

**NORTH CAROLINA DEPARTMENT OF INSURANCE
RALEIGH, NORTH CAROLINA**

**STATE OF NORTH CAROLINA
COUNTY OF WAKE**

**BEFORE THE COMMISSIONER
OF INSURANCE
Docket Number: D-1611
Docket Number: D-1612**

**IN THE MATTER OF
THE LICENSURE OF
MICHAEL KOGER
AND NICOLE LOPEZ**

**FINAL AGENCY DECISION
AND ORDER**

This matter was heard on March 7, 2012 by the undersigned Hearing Officer, as designated by the Commissioner of Insurance, pursuant to North Carolina General Statutes §§ 58-2-55, 58-2-70, 58-71-80, 58-71-85, 150B-38, 150B-40 and 11 N.C.A.C. 1.0401 *et seq.* and other applicable statutes and regulations. Petitioner, the Agent Services Division of the North Carolina Department of Insurance ["Agent Services"], was represented by Assistant Attorney General Anne Goco Kirby. Respondents Michael Koger and Nicole Lopez were represented by Steve McCloskey, Esq.

On December 26, 2011, the Agent Services moved to consolidate these matters for hearing. Respondents consented to the motion. By order entered January 25, 2012, the Hearing Officer allowed the Agent Services' Motion to Consolidate.

The hearing in this matter was originally scheduled for hearing on January 26, 2012. On January 19, 2012, Respondents' counsel filed a Motion to Continue. By order entered January 25, 2012, the Hearing Officer allowed Respondents Motion to Continue. Pursuant to the parties' agreement, the hearing was rescheduled for March 7, 2012. A Scheduling Order was entered to this effect on February 3, 2012.

Agent Services called Steve Bryant and LaShawna McCarter to testify during its case in chief. Agent Services also called Sherry Berry and Linda Bell to testify as rebuttal witnesses. Prior to the hearing, Respondents made an oral motion to sequester the Department's witnesses. The Hearing Officer allowed the motion to sequester.

Respondents testified in their own defense.

On April 16, 2012, after the conclusion of the hearing and after submission of the Respondent's proposed order, Agent Services filed a Motion to Amend the Notice of Hearing to Conform to the Evidence. By Order entered May 1, 2012, the undersigned denied the Motion to Amend.

After careful consideration of the evidence and arguments presented, and based upon the record as a whole, the undersigned Hearing Officer hereby enters the following Findings of Fact and Conclusions of Law. Any finding of fact contained in this Final Agency Decision and Order that also constitutes a conclusion of law is hereby adopted as a conclusion of law. Likewise, any conclusion of law contained in this Final Agency Decision and Order that constitutes a finding of fact is hereby adopted as a finding of fact.

FINDINGS OF FACT

1. The Department has the authority and responsibility for enforcing compliance with Article 71 of Chapter 58 and for regulating and licensing surety bondsmen.
2. Respondents Michael Koger ["Koger"] and Nicole Lopez ["Lopez"] hold surety bail bondsman licenses issued by the Department. Koger owns two bail bond businesses named Community Bail Bonds, Inc. and Afford-A-Bonds, Inc. Lopez works as a subagent for Mr. Koger.
3. On January 31, 2011, the Department's Agent Services Division received a complaint from Lashawna McCotter ["McCotter"] which alleged that Koger and Lopez wrongfully withheld a \$15,980.00 premium down payment after surrendering Calvin Wilson ["Wilson"]. McCotter alleged that Lopez and Koger apprehended and surrendered Mr. Wilson on January 29, 2011 because he was allegedly late calling them twice on a certain day.
4. On February 10, 2011, Agent Services sent a copy of McCotter's complaint to Lopez and Koger and requested that they each provide a written, notarized response to the Complaint, along with supporting documentation.
5. On February 19, 2011, Respondents submitted a joint notarized statement to Agent Services. Respondents submitted copies of the premium receipts for the down payment dated December 29, 2010, an incomplete Memorandum of Agreement signed only by Koger and dated January 7, 2011, a bond application dated January 7, 2011 signed by Wilson and Koger, and Surrender of Defendant by Surety Forms ["Surrender Forms"] executed by Lopez on January 29, 2011. Upon Agent Services' subsequent request, Lopez later obtained and produced copies of the Appearance Bonds to Agent Services. Lopez executed the bonds on December 29, 2010. Lopez also submitted a separate response to the complaint on March 16, 2011.
6. Koger wrote down reasons that they surrendered Defendant on the January 29, 2011 Surrender Forms which Lopez executed. The reasons set forth on the form were as follows: "Hide from surety, fail to provide numerical address, fail to pay premium, refused to complete payment agreement, failed to check in with surety."
7. Steve Bryant ["Bryant"], one of Agent Services' Complaint Analysts, testified regarding Agent Services' investigation into Respondents' handling of Wilson's bonds. After receiving and

reviewing the bondsmen's responses to Agent Services' requests, Agent Services concluded that the bondsmen violated G.S. § 58-71-167 by failing to complete a Memorandum of Agreement for deferred premium and violated G.S. § 58-71-20 by failing to return the \$15,980 in premium within 72 hours of surrendering Wilson. Agent Services also concluded that Koger rebated \$20.00 in premium in violation of G.S. § 58-71-95(3).

