

NORTH CAROLINA DEPARTMENT OF INSURANCE
RALEIGH, NORTH CAROLINA

STATE OF NORTH CAROLINA
COUNTY OF WAKE

BEFORE THE
COMMISSIONER OF INSURANCE

IN THE MATTER OF:

THE LICENSURES OF
NAPOLEON REED and REED
and REED INSURANCE
AGENCY, INC.

Respondents.

ORDER AND
FINAL AGENCY DECISION
Docket Number: 1812

THIS MATTER was heard on February 23, 2017 by the undersigned Hearing Officer, designated by the North Carolina Commissioner of Insurance ("Commissioner") under N.C. Gen. Stat. § 58-2-55, pursuant to a Notice of Hearing that was duly issued and served.

Respondent Napoleon Reed, on his own behalf and on behalf of Respondent Reed and Reed Insurance Agency, Inc. ("Agency" and, together with Mr. Reed, "Respondents"), was present and testified at the hearing and was represented by attorney Joy Rhyne Webb.

The Agent Services Division ("ASD") of the North Carolina Department of Insurance ("NCDOI") was present at the hearing and was represented by Terence D. Friedman, Assistant Attorney General. NCDOI employees Sherri Bumgarner and Teresa Knowles testified at the hearing.

ASD offered into evidence Petitioner's Exhibits 1 through 32, which were admitted into evidence.

Respondents offered into evidence Respondents' Exhibits 1 through 16, which were admitted into evidence.

BASED UPON careful consideration of the evidence and arguments presented, and based upon the entire record in this proceeding, the Hearing Officer hereby makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. NCDOI is a state agency responsible, in accordance with Chapter 58 of the North Carolina General Statutes, for enforcement of the insurance laws of North Carolina and for regulating and licensing insurance agents.

2. Napoleon Reed is a citizen and resident of New Bern, Craven County, North Carolina.

3. Mr. Reed holds active licenses with NCDOI as an insurance producer and broker with lines of authority for Life, Accident and Health or Sickness, Casualty and Property Lines and Medicare Supplement/Long Term Care. Mr. Reed also has a North Carolina resident broker's license.

4. Reed and Reed Insurance Agency, Inc. ("Agency") has a business entity license with NCDOI to sell, solicit, or negotiate insurance.

5. The Agency is owned by Mr. Reed and located in New Bern, North Carolina. Mr. Reed controls the operations and operating procedures of the Agency.

6. At all relevant times, Mr. Reed has been designated pursuant to N.C. Gen. Stat. § 58-33-31(b)(2) as the licensed insurance producer responsible for the Agency's compliance with the North Carolina insurance laws, administrative rules, and orders of the Commissioner.

7. At the time of the hearing, Mr. Reed was the only licensed insurance producer working for the Agency, and had been the only licensed insurance producer working there since approximately November 2015.

8. At all relevant times, Mr. Reed maintained a BB&T checking account ending in 8451 ("Primary Account") for the Agency.

9. From at least 2012, Mr. Reed deposited into the Primary Account premiums paid by his clients for insurance policies Mr. Reed had sold. In turn, either the insurance companies for which Mr. Reed had sold the policies made automatic withdrawals of these premium payments from the Primary Account, or Mr. Reed wrote checks from the Primary Account to the companies for such payments. Both insurance companies' automatic withdrawals of premium payments from the Primary Account and Mr. Reed's checks from the Primary Account to such companies for premium payments are referred to herein as "premium withdrawals." Additionally, Mr. Reed used the Primary Account to pay for business expenses and to write checks to himself.

10. In August 2012, ASD conducted an examination of Respondents'

operations between August 2010 and July 2012 ("2012 Exam"). Following the examination, ASD concluded that Respondents (a) had failed to issue premium payment receipts which contained the information required by 11 NCAC 04 .0121; (b) had commingled funds in violation of 11 NCAC 04 .0429 by incurring overdrafts in the Primary Account; and, (c) that the overdrafts in the Primary Account violated N.C. Gen. Stat. §§ 58-33-46(a)(4) and (a)(8), in that collected funds due to insurers and return premiums due to policyholders were not always available.

