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Department of Insurance
State of Idaho

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BEFORE THE DIRECTOR OF THE DEPARTMENT OF INSURANCE

STATE OF IDAHO

In the Matter of:

RUSSELL TODD JOHNSON,
Resident Producer License No. 35428,

Respondent.

Docket No. 18-2634-10

**HEARING OFFICER'S FINDINGS
OF FACT, CONCLUSIONS OF LAW
AND PRELIMINARY ORDER**

This matter came before the Hearing Officer on an evidentiary hearing on December 1, 2010. John Keenan, Deputy Attorney General, appeared on behalf of the Department of Insurance. Russell Todd Johnson appeared representing himself.

FINDINGS OF FACT

I.

1. Mr. Johnson is an insurance agent and holds an individual insurance producer license Number 35428 issued by the Department of Insurance (hereinafter "the Department"). Mr. Johnson has conducted his insurance business under the name One Idaho Insurance Group, Inc.

2. On June 3, 2010, Russell Todd Johnson submitted an application to the Department for a Resident Bail Bond Producer License. Department Exhibit 1, pages 26 through 29.

3. On July 26, 2010 the Department sent a letter to Mr. Johnson denying his application. Department Exhibit 7.

4. In the letter sent to Mr. Johnson the Department noted that in the application information Mr. Johnson had checked "no" to the following inquiry:

3. Has any demand been made or judgment been rendered against 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, for overdue monies by an insurer, insured or producer, or have you ever been subject to a bankruptcy proceeding? Do not include personal bankruptcies, unless they involve funds held on behalf of others.

5. The Department in the letter referenced that upon investigation it had learned that Mr. Johnson had filed bankruptcy in September, 2009. Department Exhibits 7 and 4. The Department further noted that several of the Creditors to the bankruptcy were revealed to be creditors of "One Idaho Insurance Group, Inc." the business entity under which Mr. Johnson conducted his insurance practice. The Department further stated in the letter denying application that the subject application question number 3, should have been answered affirmatively and a statement summarizing the details of the indebtedness should have been submitted with the application.

6. In the denial letter of July 26, 2010 the Department pursuant to Idaho Code Section 41-1016(1) denied Mr. Johnson's application for a bail agent license based upon three subsections of that statute including:

Section 41-1016(1)(a): "Providing incorrect, misleading, incomplete or materially untrue information in the license application."

Section 41-1016(1)(d): "Improperly withholding, misappropriating or converting any moneys or properties received in the course of doing insurance business."

Section 41-1016(1)(h): "Using fraudulent, coercive or dishonest practices, or demonstrating incompetence, untrustworthiness or financial irresponsibility, or being a source of injury and loss to the public or others, in the conduct of business in this state or elsewhere."

Department Exhibit 7.

7. The Department in the response letter of July 26, 2010 also noted that previously, Mr. Johnson had a "termination for cause" of his broker agreement with Inter-Americas Insurance, Corporation (hereinafter "IAI"), this termination occurring effective September 23, 2009. Department Exhibit 7, Exhibit 1 pages 11 through 13.

8. Mr. Johnson provided a response to the Department's denial letter in correspondence dated August 6, 2010 and requested a hearing on his matter

9. The Department undertook an investigation into the events involved with the termination of his brokerage agreement and ultimately filed a Notice of Violation on October 6, 2010 alleging that Mr. Johnson had violated Idaho Code Section 41-1016(1)(d), and (h) by improperly withholding monies and demonstrating financial irresponsibility. The Department identified nine separate account violations.

10. The department seeks to have (1) the denial of Mr. Johnson's application as a Bail Bond agent upheld and (2) Mr. Johnson's Resident Producer License revoked and administrative penalties imposed as a result of the aforementioned alleged violations.

11. The broker agreement in effect between Mr. Johnson and IAI was originally entered into on August 31, 2006. Department Exhibit 2, pages 4-5.

12. Pursuant to this broker agreement, Mr. Johnson obtained application information, requested endorsements and premiums paid by applicants and policy holders. Further, Mr. Johnson was obligated to promptly remit premiums and fees collected from applicants and policyholders. Department Exhibit 2, pages 4-5.

13. As part of his brokerage operations, Mr. Johnson maintained an account where premiums and other payments received from applicants and policy holders were deposited. This account was accessed by insurance companies for which Mr. Johnson acted as broker, including IAI, who

with varying frequency would “sweep” the account in order to remove deposited funds for payment of the corresponding insureds’ policy premiums.

14. In October 2007 in an effort to expand his brokerage operations, Mr. Johnson entered into an agreement with IAI to obtain financing. This financing provided monies to Mr. Johnson based upon a monthly draw and the proceeds were used to support the operations of his branch offices . Department Exhibit 1, pages 20-24; Hearing Transcript pages 149-150.

15. As part of the financing obtained from IAI Mr. Johnson entered into a personal guarantee agreement with the company for the financing provided to him. Department Exhibit 1 page 25; Hrg Trans pg 148/lines 4-23 (hereinafter page/line).

