



**THE STATE OF NEW HAMPSHIRE
INSURANCE DEPARTMENT**

21 SOUTH FRUIT STREET SUITE 14
CONCORD, NEW HAMPSHIRE 03301

John Elias
Commissioner

October 22, 2019

Alexander K. Feldvebel
Deputy Commissioner

Sent via return receipt 7016 1370 0001 3383 1673
Sent via email to roy@mcnich.com

Roy McCandless, Esq.
McCandless & Nicholson, P.L.L.C.
PO Box 4137
Concord, New Hampshire 03302

Re: Surplex Underwriters of New Hampshire, Inc.
Docket No.: INS No. 19-008-EP

Dear Attorney McCandless:

Please find enclosed the Final Order and Decision dated October 22, 2019, pursuant to RSA 400-A:23 and Ins 204.26(c). This decision arises from an evidentiary hearing conducted on July 17, 2019 and oral arguments on October 1, 2019, pursuant to Ins 204.26(a)(2)(3).

Pursuant to the provisions of Ins 204.26(e), this is a final action and you have the right to appeal this decision by submitting a request for reconsideration in accordance with RSA 541. You must file your request for reconsideration *within 30 days after the date the enclosed order/decision was signed by the Commissioner*. The Commissioner will grant a request to reconsider if, in his opinion, there is good reason to reconsider his decision. Please send any request for reconsideration to:

Sandra Barlow Clerk
New Hampshire Insurance Department
21 South Fruit Street, Suite 14
Concord, New Hampshire 03301

Copies of Ins 200, Practices and Procedures may be obtained through a link on the Insurance Department's website at www.ins.state.nh.us or at the "New Hampshire General Court Links of Interest" on the New Hampshire General Court website at www.gencourt.state.nh.us.

Very truly yours,

A handwritten signature in cursive script that reads "Sandra Barlow".

Sandra Barlow
Hearing Clerk
Assistant to the Commissioner

enclosure



**The State of New Hampshire
Insurance Department**

21 South Fruit Street, Suite 14
Concord, NH 03301
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John Elias
Commissioner

Alexander K. Feldvebel
Deputy Commissioner

**State of New Hampshire
Insurance Department**

In re Surplex Underwriters of New Hampshire, Inc.

Docket No.: 19-008-EP

FINAL DECISION and ORDER

Pursuant to the provisions of Ins 204.26(a)(4), based upon the record and in consideration of the parties' oral arguments to the Commissioner on October 1, 2019, the Proposed Decision and Order issued on August 12, 2019, by Hearing Officer Michelle Heaton is hereby ACCEPTED as a FINAL DECISION and ORDER, with the following MODIFICATIONS:

1. In Section I (Procedural History) add the following paragraphs to the end of that section, such that these new paragraphs will immediately precede Section II (Findings of Fact). These new paragraphs inserted at the end of Section I shall read as follows:

After the record closed and the Hearing Officer issued her Proposed Decision and Order, the Department filed an Exception to the Proposed Order, pursuant to Ins 204.26 (a)(2), on August 14, 2019. In its exception filing the Department argued that the Respondent's overpayment of \$1668.68 of its 2018 premium tax penalty in February 2019 should not be applied towards any administrative fine imposed on

the Respondent because the Respondent's overpayment had been refunded to the Respondent.

After the Commissioner granted the Respondent's request for an extension to file exception and hearing requests, the Respondent timely filed an Exception to the Hearing Officer's Proposed Order on September 9, 2019. In its exception filing the Respondent argued that the \$20,000 fine in the Hearing Officer's Proposed Decision and Order was excessive, given the circumstances, and that the late tax filings of the Respondent were not knowing or willful. At that time the Respondent requested a hearing before the Commissioner. For relief, the Respondent sought to decrease the fine imposed in the Hearing Officer's Proposed Decision and Order to less than \$7500 payable in 12 monthly installment payments; or, in the alternative, approval from the Commissioner to pay any fine due in monthly installments over a period of 12 months.

