

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Lorne Jay,)
)
 Appellant,)
)
 v)
)
 North Dakota Insurance)
 Department through)
 Adam Hamm, Commissioner,)
)
 Appellee.)
)

ORDER ON APPEAL
 Case No. 08-2013-CV-00804

¶1 The appellant, (“Jay”), appeals the March 15, 2013, Findings of Fact, Conclusions of Law, and Final Order issued by the appellee, North Dakota Insurance Department, (“Department”) in which Jay’s resident insurance producer license was suspended for six months and Jay was assessed a \$2,000 penalty. The issue on appeal rests on the interpretation of N.D.C.C. §26.1-26.6-05(1)(f) and (g).

PROCEDURAL HISTORY

¶2 On January 10, 2012, the Department served on Jay an administrative complaint alleging Jay failed to timely return cash collateral belonging to Fern Demerey, specifically that the collateral was not returned “immediately” and that Jay was therefore incompetent or untrustworthy in violation of N.D.C.C. §26.1-26-42(6). C.R.187-191. The Department filed a Motion for Summary Judgment. Jay did not file a response to the Motion for Summary Judgment, but instead filed a Motion to Dismiss.

¶3 Hearing on the pending motions was held November 19, 2012. A prehearing conference was held the same day before the arguments on the motions were heard by the ALJ. C.R. 22. Jay and the Department agreed that

the Administrative Law Judge (ALJ) could decide the matter on the record and upon consideration of the submissions previously made in support of the parties' respective motions. Following the prehearing conference each party presented oral arguments on the pending motions. C.R. 22-60. The ALJ issued Recommended Findings of Fact, Conclusions of Law and a Recommended Order on January 23, 2013. C.R. 87. The Recommended Order was to dismiss the Complaint. C.R. 97. The Department by Commissioner Hamm rejected the ALJ's Recommended Findings of Fact, Conclusions of Law, and Order, and adopted the Department's Proposed Findings of Fact, Conclusions of Law, and Order. C.R. 67. The Commissioner's Order granted the Department's Motion for Summary Judgment and denied Jay's Motion to Dismiss. C.R. 75.

STATEMENT OF FACTS

[¶4] The parties conceded that no material facts are in dispute. As such, the Court has lifted the statement of facts below from the parties' briefs.

[¶5] On or about December 21, 2009, Jay took possession of \$500 cash from Fern Demerey. The cash was security for a surety bond for Demerey's son, Austin DeCoteau. Activity concerning the bond took place between then and March 9, 2011, none of which is dispositive of the issue before the Court. On March 9, 2011, Judge John McClintock, Jr. signed an Order exonerating the bond. This Order terminated Jay's liability on the bond. The Order was filed in Rolette County on March 10, 2012. The Order indicates that a copy of the Order was mailed to Jay. Jay denied receiving a copy of the Order at that time. On August 31, 2011, the Department wrote a letter to Jay stating that Demerey had called the Department seeking return of the collateral. Jay returned the \$500 to Demerey on September 5, 2011.

ANALYSIS AND CONCLUSIONS

¶6] The standard of review to be applied by this Court is found at N.D.C.C. 28-32-46. Said statute requires the Court to affirm the order of an agency unless it finds any of the following:

1. The order is not in accordance with the law.
2. The order is in violation of the constitutional rights of the appellant.
3. The provisions of Chapter 28-32, N.D.C.C. have not been complied with in the proceedings before the agency.
4. The rules or procedures of the agency have not afforded the appellant a fair hearing.
5. The findings of fact made by the agency are not supported by a preponderance of the evidence.
6. The conclusions of law and order of the agency are not supported by the findings of fact.
7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.
8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or administrative law judge.

¶7] As stated above, the crux of this case is the proper interpretation of N.D.C.C. §26.1-26.6-05(1)(f) and (g), specifically whether Jay complied with the statutory requirement to return the collateral immediately upon the principal being entitled to it. The ALJ found that Jay did in fact comply with the statutory requirement in that he returned the collateral as soon as he learned that the bond had been exonerated through the August letter from the Department. C.R. 95,

97. The Commissioner rejected that finding, instead concluding that the statute imposes an implied duty upon a bail bondsman to monitor all bonds to determine when the principal on a given bond is entitled to the return of the collateral. C.R. 73.

[¶8] As part of its Findings of Fact, Conclusions of Law, and Order, the Department included a section entitled “Rationale for Not Adopting Contrary Recommendations by the Administrative Law Judge Pursuant to N.D.C.C. §28-32-46(8).” C.R. 74.

[¶9] Included in the “Rationale” is considerable discussion of facts that the ALJ included in her Findings that are not supported by the record. The Court agrees with the Department that many of the facts found by the ALJ are not supported by the record. The Department further argues that the ALJ erroneously turned to contract law to support her interpretation of the word “immediately.” These arguments are red herrings and overly complicate the issue.

[¶10] The real question here is whether the clear and plain language of N.D.C.C. §26.1-26.6-05(1)(f) and (g) creates an implied duty to monitor bonds as argued by the Department. The answer to said question is “no.” Nowhere in the language of the statute is there contained any direction to a bail bondsman that he is to monitor his bonds. Counsel for the Department conceded as much at the hearing, saying “[t]he statutes do not lay out every detail of how the bail bond agent is supposed to carry out his duties.” C.R. 30. Counsel for the Department further conceded that the manner in which a bondsman is to determine whether there is activity on the bond is part of the agreement between the purchaser of the bond and the bondsman. C.R. 31. Rather than a duty “implied” by statute, counsel for the Department argued that failure to monitor a bond is simply a poor business practice. C.R. 33-34. Counsel further conceded that no administrative

rules create a duty to monitor a bond. C.R. 34. Finally, for what it may be worth, counsel for the Department conceded that, upon receipt of the August letter from the Department informing him that he no longer was liable on the bond, “[Jay] did reasonably act to that letter. C.R. 35.

[[11] The Court finds that the Department’s creation of an implied duty to monitor a bond is not in accordance with the law. If the Legislature had intended to impose such a requirement on a bondsman, it would have done so. The Court hereby ORDERS that the action of the Department is reversed and that the Department accept the Recommended Findings of Fact, Conclusions of Law, and Order of the ALJ.

Dated at Bismarck, North Dakota, this 10 day of July, 2013.

BY THE COURT

A large, stylized handwritten signature in black ink, appearing to read 'B. Haskell', is written over a horizontal line.

Bruce B. Haskell, District Judge
South Central Judicial District

Steven Balaban
Johannes Palsgraaf