

Continuance on February 3, 2014, extending the time to February 24, 2014, for a hearing to be held.

On January 30, 2014, Joseph. C. Irby, an attorney licensed in the state of Minnesota, filed a Motion To Appear Pro Hac Vice, seeking admission to practice in North Dakota representing Skoda in this matter. On February 5, 2014, ALJ Fetch issued an Order Granting Admission Pro Hac Vice, permitting Mr. Irby to represent Skoda in this matter. On the same date, ALJ Fetch issued an Order Excusing Sponsoring Attorney, excusing Craig M. Richie from appearing in this matter.

A Notice of Hearing was issued on February 5, 2014, scheduling the hearing to be held on February 19, 2014, at the Office of Administrative Hearings in Bismarck, North Dakota. The parties were instructed to exchange witness lists and proposed exhibits and submit the same to the Administrative Law Judge no later than February 18, 2014.

A prehearing conference was held with Mr. Ubben and Mr. Irby on February 12, 2014, to discuss discovery, witnesses, documentary evidence, and anticipated motions. That same day, Mr. Irby filed a Memorandum in Support of Dismissal to dismiss the Cease and Desist Order, asserting the State of North Dakota lacks jurisdiction to adjudicate the matter; alleging the forum is inconvenient; and alleging due process violations. Mr. Ubben filed a response on February 18, 2014. ALJ Fetch issued an Order denying the motion to dismiss the cease and desist action on February 18, 2014.

The hearing was held as scheduled on February 19, 2014, at the Office of Administrative Hearings. General Counsel Jeff Ubben and Special Assistant Attorney General Johnny Palsgraaf represented the Insurance Department. Joseph C. Irby, attorney, represented Frederick Paul Skoda. The Department called two witnesses, Philip Haug, agency manager for Country

Financial, and Joyce Stone. Skoda did not testify, nor did he call any other witnesses. The Department's Exhibits 1 and 2, and Skoda's Exhibits A and B were admitted into the record. Counsel gave oral closing statements at the conclusion of the hearing. Mr. Irby requested an opportunity to file a written brief and Mr. Ubben requested an opportunity to respond. Mr. Irby filed Skoda's brief on March 10, 2014. Mr. Ubben filed the Department's response brief on March 17, 2014. After reviewing the Department's brief, Mr. Irby requested an opportunity to file a response. His request was granted and Skoda's response brief was filed on March 28, 2014. The record of this matter was closed on March 28, 2014.

The issue to be considered and decided upon the hearing is:

Whether Frederick Paul Skoda has knowingly engaged in a fraudulent insurance act and in the conduct of affairs under his license has used fraudulent, coercive, or dishonest practices in his actions and has used unfair and deceptive acts or practices in the business of insurance, in violation of N.D.C.C. §§ 26.1-02.1-02.1, 26.1-04-03(12), 26.1-26-15, and/or 26.1-26-42(6), and thus, whether the Cease and Desist Order issued pursuant to N.D.C.C. § 26.1-01-03.1 should be vacated or made permanent.

Having thoroughly considered the evidence of record, the designated Administrative Law Judge makes the following Recommended Findings of Fact, Conclusions of Law and Recommended Order for consideration of the Insurance Commissioner.

CLARIFICATION OF RULING ON HAUG'S TESTIMONY

In his post-hearing brief, Skoda argues that Haug's testimony was not the best evidence, was largely improper, and should be excluded. At the hearing, the undersigned Administrative Law Judge (ALJ) ruled that Haug's testimony would be allowed, and that the ALJ would give it the appropriate weight of consideration when making her findings. Considering that Haug was manager of Country Financial during the time of Skoda's employment, he had personal knowledge of Skoda's actions and business practices. He appeared in person to testify and be

cross-examined. His testimony is relevant. Haug was a credible witness, and there is no reason to believe his testimony is not reliable. Skoda had an opportunity to testify and attempt to refute Haug's testimony, but he chose not to. Additionally, testimony of Stone and the documentary evidence in Exhibits 1 and 2 corroborate Haug's testimony concerning the results of the audit which showed that Skoda filed fraudulent applications, forged signatures of applicants, and paid the premiums from his Premium Trust Fund Account. Considering all this, the ALJ gave considerable weight to Haug's testimony.

RECOMMENDED FINDINGS OF FACT

1. Frederick Paul Skoda, NPN 16361246, at all times pertinent to this action, held a North Dakota resident insurance producer license. He had held a resident insurance producer license in North Dakota since August 26, 2011.

