

**SOUTH DAKOTA  
DEPARTMENT OF LABOR AND REGULATION  
DIVISION OF INSURANCE**

**IN THE MATTER OF  
JUSTIN MCKINNON**

**) FINAL DECISION  
) INS 13-39**

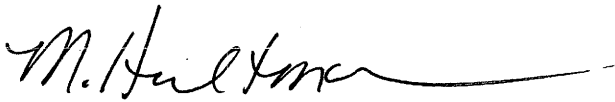
After reviewing the record and the proposed decision of the Hearing Examiner in this matter,

IT IS HEREBY ORDERED that pursuant to SDCL 1-26D-4, the Hearing Examiner's Proposed Findings of Fact, Conclusions of Law and Proposed Decision, dated June 5, 2014, is adopted in full.

Therefore, it is further ordered that the South Dakota Nonresident Insurance Producer's License of Justin McKinnon will hereby be revoked

Parties are hereby advised of the right to further appeal the final decision to Circuit Court within (30) days of receiving such decision, pursuant to the authority of SDCL 1-26.

Dated this 11 day of June 2014



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Marcia Hultman, Secretary  
South Dakota Department of Labor and Regulation  
700 Governors Drive  
Pierre, SD 57501

**STATE OF SOUTH DAKOTA  
OFFICE OF HEARING EXAMINERS**

**IN THE MATTER OF  
JUSTIN MCKINNON**

**PROPOSED DECISION  
DLR/INSURANCE 13-39**

An administrative hearing in the above matter was held on November 25, 2013. Justin McKinnon (hereinafter sometimes referred to as "McKinnon" or "Licensee") failed to appear. Frank Marnell appeared as counsel for the South Dakota Department of Labor, Division of Insurance (hereinafter sometimes referred to as "Division"). The matter was tape recorded. There is no written transcript of the tape; therefore no citation to page number will be included. Exhibits 1 through 14 were admitted and will be denoted by EX followed by the appropriate number.

**ISSUE**

Whether the Non-Resident Insurance Producer License of Justin McKinnon should be revoked due to his failure to respond in a timely manner to the South Dakota Division of Insurance inquiries dated March 29, 2013, April 5, 2013 and May 7, 2013 and due to his failure to report administrative actions to the Division within thirty days from the states of Florida, Georgia, Washington, Louisiana, Kentucky, Nebraska and Kansas. (SDCL 58-33-66, SDCL 58-33-68, SDCL 58-30-193, SDCL 58-30-167(2) and (8), 58-33-66 and 58-33-68.

**FINDINGS OF FACT**

I.

At the time of the hearing Justin McKinnon possessed an active Non-Resident Insurance Producer License from the State of South Dakota. McKinnon became licensed in the State of South Dakota on April 25, 2012. His license will expire on September 30, 2014. (EX 1)

II.

Heather Lang, Compliance Agent for the South Dakota Division of Insurance obtained information from Gerber Life Insurance Company that Justin McKinnon had been terminated for cause. The effective termination date was March 1, 2013. He was terminated for cause because he "notified the Company of his Felony Conviction and he failed to provide the requested documentation concerning the details of his conviction upon request." (EX 2)

III.

Ms. Lang wrote McKinnon a letter on March 29, 2013 requesting he provide the Division, among other things, an explanation in his own words as to the facts and circumstances surrounding the termination of appointment. (EX 3) He was given twenty days upon receipt to respond. The March 29, 2013 letter was mailed via first class mail to McKinnon at 445 State St.,

Fremont, MI 49412. This was the address Ms. Lang obtained from McKinnon's individual information inquiry. (EX 1 & 3) Ms. Lang did not receive a response.

IV.

Ms. Lang sent another letter to McKinnon on April 5, 2013 requesting he provide the Division, among other things, an explanation in his own words as to the facts and circumstances surrounding the termination of appointment. He was given twenty days upon receipt to respond. In addition he was informed that he was to inform the Director of the Division within 30 days of a change of address pursuant to SDCL 58-30-157. The March 29, 2013 letter was mailed via first class mail to McKinnon at 2344 N. Maple Island Rd., Hesperia, MI 49421. (EX 5) Ms. Lang did not receive a response. The Hyperia, MI address was provided to Ms. Lang from the insurance company.

V.

Ms. Lang sent a third letter to McKinnon on May 7, 2013. The letter included a copy of her April 5, 2013 letter and officially gave McKinnon notice that failure to respond to the Division or failure to supply information constitutes a violation of SDCL 58-33-66(1). This letter was sent both by First Class Mail and by First Class Certified Mail. A United States Postal Service Track and Confirm showed that the letter was delivered on May 10, 2013. (EX 7-A and 7-B) Ms. Lang never received a response from Mr. McKinnon.

VI.

