

NORTH CAROLINA DEPARTMENT OF INSURANCE
RALEIGH, NORTH CAROLINA

STATE OF NORTH CAROLINA)	BEFORE THE COMMISSIONER
)	OF INSURANCE
COUNTY OF WAKE)	
)	
IN THE MATTER OF:)	
)	
THE LICENSURE OF)	ORDER AND FINAL
WILLIAM KENNEDY)	AGENCY DECISION
NPN #17067926)	
)	Docket Number: 1911
and)	
)	
DELEVAN FINANCIAL, LLC)	
NPN #17437071)	
Respondents.)	
)	

THIS MATTER was heard on February 12 through 14, 2019 and March 13 through 15, 2019 by the undersigned Hearing Officer, designated by the North Carolina Commissioner of Insurance (“Commissioner”) under N.C. Gen. Stat. § 58-2-55, pursuant to a Notice of Administrative Hearing (“NOAH”) that was duly issued and served on Respondents William Kennedy and Delevan Financial, LLC (“Mr. Kennedy” and “Delevan,” individually, and “Respondents,” together). The hearing was originally noticed to commence January 15, 2019; however, as a result of the withdrawal of allegations from the NOAH, the hearing was continued until February 12, 2019.

Petitioner Agent Services Division (“ASD”) of the North Carolina Department of Insurance (“NCDOI”) was present at the hearing and was represented by M. Denise Stanford, Special Deputy Attorney General, and Terence D. Friedman, Assistant Attorney General. NCDOI employees Jennifer Collins, Lance Foss, Ted Hamby, Angela Hatchell and Teresa Knowles, as well as insurance producer Steven DeRossett, testified for ASD at the hearing.

Mr. Kennedy represented Respondents, then proceeding *pro se*, for the first three days of the hearing, February 12 through 14. Attorney J.T. Crook represented Respondents for the second three days of the hearing, March 13 through 15. Mr. Kennedy testified for Respondents at the hearing.

ASD offered into evidence Petitioner’s Exhibits 1 – 37, 39 – 60, 63, 65 – 67, 69, 72 – 79 and 81, which were admitted into evidence. (references to Petitioner’s Exhibits will hereinafter be denoted as “P. Ex.”.)

Respondents offered into evidence Respondents' Exhibits 1, 2, 4, 5, 7 – 13, 17 – 24, and 30-37, which were admitted into evidence. The Hearing Officer, upon request by Respondents, took Judicial Notice of Respondent's Exhibits 25-29. (references to Respondent's Exhibits will hereinafter be denoted as "R. Ex.")¹

BASED UPON careful consideration of the evidence and arguments presented, and based upon the entire record in the proceeding, the Hearing Officer hereby makes the following Findings of Fact and Conclusions of Law:

FINDING OF FACT

Jurisdiction

1. The NCDOI is a state agency responsible, in accordance with Chapter 58 of the North Carolina General Statutes, for enforcement of the insurance laws of North Carolina and for regulating and licensing insurance producers, insurance brokers and insurance business entities.

2. ACA regulation 45 CFR § 155.220 provides in pertinent part:

(a) General rule. A State may permit agents and brokers to –

...

(2) Subject to paragraphs (c), (d), and (e) of this section, enroll qualified individuals in a QHP in a manner that constitutes enrollment through the Exchange; and

(3) Subject to paragraphs (d) and (e) of this section, assist individuals in applying for advance payments of the premium tax credit and cost-sharing reductions for QHPs.

...

(e) Compliance with State law. An agent or broker that enrolls qualified individuals in a QHP in a manner that constitutes enrollment through the Exchange or assists individuals in applying for advance payments of the premium tax credit and cost-sharing reductions for QHPs must comply with applicable State law related to agents and brokers, including applicable State law related to confidentiality and conflicts of interest.

...

(j) Federally-facilitated Exchange standards of conduct.

¹ Where pertinent, citations to the Transcript, as well as to Petitioner's Exhibits ("P. Exs.") and Respondents' Exhibits ("R. Exs."), are included.

- (1) An agent or broker that assists with or facilitates enrollment of qualified individuals, qualified employers, or qualified employees, in coverage in a manner that constitutes enrollment through a Federally-facilitated Exchange, or assists individuals in applying for advance payments of the premium tax credit and cost-sharing reductions for QHPs sold through a Federally-facilitated Exchange, must -

...

- (iii) Comply with the standards of conduct in paragraph (j)(2) of this section.

- (2) Standards of conduct. An individual or entity described in paragraph (j)(1) of this section must -

...

- (v) Comply with all applicable Federal and State laws and regulations.

3. In an NCDOI publication entitled “Health Care Reform – Information for Agents and Brokers,” the NCDOI informed insurance agents and brokers in North Carolina who participated in the Marketplace that they must “comply with North Carolina state laws including appropriate agent appointments to QHP issuers.” (P. Ex. 73)

4. A publication by the federal Center for Medicare & Medicaid Services (“CMS”) entitled “In-Person Assistance in the Health Insurance Marketplaces” states “to the extent permitted by states, agents and brokers play an important role in educating consumers about Marketplaces and insurance affordability programs, and helping consumers receive eligibility determinations, apply for premium tax credits and cost-sharing reductions, compare plans, and enroll in coverage.” (P. Ex. 77)

5. A “Privacy Notice Statement” Mr. Kennedy created for use during the 2016 OEP states in part that, under the ACA, “Agents, Brokers and other Entities (ABE’s)” are “permitted by federal regulation (45 C.F.R. 155.220) to enroll individuals in a Qualified Health Plan offered on the Federally-facilitated Marketplace (or Exchange) and to assist individuals in applying for Enrollment, Advance Payments of the Premium Tax Credits (APTC’s) and Cost-Sharing Reductions (CSR’s) to the extent permitted to do so under State law and regulations.” (P. Ex. 47, p. 16)

Relevant Licensures

6. The NCDOI issued Mr. Kennedy a resident insurance producer’s license, Number 17067926, with lines of authority for Accident & Health or Sickness and Medicare Supplement and Long-term Care on September 27, 2013 and August 31, 2017, respectively. The North Carolina insurance laws also refer to insurance producers as “agents.” *See, e.g.*, N.C. Gen. Stat.

§§ 58-33-10(3), 58-33-10(7), 58-33-26(i), 58-33-40(a) and 58-33-82(d). Mr. Kennedy's insurance producer's license is still active. (P. Ex. 5)

7. The NCDOI issued Mr. Kennedy an insurance broker's license on January 21, 2016. After a lapse in March of 2016 for non-payment, his broker's license was re-issued on August 31, 2017 and is currently cancelled due to non-payment. (P. Ex. 7)

8. Delevan is a "business entity" within the meaning of N.C. Gen. Stat. § 58-33-10(4) and a "person" within the meaning of N.C. Gen. Stat. § 58-33-10(16). The NCDOI issued Delevan an insurance business entity's license on August 19, 2015. That license is expired due to non-payment. (P. Ex. 39)

9. Pursuant to N.C. Gen. Stat. § 58-33-31(b)(2), Mr. Kennedy was among the licensed producers designated by Delevan to the NCDOI as responsible for Delevan's compliance with the insurance laws and administrative rules of this State. (P. Ex. 39)

10. Mr. Kennedy testified that he and Christopher Ciardi decided to create Delevan to enable Mr. Kennedy to expand his outreach business. Mr. Kennedy testified the purpose of Delevan was "to assign the commissions" from Mr. Kennedy's insurance sales. (Transcript ("T") p 988) Mr. Kennedy also testified that he engaged in insurance business under Delevan's name in 2015 and 2016. Mr. Kennedy described himself and Delevan as "all the same thing." (T p 1235)

11. Delevan was owned by Mr. Ciardi until July 19, 2016, when Mr. Ciardi transferred his ownership interest in Delevan to Mr. Kennedy. (T pp 991-992)

12. Messer Financial Group, Inc. ("Messer Financial") is a North Carolina licensed insurance agency which holds a resident business entity license pursuant to G.S. § 58-33-21(b). Messer Financial is a field marketing organization ("FMO") that recruits licensed agents to market and sell insurance products for the insurance companies with which Messer Financial has contracted, including Aetna/Coventry (R. Ex. 4 T pp 63 – 65)

The Affordable Care Act

13. Mr. Kennedy testified that he became licensed as an insurance producer in North Carolina for the purpose of selling health insurance under the federal Affordable Care Act ("ACA"). (T pp 909, 1165-67)

14. Among other things, the ACA creates a federally facilitated Health Insurance Marketplace ("FFM," "Marketplace" or "Exchange") where individuals can shop for health insurance coverage. Under the ACA, a Qualified Health Plan ("QHP") is a health insurance plan that has been certified by the Marketplace to meet the ACA's requirements. (T pp 122-124) QHPs offered through the Marketplace are standardized into four "metal" levels of coverage: Bronze, Silver, Gold and Platinum. (See, www.HealthCare.gov)

15. Individuals can be enrolled in QHPs during ACA enrollment periods. The original 2015 ACA open enrollment period (“OEP”) lasted from November 15, 2014 to February 15, 2015. (P. Ex. 73, p. 2) There was a second, ACA “special enrollment period” (“SEP”) for 2015 lasting from March 15, 2015 through April 30, 2015. The 2016 OEP lasted from November 1, 2015 to January 31, 2016.

16. For certain individuals enrolling in a QHP, the federal government provides tax credits that offset in part or in whole the premiums for the QHP. To be eligible for any amount of ACA premium tax credit, North Carolina residents must have an estimated annual household income ranging from 100% to 400% of the Federal Poverty Level (“FPL”) and meet other criteria. Individuals with an estimated annual household income less than 100% of the FPL or greater than 400% of the FPL are ineligible for premium tax credits. Premium tax credits operate on a sliding scale such that a North Carolina resident whose annual household income is at or just above 100% of the FPL will receive a higher premium tax credit than one whose income is closer to 400%. (P. Ex. 74; T p 141)

17. For ACA benefit year 2015, the FPL was \$11,670. For ACA benefit year 2016, the FPL was \$11,770. (See P. Ex. 75, p. 7 for 2015 Poverty Guidelines and P. Ex. 76, p. 2 for 2016 Poverty Guidelines; T pp 145 – 148).

18. 42 USC § 18081(a) makes the federal Secretary of Health and Human Services (“HHS”) responsible for establishing the Marketplace, including the process for determining premium tax credits. 42 USC § 18081(c)(1) requires that the Marketplace submit to the Secretary of HHS requests for premium tax credits by ACA enrollees. 42 USC § 18081(c)(3) requires that the Secretary of HHS then submit such requests to the federal Secretary of the Treasury to verify the estimated income of the ACA enrollee. 42 USC § 18081(e) requires the Secretary of the Treasury to report the verified income back to the Secretary of HHS, who then reports it to the Marketplace.

19. 42 USC § 18082 permits payments of advance premium tax credits (“APTCs”) to insurers issuing QHPs. 42 USC § 18082(a)(1) requires the Marketplace to request that the Secretary of HHS determine APTCs in the same manner as under 42 U.S.C. 18081. Ultimately, in response to an APTC application, 42 USC § 18082(a)(2)(A) requires the Secretary of HHS to notify the Secretary of the Treasury of the APTC determination. In turn, under 42 USC § 18082(a)(3), the Secretary of the Treasury pays the APTCs to the insurer that issued the QHP.

20. Insurance agents and insurance brokers can enroll individuals in QHPs through the Marketplace. An agent who has been approved by the Marketplace to do so receives an FFM user identification number (“FFM ID”). (T p 61) Such agents may sign up individuals for ACA plans electronically, including by using the Marketplace’s direct enrollment pathway or “portal” at www.HealthCare.gov or Marketplace-approved “web-broker” portals that link to www.HealthCare.gov. (45 CFR 155.220; P. Exs. 19, 73; T pp 126, 137, 1104-1105)

21. During the 2015 OEP and SEP, Mr. Kennedy submitted information to the Marketplace under his own National Producer's Number ("NPN") and FFM ID through approved web-broker portals to enroll individuals in the ACA, to apply for APTCs and to select QHPs. During the 2016 OEP, Mr. Kennedy enrolled individuals in QHPs through an approved web-broker portal, although not under Mr. Kennedy's own NPN and FFM ID, as explained below.

