



THE STATE OF NEW HAMPSHIRE  
INSURANCE DEPARTMENT

21 SOUTH FRUIT STREET SUITE 14  
CONCORD, NEW HAMPSHIRE 03301

John Elias  
Commissioner

Alexander K. Feldvebel  
Deputy Commissioner

August 12, 2019

John Elias  
Commissioner  
New Hampshire Insurance Department  
21 South Fruit Street, Suite 14  
Concord, NH 03301

Re: Surplex Underwriters of New Hampshire, Inc.  
Docket No.: 19-008-EP

Dear Commissioner Elias,

Please find enclosed my Proposed Decision and Order in the above referenced matter in accordance with Ins 204.26 (a)(1).

Sincerely,

A handwritten signature in black ink, appearing to read "Michelle Heaton".

Michelle Heaton, Esq.

Enclosure

Copy to: Mary Bleier, Esq.  
Roy McCandless, Esq.

**THE STATE OF NEW HAMPSHIRE  
INSURANCE DEPARTMENT**

**In re: Surplex Underwriters of New Hampshire, Inc.**

**Docket No.: 19-008-EP**

**Appearance for Respondent:**

Roy McCandless, Esq.  
McCandless & Nicholson, P.L.L.C.  
PO Box 4137  
Concord, NH 03302

**Appearance for Department:**

Mary Bleier, Esq.  
Enforcement Counsel  
NH Insurance Department

**Hearing Officer:**

Michelle Heaton, Esq.  
Administrative Hearings Judge  
NH Insurance Department

**PROPOSED DECISION AND ORDER**

**I. Procedural History**

Surplex Underwriters of New Hampshire Inc. (hereinafter “Respondent”) in a licensed non-resident business entity. Respondent was first licensed in New Hampshire on June 15, 2001, and its current license expires on May 31, 2020. Respondent is licensed to sell Property & Casualty and Surplus Lines insurance products.

On June 5, 2019, the Insurance Department (hereinafter “Department”) issued an Order to Show Cause and Notice of Hearing (hereinafter “Notice of Hearing”) to Respondent in accordance with RSA 400-A:17, II (a). In the Notice of Hearing, the Department alleged that Respondent had routinely failed to submit monthly statements on time and had not filed any monthly statements for tax years 2018 and 2019 in violation of RSA 405:25. Respondent had

also failed to file its annual tax statement on time for tax years 2015, 2016, and 2018 in violation of RSA 405:29, I. The Department further alleged that Respondent had failed to pay the late payment penalty for tax year 2018 in violation of RSA 405:29, II. Finally, the Department alleged that Respondent had demonstrated incompetence, untrustworthiness, or financial irresponsibility in the conduct of business as evidenced by its repeated failure to comply with insurance regulations in violation of RSA 402-J:12(h). The Department sought revocation of Respondent's non-resident insurance business entity license and imposition of an administrative fine not to exceed \$2,500 per violation.

The parties participated in a hearing at the New Hampshire Insurance Department on July 17, 2019. At the hearing, the Department clarified that it was no longer seeking revocation of Respondent's license since Respondent had subsequently remitted payment for the outstanding late payment penalty. Norma Stallings, Tax Compliance Officer testified on behalf of the Department. Douglas Pratt, President and Denise Joy, Vice President appeared and testified on behalf of Respondent. The parties, without objection, submitted the following exhibits:

**Department's Exhibits:**

- Exhibit 1 – Notice
- Exhibit 2 – New Hampshire Licensing Summary
- Exhibit 3 – Surplex Filing History Spreadsheet
- Exhibit 4 – Email Communications between Norma Stallings and Denise Joy with Invoices
- Exhibit 5 – Apology from Denise Joy to Norma Stallings
- Exhibit 6 – Updated Surplex Filing History Spreadsheet

**Respondent's Exhibits:**

- Exhibit A – Emails, correspondence, and invoices from 2019
- Exhibit B – Emails and printouts from 2017
- Exhibit C – Emails and correspondence from 2016
- Exhibit D – Additional emails and correspondence from 2016

Respondent also submitted an Answer to the Order to Show Cause in which Respondent admitted to the underlying facts and provided further explanation of the circumstances that contributed to the lateness of the filings.

