OAH File No. 20140125 |
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PROCEDURAL BACKGROUND

On December 26, 2013, the North Dakota Insurance Department ("the Department") received an application for a resident individual insurance producer license submitted by Abbey McNamee ("McNamee"), Williston, North Dakota. Ex. 1. She applied for a license to sell life and health insurance. *Id.* at p. 2. On her application, McNamee answered "no" to the question "[h]ave you ever been convicted of a crime, had a judgment withheld or deferred, or are you currently charged with committing a crime?" *Id.* at p. 3. A background investigation and criminal history record check revealed that McNamee was convicted of felony Theft of Property in 2011. Exs. 3, 4, 5, 6, 7. The Department requested McNamee submit further information, which was considered by Department staff in determining McNamee's application for licensure. Exs. 8, 9.

On March 26, 2014, the Department, through Jeff Ubben, General Counsel, sent a letter notifying McNamee that her application for a resident individual insurance producer license was denied. Ex. 2. On April 8, 2014, the Department received an email from McNamee, which was received as a timely request for a hearing relating to McNamee's license denial.

On April 11, 2014, the Department made a request to the North Dakota Office of Administrative Hearings for designation of an administrative law judge (ALJ) to conduct an administrative hearing and make recommended findings of fact, conclusions of law, and a recommended order for consideration of the Insurance Commissioner. On April 15, 2014, Administrative Law Judge Wade C. Mann was designated. ALJ Mann held a prehearing conference on April 22, 2014. At the prehearing conference, Special Assistant Attorney General Johannes Palsgraaf, representing the Department, stated that the reasons for denying McNamee's application were outlined in the March 26, 2014, denial letter, but that a citation was omitted. The additional subsection was identified as N.D. Admin. Code § 26.1-26-42(1). Mr. Palsgraaf stated the Department would assert the additional subsection as an additional reason for denial. Due to a scheduling conflict, the matter was reassigned to Administrative Law Judge Bonny M. Fetch on April 22, 2014. ALJ Fetch issued notice on April 24, 2014, setting the hearing date for May 7, 2014.

The hearing was held on May 7, 2014, at the Office of Administrative Hearings. The Department appeared through its attorney, Special Assistant Attorney General Johannes Palsgraaf. McNamee appeared by telephone, without counsel. The Department called two witnesses, Kelvin Zimmer, Director, Producer Licensing Division, and Abbey McNamee. McNamee gave limited testimony but called no other witnesses. The Department's Exhibits 1-9, were admitted into the record without objection. At the close of the hearing, the parties made oral closing argument. The record of the hearing was closed on May 7, 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, Adam Hamm.

FINDINGS OF FACT

1. Abbey McNamee is not currently licensed as an individual insurance producer in North Dakota. Ex. 1.

2. On December 26, 2013, the North Dakota Insurance Department received an application for a resident individual insurance producer license submitted by McNamee. Ex. 1.

3. On her December 26, 2013, application, McNamee failed to disclose that she had a prior felony conviction. Ex. 1. Under the Background Information section of the application, McNamee answered "no" to the question asking, "[h]ave you ever been convicted of a crime, had a judgment withheld or deferred, or are you currently charged with committing a crime?" *Id.* at p. 3. "Crime" is defined in that section to include "a misdemeanor, a felony or a military offense." *Id.* "Convicted" is defined as "includes, but is not limited to, having been found guilty by a verdict of a judge or jury, having entered a plea of guilty or nolo contendere or no contest, or having been given probation, a suspended sentence, or a fine." *Id.*

4. Kelvin Zimmer ("Zimmer"), Director, Producer Licensing Division, testified the Department conducted a background investigation and criminal history record check on McNamee. The investigation and record check revealed that McNamee was convicted of felony Theft of Property in 2011. Exs. 4, 7.

5. McNamee's conviction stemmed from charges that on or about February 6, 2009, and April 4, 2011, McNamee, while employed as a money counter for the Fargo Youth Commission's gaming operation, embezzled money, thought to be about \$59,000. Exs. 3, 4, 6. McNamee confessed to stealing the money, but she thought it was around \$40,000. Ex. 6.

McNamee initially pled not guilty on June 16, 2011, but then on August 29, 2011, she pled guilty. Ex. 7. McNamee received a suspended sentence of 364 days, during which time she

was placed on supervised probation. Exs. 4, 5, 7. The period of supervised probation was from August 29, 2011 to August 28, 2012. Ex. 7. She was also sentenced to serve 35 days in jail, and ordered to make restitution in the amount of \$50,000. Exs. 4, 5, 7. On October 29, 2012, the Court amended disposition of the conviction from a felony to a misdemeanor. Ex. 7.

