

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF COMMERCE

In the Matter of the Resident Agency
License of Northwest Title Agency, Inc.;
the Resident Insurance Producer's
License of Wayne B. Holstad; the
Notary Commission of Wayne B.
Holstad; and Northwest Abstract
Company

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

This matter came on for hearing before Administrative Law Judge Raymond R. Krause (ALJ) on February 28 and March 1, 2013, at the Office of Administrative Hearings, 600 North Robert Street, St. Paul, Minnesota. The hearing concluded on March 1, 2013, however, the hearing record was held open until April 5, 2013, for submission of written briefs and replies.

Michael J. Tostengard, Assistant Attorney General, appeared on behalf of the Minnesota Department of Commerce (the Department). Gary Bodelson, Attorney at Law, appeared on behalf of Respondent, Northwest Title Agency, Inc. (NWTa). Frederic W. Knaak, Knaak and Associates P.A., appeared on behalf of Respondent Wayne B. Holstad and Northwest Abstract Company.

The Department called Jason Broberg, Senior Investigator for the Department as its only witness. Respondents called Wayne B. Holstad and Joel Holstad as witnesses. Exhibits 1-5, 7, 9-14, 16-28, 30-32, 34, 40, 43-47 and 50-54 were accepted as evidence.

STATEMENT OF THE ISSUES

The issues presented in this case are as follows:

1. As the sole designated individual producer acting on behalf of NWTa, is Respondent Holstad responsible for all of Respondents' violations pursuant to Minn. Stat. § 60K.37, subd. 3(2) (2010) and Minn. R. 2795.0800 (2009)?
2. Did Respondents improperly transfer and/or misappropriate funds from the NWTa escrow account in violation of Minn. Stat. § 60K.43, subd. 1(4) (2012)?

3. Did Respondents improperly transfer, misappropriate, and/or convert funds from the escrow account and, therefore, commit fraudulent and deceptive acts in violation of Minn. Stat. § 82.81, subd. 12(12) (2010)?

4. Did Respondents improperly withdraw, misappropriate, and/or convert funds from the escrow account, thereby demonstrating dishonesty and untrustworthiness in violation of Minn. Stat. § 60K.43, subd. 1(8) (2010)?

5. Did Respondents convert funds from the escrow account in violation of Minn. Stat. § 72A.20, subd.18 (2010)?

6. Did Respondents improperly transfer funds from the escrow account, thereby committing unfair trade practices and fraudulent acts in violation of Minn. Stat. § 60K.43, subd. 1(7) (2010)?

7. Did Respondents improperly withdraw, misappropriate, and/or convert funds from the escrow account, thereby breaching their fiduciary duty to their insurance clients in violation of Minn. R. § 2745.1300 (2009)?

8. Did Respondents fail to maintain an itemized list of fund transfers for each particular transaction in violation of Minn. R. 2795.1400 (2009)?

9. By being subjected to administrative orders of discipline in other jurisdictions, did the Respondents violate Minn. Stat. § 60K.43, subd. 1(9) (2010)?

10. By failing to report administrative orders of discipline from other jurisdictions, did the Respondents violate Minn. Stat. § 60K.54, subd. 1 (2010), and Minn. R. 2795.0700, subp. 2 (2009)?

11. Did the Respondents engage in unlicensed real estate abstracting activities, in violation of Minn. R. 2830.0030 (2009) and Minn. Stat. §§ 386.62 and 386.16 (2010)?

12. Did the Respondents engage in unlicensed real estate closing activities in violation of Minn. Stat. § 82.641 (2010)?

13. Did the Respondents engage in unlicensed title insurance activities in violation of Minn. Stat. § 60K.49, subd. 2, and Minn. R. 2795.0800 (2009)?

14. Did the Respondents utilize title insurance documents unapproved by Old Republic National Title Company (Old Republic) in violation of Minn. R. 2790.2100 (2009)?

15. Did the Respondents accept funds from an unauthorized title insurance agent in violation of Minn. Stat. §§ 60K.48, subd. 2, and 60K.43, subd. 1(12) (2010)?

16. Did Respondents demonstrate incompetence in violation of Minn. Stat. § 60K.43, subd. 1(8) (2010)?

17. Did the Respondents fail to respond to the Department's investigation in violation of Minn. Stat. § 45.027, subd. 1 (2010)?

18. Did the Respondents falsely state that Old Republic had approved of the use of the NWTAs name on its documents in violation of Minn. Stat. § 45.027, subd. 7(3) (2010)?