At the conclusion of the hearing, the record was held open for an additional seven days to allow either party to file supplemental documents, argument, or proposed findings. On July 24, 2019, Respondent filed Proposed Findings of Fact and Rulings of Law as well as two additional exhibits, Exhibit E – Advisory for RI dated January 25, 2016, and Exhibit F-Affidavit of Roy McCandless. To the extent such proposed findings of fact and rulings of law are consistent and addressed within this Order, they are granted. All others are denied. The record closed at the close of business on July 24, 2019.

## **II. Findings of Fact**

### Background

The Department's Tax Unit is responsible for collecting all premium taxes, auditing filed tax reports, and levying administrative assessments.<sup>1</sup> Surplus lines producers are required to file monthly statements with the Department on the 10<sup>th</sup> of each month providing detailed information regarding all insurance policies or contracts procured in the preceding month.<sup>2</sup> The filer has the option to pay the premium tax for that month at the time it submits the monthly statement, but is not required to do so.<sup>3</sup> The Tax Unit reviews monthly statements throughout the year to monitor for any irregularities.<sup>4</sup>

The annual statement is due January 31 and includes a report of all the gross premiums charged or placed during the preceding year ending on December 31.<sup>5</sup> The premium tax due is

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<sup>1</sup> Stallings Test.

<sup>2</sup> RSA 405:25

<sup>3</sup> Stallings Test.

<sup>4</sup> *Id.*

<sup>5</sup> RSA 405:29, I

calculated based on the data in the annual statement.<sup>6</sup> The annual statement contains less detailed information than the monthly statements.<sup>7</sup> After the close of the tax year, the Tax Unit reconciles the data collected from the monthly statements first with data in the annual statement, and then with data obtained from insurance companies.<sup>8</sup>

At all relevant times, the Department required monthly statements, annual statements, and tax payments be submitted using the Online Premium Tax for Insurance (hereinafter “OPTins”) website operated by the National Association of Insurance Commissioners.<sup>9</sup> The Department does not accept filings made outside of the OPTins system.<sup>10</sup> The Department can access documents in real time once submitted, but payments take a few days to process before the money arrives in the Department’s account.<sup>11</sup> The payment date is the date the filer submits the payment through OPTins.<sup>12</sup>

Surplex Underwriters, Inc. (hereinafter “SUI”) is a Maine corporation that has three branches: Westbrook, Maine (home office), Warwick, Rhode Island, and Bedford New Hampshire.<sup>13</sup> Respondent is a wholly owned subsidiary of SUI.<sup>14</sup> SUI will end 2019 at approximately \$7.5-8 million in premium volume.<sup>15</sup> Respondent will write about \$700,000 of premium in New Hampshire.<sup>16</sup> SUI writes surplus lines and standard admitted insurance in Maine, New Hampshire, Vermont, Rhode Island, Massachusetts, and Connecticut.<sup>17</sup>

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<sup>6</sup> *Id.*

<sup>7</sup> Stallings Test.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Resp’t Proposed Findings of Fact and Rulings of Law, p. 1.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 2.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

Doug Pratt is the President of SUI and Respondent.<sup>18</sup> Doug Pratt owns 95% of SUI, and Denise Joy owns 5%.<sup>19</sup> Ms. Joy is a nonresident New Hampshire insurance producer licensed to sell Property & Casualty and Surplus Lines insurance.<sup>20</sup> The Department first granted Ms. Joy a license on June 15, 2001, and her current license expires on July 31, 2020.<sup>21</sup> At all relevant times, Ms. Joy has been the Department's point of contact for all of Respondent's tax concerns, and she is listed on tax documents filed with the Department as the company's Vice President.<sup>22</sup>

