

STATE OF NORTH DAKOTA
BEFORE THE INSURANCE COMMISSIONER

In the Matter of)	INSURANCE DEPARTMENT'S PROPOSED
)	FINDINGS OF FACT, CONCLUSIONS OF
Lorne Jay,)	LAW, AND ORDER
NPN 7921384,)	
)	OAH File No. 20120285
Respondent.)	Case No. AG-12-337

The evidence of record has been considered and appraised. IT IS ORDERED that the Recommended Findings of Fact and Conclusions of Law of the Administrative Law Judge be **REJECTED** as the Commissioner's Findings of Fact and Conclusions of Law in this matter. Enclosed are the Commissioner's Final Findings of Fact and Conclusions of Law.

PROCEDURAL HISTORY

On January 10, 2012, the office of the Insurance Commissioner served a Complaint upon Lorne Jay ("Jay" or "Respondent") alleging Jay's return of \$500 cash collateral taken to secure a bail bond was not returned timely to Fern Demery within the requirement of N.D.C.C. § 26.1-26.6-05(1)(f) and (g) to return collateral "immediately" upon the principal being entitled to it. The Complaint alleged Jay's conduct to be incompetent or untrustworthy as prohibited by N.D.C.C. § 26.1-26-42(6), and warranted action against his North Dakota resident bail bond agent license. Complaint. On January 23, 2012, Jay timely responded that the Complaint should be dismissed "due to the fact he did not receive the Order of Exoneration [of the bail bond] from the Rolette County District Court." Response to Complaint, p. 2.

On July 20, 2012, the Office of Administrative Hearings (“OAH”) received a request from Melissa Hauer, then General Counsel for the North Dakota Insurance Department (the “Department”), requesting the designation of an administrative law judge (“ALJ”) to conduct a hearing and make recommended findings of fact, conclusions of law, and order. ALJ Susan L. Bailey was designated to preside. A prehearing conference was held August 8, 2012, and a prehearing order issued August 10, 2012. Since dispositive motions were anticipated, oral argument was scheduled for November 19, 2012. Hearing in the matter was set for December 11, 2012.

On October 3, 2012, a Motion for Summary Judgment and supporting documents were filed with OAH by the Department. On October 5, 2012, documents were filed by Jay which were construed as a Motion to Dismiss and supporting documents. On October 15, 2012, the Department’s Response Opposing Motion to Dismiss was filed with OAH.

By letter of November 6, 2012, Johannes Palsgraaf informed the parties that he had recently been assigned as Legal Counsel for the Department on the case. Palsgraaf requested a prehearing conference. No prehearing conference was held prior to the date scheduled for oral arguments on the dispositive motions as there was insufficient time for proper notice.

On November 19, 2012, the second telephonic prehearing conference and arguments were held. Appearances were made by Lorne Jay, without counsel, and Special Assistant Attorney General Johnny Palsgraaf, for the Department. Jay and Palsgraaf stipulated that the matter could be decided, and a recommendation made, by the ALJ upon consideration of the submissions previously made in support of the parties’ respective motions. The record was closed on November 19, 2012. The record includes the following: Jay Exhibits A-D, submitted October 1, 2012; Department Exhibits 1-9, submitted October 1, 2012; Facts with Citation to Source attached to Department’s Motion for Summary

Judgment dated October 1, 2012, marked and admitted as Exhibit 10; Affidavit of Kelvin Zimmer dated September 28, 2012, marked and admitted as Exhibit 11; Consent Order signed by the Insurance Commissioner on March 25, 2009, attached as Exhibit 1 to Zimmer Affidavit marked and admitted as Exhibit 11a; Affidavit of Rebecca Ternes dated September 28, 2012, marked and admitted as Exhibit 12; September 30, 2010, letter to Jay from Ternes attached as Exhibit 1 to Ternes Affidavit marked and admitted as Exhibit 12a; Order Exonerating Bond Signed March 9, 2011, attached as Exhibit 2 to Ternes Affidavit marked and admitted as Exhibit 12b. The ALJ issued Recommended Findings of Fact, Conclusions of Law and a Recommended Order on January 23, 2013.