Based on the files, records, and proceedings herein, the ALJ makes the following;

FINDINGS OF FACT

1. Respondent Northwest Title Agency Inc. (NWTAs) was licensed as a resident title insurance agency, license number 40026123 and was incorporated in Minnesota. At all times relevant to this matter, NWTAs conducted a title insurance and real estate closing agency from an office in White Bear Lake, Minnesota.¹

2. Wayne B. Holstad is the sole owner and Chief Executive Officer of NWTAs.² He is an attorney, licensed in Minnesota, and the designated quality control person for U.S. Department of Housing and Urban Development (HUD) contracts of NWTAs.³

3. Wayne Holstad is licensed as a resident insurance producer for title insurance, license number 23948.⁴ He is also commissioned as a notary, number 20041692.⁵ Joel Holstad is the owner of Northwest Abstract Company.⁶

4. At its height, NWTAs had approximately 100 employees and did business in 38 states throughout the country.⁷ NWTAs had a contract with HUD to do HUD closings in Wisconsin and Minnesota.⁸ Wayne Holstad would meet with his direct reports more than once per week, sometimes several times per day. After December 27, 2011, he delegated the management responsibilities to his brother, Joel Holstad.⁹

5. Stewart Title is an underwriter of title insurance, licensed in Minnesota. Wayne Holstad was one of Stewart Title's designated producers of title insurance in

¹ Testimony of Jason Broberg, Exs. 1 and 3.

² Test. of J. Broberg, Wayne Holstad and Ex. 21.

³ Test. of W. Holstad.

⁴ Test. of J. Broberg.

⁵ Ex. 22.

⁶ Ex. 21.

⁷ Test. of W. Holstad.

⁸ Test. of J. Broberg, Ex. 5.

⁹ Test. of W. and J. Holstad.

Minnesota.¹⁰ NWTA is prohibited from issuing title insurance without a valid contract with an underwriter.¹¹ On December 9, 2011, Stewart Title Company notified NWTA that it was terminating its contract with NWTA.¹² The letter of termination was not received by NWTA until December 12, 2011.¹³ Stewart Title did not give NWTA a reason for termination at that time.¹⁴

6. At the time of the termination of the Stewart Title contract, NWTA had approximately 200 files open and in process.¹⁵ It is considered to be industry best practice to make certain that uncompleted transactions be transferred to another title company and or real estate closer in order to protect clients from delays.¹⁶

7. In December of 2011, the Department received a tip that NWTA was making improper disbursements from its escrow account to its operating account. In response, the Department began an investigation of NWTA.¹⁷ Mr. Jason Broberg was the lead investigator.¹⁸

8. In mid-December, 2011, Joel Holstad began informally consulting for NWTA. The Holstads intended for Joel to eventually take over NWTA from Wayne.¹⁹ Joel Holstad remained with NWTA until late August, 2012.²⁰

9. Beginning on December 27, 2011 and continuing throughout the remainder of December of 2011 and January of 2012, Mr. Broberg and others from the Department visited the offices of NWTA. During the visits they obtained documents and interviewed employees. Mr. Holstad and his staff cooperated with the investigation during those visits. Charlie Kavaloski was the information technology director for NWTA. He provided full access to the NWTA computer system and ran or attempted to run reports requested by the Department. Some reports that were requested were beyond the capabilities of the computer system and could not be produced. Mr. Kavaloski left the company sometime in February 2012. None of the remaining employees were sufficiently knowledgeable with the computer system to produce additional reports pertaining to previous activities since the system was designed only to show current activity.²¹

10. In the course of the investigation, Mr. Broberg interviewed Tom Foley. Mr. Foley had been the Chief Financial Officer (CFO) of NWTA but had been terminated

¹⁰ Test. of J. Broberg.

¹¹ Minn. Stat. § 60K.49, subd. 2; and Minn. R. 2795.0800 (2009).

¹² Ex. 4.

¹³ Test. of J. and W. Holstad.

¹⁴ Test. of W. and J. Holstad and Ex. 4.

¹⁵ Test. of W. Holstad.

¹⁶ Test. of J. Broberg and W. Holstad.

¹⁷ Test. of J. Broberg.

¹⁸ Test. of Broberg.

¹⁹ Test. of J. and W. Holstad.

²⁰ Test. of J. Holstad.

²¹ Test. of W. Holstad, Joel Holstad and J. Broberg.

from that position in December 2011. Mr. Foley told Mr. Broberg that he, as CFO, caused there to be overpayments to the NWTA operating account from the NWTA escrow account. He stated that he had done this without the knowledge of Wayne Holstad. Mr. Foley also alleged that Wayne Holstad was rarely at the business and did not take an active management role.²²

11. On December 13, 2011, a check for \$130,000 was deposited in the NWTA escrow account at the direction of Wayne Holstad. Mr. Holstad had borrowed the money from his mother.²³

12. The Department made requests for further documentation on several occasions.²⁴ NWTA responded to the requests by sending several computer printouts to Mr. Broberg.²⁵ Mr. Broberg requested further documentation, specifically, reconciliation reports for the accounts in question. Joel Holstad pointed out the cabinet in which the reconciliation reports were stored and offered them to Mr. Broberg for copying on several occasions. Electronic versions of the documents were not able to be produced after the technology staff left the company. Mr. Broberg did not take any of the proffered reports.²⁶

13. The Department told NWTA to produce any material that would disprove the allegations being made against it. NWTA did not produce affirmative evidence that there were no improper transfers.²⁷ In response to Mr. Broberg's emails, Joel Holstad called Mr. Broberg in mid-February and left a voicemail message. He reiterated that all the information that NWTA had was available and the Department could have access to it upon request. The Department did not respond to this phone message.²⁸

14. The Department did not conduct an audit of NWTA's books. The Department alleges that an audit was done by Stewart Title.²⁹ No audit by Stewart Title was offered as evidence.

