

THE STATE OF NEW HAMPSHIRE
INSURANCE DEPARTMENT

In re Dennis Joseph Allen

No. 17-002-EP

PROPOSED DECISION AND ORDER

The New Hampshire Insurance Department (hereinafter “the Department”) issued a Show Cause Order to Dennis Joseph Allen (hereinafter “Respondent”), a New Hampshire insurance producer, on January 10, 2017, notifying him of his March 23, 2017 administrative hearing at the Department in Concord, New Hampshire. In its Show Cause Order the Department seeks permanent revocation of the Respondent’s New Hampshire insurance producer license. The Department also seeks an administrative fine of \$2500 for each violation found.

A hearing on the merits was held on March 23, 2017. Mary Bleier, Enforcement Counsel, represented the Department at the hearing. The Respondent attended the hearing without representation of counsel. The record closed after the hearing on March 23, 2017. However, upon a motion by the Respondent, I reopened the record to admit late exhibits submitted by the Respondent, as discussed more fully herein, in section III, G below.

This proceeding is governed by RSA 541-A, the Administrative Procedure Act, as well as rules adopted by the Department, Ins. 200, Practices and Procedures. With regard to evidence received in this proceeding, all evidence must be relevant to the issues presented. See RSA 541-A:33, II; Ins. 203.01(d)(4). All evidence received in this proceeding has met this standard.

After considering the record, the Department has sustained its burden to permanently revoke the Respondent’s producer license. As such, the Respondent’s New Hampshire producer license is permanently **REVOKED**. As to the Department’s request for administrative fines for each violation, I propose that the Respondent should be fined in the amount of **\$4000**, as discussed in further detail below.

I. Allegations

The Department alleges that the Respondent violated RSA 402-J:12, I(b) and RSA 402-J:12, I(h) by failing to comply with a Consent Order that required him to submit an initial

payment within ninety (90) days of the execution of the Consent Order and for untrustworthy practices relating to business with the Department.

II. Burden and Standard of Proof

A. Standard for Revocation and Suspension of a License.

As to hearings in which the Department seeks to revoke an insurance producer's license, as here, the Department bears the initial burden of going forward. To meet its burden, the Department must establish a prima facie case with evidence for each violation. See Ins. 204:05 (b). The Respondent then bears the burden of persuasion to present evidence that the Department's position should not be upheld. See id.

The standard of proof for both the Department and the Respondent is proof by a "preponderance of the evidence," which means that what is sought to be proved by the evidence is more probable than not. Ins. 204:05 (a); (c).

B. Standard for Administrative Fines

As to hearings in which the Department seeks to impose administrative fines, the Department bears the overall burden of proof. See Ins. 204:05 (d). The standard of proof is proof by a preponderance of the evidence. See id.

III. Factual Background

The record reveals the following relevant facts.

A. The Respondent's Insurance Producer License Summary, Department Exhibit 1

The Respondent first became licensed as a resident, property and casualty producer in New Hampshire in September 2011. Several years later, in September 2016, he also became licensed as a life, accident, and health producer. As late as March 13, 2017, the mailing address the Respondent provided to the Department was 3 Patriot Drive, Dover, New Hampshire 03820. Within his producer records the Respondent provided thesalesman1988@gmail.com as his email address. To date, his producer license is still active in New Hampshire.

B. Consent Order, Department Exhibit 2

On September 7, 2016, the Department executed a Consent Order with the Respondent. The Consent Order was based on the Department's allegations that the Respondent violated RSA 402-J:12(I)(a) for failing to disclose a criminal conviction on his 2015 producer license, renewal application.

According to the Consent Order, the Respondent agreed to pay an administrative fine in the amount of \$250. The Consent Order also stated that the Respondent "may pay the fine in two installments according to the following payment schedule: one hundred twenty five dollars (\$125) within ninety (90) days of the Insurance Commissioner's execution of this Consent Order; and one hundred twenty five dollars (\$125) within one hundred and eighty (180) days of the execution of this Order."

The Consent Order instructed that checks should be endorsed to the Treasurer, State of New Hampshire and "should be mailed or hand-delivered to the attention of Carolyn Petersen, New Hampshire Insurance Department, 21 South Fruit Street, Suite 14, Concord, New Hampshire 03301."

Directly after these two paragraphs relating to installment payments and how these payments to the Department should be sent, another paragraph stated as follows: "In the event that the Respondent fails to meet any of the terms and conditions set forth in the preceding Paragraphs B and C, the NHID may institute proceedings to revoke the Respondent's New Hampshire insurance producer license based on his failure to comply with those terms and conditions." None of the paragraphs in the Consent Order were numbered or lettered. However, other than the Consent Order's introductory paragraph, every paragraph within the Consent Order is separated by bullets.