16. On June 5, 2009, FFIC Insurance Company, Ltd.(hereinafter FFIC) which by this time had been assigned the debt by IAI demanded repayment of the entire balance due under the financing agreement. This was based upon a determination by FFIC that One Idaho Insurance Group, Inc. had failed to meet production requirements for earned premiums for the expansion offices financed by the subject agreement. Department Exhibit 8 page 4-5; Hrg Trans 157/7-18.

17. In the bankruptcy filed by Mr. Johnson on September 2, 2009, Mr. Johnson listed among other creditors, the debt owed to IAI/ FFIC. Department Exhibit 6.

18. On September 23, 2009, IAI terminated the brokerage agreement with Mr. Johnson/One Idaho Insurance Group, Inc. This termination was reported to the Department and the designated reason given was “inadequate production.” Department of Insurance Exhibit 1 page 9.

19. Correspondence sent by IAI to Mr. Johnson, dated September 23, 2009, however, provided an explanation for termination as the failure on the part of Mr. Johnson/One Idaho Insurance Group, Inc. to properly remit all funds to the company which were due and collected.

20. The Department of Insurance when it undertook investigation into the cause of termination of the broker agreement with IAI obtained an affidavit along with supporting documentation from a manager of the auto underwriting section of IAI, Mary Burford. These materials included correspondence sent to Mr. Johnson regarding his broker agreement termination, a copy of the broker agreement, bank records regarding account payment information, financial processing records, bank report statements, along with copies of e-mail correspondence to and from Mr. Johnson and IAI. Department Exhibit 2, pages 1 through 41.

21. Additionally the Department obtained correspondence from Mary Burford providing a narrative of events concerning the matters leading up to the broker agreement termination. Department Exhibit 1, pages 1-2.

22. IAI provided information regarding two series of payments, one occurring mid August 2009 and the second occurring in early September 2009 where the company was unable to obtain funds from Mr. Johnson when IAI had undertaken a regular sweep of his brokerage account. Department Exhibit 1 pages 1-4.

23. The account sweep undertaken by IAI on August 25, 2009 resulted in a payment deficiency which totaled \$937.00 and concerned premium payments on five accounts. Department of Insurance Exhibit 2, page 7-9.

24. Following the failed sweep Mr. Johnson was contacted by IAI and made arrangements to provide direct payment by mail to the company. Mr. Johnson also informed IAI that he was in the process of filing Bankruptcy and changing bank accounts. This was identified as a contributing reason for the inability of IAI to access the policy payments. The payments were ultimately received by the insurance company on or about September 2, approximately two weeks after the original payments by the policy holders. Id.

25. The recitation from the company also provided information regarding the second series of payments, those from the time period of September 1-4. IAI had on this occasion been unable to obtain payment for four accounts. Mr. Johnson explained to the company that this shortfall was due to an account sweep undertaken by a different insurance company, and the fact that this second company had taken payments out of Mr. Johnson's account for policy proceeds that had yet to be deposited, and in turn the money pulled was comprised of funds actually belonging to IAI. Following the notification, Mr. Johnson requested IAI to again attempt to withdraw funds from his account and as a result the company received the designated payments. Id.

26. Mr. Johnson provided an explanation of the course of events surrounding the payment deficiencies, in correspondence sent to the Department, first that of August 6, then that of November 1, 2010 and by way of testimony at hearing. In his correspondence to the Department, Mr. Johnson stated that the mid August 2009 payments were returned insufficient following his delay in depositing the funds into his account. Mr. Johnson indicated that he held off depositing the funds due to the advice of his attorney and the pending filing of his bankruptcy. As a result of the bankruptcy Mr. Johnson was in the process of changing his company accounts. This correspondence further stated that he had contacted representatives of IAI informed them of the situation and indicated that he could forward the funds directly by mail. Furthermore, Mr. Johnson stated that at no time did he ever indicate to IAI that he did not have the proceeds available for payment. Department Exhibit 8, Johnson Exhibit C pages 1-2.

27. At hearing on this matter Mr. Johnson testified and provided information substantially the same as that found in his correspondence to the Department of Insurance of August 6, and November 1, 2010. Hrg Trans 132/3-8; 138/10; 135/8-25; 136/1-16.

28. Additionally, Mr. Johnson offered into evidence correspondence from his bankruptcy attorney which supports Mr. Johnson's recitation confirming that his counsel directed him to not deposit premium payments from his clients into the company bank account at the time the bankruptcy petition was slated to be filed which originally was to be in August. A delay on the part of the bankruptcy attorney in completing the scheduled filing resulted in Mr. Johnson's petition being filed on a later date in September. Mr. Johnson's attorney was concerned over the status of Mr. Johnson's bank statements and accounts in regards to the timing of the bankruptcy filing and informed him to not deposit the premium payments from clients until after filing the bankruptcy had been completed. Additionally, his attorney verified the assertion that the bankruptcy did not involve any funds held on behalf of others. This correspondence also advances the conclusion of Mr. Johnson's counsel that the bankruptcy filed in September 2009 was a personal bankruptcy. Johnson Exhibit A.