Mr. Kennedy's Aetna/Coventry, BCBSNC and UHC Appointments in North Carolina and the Status of Those Appointments

22. N.C. Gen. Stat. § 58-33-26(i) provides: "No agent shall place a policy of insurance with any insurer unless the agent has a current appointment as agent for the insurer in accordance with G.S. 58-33-40 or has a valid temporary license issued in accordance with G.S. 58-33-66."

23. N.C. Gen. Stat. § 58-33-40(a) provides: "No individual who holds a valid insurance agent's license issued by the Commissioner shall, either directly or for an insurance agency, solicit, negotiate, or otherwise act as an agent for an insurer by which the individual has not been appointed."

24. For the 2015 OEP and SEP, insurance companies Aetna/Coventry, Blue Cross Blue Shield of North Carolina ("BCBSNC") and United Healthcare of North Carolina ("UHC") offered Bronze, Silver, Gold and Platinum level QHPs for sale to North Carolina residents.

25. Effective January 31, 2014, three Aetna companies appointed Mr. Kennedy to sell insurance in North Carolina. The Aetna companies canceled, without cause, their appointments of Mr. Kennedy effective July 28, 2015, and no Aetna company has reappointed Mr. Kennedy since then. (P. Exs. 6, 21)

26. Effective February 13, 2014, two Coventry companies appointed Mr. Kennedy to sell insurance in North Carolina. The Coventry companies canceled their appointments of Mr. Kennedy effective July 28, 2015, and no Coventry company has reappointed Mr. Kennedy since then. (P. Ex. 6)

27. Effective December 10, 2014, BCBSNC appointed Mr. Kennedy to sell insurance in North Carolina. BCBSNC canceled its appointment of Mr. Kennedy, for cause, effective July 15, 2015, and has never reappointed Mr. Kennedy. (P. Exs. 6, 27)

28. Effective December 17, 2014, UHC appointed Mr. Kennedy to sell insurance in North Carolina. That appointment is still active. (P. Ex. 6)

29. By virtue of his appointments, Mr. Kennedy was authorized for the 2015 OEP and SEP to sell Bronze, Silver, Gold and Platinum level QHPs for Aetna/Coventry, BCBSNC and UHC.

30. Mr. Kennedy testified that, for the 2015 OEP and SEP, he did not believe Aetna/Coventry and UHC QHPs were available for sale in every North Carolina county but that BCBSNC QHPs were for sale in every North Carolina county. (T pp 1346-1347)

Mr. Kennedy's ACA Materials and Marketing Plan for the 2015 OEP and SEP

31. N.C. Gen. Stat. § 58-33-5 provides that: "A person shall not sell, solicit, or negotiate insurance in this State unless the person is licensed for that kind of insurance in accordance with this Article."

32. N.C. Gen. Stat. § 58-33-10(1) defines "Agent" in relevant part as "a person licensed to solicit applications for, or to negotiate a policy of, insurance."

33. N.C. Gen. Stat. § 58-33-10(15) provides:

'Negotiate' means the act of conferring directly with, or offering advice directly to, a purchaser or prospective purchaser of a particular contract of insurance concerning any of the substantive benefits, terms, or conditions of the contract, only if the person engaged in that act either sells insurance or obtains insurance from insurers for purchasers. 'Negotiate' does not mean a referral to a licensed insurance agent or broker that does not include a discussion of specific insurance policy terms and conditions.

34. N.C. Gen. Stat. § 58-33-10(18) provides:

'Solicit' means attempting to sell insurance or asking or urging a person to apply for a particular kind of insurance from a particular company. 'Solicit' does not mean a referral to a licensed insurance agent or broker that does not include a discussion of specific insurance policy terms and conditions.

35. N.C. Gen. Stat. § 58-33-26(a) provides: "No person shall act or hold himself or herself out to be an agent, broker, limited representative, adjuster, or motor vehicle damage appraiser unless duly licensed."

36. For the 2015 OEP and SEP, Mr. Kennedy created and utilized an "Outreach" program to send unlicensed "Outreach Workers" to soup kitchen and homeless shelters to identify low-income individuals there and have them sign ACA enrollment forms and APTC forms. Mr. Kennedy testified that he sent his unlicensed Outreach Workers "all the way up to the mountains, and way way out west where nobody was going, and down to the beach ..."
(T p 1113)

37. Among the community organizations where Mr. Kennedy had his Outreach Workers conduct their enrollment efforts was the Urban Ministry Center in Charlotte, NC.
(T pp 1111-1112).

38. Mr. Kennedy compensated the Outreach Workers for returning completed Outreach materials to him. (P. Ex. 43; T pp 346, 1050-1052)

39. Mr. Kennedy created forms for his unlicensed Outreach Workers to have ACA enrollees complete. The first page of these forms states, at the top in bold, large script: "GET ENROLLED! ACA Healthcare Outreach." The first page of Mr. Kennedy's ACA materials for 2015 and 2016 will be referred to as the "Enrollment Form." (P. Ex. 28, pp. 9, 13; P. Ex. 48, p. 2)

40. The 2015 Enrollment Forms Mr. Kennedy created advised enrollees:

Any person who knowingly and with intent to defraud any insurance company or other person files a statement of claim containing any materially false information or conceals, with intent to mislead, information concerning any fact material thereto, commits a fraudulent insurance act, which is a crime.

41. Mr. Kennedy's 2015 Enrollment Forms requested the "Primary Applicant" to state their weekly, monthly, or annual income and to provide personal information, including social security numbers and dates of birth, for the applicant and his or her spouse and dependents. (P. Ex. 28, pp. 9, 13).

42. Mr. Kennedy created two types of 2015 Enrollment Forms, one for two Aetna/Coventry QHPs and one for a single BCBSNC QHP. Mr. Kennedy's 2015 Aetna/Coventry and BCBSNC Enrollment Forms both stated: "These are the plan choices that have been selected by Licensed Insurance Agent William Kennedy for people earning near or below the federal poverty level. Choose from the plan options below that fits your situation best." (P. Ex. 28, pp. 9, 13)

43. Mr. Kennedy's 2015 Aetna/Coventry Enrollment Form (P. Ex. 28, p. 9) stated in relevant part:

CoventryOne Bronze \$15 Copay
Primary Doctor: \$15
Emergency Room: \$75
Generic Drugs: \$20
Ded \$5000, Max Out-of-Pocket \$6600
 \$0 Monthly

CoventryOne Silver \$10 Copay
Primary Doctor: \$15
Emergency Room: \$75
Generic Drugs: \$20
Ded \$0, Max Out-of-Pocket \$1000
 Variable Pricing

44. Mr. Kennedy's 2015 Aetna/Coventry Enrollment Form did not mention the Coventry Gold or Coventry Platinum QHPs that Mr. Kennedy was authorized to sell for the 2015 OEP and SEP. Nor did Mr. Kennedy's 2015 Aetna/Coventry Enrollment Form mention the four BCBSNC QHPs which Mr. Kennedy was authorized to sell at the time in all North Carolina counties, or the four UHC QHPs that Mr. Kennedy was authorized to sell in some North Carolina counties. (T pp 1038-1047)

45. Mr. Kennedy's 2015 BCBSNC Enrollment Form (P. Ex. 28, p. 13) stated in relevant part:

Blue Cross NC Blue Value

Primary Doctor: \$45

Medical Management Programs

Ded \$5000, Max Out-of-Pocket \$6350

[] \$0 Monthly

46. Mr. Kennedy's 2015 BCBSNC Enrollment Form did not refer to three out of the four BCBSNC QHPs Mr. Kennedy was authorized to sell for the 2015 OEP and SEP. Similarly, Mr. Kennedy's 2015 BCBSNC Enrollment Form did not mention any of the UHC QHPs or the Aetna/Coventry QHPs that Mr. Kennedy was authorized to sell in some North Carolina counties at the time. (T pp 1047-1049)

47. The bottom section of Mr. Kennedy's 2015 Enrollment Forms had the enrollee certify as of the date he completed the Form:

I hereby certify that to the best of my knowledge this claim form does not contain any false, misleading or incomplete information. I understand and accept that in the event that this claim is found to be fraudulent in whole or in part, the policy will be invalidated and I will be liable for legal action.

I hereby certify that I have received the attached Privacy Notice Statement and accept all terms and agreements.

I have received information regarding my ACA Marketplace Plan.

I expect my income in 2015 to be at the federal poverty level or below. Attached is a chart based on household size and income.

48. The Privacy Notice Statement that Mr. Kennedy's Outreach Workers circulated during the 2015 OEP and SEP stated in relevant part:

I/We must collect certain information about you, called Personally Identifiable Information ('PII') in order to help you complete your application for health insurance.

...

I/We will use only the information that we need to help you obtain health insurance through the Federally-facilitated Exchange ('FFE') and to provide Authorized Functions approved by the FFE, or other service as permitted under applicable law. These are a few of the authorized functions that we may conduct. This is not a complete list:

- Helping with your application for insurance.

...

- Helping to enroll you in a qualified health plan.

...

- Correcting errors in your application.

...

I/We may share your information with certain Federal or State agencies, the health insurance issuer that you select or subcontractors that help me/us to provide services to you.

49. As noted above in Findings of Fact (“FF” 17), for ACA benefit year 2015, the FPL was \$11,670.

50. In addition to the 2015 Enrollment Forms and the Privacy Notice Statements, Mr. Kennedy’s Outreach Workers gave enrollees “Income Work Sheets” that Mr. Kennedy created for the purpose of determining APTCs. The top of the first page of the 2015 Income Work Sheets stated: “How to Estimate Your Income.” The first page of the 2015 Income Work Sheets also stated: “A single individual must have estimated income of at least \$33 per day or \$11,700 per year to qualify for the tax credit.” (P. Ex. 28, p 11)

51. The first page of the 2015 Income Work Sheets also included an “Example Worksheet,” which stated that, if an individual’s estimated 2015 total income was \$11,700, he or she would “exceed[s] federal poverty level – single” and be “eligible for tax credit.” (P. Ex. 28, p. 11)

Mr. Kennedy’s Use of His 2015 Enrollment Forms and Income Work Sheets in the Marketplace

52. Mr. Kennedy’s unlicensed Outreach Workers returned completed 2015 Enrollment Forms and Income Work Sheets to Mr. Kennedy. Mr. Kennedy relied directly on the information in these materials to enroll individuals in the Marketplace, to apply for APTCs in the Marketplace and to select QHPs in the Marketplace. (T p 347, 1008 – 1009, 1013, 1201). Mr. Kennedy testified that he never spoke personally to “many” of the enrollees about the details they had provided to Mr. Kennedy’s Outreach Workers in the Enrollment Forms and Work Sheets. (T p 1310)

53. For the 2015 OEP, Mr. Kennedy enrolled individuals using software for a web-broker portal purchased by Messer Financial, a licensed North Carolina insurance business entity. (P. Ex. 11)

54. For the 2015 SEP, the Messer Financial web-broker portal was no longer available, so Mr. Kennedy contracted to use a web-broker portal offered by Geozoning, Inc. d/b/a HealthSherpa Insurance Agency (“HealthSherpa”), which was also a North Carolina licensed insurance business entity. (P. Exs. 11, 19)

55. A page from HealthSherpa's website that Mr. Kennedy provided ASD in 2015 stated that the website was a "complete exchange solution" to "enroll clients in plans with subsidies in less than 5 minutes." (P. Ex. 28, p. 18)

56. HealthSherpa permitted Mr. Kennedy to use its web portal to enroll ACA applicants for only three days, from April 13 to April 15, 2015, after which HealthSherpa canceled Mr. Kennedy's access to the portal. In the three days that HealthSherpa permitted Mr. Kennedy to use its portal, Mr. Kennedy entered 622 applications of which approximately 600 applications were submitted to the Marketplace. For 592 of these 622 applications, Mr. Kennedy submitted exactly \$11,700 to the Marketplace as the applicants' estimated income for the purposes of determining APTCs. Of the 600 applications Mr. Kennedy submitted to the Marketplace through the HealthSherpa web portal, more than 500 of the applications were for Aetna/Coventry QHPs. (P. Exs. 13, 18, 19, 36)

57. During the 2015 SEP, Mr. Kennedy worked with Selena Witherspoon, who was a North Carolina licensed insurance producer at the time, to help him input the applications through HealthSherpa's web-broker portal. (P. Exs. 12, 29)

58. On April 20, 2015, ASD received a written complaint from the President of HealthSherpa, (P. Ex. 13) stating, in relevant part:

Mr. Kennedy signed up for an account on our agent service on Mon Apr 13 and submitted over 600 applications to the Marketplace (about 300 each in NC and SC) by Wed Apr 15. . . .