FINDINGS OF FACT

1. Respondent is presently and has been at all relevant times a licensed resident North Dakota bail bond agent. Complaint ¶ 1, admitted in Answer ¶ 2.

2. On or about December 21, 2009, Respondent took possession of collateral consisting of \$500 cash as security for a surety bond in the amount of \$5,000 on behalf of Austin DeCoteau ("DeCoteau"). DeCoteau had been arrested in connection with criminal charges filed against him in Rolette County, North Dakota. The criminal case is Case No. 40-09-K-00308. The \$500 cash was paid by Fern Demery ("Demery"), who is DeCoteau's mother. Complaint ¶ 8, admitted in Answer ¶ 2.

3. Respondent filed the surety bond with the court. Complaint ¶ 8, admitted in Answer ¶ 2.

4. Respondent knew from the time he took possession of Demery's collateral that he had a duty to return the collateral; in his words, "as long as the defendant follows the rules of the bond." Admitted in Request for Admission No. 1.

5. On May 27, 2010, Demery made a written complaint to the Department asking for her money back from Respondent. Affidavit of Kelvin Zimmer ¶ 4.

6. On June 21, 2010, the District Court issued a bench warrant on DeCoteau due to his failure to appear. Exhibit D. The bench warrant stated, "BOND PREVIOUSLY POSTED HEREBY FORFEITED." The Clerk of District Court wrote to Respondent on June 21, 2010, informing him that the bench warrant had been issued. Exhibit A.

7. The Department investigated the activity of the Respondent with respect to DeCoteau's bond. Complaint ¶ 4, admitted in Answer ¶ 2.

8. On or about September 1, 2010, a Department employee learned DeCoteau was in federal custody in Bismarck, North Dakota, and that his case in Rolette County District Court and his bond there were in a pending status. His bond had not been exonerated. At this time Demery was not entitled to get her \$500 cash collateral back. Complaint ¶ 9, admitted in Answer ¶ 2.

9. On March 2, 2011, the Department wrote to the Honorable John C. McClintock, Jr., who was the judge presiding over DeCoteau's criminal case ("March 2 letter"). Admitted in Request for Admission No. 2; Exhibit B.

10. The March 2 letter informed the judge that the bail bond agent had taken collateral to secure the bond, and that it would be helpful to have a written bond exoneration order which would trigger a return of the collateral to the posting party (Demery). Admitted in Request for Admission No. 3; Exhibit B.

11. The March 2 letter lists Respondent as a person to receive a copy of the letter. Admitted in Request for Admission No. 4; Exhibit B.

12. Respondent received a copy of the March 2 letter in March 2011. Admitted in Request for Admission No. 5.

13. On March 9, 2011, Judge McClintock signed an Order exonerating the bond. Respondent's liability on the bond was terminated by the Exoneration Order. The Exoneration Order was filed by the Rolette County Clerk of Court on March 10, 2011. The

Exoneration Order indicates a photocopy of the Order was made for Respondent.

Complaint ¶ 10, admitted in Answer ¶ 2.

14. Demery was entitled to get her \$500 cash collateral back immediately upon the court's entry of the Exoneration Order. Complaint ¶ 11, admitted in Answer ¶ 2.

15. The Department wrote to the Respondent on August 31, 2011, stating Demery had called the Department seeking return of her collateral. Admitted in Request for Admission No. 8; Exhibit C.

16. Respondent returned the \$500 cash collateral to Demery on or about September 6, 2011. Complaint ¶ 12, admitted in Answer ¶ 2.

17. Respondent returned Demery's cash collateral approximately 180 days after March 9, the date Demery was entitled to have it.