29. Mr. Johnson, also in the correspondence sent to the Department of Insurance dated November 1, 2010 provided information regarding the activities of IAI concerning their practices employed in pulling funds from his account as well as business difficulties in the relationship between Mr. Johnson and IAI. Mr. Johnson asserted that his relationship with IAI had become strained in light of his preference to work with other insurance companies who he believed better suited the needs of his clients when compared to IAI. He noted that a number of his clients had switched from IAI to other carriers and contended that this caused business relations to sour between himself and IAI. Mr. Johnson also asserted that IAI in essence retaliated against him for choosing to switch a number of customers from their company to other insurance carriers. As a result IAI made the decision to terminate his contract with them. Mr. Johnson noted that at the time his contract was terminated for "inadequate production" his office still maintained a

significant number of clients with the company which exceeded the amount of business which other agents of the company were incapable of producing. Johnson Exhibit C pages 1-2.

30. As regards his application for a license as a resident bail bond producer, Mr. Johnson in his written statement explained to the Department that he checked off the section on the form regarding no bankruptcy as his bankruptcy filed in September 2009 was a personal and non business bankruptcy. Mr. Johnson noted that his bankruptcy did not involve any funds held on behalf of others. Additionally Mr. Johnson noted that the loan received from IAI to help finance his expansion offices was a "personal loan" and therefore also outside of the scope of information requested in the application. Johnson Exhibit C page 1.

31. No policies for which Mr. Johnson acted as broker were canceled as a result of any delay in the transfer of funds to IAI. Hrg Trans 61/9-10, 18-19, 66/20-21.

32. All monies due to IAI for premium monies paid by policy holders to Mr. Johnson were eventually advanced to IAI. Hrg Trans 68/7.

33. IAI in undertaking account sweeps from Mr. Johnson's account during 2009 followed a pattern of sweeping the account once a week. Hrg Trans 130/15; 202/11, 22.

34. Mr. Johnson had in past dealings with IAI been allowed to either have policy holder payments swept from his business account or separately mailed to the company. Hrg Trans 131/1-8.

35. During the time period from August 17 and September 2, 2009, Mr Johnson contacted IAI on several occasions regarding the account sweep by IAI, the reason the proceeds had been unavailable, alternative methods of forwarding the funds, and the filing of his bankruptcy. Hrg Trans 132/ 2-6, 211/5-25, 214/2-7, 215/7-21.

CONCLUSIONS OF LAW

PART ONE

36. The issues presented in this matter fall into two separate areas. The first concerns Mr. Johnson's application for resident bail bond producer license and the second are those matters concerning his resident producer license.

37. The Department's denial of the Bail Bond Producer license was based upon Mr. Johnson's negative response to question 3 of the background information portion of the application and the subsequent information obtained by the Department regarding the nature of Mr. Johnson's filed bankruptcy. Mr. Johnson contends that his negative response to that question was due to his interpretation of the question which purportedly restricts the inquiry to business rather than personal bankruptcies, unless the personal bankruptcy involved "funds held on behalf of others." In sum, Mr. Johnson contends the bankruptcy which he filed was his individual non business bankruptcy and in turn the subject debts and creditors did not affect those funds which Mr. Johnson as a resident insurance producer held on behalf of others. Johnson also advanced in support the opinion of his bankruptcy attorney who concurred that his reading of the application question matches that of his client, and the bankruptcy was a personal one which did not concern the funds of others.

38. Mr. Johnson's reading of the application questionnaire does present an interesting question of interpretation for non attorneys completing the application form. It is accurate, to state that the application question specifically instructs the responding individual to exclude personal bankruptcies if they do not involve "funds held on behalf of others." In turn, the understandable response is if a personal, rather than business bankruptcy is filed, that the question then becomes whether the personal bankruptcy attempted to discharge liability for

matters which would include some type of escrow or trust relationship where the bankrupt is administering third party funds. While this can be perceived by the hearing officer as a rationale for Mr. Johnson to conclude that the application would not require an affirmative response from him it does nevertheless ignore several other factors which come into play in Mr. Johnson's response. While the Chapter 7 Voluntary Petition filed by Mr. Johnson was not put in evidence, copies of other bankruptcy pleadings from the case, Department of Insurance Exhibit 6, were admitted. Furthermore, Department of Insurance Exhibit 1 pages 17-19 comprise a United States District of Idaho Bankruptcy Court Docket Summary. These documents reveal that the named debtor in Mr. Johnson's bankruptcy is listed as "Russell Todd Johnson, dba One Idaho Insurance Group, Inc."

39. Next, as revealed in the creditor listing obtained from the bankruptcy schedules, the bankruptcy did include FFIC the assignee of IAI's financing agreement with Mr. Johnson. Johnson Exhibit 6, page 3-6.

40. Additionally, of note the language of application question no. 3 also asks if the applicant has been the subject of

"any demand . . . against you or any business in which you are or were an owner, partner. . . for overdue monies by an insurer . . ."

