

STATE OF MICHIGAN
DEPARTMENT OF INSURANCE AND FINANCIAL SERVICES
Before the Director of Insurance and Financial Services

In the Matter of:

Terrell L. Smith and Excalibur Agency, Inc.,
Petitioners,

v

Case No. 12-882-L
Docket No. 12-001098

Office of Financial and Insurance Regulation,
Respondent.

For the Petitioners:

Terrell L. Smith


For the Respondent:

Conrad Tatnall
Department of Insurance and
Financial Services
P.O. Box 30220
Lansing, MI 48909-7720

Issued and entered
this 21st day of May 2013
by R. Kevin Clinton
Director

FINAL DECISION

I. Background

On April 30, 2012, Chief Deputy Commissioner Annette E. Flood issued an Order of Summary Suspension and Opportunity for Hearing, and Notice of Intent to Revoke which included detailed allegations that the Petitioners violated section 249 of the Michigan Insurance Code (Code), MCL 500.249 and conducted the business of insurance in a fraudulent and dishonest manner, thereby providing a basis for license revocation under section 1239(1)(h) of the Code, MCL 500.1239(1)(h). Specifically, Petitioner Smith and his agency were alleged to have issued fraudulent certificates of workers compensation insurance. Petitioners were also alleged to have refused to cooperate with an investigation by the Office of Financial and Insurance Regulation,¹ a violation of section 249 of the Code.

1. After this case commenced, the authority, powers, duties, functions, and responsibilities of the Commissioner of Financial and Insurance Regulation were transferred to the Director of the Department of Insurance and Financial Services by Executive Order 2013-1 effective March 18, 2013. The agency is referred to in this Order hereafter as the Department of Insurance and Financial Services or "DIFS."

A hearing was held on August 2, 2012. The administrative law judge (ALJ) issued a Proposal for Decision (PFD) on January 7, 2013 which recommended that a final decision be issued finding that the Petitioners violated section 249 of the Code by refusing to comply with an examination of their books and records. The PFD also proposed a finding that the Petitioners violated sections 1239(1)(h) by engaging in coercive conduct in the course of insurance business, and by demonstrating that Petitioner Smith lacks the required knowledge of Michigan insurance laws. In addition, the PFD included a proposed finding that the Petitioners violated section 1239(1)(b) of the Code.

Petitioner Terrell Smith filed exceptions to the PFD in the form of a letter dated January 18, 2013. The DIFS staff filed exceptions on January 28, 2013. These exceptions are discussed in Section II, below.

The DIFS staff's proofs that the Petitioners engaged in fraudulent or dishonest practices in the conduct of insurance business under section 1239(1)(h) of the Code came in the testimony of four DIFS employees and three affidavits identified as being from:

- [REDACTED], a construction worker, who attested that he spoke to Mr. Smith about purchasing workers compensation insurance and that Mr. Smith arranged for him to meet with a representative of his agency at a vacant lot at the corner of Grand River and Eight Mile roads where he purchased an Excalibur Agency certificate of insurance. Affidavit dated September 9, 2011. (Exhibit 6)
- [REDACTED], president of [REDACTED], who stated that she was given insurance certificates by three of their subcontractors which were found to be fraudulent and which had been obtained from Mr. Smith. She also stated that she called Mr. Smith who told her that the certificate numbers were really binder numbers and that "the policies had not gotten into the system" yet. Affidavit dated May 18, 2011. (Exhibit 18)
- [REDACTED], an insurance agent who sold insurance to [REDACTED], who affirmed what Ms. [REDACTED] attested to. She further stated that Mr. Smith had told her that a former agent for Mr. Smith's agency had stolen information from him and must have written the fraudulent certificates. Affidavit dated May 18, 2011. (Exhibit 19)

The DIFS staff also presented a series of letters that Petitioner Smith submitted to the agency during the course of its investigation as exhibits. (Exhibits 15, 17, and 20)

None of the DIFS employee witnesses were present during any conduct involving the alleged sale of fraudulent insurance certificates. Rather, their testimony involved the letters sent to them

by Mr. Smith which they regarded as threatening and attempts to coerce and intimidate them in the course of their duties.

In rebuttal, Petitioner Smith submitted affidavits identified as being from:

- [REDACTED], attesting that he never met Mr. Smith before June 6, 2010 and never bought anything from Mr. Smith or his agency. Affidavit dated March 30, 2011. (Exhibit C)
- [REDACTED], a property owner in Florida who attested that Mr. Smith was present in Florida between March and May 2010. Affidavit dated March 17, 2011. (Exhibit B)
- [REDACTED], a construction worker who attested that he never met Mr. Smith until June 5, 2010 and never bought anything from Mr. Smith or his agency. Affidavits dated April 13, 2011 and July 28, 2012. (Exhibits D and H)

None of these individuals testified at the hearing. Mr. Smith testified on behalf of himself and his agency.

II. Exceptions

Petitioners' exceptions

The Petitioners' exceptions are contained in a letter dated January 18, 2013. The letter accuses DIFS employees and the ALJ of perjury. The ALJ and some of the DIFS employees accused by Mr. Smith did not testify at hearing. Consequently, they cannot be said to have committed perjury. In any case, the perjury accusations are supported only by Mr. Smith's personal interpretation of the evidence and his suppositions. They are not persuasive as evidence or argument.

Most of the remaining statements in the January 18 letter are either restatements of Mr. Smith's hearing testimony or are new factual allegations which are inappropriate to introduce in the form of exceptions, not being subject to cross-examination or other traditional methods of determining validity. Like many of the letters written by Petitioner Smith which were introduced at hearing, the exceptions are intemperate, abusive, and are not persuasive.

Respondent's exceptions

The DIFS staff's exceptions make two assertions: 1) that DIFS is not required to provide "definitive proof" of fraudulent transactions in order to prevail at hearing, and 2) that "hearsay

within hearsay” is not a reason to consider evidence incompetent in an administrative proceeding.

