

N.D.A.G. Letter to Pomeroy (Aug. 19, 1985)

August 19, 1985

Honorable Earl R. Pomeroy
Commissioner of Insurance
North Dakota Department of Insurance
State Capitol
Bismarck, ND 58505

Dear Commissioner Pomeroy:

Thank you for Mr. Beutler's letter of June 17, 1985, in which you request an opinion on whether or not your department can take action against an insurance company which paid a commission to an agent for work performed by the agent although the work was performed prior to the date of the agent's appointment by that company. Your letter indicates that the agent solicited business for the company while the agent was licensed by your office but before the agent was issued an appointment from that company. The commission was paid by the company after the company appointed the agent.

You specifically inquire whether the company's acceptance of the application for insurance violates N.D.C.C. Ch. 26-17.1, whether the payment of the commission violates N.D.C.C. § 26-17.1-11, and whether the insurance commissioner has authority to impose a monetary fine against an insurance company on a violation of N.D.C.C. Ch. 26-17.1.

As you are aware, the 1985 Legislative Assembly substantially revised the insurance laws of North Dakota. 1985 N.D. Sess. Laws 316, 317. 1985 N.D. Sess. Laws 316 repealed all of N.D.C.C. Ch. 26-17.1 and replaced it with N.D.C.C. Ch. 26.1-26. Section 23 of Chapter 316 states as follows:

SECTION 23. TRANSITION - APPLICATION TO EXISTING DOCUMENTS.

Any agreement, application, certificate, complaint, contract, form, license, plan, policy, or schedule approved, delivered, filed, issued, or received under provisions of title 26 as it existed on June 30, 1985, is deemed to have been approved, delivered, filed, issued, or received under the appropriate provisions of title 26.1.

It is my understanding that this transition section was enacted to alleviate potential confusion over contracts and policies in existence prior to July 1, 1985, and continuing in effect after July 1, 1985. It is my opinion that this section does not make the 1985 revisions applicable to the situation about which you inquire. All acts in question occurred prior to July 1, 1985 and should be governed by the insurance laws as they read prior to July 1, 1985.

N.D.C.C. Ch. 26-17.1 concerns the licensing and operation of insurance agents, brokers, representatives, and consultants. N.D.C.C. § 26-17.1-06 prohibits operating as an insurance agent without a license. It also provides as follows:

No insurance agent or limited insurance representative shall place a policy of insurance with any insurer as to which he does not then hold a license as an insurance agent or limited insurance representative under this chapter.

Any person violating this section is guilty of a misdemeanor.

N.D.C.C. § 26-17.1-13 provides for the term of the license. It provides in part as follows:

26-17.1-13. TERM OF LICENSE. Licenses issued pursuant to this chapter shall continue in force in perpetuity unless:

1. The license is revoked, suspended, or terminated by the commissioner of Insurance;

* * *

N.D.C.C. § 26-17.1-42 states the method by which and the grounds upon which the commissioner may suspend, revoke, refuse to continue, or refuse to issue a license. The procedure requires notice, hearing, and a subsequent finding that the licensee meets one or more conditions. These conditions include:

* * *

2. Any cause for which issuance of the license could have been refused had it then existed and been known to the commissioner at the time of issuance.
3. Violation of, or noncompliance with, any insurance laws, or for violation of any lawful rules, regulation, or order of the commissioner or of a commissioner of another state.

* * *

N.D.C.C. § 26-17.1-11 prohibits paying a commission to an unlicensed person and accepting a commission by an unlicensed person. It states as follows:

26-17.1-11. PAYMENT TO OR ACCEPTANCE BY UNLICENSED PERSON OF COMMISSION PROHIBITED -- WHEN PAYMENT OR ASSIGNMENT OF COMMISSIONS PERMITTED. -- No insurer, insurance agent, insurance broker, surplus lines insurance broker, or limited insurance representative shall pay, directly or indirectly, any commission, brokerage, or other valuable consideration to any person for services as an insurance agent, insurance broker, surplus lines insurance broker, or limited insurance

representative within this state, unless such person held at the time such services were performed a valid license for that line of insurance as required by the laws of this state for such services; nor shall any person, other than a person duly licensed by this state as an insurance agent, Insurance broker, surplus lines insurance broker or limited insurance representative at the time such services were performed, accept any such commission, brokerage, or other valuable consideration. (Emphasis supplied.)

