

STATE OF NORTH DAKOTA
INSURANCE COMMISSIONER

IN THE MATTER OF:

David Russell

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**RECOMMENDED
FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER
OAH File No. 20160080**

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PROCEDURAL BACKGROUND

David Russell ("Mr. Russell") submitted an application for a nonresident individual insurance producer license to the North Dakota Insurance Department ("Department") on January 11, 2016. The Department denied Mr. Russell's application on January 21, 2016. On February 8, 2016, the Department received a request from Mr. Russell for a hearing relating to his license denial. On February 12, 2016, the Department requested that an administrative law judge ("ALJ") be assigned to conduct an administrative hearing.

On February 16, 2016, 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 February 19, 2016. At that time, Mr. Russell waived the thirty day hearing requirement, waived the ten day written notice requirement under N.D.C.C. § 26.1-26-40 and consented to a hearing on March 18, 2016. On February 22, 2016, the ALJ served a Notice of Hearing confirming the agreed upon hearing date of March 18, 2016, and the issue on appeal. Initially, Mr. Russell intended to appear at the hearing in person, but on February 26, 2016, Mr. Russell requested to appear by telephone. The request was granted on March 3, 2016, with no objection from the Department.

The hearing was held as scheduled on March 18, 2016, in accordance with North Dakota Century Code chapters 28-32 and 26.1-26. ALJ Jeanne McLean was present during part of the hearing for training purposes. David Russell appeared by telephone, representing himself. Jordan Russell, spouse of Mr. Russell was present by phone. The Department appeared through its attorney, Special Assistant Attorney General Jeff Ubben. The Department called Mr. Russell and Kelvin Zimmer, Director of the Agency Licensing Division. Mr. Russell testified and called Aaron McCombs and Jordan Russell to testify on his behalf. The Department's Exhibits 1-13 were admitted without objection. Mr. Russell's Exhibits A-L were admitted over objection by the Department to Exhibits G, H, I and J. An Exhibit List is attached. The record of the hearing was closed on March 18, 2016. The issue for hearing is as follows:

Whether the North Dakota Insurance Department properly denied David Russell's nonresident individual insurance producer license in accordance with the provisions of N.D.C.C. §§ 26.1-26-15 & 26.1-26-42(6).

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

RECOMMENDED FINDINGS OF FACT

1. David Russell applied for a North Dakota insurance license in 1992, was approved by the North Dakota Insurance Department ("Department") and voluntarily surrendered the license in 1995.

2. Mr. Russell applied for a North Dakota insurance license in 1996 and the Department denied the application for failing to disclose his criminal history in the 1992 application.

3. Mr. Russell applied for a North Dakota insurance license in 1998, was approved by the Department and surrendered the license in 2004.

4. On January 11, 2016, Mr. Russell submitted an application for a North Dakota nonresident individual insurance producer license. In that application, Mr. Russell admitted to having prior misdemeanor convictions and denied having any prior felony convictions. However, he did not attach the required documentation: he did not attach any written statements explaining the circumstances, he did not provide copies of the charging documents and he did not provide a copy of any official documents demonstrating the resolution of the charges or final judgments.

5. In the January 2016, application, Mr. Russell denied he had ever been involved or named in an administrative proceeding regarding any professional or occupational license or registration, which includes having a license or registration application denied or the act of withdrawing an application to avoid a denial.

6. Also on the January 2016, application, under the attestation provision, Mr. Russell certified under penalty of perjury, that all of the information submitted in the application and attachments was true and complete. He attested he was aware that submitting false information or omitting pertinent or material information in connection with the application was grounds for license denial.

7. Mr. Kelvin Zimmer, Director of the Producer Licensing Division of the North Dakota Department of Insurance, 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.

8. Mr. Zimmer noted Mr. Russell had answered yes to having misdemeanor convictions, but had not attached any documentation. Mr. Zimmer contacted and advised Mr. Russell that he needed to provide documentation in regard to his admission of prior misdemeanor convictions.

9. Mr. Russell did not disclose to the Department or Mr. Zimmer his entire criminal history, but only responded to Mr. Zimmer by providing documentation of a 2003 conviction for Abuse or Neglect of a Child. Notably, Mr. Russell did not advise Mr. Zimmer of his prior dealings with the Department, did not advise that his prior criminal history had previously been disclosed in prior applications and did not advise this was the only conviction obtained since the last application with the Department. Mr. Russell also did not advise Mr. Zimmer that he had several convictions and only lacked detailed information, nor did Mr. Russell inquire as to where he could obtain accurate information on the convictions from long ago. From the information Mr. Russell provided, the 2003 conviction appeared to be the only conviction.

10. Mr. Zimmer conducted a background investigation which revealed Mr. Russell had multiple other criminal convictions which Mr. Russell had failed to disclose with his 2016 application, including a misdemeanor conviction for Theft of Property from 1987, a felony conviction for Theft of Property from 1989 that resulted in a prison sentence in 1990, convictions for Issuing Checks Without Sufficient Funds from 1989, 1990, and 2001, and a conviction for Issuing Checks Without an Account from 1990. These convictions were contained in the Insurance Department's own file from past dealings with Mr. Russell and appeared to have been previously provided by Mr. Russell.

11. Mr. Zimmer's background investigation also revealed the North Dakota Insurance Department denied Mr. Russell's resident insurance license application in 1996 for failing to provide truthful and complete statements regarding his criminal convictions.

