

STATE OF NORTH DAKOTA
INSURANCE COMMISSIONER

IN THE MATTER OF:)	
)	
)	
Rick L. Lemke)	RECOMMENDED
)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
)	AND ORDER
)	
)	OAH File No. 20110507
)	Case No. AG-11-335

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PROCEDURAL BACKGROUND

On November 16, 2011, the North Dakota Insurance Department ("Department") received an application for a resident individual insurance producer's license submitted by Rick Lemke, DOB May 13, 1974 ("Lemke"). On December 7, 2011, the Department sent a letter to Lemke notifying him of the denial of his application for an insurance producer's license due to his criminal judgments, civil judgments and child support arrearages. On December 22, 2011, the Department received Lemke's request for a hearing relating to his license denial. On December 23, 2011, the Department requested an administrative law judge ("ALJ") be assigned to conduct the hearing. On December 27, 2011, the North Dakota Office of Administrative Hearings assigned ALJ Bonny M. Fetch to these proceedings.

On January 4, 2012, at a prehearing conference, Lemke waived the 30-day hearing requirement and a hearing was scheduled for February 15, 2012. On February 3, 2012, the Department served Lemke with a Motion for Summary Judgment on this matter. The Department's Motion for Summary Judgment included the sworn Affidavit of Kelvin Zimmer, Division Director of Producer Licensing for the Department, and certified copies of Lemke's

criminal judgments, civil judgments, child support orders, and arrears balances marked as Exhibits 3 through 24. Lemke failed to respond to the Motion. On February 13, 2012, the ALJ issued an Order granting the Department's Motion for Summary Judgment and Notice of Vacated Hearing. In accordance with the ALJ's Order, the Department submitted Proposed Findings of Fact and Conclusions of Law on February 29, 2012. In accordance with the ALJ'S Order, Lemke was instructed to file his proposed findings by March 7, 2012. He failed to submit any proposed findings of his own. As such, he failed to contest the Department's proposed Findings of Fact and Conclusions of Law. The record of this matter was closed on March 7, 2012.

Having thoroughly considered the record before me, the undersigned ALJ adopts the Department's proposed Findings of Fact, Conclusions of Law, and Recommended Order.

The following facts serve as the "Findings of Fact" for purposes of the requirement of N.D.C.C. § 28-32-39(1) that the agency make and state concisely and explicitly its findings of fact. Following are the recommended Findings of Fact, Conclusions of Law and Recommended Order for consideration of the Insurance Commissioner.

FINDINGS OF FACT

1. Lemke is not currently licensed as an individual insurance producer in North Dakota. *See* Department's letter denying license, dated December 7, 2011.
2. On November 16, 2011, Lemke submitted an application to the Department for an individual insurance producer license. *See* Summary Judgment ("SJ") Ex. 2.
3. On December 7, 2011, the Department denied Lemke's application and informed Lemke he could request a hearing. *See* Department's letter denying license, dated December 7, 2011.

4. The Department's denial letter to Lemke explained the denial of his application was due to his felony convictions, record of monetary judgments, and child support arrearages. *See* Department's letter denying license, dated December 7, 2011.

5. Lemke timely requested a hearing. *See* Lemke letter, dated December 20, 2011.

6. On January 4, 2012, at a prehearing conference, Lemke waived the 30-day hearing requirement, and a hearing was scheduled for February 15, 2012, by Order dated January 6, 2012.

7. On February 3, 2012, Lemke was served with the Department's Motion for Summary Judgment.

8. Lemke did not respond to the Department's Motion for Summary Judgment.

9. On February 13, 2012, the Department's Motion for Summary Judgment was granted.

10. Marked as Exhibits 3 through 24 and submitted with the Department's Motion for Summary Judgment were certified copies of civil and criminal judgments against Lemke and a certified copy of Lemke's child support arrears balances.

11. On March 17, 1993, Lemke was convicted in Richland County of Burglary, a felony under N.D.C.C. § 12.1-22-02(2), and given a two-year deferred sentence. *See* SJ Ex. 3.

12. On November 7, 1994, having been found to have violated the conditions of his probation, Lemke's deferred sentence of March 17, 1993, was revoked and he was ordered to be imprisoned for 18 months. *See* SJ Ex. 3.

13. On February 8, 1994, Lemke was convicted in Cass County District Court of three separate counts of Forgery and sentenced to five years of imprisonment, felonies under

N.D.C.C. § 12.1-32-01. All but six months of the sentence was deferred. *See* SJ Exs. 4, 5, and 6.

14. On October 13, 1994, Lemke's deferred sentence of February 8, 1994, was revoked and he was ordered to be imprisoned for two and one-half years because he violated the terms of his probation. *See* SJ Exs. 7, 8, and 9.

15. On January 6, 1995, Lemke was convicted in Cass County District Court of two counts of Theft by Deception and one count of Forgery, each a Class C felony. Lemke was ordered to be imprisoned for three and one-half years of a five-year sentence. *See* SJ Ex. 10.

16. On August 6, 1996, Lemke was convicted in Burleigh County District Court of the crime of Escape, a Class C felony. *See* SJ Ex. 11.

17. On June 6, 2001, after a revocation of probation hearing, Lemke was ordered committed to the custody of the North Dakota Department of Corrections for one year. *See* SJ Ex. 11.

18. On August 21, 2006, Lemke was convicted in Cass County District Court of Forgery, Counterfeiting, Possession of a Controlled Substance and Possession of Drug Paraphernalia, each Class C felonies. Lemke was ordered committed to the custody of the North Dakota Department of Corrections for four years of a five-year sentence. *See* SJ Ex. 12.