Almost all of these enrollments were for individuals with an income reported of exactly \$11,700 (the federal poverty level), which qualifies these individuals for a full APTC. Further investigation determined that the addresses for many of these individuals are homeless shelters in North and South Carolina.

Our systems and a manual audit flagged this behavior as potentially fraudulent based on the volume of applications, the income stated, and the shared addresses provided. We disabled access to the software on Wednesday, April 15 and notified Mr. Kennedy that his service is disabled.

59. Mr. Kennedy acknowledged in an email to ASD of April 22, 2015 that many of the addresses for the ACA applicants he signed up through the HealthSherpa web portal were the same as the homeless shelters and soup kitchens where he sent his Outreach Workers to recruit clients. (P. Ex. 12)

60. During the approximately 18 months that he was appointed by Aetna and the approximately 17.5 months that he was appointed by Coventry, Mr. Kennedy wrote 1,946 Aetna/Coventry QHPs and was paid \$260,850.49 in commissions by Aetna/Coventry. The great majority of the Aetna/Coventry QHPs were Coventry Bronze QHPs, one of the two

Aetna/Coventry QHPs which Mr. Kennedy advertised on his 2015 Aetna/Coventry Enrollment Forms and the one which Mr. Kennedy advertised as having a \$0 premium. (P. Ex. 37)

**ASD's Document Requests to and Meetings With Mr. Kennedy
Regarding the 2015 ACA QEPs**

61. On April 21, 2015, an ASD representative wrote to Mr. Kennedy (P. Ex. 10), stating in relevant part:

The Agent Services Division has received allegations that you fraudulently submitted over 600 applications to the Marketplace. These applications were submitted April 13 through April 15, 2015.

In accordance with N.C.G.S. 58-2-195, information from records required to be kept pursuant to the provisions of this section must be furnished to the Commissioner on demand and the original records required to be kept pursuant to the provisions of the section shall be open to the inspection for the Commissioner or any other authorized employee described in N.C.G.S. 58-2-25 when demanded.

You are requested to provide a written notarized response along with any documentation regarding the above allegations to my attention within 10 days from the date of receipt of this letter.

62. ASD's April 21, 2015 request for documents was made only six days after Mr. Kennedy's HealthSherpa web-broker portal service to submit applications to the Marketplace was disabled by HealthSherpa. In an email response of April 22, 2015 (P. Ex. 11), Mr. Kennedy acknowledged receiving ASD's document request and that he understood the request had to do with his use of the HealthSherpa web-broker portal.

63. On July 6, 2015, an ASD representative sent Mr. Kennedy an email scheduling a conference for September 3, 2015. The letter outlined what potential violations of insurance law Mr. Kennedy appeared to have committed, based on the information ASD had at the time. (P. Ex. 20)

64. On September 3, 2015, ASD representatives met with Mr. Kennedy and his then-counsel. Mr. Kennedy claimed that he had destroyed all copies of the ACA application materials he had received. ASD's then-Compliance Section Supervisor Angela Hatchell testified that, at the meeting, Mr. Kennedy more fully explained his use of and compensation of the unlicensed Outreach Workers. Ms. Hatchell testified that, in the meeting, she reiterated ASD's concerns that Mr. Kennedy had violated North Carolina insurance laws and raised a particular concern that Mr. Kennedy's use of Outreach Workers might constitute unlawful solicitation. Ms. Hatchell also advised Mr. Kennedy to obtain a scanner to preserve copies of documents. (T pp 346-356, 409, 424)

65. On September 18, 2015, Mr. Kennedy, through his then-counsel, provided the first documents responsive to ASD's April 21, 2015 document requests. Mr. Kennedy provided blank copies of his 2015 Enrollment Forms, Privacy Notice Statement and Income Work Sheet. Mr. Kennedy did not provide ASD with any completed versions of his 2015 Enrollment Forms or Income Work Sheets, and his counsel indicated in an accompanying letter that Mr. Kennedy had destroyed the original 2015 ACA materials he received from clients. Mr. Kennedy's counsel provided evidence that Mr. Kennedy had purchased a scanner, as requested by Ms. Hatchell. (P. Ex. 28)

66. In his September 18, 2015 letter, Mr. Kennedy's then-counsel acknowledged that what Mr. Kennedy submitted through the HealthSherpa web portal were ACA "applications" and "sign-ups." (P. Ex. 28)

67. On October 20, 2015, ASD representatives Jennifer Collins and Wesley Dillard met with Mr. Kennedy. At the meeting, Mr. Kennedy stated that he hoped to create a marketing plan to continue selling QHPs for the upcoming 2016 OEP. Ms. Collins and Mr. Dillard informed Mr. Kennedy that they had no authority to review marketing plans but that he could submit any such plans to ASD's Ms. Hatchell for review. Mr. Kennedy did not submit any such 2016 plans to Ms. Hatchell prior to the beginning of the 2016 OEP on November 1, 2015. (T pp 645-649)

68. On November 17, 2015, Teresa Knowles, then-Assistant North Carolina Deputy Commissioner of Insurance, sent Mr. Kennedy a letter requesting information about all ACA enrollees whom Mr. Kennedy had recruited at homeless shelters in Winston-Salem and in Charlotte and about the amount of estimated income he submitted to the Marketplace for each such enrollee. (P. Ex. 41; T pp 649-654)

Mr. Kennedy's Broker's License

69. There is a limited exception to the requirements in N.C. Gen. Stat. §§ 58-33-26(i) and 58-33-40(a) that a North Carolina agent be appointed by an insurer to solicit or negotiate that insurer's policies. The exception applies to those agents who have become duly-licensed North Carolina brokers. A broker in North Carolina must be licensed. *See* N.C. Gen. Stat. § 58-33-26(a) (prohibiting a person from "act[ing] or hold[ing] himself or herself out" to be a broker "unless duly licensed."); N.C. Gen. Stat. § 58-33-120 (making it a misdemeanor to "act" as a broker "without license as is required by law.").

70. If licensed, a broker may "procure[] insurance for a party other than himself through a duly authorized agent of an insurer that is licensed to do business in this State but for which the broker is not authorized to act as agent." N.C. Gen. Stat. § 58-33-10(3).

71. Mr. Kennedy applied to become a North Carolina licensed broker on December 7, 2015. (P. Ex. 8) The application informed Mr. Kennedy:

All resident Broker applicants must submit a \$15,000 bond. Completed original NC Bond-BR form must be mailed following the instructions posted on the Department's website:

http://www.ncdoi.com/ASD/ASD_SubmissionOfLicensingDocumentation.aspx

72. North Carolina broker applications are submitted to the National Insurance Producer's Registry ("NIPR"), a third-party contractor of the NCDOI, which works with Pearson Vue, another third-party contractor of the NCDOI, to process the application. (T pp 190-191, 388-390, 478)

73. Mr. Kennedy acknowledged he did not submit a copy of the bond he had procured on the date he submitted his broker's application and that, the next day, on December 8, 2015, he received an email informing him that he needed to submit the bond. With regard to this December 8, 2015 email, Mr. Kennedy testified: "So on the 8th they sent a notice, I knew there was a problem." (T pp 915-918)

74. Mr. Kennedy then sent in a copy of the bond he had procured. NIPR's notes on Mr. Kennedy's application indicate that, on December 14, 2015, a copy of Mr. Kennedy's bond was received. (P. Ex. 8; T pp 917-918)

75. On December 14, 2015, Mr. Kennedy received an email from Pearson Vue about his broker's application. The email stated:

The bond that was sent to our office looks to be a copy. We need the original \$15,000 surety bond. We are unable to accept the copy of the bond. Please send the original bond to the same address you sent the copy to.

(R. Ex. 9) Mr. Kennedy did not respond to the December 14, 2015 email.

76. On January 7, 2016, Pearson Vue wrote Mr. Kennedy again regarding his broker's application. The email stated: "After a preliminary review of your North Carolina Insurance Broker application, it has been determined that portions of the application are incomplete and/or have missing documentation." (R. Ex. 21) Pearson Vue also informed Mr. Kennedy in the email that it was missing the "required" \$15,000 "original surety bond form with original power of attorney documents" and that the NCDOI "may withdraw your license application" if the bond was not received within 30 days.

77. Mr. Kennedy testified that Pearson Vue's January 7, 2016 email made clear to him that his broker's application was incomplete. (T pp 958-959)

78. Mr. Kennedy did not respond to the January 7, 2016 email from Pearson Vue until January 11, 2016. Mr. Kennedy testified that he sent in the original copy of his bond to Pearson Vue within two days of January 11, 2016, after he had physically procured a copy of the bond from the issuer of the bond. (T pp 958, 960-61)

79. NIPR's notes indicate that the original copy of Mr. Kennedy's bond was received on January 21, 2016. On that day, Mr. Kennedy's North Carolina broker's license was issued.

Respondents' 2016 ACA Materials and Marketing Plan

80. Delevan received its insurance business entity's license on August 19, 2015, after the 2015 OEP and SEP were over and after Mr. Kennedy's appointments by Aetna/Coventry and BCBSNC had been canceled. (P. Ex. 39) *See*, FF 8, 25-26

81. The 2016 OEP lasted from November 1, 2015 through January 31, 2016. In preparation for the 2016 OEP, Mr. Kennedy, on behalf of Delevan and himself, created new enrollment materials for what he now described as "Field Representatives" to use to recruit ACA enrollees. Mr. Kennedy stated in a January 19, 2016 statement to ASD that his Field Representative program was "substantially similar" to his prior year's Outreach program. As with his Outreach Workers, Mr. Kennedy's Field Representatives were not licensed producers. (P. Ex. 47)

82. In a February 4, 2016 letter to ASD, Mr. Kennedy's then-counsel stated that Mr. Kennedy used "field representatives to assist in locating and referring poor people who needed the assistance of an insurance professional" (R. Ex. 34, p 1) In the same letter, Mr. Kennedy's counsel also described the 2016 ACA materials Mr. Kennedy created as "specific documents that were given to prospective clients and instruction documents given to the field representatives." (R. Ex. 34, pp. 1-2)

83. Mr. Kennedy created Field Representative Agreements for use in the 2016 ACA OEP. The Field Representative Agreements stated that Field Representatives were compensated in the amount of "\$15.00 per-qualified referral" for their work procuring completed ACA materials. (P. Ex. 47, p 5) The Field Representative Agreements identified Mr. Kennedy as a "broker" over 60 times. (*See generally*, P. Ex. 47, pp 4-12) In a January 19, 2016 statement to ASD, Mr. Kennedy identified four Field Representatives who were working pursuant to these Agreements. (P. Ex. 47, p. 3)

84. Mr. Kennedy created a script for the Field Representatives to use in the 2016 OEP. In relevant part, Mr. Kennedy's script instructed the Field Representatives to state to potential enrollees:

I am working with an Insurance Broker and who can help you with enrollment. I am not a licensed Agent yet and cannot consult you on the Insurance Plan itself. I can help you with the process and with qualifying. You can select the plan for yourself. If you have any questions at all you can call the broker or the Marketplace at any time. The broker's

business card is in the take away packet. However, the broker is specifically marketing to low income folks and has provided information and his specific recommendation.

(P. Ex. 47, p. 13)

85. For the 2016 OEP, Mr. Kennedy created a comparison chart (“Comparison Chart”) for the Field Representatives to circulate to potential enrollees. (P. Ex. 47, p 17) The Comparison Chart had Mr. Kennedy’s business card in the upper right and specifically referred by name to four different 2016 QHPs – the Aetna Leap Everyday QHP, the United Healthcare Silver Compass QHP, the BCBSNC Blue Value 5000 QHP and the BCBSNC Blue Local 5000 QHP. Mr. Kennedy’s Comparison Chart compared, with exact dollar amounts, the specific costs in each of these four QHPs for such items as single and family general deductibles, single and family maximum out-of-pocket deductibles, emergency room visit costs and co-payments for generic drugs.