12. Mr. Zimmer again contacted and reminded Mr. Russell he had answered negatively to question 2 on the application, the question asking if he had previously been denied a license. Mr. Zimmer advised Mr. Russell that his application had been denied in 1996 and asked Mr. Russell to provide documentation explaining why the denial was not disclosed.

13. Mr. Russell responded by telling Mr. Zimmer he was never told he was denied; he had no documentation because he was never told he was denied; and that he got a North Dakota license from 1991-1995 and again from 1996 or 1998-2004. Notably, Mr. Russell did not admit he knew his North Dakota license application had previously been denied.

14. Mr. Zimmer then provided to Mr. Russell a letter written by Mr. Russell on October 30, 1998, wherein Mr. Russell denied receiving a letter from the Department but admitted knowing his application had been denied by the Department in 1996 for failing to disclose his criminal record in the 1992 application. Mr. Zimmer again advised Mr. Russell that his entire criminal background records need to be provided by February 2, 2016, or the license would be denied.

15. Mr. Russell did not provide any further documentation regarding his criminal history.

16. The Department denied Mr. Russell's application for lack of trustworthiness as evidenced by failing to completely disclose his criminal history and failing to disclose his 1996 license denial.

17. Mr. Russell appealed and a hearing was held on March 18, 2016.

18. At the hearing, Mr. Russell again denied that he was aware his license had been denied in 1996, claiming he did not receive the Department's denial letter because it was sent to his mother's address and an unknown person signed to receive the certified letter. Mr. Russell admitted he did not fully disclose his prior criminal record and offered no good reason for not disclosing his criminal history, but claimed he did not remember the details because it happened so long ago. He also claimed he attempted to obtain information on his prior convictions by contacting the North Dakota Bureau of Criminal Investigations but the information was not complete or accurate. Finally, Mr. Russell provided evidence of his good character through his own testimony, testimony from Aaron McCombs and testimony from Jordan Russell, spouse of Mr. Russell.

19. Mr. Russell's 2016 insurance application was not denied due to having a criminal history, but because he did not honestly, accurately and completely disclose his prior convictions. This is not the first time Mr. Russell has been denied for not accurately disclosing his past convictions. Mr. Russell is familiar with the application disclosure process because he had been denied in the past for failing to disclose his criminal record and had been approved in the past when he accurately disclosed his criminal record.

20. Mr. Russell's 2016 insurance application was also denied because Mr. Russell failed, once again, to disclose the denial of his license application in 1996. Inexplicably, Mr. Russell maintained in his testimony that he was unaware of the denial, despite his admissions in his own handwriting in 1998, that he knew his 1996 application had been denied.

21. The Commissioner has a duty to protect the public by regulating the insurance industry and those working within it by considering the trustworthiness of applicants.

22. The greater weight of the evidence established the denial of Mr. Russell's application was proper because Mr. Russell failed to completely and accurately disclose his prior criminal history, and failed to disclose the past application denial from 1996.

23. By omitting pertinent or material information in connection with his 2016 application, Mr. Russell failed to meet the trustworthiness character requirement of one applying to serve the public as an insurance producer and therefore, the denial was proper.

RECOMMENDED 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." 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. Russell was not forthright in his 2016 application. He made it appear as though he only had one misdemeanor conviction from 2003, instead of a true reflection of his past, which included several other convictions and a prior denial. Mr. Russell's lack of total candor in the application process provides evidence of lack of trustworthiness. The Commissioner properly considered this evidence in deciding whether to grant or deny the application.

4. N.D.C.C. § 26.1-26-42 sets forth authority for the commissioner to suspend, revoke, place on probation, or refuse to continue or refuse to issue any license issued under this chapter if, after notice and a hearing, certain conditions are found. As applied to this case, the Commissioner may refuse to issue a license if the applicant submits a materially untrue statement in the license application. N.D.C.C. § 26.1-26-42(1). Mr. Russell certified under penalty of perjury, that all of the information submitted in the 2016 application and attachments was true and complete. This is a materially untrue statement. N.D.C.C. § 26.1-26-42(1) provides authority for denial.

5. N.D.C.C. § 26.1-26-42(6), cited in the notice of hearing, anticipates a license has already been approved and the licensee used fraudulent, coercive, or dishonest practices, or has shown oneself to be incompetent, untrustworthy, or financially irresponsible in the conduct of affairs under the license. Because no license was issued on the 2016 application, N.D.C.C. § 26.1-26-42(6) does not apply.

6. The Commissioner properly denied Mr. Russell's January 11, 2016, application for a nonresident individual insurance producer license due to lack of trustworthiness as required by N.D.C.C. § 26.1-26-15. The Commissioner has authority under N.D.C.C. § 26.1-26-42(1) to deny Mr. Russell's application.

RECOMMENDED ORDER

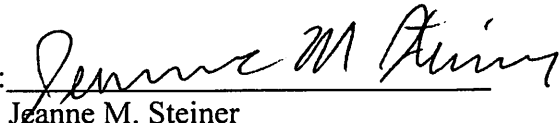
The evidence of record has been considered and appraised. The facts, as established by the greater weight of the evidence, establish grounds for denying David Russell's application for a North Dakota nonresident individual insurance producer license under applicable law.

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

Dated at Bismarck, North Dakota, this 22 day of March 2016.

State of North Dakota
Insurance Commissioner

By: _____


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