Further investigation also revealed that Mr. McKinnon had administrative actions in other states that he did not report to the Division. Those actions are as follows:

Florida (July 5, 2013)	(EX 8)
Georgia (July 2, 2013)	(EX 13)
Washington (July 15, 2013)	(EX 12)
Louisiana (June 17, 2013)	(EX 14)
Kentucky (June 13, 2013)	(EX 11)
Nebraska (June 12, 2013)	(EX 10)
Kansas (May 28, 2013)	(EX 9)

VII.

Any additional Findings of Fact included in the Reasoning section of this decision are incorporated herein by reference.

VIII.

To the extent any of the foregoing are improperly designated and are, instead, Conclusions of Law, they are hereby redesignated and incorporated herein as Conclusions of Law.

## REASONING

This case involves a request by the Division of Insurance to revoke the South Dakota Nonresident Insurance Producer's License of Justin McKinnon. As a consequence of the potential loss of Petitioner's livelihood from the lack of licensure, the burden of proof in this matter is higher than the preponderance of evidence standard, which applies in a typical administrative hearing. "In matters concerning the revocation of a professional license, we determine that the appropriate standard of proof to be utilized by an agency is clear and convincing evidence." *In re Zar*, 434 N.W.2d 598, 602 (S.D. 1989). Our Supreme Court has defined "clear and convincing evidence" as follows:

The measure of proof required by this designation falls somewhere between the rule in ordinary civil cases and the requirement of our criminal procedure, that is, it must be more than a mere preponderance but not beyond a reasonable doubt. It is that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established. The evidence need not be voluminous or undisputed to accomplish this.

*Brown v. Warner*, 78 S.D. 647, 653, 107 NW2d 1, 4 (1961). Mr. McKinnon did not appear at the hearing.

Heather Lang, Compliance Agent for the South Dakota Division of Insurance obtained information from Gerber Life Insurance Company that Justin McKinnon had been terminated for cause. The effective termination date was March 1, 2013. He was terminated for cause because he "notified the Company of his Felony Conviction and he failed to provide the requested documentation concerning the details of his conviction upon request." (EX 2)

McKinnon failed to respond in a timely fashion to inquiries made by the Division (see Findings of Fact) regarding the Gerber termination. This failure to respond constitutes a violation of SDCL 58-33-66(1) which states in pertinent part as follows:

**SDCL 58-33-66. Unfair or deceptive insurance practices.** Unfair or deceptive acts or practices in the business of insurance include the following:

- (1) Failing to respond to an inquiry from or failing to supply documents requested by the Division of Insurance within twenty days of receipt of such inquiry or request;...

South Dakota law requires that licensees report administrative actions taken against them in other states within thirty days of the final disposition of the matter. McKinnon did not do this. SDCL 58-30-193 is set forth below:

**58-30-193. Report by insurance producer of any administrative action taken against insurance producer.** An insurance producer shall report to the director any administrative action taken against the insurance producer in another jurisdiction or by another governmental agency in this state within thirty days of

the final disposition of the matter. This report shall include a copy of the order, consent order, or other relevant legal documents. (emphasis added)

The language of the statute is mandatory as denoted by the use of the word "shall". The term "shall" does not allow for discretion. This Court has repeatedly stated that: "When 'shall' is the operative verb in a statute, it is given 'obligatory or mandatory' meaning." Fritz v. Howard Township, 1997 SD 122, P15, 570 N.W.2d 240, 242 (citing In re Groseth Int'l, Inc., 442 N.W.2d 229, 231-32 (SD 1989) (citing Person v. Peterson, 296 N.W.2d 537 (S.D.1980); Tubbs v. Linn, 75 S.D. 566, 70 N.W.2d 372 (1955); 2A Sutherland Stat. Const. § 57.03, at 643-44 (4th ed.1984); Sutton, Use of "Shall" in Statutes, 4 J. Marshall LQ 204 (1938), reprinted in 1A Sutherland Stat. Const. 691 (4th ed.1985)). See also SDCL 2-14-2.1 (providing that "as used in the South Dakota Codified Laws to direct any action, the term, shall, manifests a mandatory directive and does not confer any discretion in carrying out the action so directed"). At the time of the hearing seven other states had taken administrative action against McKinnon and he had not reported any to the Division. Those states are as follows:

Florida (July 5, 2013)	(EX 8)
Georgia (July 2, 2013)	(EX 13)
Washington (July 15, 2013)	(EX 12)
Louisiana (June 17, 2013)	(EX 14)
Kentucky (June 13, 2013)	(EX 11)
Nebraska (June 12, 2013)	(EX 10)
Kansas (May 28, 2013)	(EX 9)

In deciding to revoke an insurance producer's license the Division looks to SDCL 58-33-68 for guidance as follows:

**SDCL 58-33-68.** The Division of Insurance, in interpreting and enforcing §§ 58-33-66 and 58-33-67, shall consider all pertinent facts and circumstances to determine the severity and appropriateness of action to be taken in regard to any violation of §§ 58-33-66 to 58-33-69, inclusive, including but not limited to, the following:

- (1) The magnitude of the harm to the claimant or insured;
- (2) Any actions by the insured, claimant, or insurer that mitigate or exacerbate the impact of the violation;
- (3) Actions of the claimant or insured which impeded the insurer in processing or settling the claim;
- (4) Actions of the insurer which increase the detriment to the claimant or insured. The director need not show a general business practice in taking administrative action for these violations.