41. Also, FFIC as the assignee of the financing agreement originally entered into with IAI, did on June 5, 2009 make demand on Mr. Johnson and/or One Idaho Insurance Group, Inc. for repayment of the financing agreement obligation.

42. At hearing Mr. Johnson testified that he was unaware that the bankruptcy petition listed following his name, the reference to "dba One Idaho Insurance Group, Inc." Hrg Trans 205/17-8.

43. Mr. Johnson had as an additional rationale supporting his response in the application form that the debt to FFIC was a personal liability based on the language of the guarantee agreement. Johnson Exhibit 3 page 1.

44. The evidence presented does not establish that Mr. Johnson's bankruptcy involved monies or debts which concerned accounts or the management of funds by Mr. Johnson which were being held in trust or actually belonged to third parties. The Department noted several listed creditors named in the bankruptcy action as being of the type associated with the operations of Mr. Johnson's insurance business, they were, however, again not shown to have concerned funds held by Mr. Johnson on behalf of clients or customers. It is not apparent based on this showing that Mr. Johnson's bankruptcy was one which involved "funds held on behalf of others." It is also noteworthy that no direct consumer/customer funds were involved in the ultimate discharge of debts in the bankruptcy. Hrg Trans 34/5-6; 35/4-25; 36/ 1-14.

45. Notwithstanding this, and somewhat more problematic is the named listing of Mr. Johnson along with the dba of One Idaho Insurance Group, Inc. on the bankruptcy filings. At first examination this element leads initially to the conclusion that the subject bankruptcy was not in fact solely "personal" but instead concerned business matters, namely that of Mr. Johnson's practice which operated under the name of One Idaho Insurance Group, Inc. It is in fact unclear why the dba reference was incorporated in the bankruptcy filings if in fact Mr. Johnson's corporation was not itself the subject of the bankruptcy petition. It can be speculated that perhaps the rationale of Mr. Johnson's bankruptcy lawyer was to include potential creditors who may have provided funding to Mr. Johnson through his business operations. If that in fact is the case, then the subject intent of question 3 on the application form is within the scope of intended disclosure.

46. Examining the application form, it is apparent that the intent of question 3 pertaining to demands, judgments or bankruptcies, is to have an applicant disclose pertinent financial information regarding the integrity and viability of the applicant as far as the underlying capability to operate a legitimate business utilizing the intended license. The capability to adhere to requisite fiduciary responsibilities when acting as an agent entrusted with funds is likely the rationale for the examination of this information and ultimate decision regarding the applicant's capability to responsibly undertake the duties and benefits of the requested license. The specific exclusion of personal bankruptcies, does indicate that licensing requirements do not necessarily mandate a perfect financial record. Instead the application question focuses upon bankruptcies where the applicant had some type of agency or fiduciary relationship. This obviously translates to the concern of the Department of Insurance in placing an individual in the position of responsibility, to act as an agent or fiduciary as a result of being licensed by the Department.

47. The Department noted concerns over the dollar amounts involved with Mr. Johnson's bankruptcy filing but this alone does not address the issue of whether the bankruptcy involved "funds of others". In this subject case Mr. Johnson's bankruptcy, was a "personal" bankruptcy from the perspective that the debts which were sought to be discharged did not involve monies or "funds held on behalf of others." But the bankruptcy creditor listing does reveal debts which were likely related to the business of his brokerage practice. The item of greatest significance, namely the loan/financing agreement in place with FFIC concerned monies advanced to Mr. Johnson which in essence constituted a loan for him to conduct business operations, namely office expansion. While this may take the debt out of the realm of being strictly "personal" it was contended to be a "personal" obligation of Mr. Johnson. One item that is apparent though, is

that the facts do not reveal that this debt or other potential business related debts fall within the direct language of application question no. 3 regarding “funds held on behalf of others.”

48. This, however, does not solely decide the question of whether Mr. Johnson appropriately answered inquiry no. 3 in the application. As referenced above, FFIC had prior to the filing of the bankruptcy sent a letter dated June 5, 2009 making demand for repayment of the amount owing under the financing agreement. Johnson Exhibit 8, page 4-5. That demand is within the scope of the language of application question no. 3 which requests information regarding any demand for overdue monies by an insurer. While this language may certainly be interpreted as again requesting information pertaining to monies held by way of escrow or agency, the actual language incorporated uses the phrase “overdue monies.” The nature of that debt is not indicated. It is certainly within allowable interpretation to hold that this question then seeks to find out any circumstance when an applicant has had demand made upon him or her by an insurance company for outstanding money due. While reading both sentences in question 3 together, an implication can be said to exist that the inquiry only concerns matters involving fiduciary or agency duties, the broader scope of the first sentence clearly intends to include financial shortfalls, debts, or improprieties in a relationship involving an insurer, insured or producer. It is likely that the underlying concern of the Department of Insurance is the capability and integrity of an applicant in regards to financial matters, this would include both personal and business when involving an insurer, insured, or producer. Although the scope of the inquiry is later limited by the exclusion of solely personal bankruptcies, it is still apparent that this underlying integrity, in both circumstances concerning fiduciary/agency scenarios as well as individual and business concerns is also included in the Department’s inquiry.