8. N.C.G.S. § 58-71-167 provides as follows:

(a) In any case where the agreement between principal and surety calls for some portion of the bond premium payments to be deferred or paid after the defendant has been released from custody, a written memorandum of agreement between the principal and surety shall be kept on file by the surety with a copy provided to the principal, upon request. The memorandum shall contain the following information:

(1) The amount of the premium payment deferred or not yet paid at the time the defendant is released from jail.

(2) The method and schedule of payment to be made by the defendant to the bondsman, which shall include the dates of payment and amount to be paid on each date.

(3) That the principal is, upon the principal's request, entitled to a copy of the memorandum.

(b) The memorandum must be signed by the defendant and the bondsman, or one of the bondsman's agents, and dated at the time the agreement is made. Any subsequent modifications of the memorandum must be in writing, signed, dated, and kept on file by the surety, with a copy provided to the principal, upon request.

9. N.C.G.S. § 58-71-20 provides as follows:

At any time before there has been a breach of the undertaking in any type of bail or fine and cash bond the surety may surrender the defendant to the sheriff of the county in which the defendant is bonded to appear or to the sheriff where the defendant was bonded; in such case the full premium shall be returned within 72 hours after the surrender. The defendant may be surrendered without the return of premium for the bond if the defendant does any of the following:

(1) Willfully fails to pay the premium to the surety or willfully fails to make a premium payment under the agreement specified in G.S. 58-71-167.

(2) Changes his or her address without notifying the surety before the address change.

- (3) Physically hides from the surety.
- (4) Leaves the State without the permission of the surety.
- (5) Violates any order of the court.
- (6) Fails to disclose information or provides false information regarding any failure to appear in court, any previous felony convictions within the past 10 years, or any charges pending in any State or federal court.
- (7) Knowingly provides the surety with incorrect personal identification, or uses a false name or alias.

10. N.C.G.S. § 58-71-95 provides in pertinent part as follows:

No bail bondsman or runner shall:

...

- (3) Pay a fee or rebate or give or promise anything of value to the principal or anyone in his behalf.

11. On June 20, 2011, Agent Services held an informal conference with Lopez and Koger to discuss allegations against Lopez bondsman's licenses arising out of her handling of Wilson's bonds. At the conference, Respondents reiterated the same assertions and arguments as grounds for surrendering Wilson without return of premium which they set forth in their written responses to Agent Services. In particular, Respondents continued to assert that they had grounds to surrender Wilson without returning the premium because Wilson: (1) hid from surety, (2) failed to check in with surety, (3) failed to provide a numerical address, (4) failed to pay premium, and (5) failed to complete a payment agreement.

12. After the informal conference, Agent Services reconsidered the case and reached the same conclusions regarding Lopez's handling of Wilson's bonds. On July 14, 2011, Agent Services sent an e-mail to Lopez and Koger which outlined the reasons for Agent Services' conclusion that Lopez and Koger violated G.S. § 58-71-167 and G.S. § 58-71-20. Agent Services also requested that Lopez and Koger return the \$15,980 premium.

13. By e-mail on July 25, 2011, Respondents' counsel informed Agent Services that the bondsmen dispute Agent Services findings and thus will not refund the premium.

14. McCotter testified about the dealings that she and Wilson had with Respondents regarding Wilson's bonds in December 2010 and January 2011. Respondents also testified about their dealings with McCotter and Wilson in this matter.

15. On December 19, 2010, McCotter called and spoke to Lopez regarding posting appearance bonds for Wilson. Wilson is her fiancé and was incarcerated at the Craven County jail. Wilson surrendered himself to authorities in July 2010 after his bondsman, Reginald Beasley, informed him that there were new charges against him and advised him to surrender himself. After Wilson surrendered himself, Beasley went off the bonds.

16. Wilson was incarcerated on the following charges: (a) two counts of PWIMSD cocaine and conspiracy to sell and deliver cocaine in 10 CR 52575 and 10 CR 52578, (b) two counts of assault with a deadly weapon with intent to kill in 10 CRS54680 and 10 CRS 51765, and (c) one count of unsealed wine or liquor in passenger area of vehicle in 10 CRS 51159. Bonds for these charges were set at \$250,000, \$250,000, \$100,000, and \$3,000, respectively. The total amount of the bonds was \$603,000.