However, no administrative action may be taken by the director for a violation of this section unless the insurer has been notified of the violation and refuses to take corrective action to remedy the situation. (emphasis added)

Any administrative action taken by the director shall be pursuant to the provisions of chapter 1- 26.

The Division also considers SDCL 58-30-167 for causes for revocation, refusal or renewal of license. The Division has alleged violations of subsection (2) & (8) of SDCL 58-30-167. Those subsections are as follows:

**58-30-167. Causes for revocation, refusal to issue or renew license, or for monetary penalty-- Hearing--Notice.** The director may suspend for not more than twelve months, or may revoke or refuse to continue, any license issued under this chapter, or any license of a surplus lines broker after a hearing. Notice of such hearing and of the charges against the licensee shall be given to the licensee and to the insurers represented by such licensee or to the appointing agent of a producer at least twenty days before the hearing. The director may suspend, revoke, or refuse to issue or renew an insurance producer's license or may accept a monetary penalty in accordance with § 58-4-28.1 or any combination thereof, for any one or more of the following causes:...

(2) Violating any insurance laws or rules, subpoena, or order of the director or of another state's insurance director, commissioner, or superintendent;...

(8) Using fraudulent, coercive, or dishonest practices, or demonstrating incompetence, untrustworthiness, or financial irresponsibility in the conduct of business in this state or elsewhere;...

The Division proved by clear and convincing evidence that McKinnon violated SDCL 58-30-157, 58-30-167 (2) & (8) and 58-33-66(1). Applying the law to the Findings of Fact it is clear that the Non-Resident Insurance Producer License of Justin McKinnon should be revoked.

## CONCLUSIONS OF LAW

### I.

The Division of Insurance has jurisdiction over the parties and subject matter of this hearing pursuant to Title 58 of the South Dakota Codified Laws. The Office of Hearing Examiners is authorized to conduct the hearing and issue a proposed decision pursuant to the provisions of SDCL 1-26D-4.

### II.

The Division of Insurance bears the burden of establishing the alleged statutory violations by clear and convincing evidence.

III.

Pursuant to SDCL 58-30-170 the "...director retains the authority to enforce the provisions of and impose any penalty or remedy authorized by §§ 58-30-141 to 58-30-195, inclusive, and Title 58 against any person who is under investigation for or charged with any violation of §§ 58-30-141 to 58-30-195, inclusive, or Title 58 even if the person's license or registration has been surrendered or has lapsed by operation of law."

IV.

The Division of Insurance established by clear and convincing evidence that Justin McKinnon violated SDCL 58-30-193.

V.

The Division of Insurance established by clear and convincing evidence that Justin McKinnon violated SDCL 58-30-167(2) and (8).

VI.

The Division of Insurance established by clear and convincing evidence that Justin McKinnon violated SDCL 58-33-66(1).

VII.

The Division of Insurance established by clear and convincing evidence that the South Dakota Nonresident Insurance Producers License of Justin McKinnon is subject to revocation.

VIII.

The Division of Insurance established by clear and convincing evidence that the South Dakota Nonresident Insurance Producers License of Justin McKinnon should be revoked.

IX.

Any additional Conclusions of Law included in the Reasoning section of this decision are incorporated herein by reference.

X.

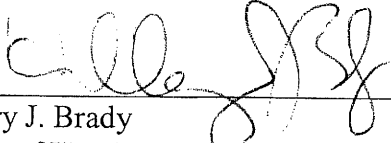
To the extent any of the foregoing are improperly designated and are instead Findings of Fact, they are hereby redesignated and incorporated herein as Findings of Fact.

Based on the above Findings of Fact, Reasoning and Conclusions of Law, the Hearing Examiner enters the following:

**PROPOSED ORDER**

The South Dakota Nonresident Insurance Producers License of Justin McKinnon should be revoked.

Dated this 5<sup>th</sup> day of June 2014



\_\_\_\_\_  
Hillary J. Brady  
Office of Hearing Examiners  
523 E. Capitol Avenue  
Pierre, South Dakota 57501

**CERTIFICATE OF SERVICE**

I certify that on June \_\_\_\_, 2014 at Pierre, South Dakota, a true and correct copy of this Proposed Order was mailed to each of the parties listed below.



\_\_\_\_\_  
Ashley Couillard

JUSTIN MCKINNON  
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HESPERIA MI 49421

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