C. The Department's Written Communications with the Respondent, Department Exhibits 3-7, 9, 11

Department Exhibit 3, September 2016 emails with the Respondent

On September 2, 2016, Attorney Bleier sent the Respondent the Consent Order to review via email, asking him to sign the document and return it to the Department if he agreed to its terms. On September 7, 2016, the Respondent responded to Attorney Bleier by email, from his thesalesman1988@gmail.com email address, informing her that he had delivered the Consent

Order to the Department for the Commissioner to sign and asking her about the status of approval of his license. Later that day, Attorney Bleier responded by emailing the Respondent a copy of the Consent Order signed by the Respondent and the Commissioner; she also informed the Respondent in her email message that his license for life, accident, and health insurance lines of business had been approved. In addition, she informed the Respondent, “[t]oday also starts the clock for you to repay your fine. As stated in the order, the first installment is due within 90 days (December 6, 2016) and the final installment is due within 180 days (March 6, 2017). If you fail to make these payments, your license will be revoked.” Carolyn Petersen, the Enforcement Department’s paralegal, was copied on this email to the Respondent.

Department Exhibits 4-6, 12/07/16 & 12/08/16 emails with the Respondent

On December 7, 2016, Ms. Petersen emailed the Respondent, copying Attorney Bleier on the email, to inform him that the Department had not received his initial payment of \$125 that was due under the Consent Order. Ms. Petersen also asked the Respondent to inform the Department when it should expect his payment. See Department Exhibit 4.

In response, later that day, the Respondent emailed Ms. Petersen to inform her that he had sent his payment last week and he was worried that it may have been lost in the mail. At that time he asked her if the Department could accept “plastic payment.” Department Exhibit 5.

The next day on December 8, 2016, Ms. Petersen responded to the Respondent’s email, stating that there was a possibility that the mail was slower than usual because of the holiday season. As a result, the Department would wait until the next day, on 12/9/16, to see if his payment arrived. If not, the Department would contact him with further instructions as to his payment. See Department Exhibit 6.

Department Exhibit 7, 12/12/16 email to the Respondent

On Monday, December 12, 2016, Ms. Petersen sent an email to the Respondent informing him that his check had not arrived yet. In addition, the Department did not accept credit card payments. As a result, he would either have to submit his check in person or send another check in the mail as soon as possible. The Department’s mailing address was included in this email and Attorney Bleier also received a copy of this email.

Department Exhibits 9 & 11, 1/31/17 emails with the Respondent

Seven weeks later, on January 31, 2017, Attorney Bleier emailed and sent a letter to the Respondent. According to this correspondence, the Department had received a check from the Respondent in the amount of \$280 on January 30, 2017, from a checking account registered to Danielle R. Lihzis. However, the amount of the Respondent's total fine was \$250 and the Department could not provide the Respondent with a refund for his overpayment. As a result, the Department could not cash his \$280 check. At that time, Attorney Bleier informed the Respondent that even if the Department could accept the Respondent's payment, it would not withdraw its Order to Show Cause that was signed by the Commissioner on January 9, 2017, and scheduled for a hearing on March 23, 2017. In closing, Attorney Bleier informed the Respondent to update the Department with his current mailing address, as required by New Hampshire law, because it appeared that his mailing address was not accurate. Ms. Petersen received a copy of this correspondence. See Department Exhibit 9.

In response, the Respondent emailed Attorney Bleier on January 31, 2017. At that time he informed Attorney Bleier that he had been unable to update his mailing address while his application was pending. He also questioned why a hearing had been scheduled if he had paid his fine in full before his second payment was due. He stated that he didn't send things in the mail very often because he has issues with his local mail carrier; as a result, the Respondent stated that he often receives mail late or not at all. After he received Attorney Bleier's email informing him about his hearing for non-payment, he said that is when he realized the Department did not receive his earlier payment. He said he did not intend to avoid payment of his fine and he asked Attorney Bleier to reconsider the need for a hearing since the Department had received his payment. He also stated that his transmission in his vehicle failed in December so he had to share a vehicle with his girlfriend, which was a hardship with both of them working, along with heating oil costs and a new baby adding to their difficulties. In closing, he stated that neither he nor his girlfriend could afford to miss work as they were living paycheck to paycheck. See Department Exhibit 11.

**D. Checks Received by the Department from the Respondent,
Department Exhibits 8 & 10**

Department Exhibit 8

Department Exhibit 8 includes a copy of an envelope addressed to the Department that is postmarked January 27, 2017 from Manchester, New Hampshire. The envelope was stamped as received by the Department on January 30, 2017. The return address on the envelope is Dennis Allen, 95 Pigeon Drive, Farmington, New Hampshire 03835. Department Exhibit 8 also includes a copy of a Bank of America check, #103 for \$280, from an account ending in #7991. The check was dated 1/30/17; it was endorsed to the Treasurer State of NH; and it was drawn off an account of Danielle R. Lihzis of 95 Pigeon Drive in Farmington, New Hampshire. The check noted that it was for “Dennis Allen’s insurance penalty payment in full.” The postmark of the envelope for this check was dated January 27, 2017.

Department Exhibit 10

Department Exhibit 10 includes a copy of an envelope addressed to the Department that is postmarked in early February 2017 from Manchester, New Hampshire. The return address on the envelope is Dennis Allen, 95 Pigeon Drive, Farmington, New Hampshire 03835. Department Exhibit 10 also includes a copy of a Bank of America check, #107 for \$250 from an account ending in #7991. This check was dated 1/31/17; it was endorsed to the Treasurer State of NH; and it was drawn from an account of Danielle R. Lihzis of 95 Pigeon Drive in Farmington, New Hampshire. The check noted that it was for a penalty fee for Dennis Allen. The postmark of the envelope for this check was dated in the first week of February, 2017.

