

**SOUTH DAKOTA  
DEPARTMENT OF LABOR AND REGULATION  
OFFICE OF THE SECRETARY**

<b>IN THE MATTER OF</b>	)	<b>FINAL DECISION</b>
<b>David Hueller</b>	)	
<b>LICENSEE</b>	)	<b>INS 13-06</b>

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 Proposed Order, dated December 3, 2013, is adopted in full.

IT IS FURTHER ORDERED that the South Dakota Non-resident Insurance Producer License of David Hueller 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 8<sup>TH</sup> day of April 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  
DAVID HUELLER**

**PROPOSED ORDER  
INSURANCE 13-06**

An administrative hearing in the above matter was held on April 25, 2013. David Hueller (hereinafter sometimes referred to as "Hueller" or "Licensee") failed to appear. Mallori Barnett 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 5 were admitted and will be denoted by EX followed by the appropriate number.

**ISSUE**

Whether the Non-Resident Insurance Producer's License of David Hueller should be revoked due to his failure to report a felony criminal prosecution to the South Dakota Division of Insurance within thirty days of the initial pretrial hearing in violation of SDCL §58-30-194. (58-30-194, 58-30-167(8))

**FINDINGS OF FACT**

I.

David Hueller possesses an active Non-Resident Insurance Producer License from the State of South Dakota. Hueller became licensed in the State of South Dakota on July 24, 2009. His license is scheduled to expire on December 21, 2013. (EX 1)

II.

Matthew Ballard, Compliance Agent for the South Dakota Division of Insurance, obtained information within the course of his duties for the Division that David Hueller had been charged with felonies in Wisconsin.

III.

By statute, within thirty days of the initial pretrial hearing date, an insurance producer shall report to the Director of Insurance, any felony criminal prosecution of the insurance producer taken in any jurisdiction. David Hueller did not do that.

IV.

The National Insurance Producer Registry (NIPR) indicated that on July 18, 2012 information was uploaded showing that Hueller had been charged with 4 felony counts for the crime of Theft in a Business Setting in violation of Wisconsin Law 943.20(1)(b). The felony counts were filed

in a criminal complaint on November 12, 2010. (EX 5) A Summons filed November 12, 2010 indicated the initial appearance date for Hueller was to be December 7, 2010 at 1:00 PM. (EX 5) The Deferred Prosecution Agreement was entered into on February 1, 2012. At that time Hueller received a deferred prosecution on Count I and all other counts were dismissed. (EX 2A & 5)

V.

Mr. Ballard wrote Hueller a letter on August 1, 2012. Hueller was asked to explain why he failed to report his felony prosecution in a timely manner to the division. He was also requested to provide the date of the initial pretrial hearing, a copy of the initial complaint filed, any other relevant legal documents regarding this matter and any explanation regarding his actions in this matter. He was further informed that pursuant to SDCL 58-33-66(1) he was required to contact Mr. Ballard within 20 days of receipt of the letter. (EX 3)

VI.

In a series of e-mails exchanged with Mr. Ballard, dated September 5, 2012, Hueller indicated that he uploaded some additional information to NIPR to clarify and that he was not aware that he needed to report the felony. (EX 4)

VII.

While the date of the initial appearance is unclear, even if Hueller's initial appearance was on the day he entered into the deferred prosecution, he still failed to report a felony criminal prosecution to the Division within thirty days.

VIII.

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

IX.

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 David Hueller. 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. Hueller did not appear at the hearing.

Matthew Ballard, compliance agent for the South Dakota Division of Insurance, found that David C. Hueller had been charged with felonies in Wisconsin and had not reported it to the South Dakota Division of Insurance. (The specifics regarding the Wisconsin administrative action are contained in Exhibit 2-A and 5)

Pursuant to SDCL 58-30-194, "Within thirty days of the initial pretrial hearing date, an insurance producer shall report to the director any felony criminal prosecution of the insurance producer taken in any jurisdiction. The report shall include a copy of the initial complaint filed, the order resulting from the hearing, and any other relevant legal documents." Hueller did not do this.

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 will consider SDCL 58-30-167 (shown in pertinent part) below:

58-30-167. Causes for suspension, revocation, refusal to issue or renew license, or monetary penalty--Notice--Hearing--Final determination. 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:

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

Applying the law to the Findings of Fact it is clear that the Non-Resident Insurance Producer License of David C. Hueller 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 March 27, 2013 by the South Dakota Division of Insurance.

### **III.**

Neither David Hueller 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 David C. Hueller failed to report to the Director of Insurance the felony prosecutions in Wisconsin within thirty days of the initial pre-trial hearing date, or even within thirty days of the final appearance of Hueller in violation of SDCL 58-30-194.

### **VI.**

The Division of Insurance established by clear and convincing evidence that the South Dakota Non-Resident Insurance Producers License of David C. Hueller is subject to revocation pursuant to SDCL 58-30-167(8).

### **VII.**

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

VIII.

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

IX.

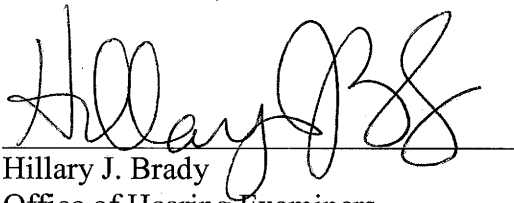
To the extent any of the foregoing are improperly designated and are instead Findings of Fact, they are hereby redesignated and incorporated herein as Findings of Fact.

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

**PROPOSED DECISION**

The South Dakota Non-Resident Insurance Producers License of David C. Hueller should be revoked.

Dated this 3<sup>rd</sup> day of December, 2013



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

**CERTIFICATE OF SERVICE**

I certify that on December 4, 2013, at Pierre, South Dakota, a true and correct copy of this Proposed Order was mailed to each of the parties listed below.



Ashley Couillard

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