11. With regard to the premium payment receipts, during the 2012 Exam ASD collected a sampling of premium receipts from the Agency. One of those receipts did not contain any signature by the person accepting payment, and another of those receipts contained only the signature "N. Reed." NCDOI employee Ms. Bumgarner testified that, after finishing the 2012 Exam, she and her colleague, NCDOI employee Kermit Nixon, explained to Mr. Reed that complete signatures were required on premium payment receipts, and that "N. Reed" was not sufficient. Mr. Reed did not dispute Ms. Bumgarner's testimony that she explained ASD's position to him on this point.

12. Mr. Reed testified at the hearing that he did not dispute ASD's conclusions in the 2012 Exam. ASD requested that Mr. Reed submit a voluntary corrective plan to address the conclusions in the 2012 Exam and contact it with any questions he had. Mr. Reed acknowledged that he never did so.

13. In February 2013, ASD conducted a compliance check of Respondents' operations from October 2012 forward ("2013 Compliance Check"). Following the compliance check, ASD concluded that Respondents (a) had commingled funds in violation of 11 NCAC 04 .0429 by incurring overdrafts in the Primary Account; and, (b) that the overdrafts in the Primary Account violated N.C. Gen. Stat. §§ 58-33-46(a)(4) and (a)(8), in that collected funds due to insurers and return premiums due to policyholders were not always available. ASD recommended that Respondents establish a premium-only account.

14. Mr. Reed testified at the hearing that he did not dispute ASD's conclusions in the 2013 Compliance Check. ASD requested that Mr. Reed submit a voluntary corrective plan to address the conclusions in the 2013 Compliance Check and contact it with any questions he had. Mr. Reed acknowledged that he never did so.

15. In May 2014, ASD conducted a compliance check of Respondents' operations from June 2013 forward ("2014 Compliance Check"). Following the compliance check, ASD concluded that Respondents (a) had commingled funds in violation of 11 NCAC 04 .0429 by incurring overdrafts in the Primary Account; and, (b) that the overdrafts in the Primary Account violated N.C. Gen. Stat. §§ 58-33-46(a)(4) and (a)(8), in that collected funds due to insurers and return premiums due

to policyholders were not always available.

16. Mr. Reed testified at the hearing that he did not dispute ASD's conclusions in the 2014 Compliance Check.

17. Ms. Bumgarner testified that, in orally summarizing the 2012 Exam and the 2013 and 2014 Compliance Checks to Mr. Reed, she and her colleague, Mr. Nixon, recommended to Mr. Reed that in order to avoid future violations of 11 NCAC 04 .0429, Mr. Reed should establish a "premium-only" banking account into which he only deposited premiums and from which only premium payments to insurance companies were withdrawn. Mr. Reed acknowledged at the hearing that Ms. Bumgarner had recommended he establish a "premium-only" account.

18. Effective January 13, 2015, Respondents and the NCDOI entered a Voluntary Settlement Agreement (hereinafter referred to as "VSA"), which referenced the 2012 Exam, the 2013 Compliance Check and the 2014 Compliance Check, and resolved all matters referenced in the VSA.

19. In the VSA, Mr. Reed agreed to the following:

- a. To comply with all provisions of Chapter 58 of the North Carolina General Statutes and Title 11 of the North Carolina Administrative Code that are applicable to him or the Agency.
- b. To pay a civil penalty of five hundred dollars (\$500.00) to NCDOI.
- c. To maintain separate premium and operating accounts for the Agency, and to have such separate premium and operating accounts in place no later than December 31, 2014.
- d. To maintain, at all times, a monetary cushion in any and all premium accounts in an amount to ensure compliance with 11 NCAC 04 .0429, and that such amount must be sufficient to avoid any overdrafts.
- e. To demonstrate, at all times, that collected funds due to insurers and return premiums due to policyholders are always available, as required by 11 NCAC 04 .0429.

20. Petitioner and Respondents agreed in the VSA that it would have the full force and effect of an Order of the Commissioner of Insurance. Further, Petitioner and Respondents agreed that pursuant to N.C. Gen. Stat. § 58-33-46(a)(2), Respondents' licenses may be revoked for violating an Order of the Commissioner of Insurance.

