

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

IN THE MATTER OF)	
THE INSURANCE PRODUCER)	FINAL DECISION
LICENSE APPLICATION OF)	INS 22-24
ZACHARY CALLAHAN)	

An administrative hearing was held in person at the Foss Building in Pierre, SD on this matter on November 17, 2022, pursuant to a Notice of Hearing issued by the South Dakota Division of Insurance (“Division”). Attorney, Clayton Grueb, appeared as a representative for the Division. The Division had a witness, Haelly Pease, to testify. Zachary Callahan (Callahan) appeared and testified at the hearing. Exhibits 1 through 11 were stipulated to and admitted on the record. The parties also stipulated that Exhibit 12 be added to the record after the hearing was concluded. Frank Marnell, Senior Legal Counsel, appeared via a Notice of Appearance filed on February 8, 2023.

The Office of Hearing Examiners, Hearing Examiner Ryan Darling, entered and served a Proposed Decision regarding the parties on January 27, 2023. After reviewing the record and the Proposed Decision, this Final Decision follows and includes Findings of Fact, Reasoning, Conclusions of Law, and the Order. I adopt and restate the Hearing Examiner’s Proposed Decision here with modifications, the reasons for which are noted in footnotes relating to those areas pursuant to SDCL 1-26D-8. Documentary evidence will be cited as “(Exhibit ___)”.

ISSUE

Whether the decision by the Division to deny Callahan a resident insurance producer license was reasonable pursuant to SDCL 58-30-168?¹

FINDINGS OF FACT²

1. On or about August 8, 2022, Callahan applied for a resident insurance producer license in South Dakota. (Exhibit 1)
2. On the application, Callahan indicated "yes" when asked if he had ever been convicted of a misdemeanor or felony. (Exhibit 1)
3. Callahan failed to include all the required documentation regarding his criminal history but did provide the materials after several emails from the Division. (Exhibits 2 through 8)

¹ The standard for review in denying an insurance producer license is contained in SDCL 58-30-168, which differs from the standards used by the Hearing Examiner for revoking an existing license.

² These Findings contain references to the administrative record and detail those exhibits.

4. Callahan's plea deal resolved three separate felony level criminal cases, 49CRI20-5010, 41CRI21-0046, and 41CRI21-0596. (Exhibits 6, 7, and 8)
 - a. The complaint in case number 49CRI20-5010, was filed on July 6, 2020, and included charges for Possession of Controlled Substance, Schedule I or II, Possession of Marijuana more than 2 ounces, and Use or Possession of Drug Paraphernalia;
 - b. The complaint in case number 41CRI21-0046 was filed on January 20, 2021, and included charges for Possession of Controlled Substance, Schedule I or II, Ingestion of an Intoxicant other than Alcohol, Possession of Marijuana more than 2 ounces, DUI under 21, Use or Possession of Drug Paraphernalia, Purchase, Receive, Consume, of Possess Tobacco under 21, Possession of Alcohol by a Minor; and
 - c. The complaint in case number 41CRI21-0596 was filed on June 28, 2021, and included the following charges Possession of Controlled Substance, Schedule I or II, Possession with Intent to Distribute Marijuana, Possession of Marijuana more than 2 ounces, Use or Possession of Drug Paraphernalia.
5. The terms of Callahan's plea deal dismissed all other charges other than one felony count, Possession of Controlled Substance, Schedule I or II, and Callahan would receive 18 months' probation with the possibility of receiving a suspended imposition of sentence at the termination of his probation. (Exhibit 8)
6. Callahan testified that the cases were delayed and ultimately recharged in one county because the parties were waiting on possible changes in the state's marijuana laws. Those changes did not occur.
7. On March 29, 2022, Callahan pled guilty to felony possession of a controlled substance scheduled I or II, Marijuana. (Exhibit 8)
8. On May 3, 2022, Callahan was sentenced to 18 months of probation. (Exhibit 8)
9. On August 8, 2022 Callahan applied for a resident insurance producer license in South Dakota. (Exhibit 1)
10. On August 26, 2022, the Division denied Callahan's application. (Exhibit 9)
11. On August 30, 2022, the Circuit Court in Lincoln County granted Callan's request to end probation early, and ordered that the action be dismissed, Callahan be discharged from probation, and the records in the action to be sealed. (Exhibit 12)
12. Callahan filed a timely appeal of the determination. (Exhibit 10)
13. A hearing on this matter was held on November 17, 2022.