The DIFS staff argues that it was not required to prove by a preponderance of evidence that the insurance certificates in question were fraudulent. Rather, it was only required to provide “evidence that a reasonable mind would find adequate to support a decision.”

In support of its argument, the Respondent cited *St. Clair Intermediate School District v Intermediate Education Association/Michigan Education Association*, 218 Mich App 734 (1996). This case addresses the issue of appellate review of an administrative agency’s decision. The standard of appellate review is not the same as the standard of proof required at hearing. The difference between the standard of proof required in an administrative hearing and the evidentiary standard applied during an appellate review of an agency decision is discussed in LeDuc, *Michigan Administrative Law*, § 6:44 and § 6:79.

Section 6:44 states that “[t]he normal standard used for the burden of proof is the preponderance of evidence standard...” citing *Aquilina v General Motors Corporation*, 403 Mich 206, 210-11 (1978); *Blue Cross Blue Shield of Michigan v Governor*, 422 Mich App 1, 89 (1985); and *Bunce v Secretary of State*, 239 Mich App 204 (1999).

Section 6:79 states:

An important distinction is that between the evidentiary issues in the agency decision-making process and the evidentiary issues in the judicial review process. The requirement in Section 85 [of the Administrative Procedures Act, MCL 24.285] is imposed on the agency in its fact-finding — the evidence that the agency relies on for its decision must be competent, material, and substantial. The requirement imposed on a reviewing court in regard to evidence is set forth in Section 106(l)(d) [of the APA, MCL 24.306]. The latter requirement is sometimes referred to as the substantial evidence test, and is intended as a test of deference to agency fact-finding.

Neither party has asserted that the certificates are genuine. The fraudulent nature of the certificates is a fact not in dispute. An insurer whose name appeared on the certificates reported that the certificates were not valid. Neither party questioned that assertion. Because the fraudulent nature of the certificates is not in dispute, there is no need to debate the level of proof required to establish that fact. The Respondent’s exception is, therefore, not adopted.

The factual issue in dispute at the hearing was whether Mr. Smith and his agency were responsible for creating or distributing the certificates. The ALJ concluded that there was

insufficient evidence that Mr. Smith “used fraudulent or dishonest practices to produce false insurance certificates as alleged....” (PFD, 17) The Director finds this conclusion by the ALJ to be appropriate in light of the limited evidence presented.

The ALJ has provided detailed reasons why she concluded that the affidavits in question were “not conclusive evidence of the facts stated therein.” The Director finds that the ALJ’s reasoning with respect to the affidavits is satisfactory and appropriate. Given the degree to which the various affidavits contradicted each other and given that none of the authors of the affidavits appeared at hearing where their veracity could be tested through the process of examination and cross-examination, the Director concurs with the judgment of the ALJ that the affidavits presented in this case are not evidence sufficient to establish the veracity of the facts the affidavits assert.

The DIFS staff has also argued that “hearsay within hearsay” is not a sufficient reason to deem such evidence to be “incompetent” in an administrative hearing [asserting while some evidence “may be considered hearsay in a judicial proceeding, an agency may rely upon it to support a decision if a reasonable mind would accept it as adequate.”] (Respondent’s Exceptions, page 2-3.) In support of this argument, the DIFS staff cites section 75 of the APA, MCL 24.275, which provides:

In a contested case the rules of evidence as applied in a nonjury civil case in circuit court shall be followed as far as practicable, but an agency may admit and give probative effect to evidence of a type commonly relied upon by reasonably prudent men in the conduct of their affairs.

The [REDACTED] affidavit offered by Petitioners is inconsistent with the [REDACTED] affidavit offered by the DIFS staff.

Petitioner Smith presented affidavits from [REDACTED] and [REDACTED] stating that they obtained the insurance certificates from an individual named “Jimmy” whom Mr. [REDACTED] described as a “scrap collector.” Both affidavits state that they had no knowledge of Mr. Smith and never met with him during the time they were trying to obtain workers compensation insurance. The DIFS staff presented an affidavit from Mr. [REDACTED] in which he stated that he was put in touch with the Excalibur Agency by a friend, [REDACTED]. In the affidavit (Respondent’s Exhibit 6), Mr. [REDACTED] says he spoke to Mr. Smith on the phone and arrangements were made to meet with an (unnamed) agency representative to make the actual insurance purchase.

How should we analyze this evidence? Since Mr. [REDACTED] did not make an appearance at the hearing, there was no opportunity for the ALJ to test his credibility by direct observation of

his direct and cross-examined testimony. Given that Mr. ██████ made inconsistent affidavits, there is every reason to doubt the reliability of both. But even looking at his affidavits in a light most favorable to the DIFS staff's position, it can only be concluded that Mr. ██████ spoke to Mr. Smith by telephone when arrangements were made to purchase the insurance. Mr. Smith does not make an appearance in Mr. ██████'s affidavit after that. Mr. ██████'s affidavit is, therefore, devoid of any evidence of Mr. Smith's direct involvement in the actual transaction.

Had Mr. ██████ testified at hearing, he might have proved a valuable witness. However, he did not testify and the problems with his competing affidavits make either of his affidavits a dubious foundation upon which to base findings of fact and legal conclusions. Therefore, the Director finds the analysis and conclusions of the ALJ appearing on pages 12-17 of the PFD to be consistent with the hearing record, well-reasoned, and persuasive. The Director does not adopt the exceptions proposed by the DIFS staff.

The evidence does support a conclusion that the Petitioner Smith used coercive or dishonest practices in his refusal to cooperate with a lawful examination of his business records and practices, conduct providing a basis for license probation, suspension, or revocation pursuant to MCL 500.1239(1)(h). The letters sent to various DIFS employees demonstrate that Mr. Smith lacked adequate knowledge of his statutory obligation to cooperate with the DIFS investigation. Mr. Smith, who is the only licensed member of his agency, failed to make agency records available to DIFS investigators. The obligation to cooperate with the investigation is borne by both Mr. Smith and his agency. The investigation was conducted according to a lawful order of the Director. Failure to cooperate with the investigation is a violation of section 249 of the Code, MCL 500.1239(1)(b), and is a basis for adverse action against Petitioners' licenses under section 1239(1)(b), MCL 500.1239(1)(b).