E. Summary of Testimony of Carolyn Petersen

Carolyn Petersen testified on behalf of the Department. She works as a paralegal for the Department in the Enforcement Division. One of her job responsibilities is the management of payments that are due under Consent Orders. To do so, she works with the Department’s business office so that proper credit is provided to individuals who have made payments according to the Department’s Consent Orders.

With regard to the Respondent, his first installment payment under his Consent Order was due on December 6, 2016. When the Department did not receive his payment on December 6, 2016, Ms. Petersen emailed the Respondent the next day to notify him that his payment was late. See Department Exhibit 4. In response, he sent her an email informing her that he had sent his payment and asked her whether he could make a payment by credit card. See Department Exhibit 5. She then went to Enforcement Counsel, Richard McCaffrey, to discuss her email exchange with the Respondent and to obtain direction from him as to how to proceed with the Respondent. After this discussion, the Department decided to extend the deadline for the Respondent's initial payment until December 9, 2016, to give the Respondent additional time. Ms. Petersen informed the Respondent of this new extension date by email at that time. See Department Exhibit 6. After Ms. Petersen did not receive a payment on December 9, 2016, Ms. Petersen checked with the Business Department to see if it had received the Respondent's payment. However, no payments by the Respondent had been received by that department. Ms. Petersen had another discussion with Attorney McCaffrey to obtain further direction about collecting the Respondent's payment. She was instructed to send the Respondent another email to inform him his check had not arrived and he would need to bring a check to the Department or send a check in the mail to the Department. Soon thereafter, Ms. Petersen sent an email to the Respondent informing him that the Department had not received his payment so he would need to send a check in the mail or personally bring a check to the Department. She also notified the Respondent that the Department did not accept credit cards at that time. See Department Exhibit 7. The Respondent did not respond to this email. She testified that she did not have any conversations with the Respondent about his payments at any time over the telephone or in person. Rather, the only communication she had with the Respondent was through emails, as reflected in Department Exhibits 4-7.

Subsequently, the Department received two checks as payment for the Respondent's fine. One, check #103, was dated on January 30, 2017, in the amount of \$280, see Department Exhibit 8, and another, check #107, dated January 31, 2017, in the amount of \$250, see Department Exhibit 10. Check #103 was received by the Department on January 30, 2017. Check #107 did not have a date stamp on it by the Department. The first check in the amount of \$280 could not be cashed because the Department could not refund the Respondent's overpayment of \$30. As a result, Attorney Bleier sent the Respondent an email and letter to inform him that the Department

had received a check for \$280 but the Department could not refund him for his overpayment. See Department Exhibit 9. The second check in the amount of \$250 was cashed. This second payment was paid before the Respondent's second installment deadline of March 6, 2017. However, no payments from the Respondent were received by the Department until the end of January 2017.

F. Summary of Testimony of the Respondent

After being sworn in, the Respondent stated that he had been licensed as a New Hampshire producer since 2011. However, he had not worked in that position for over two years. Referring to Department Exhibit 1, his producer license summary, he stated that within the past year he had submitted an application with the Department to acquire his life, accident, and health ("LAH") insurance license. After doing so, he realized that his mailing address was not accurate in the Department's database because the address listed was an Old Patriot Drive address, which was a prior employer's address. He contacted the Department about this and found out from an employee in the Department's Licensing Department that during the approval process for his LAH license application, he could not change his address in the Department's producer database. Instead, he learned that he would have to wait to change his address in the Department's system until after his LAH license was approved, which was sometime before September 7, 2016, when he signed the Consent Order with the Department. He states he should have updated his address with the Department after his LAH license approval but "too much was going on" so he forgot to do so. Instead, he updated his address with the Department on March 20, 2017, which was sometime after the Department asked him to do so in late January 2017. See Department Exhibit 9.

Referring to Department Exhibits 5 & 6, which were emails between him and Ms. Petersen in December, the Respondent stated that when Ms. Petersen emailed him to let him know his first \$125 payment under the Consent Order was overdue, he let her know that he had already sent his payment to the Department. In reference to Department Exhibit 6, the December 8, 2016 email from Ms. Petersen to him, he acknowledged that this email showed that the Department agreed to give him a few extra days in December to get his payment to the Department. He testified that during that time, he was looking for "other" ways to make his payment and he was not trying to avoid making that payment.

Between receiving an email from Ms. Petersen on December 8, 2016, Department Exhibit 6, and another email from Ms. Petersen on December 12, 2016, Department Exhibit 7, pertaining to his overdue payment, he states that he also called Ms. Petersen on the telephone. In that telephone conversation he told her that he sent her “another” check. After Ms. Petersen’s December 12, 2016 email to him, Department Exhibit 7, he states that he had another telephone conversation with Ms. Petersen. During that second telephone conversation, he told Ms. Petersen he would send out another check to the Department and he does not know why she did not receive his payment yet. He also stated that in December the transmission in his vehicle broke so he had to share one vehicle with his girlfriend for work and their young son so that situation was difficult for them.