2. Skoda was employed by Country Financial from January 2012 through October 2013. Philip Haug was agency manager of Country Financial during the course of Skoda's employment. Skoda was terminated from his employment with Country Financial due to improper business practices.

3. Haug testified that Country Financial offers their agents a guaranteed income per month. In order to continue to receive this guaranteed income agents are required to reach certain sales benchmarks. Haug testified Skoda received a base salary of \$2,000 - \$3,500 per month. In addition, he had to meet the benchmark requirements. If he did not meet the benchmark for a particular month, it resulted in a lowered salary for the month. Haug testified that failure to meet the benchmark requirements in four consecutive months would result in termination.

4. It was established, by a preponderance of the evidence presented at the hearing, that Skoda knowingly engaged in a fraudulent insurance act and in the conduct of affairs under his license, has used fraudulent, coercive, or dishonest practices in his actions and has used unfair methods of competition and unfair and deceptive acts or practices in the business of insurance beginning on or about January 1, 2013, and continuing through on or about November 7, 2013.

A. Country Financial initially became aware of problems with Skoda's conduct as an insurance agent after being notified by a client that the client had been receiving paperwork for a policy he was not aware of, nor did he want the policy. Haug spoke with Skoda about the matter, and Skoda told Haug it was a party he knew and he would talk to the party and take care of the billing.

B. Country Financial conducted an audit of Skoda's accounts for the time period from about January 1, 2013, continuing through about November 1, 2013. Country Financial accepts electronic applications. Haug testified the audit of Skoda's accounts revealed that there were inconsistencies in signatures on applications; that Skoda had been paying policy premiums from his Premium Trust Fund Account; and that after the initial payment of the premium from the trust fund account, no further payments were made on the policy and it went into a lapse state. Haug testified the premium trust fund account is set up to accommodate clients who want to pay cash. Haug testified the money in the account is supposed to come from the client, and a representative is not authorized to pay premiums out of the trust fund account.

C. It was established at the hearing, and not refuted by Skoda, that Skoda filed multiple applications for insurance coverage with Country Financial on behalf of individuals that did not want the insurance coverage, and that he forged multiple signatures on

applications for insurance coverage and submitted these forged documents to Country Financial in order to bind insurance coverage. Skoda paid the premiums for the insurance policies from his Premium Trust Fund Account. Skoda received personal financial benefit by engaging in this conduct.

Kincaid (last name only was given) was one such individual. Skoda filed life insurance policies on Kincaid's three children. The policies were filed under Skoda's representative number. Skoda was paid a commission for the policies and they also qualified toward meeting Skoda's monthly benchmark requirement. Kincaid did not want the policies and he was unaware that the policies had been filed. It was Kincaid's inquiry to Country Financial which prompted the audit. Joyce Stone ("Stone") was another individual for whom a life insurance policy was issued for her son. She testified that Skoda, acting as a realtor, helped her and her husband purchase property for a barber shop in March 2013. She testified that shortly after June 26, 2013, she and her husband visited with Skoda about life insurance for their son, but they decided against it because of financial reasons. Stone testified they did not apply for a policy. Stone testified she received a call later informing her there was a policy on her son. Since she had not applied, she was surprised and concerned. Stone testified the same evening she received the call, Skoda stopped in and said he had screwed up on some paperwork and asked Stone to say she wanted the policy if someone called her about the matter. The record contains a copy of Joyce Stone's purported signature on the application and a copy of the check for Stone's policy written from Skoda's Premium Trust Fund Account. *See* Exhibit 1. Stone testified the signature in Exhibit 1 is not hers. The record contains a copy of another signature, "Joyce M. Stone." *See* Exhibit 2. Stone testified that is her signature. While Skoda may argue that it takes a handwriting expert to compare the two to determine authenticity, that is unnecessary as Joyce

Stone testified that the signature in Exhibit 1, taken from the application, is not hers and she did not file the application.

D. It was established at hearing, and not refuted by Skoda, that Skoda knowingly and intentionally presented inaccurate data to Country Financial concerning a home he was seeking to insure, thereby reducing the value of the home, which ultimately reduced the amount of premium required for the policy and allowed Skoda to offer this home an insurance policy for less than competitors.

Heather Hays ("Hays") was the homeowner in this instance. The amount of insurance on the policy was \$100,000 less than the actual amount required for rebuilding. Skoda admitted to Haug that he undervalued the property by listing less square footage to bring the premium down in order to gain a competitive advantage to get the policy. Skoda received personal financial benefit by his action in the form of commission on the policy as well as having the policy qualify toward his meeting the monthly benchmark requirements.

