

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 discretionary, 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

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