Respondent stated that he did not realize until he received an email from the Department in January with the Show Cause Order, Department Exhibit 9, that the last check he sent after December 12 had not been received. He said he thought if the Department did not contact him, “no news was good news” so the Department must have received his check that he sent after his last telephone conversation with Ms. Petersen in December. After receiving the Show Cause Order in late January, he decided he would pay the whole amount of his fine, \$250, at once before the final deadline in March.

To explain what happened to the checks he sent to the Department in December, he stated that mail at his house is not reliable because his mailman is related to a family that once lived at his residence that does not get along with him. As a result, he stated that things in the mail tend to “get lost” and he does not use checks or mail that much. Referring to the checks the Department did receive in January, Department Exhibits 8 & 10, Respondent stated that “the checks that I did send out,” he had his girlfriend mail from another location in Dover.

When I asked the Respondent if he had a check register or any record of the checks he wrote to the Department, he said did not have one with him and he did not realize that he would need one for this proceeding. He also stated that he did not have a bank account of his own. Instead, checks written to the Department were from a checking account of his girlfriend, Danielle Lizhas. That account had checks that reflected their home address where they had resided for the past four years.

During cross-examination, the Respondent admitted that he read and signed the Consent Order, Department Exhibit 2, on September 6, 2016, and he was familiar with the terms of that

Consent Order, including how his installment payment plan worked. He was also aware that his license could be revoked if he did not follow the Consent Order. With regard to Department Exhibit 3, which was an email from Attorney Bleier to Respondent, he agreed that he received this communication that reflected that his first payment of \$125 was due to the Department by December 6, 2016, and his last payment of \$125 was due by March 6, 2017. He also acknowledged that he met with Attorney Bleier and Mr. Donald Belanger, Senior Enforcement Examiner, at the Department on October 24, 2016, to discuss the importance of following New Hampshire insurance laws and the consequences of not following those laws, including revocation of his license and administrative fines.

When questioned during cross-examination about his telephone conversations with Ms. Petersen in December 2016 from his cellphone, he stated he was not aware of any animosity between Ms. Petersen and him and he agreed that it did not make sense that she would forget those phone calls. He also stated that he did not have any telephone records to reflect their telephone conversations and that he generally clears his calls from his cellphone. Upon review by Attorney Bleier at the hearing, Respondent's cellphone had a record of calls since January 24, 2017, but none before that time.

When asked by the Department why he would call Ms. Petersen in December instead of communicating by email as they had done previously, he said he wanted to speak to Ms. Petersen by telephone to make sure she received his first installment payment, which he sent one a week prior to December 6 and again on December 12. When asked why he did not call the Department in January, he stated that after receiving the Department's Show Cause Order in January he did not call the Department. Instead, he sent a check to the Department for \$280. He said he thought things were "hostile" because of the Show Cause Order and Department's communications so he did not contact the Department by telephone. Once he learned that the Department could not cash his check for \$280 because he had overpaid, he emailed Attorney Bleier, Department Exhibit 11, to ask the Department to accept his \$280 payment in full.

When questioned by the Attorney Bleier about perjury and whether the Respondent would like to retract his statements pertaining to his testimony that he had two telephone calls with Ms. Petersen between December 7, 2016 and December 12, 2016, the Respondent had difficulty responding. Initially, he said he did not speak to Ms. Petersen on the telephone because he had no proof that he did. Directly thereafter, when I asked the Respondent whether

the December telephone calls with Ms. Petersen occurred, he said that because he could not show that the telephone calls occurred then he would have to say that they did not happen. However, when I asked him what was his specific recollection about these telephone calls, he stated that he “believed” that they did happen.

When questioned by the Department about checks he sent to the Department from his girlfriend’s checking account, the Respondent stated there should be carbon copies of checks at his house that were written to the Department. He testified that most of his household expenses were paid through automatic withdrawals from his girlfriend’s checking account or with a credit card. The checks that he used to pay the Department and his rent were randomly selected from different check packets because he does not write checks very often or in chronological order. Instead, he and his girlfriend have checkbooks lying around their house in the kitchen, office, and living room so they randomly rip out checks from various check packets whenever they need them. Recently, he opened his own checking account.

G. Documentary Evidence Submitted by the Respondent after the Hearing

During the hearing, Attorney Bleier asked the Respondent to produce carbon copies of all of the checks that had been written to the Department. After the hearing, according to the Respondent’s Motion to Reopen the Record, dated April 12, 2017, (but not received until April 18, 2017) and the Department’s Objection thereto, dated April 18, 2017, the Department renewed its request for carbon copies of checks from the Respondent. In addition, the Department asked the Respondent to produce (1) bank records from the checking account from which checks to the Department were written and (2) a record of the Respondent’s out-going telephone calls between November 2016 and January 2017. After producing carbon copies of checks and Bank of America statements from his girlfriend’s checking account to the Department, the Respondent, in his Motion to Reopen the Record, requested that I reopen the record for consideration of these late exhibits in this proceeding. The Department objected, stating that the record should not be reopened because these late submissions are either duplicative of other evidence or they are not relevant because they are not credible. For the reasons stated below, I will reopen the record to admit the bank statements and carbon copies of checks submitted by the Respondent after the hearing.

