

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

**IN THE MATTER OF
DANIEL MIGNONE,
LICENSEE**

)
) **FINAL DECISION**
) **INS 13-31**

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 Order, dated October 25, 2013, is adopted in full.

IT IS FURTHER ORDERED that the South Dakota Non-resident Insurance Producer License of Daniel Mignone 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 30 day of October 2013



Marcia Hultman, Interim 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
DANIEL MIGNONE**

**PROPOSED ORDER
DLR/INSURANCE 13-31**

An administrative hearing in the above matter was held on October 1, 2013. Daniel Mignone (hereinafter sometimes referred to as "Mignone" 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 4-C were admitted and will be denoted by EX followed by the appropriate number.

ISSUE

Whether the Non-Resident Insurance Producer License of Daniel Mignone should be revoked due to his failure to respond in a timely manner to the South Dakota Division of Insurance inquiries, dated April 16, 2013 and May 21, 2013, regarding an administrative action from the Commonwealth of Virginia. (§§SDCL 58-30-193, SDCL 58-33-66(1), SDCL 58-33-68 and SDCL 58-30-167(2), (8) & (9))

FINDINGS OF FACT

I.

Daniel Mignone possesses an active Non-Resident Insurance Producer License from the State of South Dakota. Mignone became licensed in the State of South Dakota on February 27, 2012. His license is scheduled to expire on January 31, 2014. (EX 2)

II.

Heather Lang, Compliance Agent for the South Dakota Division of Insurance obtained information that Mr. Mignone had not reported a Virginia administrative action to the South Dakota Division of Insurance.

III.

Ms. Lang wrote Mr. Mignone a letter on April 16, 2013 inquiring why Mignone had not reported that Virginia had taken administrative action against his license. (EX 3) He was given twenty days upon receipt to respond. The April 16, 2013 letter was mailed via first class mail to Mr. Mignone at P.O. Box 212742, Royal Palm Beach, FL 33421. (EX 3) This was the mailing address listed on the Individual Information Inquiry for Mignone on file with the Division. (EX 1) Ms. Lang received no response from Mignone..

IV.

Ms. Lang sent a second letter to Mr. Mignone on May 21, 2013 wherein Mignone was given notice that the Division had not received a response from the April 16, 2013 letter. Ms. Lang requested Mignone's explanation as to why the Division had not received a response regarding the Virginia action. Mr. Mignone was again given twenty days to respond and was warned that if he failed to provide the requested information within twenty days the Division would be pursuing an administrative action against him. (EX 4-A) The May 21, 2013 letter was mailed via first class mail and first class certified mail to Mignone at P.O. Box 212742, Royal Palm Beach, FL 33421. (EX 4-A & 4-B) The letter sent via first class certified mail was returned to the Division of Insurance on June 25, 2012 at 7:10 a.m. (EX 4-b & 4-C) Ms. Lang received no response.

V.

A review of the Order in the Virginia administrative action showed that an Order Revoking License was filed on February 11, 2013. That Order revoked Mr. Mignone's licenses to transact the business of insurance as an insurance agent in the Commonwealth of Virginia. This revocation stemmed from Mignone's failure to report to the State Corporation Commission within thirty (30) calendar days that an administrative action was taken against him by the Financial Industry Regulatory Authority. (Virginia Code §38.2-1826 C) (EX 1)

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 Daniel Mignone. 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. Mignone did not appear at the hearing.

Heather Lang, Compliance Agent for the South Dakota Division of Insurance, found that Daniel Mignone had not reported an administrative action taken against his insurance producer's license in the Commonwealth of Virginia. Furthermore, Mr. Mignone failed to respond in a timely manner to an inquiry made by the Division (letters dated April 16, 2013 and May 21, 2013) regarding the Virginia 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, Mr. Mignone violated SDCL 58-30-193 by not reporting the Virginia 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. (emphasis added)

The word "shall" in our statutes "manifests a mandatory directive," conferring no discretion. SDCL 2-14-2.1. The term "shall" does not allow for discretion. The Supreme Court has repeatedly stated that: "When 'shall' is the operative verb in a statute, it is given 'obligatory or mandatory' meaning." Full House, Inc. v. Stell, 2002 SD 14; 640 N.W.2d 61; 2002 S.D. Lexis 14 citing to Fritz v. Howard Township, 1997 SD 122, P15, 570 N.W.2d 240, 242 (citing In re Groseth Int'l, Inc., {640 N.W.2d 68} 442 N.W.2d 229, 231-32 (SD 1989)).

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. Mr. Mignone violated subsection (2), (8) and (9) 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;

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

(9) Having an insurance producer license, or its equivalent, denied, suspended, or revoked in any other state, province, district, or territory;

Applying the law to the Findings of Fact set forth above, it is clear that the Non-Resident Insurance Producer License of Daniel Mignone 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 August 30, 2013 by the South Dakota Division of Insurance.

III.

Neither Daniel Mignone nor anyone on his 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 Daniel Mignone 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 Daniel Mignone is subject to revocation pursuant to SDCL 58-30-167(2), (8) and (9).

VII.

The Division of Insurance provided Daniel Mignone with notification of his violations pursuant to SDCL 58-33-68.

VIII.

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

IX.

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

X.

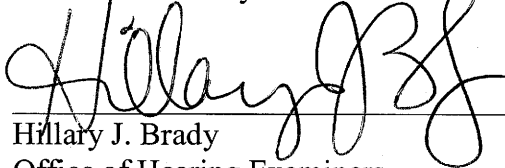
To the extent any of the foregoing are improperly designated and are instead Findings of Fact, they are hereby redesignated and incorporated herein as Findings of Fact.

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 Daniel Mignone should be revoked.

Dated this 25th day of October 2013



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