6. The Department sent an email to McNamee on January 16, 2014, requesting she provide information concerning her conviction. Ex. 9. Among other things, McNamee was asked to provide a statement in her own words explaining the circumstances of the incident that led to the charge against her; a statement of why she answered "no" to the question on the application asking whether she had ever been convicted of a crime; and a statement of why she felt a license should be issued to her. *Id.* McNamee provided a letter, presumably as an attachment to an email on February 4, 2014. Exs. 8, 9. The Department replied by email, informing McNamee her explanation was not sufficient, and that she must explain the circumstances of the incident which led to her arrest or charge. Ex. 9. McNamee provided further explanation by response to the Department's email. *Id.* On March 10, 2014, the Department requested information about the \$50,000 restitution McNamee was ordered to pay. *Id.* McNamee replied that it was all paid in full on the day of her court appearance. *Id.*

7. Zimmer testified Department staff considered the documents in Exhibits 3 through 7, concerning McNamee's criminal conviction, and McNamee's explanations in Exhibits 8 and 9, in determining McNamee's application for licensure. From his testimony, what stood out in Zimmer's mind was that McNamee was not entirely truthful in her responses, that she was evasive and not candid and upfront. McNamee's initial letter did not provide any explanation of what took place. Ex. 8. Moreover, she stated she was "charged with a misdemeanor in 2009." *Id.* Zimmer testified that statement was significant to Department staff because McNamee was

charged with a felony. Exs. 3, 4. Further, Department staff concluded McNamee did not take responsibility for her actions because she first pled not guilty to the charge and later changed her plea to guilty. But even more significantly, McNamee tried to minimize the seriousness of her actions by stating she "had taken some cash" when in fact she was ordered to make restitution in the amount of \$50,000. Ex. 9.

8. The Department has a responsibility to protect consumers. Zimmer testified the Department considers theft of property to be a serious offense because insurance producers handle large sums of money and must be honest and trustworthy.

9. In her testimony, McNamee admitted her answer on the application was not truthful. She further admitted she stole around \$40,000 "over a period of time." She stated she had no idea why the dates of February 6, 2009, and April 4, 2011, were given as the dates the offenses occurred. McNamee admitted her statement in Exhibit 8 that she was "charged with a misdemeanor in 2009" was not totally correct. Concerning that statement and her statement in Ex. 9 that she "had taken some cash," McNamee claimed she didn't even think about what she was writing.

10. In her testimony, McNamee's explanation of why she answered "no" on her application to the question asking whether she had ever been convicted of a crime was that her attorney told her after she completed her sentences and paid everything back that it would be over and done with.

11. McNamee's current employment is with Blue Cross Blue Shield as a marketing specialist. She explained her duties include answering the phone, clerical duties, answering questions, basically everything but selling insurance. She opined that her employer expected her

to become licensed. McNamee concluded by saying she made a mistake but is working hard to get everything back to normal.

12. Zimmer testified that the Department did not consider McNamee to be rehabilitated as she completed probation in 2012, and two years is not a sufficient length of time in a case as serious as theft to determine whether an individual is rehabilitated. Zimmer testified that in such cases, the Department considers four to five years to be an appropriate length of time for consideration of whether an individual may be rehabilitated.

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. McNamee 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).

3. 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.

4. 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. Testimony of Kelvin Zimmer, Director, Producer Licensing Division.

5. N.D.C.C. § 26.1-26-42(1) authorizes the Commissioner to refuse to issue an insurance producer license to any applicant who makes a materially untrue statement on the license application. By answering "no" to Background Information question number 1 on her application for a resident individual insurance producer license submitted on December 26, 2013, McNamee made a materially untrue statement on her license application. On that basis, the Commissioner may rightfully deny McNamee's license application.

6. N.D.C.C. § 26.1-02.1-02.1(3)(a) provides that "[a] person convicted of a felony involving dishonesty or breach of trust may not participate in the business of insurance." McNamee was convicted of the felony crime of Theft of Property, which is a felony involving dishonesty or breach of trust. Under that subsection, it is clear that the Commissioner has no discretion to grant a license for McNamee to participate in the business of insurance. On that basis alone, McNamee's application was properly denied.

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, specifically, "competent, trustworthy, financially responsible, and of good personal and business reputation." 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. McNamee was convicted of felony Theft of Property and made a materially untrue statement on her license application. Such actions call into question McNamee's character and the Commissioner may rightfully consider that in his decision to grant or deny a license.

8. As an applicant for a North Dakota resident individual insurance producer license, McNamee has the burden of proof to show, by the greater weight of the evidence, that she meets the statutory requirements for licensure. *See Layon V. North Dakota State Bar Bd.*, 458 N.W.2d

501 (N.D. 1990). McNamee failed in her burden to show that she meets the statutory requirements for licensure.

9. Because of McNamee's past felony conviction and the materially untrue statement she made on her license application, the Commissioner has foundations in law to refuse to issue a license to McNamee.

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 Abbey McNamee's application for a North Dakota resident individual insurance producer license under applicable law.

The Administrative Law Judge recommends that Abbey McNamee's application for a North Dakota resident individual insurance producer license be denied.

Dated at Bismarck, North Dakota, this 29th day of May 2014.

State of North Dakota
Insurance Commissioner

By: 
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