14. Any additional Findings of Fact included in the Reasoning section of this decision are incorporated herein by reference.
15. 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.

REASONING³

This case involves a request by Callahan to determine the reasonableness of the Division's decision to deny his application for an insurance producer license. As this matter deals with the denial of a professional license, rather than revocation of an existing license, the general burden of proof for administrative hearings, preponderance of the evidence, will apply. *In re Jarman*, 2015 S.D. 8, ¶ 15, 860 N.W.2d 1, 7-8; *In re Setliff*, 2002 S.D. 58, ¶ 13, 645 N.W.2d 601, 605 (other citations omitted). "Preponderance of the evidence" is defined as "the greater weight of evidence." *Pieper v. Pieper*, 2013 S.D. 98, ¶ 22, 841 N.W.2d 781, 787 (quoting *L.S. v. C.T.*, 2009 S.D. 2, ¶ 23, 760 N.W.2d 145, 151). Pursuant to SDCL 58-30-168, the review is to "determine the reasonableness of the director's action." Therefore, it is the Division's burden to show by the preponderance of the evidence that the agency was reasonable in its decision to deny Callahan's license application. *Id.*; *Jarman*, 2015 S.D. at ¶ 15, 860 N.W.2d at 7-8 (other citations omitted).

In deciding to deny a license, the Division looks to SDCL 58-30-167, providing in pertinent part:

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:

- (1) Providing incorrect, misleading, incomplete, or materially untrue information in the license application;
- (2) Violating any insurance laws or rules, subpoena, or order of the director or of another state's insurance director, commissioner, or superintendent
- ...
- (6) Having been convicted of a felony;
-
- (8) Using fraudulent, coercive, or dishonest practices, or demonstrating incompetence, untrustworthiness, or financial irresponsibility in the conduct of business in this state or elsewhere;
- ...

³ The Reasoning section was modified to include applicable legal standards for reviewing the denial of an insurance producer license rather than the standard for revoking a license, and to remove statutory references that were not alleged or made a part of the administrative record.

SDCL 58-30-167(1) provides that the Division may deny a license for "...[p]roviding incorrect, misleading, incomplete, or materially untrue information in the license application[.]" Here, Callahan did not follow the instructions on the application and provided incomplete documentation with his application. However, Callahan did eventually provide sufficient documentation to the Division after several communications.

SDCL 58-30-167(6) provides that the Division may deny a license for "...[h]aving been convicted of a felony[.]" Here, Callahan had plead guilty to a felony offense some five months before applying for his license.⁴ At the time the Division issued its denial letter, Callahan's guilty plea was still on his record, and he was still on probation. It was only after the Division denied Callahan's license that the court awarded him a suspended imposition.

SDCL 58-30-167(8) provides that the Division may deny a license for "[u]sing fraudulent, coercive, or dishonest practices, or demonstrating incompetence, untrustworthiness, or financial irresponsibility in the conduct of business in this state or elsewhere..." The evidence does not show Callahan was deceptive with the Division. He answered "yes" to the felony questions on his August 8, 2022, application. Callahan also provided information on the events that had occurred.⁵ However, the existence of the crimes themselves demonstrates the use of dishonesty and untrustworthiness in Callahan's past conduct.

ARSD 20:06:01:03 states that in determining whether a person is in good standing, the director may consider, but is not limited to, the following factors:

- (1) Suspension, revocation, or denial of license by a state;
- (2) Administrative or judicial action pending in any state and the nature of that action;
- (3) Complaints, nature and number, against the person;
- (4) False statements, oral or written, to the division, including omissions;
- (5) Neglect of financial or fiduciary responsibilities;
- (6) Conduct which is unlawful, dishonest, deceitful, or fraudulent;
- (7) Evidence of drug or alcohol abuse or dependency; and
- (8) Acting as an agent without being licensed.