86. Mr. Kennedy created a single Enrollment Form for the Field Representatives to use in the 2016 OEP. Mr. Kennedy’s 2016 Enrollment Form states, at the top in bold, large script: “GET ENROLLED! ACA Healthcare Outreach.” (P. Ex. 48, p. 2)

87. Mr. Kennedy’s 2016 Enrollment Form that his Field Representatives used advised potential enrollees:

Any person who knowingly and with intent to defraud any insurance company or other person files a statement of claim containing any materially false information or conceals, with intent to mislead, information concerning any fact material thereto, commits a fraudulent insurance act, which is a crime.

88. Mr. Kennedy’s 2016 Enrollment Form requested the “Primary Applicant” to state their weekly, monthly, or annual income and to provide personal information, including social security numbers and dates of birth, for the applicant and his or her spouse and dependents. (P. Ex. 48, p. 2)

89. The bottom of Mr. Kennedy’s 2016 Enrollment Form had the ACA enrollee certify as of the date he completed the Form:

I hereby certify that to the best of my knowledge this claim form does not contain any false, misleading or incomplete information. I understand and accept that in the event that this claim is found to be fraudulent in whole or in part, the policy will be invalidated and I will be liable for legal action.

I hereby certify that I have received the attached Privacy Notice Statement and accept all terms and agreements.

I have received information regarding my ACA Marketplace Plan.

90. The Privacy Notice Statement that Mr. Kennedy created for the Field Representatives to circulate during the 2016 OEP informed enrollees:

We must collect certain information about you, called Personally Identifiable Information ('PII') in order to help you complete your application for health insurance. .

..

These are a few examples of PII. This is not a complete list. Name, address, date of birth, telephone number, social security number, household income, marital status, race or ethnicity, credit or debit card numbers

...

We will use only the information that we need to help you obtain health insurance through the FFM and to provide Authorized Functions approved by the FFM, or other service as permitted under applicable law. These are a few of the authorized functions that we may conduct. This is not a complete list:

- Helping with your application for insurance.
- Answering question about your eligibility.
- Helping to enroll you in a qualified health plan.
- Helping with filing appeals of eligibility determinations.
- Correcting errors in your application.

...

We may share your information with certain Federal or State agencies, the health insurance issuer that you select or subcontractors that help us to provide services to you. (P. Ex. 47, p. 16)

91. Mr. Kennedy created "Pro Forma Income Projections" forms and "Pro Forma Self Employment Ledger" forms for the Field Representatives to use with enrollees in the 2016 OEP. One model version of the "Pro Forma Income Projections" form had total projected income for 2016 filled in as \$12,960, and another model version of this form had \$12,600 filled in. The model version of the "Pro Forma Self Employment Ledger" form had the total projected income for 2016 filled in as \$12,960. (P. Ex. 47, pp. 30-32)

92. For the 2016 OEP, Mr. Kennedy also created forms for the Field Representatives to circulate entitled "Insurance Plan Self Selection Authorization Plan Based on Agent Recommendation," which will be referred to as the "Self-Selection Form." (See, e.g., P. Ex. 48, p. 3) The Self-Selection Form stated that "William Kennedy, Licensed Agent has recommends [sic] the **Aetna Leap Plan Silver**," which had the "lowest premium and max out of pocket,"

which cost less than all “other Options in the Silver Category,” but which had a smaller “network of providers” than a “United Healthcare” QHP. (P. Ex. 48, p. 3 (bold emphasis in original))

93. While some of Mr. Kennedy’s 2016 Enrollment Forms were required to be returned to Delevan, others were required to be returned to Mr. Kennedy. In addition, the Self-Selection form indicates that questions regarding terms and conditions should be directed to the “Delevan Financial Customer Service Hotline.” The actual telephone number for the hotline was not provided on some of the Self-Selection form. (P. Ex. 48, pp. 3, 40)

94. Mr. Kennedy testified that his unlicensed Field Representatives were circulating his 2016 ACA materials, having people fill them out and returning them to him. (T pp 967-68, 971, 974, 1034)

95. Records also establish that Mr. Kennedy and Delevan were actively soliciting ACA enrollees before Mr. Kennedy even sent in his incomplete application to become a licensed broker on December 7, 2015. For example:

- a. One of Mr. Kennedy’s 2016 Enrollment Forms was signed by a woman named Diane Buchanan on October 12, 2015, before the 2016 OEP even began. This Enrollment Form was returnable to Delevan. (P. Ex. 59, p. 38)
- b. One of Mr. Kennedy’s 2016 Enrollment Forms was signed by a man named Marquis Foster on November 10, 2015, shortly after the 2016 OEP began. This form had a notation indicating that it was creditable to Julius Bishop, a man whom Mr. Kennedy identified as one of his 2016 Field Representatives. (See P. Ex. 47 p. 3) This form was returnable to Delevan. (P. Ex. 59, p. 98)
- c. One of Mr. Kennedy’s 2016 Enrollment Forms was signed by a man named Max Jarvis on November 12, 2015, shortly after the 2016 OEP began. This form was returnable to Delevan. (P. Ex. 59, p. 162)
- d. One of Mr. Kennedy’s 2016 Enrollment Forms was signed by a woman named Joyce Locklear on December 1, 2015. This form was returnable to Mr. Kennedy. (P. Ex. 59, p. 181)
- e. One of Mr. Kennedy’s 2016 Enrollment Forms was signed by a man named Jaworski Williams-Bell on November 17, 2015. This form indicated it was creditable to Mr. Kennedy’s 2016 Field Representative Julius Bishop. (See P. Ex. 47, p. 3) This form was returnable to Delevan. (P. Ex. 59, p. 320)

**Respondents' Use of Insurance Producer Steven DeRossett's NPN
and FFM ID to Enroll Clients During the 2016 OEP**

96. Steven DeRossett is a North Carolina licensed insurance producer. During the 2016 OEP, Mr. DeRossett was appointed by Aetna/Coventry, among other companies, to write QHPs. (T pp 57, 65)

97. Mr. DeRossett testified he did not write any Aetna/Coventry QHPs for the 2016 OEP. (T p 69) In particular, Aetna/Coventry QHPs were not available in Mr. DeRossett's region of the state for the 2016 OEP. Further, Mr. Kennedy acknowledged in his testimony that Mr. DeRossett did not write Aetna/Coventry QHPs in 2016. (T p 1076)

98. Sometime in late October to early November 2015, William Rice of Messer Financial contacted Mr. DeRossett and informed him that Mr. Kennedy was a broker who would like to work with him. Mr. DeRossett later spoke about the proposal with Mr. Kennedy directly. In this conversation, Mr. Kennedy claimed he was a broker. (T pp 64-65; *See also*, R. Ex. 4 p. 6)

99. Mr. DeRossett received a draft contract from Messer Financial in approximately the first week of December 2015. The contract stated that it would be between Delevan and Mr. DeRossett. The contract required that Mr. DeRossett provide Delevan with his NPN and his FFM ID and password, and contemplated that commissions would be paid based on "new enrollments" by Delevan. (P. Ex. 65; P. Ex. 69, p. 14; T pp 66-68)

100. For approximately two weeks in December 2015, Mr. Kennedy used a web-broker portal and Mr. DeRossett's NPN and FFM ID to enroll Mr. Kennedy's clients in the Marketplace. (T p 69; *See also* R. Ex. 4, p. 10)

101. Within approximately 10 days after Mr. Kennedy began using Mr. DeRossett's NPN and FFM, Mr. Rice of Messer Financial informed Mr. DeRossett that Mr. Kennedy did not, in fact, have a broker's license. As a result, Mr. DeRossett called Mr. Kennedy and told him to cease using Mr. DeRossett's NPN and FFM to write QHPs. (T p 70)

102. Aetna/Coventry's records demonstrate that 272 Aetna/Coventry QHPs were written under Mr. DeRossett's NPN and FFM ID in the 2016 OEP. Respondents specifically did not object to the admittance of Aetna/Coventry's records into evidence. (P. Ex. 36; T pp 266-268)

103. Mr. Kennedy testified that the only individuals whom he enrolled in QHPs using Mr. DeRossett's NPN and FFM were "renewals," or clients whom Mr. Kennedy had already enrolled in the ACA in prior years. (T p. 1221) Aetna/Coventry, however, provided ASD with records, including enrollees' names, for all Aetna/Coventry QHPs that Mr. Kennedy wrote under his own NPN and FFM ID during the 2015 OEP and SEP. Respondents did not contest that these records from Aetna/Coventry were accurate (T pp 266-268).

104. A comparison of Aetna/Coventry's 2015 records of QHPs written by Mr. Kennedy to Aetna/Coventry's 2016 records of QHPs written under Mr. DeRossett's NPN and FFM ID indicates that, at least, the following 24 individuals were newly enrolled in Aetna/Coventry QHPs during the 2016 OEP: Keisha Jones, Dwight Little, Victor Lynch, Lasonya Massey, Ronnie Maynard, Nathaniel McEwen,² Kreig Mofett, Dwayne Morrow, Brenda Nesbitt, Lorraine Pate, Rodney People, Laymond Pounds, Kenneth Pressley, Kaseem Rabouin, Jerry Reid, Kaneasha Schackleford, Carolyn Sides, Latavia Simmons, David Steele, Dwayne Stroud, Tim Teasly, Monica Threatt, Wanda Toujol and James Watson. (See Attachment to P. Ex. 36 (file names "2_a_b_c_d_e_f_g Kennedy William_all.xlsx" and "Derossett NCDOIInquiry.xlsx"))

105. On February 19, 2016, Mr. Kennedy provided ASD with Excel spreadsheets, which Mr. Kennedy testified he created and which he claimed contained details about all of the individuals whom Mr. Kennedy had enrolled in any company's QHPs, whether under his own NPN and FFM ID or under Mr. DeRossett's NPN and FFM ID. (T p. 1094) Mr. Kennedy's Excel spreadsheet for Aetna/Coventry QHPs, however, only includes one of the names of the above 24 new enrollees in Aetna/Coventry QHPs in the 2016 OEP under Mr. DeRossett's NPN and FFM ID. (See R. Ex. 31 (file name "Aetna_Coventry.xlsx")) That individual is Ronnie Maynard. Further, Mr. Kennedy's Aetna/Coventry Excel spreadsheet only refers to Mr. Maynard's 2015 QHP enrollment, not the 2016 enrollment Mr. Kennedy processed according to the Aetna/Coventry records..

106. From the Hearing Officer's unique perspective as factfinder, and because of the discrepancy between the Aetna/Coventry records to which Respondents did not object and Mr. Kennedy's testimony, the Hearing Officer herein finds that Mr. Kennedy's testimony that he only used Mr. DeRossett's NPN and FFM ID to renew preexisting policies during the 2016 OEP is not credible or supported by the evidence in the record. Rather, the Hearing Officer finds that the evidence supports a finding of fact that Mr. Kennedy used Mr. DeRossett's NPN and FFM ID to both renew pre-existing Aetna/Coventry QHPs and to write new Aetna/Coventry QHPs.

Respondents' Attempt to Have Selena and Deborah Witherspoon Enroll Individuals in QHPs During the 2016 OEP

107. After Mr. DeRossett instructed Mr. Kennedy to stop using his NPN and FFM ID in December 2015, Mr. Kennedy contacted Selena Witherspoon to seek her help in submitting completed 2016 Enrollment Forms to the Marketplace. (T p 1097)

108. Mr. Kennedy was aware that Selena Witherspoon was not appointed by Aetna/Coventry. (T pp 1097-98) Mr. Kennedy was also aware that Selena Witherspoon's mother, Deborah Witherspoon, was a licensed producer and was appointed by Aetna/Coventry. (T pp 1097-98)

² Nor was there any "Nathaniel" McEwen in Aetna/Coventry's 2015 records.