#### Tax Years 2011 through 2014

Respondent filed all its monthly statements, annual statement, and tax payment late for tax year 2011.<sup>23</sup> As a result, Respondent was assessed a late payment penalty of \$3,113.44 for tax year 2011.<sup>24</sup> Respondent filed the first four monthly statements on time for tax year 2012.<sup>25</sup> However, Respondent did not file the remaining eight monthly statements, its annual statement, or tax payment for tax year 2012 until February 2013, which resulted in a penalty of \$3,309.26.<sup>26</sup> Respondent filed all the monthly statements late for tax year 2013.<sup>27</sup> However, Respondent filed its annual statement and tax payment on time.<sup>28</sup> For tax year 2014, the Department did not receive any of Respondent's monthly statements, the annual statement, or the tax payment until April of 2015.<sup>29</sup> Respondent was assessed a late penalty of \$3,112.84 for tax year 2014.<sup>30</sup>

#### Tax Year 2015

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<sup>18</sup> *Id.* at 1.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 2.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Ex. 6.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

Respondent did not file any monthly statements for tax year 2015 until March 14 and 15, 2016.<sup>31</sup> Monthly statements for January and February of tax year 2015 were more than one year late. Respondent filed the annual statement and tax payment for tax year 2015 on March 16, 2016, which resulted in a late payment penalty of \$3,061.06.<sup>32</sup>

Respondent explained that updates by OPTins and Respondent's computer vendor resulted in compatibility issues.<sup>33</sup> These compatibility issues required Ms. Joy to make manual corrections to entries.<sup>34</sup> Emails submitted by Respondent documenting the technical difficulties show that the OPTins helpdesk was not contacted until February 1, 2016, the day after the annual statement filing deadline.<sup>35</sup> The compatibility issue with OPTins related to the format of dates in the spreadsheet.<sup>36</sup> OPTins requires all dates be enter in an mm/dd/yyyy format and Respondent's spreadsheet listed dates in an m-d-yy format.<sup>37</sup> Additionally, a separate problem with Respondent's computer vendor led to the creation of incorrect reports.<sup>38</sup>

#### Tax Year 2016

Respondent did not submit the annual statement or pay the tax due for tax year 2016 until August 31, 2017.<sup>39</sup> The late filing resulted in the Department assessing a late payment penalty of \$2,245.13.<sup>40</sup> Emails show that Donna Arcand of the Department had contacted Ms. Joy repeatedly about Respondent's lack of filings for tax year 2016 and had threatened regulatory action.<sup>41</sup> Respondent again attributed the lateness of the filings to technical difficulties involving

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> Resp't Proposed Findings of Fact and Rulings of Law, p. 5.

<sup>34</sup> *Id.*

<sup>35</sup> Ex. C, p. 8.

<sup>36</sup> Ex. C, p. 11-13.

<sup>37</sup> *Id.*

<sup>38</sup> Ex. D, p. 1.

<sup>39</sup> Ex. 6; Ex. B, p. 12.

<sup>40</sup> Ex. 6.

<sup>41</sup> Ex. B, p. 6.

the compatibility of its system with OPTins.<sup>42</sup> Yet, the emails submitted by Respondent show that Ms. Joy did not contact the OPTins helpdesk until August 17, 2017.<sup>43</sup> The technical difficulties were due to Ms. Joy using an incorrect form and improperly formatting dates.<sup>44</sup>

After Ms. Joy submitted the annual statement on August 31, 2017, the OPTins helpdesk directed her to call in to have a representative walk her through the issues she was experiencing with the monthly statements.<sup>45</sup> On September 1, 2017, Ms. Arcand reminded Ms. Joy that she still needed to file the monthly statements for tax year 2016 as well as for tax year 2017.<sup>46</sup> Ms. Joy responded that she would be calling the helpdesk to assist her with correcting the errors.<sup>47</sup> On October 12, 2017, Ms. Arcand emailed Ms. Joy again remarking that the Department had not received any monthly statements yet and reminded her that the 2016 monthly statements needed to be filed by October 15 in order to avoid regulatory action.<sup>48</sup> Respondent filed the monthly statements for tax year 2016 on October 13 and 16, 2017.<sup>49</sup> As a result, Respondent's monthly statements for January through September were more than one year late.<sup>50</sup>

### Tax Year 2017

For tax year 2017, Respondent filed monthly statements for January through April in October 2017, just after filing the monthly statements for the prior tax year.<sup>51</sup> Respondent did not file the remaining monthly statements for May through December until the end of January

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<sup>42</sup> Resp't Proposed Findings of Fact and Rulings of Law, p. 5.