Notably, administrative hearings do not adhere to strict rules of evidence like court proceedings. See Appeal of McKenney, 120 N.H. 77, 80-81 (1980); New Hampshire Milk Dealers' Ass'n v. Milk Control Bd., 107 N.H. 335, 340 (1966). Rather, all evidence received in this proceeding must be relevant to the issues presented. See RSA 541-A:33,II; Ins. 203.01(d)(4). In addition, pursuant to Ins 204.20(a), upon a motion, I shall reopen the record to receive relevant, material and non-duplicative evidence, including exhibits not previously produced.

Overall, the Respondent's bank documents are relevant to the issue of whether the Respondent abided by the Consent Order in making his first installment payment to the Department and to the issue of whether the Respondent's actions surrounding his payments to the Department were trustworthy. In addition, these documents provide additional information about the relevant checking account and the Respondent's use of that account that was not provided at the hearing. Finally, these documents arose from the Department's requests for this information, which, presumably, the Department deemed relevant at the time of its requests. In light of the foregoing, I will reopen the record to admit the Respondent's late submissions with the Bank of America statements admitted as Respondent Exhibit 1 and the carbon copies of checks admitted as Respondent Exhibit 2. However, Respondent's request to include an April 5, 2017 email from him to the Department as part of the record is denied. This email is duplicative of his testimony at the hearing, and therefore, I will not include this email as an exhibit in the record.

As to the Department's argument that the Respondent is not credible, and therefore, his submission of carbon copies of checks (Respondent Exhibit 2) cannot be authenticated, that argument is misplaced. Here, to be admitted as part of the record, the documents presented must be relevant. See Ins. 203.01(d)(4); Ins 204.20(a). Moreover, authenticity, which is an evidentiary requirement pursuant to NH Rule Evid. 901(a) that does not apply to this proceeding, is satisfied if other evidence provides support that the matter in question is what its proponent claims and the bar for authenticity "is not particularly high." State v. Palermo, 129 A.3d 1020, 1025 (NH 2015); State v. Strangle, 166 N.H. 407, 409-410 (2014). However, once evidence has been admitted in court as authentic, it is up to the trier of fact to accept or reject the evidence in whole or part. See id. Similarly, in cases pertaining to the admission of evidence over objections as to reliability, an administrative agency or court can admit such evidence while at

the same time giving the proper weight to that evidence by rejecting any portion of that evidence that the fact finder does not find credible. See e.g., Appeal of McKenney, 120 N.H. at 81; Gagnon v. Pronovost, 97 N.H. 500, 503 (1952). In sum, on the record before me, I am capable of weighing the evidence presented, including the carbon copies of checks, and rejecting any evidence I do find not credible. As such, the Department's request for a hearing to cross-examine the Respondent about his banking documents, Respondent Exhibits 1 & 2, is denied.

Bank of America Statements, Respondent Exhibit 1

The Bank of America statements provided by the Respondent reflect two checking accounts in the name of the Respondent's girlfriend, Danielle Lihzis, with a home address of 95 Pigeon Drive, like the Respondent. The first account, ending in #7991, is an account with regular activity and the account in which checks to the Department were written or cashed, as reflected in Department Exhibits 8 & 10.

With regard to the account ending in #7991, as reflected in the January 28, 2017 to February 24, 2017 bank statement, check #107, dated January 31, 2017, was endorsed to the Treasurer State of NH in the amount of \$250 for "Dennis Allen Penalty." The only other checks cashed during that period were cashed in the middle of the month and at the end of the month, checks #106 and #110, for rent, each in the amount of \$800. As to other withdrawals, there were no withdrawals for \$125 or \$280 during that time. Deposits into this account were approximately \$8100 this month, which included a \$795 deposit on January 30, 2017.

As reflected in the December 29, 2016 to January 27, 2017 bank statement, only two checks were cashed during that period in the middle of the month and at the end of the month for rent, check #101 in the amount of \$800 and check #125 in the amount of \$750. As to other withdrawals, there were no withdrawals for \$125 or \$280 during that time. Deposits into this account were approximately \$3000 this month.

As reflected in the November 29, 2016 to December 28, 2016 bank statement, check #106, dated 12/18/16, was the only check cashed during that time for rent in the amount of \$700. As to other withdrawals, there were no withdrawals for \$125 or \$280 during that time. Deposits into this account were approximately \$2200 this month.

As reflected in the October 28, 2016 to November 28, 2016 bank statement, no checks were cashed from this account during that timeframe. As to other withdrawals, there were no

withdrawals for \$125 or \$280 during that time. Deposits into this account were approximately \$1800 this month.