18. Effective March 25, 2009, Respondent entered into a Consent Order with the Commissioner based on Respondent's violations of his duties as a licensed bail bond agent. The 2009 Consent Order addressed Respondent's failure to pay forfeitures to the court. Pursuant to the 2009 Consent Order, Respondent paid a \$1,000 fine. In the 2009 Consent Order, the Commissioner took notice that Respondent had been suspended by the District Court from writing bonds in the Northeast Judicial District for a period of approximately four and one-half months in 2008 for the same violations, and consequently did not impose his own suspension of Respondent's bail bond agent license. Affidavit of Kelvin Zimmer ¶ 3, Exhibit 1 (Exhibit 11a).

19. On October 13, 2010, Respondent agreed to enter into a corrective action plan with the Department to address his recordkeeping practices that were not in compliance with North Dakota requirements. Affidavit of Rebecca Ternes ¶ 4, Exhibit 1 (Exhibit 12a).

20. Respondent completed the corrective action in December 2010. Admitted in Request for Admission No. 8.

CONCLUSIONS OF LAW

1. There is no genuine issue of material fact presented, and summary judgment may properly be granted.

2. A "bail bond agent" means any person who has been licensed by the Insurance Commissioner and appointed by an insurer by power of attorney to execute or countersign bail bonds for the insurer in connection with the judicial proceedings and charges and receives money for the services. N.D.C.C. § 26.1-26.6-01. The licensing and continuing education requirements under chapter 26.1-26 of the North Dakota Century Code apply to bail bond agents. N.D.C.C. § 26.1-26.6-02.

3. Respondent's liability on the surety bond was terminated on March 9, 2011, when the judge executed his Order Exonerating Bond dated March 8, 2011, signed by the Court on March 9, 2011, and filed and signed by the Rolette County Clerk of District Court on March 10, 2011.

4. The Order Exonerating Bond supersedes the forfeiture order in the June 2010 Bench Warrant, thus terminating Respondent's liability on the bond.

5. N.D.C.C. § 26.1-26.6-05(1) provides that the Commissioner may suspend a bail bond agent's license if, after notice to the licensee and hearing, the Commissioner finds as to the licensee any of the following conditions:

- f. Accepting anything of value from a principal other than a premium. Provided, the bail bond agent may accept collateral security or other indemnity from the principal which must be returned immediately upon final termination of liability on the bond....
- g. Willfully failing to return collateral security to the principal when the principal is entitled to the security.

Ordinarily, the word “immediately” means “without delay”. American Heritage Dictionary 643 (2nd College Edition, 1985). “Words used in any statute are to be understood in their ordinary sense, unless a contrary intention plainly appears.” N.D.C.C. § 1-02-02. A bail bond agent thus has a duty under subparagraph f to return collateral “without delay” “upon final termination of liability on the bond.”

6. A bail bond agent has an implied duty to monitor when a bond has been exonerated, in order to fulfill the express duty of N.D.C.C. § 26.1-26.6-05(1)(f) and (g) to return the collateral immediately.

7. It is not necessary to determine whether Respondent received a copy of the exoneration order from the clerk of court. Respondent admits receiving a copy of the Department’s March 2, 2011, letter to the court, which put Respondent on notice that an exoneration order may be forthcoming, which would trigger the duty to return collateral. Even if there had been no March 2, 2011, letter, a bail bond agent has an implied duty to monitor when a bond has been exonerated.

8. Demery was entitled to the return of her \$500 cash collateral immediately upon the exoneration of the bond, pursuant to N.D.C.C. § 26.1-26.6-05(1)(f).

9. Respondent’s return of Demery’s cash collateral on September 6, 2011, was not timely within the requirement of N.D.C.C. § 26.1-26.6-05(1)(f) that the collateral be returned “immediately” upon final termination of liability on the bond.

10. Respondent’s return of Demery’s cash collateral on September 6, 2011, was willful failure to return collateral to the principal when the principal is entitled to the security within the meaning of N.D.C.C. § 26.1-26.6-05(1)(g).

