

**STATE OF NEW HAMPSHIRE
INSURANCE DEPARTMENT**

In Re: David Hafen

Docket No. 22-007-EP

PROPOSED DECISION AND ORDER

Appearance for Respondent:

No appearance for David Hafen (“Hafen” or “Respondent”).

Appearance for NHID:

Joshua Hilliard, Esq.
Enforcement Counsel
NH Insurance Department (the “NHID”).

Hearing Officer Appointed by Commissioner:

Steven M. Notinger, Esq.
Administrative Hearings Judge
NH Insurance Department.

1. Summary.

Hafen is an insurance producer in Utah with a National Producer License number of 10240719. Hafen has a business address of 476 E. Riverside Drive, St. George, Utah 84790. Hafen applied for a New Hampshire insurance producer license (“license”) on or about September 8, 2021. That license was approved on September 9, 2021. Hafen answered “No” to question 1B of the license application (“application”) which required him to disclose whether he had ever

been convicted of a felony. On September 29, 2021, Hafen disclosed that he was convicted of felonies in 2009 in California. Subsequent to the issuance of his New Hampshire insurance producer license, the NHID learned that Hafen's insurance producer license was revoked in California in 2009 for the felony convictions, denied by Illinois in October 2021 for failure to disclose the felony convictions, and denied by New York in November 2021 for untrustworthiness.

The NHID requests that Hafen's New Hampshire insurance producer license be revoked or suspended for his alleged violations of: (1) RSA 402-J:12, I(a), RSA 402-J:12, I(f); and (3) RSA 402-J:12. The NHID also requests that Hafen be ordered to pay a fine of not more than \$2,500.00 per violation.

2. Procedural and Jurisdictional Background.

The NHID brought this enforcement action after receiving a referral from its licensing division on February 16, 2022. See Exhibit 3 and 4 and Testimony of Joan LaCourse. The NHID has the authority to pursue this matter pursuant to RSA 402-J:12, I, RSA 400-A:15, III, RSA 541-A:31 and Ins 200 et seq. The NHID has the burden of proof. Ins 206.03(b)(2); Ins 206.05(b), (c) and (d).

Under New Hampshire insurance law, "[t]he commissioner may place on probation, suspend, revoke, or refuse to issue or renew an insurance producer's license, or may levy an administrative fine not to exceed \$2,500 per violation, in accordance with RSA 400-A:15, III or any combination of actions against any producer who violates the provisions of RSA 402-J:12, I." See RSA 402-J:12, I.

Here, the NHID alleges that the Respondent violated: (1) RSA 402-J:12, I(a) by "[p]roviding incorrect, misleading, incomplete, or materially untrue

information in the license application”; (2) RSA 402-J:12, I(f), by having been convicted of two felonies; and (3) RSA 402-J:12, I(i) by “[h]aving an insurance producer license, or its equivalent, denied, suspended, or revoked in any other state, province, district, or territory.”

An evidentiary hearing was held in this matter on April 12, 2022, in front of Steven M. Notinger, Administrative Hearings Judge. The NHID appeared and offered the testimony of two witnesses. Hafen did not appear. Hafen was given proper notice of the hearing at two known physical addresses¹ by both certified and regular mail and by email.² See Exhibit 2.

Although Hafen did not attend his hearing on April 12, 2022, the validity of a hearing held in accordance with the Department’s notice requirements is not affected by the failure of a person to attend a hearing. See RSA 400-A:19, VII. As discussed in Appeal of City of Concord, a governmental body may provide notice by first class mail without violating due process rights of interested parties and such notice is presumed to be received by those interested parties. See Appeal of City of Concord, 161 N.H. 169, 173-74 (2010). In the instant case, three methods of notice were used, first class mail, certified mail and email to the addresses provided by Hafen in his application. See Exhibit 2 and 4. Notice was proper in this case.

The following exhibits were admitted into evidence at the hearing:

¹ These were the addresses Hafen provided in his New Hampshire insurance producer application. See Exhibit 4.

² See RSA 400-A:14, I(c).