In reviewing these factors the director may consider the recentness of the action or conduct overall, any mitigating circumstances, evidence of rehabilitation, and the person's cooperation.

Callahan was convicted of a felony drug offense involving marijuana. Callahan was arrested three separate times in the span of approximately one year, all for felony level marijuana offenses and additional drug related charges. This is evidence of a past drug dependency and proof that Callahan has engaged in several instances of unlawful conduct. Callahan's felony conviction has

⁴ The Hearing Examiner described the five-month-old felony plea as a "...mistake back in college...".

⁵ The Division never alleged any violations of SDCL 58-33-66, the section was not mentioned at hearing, and the statute is ineffective against applicants. The reference and related analysis are removed. SDCL 58-30-167(1) covers an applicant's failure to respond or provide materials to the Division in the course of an application.

been dismissed and the records have been sealed, showing some evidence of rehabilitation in this case. However, it has only been 18 months since Callahan's last arrest, and much shorter since his felony cases were resolved and dismissed. The conduct he engaged in was very serious and did carry consequences. The fear is that it would be detrimental to the insurance-buying public if Callahan decides to go back to his old behavior.⁶

Consequently, there are three provisions of the law that indicate Callahan request for a license may be denied. Applying the law to the Findings of Fact, it is not unreasonable for the Division to deny Callahan's resident insurance producer application based on these past events.⁷

CONCLUSIONS OF LAW⁸

1. The Division has jurisdiction over Callahan and the subject matter of this contested case. The Office of Hearing Examiners is authorized to conduct the hearing and issue a proposed decision pursuant to SDCL 1-26D-4.
2. The Division may modify the Hearing Examiner's Proposed Decision by giving reasons for doing so in writing pursuant to SDCL 1-26D-6 and 1-26D-8.
3. The Division bears the burden of establishing that its denial of Callahan insurance application was reasonable by a preponderance of the evidence.
4. The Division established by a preponderance of the evidence that SDCL 58-30-167(1), (6), and (8) provide grounds for the denial of Callahan's license application.
5. These violations permit the Director of the Division of Insurance to refuse to issue an insurance producer license pursuant to the provisions of SDCL 58-30-167(1), (6), and (8).
6. The Division established by preponderance of the evidence that Callahan had engaged in conduct that was unlawful and dishonest as well as evidence of prior drug and alcohol dependency and thus was not in good standing pursuant to the provisions of ARSD 20:06:01:03.

⁶ In his January 27, 2023 decision, the Hearing Examiner continually refers to the respondent's actions as "a mistake back in college." This ignores the multiple arrests and recentness of the respondent's last arrest. "The bottom line here is that Callahan was convicted of a felony drug offense involving marijuana. Callahan did make mistakes in college; however, the action has been dismissed and the records have been sealed. There is evidence of rehabilitation in this case. The question is whether a mistake back in college should follow Callahan and prevent him from being an insurance producer. However, Callahan has completed his probation and all official records on his case have been sealed. Callahan has cooperated with the Division. Callahan has a job offer with Washington National and should not be prevented from obtaining an insurance producers license." The potential for future employment is not a consideration in deciding whether to grant a license or whether the Division's denial of the license was reasonable.

⁷ In his January 27, 2023 decision, the Hearing Examiner applied a stricter standard than what is required in the law, i.e. the standard in *In re Zar*, 434 NW2d 598 (SD, 1989) requiring a "clear and convincing" standard. Using the correct standard espoused here, the Division's denial was reasonable.

⁸ The Conclusions of Law section was updated to match the additional law in the Reasoning section and reflect the correct standards for reviewing a license denial.