109. Mr. Kennedy sent a draft “Brokerage Agreement” to Selena Witherspoon with an effective date of December 20, 2015. The draft Brokerage Agreement identified Mr. Kennedy as the “Primary Broker” and stated that Mr. Kennedy would provide Selena Witherspoon with “unloadable income estimating forms (based on worksheets completed by Client) for” her to “upload to Client Marketplace accounts.” The draft Brokerage Agreement stated that Mr. Kennedy would pay Selena Witherspoon “\$3 per enrollment up front for new enrollment processing.” (P. Ex. 57)

110. Mr. Kennedy met with Selena Witherspoon once in late December 2015 to give her completed 2016 Enrollment Forms and Self-Selection Forms, as well as at least once more to do the same. (T pp. 975-976) Some of the completed 2016 Enrollment Forms that Mr. Kennedy delivered to Selena Witherspoon were returnable to Mr. Kennedy while others were returnable to Delevan (T pp 933-934, 940, 966, 979, 990).

111. Although Mr. Kennedy acknowledged that Pearson Vue’s January 11, 2016 email made clear to him that his broker’s application was incomplete, after that date Mr. Kennedy did not cease using his Field Representatives to have ACA applicants fill out Mr. Kennedy’s 2016 enrollment materials. (T pp 973-974)

112. Numerous 2016 Enrollment Forms that Mr. Kennedy delivered to Selena Witherspoon were dated between January 11, 2016 – when Mr. Kennedy responded to Pearson Vue’s January 7, 2016 email – and January 21, 2016, when Mr. Kennedy’s broker’s license was issued. For example, on January 13, 2016, an ACA enrollee named Mark Gresham signed a 2016 Enrollment Form, which was credited to one of Mr. Kennedy’s 2016 Field Representatives, Betty Gilchrist³. (P. Ex. 59, p. 121; T p. 975) Similarly, on January 14, 2016, an ACA enrollee named Leticia Carter signed a 2016 Enrollment Form, which was credited to Mr. Kennedy’s 2016 Field Representative Julius Bishop. (P. Ex. 59, p. 45; T p 979)

113. One of the 2016 Enrollment Forms that Mr. Kennedy delivered to Selena Witherspoon was signed by Rhaleal Atai on January 31, 2016, which is evidence that Mr. Kennedy provided Ms. Witherspoon with 2016 Enrollment Forms as late as the last day of the 2016 OEP. (P. Ex. 59, p. 11)

114. Mr. Kennedy delivered the completed 2016 Enrollment Forms to Selena Witherspoon for her to use them to enroll the applicants in the Marketplace. Mr. Kennedy testified that, ultimately, he was not able to enter into any agreement with Selena Witherspoon for him to be compensated. (T pp 976, 977, 1024, 1100)

115. Numerous Aetna/Coventry QHPs were written under Deborah Witherspoon’s NPN and FFM ID based on Mr. Kennedy’s 2016 materials. (P. Ex. 36)

³ The transcript incorrectly denotes the name as “Betty Fieldcrist.” (T. p. 975) Mr. Kennedy, however, identified her as “Betty Gilchrist” in his letter to Ms. Knowles on January 19, 2016. (P. Ex. 47, p. 3)

ASD's 2016 Cease and Desist Letters and Accompanying Request for Documents

116. ASD learned of Mr. Kennedy's 2016 OEP enrollment efforts on January 6, 2016, when a representative of Urban Ministry of Charlotte, Richard Hoard, alleged to ASD that Mr. Kennedy's Field Representatives were recruiting ACA enrollees nearby. (P. Ex. 44) On January 7, 2016, Mr. Hoard emailed a blank copy of Mr. Kennedy's 2016 Enrollment Form to ASD. (P. Ex. 45; T pp 664-666)

117. In a January 11, 2016 letter, Assistant Deputy Commissioner Knowles advised Respondents of the information ASD received from the Urban Ministry of Charlotte. The letter outlined what potential violations of insurance law Respondents appeared to have committed, based on the information ASD had at the time. The letter requested that Respondents immediately cease and desist these apparent violations. (P. Ex. 46)

118. Ms. Knowles' January 11, 2016 letter also included requests for Respondents to provide information, including in relevant part:

- (1) Copies of all completed 'ACA Healthcare Outreach' and 'Insurance Plan Self-Selection Authorization' forms that you or any of your Field Representatives have obtained during the November 1, 2015 Open Enrollment Period.
- (2) Copies of any other enrollment forms you have used and copies of any and all other completed enrollment forms you or any of your Field Representatives have obtained during the November 1, 2015 Open Enrollment Period.
- (3) Provide a list of all individuals for whom you or any other agent working with you wrote ACA Marketplace plans which shall include: (a) the full name, address and phone number of each individual, (b) the amount of estimated income which was entered on the application for help paying coverage which was submitted for each individual, (c) the issuer and plan type, (d) premium amount, (e) APTC amount, and (f) the name of the Field Representative who provided you with information for each individual.
- (4) (a) Provide the names and addresses of any licensed insurance agents who have assisted you in any way during the November 1, 2015 Open Enrollment Period and (b) provide a detailed explanation of all assistance which each agent has provided you.

...

(P. Ex. 46, p. 5)

119. On January 20, 2016, Mr. Kennedy's then-counsel responded to ASD's January 11, 2016 letter. Through his attorney, Mr. Kennedy provided blank copies of his 2016 ACA materials described above. Additionally, Mr. Kennedy provided completed copies of 2016 Enrollment Forms for approximately 43 individuals, as well as completed copies of Mr. Kennedy's Self-Selection Forms for most of these 43 individuals. Although most of the

Enrollment Forms listed the enrollees' estimated income, Mr. Kennedy only provided completed copies of his Pro Forma Income Projection forms for two of these 43 individuals. Additionally, Mr. Kennedy did not provide completed copies of his Pro Forma Self Employment Ledger Form for any of these 43 individuals. (P. Ex. 48)

120. Regarding the 43 individuals whose "ACA Healthcare Outreach" and "Insurance Plan Self Selection" forms Mr. Kennedy provided, in a January 19, 2016 statement to ASD, Mr. Kennedy stated he was "unable to find an agent willing to accept placement of insurance" for them. (P. Ex. 47, p 2)

121. As noted, Mr. Kennedy's insurance broker's license was not issued until January 21, 2016. In his January 19, 2016 statement to ASD, however, Mr. Kennedy stated in relevant part:

- A. William Kennedy Broker is 100% responsible to place business obtained in a legal manner. All Field reps are contracted with William Kennedy, broker only.
...
- I. As a broker, I use the services of Field Representatives unlicensed individuals to assist in marketing to and to provide referrals. . . .
...
- III. In addition to being an Agent Producer, I am also a bonded Insurance Broker. Therefore, I am not in violation of N.C.G.S. §58-33-40(a).
- 4. I am not sure if this qualifies, but as a broker I placed clients with Steve Derossett through the web portal. . . . I have indemnified him from any and all liabilities because I am the bonded broker working on behalf of my clients.

(P. Ex. 47, pp 2-3)

122. In his January 19, 2016 statement, Mr. Kennedy did not identify Selena or Deborah Witherspoon in response to ASD's January 11, 2016 request for Respondents to identify "any licensed insurance agents who have assisted you in any way" during the 2016 OEP." Mr. Kennedy did not identify the two women even though he had already delivered completed 2016 Enrollment Forms to Selena Witherspoon for ACA enrollments, hoping to be compensated. (P. Ex 46, p. 5; P. Ex. 47)

123. On January 26, 2016, Ms. Knowles of ASD sent a second letter, reiterating ASD's concerns about Respondents' activity expressed in the January 11, 2016 letter, again requesting that Respondents cease and desist their apparent violations of law and specifically advising Mr. Kennedy that it appeared he had violated brokering laws by acting as a broker prior to his broker's license being issued on January 21, 2016. (P. Ex. 50)

124. Ultimately, ASD learned of Selena Witherspoon's receipt of Mr. Kennedy's 2016 Enrollment Forms and Self-Selection Forms as the result of a complaint from a third-party. (P. Exs. 52, 53, 55) In response to this complaint, Selena Witherspoon provided ASD with approximately 322 of Mr. Kennedy's completed 2016 Enrollment Forms. (P. Exs. 57-59) Respondents agreed that these were 2016 Enrollment Forms Mr. Kennedy had given to Selena Witherspoon. (T pp 277-281)

125. Mr. Kennedy did not personally retain copies of the Enrollment Forms that he gave Selena Witherspoon. (T p 978)

CONCLUSIONS OF LAW

1. This matter is properly before the Commissioner, and he has jurisdiction over the parties and the subject matter pursuant to Chapters 58 and 150B of the North Carolina General Statutes.

2. To the extent that the Findings of Fact ("FF") contain Conclusions of Law ("COLs"), or that the Conclusions of Law are Findings of Fact, they should be considered without regard to given labels. *Charlotte v. Heath*, 226 N.C. 750, 755, 40 S.E. 2d 600, 604 (1946); *Peters v. Pennington*, 210 N.C. App. 1, 15, 707 S.E. 2d 724, 735 (2011); *Warren v. Dep't of Crime Control*, 221 N.C. App. 376, 377, 726 S.E. 2d 920, 923, disc. review denied, 366 N.C. 408, 735 S.E. 2d 175 (2012).

3. Respondents were properly served with the NOAH in this matter.

Solicitation by Mr. Kennedy's Unlicensed Outreach Workers for the 2015 OEP and SEP

4. N.C. Gen. Stat. § 58-33-10(1) defines "Agent" in relevant part as "a person licensed to solicit applications for, or to negotiate a policy of, insurance."

5. N.C. Gen. Stat. § 58-33-5 provides: "A person shall not sell, solicit, or negotiate insurance in this State unless the person is licensed for that kind of insurance in accordance with this Article."

6. N.C. Gen. Stat. § 58-33-10(18) provides:

'Solicit' means attempting to sell insurance or asking or urging a person to apply for a particular kind of insurance from a particular company. 'Solicit' does not mean a referral to a licensed insurance agent or broker that does not include a discussion of specific insurance policy terms and conditions.

7. N.C. Gen. Stat. § 58-33-26(a) provides: "No person shall act or hold himself or herself out to be an agent, broker, limited representative, adjuster, or motor vehicle damage appraiser unless duly licensed."

8. Mr. Kennedy's Outreach Workers solicited insurance under N.C. Gen. Stat. § 58-33-10(18) by asking or urging persons to apply for a particular kind of insurance from a particular company for the 2015 OEP and SEP. Mr. Kennedy's 2015 Enrollment Forms that his Outreach Workers circulated asked and urged persons to "GET ENROLLED!" in a QHP. The 2015 Aetna/Coventry Enrollment Form refers to only two particular QHPs offered by a single company, Coventry, even though Mr. Kennedy was authorized at that time to write two other Coventry QHPs and a combined eight other BCBSNC and UHC QHPs. (P. Ex. 28, p 9) The 2015 BCBSNC Enrollment Form refers to only one particular QHP offered by BCBSNC, even though Mr. Kennedy was authorized at that time to write three other BCBSNC QHPs as well as a combined eight other Coventry and UHC QHPs. (P. Ex. 28, p. 13) Mr. Kennedy testified that, among the purposes for which he used the information from the 2015 Enrollment Forms, was to apply for QHPs on the enrollees' behalf, often without ever having any personal contact with the enrollees.

9. Mr. Kennedy's Outreach Workers also solicited insurance under N.C. Gen. Stat. § 58-33-10(18) by attempting to sell insurance during the 2015 OEP and SEP. The 2015 Enrollment Forms encouraged enrollees to select specific QHPs. Mr. Kennedy's 2015 Privacy Notice Statements, which enrollees certified having received, state that the information the enrollees provide will be used, among other things, "to help you obtain health insurance" and to help "enroll you in a qualified health plan." (P. Ex. 28, p 14) Mr. Kennedy in fact used the information from the 2015 Enrollment Forms to enroll individuals in QHPs and received commissions for doing so.

10. Mr. Kennedy has argued that his 2015 Outreach materials were mere "referrals" within the meaning of N.C. Gen. Stat. § 58-33-10(18). (*See, e.g.*, T p 1196) By the plain language of N.C. Gen. Stat. § 58-33-10(18), however, a would-be referral by an unlicensed person is still a prohibited solicitation if the would-be referral asks or urges a person to apply for a particular kind of insurance from a particular company, as the 2015 Enrollment Forms did. Moreover, if the materials were mere "referrals" to Mr. Kennedy, then necessarily there would have been some follow-up contact between Mr. Kennedy and the enrollees after Mr. Kennedy received the completed Enrollment Forms. Instead, Mr. Kennedy testified that he applied for QHPs based on the information in the Enrollment Forms without ever having any personal contact with many of the enrollees.

