

STATE OF NORTH DAKOTA
INSURANCE COMMISSIONER

IN THE MATTER OF:)	
)	RECOMMENDED
Jason "Jay" P. Fettig,)	FINDINGS OF FACT,
NPN 7065778,)	CONCLUSIONS OF LAW,
DOB 12/10/69,)	AND ORDER
)	
Respondent.)	OAH File No. 20100306
)	Case No. AG-10-270

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PROCEDURAL BACKGROUND

On September 7, 2010, the North Dakota Insurance Department (“Department”), acting through Deputy Commissioner Rebecca L. Ternes, served an administrative complaint on Respondent Jason “Jay” Fettig (“Fettig”) seeking the revocation of his individual resident insurance producer’s license. Fettig timely answered on September 27, 2010, resisting the action. The Department requested designation of an Administrative Law Judge (ALJ) from the Office of Administrative Hearings to preside over the proceedings. The undersigned ALJ Bonny M. Fetch was so designated. The parties engaged in discovery. In addition to written discovery, the Department took Fettig’s deposition on March 10 and March 30, 2011. Pursuant to the ALJ’s Order, the Department filed a copy of the deposition transcript with the ALJ on May 3, 2011. The Department submitted its Motion for Summary Judgment on May 31, 2011. The Department’s Motion for Summary Judgment was supported by the following:

1. Affidavit of Rebecca L. Ternes, Deputy Commissioner, with the following attachment: Exhibit A (Bulletin 2009-2 issued by North Dakota Insurance Commissioner Adam Hamm).

2. Certified copy of Order Refusing Registration as an Agent and Investment Advisor Representative issued by North Dakota Securities Commissioner Karen J. Tyler dated October 18, 2010, with Consent to Entry of Order signed by Fettig on October 18, 2010.
3. Fettig's Amended Answers to North Dakota Insurance Department's First Set of Interrogatories, Requests for Production of Documents, and Requests for Admissions ("RFA").
4. Transcript of Deposition of Jason "Jay" P. Fettig ("Deposition").

Fettig opposed the Motion for Summary Judgment by Answer Brief on July 12, 2011. The Answer Brief was supported by the Affidavit of Fettig. Attached to Fettig's Affidavit were five unsworn, undated testimonials which were not properly before the ALJ and, therefore, were disregarded. With the permission of the ALJ, the Department filed its Reply to Answer Brief on July 19, 2011. Fettig sought and was granted leave to file another submission, which he did on July 21, 2011. The Department moved to strike Fettig's July 21 response. Fettig filed a response on August 3, 2011.

The undersigned ALJ, after reviewing the parties' submissions and viewing the facts in the light most favorable to the Respondent as the opposing party, determined that there is no genuine issue of material fact and that the resolution of the factual issues, if any, would not alter the result. The Department's Motion for Summary Judgment and supporting materials brought forth facts that were almost entirely undisputed by Fettig. The real dispute in this matter is the legal significance of the facts.

By Order dated August 8, 2011, the ALJ granted the Department's Motion for Summary Judgment and its Motion to Strike the July 21 Response. In granting the Department's Motion to

Strike the July 21 Response, the ALJ noted, Fettig's response contained evidence and argument which should have been produced in his Answer Brief in opposition to the Motion for Summary Judgment, and further, his response contained inadmissible evidence. The ALJ's Order instructed counsel to submit written Briefs along with proposed Findings of Fact and Conclusions of Law according to a schedule set by the ALJ. The Department's Brief and proposed Findings of Fact and Conclusions of Law and Recommended Order was received on August 26, 2011. Fettig's Brief was received on September 19, 2011. He did not submit proposed Findings of Fact and Conclusions of Law. Rather than submit his own proposed Findings of Fact and Conclusions of Law, Fettig requested reconsideration of the ALJ's ruling to grant the Department's Motion for Summary Judgment. The Department filed a Reply to Jay Fettig's Brief, which was received September 22, 2011. Fettig's Brief did not address the Department's proposed Findings of Fact and Conclusions of Law or identify any way in which they lack basis in the record. As such, Fettig failed to contest the Department's proposed Findings of Fact and Conclusions of Law. Fettig's other points in his Brief are unfounded and do not state a basis for action by the ALJ.

Having thoroughly read and considered the parties' submissions, the deposition transcripts and deposition exhibits, 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 Findings of Fact, Conclusions of Law and Recommended Order for consideration of the Insurance Commissioner.