7. The Division established by a preponderance of the evidence that its denial of Callahan resident insurance producer license renewal was reasonable.
8. Any Conclusions of Law in the Reasoning section of this decision are incorporated herein by reference. 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 Secretary of the Department of Labor and Regulation enters the following:

FINAL DECISION

The decision by the Director of the Division of Insurance to deny Callahan's insurance producer license application was reasonable and supported by the preponderance of the evidence.

THEREFORE IT IS HEREBY ORDERED that Zachary Callahan's resident insurance producer license application is denied.

Parties are hereby advised of the right to further appeal this Final Decision to Circuit Court within 30 days, pursuant to the authority of SDCL Ch. 1-26.

Dated this 15TH day of February, 2023.



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

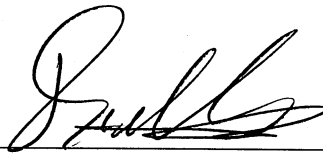
**STATE OF SOUTH DAKOTA
DEPARTMENT OF LABOR AND REGULATION
DIVISION OF INSURANCE**

**IN THE MATTER OF)
THE INSURANCE PRODUCER)
LICENSE APPLICATION OF)
JACOB HUBBS)**

**NOTICE OF ENTRY OF
FINAL DECISION
INS 22-24**

NOTICE IS HEREBY GIVEN, that attached hereto, is a true and correct copy of the Findings of Fact, Reasoning, Conclusions of Law, and Final Decision entered by Marcia Hultman, Secretary of the South Dakota Department of Labor and Regulation, on February 16, 2023.

Dated this 16th day of February, 2023.



Frank A. Marnell, Senior Legal Counsel
South Dakota Division of Insurance

CERTIFICATE OF SERVICE

I, Frank Marnell, the undersigned, do hereby certify that on the date shown below, a true and correct copy of the Findings of Fact, Reasoning, Conclusions of Law, and Final Decision with respect to the above-entitled action was sent U.S. First Class Mail thereon, to the following:

Zachary Callahan
4802 S. Hosta Ave. #108
Sioux Falls, SD 57110

Dated this 16th day of February, 2023.



Frank. A. Marnell, Senior Legal Counsel
South Dakota Division of Insurance
124 S. Euclid Ave., 2nd Floor
Pierre, SD 57501
Phone (605) 773-3563

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

**IN THE MATTER OF
ZACHARY CALLAHAN**

**INS 22-24
PROPOSED DECISION**

This matter came for hearing before the Office of Hearing Examiners on November 17, 2022. Attorney, Clayton Grueb, appeared as a representative for the Division of Insurance (Division). The Division had a witness, Haelly Pease. Zachary Callahan (Callahan) appeared and testified at the hearing. The Hearing Examiner enters these Proposed Findings of Fact, Conclusions of Law, and Proposed Order.

ISSUE

Whether the decision by the Division to deny Callahan a resident insurance producer license was reasonable?

FINDINGS OF FACT

1. On or about August 8, 2022, Callahan applied for a resident insurance producer license in South Dakota.
2. On the application, Callahan answered "yes" when asked if he had ever been convicted of a misdemeanor or felony.
3. The Division sent a letter to Callahan on August 9, 2022. The Division requested information on the misdemeanor and felony questions that Callahan answered yes to in his application.
4. Callahan sent an email message to the Division on August 11, 2022. He explained that he had a possession of a controlled substance (marijuana) case and he indicated he provided supporting documentation.
5. Callahan was charged with possession of a controlled substance, possession with intent to distribute one ounce or less, and possession of drug paraphernalia.
6. The Division emailed a reply to Callahan on August 11, 2022. The Division requested additional information on three court cases that involved Callahan. The case summary information was entered into the record as Exhibits 6, 7, and 8.
7. The incidents were charged, recharged, dismissed in one County, court dates were pushed back, and the parties were waiting on changes in the laws.
8. On March 29, 2022, Callahan pled guilty to felony possession of a controlled substance in scheduled I or II. The other charges were dismissed.
9. On or about May 3, 2022, Callahan was put on 18 months of probation.
10. Callahan was given a suspended imposition of sentence on May 10, 2022.

