

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

IN THE MATTER OF
RAMPERSAUD NARAIN,
LICENSEE

)
)
)

FINAL DECISION
INS 13-41

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 Findings of Fact, Conclusions of Law and Proposed Decision, dated January 17, 2014, is adopted in full.

IT IS FURTHER ORDERED that the South Dakota Nonresident Insurance Producer License of Rampersaud Narain 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 28th day of January, 2014.



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
RAMPERSAUD NARAIN**

**PROPOSED DECISION
DLR/INSURANCE 13-41**

An administrative hearing in the above matter was held on November 25, 2013. Rampersaud Narain (hereinafter sometimes referred to as "Narain" or "Licensee") failed to appear. 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 A through F-3 were admitted and will be denoted by EX followed by the appropriate number.

ISSUE

Whether the Non-Resident Insurance Producer License of Rampersaud Narain should be revoked due to his failure to report administrative actions in the states of Virginia, Kentucky and West Virginia within thirty days of their final disposition to the South Dakota Division of Insurance. (SDCL 58-30-167(2) & (8) and SDCL 58-30-193)

FINDINGS OF FACT

I.

At the time of the hearing Rampersaud Narain possessed an active Non-Resident Insurance Producer License from the State of South Dakota. Narain became licensed in the State of South Dakota on August 4, 2011. (EX 1) His license will expire on September 30, 2014. (EX A)

II.

Heather Lang, Compliance Agent for the South Dakota Division of Insurance obtained information from Teachers Insurance and Annuity Association (TIAA CREF), that Narain was terminated for cause. TIAA indicated that: TIAA terminated Mr. Rampersaud Narain's employment on an involuntary basis on December 6, 2012. TIAA reviewed a request from Mr. Narain's spouse, who is a TIAA client, regarding possible irregularities in her account. In 2003 and again in 2012 Narain signed his wife's signature without consent on a spousal waiver form for purposes of obtaining retirement account loans. He also changed his wife's life insurance beneficiaries without her consent in 2011. The original effective date of Narain's termination was December 6, 2012. (EX B)

III.

Ms. Lang wrote Narain a letter on January 7, 2013 requesting he provide the Division, among other things, an explanation in his own words as to the facts and circumstances surrounding the termination. (EX C) He was given twenty days to respond. (EX C) Ms. Lang did not receive a response from Mr. Narain. The January 7, 2013 letter was mailed via first class mail to Narain at

4792 Brockton Court, Concord, NC 28027. This was the address Ms. Lang obtained from Narain's individual information inquiry. (EX A)

IV.

Ms. Lang sent a second letter to Narain on February 7, 2013 wherein Narain was given notice that he failed to respond to Lang's January 7, 2013 letter and that he was in violation of SDCL 58-33-66(1) (failing to respond to the Division within twenty days of receipt). He once again was given twenty days to respond. (EX D) The letter was sent via first class mail and certified mail to his mailing address at 4792 Brockton Court, Concord, NC 28027. (EX A & D)

V.

Ms. Lang received a letter dated February 23, 2013 from Narain. It was received by the Division of Insurance on March 4 2013. Narain admitted to signing spouse's name without her consent. (EX E)

VI.

Rampersaud Narain voluntarily surrendered his license to sell insurance in the Commonwealth of Virginia effective January 28, 2013. (EX F-1)

VII.

Rampersaud Narain's license to sell insurance in the Commonwealth of Kentucky was revoked effective April 11, 2013. (EX F-2)

VIII.

Rampersaud Narain's non-resident producer's license to sell insurance in the State of West Virginia was revoked effective June 4, 2013. (EX F-3)

IX.

Rampersaud Narain did not report the administrative actions which took place in Virginia, Kentucky or West Virginia to the South Dakota Division of Insurance. These actions were discovered through the work of Ms. Lang.

X.

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

XI.

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 Rampersaud Narain. 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. Narain did not appear at the hearing.

The Division received notification from Teachers Insurance and Annuity Association (TIAA CREF) that Narain was involuntarily terminated due to forgery of his spouse's signature. Narain then failed to respond in a timely fashion to an inquiry made by the Division (letter dated January 7, 2013) regarding the TIAA CREF 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;...

Mr. Narain did eventually respond to the Division's second letter which was dated February 7, 2013. The Division received this response on March 4, 2013.

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 as follows:

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"). Ms. Lang found administrative actions against Mr. Narain in Virginia, Kentucky and West Virginia. Mr. Narain did not report any of those violations to the Division.

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.

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 subsections (2) and (8) of SDCL 58-30-167. That subsection is 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 Narain violated SDCL 58-30-167 (2) & (8), 58-33-66(1) and SDCL 58-30-193.

Applying the law to the Findings of Fact it is clear that the Non-Resident Insurance Producer License of Rampersaud Narain 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.

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

IV.

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

V.

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

VI.

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

VII.

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

VIII.

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

IX.

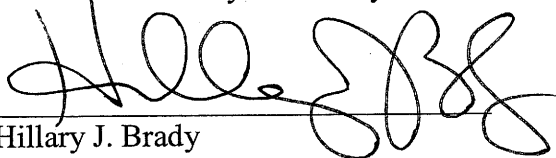
To the extent any of the foregoing are improperly designated and are instead Findings of Fact, they are hereby redesignated and incorporated herein as Findings of Fact.

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

PROPOSED ORDER

The South Dakota Nonresident Insurance Producers License of Rampersaud Narain should be revoked.

Dated this 17th day of January 2014



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