III. Findings of Fact

The PFD includes detailed findings of fact. Those findings are supported by a preponderance of the evidence. The Director finds that the ALJ made the correct analysis of the evidence presented at the hearing, including, as noted above, her analysis of the competing affidavits submitted by the parties. The Director, therefore, adopts the findings of fact in the PFD.

IV. Conclusions of Law

The conclusions of law are supported by reasoned opinion and are properly based on the findings of fact. Those conclusions are adopted. The PFD is attached and made part of this final decision. The Director finds that the Petitioners violated section 249 of the Code and used

coercive practices in an attempt to prevent or thwart a lawful investigation of this Department. Such conduct provides justification for license revocation pursuant to sections 1239(1)(b) and (h) of the Code

1. By refusing to cooperate with a lawful investigation of this Department, the Petitioners violated section 249 of the Code. This refusal constitutes a violation of a director's order and justifies license revocation pursuant to section 1239(1)(b) of the Code.

2. By using coercive practices in an attempt to prevent or thwart a lawful investigation of this Department, the Petitioners engaged in conduct which justifies revocation pursuant to section 1239(1)(h) of the Code.

V. Order

Based on the conduct described above and in accordance with the Code provisions cited, all insurance licenses of Terrell Smith (System ID No. 0067282) and Excalibur Agency, Inc. (System ID No. 0025391) are revoked.



R. Kevin Clinton
Director

**STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM**

IN THE MATTER OF:	Docket No.:	12-001098-OFIR
Terrell L. Smith and Excalibur Agency, Inc., Petitioner	Case No.:	12-882-L
v	Agency:	Office of Financial & Insurance Regulation
Office of Financial and Insurance Regulation, Respondent	Case Type:	OFIR/OFIS-Insurance
	Filing Type:	Appeal

**Issued and entered
this 7th day of January 2013
by Renee A. Ozburn
Administrative Law Judge**

PROPOSAL FOR DECISION

On April 30, 2012, the Office of Financial and Insurance Regulation (OFIR/Respondent) issued an Order of Summary Suspension and Notice of Intent to Revoke against the insurance producer licenses of Terrell Smith and Excalibur Agency, Inc. (Petitioner).

A Notice of Hearing was issued on June 26, 2012. A hearing was held in this matter on August 2, 2012. At all times relevant to this contested case, Petitioner Terrell Smith has appeared without legal counsel. Mr. Terrell testified on his own behalf. Attorney Conrad Tatnall appeared on behalf of OFIR. Felix Sharp, Catherine Kirby and Regan Johnson testified as witnesses for OFIR. The record remained open until November 16, 2012 for submission of written closing arguments.

ISSUES AND APPLICABLE LAW

The issue in this matter is whether Mr. Smith violated the Michigan Insurance Code, (Code), 1956 PA 218, as amended, MCL 500.100 *et seq.*, as alleged in the Notice of Intent to Revoke which cites the following applicable Code provisions:

500.249 Insurance commissioner; investigations of agents, adjusters, counselors, managers, promoters, officers and directors.

Sec. 249.

For the purposes of ascertaining compliance with the provisions of the insurance laws of the state or of ascertaining the business condition and practices of an insurer or proposed insurer, the commissioner, as often as he deems advisable, may initiate proceedings to examine the accounts, records, documents and transactions pertaining to:

(a) Any insurance agent, surplus line agent, general agent, adjuster, public adjuster or counselor.

500.1239 Probation, suspension, or revocation of insurance producer's license; refusal to reissue; causes; civil fine; notice of license denial; hearing; license of business entity; penalties and remedies.

Sec. 1239.

In addition to any other powers under this act, the commissioner may place on probation, suspend, or revoke an insurance producer's license or may levy a civil fine under section 1244 or any combination of actions, and the commissioner shall refuse to issue a license under section 1205 or 1206a, for any 1 or more of the following causes:

(b) Violating any insurance laws or violating any regulation, subpoena, or order of the commissioner or of another state's insurance commissioner.

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

SUMMARY OF ADMITTED EXHIBITS

Petitioner Exhibits:

<u>Exhibit A</u>	Affidavit of [REDACTED]
<u>Exhibit B</u>	Affidavit of [REDACTED]
<u>Exhibit C</u>	Affidavit of [REDACTED]
<u>Exhibit G</u>	Letter dated October 8, 2012
<u>Exhibit H</u>	Statement of [REDACTED]

Respondent Exhibits:

<u>Exhibit 6</u>	Affidavit of [REDACTED]
<u>Exhibit 7</u>	Excalibur Agency Articles of Incorporation
<u>Exhibit 8</u>	Workers Compensation Certificates
<u>Exhibit 12</u>	Multiple Documents from June 2010
<u>Exhibit 15</u>	Letter dated October 18, 2010 from T. Smith to C. Kirby
<u>Exhibit 17</u>	Letter dated February 21, 2010 from T. Smith to A. Flood
<u>Exhibit 18</u>	Affidavit of [REDACTED]
<u>Exhibit 19</u>	Affidavit of [REDACTED]
<u>Exhibit 20</u>	Letter dated April 5, 2012 from T. Smith to A. Flood
<u>Exhibit 21</u>	Proposed Consent Order & Stipulation
<u>Exhibit 24</u>	Letter dated 5May 18, 2012 from F. Sharp to T. Smith

FINDINGS OF FACT

The undersigned Administrative Law Judge, based upon the whole record of competent, material and substantial evidence, finds the following facts to be established:

1. Terrell Smith has been licensed as a resident insurance producer in Michigan since 1968. Articles of Incorporation indicate that Terrell Smith has been the resident agent of Excalibur Agency, Inc. since at least 1990. (Exhibit 7)
2. Felix Sharpe is an Insurance Investigator for the Office of Financial and Insurance Regulation (OFIR). In April 2010, Mr. Sharpe was contacted by Amerisure Insurance Company about three (3) workers compensation certificates allegedly issued by Excalibur Agency and Terrell Smith, listing Amerisure as the insurer.
3. Amerisure sent Mr. Sharpe the following three (3) certificates of liability insurance (Exhibit 8):
 - a. A certificate naming Excalibur Insurance Services as producer with "Terry Smith" listed as contact for the producer. [REDACTED] is named as insured. Western World Ins. Co. and Amerisure Insurance Co. are listed as insurers. A workers compensation policy ([REDACTED]) is listed with a policy effective date of '04/16/2010'. The certificate contains the signature of "Terry Smith" signing as authorized representative.
 - b. A certificate naming Excalibur Insurance Services, LLC as producer with "Terry Smith" listed as contact for the producer. [REDACTED] is named as insured and Northland Insurance Co. and Amerisure Insurance Co. are listed as insurers. A workers compensation policy ([REDACTED]) is listed with a policy effective date of '04/20/2010'. The certificate lists [REDACTED]

██████████ as an additional insured on the workers compensation policy. The certificate contains the signature of "Terry Smith" signing as authorized representative. On the Exhibit 8 copy of the certificate, there is also an "Excalibur Agency, Inc. / 20" seal or stamp affixed to the certificate.

- c. A certificate naming Excalibur Insurance Services, LLC as producer with "Terry Smith" listed as contact for the producer. ██████████ is named as insured and Northland Insurance Co. and Amerisure Insurance Co. are listed as insurers. A workers compensation policy (██████████) is listed with a policy effective date of '04/05/2010'. The certificate lists ██████████ as an additional insured on the workers compensation policy. The certificate contains the signature of "Terry Smith" signing as authorized representative. On the Exhibit 8 copy of the certificate, there is also a stamped seal that is obscured, but looks similar to the stamp on the certificate noted in subsection (b) above.
4. Mr. Sharpe contacted the workers compensation insurers listed on the certificates (i.e. Western World, Northland and Amerisure). All three insurers denied issuing these workers compensation certificates. (Hearing Transcript [Tr.] p. 35)
5. On May 13, 2010, Mr. Sharpe went to an address (i.e. ██████████) on file with OFIR for the Excalibur Agency. The woman who answered the door at this residence indicated that Mr. Smith was not present. Mr. Sharpe left a business card and asked the woman to have Mr. Smith call him. (Tr. p 37)
6. In May 2010, Mr. Smith was in Florida when he learned that OFIR staff had visited his home in Redford Township. (Tr. pp. 111 - 118)
7. Mr. Sharpe sent correspondence to Terrell Smith dated May 18, 2010, (Exhibit 24) asking for a written response to allegations that fraudulent certificates had been issued by his agency.
8. In correspondence dated June 10, 2010 (Exhibit 12), Mr. Smith submitted his response to OFIR's May 18, 2010 request. Attached to Mr. Smith's correspondence were four written statements purporting to be from ██████████ ██████████ ██████████ and ██████████. The statements of ██████████ ██████████ and ██████████ all have paraphrased versions of the same story: That the three men talked to Mr. Smith about workers compensation insurance but decided to look elsewhere and eventually paid 'Jimmy' for binders that were rejected as proof of workers compensation insurance. The three statements assert that none of the three men bought a certificate of insurance from Terrell Smith. (Tr. pp. 39, 40) None of these statements are notarized. (Tr. pp.118 - 130)

9. In his June 10, 2010 correspondence (Exhibit 12), Mr. Smith denied issuing the workers compensation certificates at issue. He denies that he ever signs his name "Terry" as indicated on the certificates. He asserted that an individual named [REDACTED] was responsible for producing the fraudulent certificates with an old computer that Mr. Smith sold to Mr. [REDACTED]. However, at the hearing on August 2, 2012, Mr. Smith testified that naming [REDACTED] was speculation and as of August 2012, he no longer believed [REDACTED] was responsible. (Tr. pp. 169 – 171)
10. In or around July 2010, Mr. Sharpe requested that Mr. Smith come to Lansing and meet with OFIR staff to answer questions. Mr. Smith was unable to comply with that request because he was receiving medical treatment. Mr. Sharpe then requested that Mr. Smith provide contact information for the people who allegedly gave the written statements attached to Mr. Smith's June 10, 2010 correspondence to OFIR. This request angered Mr. Smith and he refused to comply with the request for contact information. (Tr. pp. 131 - 136)
11. Mr. Sharpe questioned the credibility of the written statements attached to Mr. Smith's June 10, 2010 correspondence, initially, because there was no contact information from any of the four men who purportedly signed the statements. Approximately one year later Mr. Sharpe contacted [REDACTED] who subsequently provided a sworn affidavit dated September 9, 2011 (Exhibit 6). (Tr. pp. 40, 41, 51- 64)
12. Catherine Kirby is Deputy Commissioner of the Consumer Services Division for OFIR. She oversees OFIR's complaint process and insurance investigations.
13. Ms. Kirby sent Mr. Smith correspondence dated October 8, 2010 (Exhibit G), citing Code Section 249 as the basis for requesting that Mr. Smith make his agency's insurance records available for an onsite review on a mutually acceptable date by contacting Investigations Manager Karen Porter by October 22, 2010.
14. Mr. Smith sent correspondence dated October 18, 2010 (Exhibit 15), responding to Ms. Kirby's October 8, 2010 correspondence in which he refused the request to make his agency records available to OFIR. Despite the statutory authority cited by Ms. Kirby, Mr. Smith believed that OFIR needed a warrant to conduct an open-ended search of his records. Mr. Smith acknowledges that the tone of his October 18, 2010 letter was angry because he felt like he was being "pushed around". (Tr. pp. 137 – 140)

In pertinent part, Mr. Smith's October 18th response states:

"Well, Ms. Kirby, it would appear that you are a person who enjoys fishing, and indeed we, who live in Michigan are very blessed to have thousands of lakes, rivers, creeks and ponds

to go fishing in, BUT THE ONE PLACE YEA SHALL "NEVER" GO FISHING, IS IN MY AGENCY OR MY FILES." My files and the information contained in those files are the private property of my clients and my Agency, and the information is sacrosanct. And pursuant to the rights of all American citizens to be free of illegal searches and seizures, you neither have the right, nor legal power in your position to search my office for a possible violation without a court order...My office is in my briefcase. The [REDACTED] address is the private home of a long time lady friend of mine, and I had a business phone installed in her home so she answers my clients, and I have a Michigan address for all my business mail. ...After I closed my old office and went into semi-retirement, I moved all my hard files for insurance...to a bank vault in another state where I have controlling interest in a business which operates out of a former bank...not even my partner has access to that vault...I have no accord system in my computer...and never issued certificates directly to clients. Always ordered certificates directly from the underwriting department of the company I was dealing with. So the idea that I would be in Michigan in April issuing phony accord certificates for some losers would be funny if not for the insanity of this entire event.

MCL 500.249 is not applicable in this case, my attorney ...said you have reached the point of official misconduct, your continued harassment and inappropriate application of the regulations of your office has gone too far.

I demand you cease this obnoxious and ridiculous investigation, or I am going to let the Big Dog go. And when my attorney drags you into the 36th district court you will learn a very expensive and painful lesson. Public employees are not protected from being sued when they engage in the type of conduct Mr. Sharp is guilty of. And it would appear you are one of his cohorts in this matter as well. It has been said 'Never underestimate the predictability of stupidity' and you and Mr. Sharp are a good example.

...I have been very forgiving of Mr. Sharp's lies and misrepresentations of the truth up until June 18th, 2010 when he sent me a letter claiming Amerisure was the Complainant...this game of trying to find something has gone way too far, he is so stupid he request(ed) that Mr. [REDACTED] [REDACTED] travel from Tennessee to Lansing so he could test his handwriting...

This is not a game, and I have had enough of your harassment and lies. I have provided all the proof needed to prove I am not guilty of the infractions you claimed in Mr. Sharp's May 18th, letter. I have on file the signed statements of 4-individuals who have cleared me and my agency of any wrong doing. And I will not tolerate any more of your petty vendetta ...just ask yourself this, are you willing to lose your job with the state: Just continue with these (this) nonsense and I will make it my life mission to get you and Sharp fired. And I know how to get it done.

If you have any sense at all, and care about your future, you better send me a letter thanking me for providing the help needed to get to the truth, that a contractor working with the three men in question was the person responsible for the production of the fraudulent certificates and you are sorry for any misunderstanding between myself and Felix Sharp. And the file is being closed with the finding that myself and my agency are cleared of any wrong doing.

...my doctor told be I had developed a heart condition...he diagnosed the source of my heart problems to stress...the only source of stress in my life is your department and their misconduct and lying. ...All I ask of you is to leave me alone, clear my name, and close out your investigation so I can go to Florida....So I don't give a damn what you think, it's all about what you can prove and in this case that is zero. So do the smart and right thing and close this file forever. I will await your answer."

Ms. Kirby considered this letter intimidating, threatening, coercive and indicative of Mr. Smith's failure to understand crucial Code provisions governing the regulation of insurance producers. (Tr. pp. 79 – 80)

15. Regan Johnson is Director of OFIR's Market Conduct Division. In 2011 she was also Director of the Investigation Division. Ms. Johnson was contacted by [REDACTED] of [REDACTED] regarding some possible fraudulent insurance certificates the company had received. Ms. Johnson took notes of what Ms. [REDACTED] communicated and sent a copy of the notes for Ms. [REDACTED] to confirm. Ms. Johnson then prepared an affidavit for Ms. [REDACTED] to have notarized. (Exhibit 18). (Tr. pp. 94 - 98)
16. Ms. Johnson also had telephone conversations with [REDACTED] who identified herself as the insurance agent for [REDACTED]. Ms. Johnson made notes of their conversations and prepared an affidavit for Ms. [REDACTED] to verify and notarize. (Exhibit 19) (Tr. pp. 99- 101)

17. Mr. Smith considers [REDACTED] a competitor. (Tr. p. 173)
18. Mr. Smith participated in a compliance conference on or about May 3, 2011, during which Mr. Smith presented three affidavits (Exhibits B, C & D) purporting to be from [REDACTED], [REDACTED] and [REDACTED]. After the compliance conference, Mr. Smith agreed to an inspection of his office. (Tr. pp. 140 - 147)
19. In June 2011, OFIR Attorney Conrad Tatnall, Investigator Felix Sharpe and Investigator Jason McNally visited Mr. Smith's office located at [REDACTED] in [REDACTED]. Mr. Smith gave the OFIR staff a 3-ring book/binder listing clients. Mr. Smith also produced something he identified as a statement of operations. OFIR staff took pictures. Mr. Smith explained that he did most of his business electronically on a computer, but the computer with his insurance business information was not available during OFIR's visit in June 2011. Further, Mr. Smith never made arrangements to make his computer available for review by OFIR. (Tr. pp. 148 – 155, 185 - 190)
20. Mr. Smith sent correspondence dated February 21, 2012 (Exhibit 17) to Ms. Kirby's supervisor, Chief Deputy Commissioner Annette Flood. This letter was provided to Ms. Kirby in the course of her role in the investigation of Mr. Smith. In pertinent part, Mr. Smith's February 21, 2012 letter states:

"I am writing to you as a courtesy out of respect for your position as the Chief Deputy Commissioner...if you were to affix your signature to the offer being placed before you, your career would be in grave jeopardy..."

I am going to address Mr. Tatnall's 19 statements, but first...allow me to finish the winter in Florida. For health reasons, and not for recreational...I have a very detailed minute by minute record of all events and actions taken on behalf of this case.

However, those records are locked in my safety deposit box and I am the only one who can access the box while I am living...

