

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

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|-------------------------|---|-----------------------|
| IN THE MATTER OF |) | |
| DAVID ROBERTS |) | FINAL DECISION |
| LICENSEE |) | INS 13-27 |

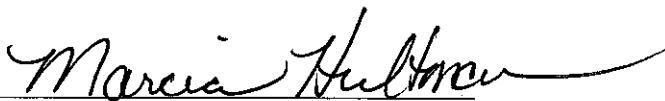
After reviewing the record and the proposed decision of the Hearing Examiner in this matter,

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 May 2, 2014 is adopted in full.

IT IS FURTHER ORDERED that the South Dakota Non-resident Insurance Producer License of David Roberts 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 22 day of August, *nunc pro tunc* to May 12th, 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
DAVID ROBERTS**

**PROPOSED ORDER
INSURANCE 13-27**

An administrative hearing in the above matter was held on September 16, 2013. David Roberts (hereinafter sometimes referred to as "Roberts" or "Licensee") failed to appear. Frank Marnell appeared as counsel for the South Dakota 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 13 were admitted and will be denoted by EX followed by the appropriate number.

ISSUE

Whether the Non-Resident Insurance Producer's License of David Roberts should be revoked due to his failure to report administrative action in Kansas within thirty days of the violation, his failure to update his address in a timely fashion with the Division of Insurance and his commission of a violation in that he knowingly provided false, misleading or incomplete information to the Division in violation of SDCL 58-33-66(2), SDCL 58-30-167(2), (7) and (8), SDCL 58-30-157, 58-33-66(2), 58-30-193.

FINDINGS OF FACT

I.

David Brian Roberts possessed a Non-Resident Insurance Producer License from the State of South Dakota. Roberts originally became licensed in the State of South Dakota on August 29, 2012. His license expired on July 17, 2013, prior to the hearing. (EX 1)

II.

Matthew Ballard, Compliance Agent for the South Dakota Division of Insurance, obtained a letter dated December 18, 2012 from UnitedHealthcare that indicated they had electronically terminated for cause David Robert's appointments in the State of South Dakota effective December 12, 2012. This termination for cause was based on United Healthcare's internal investigation which indicated the conduct of Roberts violated Company policy and/or the Centers for Medicare and Medicaid Services (CMS) regulations and guidelines in the marketing and selling of federal insurance products. (EX 2)

III.

Mr. Ballard wrote Mr. Roberts a letter on January 3, 2013 inquiring about the termination for cause by UnitedHealthcare. The licensee was given twenty days upon receipt of the letter to respond to the Division. The letter was mailed via first class mail to Roberts at 189 E. Fort

Union Blvd., Suite 205, Midvale, UT 84047. (EX 3-A) This was the address listed as Roberts mailing address on his Individual Information Inquiry on file with the Division. (EX 3-A)

IV.

Mr. Ballard sent a letter to UnitedHealthcare on January 3, 2013. Therein he requested, among other things, a complete explanation of the facts and circumstances, along with any relevant documents, surrounding the termination for cause of Roberts. (EX 3-B)

V.

UnitedHealthcare responded to Mr. Ballard in a letter dated January 16, 2013. Their letter indicated as follows: "Agent David Roberts' appointment was terminated for cause based on an investigated complaint in which the consumer attested that the signature on the enrollment application was not his or that of an authorized representative." The response also contained the investigator's report wherein it was found that the allegations were substantiated. (EX 4-A, 4-B)

VI.

Mr. Ballard sent Mr. Roberts another letter on February 8, 2013 once again inquiring about the UnitedHealthcare action and explaining that Roberts had failed to supply requested documents to the Division within 20 days of receipt of the first letter. (EX 5-A) He was again given twenty days upon receipt of the letter to respond. He was also informed that this second letter served as official notice pursuant to SDCL 58-33-68 that he was in violation of SDCL 58-33-66(1). Two letters were sent, one via first class mail and another via certified mail, to Roberts at 189 E. Fort Union Blvd., Suite 205, Midvale, UT 84047.

VII.

The letter sent via certified mail was returned to the division on February 20, 2013 stamped RETURN TO SENDER, INSUFFICIENT ADDRESS, UNABLE TO FORWARD. (EX 5-B)

VIII.

On February 20, 2013, Mr. Ballard sent a copy of his February 8, 2013 letter to Roberts. This was sent via first class and Certified Mail to Roberts at 12397 S. 300 E, Suite 300, Draper, UT, 84020. (EX 6)

IX.

On March 11, 2013 the Division received a letter from an individual named Michael D. Roberts who indicated he was an attorney for David B. Roberts and that UnitedHealthcare was reviewing the termination and would be deciding the matter of re-appointment within the next two weeks. (EX 7-A) This was accompanied by documentation. (EX 7-B)

X.