17. McCotter spoke by telephone with Lopez on several occasions between December 19 and 29, 2010. During her telephone conference with Lopez on December 19, 2010, McCotter claimed that she also told Lopez that she had \$16,500.00 for a down payment on Wilson's bonds. McCotter testified that she also told Lopez that she and Wilson would pay at least \$500.00 a month towards the premium and would pay additional amounts when possible after his release. Finally, McCotter promised Lopez that she, her mother, and two others persons would serve as indemnitors.

18. McCotter testified that during one of these telephone conversations in December 2010, she provided Lopez with information on Wilson. McCotter claimed that she told Lopez that Wilson would be living with her at her mother's house at the 2709 New Bern Avenue, New Bern address after his release. While McCotter claimed that she gave the New Bern Avenue address as Wilson's address, the evidence shows that the Defendant himself never informed Lopez or Koger that he would be living at the New Bern Avenue address. Instead, the Defendant told the Respondents that he would be living in a trailer at Bayboro. N.C.G.S. § 58-71-20 focuses on the actions of the defendant, and the defendant may be surrendered without the return of premium for the bond if the defendant does any of the items set out in N.C.G.S. § 58-71-20, including changing his address without notifying the surety before the address change.

19. Lopez testified that it is customary to gather information about a defendant, including his address, before posting bonds for his release. Lopez testified that she asked McCotter questions about Wilson, including where he would be living after his release, during one of her telephone conversations with McCotter in December 2010 and that McCotter told her that Wilson would be living with her after his release. However, Lopez denied that McCotter ever told her that she lived at the New Bern Avenue address and testified that McCotter had previously told her that she did not live there.

20. McCotter testified that when Lopez called her back on December 24, 2010, she told Lopez that she then only had \$16,000 for a down payment because she had to spend \$500 of the money. McCotter told Lopez that if she would accept \$16,000 as down payment Wilson would pay an additional \$500.00 by at least the Thursday after his release.

21. McCotter testified that on December 29, 2010, Lopez called McCotter and told her that she could write the bonds for \$16,000. Lopez then made arrangements to meet McCotter that evening to collect the down payment and complete the indemnity agreements. Lopez testified that she called McCotter on December 29, 2010 to make arrangements to post Wilson's bonds.

However, she denied that McCotter ever told her that McCotter had spent \$500 of the money and that she would only have \$16,000.00 for the down payment.

22. When Koger and Lopez arrived at the New Bern Avenue address on the evening of December 29, 2010, they were first greeted by Berry. McCotter later arrived with the money for the down payment. Koger testified that when McCotter arrived, her shirt was stuffed full of cash. The bills were mostly 20s, with some 50 and 100 dollar bills. Koger testified that McCotter told them that she had just picked up the money from Wilson's "people."

23. McCotter testified that she believed that she had a total of \$16,000.00. However, Lopez counted only \$15,980.00 in bills. Upon discovering the shortage, Lopez asked Berry if she had \$20.00. Berry searched around and found twenty dollars in small bills and change. Koger did not want to take the small bills and change. Thus, Koger took a \$20.00 bill out of his pocket and put it in the pile of money to make it an even \$16,000.00 down payment.

24. Koger testified that he did not know that he was doing anything wrong by contributing \$20.00 towards the down payment. In a March 7, 2011 e-mail response to follow up questions from Agent Services, Koger told Agent Services that he put \$20.00 of his own money toward the bond because "[w]e advised the surety that we were collecting \$16,500 down. She only had \$15,980.00. Adding the \$20.00 made it the even sixteen which looks better for the client to the surety."

25. After counting only \$15,980, Lopez testified that she told McCotter "I thought we said \$16,500." In response, McCotter told Lopez that it was all she could get and that she thought the agreement was for \$16,000. McCotter told Lopez that she could get the \$500.00 from his [Wilson's] people.

26. Koger testified that he recalled that when they met with McCotter on December 29, 2010, McCotter told them that she lived at the New Bern address and that Wilson would be living at a trailer. Koger's testimony on this point is supported by the fact that the receipts for the premium listed Wilson's address as Bayboro. The undersigned finds Koger's testimony on this point to be credible.

27. After counting the premium and getting the indemnity agreements signed, Koger and Lopez drove to the Magistrate's office to post the appearance bonds for Wilson's release. Lopez informed the Magistrate's office that she was there to bail out Wilson. The Magistrate's office then printed out the four Appearance Bonds for Pretrial Release and notified the jail that Lopez and Koger would be on their way to get Wilson out. An address of "1101 Lagrange Street, New Bern" was typewritten on the top left corner of the Appearance Bond forms under Wilson's name. The form indicates that this address is Defendant's mailing address. The forms were signed by Wilson.