#8...This complaint was...has been produced by a long time enemy of mine...This person is very bitter towards me and it (may) help to explain the lies and fabrications...

#10...there is no reason or probable cause to go fishing in my records in hopes that your office might turn up something that could justify this investigation continuing long after the person they should be looking for...

#12... I gave to Conrad new notarized copies of the new statements by the contractors and the landlord of the condo I had stayed at during 2010. The statements...were...the same information as I provided...in June 2010... I had to...have a notary take their statements and give legal witness to those statements...

#13...they did search and inspect my office...I gave Mr. Tatnall a ringed hard cover book containing all my clients, and the insurance companies and their policy numbers and all the contact information needed to confirm the way my office is managed...I gave Mr. Tatnall a copy of my business operations and how collections are made and forwarded to the companies. My agency is 100% EFT, I do not keep or deposit monies. All payments are EFT to the company ...and the records of all transactions are available...on the company websites...Mr. Tatnall took pictures of everything in my office...

#14 I have for 44 years always been in 100% compliance with the laws and rules for the State of Michigan. And any claim that I have violated any of those laws is a damn lie.

#15 I have never seen or been schooled in any of those sections as they do not appear in any of the courses I have taken over the past 44 years but...I always followed the rules and regulations of the companies I represented...but to have knowledge of codes by section is not a reasonable demand...

#17...I did not refuse to allow Conrad to inspect my records and books...

#19...And Ms. Flood, know this to be fact, as I write this letter my attorney is preparing to take this case to a level that could end your career...if you like being Deputy Commissioner, I would advise you to end this investigation with a letter addressed to me and my agency, thanking me for my cooperation and apologizing for the time and expense I had to give to defend myself..."

Ms. Kirby considered Mr. Smith's February 21, 2012 letter (Exhibit 17) to Commissioner Flood to be intimidating and threatening in nature, much like the October 2010 letter (Exhibit G) Mr. Smith addressed to Ms. Kirby. Ms. Kirby was alarmed that a licensee would communicate to a regulator in this manner. (Tr. p. 82 – 89)

21. Before receiving Mr. Smith's February 21, 2012 correspondence, on February 22, 2012, OFIR sent Mr. Smith a proposed Consent Order and Stipulation (Exhibit 21). The proposed Order addresses issues related to OFIR's authority under Code Section 249 to review books and records and Mr. Smith's history of responding to such requests. (Tr. pp. 155, 178 - 181)
22. Mr. Smith sent an additional correspondence to Ms. Flood dated April 5, 2012 (Exhibit 20), which was given to Ms. Kirby for purposes of the investigation. Ms. Kirby found this additional correspondence inappropriate and further evidence that Mr. Smith lacked knowledge required of licensees. (Tr. pp. 90 – 93)

In pertinent part, Mr. Smith's April 5, 2012 correspondence contains the following statements:

"While I was in Florida on winter vacation, someone in your office sent to my attorney [REDACTED] a copy of the Szabo v Insurance Commissioner.

I guess you think that decision justifies your department's continued persecution and harassment of me and my agency.

Before I explain to you why Szabo...has no application to my case first let me inform you. This shall be the last communication I address to you. If you do not terminate this illegal investigation of me and my Agency, I shall go directly to Governor Snyder's office and demand that you and your staff be punished for engaging in official misconduct.

And if you think that this is an idle threat, don't...You have to ask yourself this question, how much are you willing to lose to continue this wrongful investigation of me and my Agency. When Governor Snyder calls the head of your department on the carpet for this absurd waste of taxpayer's money for no other reason than to satisfy members of your department's lust to win at all cost.

Then your boss is going to call you in and he will hold you accountable for this entire debacle...Are you willing to take a chance on losing your job to protect persons in your department who did not do their job in a proper manner...The unemployment line is long and deep and you will never again find a nice cushy job like the one you have now...

...I'll be damned if I am going to allow a bunch of Bureaucratic Bullies to ruin my good reputation...

...In Szabo v. Ins. Commissioner...just because the court sided with the commissioner in this case, does not make the decision correct...

So, unlike Szabo, there should never have been an investigation of me or my agency because there was no evidence or proof. And as further proof of that, I have continued to do business with Amerisure without any interruption of service...

...your out of control investigators conducted themselves in a completely unprofessional and unethical manner wasted thousands of taxpayer dollars and almost \$5,000 of my hard to come by funds, while performing a witch hunt. ...

...so who gives the order for Felix Sharp and his cohort the right to just waste taxpayers money, by running down to my office unannounced and uninvited. ...They arrived with no legal mandate...

...Your department continued to harass and persecute me by demanding that I make a personal appearance in Lansing for NO GOOD REASON. ...Then WITHOUT ANY PROBABLE CAUSE OR JUSTIFIABLE CAUSE YOUR DEPARTMENT DEMANDS I SHOULD ALLOW THEM TO RUMAGE THROUGH MY OFFICE LOOKING FOR UNNAMED ITEMS....I never refused to allow a search as long as it was done in a proper legal fashion. Show probable cause to a judge and get a search warrant...

...If one does not break the rules, or do anything wrong why should I be dragged to Lansing ...just another example of the Bully tactics your department uses to try and force everyone to kiss your behind. That is in fact what this whole case is about. ...my refusal to bow down to your department's absurd demands, while they ignored the truth. ...

...I am in 100% COMPLIANCE WITH THE RULES AND REGULATIONS OF ALL THE COMPANIES THAT I REPRESENT. ...I don't have to follow your outdated ideas of how an insurance agent must keep records. ...

...end it now, or get ready for a real contest one where you will have no Control over the rules...And I am sure Mr. Cut Everything he can "Snyder" will love my suggestion that your department is completely useless...And your enforcement Division should be eliminated because it is in gross violation of the Constitution of the United States. Operating under the pretense that you have the right to force business persons to violate their rights under the Constitution....

So Ms. Flood, in closing, if you value your job, I would suggest you end this persecution of me and my agency...