NHID's Exhibits:

1. Order to Show Cause and Notice of Hearing (“Show Cause Order”).
2. Proof of Service of Notice.
3. Licensee Summary.
4. NH Producer License Application.
5. Attachment Warehouse documents.
6. Felony court documents.
7. RIRS regulatory actions report.
8. New York DOI license denial.
9. IL DOI license denial.

During the hearing, NHID presented the testimony of the following two witnesses:

1. Sarah Prescott, Enforcement Paralegal for the NHID; and
2. Joan LaCourse, Licensing Supervisor & Continuing Education Coordinator.³

3. Standard of Review.

The NHID has the burden of proof on all issues in this matter by a preponderance of the evidence even if the respondent does not appear. Ins 206.03(b)(2); Ins 206.05(b), (c) and (d).

4. Findings of Fact.

Hafen is an insurance producer from Utah with a National Producer License number of 10240719. See Exhibit 4. Hafen applied for a non-resident insurance producer license in New Hampshire on or about September 8, 2021. See Exhibit 4. Question 1B of the application states: “Have you ever been convicted of a felony [?]” To this question, Hafen answered “No”. Id. Hafen’s New

³ Pursuant to Ins 206.01(c)(4), the Hearing Officer allowed Ms. LaCourse to testify remotely by video. See Order Allowing Remote Witness, dated 4/11/2022.

Hampshire producer's license application was approved on September 9, 2021. Id. Twenty one days after license approval, on September 29, 2021, Hafen submitted additional documents through the "Attachment Warehouse" feature of the producer application software.⁴ See Exhibits 5 and 6 and Testimony of Joan LaCourse. The documents reveal that Hafen was convicted of two felony counts in California in 2009. See Exhibit 6. The felony convictions were for unlawful sex with a minor in 2005. See Exhibit 6. Subsequently, Ms. LaCourse discovered that California revoked Hafen's producer license on December 17, 2009, for the "felony conviction." See Exhibit 3 and Testimony of Joan LaCourse. On October 28, 2021, Illinois denied Hafen an insurance producer license citing the failure to disclose the felony convictions on the license application as the reason for the denial. See Exhibits 3 and 9 and Testimony of Joan LaCourse. On November 1, 2021, New York denied Hafen's insurance producer license application on the grounds of "untrustworthiness." See Exhibits 8 and Testimony of Joan LaCourse. All of these denials were reported in the Regulatory Actions (RIRS) database.⁵ See Exhibit 7 and Testimony of Sarah Prescott. Hafen did report the Illinois and New York denials after they were reported by the respective states in the "Attachment Warehouse" electronic database available to all states. See Exhibit 5 and Testimony of Joan LaCourse.

After discovering possible violations of New Hampshire insurance law, the NHID licensing division referred the matter to NHID's enforcement division.

⁴ Attachment Warehouse is an online database used for submitting documents electronically in the license process. See Testimony of Joan LaCourse.

⁵ The RIRS database is a national database that reports regulatory actions against producers. See Testimony of Sarah Prescott.

See Testimony of Joan LaCourse. The enforcement group attempted to contact Hafen, without success. See Testimony of Sarah Prescott.⁶ On March 10, 2022, the New Hampshire Insurance Commissioner issued the Show Cause Order. See Exhibit 1. The notice was sent by regular mail, certified mail and by email to the addresses listed on Hafen’s application. See Exhibits 2, 4 and Testimony of Sarah Prescott.

An administrative hearing was held on April 12, 2022, at 1:00 p.m. at the NHID offices in Concord, New Hampshire. Hafen did not respond to the Show Cause Order or appear at the hearing. See Exhibit 1 and Testimony of Sarah Prescott.

5. NHID’s Allegations.

The NHID alleges that Hafen violated the following New Hampshire insurance laws:

1. RSA 402-J:12, I(a) by “[p]roviding incorrect, misleading, incomplete, or materially untrue information in the license application”; and
2. RSA 402-J:12, I(f) by “[h]aving been convicted of a felony”; and
3. RSA 402-J:12, I(i) by “[h]aving an insurance producer license, or its equivalent, denied, suspended, or revoked in any other state, province, district, or territory.”