15. On December 19, 2011, Alan Kantrud was hired by NWTA as its Chief Compliance Officer.³⁰ Mr. Kantrud is also an attorney. Mr. Kantrud was, at the time of his appointment as compliance officer for NWTA, a title agent for Old Republic Title Insurance Company. Old Republic is a licensed title insurance underwriter similar to Stewart Title.³¹

²² Test. of J. Broberg.

²³ Test. of W. Holstad and Ex. 9.

²⁴ Test. of J. Broberg and Exs. 11, 43–46.

²⁵ Exs. 16, 17, and 18.

²⁶ Test. of J. Holstad.

²⁷ Test. of J. Broberg.

²⁸ Test. of J. Holstad.

²⁹ Test. of J. Broberg.

³⁰ Ex. 20.

³¹ Test. of J. Broberg.

16. On December 19, 2011, Old Republic declined to accept NWTAs application to become a policy issuing agent for Old Republic.³²

17. On December 21, 2011, Old Republic terminated its agency agreement with Mr. Kantrud.³³

18. Mr. Kantrud's agency status was terminated by Old Republic because he allowed NWTAs employees to issue Commitment Protection Letters (CPL's) on behalf of Old Republic although NWTAs had no agency relationship with Old Republic.³⁴

19. Throughout the month of December 2012, NWTAs continued to work on matters that were in process at the time of the termination of the Stewart Title contract.³⁵

20. Mr. Kantrud issued CPL's on behalf of Old Republic between December 16 and December 20, 2011. He issued them using his office address in Maplewood Minnesota. The file numbers on the CPL's corresponded to files at NWTAs.³⁶

21. Mr. Kantrud also issued CPL's on behalf of Old Republic or Stewart Title during 2011, using NWTAs office address in White Bear Lake. Those CPL's were dated October 31, 2011, and November 18, 2011.³⁷

22. On one occasion, Mr. Kantrud issued a CPL as an agent of Old Republic and used NWTAs address and letterhead. The CPL is dated November 2, 2011, and the fax cover sheet is dated December 19, 2011.³⁸

23. A CPL being executed does not necessarily mean that an actual closing occurred.³⁹

24. On December 16, 2011, Louis White, President of NWTAs, signed a memorandum stating that a loan policy of title insurance underwritten by Old Republic was being issued by NWTAs.⁴⁰

25. On December 20, 2011, a HUD-1 Settlement Statement was executed showing \$300.00 for "Settlement or Closing Fee". NWTAs was noted alongside the amount. The HUD-1, however, did not show that \$300.00 was actually disbursed to anyone.⁴¹

³² Ex. 40.

³³ Exs. 25 and 34.

³⁴ Exs. 23 and 24.

³⁵ Ex. 19.

³⁶ Ex. 27-28 and Exs. 16-18.

³⁷ Exs. 31 and 32.

³⁸ Ex. 30.

³⁹ Test. of W. Holstad.

⁴⁰ Ex. 31.

⁴¹ Ex. 53.

26. Screen shots of NWTAs electronic calendar show that several closings had been scheduled for the period after December 13, 2011.⁴² The calendar screen shots do not purport to demonstrate that the closings actually occurred.

27. On December 27, 2012, Joel Holstad assumed control of NWTAs as Chief Operating Officer. An agreement in principle was reached between Wayne Holstad and Joel Holstad to the effect that Joel would take over day-to-day operations immediately and purchase the business, over time, from Wayne.⁴³

28. On December 30, 2011, a HUD-1 Settlement Statement was executed showing a disbursement to NWTAs of \$346.00 for "Settlement or Closing Fee."⁴⁴

29. On January 4, 2012, a HUD-1 Settlement Statement was executed showing a disbursement of \$346.00 to NWTAs for "Settlement or Closing Fee."⁴⁵

30. On January 4, 2012, Stewart Title informed the Department of its termination of the NWTAs contract and the termination of the appointment of Wayne Holstad.⁴⁶

31. On January 10, 2012, the Department conducted an interview, under oath, with Wayne Holstad. Holstad stated that the former CFO, Tom Foley, told him that there was a shortage in the escrow account of \$130,000. Wayne Holstad had no personal knowledge of the shortage but took Foley's word for it. In response to Foley's statement, Holstad borrowed \$130,000 from his mother and caused it to be placed in the escrow account.⁴⁷