<sup>43</sup> Ex. B, p. 2.

<sup>44</sup> Ex. B, p. 3, 8, and 13.

<sup>45</sup> Ex. B, p. 13.

<sup>46</sup> Ex. B, p. 14.

<sup>47</sup> *Id.*

<sup>48</sup> Ex. B, p. 15-16.

<sup>49</sup> Ex. 6.

<sup>50</sup> Ex. 6.

<sup>51</sup> *Id.*



2018.<sup>52</sup> All of the monthly statements for tax year 2017 were late.<sup>53</sup> Respondent filed the annual statement and remitted payment for the tax owed for tax year 2017 on time.<sup>54</sup>

#### Tax Years 2018 and 2019

On February 5, 2019, the Department received Respondent's 2018 annual tax statement along with payment of the tax due for tax year 2018.<sup>55</sup> Ms. Joy had prepared the annual statement and attempted to upload it to the OPTins website along with the tax payment on January 31, 2019.<sup>56</sup> She had trouble submitting the information through the website, but thought it had gone through.<sup>57</sup> The next day Ms. Joy was in the office she realized the filing and payment had not gone through.<sup>58</sup> Ms. Joy resubmitted the annual statement and payment on February 5, 2019 knowing it was late.<sup>59</sup> She did not pay the late penalty at that time because the annual statement was already prepared and she was not sure how to amend the filing.<sup>60</sup> Ms. Joy was still working on completing the monthly statements for tax year 2018 when she submitted the annual statement.<sup>61</sup>

On February 14, 2019, the Department issued an invoice of \$1,668.68 for the late payment penalty assessed in accordance with RSA 405:29, II and requested the monthly statements for tax year 2018.<sup>62</sup> The invoice stated that payment must be received no later than February 28, 2019.<sup>63</sup> On or about February 14, 2019, Respondent suffered a ransomware

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> Joy Test.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> Joy Test.

<sup>62</sup> Ex. 4, p. 14 and 16.

<sup>63</sup> *Id.*

attack.<sup>64</sup> Respondent was able to recover most of its data, as it was backed-up on a server.<sup>65</sup> However, Ms. Joy's computer, where the monthly statements had been saved, had not been properly backed up and the data stored on her computer was lost.<sup>66</sup> Respondent was able to recover the underlying data for the monthly statements, but it was necessary to create new monthly statements.<sup>67</sup> Respondent resolved its computer issues on February 20, 2019.<sup>68</sup> Respondent failed to remit payment or submit any monthly statements by the February 28, 2019 deadline.<sup>69</sup>

On March 13, 2019, the Department issued a second notice for the late payment penalty.<sup>70</sup> The second notice contained a highlighted statement that the payment was past due and must be paid no later than March 29, 2019, in order to avoid regulatory action.<sup>71</sup> The second notice was sent in an email, which included the following statement, "Please advise of when you will be submitting the required monthly reporting."<sup>72</sup> After receiving the email containing the second notice, Ms. Joy responded directly apologizing for the lack of response.<sup>73</sup> She explained that the company had a major system crash and was working on restoring lost data.<sup>74</sup> She added that she would review the matter that week and get back to the Department.<sup>75</sup> Respondent again failed to remit payment for the penalty by the date provided and failed to submit any monthly statements for tax year 2018.<sup>76</sup>

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<sup>64</sup> Resp't Proposed Findings of Fact and Rulings of Law, p. 2.

<sup>65</sup> Pratt Test.

<sup>66</sup> Resp't Proposed Findings of Fact and Rulings of Law, p. 2-3.

<sup>67</sup> *Id.*

<sup>68</sup> Ex. A, p. 4.

<sup>69</sup> Ex. 6.

<sup>70</sup> Ex. 4, p. 14 and 17.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> Ex. 4, p. 13.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> Ex. 6.