* * *

Please note that N.D.C.C. § 26-17.1-11 includes a reference to insurers. In general, insurers are not regulated by N.D.C.C. Ch. 26-17.1. Rather, the scope of the chapter, as set out in N.D.C.C. § 26-17.1-01, concerns "the qualifications and procedures for the licensing of insurance agents, insurance brokers, surplus lines insurance brokers, insurance consultants and limited insurance representatives." Insurers are regulated elsewhere in the code.

N.D.C.C. § 26-17.1-44 provides for a civil penalty of not less than \$100.00 nor more than \$1000.00 which may be collected and recovered in an action brought in the name of the state. Finally, N.D.C.C. § 26-17.1-45 requires that "All proceedings, hearings, and appeals under this chapter shall be governed by chapter 28-32."

There is no provision in N.D.C.C. Ch. 26-17.1 regarding an insurer's acceptance of an application for insurance procured by a licensed, but not yet appointed, agent. It is my opinion, therefore, that such acceptance by the company does not violate N.D.C.C. Ch. 26-17.1. The activity is not specifically prohibited and the statute is not generally concerned with an insurer's actions.

To determine whether the payment of the commission violates N.D.C.C. § 26-17.1-11, we must determine whether the agent held a valid license (as used in N.D.C.C. §26-17.1-11) at the time he solicited the business and performed the services for the company which subsequently paid his commission.

N.D.C.C. § 26-17.1-13 provides that the license is in force in perpetuity unless revoked, suspended, or terminated by the commissioner (or unless terminated on other grounds not relevant to this discussion) and N.D.C.C. §26-17.1-42 provides the procedure and grounds for such revocation or suspension. There are 13 specific conditions stated in N.D.C.C. §26-17.1-42 for denying, non-renewing, revoking, or suspending a license and none of the 13 specifically addresses soliciting business without an appointment. Subsections 2 and 3 of that section are general conditions which may include the activity complained of in this case. Subsection 2 allows action for any cause for which issuance could have been refused and subsection 3 allows action for violation of or noncompliance with the insurance laws rules and regulations. If the activity in question appears to fit one of the categories set forth in the statute, the commissioner may issue notice and hold a hearing pursuant to the North Dakota Administrative Agencies Practice Act (N.D.C.C. Ch. 28-32) and make a decision on whether to terminate, revoke, or suspend the license.

There are several references in N.D.C.C. Ch. 26-17.1 to the appointment process whereby an agent who wishes to work for a specific company becomes appointed with that company and makes such information known to the Insurance Department. Initial licensing requires at least one such appointment. However, the appointment provisions do not specifically hold that soliciting or doing business without an appointment invalidates a license *per se*. Since the agent's license in this case has not been terminated, revoked, or suspended, after due notice and hearing, and since doing business without an appointment does not invalidate a license per se, it is my opinion that the payment of the commission in the instant case was not a violation of N.D.C.C. § 26-17.1-11

The insurance commissioner has authority to revoke or suspend the license of an agent and to impose a civil penalty for violations of the statute as set forth therein. However, this authority is subject to the requirements of the North Dakota Administrative Agencies Practice Act affording notice, hearing, and right of appeal. Should the commissioner desire to pursue the matter as a violation of N.D.C.C. § 27-17.1-06, a criminal action must be initiated against the agent.

In the final sentence of your letter you ask that if I consider the company's payment of a commission proper, why is it necessary for an agent to become appointed. I have not made a determination in this analysis of whether or not the company's actions were proper. I have only determined that acceptance of the application did not violate N.D.C.C. Ch. 26-17.1 and that the agent held a valid license at the time the services were performed. As indicated above, the insurance commissioner may wish to investigate the question at a hearing, pursuant to N.D.C.C. Ch. 28-32, and make a determination thereon.

Perhaps the issue of soliciting business for a particular insurance company prior to an effective appointment from that company is a matter to be taken up by the Legislative Assembly.

Sincerely,

Nicholas J. Spaeth

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