11. The 2015 Enrollment Forms were not mere referrals within the meaning of N.C. Gen. Stat. § 58-33-10(18) because they contained specific discussions of terms and conditions of specific QHPs. The 2015 Aetna/Coventry Enrollment Forms included, by specific dollar amount, the general co-payments, primary doctor co-payments, emergency room co-payments, generic drugs co-payments and two different deductibles for two CoventryOne QHPs, while the 2015 BCBSNC Enrollment Form contained the dollar amounts of primary doctor fees and deductibles for one BCBSNC QHP.

12. Mr. Kennedy testified that he gave Outreach Workers verbal instructions not to discuss the terms and conditions of any QHP. The definition of solicitation under N.C. Gen. Stat. § 58-33-10(18) is not limited to verbal solicitation, however. Here, the face of the 2015 Enrollment Forms that the Outreach Workers circulated discussed terms and conditions of QHPs.

Additionally, Mr. Kennedy was unaware of the names of many of the Outreach Workers, did not meet all of them and, although he verbally instructed his middle man Mr. Reed not to discuss terms and conditions, Mr. Kennedy could not confirm Mr. Reed had passed on these instructions. (T pp 1310-1311, 1313-1314)

13. Mr. Kennedy has also argued the 2015 Enrollment Forms and Income Work Sheets were not related to insurance but rather to APTCs and that, therefore, Mr. Kennedy's conduct in procuring and using the Forms and Work Sheets is not within the jurisdiction of the NCDOJ to regulate under North Carolina insurance laws and 45 CFR § 155.220. (T pp 1010-1011) Mr. Kennedy's argument appears to be that his forms relate solely to an insurance-neutral, general IRS administrative procedure for determining a tax credit. However, without the APTC, many of Mr. Kennedy's clients would not have been able to afford the premium payments. Thus, the Enrollment Forms and Income Work Sheets are a necessary part of the overall insurance transaction.

14. The purpose of Mr. Kennedy's entire Outreach efforts, however, was to procure insurance in the form of QHPs for his clients. Mr. Kennedy was charged with notice of the North Carolina insurance law and 45 CFR § 155.220 and, in his 2016 Privacy Notice Statement, Mr. Kennedy expressly acknowledged he was subject to "state law and regulation" with regard to his ACA activities. (P. Ex. 47, p. 16) Further, Mr. Kennedy testified that he used the information provided in the 2015 Enrollment Forms to apply for QHPs through the Marketplace. (T p 1010) The 2015 Enrollment Forms also state that: (a) if an enrollee provides false information in the Forms, it may be fraud against an "insurance company" and a "fraudulent insurance act," which may lead the enrollee's "policy" to be "invalidated," and "liable for legal action;" and (b) the enrollee who fills out the Enrollment Form has "received information regarding my ACA Marketplace Plan." (P. Ex. 28, p. 9) Mr. Kennedy's 2015 Privacy Notice Statements, which enrollees certified having received, state that the information will be used: (a) "to help you complete your application for health insurance;" (b) "to help you obtain health insurance;" (c) to help "enroll you in a qualified health plan;" and (d) to correct "errors in your application." (P. Ex. 28, p. 10)

15. The purpose of the APTCs is to be paid directly to insurance companies to subsidize premium payments for health insurance in the form of QHPs. 42 USC § 18082(a)(3). The procedure for determining APTCs is inextricably interwoven with the Marketplace. Mr. Kennedy testified that he submitted APTC applications to the Marketplace, not the IRS. (T pp 1010-1013) Federal law confirms that the Marketplace refers such applications to the Secretary of the HHS, who then refers them to the Secretary of the Treasury for verification, after which the Secretary of the Treasury refers the verifications back to the Secretary of the HHS, who then determines the applicable APTC on behalf of the Marketplace and requests the IRS to pay the APTC to the relevant insurance carrier. *See* 42 USC §§ 18081(c)(1), 18081(c)(3), 18081(e), 18082(a)(1), 18082(a)(2)(A) and 18082(a)(3). The 2015 Enrollment Forms and Income Work Sheets clearly relate to insurance, not to some insurance-neutral practice by the Treasury or the IRS. Thus, Mr. Kennedy's use of these Forms and Work Sheets is the sort of conduct by insurance agents in procuring QHPs that the NCDOJ is explicitly permitted to regulate, as recognized by 45 CFR § 155.220.

16. By soliciting insurance in the above manners while unlicensed, Mr. Kennedy's Outreach Workers violated N.C. Gen. Stat. § 58-33-5. Mr. Kennedy's Outreach Workers also acted as insurance agents by soliciting insurance without being licensed, in violation of N.C. Gen. Stat. §§ 58-33-26(a) and 58-33-120.

17. Mr. Kennedy's broker's license is currently canceled. Under N.C. Gen. Stat. § 58-33-46(f), however, the Commissioner "shall retain the authority to enforce the provisions of, and impose any penalty or remedy authorized by, this Chapter against any person who is under investigation for or charged with a violation of this Chapter even if the person's license or registration has been surrendered or has lapsed by operation of law."

18. N.C. Gen. Stat. § 58-33-46(a)(8) provides in relevant part that the Commissioner may revoke an insurance producer's license or an insurance broker's license for "[u]sing fraudulent, coercive, or dishonest practices, or demonstrating incompetence, untrustworthiness, or financial irresponsibility in the conduct of business in this State or elsewhere."

19. Mr. Kennedy's producer and broker licenses should be revoked under § 58-33-46(a)(8) because Mr. Kennedy's orchestration, aiding and abetting of the unlawful solicitation and resulting violations by his Outreach Workers of N.C. Gen. Stat. §§ 58-33-5, 58-33-26(a) and 58-33-120 constitute dishonest practices and incompetence and untrustworthiness by Mr. Kennedy in the conduct of business in this State.

Negotiation by Mr. Kennedy's Unlicensed Outreach Workers for the 2015 OEP and SEP

20. N.C. Gen. Stat. § 58-33-10(15) provides:

'Negotiate' means the act of conferring directly with, or offering advice directly to, a purchaser or prospective purchaser of a particular contract of insurance concerning any of the substantive benefits, terms, or conditions of the contract, only if the person engaged in that act either sells insurance or obtains insurance from insurers for purchasers. 'Negotiate' does not mean a referral to a licensed insurance agent or broker that does not include a discussion of specific insurance policy terms and conditions.

21. Mr. Kennedy's Outreach Workers negotiated insurance under N.C. Gen. Stat. § 58-33-10(15) by conferring directly with prospective purchasers of QHPs regarding the substantive benefits, terms and conditions of particular QHPs. The Outreach Workers circulated Mr. Kennedy's 2015 Enrollment Forms to ACA enrollees and had the enrollees fill them out. The 2015 Aetna/Coventry Enrollment Form concerned specific co-payments and deductibles – which are substantive benefits, terms, and conditions – of two particular Coventry QHPs. The 2015 BCBSNC Enrollment Form concerned a specific cost for a physician and deductibles – which are substantive benefits, terms, and conditions – for one particular BCBSNC QHP.
(P. Ex. 28, pp. 9, 13)

22. For the reasons stated in Conclusions of Law 8, 9, 10 and 11 above, Mr. Kennedy's Outreach Workers were not providing mere referrals within the meaning of N.C. Gen. Stat. § 58-33-10(15) when negotiating insurance for the 2015 QEP and SEP.

23. For the reasons stated in COLs 13 and 14 above, Mr. Kennedy's conduct in procuring and using the Enrollment Forms and Income Work Sheets relates to insurance and is within the jurisdiction of the NCDOI to regulate under North Carolina insurance laws, as recognized by 45 CFR § 155.220.

24. By negotiating insurance in the above manners while unlicensed, Mr. Kennedy's Outreach Workers violated N.C. Gen. Stat. § 58-33-5. Mr. Kennedy's Outreach Workers also acted as insurance agents by negotiating insurance without being licensed, in violation of N.C. Gen. Stat. §§ 58-33-26(a) and 58-33-120.

25. Mr. Kennedy's producer and broker licenses should be revoked under § 58-33-46(a)(8) because Mr. Kennedy's orchestration, aiding and abetting of the unlawful negotiation and resulting violations by his Outreach Workers of N.C. Gen. Stat. §§ 58-33-5, 58-33-26(a) and 58-33-120 constitute dishonest practices and incompetence and untrustworthiness by Mr. Kennedy in the conduct of business in this State.

Solicitation by Unlicensed Field Representatives for the 2016 OEP

26. The Field Representatives solicited insurance under N.C. Gen. Stat. § 58-33-10(18) by asking or urging persons to apply for a particular kind of insurance from a particular company for the 2016 OEP. The 2016 Enrollment Forms that Mr. Kennedy created for the Field Representatives to circulate both asked and urged persons to "GET ENROLLED!" in a QHP. (P. Ex. 48) The 2016 Privacy Notice Statements, which enrollees certified having received, state, among other things, that the information the enrollees provide will be used: (a) "to help you complete your application for health insurance;" (b) "to help you obtain health insurance;" and (c) to help "enroll you in a qualified health plan." (P. Ex. 47, p. 16) Mr. Kennedy testified that he delivered completed 2016 Enrollment Forms and Self-Selection Forms to Selena Witherspoon, anticipating that she would use them to enroll the applicants in the Marketplace to receive QHPs. (T pp 976, 1100)

27. Additionally, the Field Representatives solicited insurance under N.C. Gen. Stat. § 58-33-10(18) by attempting to sell insurance during the 2016 OEP. The 2016 Enrollment Forms encouraged enrollees to select specific QHPs. As noted, the 2016 Privacy Notice Statements, which enrollees certified having received, state that the information the enrollees provide will be used, among other things, "to help you obtain health insurance" and to help "enroll you in a qualified health plan." Mr. Kennedy gave the 2016 Enrollment Forms to Selena Witherspoon for her to use to enroll his clients in QHPs. (T pp 976, 1100)

28. Mr. Kennedy has argued that the 2016 ACA materials the Field Representatives distributed were mere "referrals" within the meaning of N.C. Gen. Stat. § 58-33-10(18). (P. Ex. 47, pp 2-3) The 2016 ACA materials, however, contained specific discussions of terms and conditions of specific QHPs. Particularly, the Self-Selection Forms that the Field Representatives had enrollees fill out along with 2016 Enrollment Forms stated that "William

Kennedy, Licensed Agent has recommends [sic] the **Aetna Leap Plan Silver**,” which had the “lowest premium and max out of pocket,” which cost less than all “other Options in the Silver Category” and which had a smaller “network of providers” than a “United Healthcare” QHP. (P. Ex. 48, p. 3) (bold emphasis in original)) Further, the Comparison Chart that Mr. Kennedy gave the Field Representatives to circulate named four different 2016 QHPs and compared, with exact dollar amounts, the specific costs in each of the four QHPs for such items as single and family deductibles, single and family maximum out-of-pocket deductibles, emergency room visit costs and co-payments for generic drugs. (P. Ex. 47, p. 17) Finally, the fact that Mr. Kennedy’s 2016 script for his Field Representatives prohibited them from discussing insurance terms and conditions does not mean the Representatives were providing mere referrals because the Field Representatives also circulated the Self-Selection Forms and the Comparison Chart, which included exactly such terms and conditions.

29. Mr. Kennedy testified that he never finalized an agreement with Selena Witherspoon and therefore never received commissions for any QHPs she or Deborah Witherspoon wrote based on Mr. Kennedy’s 2016 Enrollment Forms and Self-Selection Forms. (T pp 977, 1100) The definition of solicitation under N.C. Gen. Stat. § 58-33-10(18), however, does not require that an actual sale of insurance result from asking or urging a person to apply for a particular kind of insurance from a particular company, nor does it require the payment of commissions.

30. For the reasons stated in COLs 13 and 14 above, Mr. Kennedy’s conduct in preparing and having the Field Representatives circulate his 2016 ACA materials relates to insurance and is within the jurisdiction of the NCDOI to regulate under North Carolina insurance laws, as recognized by 45 CFR § 155.220.