E. The audit revealed that the majority of the policies in question were all issued the last four to five days of the month, which strongly indicates that Skoda was trying to meet the benchmark requirements by filing fraudulent applications.

F. In addition to his North Dakota license, Skoda held a non-resident Insurance Producer license in Minnesota. *See Exhibits A and B.* The Kincaid policies were issued in North Dakota. The Stone policy was issued in Minnesota. The Hays policy was also issued in Minnesota.

G. By the foregoing actions, Skoda has shown himself to be incompetent, untrustworthy, and/or financially irresponsible.

5. Skoda voluntarily surrendered his North Dakota license on or about February 10,

2014. See Exhibit A. He submitted a Voluntary Cancellation Request or Removal of Lines of Authority (SFN 53881) to the North Dakota Insurance Department on or about January 10, 2014, on which he checked the box indicating he wanted to cancel his North Dakota Insurance producer license. See Exhibit 3.

RECOMMENDED CONCLUSIONS OF LAW

1. N.D.C.C. § 26.1-01-03.1 authorizes the Commissioner to issue an Order to cease and desist when it appears that any person or business entity is or has engaged in an act or practice which violates or may lead to a violation of Title 26 of the North Dakota Century Code.

2. N.D.C.C. ch. 26.1-26 regulates the licensing of insurance producers.

3. N.D.C.C. § 26.1-02.1-02.1(1) states:

A person may not commit a fraudulent insurance act.

4. N.D.C.C. § 26.1-04-03 states, in pertinent part:

26.1-04-03. Unfair methods of competition and unfair or deceptive acts or practices defined. The following are unfair methods of competition and unfair and deceptive acts or practices in the business of insurance:

...

12. Misrepresentation in insurance applications.
Making false or fraudulent statements or representations on or relative to an application for an insurance policy, for the purpose of obtaining a fee, commission, money, or other benefit from any insurer, insurance producer, or individual.

5. N.D.C.C. § 26.1-26-15 states:

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.

7. N.D.C.C. § 26.1-26-42 states, in part:

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:

...

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.

8. The preponderance of the evidence presented at the hearing established that Frederick Paul Skoda, while licensed as a resident insurance producer in the State of North Dakota, knowingly engaged in a fraudulent insurance act and in the conduct of affairs under his license used fraudulent, coercive, or dishonest practices in his actions and used unfair and deceptive acts or practices in the business of insurance. Skoda's actions showed that he is incompetent, untrustworthy, and/or financially irresponsible. The Commissioner has a duty to protect insurance consumers from such acts or practices.

9. Skoda's conduct constitutes violations of N.D.C.C §§ 26.1-02.1-02.1, 26.1-04-03(12), 26.1-26-15, and 26.1-26-42(6).

10. The matter of the Cease and Desist Order is not moot simply because Skoda voluntarily surrendered his North Dakota Insurance producer license.

In the first place, Skoda waived any mootness argument in regard to the Cease and Desist Order when he signed and submitted to the Department a State of North Dakota form entitled "Voluntary Cancellation Request or Removal of Line(s) of Authority" wherein Skoda requested the voluntary cancellation of his North Dakota insurance producer license. *See* Exhibit 3. Skoda's request for cancellation was made contingent upon the understanding that "[v]oluntary cancellation does not release me from the results of any pending or future administrative actions,

including orders revoking or suspending my license privileges, fines imposed, or other penalties imposed due to my conduct as a producer during the time I held a valid license.” *Id.* The request was submitted by Skoda on or about January 10, 2014, a time when the Cease and Desist administrative action was pending. In addition, it is uncontested that the Cease and Desist Order was imposed due to Skoda’s conduct as a producer during the time he held a valid license. In the final analysis, in order for the Department to accept Skoda’s voluntary cancellation request, Skoda had to agree that the Department would be free to pursue any pending or future administration actions due to his conduct as a producer during the time he held a license.

In the second place, Skoda’s mootness argument is not supported by fact or law. Skoda’s post-hearing brief mischaracterizes the applicable facts and law. Skoda’s license did not “expire” or “lapse” as it is stated in Skoda’s post-hearing brief. Instead, Skoda voluntarily cancelled his license in writing. *See* Exhibit 3.