49. The Department at hearing articulated the concern that fiduciary funds held by a broker may be at risk when the solvency of a brokerage is faltering. Hrg Trans 37/5-17

50. Overall it is the interpretation of this hearing officer, that the intent of this question in light of the entirety of the application is a request to obtain background information and reveal potential improprieties or a lack of capability on the part of an applicant to undertake the duties and obligations of licensee status if the applicant is to receive the requested license. To put it more simply, is the applicant an appropriate individual to be entrusted with the funds of another or has that individual based upon past financial activities proven themselves to have less than the requisite integrity or capability necessary to be a license holder.

51. As is further apparent from the testimony of Ms. McBride, on behalf of the Department, the individual tasked with the duty of reviewing license applications, the responses provided by an applicant allow the Department of Insurance to determine if baseline qualifications for issuance of a license have been met. Hrg Trans 21-24. It is also not apparent to this hearing officer, that simply answering the inquiry in the affirmative automatically precludes an applicant from qualifying for a license.

52. In this proceeding, the evidence submitted does not establish that Mr. Johnson deliberately attempted to withhold pertinent information from the Department, but instead interpreted the language of the application form to mean that he could answer question 3 in the negative. This conclusion was reached based upon his interpretation of the second sentence found under inquiry 3 and the exclusion of bankruptcies if they did not involve "funds held on behalf of others." As also referenced above, it is the conclusion of Mr. Johnson's bankruptcy counsel that the subject bankruptcy was in fact a "personal" bankruptcy one which did not include monies held by Mr. Johnson in trust or as an agent. The scope of this proceeding, does

not include the question of the propriety of Mr. Johnson to rely upon the conclusion of his bankruptcy counsel. The evidence also does not establish that Mr. Johnson, when filling out the application specifically made inquiry of his counsel as to the response which his counsel deemed appropriate. This conclusion was apparently reached after the Department's concern over the fact that Mr. Johnson had previously filed bankruptcy and that at least one of the subject debts sought to be discharged included his obligation to FFIC.

53. The evidence does not reveal that Mr. Johnson deliberately intended to withhold information from the Department and in fact after receiving the denial from the Department freely offered in response further information pertaining to the bankruptcy. Department Exhibit 8.

54. Even so, the additional fact that as of June 2009, FFIC had made demand upon Mr. Johnson for the repayment of the monies loaned by IAI along with the naming in the bankruptcy petition by way of a dba of One Idaho Insurance Group, Inc. should have caused Mr. Johnson to include information regarding the bankruptcy and as further indicated under question 3 the submission of a statement providing further details.

55. The focus of the Department in the denial, Department Exhibit 7, is the incorrect answer and the corresponding failure to provide additional information. The Department also noted that it appeared that several creditors listed in the bankruptcy actually involved obligations arising from Mr. Johnson's business operations of One Idaho Insurance Group, Inc.

56. The evidence establishes that the Department's decision to deny the resident Bail Bond Producer license application is within the appropriate discretion as exercised by the Department. While it is not apparent that Mr. Johnson had the intent of concealing information regarding the bankruptcy or the demand for repayment by FFIC Insurance Company it is apparent that the

Department had recognizable concerns over the financial capability and integrity of Mr. Johnson in the operation of One Idaho Insurance Group, Inc. This is especially of concern in light of the fact that the underlying loan obligation which originated with IAI, (later assigned to FFIC) was one of the debts being discharged by the subject bankruptcy. While at hearing Mr. Johnson provided explanation as to the financial circumstances which gave rise to first the origination of the loan, and second his inability to pay back the loan, nevertheless the concern of the Department of Insurance is the capability and integrity of license applicants. While the non disclosure of the information in the application form maybe excused in light of the interpretation given the language by Mr. Johnson, the underlying concerns of the Department over the integrity of Mr. Johnson as a licensed applicant are well grounded.

57. The full rationale for denial of a license is obviously beyond the simple reason for checking no when one should have checked yes on an application form. Here the Department had legitimate concerns over the financial capabilities of Mr. Johnson and in turn potential issues of integrity in light of the discharge of a debt to one of Mr. Johnson's business insurance lines. While certainly the explanation given by Mr. Johnson as to the history between himself, his company and this insurance producer provided some explanation of the debt and his reason for discharging it, the underlying fact is that Mr. Johnson failed to maintain financial viability with aspects of his company and in the relationship with one of the insurance companies for which he acted as agent. Those circumstances, while shown to not be nefarious or otherwise underhanded are still within the Department's scope when reviewing the overall integrity and capability of licensed applicants.

58. The provisions in Idaho Code Section 41-1016(1), providing for the licensing and regulation of individuals seeking a license through the Department represents an exercise of the

police power of the State. *Williams v. O'Connell*, 76 Idaho 121, 278 P2d 196 (1954). Pursuant to Idaho Code Section 41-1016(1) the Director of the Department may refuse issuance of a license when an applicant has failed to comply with the restrictions found in this statutory section.