31. By soliciting insurance in the above manners while unlicensed, the Field Representatives violated N.C. Gen. Stat. § 58-33-5. The Field Representatives also acted as insurance agents by soliciting insurance without being licensed, in violation of N.C. Gen. Stat. §§ 58-33-26(a) and 58-33-120.

32. Mr. Kennedy’s producer and broker licenses should be revoked under N.C. Gen. Stat. § 58-33-46(a)(8) because Mr. Kennedy’s orchestration, aiding and abetting of the unlawful solicitation and resulting violations by the Field Representatives of N.C. Gen. Stat. §§ 58-33-5, 58-33-26(a) and 58-33-120 constitute dishonest practices and incompetence and untrustworthiness by Mr. Kennedy in the conduct of business in this State.

33. Mr. Kennedy testified that he and Mr. Ciardi decided to create Delevan, and the purpose of Delevan was “to assign the commissions” from Mr. Kennedy’s insurance sales. (T p. 988) Delevan received its insurance business entity’s license on August 19, 2015, which was after the 2015 OEP and SEP were over and after Mr. Kennedy’s appointments by Aetna/Coventry and BCBSNC had been canceled, but before the 2016 OEP began. Some of the completed 2016 Enrollment Forms credited to Field Representatives were returnable to Delevan and others were returnable to Mr. Kennedy. The draft agreement sent to Mr. DeRossett for Mr. Kennedy’s use of his NPN and FFM ID was between Delevan and Mr. DeRossett. (P. Ex. 69) Based on these facts, the Hearing Officer determines that the Field Representatives’ unlawful

solicitation and resulting violations of N.C. Gen. Stat. §§ 58-33-5, 58-33-26(a) and 58-33-120 are attributable to Delevan, as well as Mr. Kennedy.

34. N.C. Gen. Stat. § 58-33-46(a)(8) authorizes the Commissioner to revoke any license issued under Article 33 of Chapter 58 of the North Carolina General Statutes. Delevan's business entity license was issued under N.C. Gen. Stat. §§ 58-33-26(j) and 58-33-31(b) and is thus subject to sanction under N.C. Gen. Stat. § 58-33-46(a)(8), even though the license is currently lapsed. *See* N.C. Gen. Stat. § 58-33-46(f).

35. Delevan's business entity license should be revoked under N.C. Gen. Stat. § 58-33-46(a)(8) because the unlawful solicitation and resulting violations by the Field Representatives of N.C. Gen. Stat. §§ 58-33-5, 58-33-26(a) and 58-33-120 are attributable to Delevan and therefore constitute dishonest practices and incompetence and untrustworthiness by Delevan in the conduct of business in this State.

Negotiation by Unlicensed Field Representatives for the 2016 OEP

36. The Field Representatives negotiated insurance under N.C. Gen. Stat. § 58-33-10(15) by conferring directly with prospective purchasers of QHPs regarding the substantive benefits, terms, and conditions of particular QHPs. As noted in COL 27, Mr. Kennedy's Self-Selection Forms stated that the premium and out-of-pocket costs of the Aetna Leap Plan Silver QHP were lower than silver-level QHPs offered by other insurers, although a UHC QHP had a broader network of providers. Further, as noted in COL 27, the Comparison Chart that Mr. Kennedy had the Field Representatives circulate referred to four different QHPs and compared the exact amounts of each QHP's costs for numerous items.

37. For the reasons stated in COL 28 above, the Field Representatives were not providing mere referrals within the meaning of N.C. Gen. Stat. § 58-33-10(15) when negotiating insurance during the 2016 QEP.

38. The definition of negotiation under N.C. Gen. Stat. § 58-33-10(15) does not require that an actual sale of insurance result from conferring directly with, or offering advice directly to, a prospective purchaser of a particular contract concerning any of the substantive benefits, terms, or conditions of the contract. Thus, the fact that Mr. Kennedy never received any compensation from the QHPs Selena or Deborah Witherspoon wrote based on Mr. Kennedy's completed ACA materials does not mean the Field Representatives were not negotiating.

39. For the reasons stated in COLs 13 and 14 above, Mr. Kennedy's conduct in preparing and having the Field Representatives circulate his 2016 ACA materials relates to insurance and is within the jurisdiction of the NCDOT to regulate under North Carolina insurance laws, as recognized by 45 CFR § 155.220.

40. By negotiating insurance in the above manners while unlicensed, the Field Representatives violated N.C. Gen. Stat. § 58-33-5. The Field Representatives also acted as insurance agents by negotiating insurance without being licensed, in violation of N.C. Gen. Stat. §§ 58-33-26(a) and 58-33-120.

41. Mr. Kennedy's producer and broker licenses should be revoked under N.C. Gen. Stat. § 58-33-46(a)(8) because Mr. Kennedy's orchestration, aiding and abetting of the unlawful negotiation and resulting violations by his Field Representatives of N.C. Gen. Stat. §§ 58-33-5, 58-33-26(a) and 58-33-120 constitute dishonest practices and incompetence and untrustworthiness by Mr. Kennedy in the conduct of business in this State.

42. For the same reasons stated in COL 33 above, the unlawful negotiation and resulting violations by the Field Representatives of N.C. Gen. Stat. §§ 58-33-5, 58-33-26(a) and 58-33-120 are attributable to Delevan. Delevan's business entity license should be revoked under N.C. Gen. Stat. § 58-33-46(a)(8) because the unlawful negotiation and resulting violations constitute dishonest practices and incompetence and untrustworthiness by Delevan in the conduct of business in this State.

Unlawful Compensation of the Outreach Workers and Field Representatives

43. N.C. Gen. Stat. § 58-33-82(b) provides: "A person shall not accept a commission, service fee, brokerage, or other valuable consideration for selling, soliciting, or negotiating insurance in this State if that person is required to be licensed under this Article and is not so licensed."

44. N.C. Gen. Stat. § 58-33-82(d) provides: "Except as provided in subsection (e) of this section, only agents who are duly licensed with appropriate company appointments, licensed brokers, licensed limited lines producers, or licensed limited representatives may accept, directly or indirectly, any commission, fee, or other valuable consideration for the sale, solicitation, or negotiation of insurance."

45. Mr. Kennedy testified that he compensated his unlicensed Outreach Workers for what has been determined to be their solicitation and negotiation of insurance for the 2015 OEP and SEP, and the 2016 Field Representative Agreements state that the unlicensed Field Representatives were compensated for what has been determined above to be their solicitation and negotiation of insurance for the 2016 OEP.

46. The Outreach Workers and the Field Representatives violated N.C. Gen. Stat. §§ 58-33-82(b) and 58-33-82(d) by receiving compensation for their solicitation and negotiation of insurance without being licensed.

47. Mr. Kennedy's producer and broker licenses should be revoked under N.C. Gen. Stat. § 58-33-46(a)(8) because Mr. Kennedy's orchestration, aiding and abetting of the violations by the Outreach Workers and Field Representatives of N.C. Gen. Stat. §§ 58-33-82(b) and 58-33-82(d) constitute dishonest practices and incompetence and untrustworthiness by Mr. Kennedy in the conduct of business in this State.

48. N.C. Gen. Stat. § 58-33-82(a) prohibits in relevant part a producer from paying “a commission, service fee, or other valuable consideration to a person for selling, soliciting, or negotiating insurance in this State if that person is required to be licensed under this Article and is not so licensed.”

49. Mr. Kennedy violated N.C. Gen. Stat. § 58-33-82(a) by paying consideration to the Outreach Workers and Field Representatives for soliciting and negotiating insurance.

50. N.C. Gen. Stat. § 58-33-46(a)(2) provides in relevant part that the Commissioner may revoke a producer or broker license for “[v]iolating any insurance law of this or any other state, violating any administrative rule, subpoena, or order of the Commissioner or of another state's insurance regulator, or violating any rule of the FINRA.”

51. Mr. Kennedy's producer and broker licenses should be revoked under § 58-33-46(a)(2) based on Mr. Kennedy's violations of N.C. Gen. Stat. § 58-33-82(a).

52. For the reasons stated in COL 33 above, the Field Representatives' violations of N.C. Gen. Stat. §§ 58-33-82(b) and 58-33-82(d) and Mr. Kennedy's violations of N.C. Gen. Stat. § 58-33-82(a) during the 2016 OEP are attributable to Delevan. Delevan's business entity license should be revoked under N.C. Gen. Stat. § 58-33-46(a)(8) because these violations constitute dishonest practices and incompetence and untrustworthiness by Delevan in the conduct of business in this State.

Solicitation, Negotiation and Acting as an Agent for Aetna/Coventry and Placing Aetna/Coventry QHPs, All Without an Appointment

53. N.C. Gen. Stat. § 58-33-26(i) provides: “No agent shall place a policy of insurance with any insurer unless the agent has a current appointment as agent for the insurer in accordance with G.S. 58-33-40 or has a valid temporary license issued in accordance with G.S. 58-33-66.”

54. N.C. Gen. Stat. § 58-33-40(a) provides: “No individual who holds a valid insurance agent's license issued by the Commissioner shall, either directly or for an insurance agency, solicit, negotiate, or otherwise act as an agent for an insurer by which the individual has not been appointed.”

55. Through the use of the Field Representatives, and prior to being issued his broker's license on January 21, 2016, Mr. Kennedy violated N.C. Gen. Stat. § 58-33-40(a) by directly and for Delevan soliciting, negotiating and otherwise acting as an agent for Aetna/Coventry without having an appointment. The Self-Selection Form that the Field Representatives had enrollees fill out stated that “William Kennedy, Licensed Agent has recommends [sic] the **Aetna Leap Plan Silver**.” (P. Ex. 48, p. 3 (bold emphasis in original)) Mr. Kennedy was not appointed by Aetna/Coventry during the time the Field Representatives circulated the Self-Selection Forms and was not licensed to broker business for Aetna/Coventry until January 21, 2016.

56. Mr. Kennedy violated N.C. Gen. Stat. § 58-33-26(i) by placing renewals of Aetna/Coventry QHPs and new Aetna/Coventry QHPs using Mr. DeRossett's NPN and FFM ID at a time when Mr. Kennedy was not appointed by Aetna/Coventry and was not a licensed broker.

57. Mr. Kennedy's producer and broker licenses should be revoked under N.C. Gen. Stat. § 58-33-46(a)(2) based on Mr. Kennedy's violations of N.C. Gen. Stat. §§ 58-33-26(i) and 58-33-40(a).

58. Mr. Kennedy's producer and broker licenses should be revoked under N.C. Gen. Stat. § 58-33-46(a)(8) because his actions in acting as an agent for Aetna/Coventry during the 2016 OEP without an appointment constitute dishonest practices and incompetence and untrustworthiness in the conduct of business in this State.

59. For the reasons stated in COL 33, Mr. Kennedy's violations of N.C. Gen. Stat. §§ 58-33-26(i) and 58-33-40(a) during the 2016 OEP are attributable to Delevan. Delevan's business entity license should be revoked under N.C. Gen. Stat. § 58-33-46(a)(8) because these violations constitute dishonest practices and incompetence and untrustworthiness by Delevan in the conduct of business in this State.

Acting as an Unlicensed Broker

60. N.C. Gen. Stat. § 58-33-26(a) provides: "No person shall act or hold himself or herself out to be an agent, broker, limited representative, adjuster, or motor vehicle damage appraiser unless duly licensed."

61. N.C. Gen. Stat. § 58-33-120 provides in relevant part:

Agent, adjuster, etc., acting without a license or violating insurance law. If any person shall assume to act either as principal, agent, broker, limited representative, adjuster or motor vehicle damage appraiser without license as is required by law . . . or as principal or agent shall violate any provision of law contained in Articles 1 through 64 of this Chapter, the punishment for which is not elsewhere provided for, he shall be deemed guilty of a Class 1 misdemeanor.

62. Prior to being licensed as a broker on January 21, 2016, Mr. Kennedy violated N.C. Gen. Stat. § 58-33-26(a) by repeatedly holding himself out as a broker. Mr. Kennedy described himself as a broker in his Field Representative Agreements, in the script he had the Field Representatives read to enrollees, in his conversation with Mr. DeRossett about using Mr. DeRossett's NPN and FFM, in the draft Brokerage Agreement he sent to Selena Witherspoon and in his January 19, 2016 statement to ASD.