28. Lopez executed four Appearance Bonds for Pretrial Release for Wilson in the following amounts on December 29, 2010: \$250,000, \$250,000, \$100,000, and \$3,000. The \$603,000

bonds were the largest bonds that Lopez had ever written. Lopez executed an Affidavit of Surety for each bond. On the Affidavits of Surety, Lopez wrote down the amount of premium which she received and the amount of premium which had been promised for each of these bonds as follows: (a) \$20,000 promised and \$8,000 received for each of the \$250,000 bonds, (b) \$8,000 promised and \$0 received for the \$100,000 bond, and (c) \$240.00 promised and 0 received for the \$3000 bond.

29. The bonds and the receipts for the down payment which Koger prepared for Wilson on December 29, 2010 reflected that they charged a total of \$48,240.00 premium, that they received a \$16,000.00 down payment, and that a balance of \$32,240.00 was owed. The appearance bonds showed that as of December 29, 2010, the principal and surety had made an agreement for the remainder of the bond premium to be deferred and paid after the Defendant had been released from jail.

30. After leaving the Magistrate's office, Respondents drove to the jail. McCotter followed them in another car. When they arrived at the jail, Lopez got out of the car and went into the jail to get Wilson. Koger remained inside the car. McCotter got out of the car she was riding in and waited in the parking lot for Lopez to return with Wilson.

31. Lopez met briefly with Wilson in a holding cell and then left the jail with him. When they got outside the jail, Lopez told Wilson that they needed to go over the paperwork and that he would need to call to check in with them three days a week before 6 pm. Lopez initially instructed Wilson to go over to her car to do paperwork. However, Lopez testified that when she opened the car door, Koger asked her whether she told Wilson and McCotter to come to the office the next day to do paperwork. Lopez then walked back to Wilson and McCotter and told them to come to their office in Jacksonville the next day to do all the paperwork. No Memorandum of Agreement was executed at this time. The Respondents obtained the Defendant's release pursuant to a deferred premium bond and allowed the Defendant to leave the premises of the jail and the Respondent's custody without executing a Memorandum of Agreement.

32. Lopez testified that when she went back to her car again, Koger asked her whether she had told Wilson that he needed to call to check in with them. Although Lopez told him that she had done this, Koger drove around to the car that Wilson and McCotter were riding in to speak to Wilson. Koger testified that he spoke to Wilson for about 15 minutes and that during this conversation, McCotter got out of the car and went over to talk to Lopez.

33. Koger testified that during this conversation he told Wilson that he needed to call and check in with them before 6 p.m. on Wednesdays, Fridays, and Sundays. Koger also testified that he asked Wilson where he would be staying. In response, Wilson told him he could use the address on the Appearance Bonds for Pretrial Release, which is where he gets his mail. Koger informed Wilson that he needed to know where he would be living. Wilson then told Koger that McCotter had a trailer for him but he did not know the address yet. Wilson did not provide Koger or Lopez with the New Bern Avenue address as his residential address.

34. Lopez testified that she heard this conversation between Koger and Wilson and that Koger told Wilson he would need to call to check in with them and that he should be in their office by 11:00 a.m. the next day.

35. McCotter testified that Koger remained in the car the whole time they were outside the jail and that Koger never said a word to her or Wilson while they were outside the jail. She further testified that Lopez initially told them that she and Koger would meet them in New Bern the next day to complete the paperwork. However, after they left, Lopez called her on her cell phone and asked her if they could meet at the bondsmen's office in Jacksonville the next day instead of New Bern.

36. In their February 19, 2011 statement to Agent Services, Respondents described what happened after Lopez brought Wilson out of the jail. They stated that Koger "asked [Wilson] where he was living and he stated a trailer in Pamlico County, but he did not know the address."

37. The Hearing Officer finds Koger's testimony concerning his conversation with Wilson in the jail parking lot on the evening of December 29, 2010 to be credible.

38. Lopez and Koger testified that they had no concerns about releasing Wilson on December 29, 2010 without completing any paperwork and without knowing the address where Wilson would be living. Koger testified that he was not concerned because he felt confident that Wilson was not going to go anywhere, he knew the indemnitors, and he knew that he could find Wilson if he needed to do so.

39. Koger further testified that he completes the bond application and Memorandum of Agreement with a Defendant right after his release about 60 percent of the time. In this case, however, Koger decided to meet with Wilson the next day to do the paperwork because it was late. Koger further explained that he believes that Defendants often feel more comfortable with their bondsmen when they meet them in their office.

40. Lopez admitted that she and Koger could have completed the bond application and Memorandum of Agreement with Wilson when he was released to her on December 29, 2010. However, she stated that they did not do the paperwork at that time because it was dark, late and cold. Moreover, she talked to McCotter and Wilson twice about coming to their office the next day to complete the paperwork and "they were convincing that it would be done the next day." Lopez further testified that she and Koger were "hoping he [Wilson] would do the right thing and show up."