32. An internal investigation of the escrow and operating accounts of NWTAs was conducted by Joel Holstad and staff. The investigation turned up three or four accounting errors through routine reconciliation. The errors were relatively minor, were corrected promptly, and did not result in a permanent shortage of the escrow account.⁴⁸

33. During the course of the Department's investigation, the investigators determined that on April 8, 2009, the State of Nebraska Department of Insurance issued a final order with respect to Wayne B. Holstad. The order concluded that Wayne Holstad handled escrow and/or security deposits in conjunction with real estate closings for property located in Nebraska without a surety bond, letter of credit, certificate of deposit, or a deposit of cash or securities in violation of Neb. Rev. Stat. §§ 44-19, 109(3) and 44-4059(1)(b). As a result of the order, Wayne Holstad was required to pay a fine of \$500.00.⁴⁹ Mr. Holstad was told by Nebraska officials at the time that this did

⁴² Ex. 19.

⁴³ Exs. 2 and 10.

⁴⁴ Ex. 47.

⁴⁵ Ex. 54

⁴⁶ Ex. 7.

⁴⁷ Ex. Ex. 2.

⁴⁸ Test. of J. Holstad.

⁴⁹ Ex. 12.

not need to be reported to the Department.⁵⁰ Mr. Holstad did not report the disciplinary action to the Department.⁵¹

34. The Department also discovered that on November 23, 2009, the State of Kansas Commissioner of Insurance issued an order revoking the nonresident insurance agent's license of Wayne Holstad. The revocation was based on the fact that Mr. Holstad was disciplined by the State of Nebraska and did not report this fact to the Kansas Commissioner of Insurance.⁵² Mr. Holstad did not report the Kansas disciplinary order to the Department.⁵³

35. In addition to the order revoking the license of Wayne Holstad, the Kansas Commissioner of Insurance issued an order on September 17, 2010, revoking the resident title agency license of NWT A and issuing a fine of \$1000.00. The basis for the revocation and fine was failure to timely file an annual audit in violation of K.S.A. 2009 Supp. 40-1137.⁵⁴ NWT A did not report this disciplinary action to the Department.⁵⁵

36. On February 1, 2012, Joel Holstad, on his own initiative, voluntarily came to the Department to meet with investigators. He intended to informally discuss the issues that were being investigated and provide any information he had that might assist the Department. He also hoped the Department would alert him to any concerns they had so that he could investigate and report back to the Department. Joel Holstad was not accompanied by counsel. Instead of an informal discussion as he requested, the Department put Joel Holstad under oath and recorded the interview.⁵⁶

37. As of February 1, 2012, Joel Holstad was unaware of the reason for Stewart Title's termination of NWT A's contract. His assumption was that Stewart Title terminated the contract because of the alleged shortage reported by Tom Foley.⁵⁷

38. Joel Holstad's internal investigation was ongoing at the time of the interview, but he had not been able to find any shortage amounting to \$130,000. He was told by Stewart Title that their records showed no shortage of cash in any of NWT A's file. Holstad's internal review showed four accounting errors where funds were inadvertently posted to the wrong file or where closing errors were made. These errors had been corrected by the time of the interview or were in the process of being corrected. Joel Holstad admitted that there might have been an actual shortage in the escrow account of up to \$5,000 due to bank fees or other charges that had not yet been posted to the proper files and repaid. As of February 1, 2012, he was still reconciling the January and December accounts so his statements were not definitive.⁵⁸

⁵⁰ Test. of W. Holstad.

⁵¹ Test. of J. Broberg and W. Holstad.

⁵² Ex. 13.

⁵³ Test. of W. Holstad and J. Broberg.

⁵⁴ Ex. 14.

⁵⁵ Test. of W. Holstad and J. Broberg.

⁵⁶ Ex. 10.

⁵⁷ *Id.*

⁵⁸ *Id.*

39. Because Wayne Holstad had deposited the \$130,000 from his mother in the escrow account, there was a cash surplus in the escrow account of approximately \$130,000.⁵⁹

40. During the interview on February 1, 2012, Joel Holstad told investigators that when Alan Kantrud was hired, it was Mr. Kantrud's intention to issue CPL's to cover the files that NWTA could no longer handle since losing the Stewart Title contract. He would issue CPL's on behalf of Old Republic, for whom he was an agent. His plan was to issue the CPL's on his authority using NWTA's staff and computer system. Kantrud explained this to Chad Novak who was Kantrud's contact at Old Republic. Mr. Novak did not have a problem with the proposed arrangement but wanted to see the forms being used. Joel Holstad and Kantrud issued several CPL's and showed them to Novak. Novak required them to make some changes. The changes were made and Novak approved the forms.⁶⁰

41. Joel Holstad's belief, at the time of the interview, was that two NWTA staff members may have issued CPL's using Kantrud's access to the Old Republic system without notifying Kantrud and possibly representing the CPL's as being from NWTA. He promised to investigate further.⁶¹

42. Joel Holstad was interviewed by Department staff for almost two hours and was extremely cooperative. He specifically expressed a desire to work with the Department to resolve the issues of concern and asked them to let him know what else he could do.⁶²

43. On September 4, 2012, the Department issued an Order of Summary Suspension of the Resident Agency License of NWTA, the Resident Insurance Producer's License of Wayne B. Holstad, and the Notary Commission of Wayne B. Holstad.