21. In January 2016, ASD conducted a compliance check of the Agency's operations from January 2015 forward ("2016 Compliance Check").

22. In the course of the 2016 Compliance Check, ASD collected a sampling of premium receipts from the Agency. Eight of those receipts did not contain printed or stamped names and addresses for either Mr. Reed or the Agency. Three of those receipts did not state the name of the relevant insurer.

23. As of the period covered by the 2016 Compliance Check, Mr. Reed created a new, second BB&T checking account ending in 7687 ("Overdraft Account") for the Agency.

24. Mr. Reed testified that he set up the new Overdraft Account so that if the account balance in the Primary Account ever became a negative number, funds would automatically be transferred from the Overdraft Account to the Primary Account.

25. After establishing the Overdraft Account, Mr. Reed continued to deposit premium payments into the Primary Account. Premium withdrawals from the Primary Account continued to occur. Additionally, Mr. Reed continued to write checks to himself from the Primary Account. Mr. Reed testified that some of these checks represented commissions he had earned.

26. During the period covered by the 2016 Compliance Check, Mr. Reed arranged for \$100.00 to be automatically withdrawn every month from the Primary Account and deposited into the Overdraft Account. Mr. Reed also arranged with BB&T that, whenever the balance in the Primary Account fell to zero, it would trigger an automatic withdrawal from the Overdraft Account.

27. The 2016 Compliance Check revealed that, between January 2015 and January 2016, the balance in the Primary Account fell to zero on three dates when there were premium withdrawals. On these three occasions, the Primary Account overdrafts were satisfied by automatically withdrawing funds from the Overdraft Account.

28. The 2016 Compliance Check also revealed that, between January 2015 and January 2016, BB&T charged Insufficient Funds (NSF) fees to the Primary Account on three separate dates when there were premium withdrawals. BB&T charged multiple NSF fees to the Primary Account on each of these three days. The NSF fees in this period totaled \$216.00. Again, the records for the Primary Account indicated that, whenever Mr. Reed incurred NSF fees, BB&T ultimately advanced any shortfall in the Primary Account to Mr. Reed and paid the insurance companies.

29. Ms. Bumgarner testified as to her deduction that the reason BB&T charged NSF fees to the Primary Account on these three days was because there had not been sufficient funds in the Overdraft Account to satisfy the premium withdrawals from the Primary Account.

30. Following the 2016 Compliance Check, ASD concluded and advised Mr. Reed and the Agency that, among other things, it appeared the Respondents: (a) had failed to issue premium payment receipts which contained the information required by 11 NCAC 04 .0121; (b) had commingled funds in violation of 11 NCAC 04 .0429 by incurring overdrafts in the Primary Account on both the three dates when there were zero balances but no NSF fees and the three dates when NSF fees were charged; and (c) that the overdrafts in the Primary Account violated N.C. Gen. Stat. §§ 58-33-46(a)(4) and (a)(8), in that collected funds due to insurers and return premiums due to policyholders were not always available.

31. Contrarily, Mr. Reed testified that he believed as long as funds were transferred from the Overdraft Account to the Primary Account when the funds became too low in the Primary Account, then this would not be a violation of 11 NCAC 04 .0429 or N.C. Gen. Stat. §§ 58-33-46(a)(4) and (a)(8), because no premium payments or refunds were ever disallowed.

CONCLUSIONS OF LAW

1. This matter is properly before the Commissioner, and he has jurisdiction over the parties and the subject matter pursuant to N.C. Gen. Stat. §§ 58-2-50, 58-33-46, 150B-38 and 150B-40, and other applicable statutes and regulations.

2. Respondents were properly served with the Notice of Administrative Hearing in this matter.

3. N.C. Gen. Stat. § 58-33-46, entitled "Suspension, probation, revocation, or nonrenewal of licenses," provides in pertinent part:

(a) The Commissioner may place on probation, suspend, revoke, or refuse to renew any license issued under this Article, in accordance with the provisions of Article 3A of Chapter 150B of the General Statutes, for any one or more of the following causes:

...

(2) Violating any insurance law of this or any other state, violating any administrative rule, subpoena, or order of the commissioner or of another state's

insurance regulator, or violating any rule of the
FINRA.