On October 1, 2019, the Department's Enforcement Counsel and counsel for the Respondent attended a hearing before the Commissioner and presented oral argument in support of their exception filings pertaining to the Hearing Officer's Proposed Decision and Order. During that hearing, the Respondent's counsel conceded that the Department had refunded the Respondent overpayment of \$1668.68 of the 2018 tax penalty that Respondent had paid in February 2019. In addition, at this hearing the Department's Enforcement Counsel stated that she had no objection to the

Respondent paying the fine owed in relation to this case in monthly installment payments over a period of 12 months.

2. In Section III (Rulings of Law and Legal Analysis) at the end of the “Untimely Filings” subsection and immediately preceding the “Incompetence, Untrustworthiness, and Financial Irresponsibility” subsection the following paragraphs shall be added:

Finally, “knowing” violations in the insurance regulatory context do not require that someone have actual knowledge that his or her activities are unlawful. See Appeal of Metropolitan Property and Liability Ins. Co., 120 N.H. 733 (N.H. 1980). Unlike the criminal code, the insurance code does not define “knowingly.” See, e.g., RSA 626:2(II)(b) (knowingly requires awareness of a particular type of conduct). Rather, as the New Hampshire Supreme Court has explained in insurance regulatory matters it “is enough that the acts complained of are done voluntarily rather than through mistake or inadvertence.” See Appeal of Metropolitan Property and Liability Ins. Co., 120 N.H. 733 (N.H. 1980). “Mistake or inadvertence” in the regulatory context is something that is beyond the control of the Respondent. Compare, e.g., Appeal of William H. Morgan, R.P.H. 144 N.H. 44, 53 (1999) (upholding Pharmacy Board’s finding of professional misconduct of a pharmacist based on a determination that a willful violation of a pharmacy statute means a violation in which nothing beyond the pharmacist’s control prevented him from abiding by the

statute). Year after year nothing prevented the Respondent from taking the action that it needed to take in order to comply with the tax filing requirements under the insurance code. As such, the Respondent's voluntary actions of filing annual and monthly reports beyond the filing deadline on numerous occasions, were "knowing" violations under the insurance code.

3. Within Section IV (Conclusion) of the Proposed Decision and Order, the second paragraph that begins with "Respondent is assessed an administrative fine in the amount of . . ." is not adopted. Rather, it is modified and replaced with the following paragraph:

Respondent is assessed an administrative fine in the total amount of \$19,500, representing the following: \$250 for each of the three times Respondent failed to remit payment of the late penalty for tax year 2018 (total of \$750); \$500 for each of the 16 violations in which the Respondent was more than one year late in submitting a required filing since tax year 2015 (total of \$8000); and \$1500 for demonstrating incompetence, untrustworthiness, and financial irresponsibility. In addition, as to the 39 times since tax year 2015 that the Respondent submitted a late filing within one year of when it was due, two of those times were monthly filing reports due for the months of February 2019 and March 2019. These two monthly reports were due in early March and April soon after the Respondent had its computer system compromised by a ransomware attack on or about

February 14, 2019. Given the timing of these two monthly filing deadlines, which were *after* and in close proximity to the ransomware attack, and the fact that filing these two monthly reports late did not result in any late regulatory payments to the Department, this is a mitigating factor that would reduce the 39 late filing violations occurring within one year of their due date to 37. As to these 37 violations, a fine of \$250 shall be assessed per violation, which totals \$9250. Given Respondent's acceptance of responsibility and the efforts it plans to take to correct the deficiencies, a portion of the total fine shall be suspended. Of the \$19,500 assessed, \$9000 shall be suspended, and thus, need not be paid on the condition that Respondent submits all required insurance regulatory filings on time for the next five years. If Respondent files any required filing after the applicable deadline, the Department may petition the Commissioner to impose the suspended portion of the fine in addition to assessing fines for any new violations. As to the \$10,500 portion of the fine that is not suspended, the Respondent, as requested, may make payment to the Department in 12 monthly (and equal) installments, which will be due the 15th of every month beginning in November 2019.

This is the final action of the Department. You have the right to appeal by requesting reconsideration of this final action within 30 days in accordance with RSA 541.

SO ORDERED.

10/22/19
Date



John Elias, Commissioner