44. The Resident Agency License of NWTA lapsed in September 2012, for lack of renewal.⁶³

45. NWTA, Wayne Holstad and Northwest Abstract Company timely appealed.

46. At the hearing on February 28, 2012, the Department informed the ALJ that it would not pursue Count XI relating to unlicensed abstracting activities.

Based on the foregoing Findings of Fact, the ALJ makes the following:

⁵⁹ *Id.*

⁶⁰ Exs. 10 and 24.

⁶¹ Ex. 10.

⁶² *Id.*

⁶³ Test. of J. Broberg.

CONCLUSIONS OF LAW

1. The Commissioner of the Department of Commerce (the Commissioner) and the ALJ have jurisdiction to hear this matter pursuant to Minn. Stat. §§ 45.027, subd.7 (b) (2010) and 14.50.
2. The Department has complied with all procedural requirements and appropriate notice has been provided.
3. The Department has the burden of proof to establish its charges by a preponderance of the evidence.⁶⁴
4. Improper transfer and misappropriation of funds from an escrow account is a violation of Minn. Stat. §§ 60K.43, subd. 1(4) (2012) and 72A.20, subd. 18 (2010).
5. Improper transfer and misappropriation of funds from an escrow account is a fraudulent and deceptive act in violation of Minn. Stat. § 82.81, subd. 12(12) (2010).
6. Improperly withdrawing, misappropriating, and converting funds from an escrow account is a violation of Minn. Stat. § 60K.43, subd. 1(8) (2010).
7. Improper transfer of funds from an escrow account is an unfair trade practice and a fraudulent act in violation of Minn. Stat. § 60K.43, subd. 1(7) (2010).
8. Improper withdrawing, misappropriating and converting funds from an escrow account is a breach of fiduciary duty in violation of Minn. R. 2745.1300 (2009).
9. The Department did not demonstrate by a preponderance of the evidence that any misappropriation, improper transfer, improper withdrawal, or conversion of funds from an escrow account of NWT A occurred.
10. Failure to maintain an itemized list of transfers for each particular transaction is a violation of Minn. R. 2795.1400 (2009).
11. The Department did not demonstrate by a preponderance of the evidence that NWT A or Wayne Holstad failed to maintain an itemized list of transfers for each particular transaction.
12. Being subjected to administrative orders of discipline in another jurisdiction is a violation of Minn. Stat. § 60K.43, subd. 1(9) (2010).
13. Failure to report an administrative order of discipline in another jurisdiction within 30 days is a violation of Minn. Stat. § 60K.54, subd. 1 (2010) and Minn. R. 2795.0700, subp. 2 (2009).

⁶⁴ Minn. R. 1400.7300, subp. 5.

14. The Department demonstrated by a preponderance of the evidence that Wayne B. Holstad was the subject of an administrative order of discipline in another jurisdiction (Nebraska) and did not report the discipline to the Department within 30 days.

15. The Department demonstrated by a preponderance of the evidence that Nwta was the subject of an administrative order of discipline in another jurisdiction (Kansas) and did not report the discipline to the Department within 30 days.

16. Acting as a real estate closing agent without a license is, subject to certain exceptions, a violation of Minn. Stat. § 82.641 (2010).

17. The Department demonstrated by a preponderance of the evidence that on two occasions, Nwta acted as a closing agent without a valid license.

18. A licensed insurance producer shall not engage in the business of insurance with an insurer unless the producer either has been appointed by that insurer or has the permission of the insurer to transact business on its behalf and obtains an appointment within 15 days after the first application is submitted to the insurer.⁶⁵

19. The Department demonstrated by a preponderance of the evidence that on two occasions Nwta engaged in the business of title insurance without permission or appointment by an insurer.

20. Acceptance of funds from an unlicensed title insurance agent is a violation of Minn. Stat. §§ 60K.48, subd. 2, and 60K.43, subd. 1(12).

21. The Department did not demonstrate by a preponderance of the evidence that Nwta accepted funds from an unlicensed insurance agent.

22. Using fraudulent, coercive, or dishonest practices, or demonstrating incompetence, untrustworthiness, or financial irresponsibility whether or not involving the business of insurance in this state or elsewhere is a violation of Minn. Stat. § 60K.43, subd. 1(8) (2010).

