

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

**IN THE MATTER OF
DENISE GRAHAM
LICENSEE**

)
)
)

**FINAL DECISION

INS 12-18**

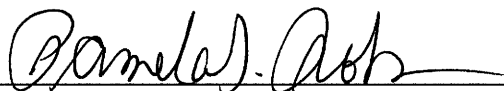
After reviewing the record and the proposed order of the Hearing Examiner in this matter,

IT IS HEREBY ORDERED that pursuant to SDCL 1-26D-4, the Hearing Examiner's Proposed Findings of Fact, Conclusions of Law and Decision, dated December 5, 2012, is adopted in full.

IT IS FURTHER ORDERED that the South Dakota Non-resident Insurance Producer License of Denise Graham 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 14th day of December, 2012.



Pamela S. Roberts, 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
DENISE GRAHAM**

**PROPOSED ORDER
DLR/INSURANCE 12-18**

An administrative hearing in the above matter was held on September 10, 2012. Denise Graham (hereinafter sometimes referred to as "Graham" or "Licensee") failed to appear. Mr. Frank Marnell appeared as counsel for the 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 6 were admitted and will be denoted by EX followed by the appropriate number.

ISSUE

Whether the Non-Resident Insurance Producer License of Denise Graham should be revoked due to her failure to respond in a timely manner to the South Dakota Division of Insurance inquiries, dated June 11, 2012 and July 11, 2012, regarding a Kentucky administrative action. (§§SDCL 58-30-193, SDCL 58-33-66(1), SDCL 58-30-167(2))

FINDINGS OF FACT

I.

Denise Graham possesses an active Non-Resident Insurance Producer License from the State of South Dakota. Ms. Graham became licensed in the State of South Dakota on March 15, 2005. Her license is scheduled to expire on March 23, 2013. (EX 1)

II.

Matthew Ballard, Compliance Agent for the South Dakota Division of Insurance obtained information that Ms. Graham had not reported a Kentucky administrative action to the South Dakota Division of Insurance.

III.

Mr. Ballard wrote Ms. Graham a letter on June 11, 2012 inquiring why Graham had not reported that Kentucky had taken administrative action against her license. (EX 3) She was given twenty days upon receipt to respond. The June 11, 2012 letter was mailed via first class mail to Ms. Graham at 1103 Yerba Verde Dr., El Cajon, CA, 92020. (EX 3) This was the mailing address listed on the Individual Information Inquiry for Ms. Graham on file with the Division. (EX 1) Mr. Ballard received no response.

IV.

Mr. Ballard sent a second letter to Ms. Graham on July 11, 2012 wherein Graham was given notice that the Division had not received a response from the June 11, 2012 letter. Mr. Ballard requested Graham's explanation as to why the Division has not received a response regarding the Kentucky action. Ms. Graham was again given twenty days to respond and was warned that if she failed to provide the requested information within twenty days the Division would be pursuing an administrative action against her. (EX 4) The June 11, 2012 letter was mailed via first class mail and first class certified mail to Graham at 1103 Yerba Verde Dr., El Cajon, CA, 92020. (EX 4) The letter sent via first class certified mail was returned to the Division marked as "not deliverable as addressed, unable to forward" on August 7, 2012 at 6:29 a.m. (EX 5 & 6) Mr. Ballard received no response.

V.

A review of the Order in the Kentucky action showed that it was signed on February 7, 2012. That Order was the result of Kentucky Department of Insurance finding that Ms. Graham had not filed her annual reconciliation report with the commissioner of the Kentucky Department of Insurance. She was ordered to file the annual reconciliation report with each local government to which premium taxes should have been paid; file the reconciliation report with the Department of Insurance with a \$5 filing fee and pay a civil penalty of \$500. Graham's failure to comply with this order would result in revocation of her Broker's license. (EX 2)

VI.

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

VII.

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 Non-Resident Insurance Producer's License of Denise Graham. 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). Ms. Graham did not appear at the hearing.

Matthew Ballard, Compliance Agent for the South Dakota Division of Insurance, found that Denise Graham had not reported an administrative action taken against her insurance producer's license in the State of Kentucky. Furthermore, Ms. Graham failed to respond in a timely manner to an inquiry made by the Division (letters dated June 11, 2011 and July 11, 2012) regarding the Kentucky administrative action in violation of SDCL 58-33-66(1). That statute, in pertinent part, reads 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;...

In addition, Ms. Graham violated SDCL 58-30-193 by not reporting the Kentucky action to the Division. SDCL 58-30-193 reads as follows:

SDCL 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.

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

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.

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

Additionally, the Division will consider SDCL 58-30-167. Ms, Graham violated subsection (2) of SDCL 58-30-167 which is set forth in pertinent part below:

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;....

Applying the law to the Findings of Fact it is clear that the Non-Resident Insurance Producer License of Denise Graham 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 Notice of Hearing was issued on September 13, 2012 by the South Dakota Division of Insurance.

III.

Neither Denise Graham nor anyone on her behalf appeared at the scheduled and noticed time of the hearing.

IV.

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

V.

The Division of Insurance established by clear and convincing evidence that Denise Graham committed unfair or deceptive insurance practices by violating SDCL 58-33-66(1) and SDCL 58-30-193.

VI.

The Division of Insurance established by clear and convincing evidence that the South Dakota Non-Resident Insurance Producers License of Denise Graham is subject to revocation pursuant to SDCL 58-30-167(2).

VII.

The Division of Insurance established by clear and convincing evidence that Denise Graham did not inform the Division of a change of address as is required by SDCL 58-30-157.

VIII.

The Division of Insurance established by clear and convincing evidence that the South Dakota Non-Resident Insurance Producers License of Denise Graham should be revoked.

IX.

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

X.

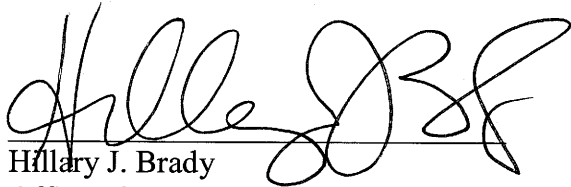
To the extent any of the foregoing are improperly designated and are instead Findings of Fact, they are hereby redesignated and incorporated herein as Findings of Fact.

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

PROPOSED ORDER

The South Dakota Non-Resident Insurance Producers License of Denise Graham should be revoked.

Dated this 5th day of December 2012

A handwritten signature in black ink, appearing to read "Hillary J. Brady". The signature is written in a cursive style with large, sweeping loops.

Hillary J. Brady
Office of Hearing Examiners
210 E. 4th Street
Pierre, South Dakota 57501-1538