And I will make this offer to you, if you agree to clear me and my agency of any wrong doing...and bring it to an official close, I will sign an agreement ...not to enter into a lawsuit or file any complaints with the Governor or anyone with the Government of the State of Michigan....That way you don't have to worry about any repercussions of doing the right thing and bringing this case to a close that will not cause harm to anyone."

23. OFIR issued an Order of Summary Suspension and Notice of Intent to Revoke on April 30, 2012.

CONCLUSIONS OF LAW

The principles that govern judicial proceedings also apply to administrative hearings. 8 Callaghan's Michigan Pleadings and Practice, §60.48 at 239 (2d ed. 1994). The burden of proof is on Respondent OFIR to prove that grounds exist for the revocation of Petitioner's license to practice as a licensed insurance producer in Michigan. The Michigan Administrative Procedures Act (APA), 1969 PA 306, as amended, MCL 24.201 *et seq.*, addresses standards of proof in administrative hearings. Specifically APA Sections 75 and 85, in pertinent part, provide as follows:

Sec. 75.

In a contested case the rules of evidence as applied in a nonjury civil case in circuit court shall be followed as far as practicable, but an agency may admit and give probative effect to evidence of a type commonly relied upon by reasonably prudent men in the conduct of their affairs.

Irrelevant, immaterial or unduly repetitious evidence may be excluded. ...

Sec. 85.

...Findings of fact shall be based exclusively on the evidence and on matters officially noticed. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting them. ...Each conclusion of law shall be supported by authority or reasoned opinion. A decision or order shall not be made except upon consideration of the record as a whole or a portion of the record as may be cited by any party to the proceeding and as supported by and in accordance with the competent, material and substantial evidence. ...

The courts have held that while an administrative agency has wide latitude in admission of evidence Young v Liquor Control Commission, 39 Mich App 101 (1972), administrative hearings must still provide due process and decisions must be supported by competent, material and substantial evidence. Viculin v Department of Civil Service, 386 Mich 375 (1971). Although hearsay is generally not considered competent evidence, under the residual rule, a statement not specifically covered by an exception to the hearsay rules may still be admissible if it is trustworthy as determined by 'trustworthiness' factors such as (1) the spontaneity of the statement, (2) the consistent repetition of the statement, (3) the declarant's lack of motive to fabricate, and (4) the reason for the declarant's inability to testify at trial. People v Welch 226 Mich App 461 (1998).

While Administrative Law Judges are permitted to receive evidence that might be inadmissible in a court of law, they must still appraise the quality of the evidence received and the weight accorded it. The courts will generally apply the substantial evidence test to determine if administrative decisions are to be upheld. Substantial evidence is such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact.

An affidavit is a written statement of facts voluntarily made by an affiant under an oath or affirmation administered by a person authorized to do so by law. An affidavit is based upon either the personal knowledge of the affiant or his or her information and belief. Personal knowledge is the recognition of particular facts by either direct observation or experience. Information and belief is what the affiant feels he or she can state as true, although not based on firsthand knowledge.

Affidavits serve as evidence in civil actions and criminal prosecutions in certain instances. They are considered a very weak type of evidence because they are not taken in court, and the affiant is not subject to cross-examination. Their use is usually restricted to times when no better evidence can be offered. If a witness who has made an affidavit is not available to testify at a trial, his or her affidavit may be admitted as evidence. If the witness is present, his or her affidavit is inadmissible except when used to impeach the witness's testimony, or to help the witness with past recollection of facts.

An affidavit based on the knowledge of the affiant is accorded more weight than one based on information and belief. ***When admissible, affidavits are not conclusive evidence of the facts stated therein.***

Section 249

OFIR alleges that Mr. Smith violated Code Section 249 by refusing to comply with its requests to examine his books and records or to explain his business practices. OFIR first requested that Mr. Smith submit a signed written statement responding to allegations about fraudulent certificates on May 18, 2010. OFIR cited Code Section 249 as the statutory authority for its request for information. In pertinent part, Section 249 states:

For the purposes of ascertaining compliance with the provisions of the insurance laws of the state or of ascertaining the business condition and practices of an insurer or proposed insurer, the commissioner, as often as he deems advisable, may initiate proceedings to examine the accounts, records, documents and transactions pertaining to:

Any insurance agent, surplus line agent, general agent, adjuster, public adjuster or counselor.

Mr. Smith responded to OFIR's May 18, 2010 request, as directed, by submitting a written correspondence dated June 10, 2010. However, when OFIR requested follow-up information in or around July 2010, Mr. Smith refused to comply.

Next, in correspondence dated October 8, 2010, OFIR requested that Mr. Smith make his agency's insurance records available for an onsite review, again citing Code Section 249. Mr. Smith's October 18, 2010 response included the following statements:

"...THE ONE PLACE YEA SHALL NEVER GO FISHING IS IN MY AGENCY OR MY FILES."

" My files and the information contained in those files are the private property of my clients and my Agency, and the information is sacrosanct."

“...you neither have the right, nor legal power in your position to search my office for a possible violation without a court order.”

Despite OFIR's legitimate request to review his records in October 2010, Mr. Smith did not make his office available for an onsite review until June 2011. Further, during the June 2011 office inspection, Mr. Smith did not have all of his records available for review. In addition, Mr. Smith expressly refused to let OFIR conduct an onsite review of his insurance business until more than 6-months after OFIR's initial request.

Therefore, OFIR has met its burden of proving that Mr. Smith violated Code Section 249.

Section 1239(1)(h)

OFIR alleges that Mr. Smith acted in a fraudulent and dishonest manner in violation of Code Section 1239(1)(h) by producing workers compensation certificates for three insureds naming insurers who did not issue the certificates. The evidence presented in support of this allegation included copies of three certificates with signatures purporting to be Mr. Smith's. Mr. Smith denied that the signatures were his and there was no additional competent evidence presented to establish otherwise.