On May 3, 2013, Mr. Ballard wrote Michael D. Roberts regarding the status and outcome of UnitedHealthcare's reconsideration. He is also given notice that David Robert's does not have a current address on file with the Division and the Division was requesting an explanation regarding this violation of SDCL 58-30-157. Michael D. Roberts was given twenty (20) days to respond. (EX 8) Mr. Ballard received no response to this letter.

XI.

On June 3, 2013, Mr. Ballard wrote Michael D. Roberts, David Robert's counsel, regarding his May 3, 2013 letter. It was also copied to David Roberts. He informed Mr. Michael Roberts that his client David Roberts was in violation of SDCL 58-33-66(1). This was sent via first class mail and certified mail to Mr. Roberts at the Draper, UT address previously used by the Division. (EX 9-A) The letter sent via certified mail was returned to the Division stamped RETURN TO SENDER, NOT DELIVERABLE AS ADDRESSED, UNABLE TO FORWARD. (EX 9-B)

XII.

Mr. Ballard received a response directly from David Roberts dated June 14, 2013. Roberts indicated he replied late to Mr. Ballard because of UnitedHealthcare's delayed response to his appeal. Mr. Ballard later was able to prove this was false information. (EX 11)

XIII.

Mr. Ballard received e-mail communication from UnitedHealthcare's Carolyn Haider regarding David Roberts's appeals with the company. She reported Robert's appeal had been heard on March 18, 2013 and they had denied his request for reinstatement of employment. UnitedHealthcare provided proof that UPS had delivered a letter to Roberts notifying him of his denial. This was delivered to him on March 21, 2013 and had required his signature. (EX 12 and 13)

XIV.

Mr. Ballard's further investigation found that Kansas had taken administrative action against Roberts. He was originally revoked and then the final order was amended to an admonishment. The date of the final action by Kansas was May 13, 2013. As of the date of the hearing Roberts had not reported it to the Division. (EX 10-A and 10-B)

XV.

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

XVI.

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 David Roberts. 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. Gil did not appear at the hearing.

Pursuant to SDCL 58-30-170 the director retains the authority to enforce the provisions of and impose any penalty or remedy authorized by §§ 58-30-141 to 58-30-195, inclusive, and Title 58 against any person who is under investigation for or charged with any violation of §§ 58-30-141 to 58-30-195, inclusive, or Title 58 even if the person's license or registration has been surrendered or has lapsed by operation of law. Roberts's license had expired even before the hearing was held; however, based upon the above statute the Division has authority for the action.

The facts are set forth in detail in the Findings of Fact and will not be repeated herein. Roberts is in violation of:

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;...
- (2) Knowingly supplying the Division of Insurance with false, misleading, or incomplete information.

In addition Mr. Roberts violated SDCL 58-30-193. That statute reads 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)

Mr. Roberts did not report a State of Kansas administrative action in a timely fashion to the Division. The final order date of the action was May 13, 2013. As of the time of the hearing Roberts had not reported it. 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. Roberts 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;

(7) Having admitted or been found to have committed any insurance unfair trade practice or fraud;

(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 Roberts 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 5, 2013 by the South Dakota Division of Insurance.

III.

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

IV.

Pursuant to SDCL58-33-68 the Division has shown that Mr. Roberts has been notified of the violation and refused to take corrective action to remedy the situation.

V.

The Division of Insurance established by clear and convincing evidence that Roberts committed unfair or deceptive insurance practices and that he provided misleading information to the South Dakota Division of Insurance by violating SDCL 58-33-66(1) & (2)..

VI.

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

VII.

The Division of Insurance established by clear and convincing evidence that Roberts violated SDCL 58-30-157.

VIII.

The Division of Insurance established by clear and convincing evidence Roberts that the South Dakota Nonresident Insurance Producers License of is subject to revocation pursuant to SDCL 58-30-167(2), (7) and (8).

IX.

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

X.

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

XI.

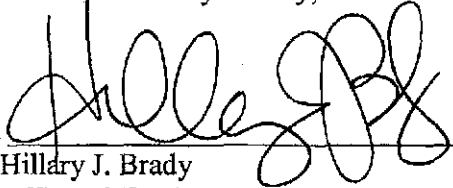
To the extent any of the foregoing are improperly designated and are instead Findings of Fact, they are hereby redesignated and incorporated herein as Findings of Fact.

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 David Roberts should be revoked.

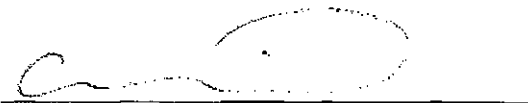
Dated this 2nd day of May, 2014.



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

CERTIFICATE OF SERVICE

I certify that on May 5, 2014, at Pierre, South Dakota, a true and correct copy of this Proposed Order was mailed to each of the parties listed below.



Ashley Couillard

DAVID ROBERTS
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MIDVALE UT 84047

FRANK MARNELL
ATTORNEY FOR THE DEPARTMENT
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PIERRE SD 57501