Overall, the account ending in #7991, between October 28, 2016 and February 24, 2017, had a range of 66 withdrawals to 95 withdrawals per month with \$1200-\$3000 typically cycling in and out of the account on a monthly basis. However, in the last statement from January 28, 2017 to February 24, 2017, deposits into that account more than doubled to approximately \$8137 that month. Between October 28, 2016 and February 24, 2017 these statements do not reflect any stop payment fees for cancellation of any checks drawn from the account. The dates of checks cashed from this account and their corresponding check numbers reflect that checks were not written in chronological order.

The second account reflected in these statements, ending in #0845, is an active account. However, it does not have nearly the activity of the #7991 account. According to the statements, no checks were cashed from that account between October 28, 2016 and February 24, 2017 and that account typically had less than \$100 as an average daily balance. The statements for this account do not reflect any stop payment fees for cancellation of any checks drawn from the account.

Carbon Copies of Checks, Respondent Exhibit 2

No account numbers are provided on any of the carbon copies of checks. On each carbon there is a typed statement that names and account numbers are not provided for security purposes. On all of the carbons it is difficult to read any of the copied signatures because a black rectangular box obscures most, if not all, of those signatures.

As to the carbon copies provided, there is a carbon copy dated 12/1/16, identified as check #194, written to the Treasurer State of NH for \$150. At the bottom of that carbon copy "penalty fine payment" is written. The print on this carbon copy is dark and legible.

Another carbon copy provided, dated 12/12/16 and identified as check #195, is written to Treasurer State of NH for \$150. At the bottom of that carbon copy "penalty fee payment" is written. The print on this carbon copy is dark and legible.

Another carbon copy provided, dated 12/15/16 and identified as check #104, states that it is for rent in the amount of \$700. It is not endorsed to anyone. The print on this carbon copy is dark and legible.

Another carbon copy provided, dated 12/15/16 and identified as check #105, states that it is for rent in the amount of \$700. It is not possible to see who this copy is endorsed to. The print on this carbon copy is much lighter than the three previous carbon copies.

Another carbon copy provided, dated 1/30/17 and identified as check #103, is written to Treasurer State of NH for \$280. At the bottom of that carbon copy “Penalty Payment” is written. This copy is much lighter. It is still legible but it is more difficult to read.

Another carbon copy provided, dated 1/30/17 and identified as check #106, is written to Walter Pigeon for “rent & Dennis” in the amount of \$800. The print on this carbon copy is dark and legible.

Another carbon copy provided, dated 1/31/17 and identified as check #107, is written to Treasurer State of NH for \$250. At the bottom of that carbon copy “Dennis Allen Penalty Fee” is written. This carbon copy has dark, legible print.

Two other carbon copies are provided, a voided one identified as check # 102 to the Treasurer of NH, and another, identified as check #108, to Doreen Fog for rent in the amount of \$700. There is no date on the #102 carbon copy and the #108 carbon copy’s date is difficult to read.

H. Findings of Facts as to Disputed Testimony and Records

1. Whether the Respondent sent checks to the Department in December 2016

A key factual issue in this case is whether the Respondent sent checks to the Department in December 2016 for his first installment payment, as required by his Consent Order. Based on a totality of the evidence, as discussed below, I find that the Defendant did not send any payments to the Department in December 2016.

First, the Respondent’s own testimony as to the checks he sent to the Department in December was inconsistent. Initially, he testified that he sent a check to the Department a week prior to December 6, 2016; another check between December 7, 2016 and December 12, 2016 after he learned from Ms. Petersen that his payment did not arrive; and then a third check on or after December 12, 2016 after speaking with Ms. Petersen on December 12, 2016 about his missing payment. Later on, during cross-examination, he testified that he sent two payments to the Department in December for his first installment payment—one before December 6, 2016 and one after speaking to Ms. Petersen on December 12, 2016.

His explanation that his mailman lost his mail in December is also not persuasive, particularly given the circumstances that the mailman would have had to lose or destroy his payments to the Department at least two, if not three times, depending upon the two versions of events presented by the Respondent. Notably, in testifying about the checks that the Department received from him in January by mail, he stated “the checks that I did send out,” he had his girlfriend mail from another location in Dover. This statement implies that he did not send any other checks to the Department other than the ones received in January 2017 after his December deadline for his first installment payment.

Likewise, the Department did not receive any checks from the Respondent in December 2016, as reflected by Ms. Petersen’s testimony and the Department exhibits, for his first installment payment of \$125 that was due. The banking documents, Respondent Exhibits 1 & 2, provided by the Respondent after the hearing, also do not support his position that he sent multiple checks to the Department in December 2016 for his first installment payment.

For instance, with regard to the Bank of America statements, Respondent Exhibit 1, the only check cashed by the Department from the checking account that the Respondent used to make his payments, account ending in #7991, is check #107, dated 1/31/17, for \$250. Between the end of October 2016 and the end of January 2017, these statements do not reflect any checks cashed by someone else or any withdrawals in the amount of \$125, which was the amount due to the Department by that time. These bank statements also do not reflect any stop payment and/or cancellation fees for checks written that the Respondent would have wanted to cancel if he had sent checks that were lost or destroyed in the mail. The bank statements do, however, reflect that additional money was available to the Respondent’s household, specifically \$4000 more in deposits than in previous months between the end of January and the end of February 2017, including a deposit for \$795 on January 30, 2017. As a result, during that time period the Respondent would have had more resources to pay for his expenses than other months, including the first check that the Department received from the Respondent for \$280, Department Exhibit 8, which was dated 1/31/17, but had a postmark on its envelope of January 27, 2017.

