

represented by Diana C. Carter of Brydon, Swearingen, & England, P.C. The Director was represented by Tamara A. Kopp.

Findings of Fact

1. Holden was licensed as a title insurance agent on September 6, 1990. On January 1, 2003, Holden's license was converted to a title insurance producer license. His producer's license was cancelled at his request on August 11, 2008.

2. Holden is employed at Entitle Insurance Company ("Entitle"). He started in December 2009 as an independent consultant. On June 15, 2010, he was hired as an in-office consultant and became a full-time salaried employee on January 31, 2011.

3. Before working at Entitle, Holden worked as an independent business consultant to title agents across the United States.

4. Before becoming an independent business consultant, Holden worked at Dakota Homestead for 13 months.

5. Prior to working at Dakota, Holden worked at LandChoice Company, L.L.C. ("LandChoice").

6. LandChoice absorbed Guaranty Land Title Insurance, Inc. ("Guaranty"), in 2005.

7. Holden was the president of Guaranty from 1999 through 2008.

8. Holden applied for an individual insurance producer's license in the state of Missouri on May 4, 2009.

9. His application sat without determination for 13 months.

10. Holden gave an affirmative response to a question that asked, "Are you currently a party to, or have you ever been found liable in, any lawsuit or arbitration proceeding involving allegations of fraud, misappropriation or conversion of funds, misrepresentation or breach of fiduciary duty?"

11. The question instructs an applicant answering “yes” to attach the following documents:
 - a. a written statement summarizing the details of each incident,
 - b. a certified copy of the Petition, Complaint or other document that commenced the lawsuit or arbitration, and
 - c. a certified copy of the official document that demonstrates the resolution of the charges or any final judgment.

12. Holden did not attach a copy of the Petition or Complaint, but stated, in his written summary of the lawsuit, that the Department already had a copy of the case in the Consumer Affairs Department.

13. Holden’s application was sent to the special investigations unit.

14. The Department usually acts on an application in seven to ten working days.

15. A question on the application asks the applicant to account for all employment history during the last five years.

16. The application did not ask Holden to name “Doing Business As” names for the companies he had worked for during the last 5 years.

17. A question on the application asks the applicant, “Have you or any business in which you are or were an owner, partner, officer, or director, or member or manager of limited liability company ever been involved in an administrative proceeding regarding any professional or occupational license, or registration?”

18. On the application, “involved in” is defined as “having a license censured, suspended, revoked, canceled, terminated; or being assessed a fine, a cease and desist order, a

prohibition order, a compliance order, placed on probation or surrendering a license to resolve an administrative action.”

19. Holden has not been subject to discipline.

20. Holden signed three voluntary forfeiture agreements (“VFAs”) on behalf of Guaranty before that entity was absorbed by LandChoice.

21. A VFA is an administrative consent order issued by the Director in the public interest as a complete or partial settlement of any investigation, examination, or other proceeding.

22. VFAs are reported to the National Association of Insurance Commissioners (“NAIC”) and entered into the Regulatory Information Retrieval Service (“RIRS”), a nationwide database that tracks information about insurance producers.

23. If the Department found a VFA while reviewing a license application, it could investigate the agreement to determine whether the applicant should be licensed.

24. The Department considers VFAs to be administrative proceedings that must be included in any response to question 2 on the application, which asks whether the applicant has been involved in any administrative proceeding regarding any professional or occupational license or registration.

25. Holden’s former employer, Guaranty, paid \$1,950 to the Missouri School Fund for the first VFA, and Holden signed on Guaranty’s behalf.

26. Guaranty paid \$75 to the Missouri School Fund for a second VFA, and Holden signed on the signature line.

27. Holden signed a third VFA between the Department and Guaranty, which related to an employee's unlicensed activities. That agreement required a \$100 payment to the Missouri School Fund.

28. Determining insurability in the context of title insurance is a process in which documents and other information relevant to the ownership of land are examined to determine what risks the insuring company faces.

29. The investigator for the Department did not review the Dakota Homestead agency agreement.

30. The investigator for the Department never spoke with Holden.

31. On January 29, 2009, Holden received an e-mail from Stacy Pollack, a licensed title insurance producer who often used Dakota Homestead as an underwriter. In that e-mail, Pollack asked Holden what the owner's policy and lender's policy amounts were on a policy she was writing. The next day, without possessing an insurance producer's license, Holden responded, "I calculate the rate at \$1074.00 for the owners and Simeltanious [sic] issued mortgage is \$25.00."

32. Pollack testified that "usually, when you get into million dollar homes or commercial properties we would contact the insurer being Dakota or our rep., Holden in this case, to give us a quote as far as the amount of insurance we should charge for the client."