59. Providing incorrect information does allow the Department discretion in the grant or denial of a license. The concerns of the Department for the safety of the public under Idaho Code Section 41-113 are legitimately exercised under Idaho Code Section 41-210 and in the application of the provisions of Idaho Code Section 41-1016(1). Failure to meet the qualifications in the underlying requirements for licensing and in providing correct, accurate information in the application process may be used as sufficient grounds for the denial of a license application. It is not apparent from the evidence submitted in this matter that the Department inappropriately or arbitrarily applied the discretion which it has in the inquiry and ultimate determination of compliance with licensing application requirements. The evidence presented fails to establish that this power was improperly exercised.

60. It is the conclusion of this hearing officer that Mr. Johnson did violate Section 41-1016(1)(a) by providing incorrect or materially untrue information in the application for resident bail bond producer license. This denial by the Department of issuance of this license is upheld.

PART TWO

61. The next area of inquiry concerns allegations by the Department that Mr. Johnson violated Idaho Code Sections 41-10169(1)(d) and (h) as well as 41-1024 which concern allegations of improper withholding of monies and demonstration of financial irresponsibility.

These allegations concern the failure of Mr. Johnson to have readily available funds in his broker account when IAI made attempts to access the account and “sweep” premium payments placed into it. The Department argues that Mr. Johnson improperly withheld premium payments received and in turn demonstrated financial irresponsibility in the conduct of his business. The Department also notes that these acts constitute a violation of Idaho Code Section 41-1024 which pertains to the duty of a producer to account and turn over funds received. As referenced in the Findings of Fact on two separate occasions the first being August 25, 2009 and the second September 9, 2009 attempts by IAI to transfer funds were unsuccessful and returned due to insufficient funds.

62. The Department seeks revocation of Mr. Johnson’s Idaho Resident Producer license no. 35428 and the imposition of a penalty of \$1,000.00 for each violation alleged against him. The Department has identified nine contended violations.

63. It is the conclusion of the hearing officer that the circumstances surrounding the events at issue do not warrant revocation of Mr. Johnson’s Resident Producer license but do call for the imposition of administrative penalties. The circumstances of this case warrant this as the evidence does not support a conclusion that Mr. Johnson deliberately attempted to engage in dishonest or deceitful conduct or practices.

64. While financial improprieties did occur, namely an incapability of IAI to obtain funds from Mr. Johnson’s trust fund account, these matters were ultimately remedied without the result of an insured being denied appropriate credit for premium dollars paid. In turn no insured suffered any loss of coverage or similar policy denials. Hrg Trans 61/9-10; 18-19.

65. Additionally it does not appear that Mr. Johnson at any time provided any false statements regarding the subject activity nor did he try to conceal the course of events leading to

IAI's inability to obtain the proceeds. Furthermore the testimony of Mr. Johnson, which was not directly challenged, established that the funds at no time were unavailable or had otherwise been misappropriated for other purposes. Hrg Trans 201/24-5. While materials presented by the Department included referenced remarks from Mary Burford of IAI that Mr. Johnson had at one time indicated to IAI that the funds were not available, the evidence from IAI and in turn the investigation by the Department, is inconsistent on this point and greater credibility is given to the direct testimony of Mr. Johnson. Department Exhibit 1, pages 1 and 4.

66. It is also of note that IAI did not register a complaint with the Department regarding the events which occurred in August and September of 2009 nor originally provide to the Department information originally beyond the initially reported cancellation due to "inadequate production".

67. Several important facts mitigate the potential penalty which could be imposed upon Mr. Johnson. This includes the apparent deteriorating relationship of Mr. Johnson and IAI along with the role which it and the Bankruptcy filing had in the broker contract cancellation. As indicated in both written materials submitted to the Department, Johnson Exhibit C, Department Exhibit 1, pages 1 and 2, and Exhibit 8, as well as hearing testimony, Hrg Trans pgs 130-134/138; 161 1-23; these matters led IAI, at least in part, to use the issues regarding fund transference as a stated rationale to terminate the broker agreement between the Company and Mr. Johnson. Department Exhibit 5. The strain on this relationship was apparently the result of both Mr. Johnson's inability to sustain the expansion offices and in turn repayment of the loan made by IAI along with the decrease in business which Mr. Johnson wrote on behalf of the company. The filing of the bankruptcy to extinguish his loan obligation to IAI further compounded this already fragile situation.

68. Mr. Johnson who had attempted to expand his business practice by establishing branch or satellite offices received the aforescribed operating loan from IAI. Repayment of this loan was in part drawn from the earned commissions of Mr. Johnson. Hrg Trans 133-135, 149. When the satellite offices under produced from original projections, Mr. Johnson found himself in a financial bind with repayment of this loan and the corresponding reduction of his take home earnings as a result of the customary brokerage commission being apportioned directly to loan repayment. Id, Hrg Trans 126-128, 155/1-3.