23. The Department did not demonstrate by a preponderance of the evidence that Nwta or Wayne Holstad acted fraudulently or dishonestly, or that Nwta or Wayne Holstad were incompetent, untrustworthy or financial irresponsible.

24. A licensee is required to comply with requests for information and production of requested documents during an investigation by the Commissioner.⁶⁶

⁶⁵ Minn. Stat. § 60K.49, subd. 2; and Minn. R. 2795.0800 (2009).

⁶⁶ Minn. Stat. § 45.027, subd. 1(a) (2010).

25. The Department did not demonstrate by a preponderance of the evidence that Nwta or Wayne Holstad failed to cooperate or comply with requests for information or documents.

26. Providing false, misleading or incomplete information to the Commissioner is a violation of Minn. Stat. § 45.027, subd. 7(3) (2010).

27. The Department did not demonstrate by a preponderance of the evidence that Respondents provided the Department with false, incomplete, or misleading information.

28. An insurer shall require its agents or agencies and any other person or agency preparing advertisements naming the insurer or its products to submit proposed advertisements to it for approval prior to use.⁶⁷

29. The Department did not demonstrate by a preponderance of the evidence that Nwta or Wayne Holstad failed to submit advertisements to an insurer for approval prior to use.

30. The sole individual designated producer of insurance is responsible for violations committed by his employees and agents.⁶⁸

31. The Department did demonstrate by a preponderance of the evidence that Wayne B. Holstad is the sole designated individual producer acting on behalf of Nwta and is, therefore, responsible for all Nwta's violations.

Based on the foregoing Findings of Fact and Conclusions of Law, and for the reasons set forth in the attached Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED THAT:

1. The charges contained in Counts II through VII of the Notice and Order for Hearing be dismissed.

2. The charges contained in Counts VIII, XI, XIV, XV, XVI, XVII, and XVIII of the Notice and Order for Hearing also be dismissed.

3. The charges contained in Counts IX and X of the Notice of and Order for Hearing be affirmed as to Wayne Holstad for the Nebraska and Kansas discipline and as to Nwta for the Kansas discipline.

⁶⁷ Minn. R. 2790.2100, subp. 2 (2009).

⁶⁸ Minn. Stat. § 60K.37, subd. 3(2) (2010) and Minn. R. 2795.0800 (2009).

4. The charges contained in Counts XII and XIII of the Notice and Order of Hearing be affirmed as to NWTa.

5. The Commissioner take such disciplinary action against the licenses of NWTa and Wayne Holstad as is deemed appropriate.

6. Such discipline is in the public interest.

Dated: April 16, 2013

s/Raymond R. Krause
RAYMOND R. KRAUSE
Administrative Law Judge

Digitally Recorded: No Transcription

NOTICE

This report is a recommendation, not a final decision. The Commissioner of Commerce (Commissioner) will make the final decision after a review of the record. Under Minn. Stat. § 14.61, the Commissioner shall not make a final decision until this Report has been made available to the parties for at least ten calendar days. The parties may file exceptions to this Report and the Commissioner must consider the exceptions in making a final decision. Parties should contact Michael Rothman, Commissioner, Department of Commerce, Attn: Melissa Knoepfler Suite 500, 85 Seventh PI E, St. Paul, MN 55101, (651) 296-2715, to learn the procedure for filing exceptions or presenting argument.

The record closes upon the filing of exceptions to the Report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and Administrative Law Judge of the date the record closes. If the Commissioner fails to issue a final decision within 90 days of the close of the record, this Report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. In order to comply with this statute, the Commissioner must then return the record to the Administrative Law Judge within ten working days to allow the Judge to determine the discipline imposed.

Under Minn. Stat. § 14.62, subd. 1, the Commissioner is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

I. Background

Northwest Title Agency is a Minnesota corporation owned, during all times relevant to this matter, by Wayne B. Holstad. It was licensed as a title insurance producer and operated in several states. In November or December 2011 NWTAs Chief Financial Officer Tom Foley called Wayne Holstad and informed Mr. Holstad that he (Foley), had improperly transferred monies from the NWTAs escrow account to the operating account. He told Wayne Holstad that he had done this on his own initiative.

Wayne Holstad had no personal knowledge of a shortage in the escrow account but assumed it was true. Consequently, he borrowed \$130,000 and caused that amount to be deposited in the escrow account in order to cover any deficits.

At approximately the same time, Foley apparently also called Stewart Title and told them the same thing. Stewart Title is a licensed title insurance company in Minnesota. NWTAs policies of title insurance were issued through an exclusive agency agreement with Stewart Title. Without the Stewart Title contract, NWTAs had no authority to issue title insurance. Upon receiving the information from Foley, Stewart Title apparently performed some sort of audit and terminated its contract with NWTAs. At that point, NWTAs could no longer issue title insurance.