33. Holden advised insurance agents thirteen separate times that they could insure certain properties.

34. Holden was notified that his application had been denied on June 15, 2010.

35. The Department listed a violation of § 381.115.3¹ as a ground for denial, stating that Holden had “determined insurability in Missouri by assisting title insurance agents in Missouri with underwriting.”

36. The Department listed violations of § 381.115.1 and § 385.115.2(2) as grounds for denial as well, stating that Holden had transacted business as an insurance producer without a license.

37. The Department listed Holden’s failure to report at least two VFAs and his failure to include his employment with Guaranty on his license application as grounds for denial, pursuant to § 375.141.1(1) and (3).

Conclusions of Law

The Director refused to issue Holden an insurance producer license, citing § 375.141.1(1), (2), (3), and (12). The grounds for denial include:

- (I) Transacting business as an insurance agent while not licensed as a Missouri insurance producer by:
 - a. calculating insurance rates and
 - b. determining insurability.
- (II) Providing materially incorrect, misleading, incomplete, or untrue information on his application with regard to three VFAs he signed while working at Guaranty, as well as his failure to list Guaranty as a former employer.

We have jurisdiction to hear this case because it involves an appeal of the Department’s decision denying Holden a license.² Holden bears the burden of proof to show he is entitled to a

¹ Statutory citations are to the 2012 Supplement to the Missouri Revised Statutes unless otherwise noted.

² Section 621.045.1.

license.³ We decide the issue that was before the Director,⁴ which is whether the application was properly denied. The Director has discretion to grant or deny a license. We do not have that discretion.⁵ Our review therefore is limited to whether there was cause for the Director to deny the application. Because Holden both transacted business as an insurance producer and failed to submit a complete application, we find that there was cause to deny him a license.

I. Transacting Business as an Insurance Producer without a License

Sections 381.115.1 and 381.115.2(2) prohibit any person from transacting the business of title insurance without a license as a title insurer, title agency, or title agent.⁶ The business of title insurance requiring a license includes “determin[ing] insurability,” and “solicit[ing] or negotiat[ing] a title insurance policy.”⁷ Holden transacted business as an insurance producer without an individual insurance producer license in violation of §§ 381.115.1 and 381.115.2(2) by calculating insurance rates and determining insurability. We do not hesitate to find that calculating rates for title insurance is part of soliciting or negotiating a title insurance policy.

Under § 375.141.1(2), we may deny Holden an individual insurance producer license based on his violation of those two statutes.

A. Calculating Insurance Rates

On January 29, 2009, Holden received an e-mail from Stacy Pollack, a licensed title insurance producer, for whom Dakota acted as a re-insurer (“underwriter”). Stacy Pollack asked Holden for the owner’s policy amount and the lender’s policy amount on an insurance contract

³ Section 621.120 (RSMo 2000).

⁴ *Department of Soc. Servs. v. Mellas*, 220 S.W.3d 778 (Mo. App. W.D. 2007).

⁵ Section 374.051.1.

⁶ Certain salaried employees of a title insurer, title agency, or title agent do not have to be licensed. Section 381.115.3. None of those exceptions apply to this case.

⁷ Section 381.115.3.

she was writing. The following day, without possessing an insurance producer's license, Holden responded, "I calculate the rate at \$1,074.00 for the owners and Simeltanious [sic] issued mortgage is \$25.00."

Pollack gave the following testimony:

[U]sually when you get into million dollar homes or commercial properties we would contact the insurer being Dakota or our rep, Holden in this case, to give us a quote as far as the amount of insurance we should charge for the client.⁸

By giving rate quotes, Holden was calculating insurance premiums. When Holden prefaced his e-mail with the words, "I calculate the rate at," and subsequently gave two specific dollar amounts, he calculated an insurance premium for a title insurance policy in violation of §§ 381.115.1 and 381.115.2(1).

Holden argues that the e-mail with the dollar amounts listed above cannot be used as a ground for denial of his license because no policy was issued in that case. He also argues that he did not *materially* calculate insurance rates because e-mail exchanges like the ones listed above were a very small part of his job. We do not agree that the test for materiality turns on the number of times a statute is violated.

Negotiation does not always lead to a completed deal. In this case, Holden negotiated with agent Pollack by providing her with rate information. Pollack then had two options: accepting or declining Holden's offer. The lack of an acceptance does not render Holden's offer to provide insurance services any less of a negotiation.

⁸ Tr. 168.

Holden next argues that he did not believe that “just doing the math” constituted calculation of a premium within the meaning of § 381.115.1 and that he was simply teaching an agent how to calculate the rate and use the rate manual properly. This argument is spurious. Holden calculated an insurance premium and relayed that quote to an agent. Holden did so in response to an agent’s request for a quote. He calculated a premium and thus violated § 381.115.1.