On April 11, 2019, the Department issued a final notice for the outstanding late payment penalty.<sup>77</sup> The invoice included, in part, the following highlighted statement:

**IF PAYMENT IS NOT RECEIVED BY APRIL 26<sup>TH</sup>, 2019, IT WILL BE GIVEN TO THE DEPARTMENT'S ENFORCEMENT DIVISION FOR COLLECTION.**<sup>78</sup>

The Department sent the final notice by email and included the following message, "Good morning, I am following up on the status of the calendar year 2018 monthly filing[s] and outstanding final invoice."<sup>79</sup> The Department did not receive any monthly statements, payment of the outstanding penalty, or any communications from Respondent by the specified deadline.<sup>80</sup>

On June 5, 2019, the Department issued the Notice of Hearing in this matter.<sup>81</sup> The Department sent the Notice of Hearing to Respondent by certified mail and by email.<sup>82</sup> On June 6, 2019, Mr. Pratt emailed the Department apologizing for the non-payment and sent a check that day for the outstanding amount.<sup>83</sup> Mr. Pratt explained that Ms. Joy handled the tax filings and that she was on vacation.<sup>84</sup> He stated this was the first time he had heard of the late payment penalty.<sup>85</sup>

On June 10, 2019, Ms. Joy signed the certified mail receipt for the Notice of Hearing.<sup>86</sup> That day she filed monthly statements for months January through May for tax year 2019.<sup>87</sup> All of these filing were late except for the May statement.<sup>88</sup> On June 18, 2019, Ms. Joy filed monthly statements for January, February, March, April, and November for tax year 2018.<sup>89</sup> The

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<sup>77</sup> Ex. 4, p. 13 and 17.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> Stallings Test.

<sup>81</sup> Ex. 1, p. 1.

<sup>82</sup> Ex. 1; and Ex. A, p. 7.

<sup>83</sup> Ex. A, p. 7-9.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> Ex. 1, p. 4.

<sup>87</sup> Ex. 6.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

next day, Ms. Joy filed the rest of the outstanding monthly statements for tax year 2018 and paid again the late payment penalty.<sup>90</sup> All of the filings for tax year 2018 were late and five of the filings were more than one year late.<sup>91</sup>

On June 28, 2019, the Department received a letter from Ms. Joy apologizing for the “delay and disregard of your letters.”<sup>92</sup> Ms. Joy stated that there were extenuating circumstances that contributed to the delay and admitted that there was no excuse for her lack of response to the Department’s inquiries.<sup>93</sup> In the letter, Ms. Joy stated that she had not been aware that the monthly reports were due on the 10<sup>th</sup> until she received the Notice of Hearing from the Department.<sup>94</sup>

### **III. Rulings of Law and Legal Analysis**

As an insurance producer, Respondent is bound by the provisions of RSA 402-J.<sup>95</sup> RSA 402-J:12 allows the commissioner to impose a penalty against a producer for “violating any insurance laws, or violating any rule, regulation, subpoena, or order of the commissioner or of another state's insurance commissioner.”<sup>96</sup> Similarly, RSA 405:31 provides, “Any person who violates or fails to comply with any of the provisions of this subdivision shall be subject to a fine not more than \$2,500 or have any license suspended or revoked or shall both be fined and have any license suspended or revoked.”

#### Untimely Filings

RSA 405:25 requires monthly statements be submitted on the tenth of every month providing data for the preceding month. The undisputed evidence shows that over the last eight

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<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> Ex. 5.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> RSA 402-J:1

<sup>96</sup> RSA 402-J:12, I (b)

years Respondent routinely failed to file monthly statements on or before the tenth of each month in violation of RSA 405:25, and 402-J:12, I (b). Of the 54 monthly statements submitted by Respondent since tax year 2015, Respondent submitted 52 of the filings past the tenth of the month deadline and often several months after the deadline. Respondent submitted 16 of these monthly statements more than one year late. Respondent violated RSA 405:25 each time it failed to submit a monthly statement on time.

RSA 405:29, I requires licensed producers file with the commissioner a statement of the gross premiums charged for insurance procured in the preceding calendar year and pay a tax on the premiums no later than January 31 each year. Respondent failed to file an annual tax statement and remit payment of the tax due by the January 31 deadline for tax years 2015, 2016, and 2018 in violation of RSA 405:29, I, and 402-J:12, I (b). Respondent violated RSA 405:29, I each time it failed to submit an annual statement and pay the tax due on time.