NWTAs had several hundred transactions in progress at the time of the termination by Stewart Title. NWTAs sought help to continue to service these customers through other insurance companies. This is considered industry best practice. NWTAs attempted to get another title insurance company to authorize NWTAs to issue insurance. However, this company, Old Republic, declined to enter into a contact with NWTAs. NWTAs also attempted to bring in Alan Kantrud to issue policies. Kantrud was an attorney and had an insurance producer contract with Old Republic. He issued several CPLs for NWTAs customers before Old Republic terminated his contract.

Based on a tip, the Department began an investigation into the possible shortage in the NWTAs escrow account. The investigators visited the White Bear Lake offices of NWTAs, interviewed employees, and took many documents from the office. The office staff cooperated with the investigators.

Because of the loss of the Stewart Title contract and the inability of NWTAs to find a replacement, NWTAs was unable to conduct business. The management of this situation was more than Wayne Holstad felt comfortable handling alone. He asked his brother, Joel Holstad, who is also experienced in this business, to help. Joel essentially took over day-to-day management of NWTAs from December 27, 2011, forward. Wayne and Joel agreed that Joel would buy the business from Wayne over time. In the meantime, staff began to leave what appeared to be a sinking ship.

Eventually, NWTA let its license lapse and the Department filed its charges against Wayne Holstad and NWTA.

II. NWTA's Escrow Account

The Department alleges that NWTA and Wayne Holstad misappropriated, improperly withdrew, and converted escrow funds thereby causing a \$130,000 shortage. This allegation is apparently based solely on a hearsay statement by Tom Foley. Mr. Foley was not called as a witness and was not subject to cross examination. The Department offered no documentary evidence from its extensive investigation to demonstrate that a shortage of any kind occurred. The Department did not perform an audit. The Department did not offer the audit that it claims Stewart Title performed as evidence. In short, the Department has no credible evidence that there was any misappropriation, improper withdrawal, conversion, or shortage in NWTA's escrow account.

Joel Holstad undertook an internal investigation of the escrow account and determined that there never was a shortage. He maintained this position under oath during the Department's interview and again at the hearing.

The Department must prove its case by a preponderance of the evidence. It did not come close to meeting that burden with respect to Counts II through VIII.

III. The Kansas and Nebraska Disciplinary Actions

Wayne Holstad was the subject of a formal order of discipline by the Nebraska Department of Insurance. He does not deny the discipline. He argues, however, that the Nebraska officials who imposed the discipline told him that he need not report the discipline to Minnesota authorities. Even assuming that he was told this by Nebraska, the Minnesota statute is clear that any discipline in another state must be reported within 30 days to Minnesota. Getting bad advice and listening to it is no excuse for non-compliance with a clear statutory mandate.

Similarly, NWTA was disciplined in Kansas because NWTA did not comply with Kansas' audit requirement. NWTA argues that it surrendered its license rather than go to the expense of the audit. That may be what NWTA thought was happening. However, the evidence is clear that Kansas revoked the NWTA license. This discipline was, again, not reported to the Department.

In the Administrative Law Judge's Order of December 5, 2012, the ALJ dismissed Count IX with regard to Respondent Wayne Holstad because no evidence was produced at that time to show a Kansas order of discipline against him. At the evidentiary hearing, a Kansas order pertaining to Wayne Holstad was produced. The charge against Wayne B. Holstad relative to discipline by Kansas, however, had already been dismissed in the December Order for lack of evidence. If the Department now wishes to pursue that charge, it must re-file.

IV. Unlicensed Closing and Title Insurance Activity

The Department alleges that after the Stewart Title termination, NWTa had no authority to perform closing activities. NWTa was conducting activities to prepare files for closing. These general functions do not require specific authority. However, the Department did demonstrate that NWTa staff, on December 30, 2011 and January 4, 2012, actually performed two closings for which NWTa was paid. This is a violation of Minn. Stat. § 82.641 (2010).

Similarly, the evidence demonstrates that on December 16 and 19, 2011, NWTa issued CPL's or title commitments purporting to be from NWTa, when there was no authority to do so. This is a violation of Minn. Stat. § 60K.49, subd. 2 and Minn. R. 2795.0800 (2009).

V. Unapproved Documents

The Department alleges that NWTa issued CPL's under the name of Old Republic without prior approval and then lied to the Department about it. The evidence does not support that conclusion.

Mr. Kantrud, who was at the time a NWTa employee, issued some CPL's and sent them to Chad Novak at Old Republic. Mr. Novak was the Old Republic employee with whom Kantrud regularly worked. Novak told Kantrud that changes needed to be made if Kantrud wanted Old Republic's approval. Kantrud made the required changes and sent them on to Old Republic. Apparently, another employee of Old Republic did not feel this was sufficient and after the issuance of the CPL's, terminated Kantrud's contract with Old Republic.