We find there is cause to deny Holden an individual insurance producer license under § 375.141.1(2) based on his violation of § 381.115.1.

B. Determining Insurability

Holden argues that although he answered agents’ questions about insurability while serving as Director of Business Development and Assistant Underwriter at Dakota, he did not determine insurability. In his post-hearing brief, Holden argues that no evidence was presented by the Department at the hearing to demonstrate that he actually determined insurability; furthermore, he argues that underwriting is not synonymous with determining insurability. We disagree.

The Department entered into evidence thirteen e-mails between outside insurance agents and Holden. Dakota served as an underwriter for each of those agents. In each of those e-mails, an agent asks Holden whether to issue or how to issue a policy in a particular case. Kathleen Jolly, an investigator in consumer affairs for the Department, testified that in each of those e-mails Holden determined insurability. For example, she testified that in the transaction described in Exhibit 11, Holden made a judgment about the risks of the certain aspects of the property.⁹

⁹ Tr. 58, 59.

According to the investigator, Holden authorized the agent to write the policy when he wrote, “I deem that to be little risk.”¹⁰ We agree. The phrase “I deem” shows that Holden authorized the issuance of a policy in that case.

Exhibit 12 is an e-mail chain between Holden and Mike Prosser, a Missouri insurance producer, who used Dakota Homestead as an underwriter at that time. Holden concludes the e-mail chain by writing, “You can insure over it.”¹¹ Prosser testified at the hearing that Exhibit 12 was typical of the types of questions he would send to Holden.

Prosser also testified that when he asked Holden such a question, he was generating an e-mail he could save with the file to show that his underwriter, Dakota Homestead, had approved the policy: “[I]f anything in the future came back on us stating why we didn’t, you know, include this we would go back to that E-mail and again say our underwriter told us it was okay to insure over it and issue the title policy.”¹² Prosser also testified that “as long as, you know, the underwriter told us it was okay to overinsure something, we went ahead and closed the file and then did the title policy and sent it off.”¹³ Prosser’s testimony shows that Holden was making ultimate decisions on whether to insure certain clients. This was a violation of § 381.115.1.

Holden also argues that his application cannot be denied because he never knew he was violating § 381.115.1. We reject this argument. Section 375.141.1(2) states that “the director may ... refuse to issue an insurance provider license” when an applicant “violat[es] any insurance law.” There is no knowledge requirement in that statute. Holden’s argument fails.

¹⁰ Exhibit 11.

¹¹ Exhibit 12.

¹² Tr. 181.

¹³ Tr. 185.

We find that there is cause to deny Holden a license under § 375.141.1(2) because Holden violated § 381.115.1.

II. Intentionally Providing Materially Incorrect Information

Section 375.141.1(1) provides cause to deny a license to an applicant if that person “intentionally provid[es] materially incorrect, misleading, incomplete or untrue information in the license application.” We find that Holden intentionally provided materially incomplete information on his license application.

A. Failure to Disclose Voluntary Forfeiture Agreements

Question 2 on page 3 of the application asks the applicant the following question:

Have you or any business in which you are or were an owner, partner, officer or director, or member or manager of [a] limited liability company, ever been involved in an administrative proceeding regarding any professional or occupational license, or registration?^[14]

The application defines “involved” as “having a license censured, suspended, revoked, canceled, terminated; or, being assessed a fine, a cease and desist order, a prohibition order, a compliance order, placed on probation or surrendering a license to resolve an administrative action.”¹⁵

The Director argues that when Holden answered “no” to that question, he intentionally provided materially incorrect, misleading, incomplete or untrue information on his application. We agree.

¹⁴ Exhibit 17, page 3.

¹⁵ *Id.*

1. Holden failed to disclose information.

Holden signed three VFAs in his capacity as president of Guaranty. The VFAs required Guaranty to pay fines into the Missouri School Fund, so Guaranty was “being assessed a fine,” within the meaning of the application. The only question left is whether those forfeitures were made to “resolve an administrative action,” within the meaning of the application instructions.