As to the carbon copies of checks provided, Respondent Exhibit 2, these documents also do not support a finding that the Respondent sent checks to the Department in December 2016 to satisfy his first installment payment. Carbon copies of checks #194 & #195 were written to the Department, as Treasurer State of NH. However, no account number or address is provided on

the carbon copies to reflect what checking account the carbon copies come from. In addition, four checks that were provided as carbon copies, #194, #195, #104, & #105, were never cashed according to the Bank of America statements. See Respondent Exhibit 1; Respondent Exhibit 2. Moreover, the installment payments due under the Consent Order were \$125 each with one due on December 6, 2016 and another due by March 6, 2017. Yet, the carbon copies, checks #194 and #195, dated in December and endorsed to the NH State Treasurer for penalty payments were written for \$150 each. See Respondent Exhibit 2. The Respondent never testified that he mistakenly sent payments to the Department for \$150, instead of \$125, in December 2016 and there is no reason to explain why he would have done so on this record. In addition, given the Respondent's testimony that he and his girlfriend randomly use check numbers from this account to pay for expenses, it would be very easy for the Respondent to produce carbon copies of checks that were never sent or cashed.¹

Finally, based upon his testimony, his cross-examination of Ms. Petersen, and his correspondence with the Department, as reflected in the Department's exhibits, it has become apparent to me that the Defendant is under a mistaken belief that as long as he paid his fine in full before the last installment payment was due in March, then he could satisfy the Consent Order. In sum, based on my assessment of credibility and the totality of evidence, I find that the Respondent did not send any checks to the Department in December 2016 to satisfy his first installment payment due under the Consent Order.

2. Whether the Respondent spoke to Ms. Petersen by telephone in December 2016 to discuss his payments

Another factual issue in dispute is whether the Respondent communicated by telephone with Ms. Petersen in December 2016 to discuss his payments. This fact bears on the trustworthiness and credibility of the Respondent, which is relevant. Based on a totality of the evidence, including testimony of both witnesses and the Department's exhibits that reflect written correspondence with the Defendant, as discussed below, I find that the Defendant did not speak to Ms. Petersen on the telephone in December 2016 to discuss his payments.

¹ A more reliable piece of evidence to provide for my consideration to prove that specific checks were sent to the Department in December 2016 would have been a check register containing all checks written by him or his girlfriend during the relevant time period. However, no such register was produced during or after the hearing even though I asked the Respondent about this type of record during the hearing.

According to the Respondent, he spoke to Ms. Petersen two times in December 2016 on the telephone to discuss his first installment payment. Ms. Petersen, who was responsible for managing Consent Order payments to the Department, testified that she never spoke to the Respondent on the telephone. Rather, all of her communications with him were by email, as reflected in Department Exhibits 4-7, in their correspondence between December 7, 2016 and December 12, 2016. The Respondent admitted that there was no animosity between him and Ms. Petersen and it did not make sense that she would forget telephone calls between them. During the hearing and after the hearing, he also could not produce any telephone records to verify that he spoke to Ms. Petersen in December.

Finally, when questioned by the Department about whether he would like to retract his testimony that he had two telephone calls with Ms. Petersen between December 7, 2016 and December 12, 2016, the Respondent was evasive. In his initial response, he said he had no proof that these calls occurred so he would have to say that they did not. When I asked the Respondent about the December telephone calls with Ms. Petersen, he had a similar response, stating that because he could not show that the telephone calls occurred then he would have to say that they did not happen. However, when I asked him what was his specific recollection about these telephone calls, he stated that he “believed” that they did happen, which was his original testimony during his presentation of his case. Given his inconsistent answers, demeanor, and the totality of the evidence, including Ms. Petersen’s testimony, I find that these telephone calls with Ms. Petersen in December 2016 did not occur.

IV. Legal Analysis

A. Untrustworthy Allegation, RSA 402-J:12, I(h)

RSA 402-J:12, I(h) provides that “[t]he commissioner may place on probation, suspend, revoke, or refuse to issue or renew an insurance producer's license, or may levy a penalty in accordance with RSA 400-A:15, III or any combination of actions for any one or more of the following causes: . . . (h) using fraudulent, coercive, or dishonest practices, or demonstrating incompetence, untrustworthiness or financial irresponsibility in the conduct of business in this state or elsewhere.”

The Department’s exhibits, the Respondent’s exhibits, and the testimony of Ms. Petersen and the Respondent reflect that the Respondent was untrustworthy in his business dealings with

the Department relating to his installment payments under the Consent Order. The Consent Order was clear that an installment payment of \$125 was due on or before December 6, 2016, and the Respondent agreed to those terms when he signed the Consent Order. See Department Exhibit 2. His testimony reflects that he also understood the terms of the Consent Order and that he would have to pay half of his fine, \$125, by December 6, 2016. However, rather than pay his installment payment in December 2016, he informed the Department by email in early and mid-December that he had sent multiple checks to the Department when he had not. He also testified that he did not communicate with the Department in early or mid-January 2017 in any way to discuss his payments under the Consent Order. Rather, he did not make any payments to the Department until January 30, 2017, nearly three weeks after he received the present Show Cause Order from the Department for his failure to pay.