Skoda inaccurately quotes the Cease and Desist statute found at N.D.C.C. § 26.1-01-03.1. On page 3 of Skoda’s brief, Skoda states that a citation from N.D.C.C. § 26.1-01-03.1 reads “any person or business entity is or has engaged in an act or practice which violates or may lead to a violation of Title 26 [sic] of the North Dakota Century Code.” (Emphasis retained from original). The quoted language “or business entity is or has” is not present in N.D.C.C. § 26.1-01-03.1. Instead, N.D.C.C. § 26.1-01-03.1 provides in relevant part:

Cease and desist authority--Hearing--Failure to appear

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.

Skoda then goes on to mischaracterize the Department’s argument concerning the sentence structure of a provision of the Cease and Desist Order concerning the use of the word

“or” by incorrectly saying “the State argued since the words ‘any person’ and ‘business entity’ is separated by the word ‘or,’ the Statute is intended to be disjunctive and cover individuals acting on their own, thus, this action is not moot since Mr. Skoda could theoretically still go out and sell insurance while operating as a rouge [sic] and unaffiliated individual.”

At the February 19th hearing, the Insurance Department drew the Administrative Law Judge's attention to a disjunctive “or” included in a provision found on pages 4-5 of the Department’s December 26, 2013, Cease and Desist Order. That provision reads as follows:

NOW, THEREFORE, IT IS HEREBY ORDERED pursuant to N.D.C.C. § 26.1-01-03.1 that Respondent, whether acting in the State of North Dakota as an insurance producer or otherwise engaging in the business of insurance, either directly or indirectly through named and unnamed persons, entities, agents, or otherwise, shall immediately **CEASE AND DESIST** from soliciting, transacting, or otherwise engaging in the business of insurance. (Emphasis added to the word “or”).

The argument the Department made at the hearing is that the Cease and Desist Order issued by the Commissioner applies to two separate types of conduct: (1) conduct as an insurance producer and (2) to otherwise engaging in the business of insurance, either directly or indirectly through named and unnamed persons, entities, agents, or otherwise. This second provision prohibits an unlicensed individual from engaging in certain conduct relating to the business of insurance.

The North Dakota Supreme Court has also held the word “or” is ordinarily disjunctive in nature. “The word ‘or’ is disjunctive in nature and ordinarily indicates an alternative between different things or actions.” State v. FreeEats.com, Inc., 2006 ND 84, ¶ 14, 712 N.W.2d 828 (citations omitted). “Terms or phrases separated by ‘or’ have separate and independent significance.” *Id.* Indus. Contractors, Inc. v. Workforce Safety & Ins., 2009 ND 157, 772 N.W.2d 582, 589.

As previously noted, the language of the Cease and Desist statute is not written to apply only to the actions of licensed insurance producers. The language of the Cease and Desist statute applies to the actions of “any person.” N.D.C.C. § 26.1-01-03.1.

The December 26, 2013, Cease and Desist Order issued against Skoda not only prohibits conduct as an insurance producer, it also prohibits an unlicensed individual from otherwise engaging in the business of insurance, either directly or indirectly through named and unnamed persons, entities, agents, or otherwise. As the Cease and Desist Order issued to Skoda addresses two separate and distinct types of conduct, one of which applies to unlicensed individuals, Skoda’s motion to dismiss this matter for being moot must be denied.

10. Skoda contends that the "alleged acts" which led to the initial issuance of the cease and desist order are not violations N.D.C.C. 26.1-01 because they occurred in Minnesota pursuant to his Minnesota license. *See* Skoda's Response Brief to New Post Hearing Issue and Evidence. That is not correct, as the facts show that at least three of the policies, the Kincaid policies, were issued in North Dakota. In any event, the fact that some of his actions occurred outside the State of North Dakota is irrelevant.

In considering violations of the statutes cited above, the Commissioner is not restricted to considering only actions which occur in North Dakota. Skoda was found to have engaged in a fraudulent insurance act, he used fraudulent, coercive, or dishonest practices, and used unfair and deceptive acts or practices in the business of insurance. Skoda's actions were egregious, and showed that he is incompetent, untrustworthy, and/or financially irresponsible. It does not matter where the acts occurred, the Commissioner has a duty to protect insurance consumers from such acts or practices.

RECOMMENDED ORDER

The facts require that the Commissioner's Cease and Desist Order dated December 26, 2013, be made permanent, as established by a preponderance of the evidence presented at the hearing and by application of law.

Dated at Bismarck, North Dakota, this 25th day of April, 2014.

By: 
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