FINDINGS OF FACT

Licensing Background

1. Respondent Jason “Jay” Fettig (“Fettig”), presently and at all times pertinent to this action, has held an individual North Dakota resident insurance producer license. Complaint ¶ 2; admitted in Answer ¶ 2. Fettig has lines of authority under his producer’s license to sell, solicit, or negotiate accident and health, life and annuity, and variable life and annuity insurance products. Ternes Affidavit ¶ 4.

2. Fettig has held an individual resident insurance producer license in North Dakota since October 1, 1998. Complaint ¶ 16; admitted in Answer ¶ 16.

3. The Complainant is the Deputy Insurance Commissioner of the North Dakota Insurance Department, State Capitol, Bismarck, North Dakota. Complaint ¶ 3; admitted in Answer ¶ 3.

4. The Complainant and other employees of the Department have investigated the activity of Fettig. Complaint ¶ 4; admitted in Answer ¶ 4.

5. N.D.C.C. chapter 26.1-26 governs the qualifications and procedures for the licensing of insurance producers in the State of North Dakota. Complaint ¶ 5; admitted in Answer ¶ 5,

6. N.D.C.C. § 26.1-26-15 requires that an applicant for a license be deemed by the Commissioner to be competent, trustworthy, financially responsible, and of good personal and business reputation. Complaint ¶ 6; admitted in Answer ¶ 6.

7. The purpose of the Department’s licensing of insurance producers is to protect the public by ensuring that individuals and entities that sell, solicit, or negotiate insurance are competent and trustworthy and have met all other requirements to do those activities. A licensee must maintain a good personal and business reputation. Ternes Affidavit ¶ 5.

8. For producers with accident and health, life, annuity, and variable life and annuity lines of authority, the insurance producer's license authorizes the producer to collect premiums and obtain private personal information about an individual's health status and finances. These products are often times investment vehicles for the consumers who buy them. Ternes Affidavit ¶ 7.

9. One function of the Department is to encourage a robust, competitive and stable marketplace. By requiring all producers to play by the same rules, the Department keeps a level playing field where all producers have the same opportunity to be successful. Playing by the same rules includes paying your taxes. Producers who do not pay their taxes have extra resources that law abiding ones do not. They can use that extra money to do more marketing, giving of gifts to potential clients, hiring more staff, etc. That causes inequity for the ones who are doing the right thing by paying their taxes. Ternes Affidavit ¶ 8.

10. The Department has an administrative rule declaring that a producer who is indebted to an insurance company and who fails to timely pay that debt is financially irresponsible within the meaning of the statute that authorizes revocation of a license for financial irresponsibility. Debts of this nature are of special concern because a stable and trustworthy relationship between the company and the producer is vital to ensuring the highest level of consumer protection and service. A responsible producer would not owe the company significant amounts of money. That situation is avoidable. Ternes Affidavit ¶ 9.

JAJ Ventures and Securities Consent Order

11. Fettig was registered to sell securities until April 2010. Complaint ¶ 16; admitted in Answer ¶ 16.

12. In April 2010 Fettig's registration as an agent and investment adviser was refused by the North Dakota Securities Commissioner. Complaint ¶ 16; admitted in Answer ¶ 16. The

April 2010 registration refusal is documented in the Securities Commissioner's Order Refusing Registration as an Agent and Investment Advisor Representative dated October 18, 2010 ("October 2010 Securities Order"). Exhibit 1 attached to Department's Brief in Support of Motion for Summary Judgment.

13. Fettig was a registered representative with Primevest Financial Services, Inc. ("Primevest") from March 26, 2004, to May 29, 2007. October 2010 Securities Order ¶¶ 1, 4.

14. JAJ Ventures, Inc., is a North Dakota corporation. At all times pertinent to this action, Fettig has been an officer, director and shareholder of JAJ Ventures, Inc. JAJ Ventures, Inc., owned and operated several retail businesses in the Bismarck area including Prairie Peddler, Gelato d'Italia, Joy's Hallmark Cards, and Graphic Services. By April 2010, all of the businesses were out of business. Admitted in Answer ¶ 17; Fettig Deposition March 10 and March 30, 2011 ("Deposition"), p. 316, lines 19-21.

15. Initially, Fettig and two others, Arthur Jerome and Joe Vadnais, each contributed \$4,000 cash to JAJ Ventures, Inc. Fettig and the other two stockholders took out bank loans in excess of \$800,000 to buy businesses operated by JAJ Ventures, Inc. Deposition p. 57, line 21 through p. 58, line 13. Fettig, Jerome and Vadnais also took out a \$150,000 line of credit which they tapped in its entirety. Deposition p. 59, lines 10-24.