Although not determinative, it is also worth noting that by the Respondent's own testimony, he did not have his own checking account until after January 2017 and he has checkbooks lying around his house with checks used randomly for expenses. There is also no evidence presented that he or his girlfriend maintain any written record, other than bank statements, of the household expenses they draw from this account. It is absolutely imperative that the Respondent is competent to be fiscally responsible for his insurance clients' funds and that he is capable of managing those funds properly. Based on the record before me, I have serious concerns about the Respondent's ability to do that.

In sum, the record reflects untrustworthy and deceitful activities on the part of the Respondent in the conduct of business in violation of RSA 402-J:12, I(h). Although the Respondent did pay his fine of \$250, in full, before March 6, 2017, overall, he was not trustworthy in his business dealings with the Department surrounding his payments due under the Consent Order. As such, the Department has sustained its burden of going forward as to whether the Respondent's producer license should be revoked based upon a violation of RSA 402-J:12, I(h). Since the Respondent's testimony as to how his checks were lost was not credible and the totality of the evidence does not support his testimony, he has not met his burden of persuasion. See Ins. 204:05 (b). I propose that the Respondent's producer license be **REVOKED** for this violation. With regard to imposing a fine for this particular violation, the Department has requested the maximum penalty amount of \$2500. Given the foregoing facts

and nature of this violation, I propose that the Respondent's fine for violating RSA 402-J:12, I(h) should be **\$2500**.

B. Violation of Insurance Law Allegation, RSA 402-J:12, I(b)

RSA 402-J:12, I(b) provides that “[t]he commissioner may place on probation, suspend, revoke, or refuse to issue or renew an insurance producer's license, or may levy a penalty in accordance with RSA 400-A:15, III or any combination of actions for any one or more of the following causes: . . .(b) violating any insurance laws, or violating any rule, regulation, subpoena, or order of the commissioner or another state's insurance commissioner.”

The Consent Order, dated September 7, 2016, required the Respondent to pay a total fine of \$250. Instead of paying his fine in full at that time, the Consent Order provided that he could pay his fine in installment payments with the first installment payment of \$125 due by December 6, 2016, and the second installment payment of \$125 due by March 6, 2016. See Department Exhibit 2 at p.1. In paragraph two on the second page of the Consent Order it states that if the Respondent fails to meet any of the terms and conditions set forth “in the preceding Paragraphs B & C” the Department could institute proceedings to revoke his producer license. Although not perfect in its construction in light of the fact that the preceding paragraphs are not captioned by the letters “B & C,” anyone reading the Consent Order would understand that the terms preceding this compliance paragraph, such as the installment payment terms, were terms the Respondent had to comply with in order to avoid the Department from seeking revocation of his license. See Department Exhibit 2. The Respondent also admitted when cross-examined by the Department, that he understood that if he did not comply with the terms of the Consent Order, his license could be revoked and this was communicated to him multiple times by the Department.

However, rather than abide by the Consent Order and provide the Department with his first installment payment by December 6, 2016 or by December 9, 2016, in accordance with the Department's extension of the initial deadline, as discussed previously, he prolonged all payments to the Department until the end of January 2017, after receiving the Department's Show Cause Order in this case. Although his full payment of \$250 was submitted prior to the last installment deadline of March 6, 2017, his failure to make a payment in December, as discussed above, is still a violation of the Consent Order.

The Department has sustained its burden of going forward as to whether the Respondent's producer license should be revoked based upon a violation of RSA 402-J:12, I(b). The Respondent has not sustained his burden of persuasion to prove otherwise. See Ins. 204:05 (b). I find that the Respondent's violation of the Consent Order is a violation of RSA 402-J:12, I(b), and propose that the Respondent's producer license be **REVOKED** for this violation.

With regard to imposing a fine for this particular violation, the Department has requested the maximum penalty amount of \$2500. I am aware, given the Respondent's testimony and the record before me, that it is likely that the Respondent was experiencing financial strain in December 2016 and that played at least some role in his failure to pay his first installment payment. In addition, for reasons unknown, he was under a mistaken belief that he could rectify his situation by making a full payment of his fine to the Department before the second installment deadline of March 6, 2017. See e.g., Department Exhibit 11. However, rather than mislead the Department or avoid making his payment, he should have been upfront with the Department and tried to discuss any financial problems he was having in making his payment. Considering the foregoing, I propose that the Respondent's fine for violating RSA 402-J:12, I(b) should be **\$1500**.

V. **Conclusion**

Based on the foregoing, I propose that the Respondent's producer license should be permanently **REVOKED** as a result of each of his violations, as specified above. In addition, I propose that a total fine be levied in the sum of **\$4000**, as discussed herein, for the Respondent's insurance regulatory violations.

Date:

4/27/17

Heather Silverstein

Heather Silverstein, Hearing Officer