41. Wilson did not show up at their office in Jacksonville the next day, December 30, 2010. Around 12:30 or so, Lopez and Koger called and spoke to Wilson on the telephone to find out what was going on. Wilson told them that he was having car trouble and that he would try to find a ride to Jacksonville that day. Koger asked Wilson where he was. Defendant claimed to be in Pamlico County. Koger offered to come get him, but the Defendant said he would get a ride and did not provide his location. Later that afternoon, Koger called Wilson again. Wilson told Koger

that his ride had fallen through and that he was still going to try to get to Jacksonville that day. Wilson did not show up.

42. McCotter testified that Koger called her on her cell phone early in the morning on December 31, 2010 and told her they needed to be in Jacksonville by 11:00 a.m. McCotter told Koger that they could get to Jacksonville, but it wouldn't be until later in the day because they just got up and they were having car trouble. Koger told McCotter that he and Lopez did not have time to wait for them because they were going out of town. McCotter then asked Koger if she could Western Union the \$500.00 to their office.

43. Koger testified that Wilson missed checking in the first Friday, December 31, 2010. Koger called Wilson that day to remind him about checking in. During this conversation, Wilson told Koger he was at the trailer. Koger asked Wilson for the address of the trailer. Wilson told him that he did not know the address. Koger asked him to look on the front of the trailer to see what the number was. The Defendant claimed that there was no number on the trailer. Koger then asked him whether there was any mail in the trailer so that the Defendant could get the address from that. The Defendant responded that he would get them the address. During this phone call, Koger told Wilson that they could make arrangements to do the paperwork when he called to check in with him on Sunday.

44. On Sunday, January 2, 2011, Koger spoke to Wilson on the telephone. Wilson told him that he was hung over. Koger told Wilson that he did not have to come to Jacksonville that day since he had a hangover. That week, Wilson checked in on 2 of the 3 days he was required to check in.

45. Koger testified that he and Lopez decided on January 7, 2011 to go to New Bern to get the paperwork for Wilson completed. Respondents did not call Wilson or McCotter to schedule the meeting ahead of time. Instead, they just showed up at Ms. Berry's house. Koger testified that Berry was the only one at the house when they arrived. Koger testified that that Berry told him that Wilson lived in a trailer in Pamlico County.

46. Berry testified that she did not tell Koger that Wilson lived in a trailer in Pamlico. She further testified that Wilson lived with her and McCotter at the 2709 New Bern Avenue, New Bern address after his release on December 29, 2010 and hung out with friends at a trailer in Pamlico County.

47. McCotter also testified that she and Wilson lived with her mother at the New Bern Avenue address after Wilson was released on December 29, 2010. However, Wilson did not have a job and spent much of his time during the day hanging out with friends who lived in a trailer in Bayboro. She stated that since McCotter was Wilson's only source of transportation, McCotter drove Wilson to the trailer to hang out on those days and picked him up at the end of the day to go back home to New Bern.

48. There was no evidence that Defendant Wilson informed Koger and Lopez that he was

living at Ms. McCotter's house on New Bern Avenue. An address of 1101 LaGrange Street, New Bern was used on the appearance bonds which were signed by Wilson. In multiple conversations with the Respondents, Wilson said that he was living at a trailer in Pamlico County or Bayboro for which he could not provide an actual street address.

49. Lopez called Wilson after they arrived at Ms. Berry's house on January 7, 2011 and told him to come meet them there. McCotter stated that she had recently dropped Wilson off at his friends' trailer and was driving back to New Bern. Wilson called McCotter and told her that the bondsmen were in New Bern and wanted to meet with him. After talking to Wilson, McCotter drove back to Bayboro to pick up Wilson.

50. Koger testified that when Wilson arrived at Ms. Berry's house on January 7, 2011, the Defendant got in their car to speak with them. During this meeting, Koger and Lopez completed the bond application with Wilson. The first two pages of the application are a series of questions about the Defendant, including the Defendant's address and the address of Defendant's hangouts.

51. Per their normal procedure, Koger and Lopez did not let Wilson fill out the bond application. Instead, Koger asked him the application questions and recorded his answers on the application. Koger and Lopez testified that when they asked Wilson for the address of the place he was living, Wilson told them that he did not want to give them a numerical address because he did not want the federal authorities to know where he was living.

52. Koger told Wilson that the surety company needed this information and tried to assure him that they would not share the information with the federal authorities. Wilson still would not give them a street address. Koger testified that Wilson eventually told them that he was staying at a trailer in Bayboro, that the trailer park was near a convenience store called Cash Corner, and that it was the 4th trailer on the right. Wilson promised to provide an actual numerical address for the trailer; however, he never did so even though the Respondents repeatedly requested this information.