16. On or about March 3, 2007, while employed at Primevest as an investment advisor, Fettig engaged in the offer and sale of 500 shares of common stock of JAJ Ventures, Inc., to two North Dakota residents who were also his investment clients at Primevest. October 2010 Securities Order ¶ 7. Fettig persuaded these investment clients, Matt and Brenda Hill, to become partners in his outside businesses. RFA No. 1 attachment; Deposition p. 65, lines 5-7. The 500 shares that Fettig pitched to the Hills represented a one-third interest in JAJ Ventures, Inc. Deposition Exhibit 15; Deposition p. 247, line 22 through p. 248, line 9.

17. The Hills agreed to the purchase and they paid JAJ Ventures, Inc., \$500,000 for their ownership interest in March 2007. Deposition p. 66, lines 1-3, and p.135, lines 5-15; October 2010 Securities Order ¶ 7.

18. At the time the Hills purchased their ownership interest, Arthur Jerome wanted to sell his one-third ownership interest. Deposition p. 61, lines 19-24, and p. 62, lines 20-22. Arthur Jerome received \$4,000 for his share of JAJ Ventures when he left. Deposition p. 63 line 22 through p. 64 line 11.

19. The \$500,000 from the Hills went to pay expenses of the various businesses owned by JAJ Ventures, Inc., including the equipment to start up the Gelato businesses. Deposition p. 70, lines 9-15, and p.135, lines 5-11. There is no money left in the businesses of JAJ Ventures, Inc. Deposition p.135, lines 12-15.

20. As of April 2010, Fettig personally and the businesses in which he owned an interest had hundreds of thousands of dollars of debt. Deposition p. 318, lines 2-17.

21. The Commissioner asked Fettig three times in April 2010 to disclose the full extent of his personal and business indebtedness, including disputed debts and debts where the full amount was not known. Fettig disclosed financial statements to the Department on April 26 and 28, 2010. Fettig admitted in his deposition that there were debts he did not disclose on these financial statements. Fettig listed some debts but left off others. Fettig failed to disclose the full extent of his indebtedness to the Commissioner when asked to do so. Deposition p. 312, line 13 through p. 315, line 5; Deposition Exhibits 7 and 7a.

22. Fettig entered into a Consent to Entry of Order on October 18, 2010, with the North Dakota Securities Commissioner. Admitted RFA Nos. 1, 5. The October 2010 Consent to Entry of Order is attached to the document "October 2010 Securities Order". The October 2010 Consent to Entry of Order signed by Fettig states, in part:

The Respondent admits the accuracy of the factual determinations of the Commissioner, as set forth in the foregoing Consent Order, and he is specifically precluded from denying those determinations in any forum, public or otherwise.

October 2010 Consent to Entry of Order ¶ 4.

23. The certified copy of the October 2010 Securities Order and October 2010 Consent to Entry of Order found in the record as Exhibit 1 attached to the Department's Brief in Support of Motion for Summary Judgment is a true and correct copy of that document. Admitted RFA No. 2.

24. In the October 2010 Securities Order, Fettig was found to have violated securities laws. Admitted RFA No. 3.

25. In the October 2010 Securities Order, Fettig was found to have engaged in dishonest or unethical practices in the securities industry. Admitted RFA No. 4; Fettig Affidavit p. 1.

26. In the October 2010 Securities Order, the Securities Commissioner found that Fettig is not of good business reputation. Admitted RFA No. 6.

27. In the October 2010 Securities Order, Fettig's registration as an agent and investment adviser was refused. Admitted RFA No. 5.

28. Fettig did not report the October 2010 Securities Order to the Insurance Commissioner. Admitted RFA No. 71; Deposition p. 322, line 5 through p. 323, line 3.

29. Bulletin 2009-2 addresses the duties of producers imposed by N.D.C.C. § 26.1-26-45.1 to report administrative actions by other authorities. Bulletin 2009-2 was promulgated by the Commissioner on September 28, 2009, and has not been superseded. It has been posted on the Department's website since it was adopted. Ternes Affidavit ¶ 6. Bulletin 2009-2 provides, in part:

The North Dakota Insurance Department issues this bulletin as a reminder to licensed insurance producers and license applicants of their duty to report any criminal history they may have as well as any administrative action taken by other governmental agencies. This duty exists both at the time of application and continues while licensed.