19. On August 21, 2006, Lemke was convicted in Cass County District Court of the crime of Theft by Deception, a Class C felony. Lemke was ordered committed to the custody of the North Dakota Department of Corrections for four years of a five-year sentence. *See* SJ Ex. 13.

20. On August 21, 2006, Lemke was convicted in Cass County District Court of the crime of Conspiracy to Commit Forgery, a Class C felony. Lemke was ordered committed to the

custody of the North Dakota Department of Corrections for four years of a five-year sentence. *See* SJ Ex. 14.

21. On August 24, 2007, Lemke was convicted in the United States District Court of North Dakota for the crime of Theft, a felony under 18 U.S.C. § 3559. Lemke was ordered committed to the custody of the United States Bureau of Prisons for two years. *See* SJ Ex. 15.

22. On January 6, 1995, Lemke pled guilty to two counts of Forgery and one count of Theft by Deception, each a Class C felony. *See* SJ Ex. 16.

23. On September 2, 2005, Lemke pled guilty to Disorderly Conduct, a Class B misdemeanor. *See* SJ Ex. 17.

24. On August 19, 1999, Lemke pled guilty to Possession of Stolen Property. *See* SJ Ex. 18.

25. On October 14, 2004, a civil monetary judgment was entered against Lemke for \$559.67. *See* SJ Ex. 19.

26. On June 27, 2000, a civil monetary judgment was entered against Lemke for \$803.00. *See* SJ Ex. 20.

27. On April 4, 2000, a civil monetary judgment was entered against Lemke for \$1,475.00. *See* SJ Ex. 21.

28. On February 22, 2005, a civil monetary judgment was entered against Lemke for \$6,229.03. *See* SJ Ex. 22.

29. On May 22, 2009, Lemke was ordered to pay foster child care support on behalf of B.A.P., a minor child. *See* SJ Ex. 23.

30. As of January 24, 2012, Lemke was in arrears \$9,690.93 for payment of support on behalf of B.A.P., a minor child. *See* SJ Ex. 24.

31. On April 17, 2007, Lemke was ordered to pay child support on behalf of his minor child to Dena Raab. *See* SJ Ex. 25.

32. As of January 24, 2012, Lemke was in arrears \$1,618.41 for child support owed to Dena Raab on behalf of his minor child. *See* SJ Ex. 24.

33. As of January 24, 2012, Lemke was in arrears \$13,414.15 for child support owed to Sara Lemke on behalf of his minor child. *See* SJ Ex. 24.

CONCLUSIONS OF LAW

1. There is no genuine issue of material fact presented here. No evidentiary hearing need be held where there is no fact issue to be resolved. N.D. Admin. Code § 98-02-03-01. Summary judgment is appropriate where there is no genuine issue of material fact. Rule 56, N.D.R.Civ. P.; Union State Bank of Woell, 434 N.W.2d 712, 716 (N.D.1989).

2. A license to practice as an insurance producer 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.

3. Lemke does not currently have an 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). "A regulated privilege is not a right." *North Dakota Dep't. of Transp. v. DuPaul*, 487 N.W.2d 593,598 (N.D. 1992).

4. An individual applicant may be granted the regulated privilege to practice as an insurance producer by the Commissioner only as authorized under N.D.C.C. title 26.1 generally, and the Commissioner is statutorily responsible to license and regulate individual insurance producers under N.D.C.C. chapter 26.1-26.

5. N.D.C.C. § 26.1-02.1-02.1(3) prohibits a person convicted of a felony involving dishonesty or breach of trust from participating in the business of insurance. Lemke has been convicted of multiple felonies involving dishonesty or breach of trust including burglary, forgery, conspiracy to commit forgery, theft, theft by deception and escape. The law provides no discretion to the Commissioner and Lemke may not be granted a license due to his criminal history.

6. 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. Lemke has failed to meet his burden of proof to demonstrate he is currently competent, trustworthy, financially responsible, and of good personal and business reputation. Lemke has failed to show that N.D.C.C. § 26.1-26-15 is an impediment to receiving a producer license. The Commissioner properly concluded that Lemke is not competent, trustworthy, financially responsible, and of good personal and business reputation due to Lemke's child support arrearages, civil judgments, and criminal convictions for burglary, forgery, conspiracy to commit forgery, theft, theft by deception, escape, disorderly conduct, possession of a controlled substance and possession of stolen property.

7. In accordance with N.D.C.C. § 26.1-26-42(17) the Commissioner may refuse to issue a license to an applicant who knowingly fails to comply with court-ordered child support. The Commissioner would be acting properly within his authority to deny Lemke's license due to Lemke's multiple child support arrearages.

8. Because of Lemke's past criminal conduct, outstanding civil judgments, and child support arrearages, the Commissioner now has, and continues to have, bases in law to refuse to

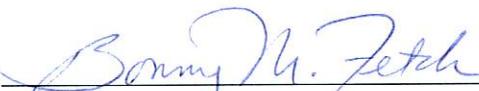
issue a license to Lemke. Further, the Commissioner is required by law to deny the license due to Lemke's convictions of felonies involving dishonesty or breach of trust.

RECOMMENDED ORDER

The evidence of record has been considered and appraised. The facts, as established by undisputed evidence, establish ample grounds for denying Lemke's application for a North Dakota resident individual insurance producer license under applicable law. **IT IS ORDERED** that Lemke's application for a North Dakota resident individual insurance producer license is **DENIED**.

Dated at Bismarck, North Dakota, this 19th day of March, 2012.

State of North Dakota
Insurance Commissioner

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