53. Koger wrote down "trailer park Bayboro trailer 4th trailer cash corner trailer park" as Wilson's address on the application. Koger testified that Wilson told him that he hung out at Stimpson Street near Berry's house on New Bern Avenue in New Bern. Koger then wrote down "Newbern Stimpson St." as Wilson's hangout on the application.

54. The third and last page of the bond application was signed by Wilson and Koger on January 7, 2011. The last page of the bond application sets forth six reasons for which the bondsman can surrender the Defendant without the return of premium for the bond. These six reasons are similar in wording to the first six of seven reasons set forth in N.C.G.S. § 58-71-20. The document informed the Defendant that the Defendant could be surrendered without the return of premium for the bond if the Defendant changed his or her address without notifying the bondsman/surety before the address change.

55. After completing the bond application on January 7, 2011, Koger began to complete a

Memorandum of Agreement containing the terms and schedule for payments of deferred premium. Although Koger and Lopez agreed to charge 8% for the bonds and the Affidavits of Surety which Lopez filed with the court reflect that they charged a total of \$48,240 in premium for the bonds, Koger testified that he decided not to charge the \$240.00 premium and thus told Wilson that he would change the premium to a round \$48,000. Accordingly, Koger wrote down \$48,000 as the amount of bond premium charged and \$32,000 as the amount of bond premium deferred on the Memorandum of Agreement.

56. The Memorandum of Agreement contains the following language in the first paragraph: "THE MEMORANDUM OF AGREEMENT IS BETWEEN THE PRINCIPAL AND SURETY WHEN IN ANY CASE SOME PORTION OF THE BOND PREMIUM PAYMENTS ARE TO BE DEFERRED OR PAID AFTER THE DEFENDANT HAS BEEN RELEASED FROM CUSTODY PURSUANT TO NORTH CAROLINA GENERAL STATUTE 58, ARTICLE 71, SECTION 167." The foregoing paragraph correctly explains the requirement under N.C.G.S. § 58-71-167 for the bondsman to obtain a completed Memorandum of Agreement signed by the Defendant whenever any portion of the bond premium payments are to be deferred or paid after the Defendant has been released from custody.

57. On January 7, 2011, Koger told Wilson that they needed to complete the Memorandum of Agreement. Lopez testified that Wilson told them at the time that he would not sign a Memorandum of Agreement because he said that he did not want to sign anything that would let the federal authorities know how much money he had. Koger further testified that Wilson told him that he wanted to make a large lump sum payment. However, Wilson told Koger that he did not know what he could pay yet and that he needed to talk to the people he works with in the next day or so to see what he could get.

58. Respondents spoke to Wilson by telephone on a number of occasions between January 7 and January 29, 2011. During this period of time, Wilson did not make any payment, complete a Memorandum of Agreement, or provide a street address for the trailer.

59. On January 29, 2011, Koger and Lopez decided to surrender Wilson. Koger testified that they get worried about Defendant fleeing after about 30 days and that they considered this risk when deciding to surrender Wilson.

60. Respondents drove to Ms. Berry's house on January 29, 2011 in an effort to find Wilson and pick him up. When they arrived at the New Bern address, Wilson and McCotter were not there. Koger called Wilson and told him that they were at Ms. Berry's house and wanted to complete the paperwork and collect a payment. In his February 18, 2011 response, Koger stated that "I called Mr. Wilson and convinced him to meet me at Ms. McCotter's mother's house under the guise of completing the payment agreement." McCotter testified that after Wilson received Koger's call, she drove him to the New Bern Avenue address to meet Respondents.

61. Koger testified that he got out of the car and began talking to Wilson about how he had not done any of the things he had said he would do. He told Wilson that the surety wanted him to

surrender Wilson and that he did not want to do it, but Wilson had not done what he said he would do. Koger again asked Wilson what he had to give him for an address and told Wilson that he had to tell him his address even though he did not want to do so. Wilson again could not provide an address at that time and said he would provide it. Koger asked Wilson about the money. Wilson told him that he was not going to be able to pay him any lump sum like he thought he would. At that point, he arrested Wilson.

62. The Appearance Bonds for Pretrial Release show the amount of premium promised and the amount of premium received. These bonds were signed by Respondent Lopez and Wilson on December 29, 2010. The Appearance Bonds for Pretrial Release show that on December 29, 2010, there was an agreement between principal and surety which called for a portion of the bond premium payments to be deferred and paid after the Defendant had been released from custody. However, no written Memorandum of Agreement was executed on December 29, 2010 or thereafter. The Respondents deliberately did not execute a Memorandum of Agreement on December 29, 2010.