11. The Division denied Callahan's application for a license on August 26, 2022. The reasons for denial were for incomplete information on the application, violating the insurance laws of South Dakota, and for having been convicted of a felony.
12. On August 30, 2022, the Circuit Court ordered that the action be dismissed, and Callahan be discharged from probation.
13. Callahan filed a timely appeal of the Division's determination.
14. Any additional Findings of Fact included in the Reasoning section of this decision are incorporated herein by reference.
15. 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 determination by the Division to deny a South Dakota Resident Insurance Producer's License for Callahan. As a consequence of the potential loss of Respondent'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).

SDCL 58-30-167(6) provides that 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 having been convicted of a felony. Here, Callahan was convicted of a felony which is grounds to deny a license.

SDCL 58-30-167(8) provides that 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 using fraudulent, coercive, or dishonest practices, or demonstrating incompetence, untrustworthiness, or financial irresponsibility in the conduct of business in this state or elsewhere.

The evidence does not show Callahan was deceptive with the Division. He answered yes to the misdemeanor and felony questions on his August 8, 2022, application. Additionally, Callahan provided documentation on his court cases when asked by the Division. The journey through criminal court for Callahan was confusing at best. However, Callahan did provide information on the events that had occurred. Unfair or deceptive acts or practices in the business of insurance include 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. SDCL 58-33-66(1).

ARSD 20:06:01:03 states that in determining whether a person is in good standing, the director may consider, but is not limited to, the following factors:

- (1) Suspension, revocation, or denial of license by a state;
- (2) Administrative or judicial action pending in any state and the nature of that action;
- (3) Complaints, nature and number, against the person;
- (4) False statements, oral or written, to the division, including omissions;
- (5) Neglect of financial or fiduciary responsibilities;
- (6) Conduct which is unlawful, dishonest, deceitful, or fraudulent;
- (7) Evidence of drug or alcohol abuse or dependency; and
- (8) Acting as an agent without being licensed.

In reviewing these factors the director may consider the recentness of the action or conduct overall, any mitigating circumstances, evidence of rehabilitation, and the person's cooperation.

The bottom line here is that Callahan was convicted of a felony drug offense involving marijuana. Callahan did make mistakes in college; however, the action has been dismissed and the records have been sealed. There is evidence of rehabilitation in this case. The question is whether a mistake back in college should follow Callahan and prevent him from being an insurance producer. The conduct he engaged in was very serious and did carry consequences. The fear is that Callahan decides to go back to his old behavior which would be detrimental to the insurance buying public.

However, Callahan has completed his probation and all official records on his case have been sealed. Callahan has cooperated with the Division. Callahan has a job offer with Washington National and should not be prevented from obtaining an insurance producers license.

CONCLUSIONS OF LAW

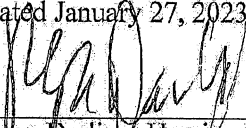
1. The Division has jurisdiction over Callahan and the subject matter of this contested case. The Office of Hearing Examiners is authorized to conduct the hearing and issue a proposed decision pursuant to SDCL 1-26D-4.
2. The Division bears the burden of establishing the alleged statutory violations by clear and convincing evidence.
3. Callahan should not be denied an insurance producers license. ARSD 20:06:01:03
4. Any additional Conclusions of Law included in the Reasoning section of this decision are incorporated herein by reference.
5. 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 DECISION

The South Dakota Resident Insurance Producer License application of Zachary Callahan be granted.

Dated January 27, 2023



Ryan Darling, Hearing Examiner
Office of Hearing Examiners
523 East Capitol Avenue
Pierre, SD 57501

CERTIFICATE OF SERVICE

I certify that on January 27, 2023, at Pierre, South Dakota, a true and correct copy of the Findings of Fact, Conclusions of Law and Proposed Order in the above-entitled matter was sent via U.S. Mail or Inter-Office Mail to each party listed below.



Julie McClelland
Legal Secretary

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