If Hafen knowingly violated any or all of the statutes, the Commissioner may revoke or suspend his license or fine him up to \$2,500.00 per violation or any combination of these actions. RSA 402-J:12, I.

⁶ NHID’s enforcement counsel also represented at the hearing that he attempted to contact Hafen.

6. Analysis.

NHID asserts Hafen's alleged violations of RSA 402-J:12, I(a), (f) and (i) justify revocation of Hafen's license and the issuance of penalties against him. If NHID establishes it is more likely than not Hafen knowingly violated 402-J:12, I(a), (f) and (i), the Commissioner has discretion whether to revoke an insurance producer's license or issue penalties, or both, for any of the causes set forth in RSA 402-J:12, I(a)-(m). See RSA 402-J:12, I(a)-(m).

In order to suspend an insurance producer's license under RSA 400-A:15, III⁷ (the statute referenced in RSA 402-J:12, I) the violation must be a "knowing" violation. See RSA 402-J:12, I; see also Appeal of Metropolitan Property & Liability Ins. Co., 120 N.H. 733, 736 (1980) (explaining that "[t]he legal definition of 'knowingly' is not fixed but varies according to the context in which it is used" and that "[i]t is enough that the acts complained of are done voluntarily rather than through mistake or inadvertence") (citations omitted); see also United States v. Lange, 528 F.2d 1280, 1287-89 (5th Cir. 1976) ("[t]o commit an act 'knowingly' is to do so with knowledge or awareness of the facts or situation, and not because of mistake, accident or some other innocent reason").

RSA 402-J:12, I(a) is triggered by knowingly "[p]roviding incorrect, misleading, incomplete, or materially untrue information" in the producer's

⁷ RSA 400-A:15, III provides:

Any person who knowingly violates any statute, rule, regulation, or order of the commissioner may, upon hearing, except where other penalty is expressly provided, be subject to such suspension or revocation of certificate of authority or license, or administrative fine not to exceed \$2,500 per violation, as may be applicable under this title for violation of the statute or the provision to which the rule, regulation, or order relates.

Id.

license application. See RSA 402-J:12, I(a); 400-A:15, III. The New Hampshire insurance producer license application states quite plainly that an applicant needs to disclose if he was ever convicted of a felony. See Exhibit 4, Question IB. Hafen answered “No” to question IB on his September 8, 2021 application⁸. Id. As a result, his application was approved the next day. Id. However, Hafen failed to disclose on his application that he was convicted in California in 2009 on two felony counts of having sex with a minor. See Exhibits 4 and 6. It is clear Hafen knew of the felonies at the time he submitted his license application to the NHID because twenty two days later, without explanation, he submitted his felony judgment through the “Attachment Warehouse” for NHID personnel to see. See Exhibits 5 and 6.

Hafen’s representations in the license application were “incorrect, misleading, incomplete and materially untrue.”⁹ Not disclosing felony convictions are certainly material to an application to become a New Hampshire insurance producer, a profession that requires trustworthy people.¹⁰ Insurance producers handle other people’s money and need to be honest in the way they disclose information and answer questions. It is also the second background question in the application, so it has immediate importance. See Exhibit 4.

Hafen disclosed the convictions on September 29, 2021, twenty two days after the application was submitted. See Exhibits 5 and 6. Disclosing the felony

⁸ Hafen answered yes to question 1A on the application “have you been convicted of a misdemeanor”, so he understood the questions.

⁹ RSA 402-J:12, I(a).

¹⁰ The Hearing Officer takes judicial notice of this fact. NH Rule. Evid. 201; Ins 206.10(a); and RSA 541-A:33, V(d).

convictions twenty two days after his application was filed does not change the fact that Hafen failed to disclose the convictions in his original application. See Exhibit 4 and Testimony of Joan LaCourse. The statute specifically refers to misrepresentations in the licensing application itself, not amendments. See RSA 402-J:12, I(a).