63. Despite defendant's failure to give an address or to make any additional payment on the bond premium, Respondents allowed the Defendant to remain free for over 30 days on a bond undertaking totaling \$603,000.

64. No evidence was presented of any prior adverse administrative actions against the Respondents.

CONCLUSIONS OF LAW

1. This matter is properly before the Commissioner. The Commissioner has jurisdiction over the parties and the subject matter pursuant to North Carolina General Statutes §58-71-80, 150B-38, 150B-40, 11 NCAC 1.0401 *et seq.* and other applicable statutes and regulations.

2. Lopez was properly served with her Notice of Administrative Hearing. Koger was properly served with his Notice of Administrative Hearing.

3. N.C.G.S. § 58-71-20 provides that “[a]t any time before there has been a breach of the undertaking in any type of bail or fine and cash bond the surety may surrender the defendant to the sheriff of the county in which the defendant is bonded to appear or to the sheriff where the defendant was bonded.” N.C.G.S. § 58-71-20 also requires the surety to return the full premium within 72 hours after the surrender of defendant unless the defendant commits one or more of the acts set forth under N.C.G.S. § 58-71-20(1)-(7). Pursuant to N.C.G.S. § 58-71-20(2), the defendant may be surrendered without the return of premium for the bond if the defendant “[c]hanges his or her address without notifying the surety before the address change.” The notification of the change of address issue is critical to the decision in this matter.

a. The only actual address with an exact street location which was acknowledged by Defendant Wilson was the 1101 LaGrange Street, New Bern address. This address

appeared on the appearance bond forms signed by Wilson and was listed as a mailing address for Wilson. However, Wilson was not residing at this address.

b. Later, Defendant Wilson claimed to be living in a trailer at Bayboro; however, Wilson repeatedly withheld the exact location and street address of the trailer from the Respondents. Wilson gave a variety of unbelievable excuses for why he could not give a street address and number for the trailer. At times, Defendant Wilson told the Respondents that he did not want to give his address because he did not want the Feds to know where he was.

c. While the evidence shows that Defendant Wilson repeatedly claimed to be residing in a trailer at Bayboro, McCotter and Berry testified that Wilson was living at Ms. Berry's house at 2709 New Bern Avenue in New Bern. The evidence shows that Defendant Wilson never notified the Respondents that his address was 2709 New Bern Avenue in New Bern.

Based on the foregoing, there is insufficient evidence to conclude that the Respondents violated N.C.G.S. § 58-71-20. Given the foregoing, it is unnecessary to reach the other arguments concerning N.C.G.S. § 58-71-20.

4. N.C.G.S. § 58-71-95(3) provides that "No bail bondsman or runner shall: . . . (3) Pay a fee or rebate or give anything of value to the principal or anyone in his behalf." Koger violated G.S. § 58-71-95(3) by paying \$20.00 of the premium down payment.

5. N.C.G.S. § 58-71-167 provides as follows:

(a) In any case where the agreement between principal and surety calls for some portion of the bond premium payments to be deferred or paid after the defendant has been released from custody, a written memorandum of agreement between the principal and surety shall be kept on file by the surety with a copy provided to the principal, upon request. The memorandum shall contain the following information:

(1) The amount of the premium payment deferred or not yet paid at the time the defendant is released from jail.

(2) The method and schedule of payment to be made by the defendant to the bondsman, which shall include the dates of payment and amount to be paid on each date.

(3) That the principal is, upon the principal's request, entitled to a copy of the memorandum.

(b) The memorandum must be signed by the defendant and the bondsman, or one of the bondsman's agents, and dated at the time the agreement is made. Any subsequent modifications of the

memorandum must be in writing, signed, dated, and kept on file by the surety, with a copy provided to the principal, upon request. (Emphasis Added.)

6. On December 29, 2010, the Respondents and Wilson agreed to defer payment of the remainder of the bond premium until after his release from custody. Prior to bonding the Defendant out of jail and during the night that they bonded the Defendant out of jail, neither Respondent attempted to have Wilson sign a Memorandum of Agreement.

7. The Appearance Bonds for Pretrial Release show the amount of premium promised and the amount of premium received. These bonds were signed by Respondent Lopez and Defendant Wilson on December 29, 2010. The Appearance Bonds for Pretrial Release show that on December 29, 2010, there was an agreement between principal and surety which called for a portion of the bond premium payments to be deferred and paid after the Defendant has been released from custody. However, a written Memorandum of Agreement was not executed prior to bonding the Defendant out of jail and was not executed on the night that the Defendant was bonded out of jail. The Defendant was freed from jail under appearance bonds and a deferral of payment of the remainder of the bond premium. The Respondents allowed the Defendant to leave the premises of the jail and the custody of the Respondents without executing a written Memorandum of Agreement. A written Memorandum of Agreement was never executed by Defendant Wilson. The Respondents violated N.C.G.S. § 58-71-167.