Exhibit A to Ternes Affidavit.

Debt to Insurance Companies

30. In October 2008, Fettig received commissions of \$810,221.79 from the insurance policies he sold to C.P. Admitted Answer ¶ 24; RFA No. 8. Approximately \$500,000 of the commission proceeds was gone within days. Deposition p. 138, lines 12 -19, and p. 217, lines 1-10.

31. All of the insurance policies Fettig sold to C.P. were canceled within approximately eight weeks of their purchase. Admitted RFA No. 15.

32. Because the policies were canceled, Fettig was required to repay the commissions to the insurance companies. Admitted Answer ¶ 26; RFA No. 16.

33. Fettig has owed John Hancock Life Insurance Company for the chargeback of commission since at least January 2009. Admitted RFA No. 18. Fettig owes John Hancock Life Insurance Company \$95,816.00. Fettig Affidavit p. 3; RFA No. 17.

34. As of the date of his July 12, 2011, Affidavit, Fettig owes AXA Equitable Life Insurance Company \$30,151.00 for commissions. Fettig Affidavit p. 3.

Other Business Debts and Bankruptcy

35. Fettig and his wife instituted voluntary bankruptcy proceedings by filing a petition for Chapter 7 bankruptcy on November 18, 2010. Fettig Deposition Exhibit 6; RFA No. 22. The petition contains an accurate listing of debts. Deposition p. 305, lines 7-9; Deposition Exhibit 6 p. 3 of 97 ("I declare under penalty of perjury that the information provided in this

petition is true and correct.”); RFA No. 24. The bankruptcy petition states total assets of \$653,878.56 and total liabilities of \$2,223,076.16. Deposition Exhibit 6, p. 21 of 97.

36. Businesses Fettig owned with Matt and Brenda Hill and Joe Vadnais still had an outstanding debt to the Internal Revenue Service for income tax as of March 30, 2011. There is money owed to the North Dakota Tax Commissioner as well. Deposition p. 308, lines 2-8; RFA No. 21; Deposition p. 310, lines 1-3.

CONCLUSIONS OF LAW

1. The Insurance Commissioner (“Commissioner”) has jurisdiction over these proceedings pursuant to N.D.C.C. §§ 26.1-01-03 and 26.1-26-42 and N.D.C.C. chapter 28-32. Complaint ¶ 1; admitted in Answer ¶ 1. Finding of Fact Nos. 1, 2, 3, 4, 5, 6, 7.

2. 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).

3. Viewing Fettig’s Affidavit in the light most favorable to Fettig as opponent of the Motion for Summary Judgment, his Affidavit still does not raise any factual dispute that makes a difference to the result when considered in the totality of the evidence before the ALJ.

4. The Commissioner may revoke Fettig’s insurance producer license based on the October 2010 Securities Order and Consent to Entry of Order. Findings of Fact Nos. 11, 12. Ample case law authority supports the authority of the Insurance Commissioner to revoke an insurance license due to the licensee’s misconduct in the securities arena. Schweig v. Schacht, 276 Ill. App.3d 311, 657 N.E.2d 1152 (1995) (revocation of insurance producer license based on convictions for securities violations upheld by two appellate courts); Herzberg v. Humphrey, 20

Ariz. App. 428, 513 P.2d 966 (1973) (insurance license was denied based on an administrative finding of securities law violations; denial affirmed); Herman v. Serio, 28 A.D.3d 909, 813 N.Y.S.2d 256 (2006) (insurance license revoked after producer's violations of stock exchange rules led to him being barred from further employment on stock exchange floor; appeals court affirmed revocation); Chandler v. Office of Insurance Commissioner, 141 Wash. App. 639, 173 P.3d 275 (2007) (producer entered into consent order with state securities regulator; state insurance commissioner revoked insurance license for lack of trustworthiness; two appeals courts affirmed revocation).

5. Fettig no longer has a good business reputation as required by N.D.C.C. § 26.1-26-15. The October 2010 Securities Order determines that Fettig is no longer of good business reputation. Fettig specifically consented to the Securities Commissioner's fact determinations and waived his right to contest those determinations in any forum when he signed the October 2010 Consent to Entry of Order. Fettig's lack of good business reputation is supported by the undisputed facts of his dealings with the Hills. Findings of Fact Nos. 13, 14, 15, 16, 17, 18, 19, 26. Case law supports the authority of the Insurance Commissioner to revoke an insurance producer license for failure to maintain good business reputation. Wacaser v. Insurance Commissioner, 321 Ark. 143, 900 S.W.2d 191 (1995) (applying statutory language that is virtually identical to North Dakota's statutes); Wood v. Superintendent of Insurance, 638 A.2d 67 (Me. 1994) (revocation of insurance license upheld where the insurance commissioner found the producer had lost his "good personal and business reputation" due to eight instances of out-of-state disciplinary proceedings that the producer had not reported to the Maine Superintendent).