11. Respondent returned Demery’s cash collateral approximately 179 days after Demery was entitled to have it, showing Respondent to be incompetent or untrustworthy as prohibited by N.D.C.C. § 26.1-26-42(6).

12. Respondent's previous administrative discipline by the Commissioner and the District Court of the Northeast Judicial District was not effective to bring Respondent into compliance with his duties regarding the timely return of Demery's cash collateral.

**RATIONALE FOR NOT ADOPTING CONTRARY RECOMMENDATIONS
BY THE ADMINISTRATIVE LAW JUDGE PURSUANT TO N.D.C.C. § 28-32-46(8)**

The Recommended Findings of Fact, Conclusions of Law and Order by the ALJ ("recommended decision") incorporate facts that are not part of the record. The proceedings on November 19, 2012, began as a prehearing conference and continued as oral argument on the Department's Motion for Summary Judgment and Respondent's Motion to Dismiss. No sworn testimony was taken. The ALJ refers on page 7 of the recommended decision to "an unreasonable increase in work load for Clerks of Court". No evidence was admitted which supports this assertion. The ALJ's recommended Conclusion of Law No. 2 interpreting the word "immediately" is based on a statute from Title 9, Contracts (N.D.C.C. § 9-07-22) that does not apply because the duty to act "immediately" is derived from statute, not from contract. The application of N.D.C.C. § 9-07-22 was neither raised nor argued by either party to the proceedings. The ALJ's Conclusion of Law No. 3 does not accurately reflect the proceedings at oral argument and in the Department's written submissions. At oral argument, counsel for the Department reiterated the argument made in the Department's Brief in Support of Motion for Summary Judgment, page 8, that at all times, Respondent Jay had a duty to monitor the status of the bond, so that he could return the collateral "immediately" when the bond was exonerated, and that a competent bail bond agent must monitor the status of bonds for which the bail bond agent is holding collateral, so that the duty to return collateral immediately may be fulfilled. These arguments are based on the express language of the statute (N.D.C.C. § 26.1-26.6-05(1)(f) and (g)) that a bail bond agent must return collateral "immediately upon final termination of liability on the

bond....” and may not willfully fail to return collateral when the principal is entitled to it. The ALJ’s recommended Conclusion of Law No. 4 is not supported by competent evidence in the record, and it is not based on applicable authority. The first three sentences of recommended Conclusion of Law No. 4 recite factual material for which there is no basis in the record. Recommended Conclusion of Law No. 4 refers to an “implied concept of reasonableness” and a statute found in the Uniform Commercial Code (N.D.C.C. § 41-01-18) that were not raised or argued by either party and which do not apply here. The ALJ’s conclusion that the duty to actively monitor the status of a bond must be established through legislative or rulemaking processes is contrary to the letter of N.D.C.C. § 26.1-26.6-05(1)(f). The North Dakota Supreme Court has addressed in a “long line of cases” “the circumstances under which an agency is required to formally promulgate rules”. Rennich v. North Dakota Department of Human Services, 2008 ND 171 ¶¶ 21, 756 N.W.2d 182, 187-188. An agency is not required to promulgate a rule on every conceivable situation that may come before it. Id. at ¶¶21, 756 N.W.2d 188.

Recommended Conclusion of Law No. 5 is speculative; it appears to be based on evidence not in the record; and it is contrary to the bail bond agent’s duty stated in N.D.C.C. § 26.1-26.6-05(1)(f). Recommended Conclusions of Law Nos. 6, 7, and 8 are similarly infirm.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. Department’s Motion for Summary Judgment is granted. Respondent’s Motion to Dismiss is denied.
2. Respondent’s license is **SUSPENDED** for six months effective upon the Commissioner’s execution of this Order.
3. Respondent is assessed a civil penalty in the amount of \$2,000 payable by

credit card, cashier's check, or money order to the North Dakota Insurance Department within 30 days of the effective date of this Order.

DATED at Bismarck, North Dakota, this 15th day of March, 2013.



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