8. The Respondent's decision not to execute a Memorandum of Agreement the night of the Defendant's release on December 29, 2010 was deliberate. However, later on January 7, 2011, the Respondents did unsuccessfully attempt to complete a Memorandum of Agreement.

9. Respondents attempt to argue that the Respondents and Wilson were still in the process of negotiating the terms of the deferred premium arrangement and that there was no agreement within the meaning of the statute. This argument is without merit. N.C.G.S. § 58-71-167 requires a written memorandum of agreement "in any case where the agreement between principal and surety calls for some portion of the bond premium payments to be deferred or paid after the Defendant has been released from custody." "The memorandum must be signed by the Defendant and the bondsman, or one of the bondsman's agents, and dated at the time the agreement is made." Since Respondents agreed that a portion of the bond premium payments would be made after Wilson's release from jail, Respondents were required to complete a Memorandum of Agreement as specified in N.C.G.S. § 58-71-167 at the time of the agreement to defer the premium. The Memorandum of Agreement should have been completed the night that the Defendant was bonded out of jail.

10. Respondents argue that Wilson's refusal to complete the Memorandum of Agreement excused any violation of N.C.G.S. § 58-71-167. The Hearing Officer does not agree with the Respondent's argument and concludes that Respondents are accountable for violations of N.C.G.S. § 58-71-167. The Respondents made no attempt to execute a Memorandum of Agreement at the time that they agreed to allow a portion of the bond premium payments to be

deferred. On the night of the Defendant's release from jail, December 29, 2010, the Respondents did not require the Respondent to execute a Memorandum of Agreement. They allowed the Defendant to go free under a deferred premium bond without first executing a Memorandum of Agreement. Defendant Wilson's direct refusal to sign the Memorandum of Agreement did not occur until January 7, 2011 and does not excuse the Respondent's violations of N.C.G.S. § 58-71-167. However, the Respondents' subsequent and belated attempts to execute a Memorandum of Agreement are mitigating circumstances.

11. Lopez's surety bondsman license is subject to suspension or revocation pursuant to N.C.G.S. § 58-71-80(a)(7) for violating N.C.G.S. § 58-71-167.

12. Koger's surety bondsman license is subject to suspension or revocation pursuant to N.C.G.S. § 58-71-80(a)(7) for violating N.C.G.S. §§ 58-71-95(3) and 58-71-167.

13. In light of the Respondents' belated attempts to complete the Memorandum of Agreement, the Defendant's failure to cooperate in the completion of the Memorandum of Agreement, and other circumstances in this case, the undersigned in his discretion concludes that civil penalties should be imposed pursuant to N.C.G.S. § 58-2-70 in lieu of suspension or revocation.

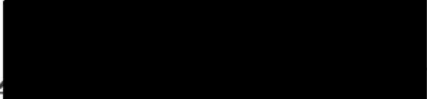
14. Having considered the factors set out in N.C.G.S. § 58-2-70(d), the undersigned concludes that each Respondent should be assessed a civil penalty of \$600 for their violations of N.C.G.S. § 58-71-167 and Respondent Koger should also be assessed a civil penalty of \$100 for his violation of N.C.G.S. § 58-71-95(3).

Based on the foregoing Finding of Facts and Conclusions of Law, the Hearing Officer hereby orders the following:

ORDER

1. Respondent Nicole Lopez shall pay a civil penalty of \$600 to the North Carolina Department of Insurance by no later than July 16, 2012.
2. Respondent Michael Koger shall pay total civil penalties of \$700 to the North Carolina Department of Insurance by no later than July 16, 2012.
3. Payment of these civil penalties shall be made payable to the "North Carolina Department of Insurance." These civil penalties shall be subject to disbursement in accordance with the provisions of Article IX, Section 7 of the North Carolina Constitution for the benefit of the public schools.

This 17th day of May, 2012.


Stewart L. Johnson, 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 Final Agency Decision and Order by first class postage prepaid, addressed as follows:

Mr. Steven A. McCloskey
240 Natalie Drive
Winston-Salem, NC 27104-2457

I also hereby certify that I have this day served the foregoing Final Agency Decision and Order by state courier, addressed as follows:


Ms. Anne G. Kirby
Assistant Attorney General
N. C. Department of Justice
Old Education Building
Raleigh, N.C.

A copy was also served on Mr. McCloskey and Ms. Kirby via fax:

Mr. Steven A. McCloskey
(336) 499-4122

Ms. Anne G. Kirby
(919) 716-6757

This the 17th day of May, 2012.


Mary Faulkner
Paralegal
N.C. Department of Insurance
1201 Mail Service Center
Raleigh, NC 27699