RSA 405:29, II provides, "Any producer failing to file the report or failing to remit the proper tax within the time period for filing shall pay a penalty equal to 10 percent of the amount of tax due." Respondent was assessed a penalty for tax years 2015, 2016, and 2018. Respondent paid the 10% penalty for tax years 2015 and 2016 at the same time it remitted the tax due for those tax years. For tax year 2018, the Department issued three separate invoices ordering payment of the tax penalty by a specified date. Respondent failed to remit payment of the tax penalty before any of the deadlines set by the Department in violation of RSA 405:29, II, and 402-J:12, I (b). Respondent violated an order of the commissioner each of the three times it failed to remit payment by the specified deadline. Respondent did ultimately remit payment of the outstanding penalty in June 2019.

Respondent does not dispute that the required filings were late, but instead argues that there were extenuating circumstances that contributed to the lateness of the filings and these circumstances justify leniency by the Department. However, I do not find Respondent's arguments persuasive.

Respondent points to compatibility issues with the OPTins system to explain the delays in submitting the required filings for tax years 2015 and 2016. However, the evidence shows that Respondent had already missed all the required deadlines when it encountered technical difficulties. The emails submitted by Respondent show that the OPTins helpdesk was not contacted in either 2016 or 2017 until well after all the filing deadlines had past. Had Respondent attempted to submit the monthly statements on time, Respondent could have discovered and resolved any compatibility issues in a more timely manner.

Furthermore, the alleged incompatibility with the OPTins system amounts to Respondent inputting dates in the wrong format and using the incorrect form. The OPTins helpdesk pointed out to Ms. Joy the correct format for dates in 2016. Yet in 2017, Ms. Joy again entered the dates in the wrong format causing the OPTins system to reject the submissions. Respondent submitted an advisory from Rhode Island Division of Taxation dated January 25, 2016, which referenced "system compatibility issues" relating to the OPTins system. However, this document does not provide any further details about what the compatibility issues were or whether the OPTins system was responsible for the issues. Ms. Stallings testified that she was not aware of any systemic compatibility issues within the OPTins system. Based on the evidence presented, there is insufficient evidence to suggest that an error in the OPTins system contributed to the difficulties Respondent experienced when attempting to submit the required filings.

Respondent also explains that a recent ransomware attack contributed to the delay in submitting the monthly statements for tax year 2018. While I can appreciate the disruption a cyber-attack can cause, the attack occurred well after the deadlines for submitting the monthly statements. Again, had Respondent filed the monthly statements by the required deadlines, or even when the annual statement was submitted, the ransomware attack would have had no impact on Respondent's filings for the 2018 tax year. Additionally, the invoices submitted by Respondent documenting the cyber-attack show that the computer issues were resolved by February 20, 2019, eight days in advance of the deadline included in the first notice. Even if, for arguments sake, the cyber-attack could excuse Respondent's failure to meet the first deadline, it cannot excuse Respondent's continued failure to meet subsequent deadlines.

Respondent further argues in its pleadings that failure to submit the required filings on time does not constitute a violation because Respondent did not do so knowingly or willfully. However, neither RSA 405:31, 405:25, nor 405:29 include a requirement that a person must "knowingly" fail to meet a requirement in order to find a violation has occurred. Likewise, RSA 402-J:12, I (b) also does not include a required mental state in order to find a violation has occurred. Other statutes within Title XXXVII (Insurance), and even other sections of RSA 402-J:12, do require a mental state be proven in order to find a violation has occurred.<sup>97</sup> Therefore, it can be inferred that had the Legislature intended to require a "knowing" mental state be proven in order to find a violation has occurred with respect to RSA 405:25, 405:29, 405:31, or 402-J:12, I (b) it would have included such a requirement in the statutes.

Furthermore, even if a "knowing" mental state were required, it would not change the analysis in this matter. It is a well-established principle, and even Respondent points out, that

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<sup>97</sup> See RSA 402-J:12, I (e) and (l); and RSA 400-A:15.

“Ignorance of the law is no excuse.”<sup>98</sup> As such, a requirement that a person “know” refers only to knowledge of facts, and not knowledge of the law.<sup>99</sup> Here, Respondent argues that it did not knowingly violate the law because it did not know when the monthly statements were due. Since Respondent’s ignorance relates to the law and not to fact, it would not negate a knowing requirement, if such a requirement existed.