6. By operation of N.D. Admin. Code § 45-02-02-14.2, Fettig is financially irresponsible within the meaning of N.D.C.C. § 26.1-26-42(6) due to his debts for the repayment of commissions. Fettig has not timely paid his debts to John Hancock Life Insurance Company and to AXA Equitable Life Insurance Company. Debts owed by producers to insurance companies merit the special status of financial irresponsibility because they are avoidable and because they jeopardize consumer protection and service. Findings of Fact Nos. 10, 30, 31, 32, 33, 34.

7. Fettig is no longer trustworthy as required by N.D.C.C. §§ 26.1-26-15 and 26.1-26-42(6). He has shown himself to be untrustworthy by his dishonest or unethical actions in the securities arena; by his failure to disclose all his debt to the Insurance Commissioner when asked; and by his failure to report the October 2010 Securities Order to the Insurance Commissioner. Findings of Fact Nos. 21, 24, 25, 27, 28, 29. An insurance producer is required to know the laws governing the sale of insurance, and a producer's license may be revoked for noncompliance with an insurance law. Gust v. Pomeroy, 466 N.W.2d 137, 140 (N.D. 1991).

8. Fettig's failure to report the October 2010 Securities Order to the Commissioner demonstrates lack of candor to his regulator. This demonstration of lack of candor to the regulator constitutes untrustworthiness within the meaning of N.D.C.C. §§ 26.1-26-15 and 26.1-26-42(6). Finding of Fact No. 28.

9. Fettig is no longer financially responsible as required by N.D.C.C. §§ 26.1-26-15 and 26.1-26-42(6). A licensee's inability to manage personal and business finances in a responsible manner is grounds for revoking the license. Words used in a statute are to be understood in their ordinary sense unless a contrary intention plainly appears. N.D.C.C. § 1-02-02. "Irresponsible" means "lacking a sense of responsibility." The American Heritage

Dictionary, Second College Edition 1985, p. 678. Fettig has shown himself to be lacking a sense of financial responsibility by his JAJ Ventures, Inc., businesses that incurred large debts and went out of business; his personal and business debt as shown on his bankruptcy petition; his debts to insurance companies to repay commissions; and his debts to the Internal Revenue Service and North Dakota Tax Commissioner. Findings of Fact Nos. 8, 9, 10, 14, 15, 19, 20, 32, 33, 34, 35, 36. Courts have recognized that failure to pay taxes shows financial irresponsibility or untrustworthiness for licensing purposes. Livingston v. Department of Consumer Protection, 120 Conn. App. 92, 991 A.2d 570, 575 (2010) (“On the basis of the factual finding that the plaintiff had employees and did not properly file tax returns or pay required taxes for those employees, the commission had reasonable cause to believe that he was financially irresponsible....”); Coulter v. State of N.Y. Insurance Department, 74 A.D. 3d 963, 902 N.W.S.2d 652, 654 (2010) (failure to remit payroll taxes to the Internal Revenue Service, among other acts, shows “untrustworthiness and/or incompetence”).

10. The Commissioner may revoke Fettig’s license for failing to report the October 2010 Securities Order to the Insurance Commissioner. Fettig had a duty to report the Securities Commissioner’s action to the Insurance Commissioner. The October 2010 Securities Order is an administrative action within the meaning of N.D.C.C. § 26.1-26-45.1(1). Findings of Fact Nos. 22 through 29.

11. The Commissioner may revoke Fettig’s insurance license based on his securities violations.

12. The Commissioner may revoke Fettig’s insurance license based on his being untrustworthy.

13. The Commissioner may revoke Fettig's insurance license based on his being financially irresponsible.

14. The Commissioner acts within his discretion and supported by the facts in revoking Fettig's individual insurance producer license.

RECOMMENDED ORDER

The facts, as established by undisputed evidence, establish ample grounds for revoking Fettig's North Dakota resident individual insurance producer license under applicable law.

Fettig's license is hereby **REVOKED**.

Dated at Bismarck, North Dakota, this 18 day of October, 2011.

State of North Dakota
Insurance Commissioner

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