69. The ultimate decision by Mr. Johnson that the financial viability of his office expansion could not be maintained and that he would have to close these offices also impacted this relationship. Hrg Trans 163/11-25, 164/10-21.

70. At hearing Mr. Johnson presented testimony regarding the nature of the relationship between him and IAI along with his growing dissatisfaction with the practices of IAI and the corresponding increase in policy writing for other carriers. Hrg Trans 129/12-25, 161. In particular Mr. Johnson noted his worries over the practice which IAI used to cancel coverage for policyholders immediately upon the failure to make timely premium payments. Hrg Trans 93/12-25; 129/6-11. This caused concern over the coverage effectiveness which Mr. Johnson believed his policyholders were receiving. Id.

71. This deterioration of the relationship with IAI was obviously compounded by Mr. Johnson's apparent escalation of transferring policy holders from IAI to other carriers. As Mr. Johnson testified his dissatisfaction with the business practices of IAI as regards cancellation notices and other coverage aspects led him to conclude that other carriers offered products superior to that of IAI. Hrg Trans 161/1-23. Mr. Johnson also alludes to possible vindictiveness and/or retaliatory behavior on the part of IAI in connection with this matter and calls into

question the recitation of information provided by IAI to the Department of Insurance. Department Exhibit 8, Johnson Exhibit C, Hrg Trans 209/24-5, 210/1-2.

72. It should be noted that the issue for ultimate cancellation of the broker agreement was described in one manner to the Department (Department Exhibit 1, page 9) and differently in correspondence sent to Mr. Johnson which gave the reason of a failure to promptly remit all funds due to the company. Department Exhibit 5. Subsequent explanation, provided by IAI expanded on this concern over the failure to remit funds and provided in response to the Department's inquiry, further details regarding the course of events in August and September of 2009. Department Exhibit 1, pages 1-2.

73. The Hearing Officer finds credible the explanation provided by Mr. Johnson that the delay in remitting funds which occurred in mid August 2009 was caused in part by the instruction Mr. Johnson received from his bankruptcy counsel to hold off deposits into his trust fund account based upon the impending filing of Mr. Johnson's bankruptcy. Johnson Exhibit A, Hrg Trans 209/12. Mr. Johnson was undertaking efforts to set up a new bank account in connection with the bankruptcy filing to accommodate the deposited funds and not involve business trust monies to be incorporated in the Bankruptcy reporting requirements. Johnson Exhibit A; Hrg Trans 192/10-25. In turn, the efforts of IAI to sweep Mr. Johnson's trust account were unsuccessful as Mr. Johnson had yet to deposit all remitted funds during the week of August 17. On the following Monday, August 24, the efforts of the company to remove these funds resulted in premium payments being unavailable for five insurance policies. Subsequent efforts to remedy this failure were made on the part of both IAI and Mr. Johnson and involved an overnight delivery of a payment directly to IAI but these efforts, the specifics of which remain

unclear following submission of the evidence, were unsuccessful until payment was ultimately received by the Company on September 2.

74. The second incident, occurring in the first part of September 2009 resulted in four policy payments being returned due to insufficient funds. An explanation was advanced by Mr. Johnson which involved a second insurance company withdrawing the proceeds actually due IAI. In turn the timing of the deposits made by Mr. Johnson impacted the accounting and withdrawal method used by the second company, resulting in monies being taken which technically belong to that of IAI.

75. It is nevertheless, the reason for this initial payment delay and in turn the repeat of these issues in early September 2009 that leads this Hearing Officer to the conclusion that an administrative penalty should be imposed upon Mr. Johnson. While at the hearing, evidence was presented regarding difficulties in administratively facilitating IAI's method for withdrawing funds, which apparently involved both or either mailing and/or electronic transfer of funds by way of account sweep, in any event whichever method was to be utilized, once Mr. Johnson had knowledge that the payments had not in fact been received by IAI a method for remitting these monies was available to him which could have accomplished the transfer quicker than the time which was ultimately required.

76. While ultimately the payment of the monies did in fact reach IAI the error did occur and represents a breach of Mr. Johnson's duties under Idaho Code Section 41-1016(1)(d) ,(h) and 41-1024. As indicated earlier these payment deficiencies did not result in any denial of coverage for the respective policy holders. This factor clearly mitigates in favor of Mr. Johnson.

77. The filing of the Bankruptcy was, even if the exact timing remained in flux due to his attorney, a planned event by Mr. Johnson. The corresponding difficulties with adequately posting

the received monies in the proper account or making them readily available to transfer to IAI were the ultimate responsibility of Mr. Johnson. In turn the evidence that Mr. Johnson contacted IAI regarding the failed sweep and remedy efforts does mitigate in his favor. Still though, it is apparent that the transfer could have been undertaken with greater speed and/or efficiency. It should be noted that the initial response of IAI to the failed sweep was apparently not one of significant concern. Johnson Exhibit 3, Department Exhibit 1, page 1.