...

- (4) Improperly withholding, misappropriating, or converting any monies or properties received in the course of doing insurance business.

...

- (8) Using fraudulent, coercive, or dishonest practices, or demonstrating incompetence, untrustworthiness, or financial irresponsibility in the conduct of business in this State or elsewhere.

- 4. 11 NCAC 04 .0121, entitled "Premium Payment Receipts," provides:

All premium payment receipts and copies issued by an agent, broker, or limited representative, shall be dated and contain the printed or stamped name and address of the agency or agent, broker, or limited representative, and the name of the insurer. Receipts shall be signed by the person accepting the payment.

- 5. The premium receipts that ASD collected from the Agency in the 2016 Compliance Check do not comply with 11 NCAC 04 .0121 in that: (a) eight of the receipts do not contain printed or stamped names and addresses of either Mr. Reed or the Agency; (b) three of the receipts do not state the name of the relevant insurer; and (c) six of the receipts do not contain a complete signature.

- 6. At the hearing, Mr. Reed disputed whether 11 NCAC 04 .0121 requires a complete signature, as opposed to a signature such as "N. Reed." However, given the fact that Ms. Bumgarner testified that, after finishing the 2012 Exam, she and her colleague, NCDOI employee Kermit Nixon, explained to Mr. Reed that complete signatures were required on premium payment receipts, and Mr. Reed did not deny this testimony, the Hearing Officer finds Mr. Reed's explanation unpersuasive.

- 7. Respondents' violation of 11 NCAC 04 .0121 constitutes a violation of "any insurance law" or "any administrative rule" of this state, in accordance with N.C. Gen. Stat. § 58-33-46(a)(2).

- 8. 11 NCAC 04 .0429, entitled "Commingling," provides:

The accounting records maintained by agents, brokers, and limited representatives shall be separate and apart from any other business

records and demonstrate at all times that collected funds due to insurers and return premiums due to policyholders are available at all times.

9. The records for the Primary Account establish that, between January 2015 and January 2016, the balance in the Primary Account dropped to zero on three occasions when there were premium withdrawals, and BB&T charged NSF fees to the Primary Account on another three occasions when there were premium withdrawals. These six instances of overdrafts violated 11 NCAC 04 .0429.

10. Mr. Reed argued at the hearing that these six instances did not violate 11 NCAC 04 .0429 because either (a) there were sufficient funds in the Overdraft Account to cover the three days when there were zero balances in the Primary Account but no NSF fees, or (b) on the three occasions NSF fees were charged, BB&T advanced Mr. Reed and the Agency money to cover the premium withdrawals from the Primary Account so that the insurance companies were ultimately paid. This argument is unavailing.

11. Mr. Reed testified that he did not dispute ASD's conclusions in the 2012 Exam and 2013 Compliance Check, which included the conclusions that merely incurring the relevant NSF fees in the Primary Account on days there were premium withdrawals violated 11 NCAC 04 .0429.

12. More importantly, under the plain meaning of 11 NCAC 04 .0429, when a financial institution is required to advance its own funds, or transfer funds from another "overdraft" account, in order to cover a debit to an account, it is abundantly clear that monies were not available "at all times" for the reasons expressed in 11 NCAC 04 .0429.

13. Respondents' violation of 11 NCAC 04 .0121 constitutes:

- a. a violation of "any insurance law" or "any administrative rule" of this state, in violation of N.C. Gen. Stat. § 58-33-46(a)(2);
- b. "[i]mproperly withholding, misappropriating, or converting any monies or properties received in the course of doing insurance business," in violation of N.C. Gen. Stat. § 58-33-46(a)(4); and,
- c. "incompetence . . . or financial irresponsibility in the conduct of business in this State," in violation of N.C. Gen. Stat. § 58-33-46(a)(8).

14. However, Respondents' actions do not constitute "fraudulent, coercive, or dishonest practices, or demonstrating . . . untrustworthiness," in accordance with N.C. Gen. Stat. § 58-33-46(a)(8).