There was no testimony offered from witnesses with first hand knowledge of the alleged fraudulent transactions Mr. Smith is accused of perpetrating. Neither the insureds nor any insurer testified to verify the essential facts alleged. Both parties attempted to use affidavits of individuals who were not available for cross-examination to support their positions. These affidavits were insufficient as competent evidence for a number of reasons. For example, both parties offered affidavits purporting to contain sworn statements of [REDACTED] (i.e. Exhibits C & 6). Both of these affidavits are notarized and contain signatures that, to the naked eye, appear to be by the same person. The statements in these affidavits contain contradictory assertions. In the absence of actual testimony from the affiant to verify the affidavits and the assertions contained therein, both affidavits fail the test of trustworthiness. Therefore, any substantive assertions in these affidavits are not competent for purposes of establishing facts or conclusions of law.

OFIR also submitted an affidavit from a [REDACTED], who did not testify. This affidavit contains sworn statements in which Ms. [REDACTED] quotes what other individuals, who were not witnesses at the hearing, allegedly said to Ms. [REDACTED]. Significantly, Ms. [REDACTED]'s affidavit also contains her speculative beliefs that two of the individuals she quotes were not truthful. Finally, Ms. [REDACTED] affidavit attributes statements to Mr. Smith which he denied under oath at the hearing. Against Mr. Smith's sworn testimony at the hearing, Ms. [REDACTED]'s uncorroborated affidavit does not hold weight.

Next, OFIR submitted an affidavit from [REDACTED], an insurance producer and owner of an agency that Mr. Smith considers a competitor. Ms. [REDACTED] did not testify at the hearing. In her affidavit, Ms. [REDACTED] acknowledges that [REDACTED] was a long time client of her agency. This calls into question her motivations for making statements against Mr. Smith. Ms. [REDACTED]'s sworn affidavit statements consist of a series of communications she allegedly had with others who were not witnesses at the hearing. In one affidavit statement, Ms. [REDACTED] indicates that she got her information about subcontractors from Mr. and Mrs. [REDACTED]. However, in another statement, Ms. [REDACTED] asserts that she was told by [REDACTED] and [REDACTED] how they had purchased the certificates from Terrell Smith. These discrepancies could not be reconciled in the absence of an opportunity to question Ms. [REDACTED] as a witness.

Although OFIR's Director of Market Conduct, Regan Johnson, gave credible testimony regarding how she obtained the affidavits of Ms. [REDACTED] and Ms. [REDACTED], Ms. Johnson's credibility does not rehabilitate the contradictions and hearsay within hearsay contained in the affidavits. Two deficient affidavits can not corroborate each other to prove the truth of facts asserted by OFIR. As noted above, affidavits are not conclusive evidence of fact. Further, these affidavits are not the type of evidence that a reasonably prudent person would rely on as definitive proof of fraudulent transactions.

ORIF also alleges that Mr. Smith's refusal to comply with legitimate investigative requests and his hostile written communications to OFIR's regulatory staff indicate a propensity to use coercive practices and reflects a lack of competence and trustworthiness to serve the public in violation of Code Section 1239(1)(h).

By Mr. Smith's own admission, he authored at least three correspondences addressed to deputy commissioners in 2010 and 2012 that expressed his anger with OFIR's investigative efforts. One of the deputy commissioner's testified to feeling threatened by language in these letters to her and her supervisor. In particular, Mr. Smith made the following statements in his correspondences to commissioners Kirby and Flood:

"I demand you cease this obnoxious and ridiculous investigation, or I am going to let the Big Dog go. And when my attorney drags you into the 36th district court you will learn a very expensive and painful lesson..."

"Never underestimate the predictability of stupidity – and you and Mr. Sharp are a good example."

"This is not a game...just ask yourself if you are willing to lose your job with the state. Just continue with this nonsense and I will make it my life mission to get you and Mr. Sharp fired. And I know how to get it done."

"If you have any sense at all, and care about your future, you better send me a letter thanking me for providing the help needed to get to the truth..."

"So I don't give a damn what you think, its all about what you can prove and in this case that is zero. "

"If you like being Deputy Commissioner, I would advise you to end this investigation..."

"This shall be the last communication I address to you. If you don not terminate this illegal investigation of me and my Agency, I shall go directly to Governor Snyder's office and demand that you and your staff be punished for engaging in official misconduct."

"I'll be damned if I am going to allow a bunch of Bureaucratic Bullies to ruin my good reputation.'

"end it now, or get ready for a real contest one where you will have no Control over the rules. "

"And your enforcement Division should be eliminated because it is in gross violation of the Constitution of the United States."

A number of these statements indicate that Mr. Smith is disrespectful and full of hubris. However, it is Mr. Smith's statements adamantly refusing to comply with OFIR's legitimate requests for information and his demands that OFIR change their investigative focus or face his attempts to get people fired, that indicates a coercive propensity.

Therefore, although OFIR has failed to establish that Mr. Smith used fraudulent or dishonest practices to produce false insurance certificates as alleged in the Notice of Intent to Revoke, OFIR has met its burden of establishing that Mr. Smith acts coercively in the conduct of insurance business and lacks competent knowledge of crucial Code provisions in violation of Code Section 1239(1)(h).

Section 1239(1)(b)

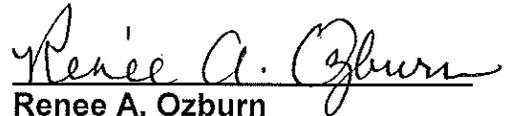
Mr. Smith's violations of Code Sections 249 and 1239(1)(h) also constitute violations of Section 1239(1)(b).

PROPOSED DECISION

The undersigned Administrative Law Judge proposes that the Commissioner issue a final order consistent with the above Findings of Fact and Conclusions of Law.

EXCEPTIONS

The parties may file Exceptions to this Proposal for Decision within 20 days after it is issued. Exceptions should be addressed to the Office of Financial and Insurance Regulation, 611 West Ottawa Street, 3rd Floor, P.O. Box 30220, Lansing, Michigan 48909; Attention: Dawn Kobus.


Renee A. Ozburn
Administrative Law Judge