78. The bankruptcy filing and bank account changes are also, in part offered as an explanation for the second occurrence in September of 2009. That incident is further contended to be the result of a second insurance company sweeping Mr. Johnson's account and taking funds which should have been sent to IAI. While the timing of the bankruptcy filing was also of impact during this same time period, Mr. Johnson apparently remedied this second occurrence in a shorter time than the first.

79. In further mitigation is the conclusion that subject monies received by Mr. Johnson from policy holders during August and September of 2009 were not misappropriated or diverted for improper purposes. These proceeds were not used or applied other than to the respective policy holder/applicant's account. Hrg Trans 134/23-4, 201/24-5, 216/23-4.

80. No evidence was presented by the Department of Insurance that Mr. Johnson had experienced any past complaints or disciplinary proceedings as an insurance broker prior to this current matter. Hrg Trans 91/1-16. (Mr. Johnson had been the subject of one prior complaint but as a policy holder not broker. Id.) Additionally Mr. Johnson presented evidence regarding his business integrity through statements of his counsel, Defendant Exhibit A and a former Idaho Company representative for IAI, Marvin Yates, Johnson Exhibit B, who also testified on Mr.

Johnson's behalf. Mr. Yates additionally provided information regarding the difficulties with the business practices of IAI.

81. As was apparent from testimony elicited at hearing in this matter, the seriousness of the charges and the prospective impact which the outcome of this decision may have upon Mr. Johnson and his continued capability to engage in the business of an insurance broker have certainly weighed heavily upon him. It was readily apparent that the potential adverse ramifications are known to be severe and could substantially impact the capability of Mr. Johnson to continue in his livelihood.

82. Evidence was also advanced at hearing which established that Mr. Johnson does engage in a successful practice with policies written with a number of carriers and different product lines. Johnson Exhibit C, Hrg Trans 110/3-4, 112/11-12, 162/18-25.

83. It is hereby ordered that Russell Todd Johnson pay the following administrative penalties; for improperly withholding monies received in the course of doing insurance business, in violation of Idaho Code § 41-1016(1)(d) which also constitutes a violation of Idaho Code § 41-1016(1)(h) a demonstration of financial irresponsibility, and a violation of Idaho Code Section 41-1024, the sum of \$500.00 for each incident which total 9;

84. The total then administrative penalty imposed is the sum of Four Thousand Five Hundred Dollars (\$4,500.00).

IT IS SO ORDERED

PRELIMINARY ORDER

NOTIFICATION OF RIGHTS

This is a preliminary order of the Hearing Officer. It can and will become final without further action of the Department of Insurance unless any party petitions for

reconsideration before the Hearing Officer or appeals to the Director for the Department of Insurance (or the designee of the Director). Any party may file a motion for reconsideration of this preliminary order with the Hearing Officer within fourteen (14) days of the service date of this order. The Hearing Officer will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. *See* Idaho Code §67-5243(3).

Within fourteen (14) days after (a) the service date of this preliminary order, (b) the service date of the denial of a petition for reconsideration of this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration of this preliminary order, any party may in writing appeal or take exception to any part of the preliminary order and file briefs in support of the party's position on any issue in the proceeding to the Director of the Department of Insurance (or the designee of the Director.) Otherwise, this preliminary order will become a final order of the Department of Insurance.

If any party appeals or takes exception to this preliminary order, opposing parties shall have twenty-one (21) days to respond to any party's appeal within the Department of Insurance. Written briefs in support of or taking exception to the preliminary order shall be filed with the Director of the Department of Insurance (or the designee of the Director). The Director may review the preliminary order on his own motion.

If the Director of the Department of Insurance (or his designee) grants a petition to review the preliminary order, the Director (or his designee) will allow all parties an opportunity to file briefs in support of or taking exception to the preliminary order and may schedule oral argument in the matter before issuing a final order. The Director (or

his designee) will issue a final order within fifty-six (56) days of receipt of the written briefs or oral argument, whichever is later, unless waived by the parties for good cause shown. The Director (or his designee) may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order.

Pursuant to Idaho Code §§ 67-5270 and 67-5272, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which: (1) the hearing was held, (2) the final agency action was taken, (3) the party seeking review of the order resides, or operates its principal place of business in Idaho, or (4) the real property or personal property that was the subject of the Department's action is located.

This appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. *See* Idaho Code § 67-5273. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.

DATED this 4th day of January, 2011.

By: David V. Nielsen
David V. Nielsen
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of January, 2011, I served a true and correct copy of the foregoing by delivering the same to each of the following party, by the method indicated below, addressed as follows:

Russell Todd Johnson 391 N. Placer Avenue Idaho Falls, ID 83402 (208) 521-9929	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand-Delivered <input type="checkbox"/> Overnight mail <input type="checkbox"/> Facsimile
John Keenan Deputy Attorney General for Idaho Department of Insurance 700 W. State Street, 3 rd Floor Boise, ID 83720 (208) 334-4283 Fax: (208) 334-4298	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand-Delivered <input type="checkbox"/> Overnight mail <input type="checkbox"/> Facsimile



David V. Nielsen