Each VFA was executed “in lieu of . . . the suspension or revocation of the license of Guaranty Land Title Insurance, Inc.”¹⁶ In short, the VFAs were made in order to settle an administrative proceeding. Civil settlements such as these constitute administrative actions because they settle matters of discipline against a license.¹⁷

Holden argues that since this Commission was not present during the signing of the VFAs, they were “agency” actions, rather than “administrative” actions, and that he did not have to report them on his application under question 2, which asked if the applicant had been involved in any “administrative proceeding.” Holden draws a distinction without a difference. The application’s definition of “involved” is “being assessed a fine . . . to resolve an administrative action.” Each VFA involved the assessment of a fine, payable to the Missouri School Fund; furthermore, each VFA contains a waiver of any rights to a hearing before this Commission. Moreover, the statute authorizing the Director to execute VFAs suggests they are administrative in nature: “The director is authorized to issue **administrative consent orders** in the public interest as complete or partial settlement of any investigation ... [including] voluntary

¹⁶ Exhibits 14-16.

¹⁷ *Bhuket v. State ex rel. Missouri State Bd. Of Registration for the Healing Arts*, 787 S.W.2d 882 (Mo. App. W.D. 1990); *Taylor v. Missouri State Bd. of Accountancy*, 880 S.W.2d 360, 361 (Mo. App. W.D. 1994).

forfeiture” (emphasis added).¹⁸ It is common sense that proceedings that may end in administrative consent orders or in this Commission are administrative. Holden’s argument that the VFAs were not “administrative” fails.

2. The undisclosed information was material.

Information is material when it “ha[s] real importance or great consequences[.]”¹⁹ In this case, the VFAs were material. They demonstrated that Holden’s employees had not followed the law and that the Department had sought action against Holden’s company previously for failure to comply with the law. Holden was the president of the company. Knowledge of past violations of the law occurring under Holden’s watch at Holden’s company would have importance to the Director.

3. The nondisclosure was intentional.

The Department must also prove Holden intended to make a misrepresentation on his application. We may infer the requisite mental state from the conduct of the licensee “in light of all surrounding circumstances.”²⁰ The surrounding circumstances were that in lieu of risking the loss of its business license in a disciplinary hearing, Guaranty agreed to pay multiple fines after eight of its employees were caught selling title insurance without proper certification. One of the available causes for denial of a new insurance producer’s license is “knowingly . . . accepting insurance business from an individual knowing that person is not licensed.”²¹ Because the VFAs were based on Guaranty’s acceptance of insurance business from eight different unlicensed

¹⁸ Section 374.046.15. See also § 374.280.

¹⁹ Merriam-Webster’s Collegiate Dictionary 765 (11th ed. 2004).

²⁰ *Duncan v. Missouri Bd. for Arch’ts, Prof’l Eng’rs & Land Surv’rs*, 744 S.W.2d 524, 533 (Mo. App. E.D. 1988).

²¹ Section 375.141.1(12).

employees, we infer that Holden anticipated that revealing his history of VFAs to the Department would cause it to refuse to issue him a license. We therefore conclude that Holden's nondisclosure was intentional.

There is cause to deny Holden's application under § 375.141.1(1).

B. Failure to Disclose Employment History

Question 37 on page 1 of the application instructs the applicant to "give all employment experience starting with your current employer working back five years."²² Holden listed two organizations: Dakota Homestead, his employer at that time, and LandChoice Title Company, where he worked until 2008.²³ The Department listed "failure to disclose his employment as President of Guaranty Land Title Insurance, Inc." as a ground for denial.²⁴

Holden argues that he was not obligated to list his employment with Guaranty because it was absorbed by LandChoice in 2005, along with ten other companies. He also argues that the application does not require prior names of employers to be listed. We disagree. Before 2005, Holden was not an employee of LandChoice; he was an employee of Guaranty. Holden was required to disclose his actual employers during the relevant time periods. This requirement is backed by common sense. Disclosing the actual employers allows the Department to conduct a search of an applicant's employment and determine if the companies employing the applicant had been investigated for violations of the law.

²² Exhibit 17, page 1.

²³ *Id.*

²⁴ Exhibit 22 (Refusal to Issue Insurance Producer License), page 6.

The next issue is whether that omission was material. Information is material when it “ha[s] real importance or great consequences[.]”²⁵ The information here was material. Holden failed to disclose on his application any connection with Guaranty and thus obscured his relationship with the three VFAs. The Department also must show that the nondisclosure was intentional. We find, for the same reasons in the previous section, that Holden’s failure to disclose here was intentional.

There is cause to deny Holden’s application under § 375.141.1(1).

Summary

The Director has cause to deny Holden’s application under § 375.141.1(1) and (2). The Director, in his discretion, chose to deny Holden a license. We lack that discretion and are bound by the Director’s decision.²⁶

SO ORDERED on April 25, 2013.

/s/ Nimrod T. Chapel, Jr. _____

NIMROD T. CHAPEL, JR.

Commissioner

²⁵ Merriam-Webster’s Collegiate Dictionary 765 (11th ed. 2004).

²⁶ Section 374.051.1.