15. In addition to the violations of 11 NCAC 04 .0121 and 11 NCAC 04 .0429 described above, the 2016 Compliance Check also demonstrates that Mr. Reed violated the VSA. As an initial matter, the violations of 11 NCAC 04 .0121 and 11 NCAC 04 .0429 breached Mr. Reed's agreement in the VSA to "comply with all provisions of Chapter 58 of the North Carolina General Statutes and Title 11 of the North Carolina Administrative Code that are applicable to him or his agency."

16. Next, Mr. Reed's violations of 11 NCAC 04 .0429 described above breached the requirement of the VSA that Mr. Reed would "maintain separate premium and operating accounts for his agency" and have such accounts "in place no later than December 31, 2014." As Ms. Bumgarner testified, 11 NCAC 04 .0429 by its terms does not prohibit a so-called "combined account" into which an insurance producer or business entity may deposit premium payments, from which insurance companies may withdraw premium payments and from which the producer or business entity may pay business expenses or commissions. Nonetheless, in the VSA – an Order of the Commissioner – Mr. Reed consented to more stringent requirements than those in 11 NCAC 04 .0429.

17. Finally, Respondents' violations of 11 NCAC 04 .0429 described above breached the VSA's requirement that he be able to "demonstrate at all times that collected funds due to insurers and return premiums due to policyholders are available at all times, as required by 11 NCAC 04 .0429."

18. Respondents' violation of the VSA constitutes a violation of an "order of the Commissioner," in accordance with N.C. Gen. Stat. § 58-33-46(a)(2).

19. While Respondents' violations of the insurance laws and administrative rules pursuant to the 2016 Compliance Check may not have risen to the level of revocation by themselves, given that the 2012 Exam, the 2013 Compliance Check and the 2014 Compliance Check all produced similar violations of the insurance laws and administrative rules, and that Respondents previously entered into a VSA in which they agreed to not commit such violations in the future, the Hearing Officer finds there is no other choice but to revoke Respondents' licenses.

20. The Hearing Officer finds that Mr. Reed's producer and broker licenses and the business entity license of the Agency that Mr. Reed controls should be revoked under § 58-33-46(a)(2) due to the violations described above of the regulations 11 NCAC 04 .0121 and 11 NCAC 04 .0429 and of the Commissioner's Order in the form of the VSA.

21. Additionally, and in the alternative, the Hearing Officer finds that Mr. Reed's producer and broker licenses and the business entity license of the Agency should be revoked under N.C. Gen. Stat. § 58-33-46(a)(4) because the overdrafts described above in violation of 11 NCAC 04 .0429 constitute the improper withholding

or misappropriating of monies received in the course of doing insurance business.

22. Additionally, and in the alternative, the Hearing Officer finds that Mr. Reed's producer and broker licenses and the business entity license of the Agency should be revoked under N.C. Gen. Stat. § 58-33-46(a)(8) because the violations described above of 11 NCAC 04 .0121 and 11 NCAC 04 .0429 and of the VSA demonstrate incompetence or financial irresponsibility in the conduct of business in this State.

ORDER


Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Mr. Reed's licenses as a resident insurance producer and resident broker and the Agency's business entity license be revoked.

APPEAL RIGHTS

This is a Final Agency Decision issued under the authority of N.C. Gen. Stat. § 150B, Article 3A.

Under the provisions of N.C. Gen. Stat. § 150B-45, any party wishing to appeal a final decision of the North Carolina Department of Insurance must file a Petition for Judicial Review in the Superior Court of the County where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. The appealing party must file the petition within 30 days after being served with a written copy of the Order and Final Agency Decision. In conformity with the 11 NCAC 01 .0413 and N.C.G.S. § 1A-1, Rule 5, this Order and Final Agency Decision was served on the parties on the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Order and Final Agency Decision. N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. The mailing address to be used for service on the Department of Insurance is: A. John Hoomani, General Counsel, 1201 Mail Service Center, Raleigh, NC 27699-1201.

This the 22nd day of March 2017.


A. John Hoomani, Hearing Officer
N.C. Department of Insurance


CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served a copy of the foregoing ORDER AND FINAL AGENCY DECISION by mailing a copy of the same via certified U.S. Mail, return receipt requested, in a first-class postage prepaid envelope, and via State Courier, addressed as follows:

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This the 22nd day of March, 2017.



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