Despite the later termination, Kantrud, on behalf of NWTa, did get initial approval or at least reasonably thought he had Old Republic's approval. Kantrud stopped issuing CPL's when notified that he no longer had a contract with Old Republic. NWTa did not mislead the Department. NWTa reasonably assumed that the regular contact with Old Republic had authority as he had in the past and, therefore, they had proper authorization.

VI. Acceptance of Unauthorized Funds

The Department alleges that NWTa improperly received funds from an unauthorized insurance agent. Presumably, the Department means that NWTa received money from Mr. Kantrud after Old Republic terminated its agent relationship with Kantrud. The ALJ is left to speculate upon this because the Department never made this clear in its Statement of Charges or during the hearing.

The record does not reflect any documentary or testimonial evidence to support the allegation. The Department, therefore, did not meet the burden of demonstrating by a preponderance of the evidence that such transfers occurred.

VII. Incompetence Untrustworthiness and Financial Irresponsibility

The Department suggests that because NWTa and Wayne Holstad committed the violations cited above, they demonstrated incompetence, untrustworthiness and financial irresponsibility. The record as a whole shows that NWTa and Wayne Holstad were put in crisis mode based on the statement by Tom Foley. They took actions to protect themselves and their clients. Some of those actions followed industry norms and best practice. Some of those actions and actions by subordinates were ill advised and, in at least four instances, were illegal.

With the company disintegrating in front of him, Wayne Holstad faced a situation that he felt was too much for him. Rather than let his clients suffer, he brought in his brother who was also experienced in the business. His brother, Joel, took leadership of the operation and insured that no clients had major problems because of NWTa's problems. It is not a sign of incompetence to call for experienced help when faced with a situation that one has never before faced.

The Department alleges Wayne Holstad was not an active manager of the business and had no control over what was going on. The only evidence of that is, again, a hearsay report by Tom Foley who was not called to testify. Against that is the sworn testimony of Wayne and Joel Holstad. They testified that Wayne was very involved in the operations of the business prior to December 27, 2011. The unrefuted testimony demonstrates that he met with his direct reports regularly and had phone calls with them at least daily. He was the CEO of the company and, as such, is not expected to know every detail of every subordinate's responsibility. Contrary to the argument of the Department, delegation of authority by a businessman to his subordinates is a common practice and does not equate to incompetence.

After December 27, 2011, Joel Holstad became the active manager of the business. One need only listen to the recording of his interview with the Department to see that he was very involved and very active in the management of NWTa. The Department provided no standard against which to measure the quality of the management of NWTa. Given the lack of a specific standard, NWTa's actions must be measured against the expectations put on any other business. NWTa's management did not fall below the reasonable standards expected of a business of its size.

VIII. Failure to Cooperate with an Investigation

NWTa's staff cooperated whenever the Department's investigators came to the offices. The head of information technology spent large amounts of time preparing special documentation runs from NWTa's archaic computer system. When he left the

company, no one else had his capability and so no one could continue to provide the kind of reports that he had provided.

When NWTa could no longer provide electronic support, they pointed out the paper records that contained the information sought by the Department. They told investigators that they could make copies of whatever was needed. The Department did not follow up on this.

Furthermore, Joel Holstad went on his own initiative to the Department to give investigators any help he could. He was interviewed for nearly two hours and was as cooperative as he could be. Again, one need only listen to the recording of the Joel Holstad interview to get a feel for his willingness to be forthright and helpful. The Department did not demonstrate a failure to cooperate by a preponderance of the evidence.

IX. Summary

It is apparent to the ALJ that many of the charges that made it to hearing and most all the charges that were dismissed earlier, could have been resolved by better communication and a more cooperative approach by the Department. The fact that the Department dropped the illegal abstracting charge on the morning of the hearing is indicative of the problem.

The Department argues vociferously that all the allegations have been proven by hearsay evidence and that hearsay evidence is admissible under the rules of Chapter 1400. Hearsay evidence may be admitted if the ALJ finds it to be probative and if it the type of evidence upon which reasonable, prudent persons are accustomed to rely in the conduct of their serious affairs. Just because hearsay may be admitted does not mean that it must be admitted or that it is dispositive. Hearsay can be overcome by better evidence. In this case, for example, there was hearsay evidence that Mr. Holstad was rarely an active supervisor of his business. That evidence was overcome by sworn testimony to the contrary that was in court and subject to cross examination. Much of the Department's proffered evidence was not probative or was not deemed reliable by the ALJ.

That having been said, there were several valid charges that were proven. The Department proved the failure to notify the Department of disciplinary orders by other jurisdictions, one for Wayne Holstad in Nebraska and one in Kansas for NWTa. The Department also demonstrated that on more than one occasion, NWTa staff engaged in actual closings and insurance production that were improper.

Wayne Holstad was the sole owner of NWTa and the designated individual producer acting on behalf of NWTa. He is, therefore, responsible for the violations committed by NWTa as well as his own. The violations are serious enough that some negative action against the Respondents would be in the public interest.

R. R. K.