63. Mr. Kennedy violated N.C. Gen. Stat. § 58-33-26(a) by acting as a broker without a broker's license. Mr. Kennedy repeatedly held himself out as a broker before he was licensed as a broker. Before becoming licensed as a broker and without an Aetna/Coventry appointment, Mr. Kennedy himself renewed Aetna/Coventry QHPs and placed new Aetna/Coventry QHPs by using Mr. DeRossett's NPN and FFM ID.

64. Mr. Kennedy has argued that he was entitled to act as a broker before receiving his license based on the following definition of “broker” in N.C. Gen. Stat. § 58-33-10(3):

‘Broker’ means a person who, being a licensed agent, procures insurance for a party other than himself through a duly authorized agent of an insurer that is licensed to do business in this State but for which the broker is not authorized to act as agent. A person not duly licensed who procures insurance for a party other than himself is a broker within the intent of this Article, and thereby becomes liable for all the duties, requirements, liabilities and penalties to which such licensed brokers are subject.

(Emphasis added). This underlined portion of N.C. Gen. Stat. § 58-33-10(3) only clarifies that, if a person acts as a broker without a license, he is still financially liable and subject to any penalties to which an actual broker would be subject. This section does not relieve Mr. Kennedy of the requirements in N.C. Gen. Stat. §§ 58-33-26(a) and 58-33-120 that he actually be a licensed broker in order to act as one. If the law were otherwise, then the license requirements of N.C. Gen. Stat. §§ 58-33-26(a) and 58-33-120 would be surplusage, and any licensed producer could become a licensed broker by unilaterally deciding to act as one, which would be an absurd consequence. Moreover, Mr. Kennedy testified that to work as a broker, “[Y]ou need to apply for a broker’s license.” (T p 1239). Mr. Kennedy’s statement indicates that he was aware that working as a broker requires a license.

65. Mr. Kennedy also argued that he believed in good faith he became a broker immediately upon submitting his broker’s application on December 7, 2015. (T pp. 911, 916-918) First, there is no good-faith exception to the requirements in N.C. Gen. Stat. §§ 58-33-26(a) and 58-33-120 that Mr. Kennedy actually be a licensed broker in order to act as one.

66. Second, from her unique position as factfinder, the Hearing Officer does not find Mr. Kennedy’s claim that he actually believed he became a broker upon filing his application to be credible. The Field Representatives were already obtaining signed 2016 Enrollment Forms returnable to Delevan and to Mr. Kennedy prior to December 7, 2015. Thus, Mr. Kennedy was already acting as an unlicensed broker by soliciting and negotiating for Aetna/Coventry even before filing his broker’s application. Additionally, Mr. Kennedy acknowledged he was only a “licensed agent” in his Self-Selection Form, even as he claimed to be a broker in his other, contemporaneous 2016 ACA materials cited in COL 62.

67. On numerous occasions, the NCDOT, through its third-party contractors, made clear to Mr. Kennedy that his broker’s application was incomplete. On December 8, 2015, Mr. Kennedy was informed that he needed to forward his bond, which Mr. Kennedy recognized as “a problem” with his application. (T p. 917) On December 14, 2015, Pearson Vue informed Mr. Kennedy that it needed the original bond and was “unable” to accept the mere copy of the bond Mr. Kennedy had forwarded. On January 7, 2016, Pearson Vue informed Mr. Kennedy that his broker’s application was “incomplete” because it had not received the original copy of the bond and that, as a result, the NCDOT “may withdraw” Mr. Kennedy’s application. Despite

these warnings, Mr. Kennedy did not ensure that the original copy of the bond was received until January 21, 2016. (See FF 73-79) Rather, after each warning, Mr. Kennedy allowed the Field Representatives to continue circulating and obtaining completed copies of his 2016 Enrollment Forms and Self-Selection Forms.

68. Mr. Kennedy's producer and broker licenses should be revoked under N.C. Gen. Stat. § 58-33-46(a)(2) based on Mr. Kennedy's violations of N.C. Gen. Stat. § 58-33-26(a).

69. Mr. Kennedy's producer and broker licenses should be revoked under N.C. Gen. Stat. § 58-33-46(a)(8) because his actions in acting as a broker without a license constitute dishonest practices and incompetence and untrustworthiness in the conduct of business in this State.

70. For the reasons stated in COL 33, Mr. Kennedy's violations of N.C. Gen. Stat. § 58-33-26(a) during the 2016 OEP are attributable to Delevan. Delevan's business entity license should be revoked under N.C. Gen. Stat. § 58-33-46(a)(8) because these violations constitute dishonest practices and incompetence and untrustworthiness by Delevan in the conduct of business in this State.

Failure to Maintain and Produce Documents

71. N.C. Gen. Stat. § 58-2-185 provides:

All companies, agents, or brokers doing any kind of insurance business in this State must make and keep a full and correct record of the business done by them, showing the number, date, term, amount insured, premiums, and the persons to whom issued, of every policy or certificate or renewal. Information from these records must be furnished to the Commissioner on demand, and the original books of records shall be open to the inspection of the Commissioner when demanded.

72. N.C. Gen. Stat. § 58-2-195(a) provides:

The Commissioner is empowered to make and promulgate reasonable rules and regulations governing the recording and reporting of insurance business transactions by insurance agencies, agents, brokers and producers of record, any of which agencies, agents, brokers or producers of record are licensed in this State or are transacting insurance business in this State to the end that such records and reports will accurately and separately reflect the insurance business transactions of such agency, agent, broker or producer of record in this State. Information from records required to be kept pursuant to the provisions of this section must be furnished the Commissioner on demand and the original records required to be kept pursuant to the provisions of this section shall be open to the inspection for the Commissioner or any other authorized employee described in G.S. 58-2-25 when demanded."

73. 11 NCAC 19.0102(b) provides, in pertinent part:

Every agency, agent, broker, or producer of record shall maintain a file for each policy sold. The file shall contain all work papers and written communications in his or her possession pertaining to that policy.

74. In response to ASD's April 21, 2015 document request, Mr. Kennedy was unable to produce any copies of the 2015 Enrollment Forms and Income Work Sheets he received from his Outreach Workers and then used to write many hundreds of QHPs. Rather, he claimed he had destroyed them. (T pp 355-356, 647) Mr. Kennedy's failure to maintain and produce these materials violated N.C. Gen. Stat. §§ 58-2-185 and 58-2-195(a) and 11 NCAC 19.0102(b).

75. The NCDOI's January 11, 2016 letter (P. Ex. 46, p. 5) included requests for Respondents to provide information, including in relevant part:

- (1) Copies of all completed 'ACA Healthcare Outreach' and 'Insurance Plan Self-Selection Authorization' forms that you or any of your Field Representatives have obtained during the November 1, 2015 Open Enrollment Period.
- (2) Copies of any other enrollment forms you have used and copies of any and all other completed enrollment forms you or any of your Field Representatives have obtained during the November 1, 2015 Open Enrollment Period.
- (3) Provide a list of all individuals for whom you or any other agent working with you wrote ACA Marketplace plans which shall include: (a) the full name, address and phone number of each individual, (b) the amount of estimated income which was entered on the application for help paying coverage which was submitted for each individual, (c) the issuer and plan type, (d) premium amount, (e) APTC amount, and (f) the name of the Field Representative who provided you with information for each individual.
- (4) (a) Provide the names and addresses of any licensed insurance agents who have assisted you in any way during the November 1, 2015 Open Enrollment Period and (b) provide a detailed explanation of all assistance which each agent has provided you.

76. In response to ASD's January 11, 2016 document request, Respondents never produced any copies of the signed 2016 Field Representative Agreements or copies of completed Pro Forma Income Self Employment Ledger Forms. For clients for whom they never obtained QHPs, Respondents produced approximately 43 completed 2016 Enrollment Forms and a similar number of Self-Selection Forms but only two completed Pro Forma Income Projection Forms. (See FF 119) Respondents did not produce or maintain any copies of the 322 2016 Enrollment Forms that Mr. Kennedy gave to Selena Witherspoon. Respondents did not produce to ASD Self-Selection Forms for the approximately 322 enrollees whose applications Mr. Kennedy gave to Selena Witherspoon. (See P. Ex. 58) Respondents' failure to maintain and produce the

completed copies of such materials violated N.C. Gen. Stat. §§ 58-2-185 and 58-2-195(a) and 11 NCAC 19.0102(b).

77. Respondents contend that Mr. Kennedy's February 19, 2016 Excel spreadsheets satisfy the requirement of N.C. Gen. Stat. § 58-2-185 that all companies or agents keep a record of the "business done by them, showing the number, date, term, amount insured, premiums, and the persons to whom issued, of every policy or certificate or renewal." The February 19, 2016 spreadsheets, however, do not display any information about the Aetna/Coventry renewals Mr. Kennedy processed using Mr. DeRossett's NPN and FFM ID, which ASD requested in its January 11, 2016 letter. Nor do the Excel spreadsheets contain any information about 23 of the 24 new Aetna/Coventry enrollees for whom Mr. Kennedy placed QHPs using Mr. DeRossett's NPN and FFM ID. Instead, these 23 new enrollees are only apparent from the materials ASD had to obtain itself from Aetna/Coventry.

78. Mr. Kennedy's producer and broker licenses should be revoked under N.C. Gen. Stat. § 58-33-46(a)(2) based on Mr. Kennedy's violations of N.C. Gen. Stat. §§ 58-2-185 and 58-2-195(a) and 11 NCAC 19.0102(b).

79. Mr. Kennedy's producer and broker licenses should be revoked under N.C. Gen. Stat. § 58-33-46(a)(8) because his actions in failing to maintain and produce the documents above constitute incompetence and untrustworthiness in the conduct of business in this State.

80. Delevan's business entity license should be revoked under N.C. Gen. Stat. § 58-33-46(a)(2) based on its own violations, as an agency, of N.C. Gen. Stat. § 58-2-195(a) and 11 NCAC 19.0102(b).

81. Delevan's business entity license should be revoked under § 58-33-46(a)(8) because its actions in failing to maintain and produce the documents above constitute incompetence and untrustworthiness in the conduct of business in this State.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Mr. Kennedy's resident insurance producer's and broker's licenses be revoked and that Delevan's business entity license be revoked.

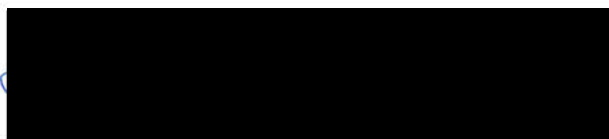
APPEAL RIGHTS

This is a Final Agency Decision issued under the authority of N.C. Gen. Stat. § 150B, Article 3A.

Under the provisions of N.C. Gen. Stat. § 150B-45, any party wishing to appeal a final decision of the North Carolina Department of Insurance must file a Petition for Judicial Review in the Superior Court of the County where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. The appealing party must file the petition within

30 days after being served with a written copy of the Order and Final Agency Decision. In conformity with the 11 NCAC 1.0413 and N.C.G.S. § 1A-1, Rule 5, this Order and Final Agency Decision was served on the parties on the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Order and Final Agency Decision. N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. The mailing address to be used for service on the Department of Insurance is: A. John Hoomani, General Counsel, 1201 Mail Service Center, Raleigh, NC 27699-1201.

This ^{28th} day of June 2019.



Sherri Hubbard, Hearing Officer
N.C. Department of Insurance
1201 Mail Service Center
Raleigh, NC 27699-1201

CERTIFICATE OF SERVICE

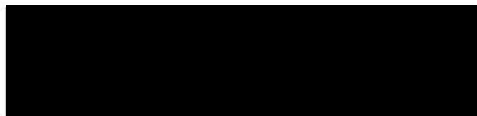
I hereby certify that I have this day served the foregoing Order and Final Agency Decision by mailing a copy of the same via First Class U.S. Mail to the licensee at the address provided to the Commissioner pursuant to N.C. Gen. Stat. § 58-2-69(b); and via State Courier, addressed as follows:

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This the 28th day of June 2019.



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