As illustrated by Hafen's application, which was filed on September 8, 2021, and approved a day later, the licensing process is generally fairly rapid and automated unless there is a "red flag" in the application. See Exhibit 4. Given the nature of the application process, it is essential that applicants provide full, complete and accurate information in their applications to allow NHID to properly consider their applications.

In this instance, there was no inadvertence or mistake on the part of Hafen. If Hafen had a valid reason for waiting until twenty two days after the application was filed to disclose the felony convictions to NHID, he has had ample opportunity to explain his conduct. He has not done so. Hafen did not respond to any communications from the NHID, respond to the Show Cause Order, or appear at the hearing. See Exhibit 1 and Testimony of Sarah Prescott. The approach of Hafen to deny he had felony convictions, then after approval of the license, disclose them, is knowing conduct, as opposed to a mistake or involuntary act. Therefore, Hafen violated RSA 402-J:12, I(i).

The Commissioner, in his discretion, may take regulatory action against a producer for "cause" who has been "convicted of a felony." See RSA 402-J:12, I(f). In 2009, Hafen was convicted of two felonies in California. See Exhibit 6.

For purposes of RSA 402-J:12, I(f), capital felonies and felonies involving fraud and defalcation are the most troubling felonies.¹¹ Hafen was not convicted of these types of felonies. See Exhibit 6. He was convicted of having sex with a minor when he was twenty-one years old. Id. From the record, it is impossible to know the circumstances of the felonies and/or whether Hafen has been rehabilitated. Id. We do know that Hafen was convicted of two felonies and knowingly did not disclose them in the license application. See Exhibit 6. It is undisputed Hafen violated the statute. RSA 402-J:12, I(f). It is also undisputed that Hafen has chosen not to participate in these proceedings. See Exhibit 2 and Testimony of Sarah Prescott.

Since Hafen knew of the felonies before he applied for a New Hampshire license, he violated RSA 402-J:12, I(f). For this violation, the Commissioner may revoke Hafen's New Hampshire insurance producer license and/or impose penalties against him. See RSA 402-J:12, I(f).

Hafen has also violated RSA 402-J:12, I(i) by having his insurance producer license, denied, suspended, or revoked in another state. Id. Hafen had his insurance producer license applications denied in New York and Illinois and his insurance producer license revoked in California. See Exhibits 7, 8 and 9. New York cited "untrustworthiness" as reason for the denial. See Exhibit 8. Illinois based its denial on Hafen's failure to disclose the felony convictions in the license application. See Exhibit 9. California cited felony convictions, and Hafen's criminal record as the reasons for revoking his producer license. See Exhibit 7.

¹¹ Federal law prohibits fraudulent actions by insurance producers. See 18 U.S.C. 1033(a)(1) and (b)(1)(B).

It is more likely than not that Hafen was aware of what he was doing during the application process. Hafen did not check the wrong box or forget about his felony convictions. These circumstances are not plausible on the record before the hearing judge. Hafen engaged in the same conduct in Illinois, but they caught the issue before the license was issued. See Exhibit 9.

If any of Hafen's conduct was by accident or he has an explanation, he has certainly had the opportunity to present his case, and he has not. The only evidence presented at the hearing was presented by the NHID. Hafen did not participate in the hearing or otherwise submit any evidence that disputed any of the evidence presented by the NHID.

The NHID has proven its case by a preponderance of the evidence on all violations in accordance with Ins 206.03; Ins 206.05 and applicable law. Ins 206.03(b)(2); Ins 206.05(b), (c) and (d).

7. Revocation and Penalties.

For the reasons discussed herein above, the Hearing Officer proposes that the Commissioner revoke Hafen's New Hampshire insurance producer license pursuant to RSA 402-J:12, I for a period of five years after which time he can reapply for a license. Since the statutes overlap in some respects, the undersigned also proposes that Hafen be fined a total of \$3,000 for violations for RSA 402-J:12(f) and (i) to be paid within 30 days of the date of the issuance of the Commissioner's Final Order and Decision or the license suspension shall be permanent.

The Hearing Officer recommends that the remainder of any penalties be denied.

SO ORDERED.

Date:

5/16/22



Steven M. Notinger, Hearings Judge