Incompetence, Untrustworthiness, and Financial Irresponsibility

Respondent’s repeated failure to comply with the requirements of RSA 405:25 and 405:29 demonstrates incompetence, untrustworthiness, and financial irresponsibility in the conduct of business in violation of RSA 402-J:12, I (h). Respondent has been licensed in New Hampshire since 2001, yet was admittedly unaware of the tax filing requirements until receiving the Notice of Hearing. Respondent has only filed eight of its 110 required filings on time since tax year 2011. Often times, Respondent submitted the required filings several months past the deadlines. Respondent made little, if any, efforts to ensure compliance with required deadlines until very recently and demonstrated a general lack of urgency in resolving issues brought to its attention by the Department. Taken together, this conduct demonstrates incompetence.

Respondent’s history over the last eight years shows that the Department cannot depend upon or trust Respondent to comply with requirements or address concerns brought to its attention. Over the years, Ms. Joy has shown a pattern of continually disregarding filing deadlines even after receiving repeated communications from the Department. More than once, Ms. Joy told the Department she would address an issue and failed to do so. Ms. Joy filed the 2016 tax year annual statement and tax payment seven months late and was unable to provide an adequate explanation as to the cause of the delay. During those seven months, the Department

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<sup>98</sup> State v. Stratton, 132 N.H. 451, 457.

<sup>99</sup> See RSA 626:3; State v. Riendeau, 160 N.H. 288, 297 (2010); and State v. W.J.T. Enterprises, 136 N.H. 490, 495.



repeatedly contacted Ms. Joy about the filings and received little or no response. The evidence shows that Ms. Joy did not attempt to submit the annual filings until the Department threatened regulatory action. Even after submitting the 2016 annual statement, Ms. Joy delayed another month and a half before submitting the monthly statements and did not submit any of the monthly statements until the Department again threatened regulatory action. Similarly, in 2019, the Department had to issue three notices and initiate regulatory action in order to collect the outstanding penalty and to get Respondent to submit the required monthly filings.

Over the last eight years, Respondent has been assessed a 10% penalty in six out of eight tax years. As a result, Respondent has paid over \$16,500 in penalties. It is evident that these penalties have done little to deter further noncompliance. Additionally, Respondent's President was not aware of the extent of the late filings or tax penalties until receiving the Notice of Hearing. Since becoming aware, Mr. Pratt, to his credit, has taken some remedial actions to address these concerns. Mr. Pratt immediately remitted payment of the outstanding tax penalty and has since stated he has taken over all tax filing duties. These are positive steps in the right direction. However, it is concerning that in a small family company these issues were able to go unnoticed for so long, especially considering the financial impact of the penalties. Management's ignorance of Respondent's tax situation along with its readiness to accept penalties rather than ensure compliance demonstrates financial irresponsibility.

#### **IV. Conclusion**

Based on the foregoing, I propose the following penalty:

Respondent is assessed an administrative fine in the amount of \$20,000 representing the following: \$250 for each of the three times Respondent failed to remit payment of the late penalty for tax year 2018 (total of \$750); \$500 for each of the 16 violations in which Respondent

was more than one year late in submitting a required filing since tax year 2015 (total of \$8,000); \$250 for each of the 39 times Respondent submitted a late filing within one year of when it was due since tax year 2015 (total of \$9,750); and \$1,500 for demonstrating incompetence, untrustworthiness, and financial irresponsibility. Given Respondent's acceptance of responsibility and the efforts it plans to take to correct the deficiencies, a portion of the fine shall be suspended. Of the \$20,000 assessed, \$8,500 shall be suspended and thus need not be paid on the condition that Respondent submits all required filings on time for the next five years. If Respondent files any required filing after the applicable deadline, the Department may petition the Commissioner to impose the suspended portion of the fine in addition to assessing fines for any new violations. The \$1,668.68 Respondent overpaid for the 2018 tax penalty shall be applied towards payment of the administrative fine.

Date: 8/12/19

  
Michelle Heaton, Hearing Officer