

**BEFORE THE COMMISSIONER OF INSURANCE
OF THE STATE OF KANSAS**

In the Matter of the Kansas Nonresident)
Insurance Agent’s License of)
DAVID A. HERLICKA,) Docket No. **4747--SO**
NPN 768654.)

SUMMARY ORDER

(Pursuant to K.S.A. 40-4909 and K.S.A. 77-537)

Pursuant to authority granted to the Commissioner of Insurance (“Commissioner”) by K.S.A. 40-4909, the Commissioner hereby proposes to find facts and revoke the Kansas nonresident insurance agent’s license of DAVID A. HERLICKA (“Respondent”), by way of Summary Order as provided by K.S.A. 77-537.

Findings of Fact

1. Following investigation, the Commissioner has no reason to believe that protection of the public interest requires the Commissioner to give notice and opportunity to participate to anyone other than Respondent.
2. Following investigation, the Commissioner finds evidence sufficient to support the following facts:
3. Respondent was licensed as a Kansas nonresident insurance agent on May 30, 2012, and has been continuously so licensed to date.
4. Respondent’s legal address is in Bedford, New Hampshire, and his mailing address of record is Herlicka Financial Group, 1339 Hooksett Road, Hooksett, NH 03106-1847.
5. By Acceptance, Waiver and Consent (“AWC”) accepted by the Financial Industry Regulatory Authority (“FINRA”) on May 23, 2014, Respondent was suspended from the securities business for 18 months and fined \$97,484.01, including disgorgement of commissions of \$77,484.01 paid to him for sales of insurance products.
6. *Inter alia*, the AWC includes the findings that, between 2003 and 2011, Respondent recommended to eight consumers the purchase of variable universal life insurance products that were unsuitable for the consumers, misrepresented the features of the policies and failed to disclose material facts, and misrepresented material facts on the policy applications.
7. In addition, the AWC includes a finding that in 2011, knowing that the consumer wished to consider a proposed replacement of an existing variable annuity and had not authorized its surrender or an application for a new variable universal life policy, Respondent surrendered the existing annuity and used the proceeds to purchase the variable universal life policy on behalf of the consumer.

8. Respondent's AWC includes an agreement that the findings may be used by another regulator and that Respondent will not take any action or make any statement denying any finding or creating the impression that any finding of the AWC is without factual basis.
9. Respondent did not report this action to the Commissioner within 30 days as required by K.A.R. §40-7-9(b) but reported it by letter dated January 22, 2015, and received by KID on January 26, 2015.
10. By letter of March 17, 2015, addressed to Respondent at his address of record, counsel for KID invited Respondent to reply by March 27, 2015, if he disputed the above statements of fact.
11. Respondent did not reply by March 27; thus, the facts are deemed undisputed.
12. On April 6, 2015, counsel for KID received electronic mail from another person representing that Respondent wished to surrender his license.

Applicable Law

13. K.S.A. 40-4909(a) provides, in relevant part:

“The commissioner may deny, suspend, revoke or refuse renewal of any license issued under this act if the commissioner finds that the applicant or license holder has: . . .

 - (2) Violated:
 - (A) Any provision of chapter 40 of the Kansas Statutes Annotated, and amendments thereto, or any rule and regulation promulgated thereunder;
 - . . .
 - (7) Admitted to or been found to have committed any insurance unfair trade practice or fraud in violation of K.S.A. 40-2404, and amendments thereto.
 - (8) Used any fraudulent, coercive, or dishonest practice, or demonstrated any incompetence, untrustworthiness or financial irresponsibility in the conduct of business in this state or elsewhere.” K.S.A. 2013 Supp. 40-4909(a).
14. A licensed agent is required to report to the Commissioner within 30 days each disciplinary action against an occupational or professional license other than an insurance agent's license. K.A.R. §40-7-9(b).
15. “Making false or fraudulent statements or representations on or relative to an application for an insurance policy, for the purpose of obtaining a fee, commission, money or other benefit from any insurer, agent, broker or individual” is an insurance unfair trade practice. K.S.A. 2013 Supp. 40-2404(11).
16. “The following shall be deemed prohibited, unfair or deceptive acts or practices in the selling of insurance:
 - (1) Making a misrepresentation or false, deceptive or misleading statement;

(2) using comparisons or analogies or manipulating amounts and numbers in a way that will mislead the prospective purchaser concerning the cost of the insurance protection coverage;

. . . and

(5) recommending to a prospective purchaser the purchase or replacement of any life insurance policy or annuity contract with reasonable grounds to believe that the recommendation is unsuitable for the applicant on the basis of information furnished by this person, or otherwise obtained.” K.A.R. §40-2-14(c)

17. In addition, the Commissioner may revoke any license issued under the Insurance Agents Licensing Act if the Commissioner finds that the interests of the insurer or the insurable interests of the public are not properly served under such license. K.S.A. 2013 Supp. 40-4909(b).

18. A person whose license has been revoked or suspended may not be employed directly or indirectly by an insurance company and “may not perform any act toward the solicitation of or transaction of” insurance business in Kansas. K.S.A. 2013 Supp. 40-4909(g).

19. “Any action taken under this section which affects any license or imposes any administrative penalty shall be taken only after notice and an opportunity for hearing conducted in accordance with the provisions of the Kansas administrative procedures act.” K.S.A. 2013 Supp. 40-4909(c).

Conclusions of Law

20. The Commissioner has jurisdiction over Respondent as well as the subject matter of this proceeding, and such proceeding is held in the public interest.

21. The Commissioner finds that action may be taken against Respondent’s license because Respondent violated K.A.R. §40-7-9(b) by failing to report the FINRA action within 30 days.

22. The Commissioner further finds that the FINRA action is exceptionally material to Respondent’s status as a licensed insurance agent because the transactions at issue were sales of insurance products.

23. The Commissioner finds from the factual findings of the AWC that Respondent’s license may be revoked pursuant to K.S.A. 40-4909(a)(7) because Respondent has made false or fraudulent statements or representations on or relative to an application for an insurance policy, for the purpose of obtaining a fee, commission, money or other benefit from any insurer, agent, broker or individual, which is an insurance unfair trade practice as defined by K.S.A. 40-2404(11), and because Respondent has committed unfair trade practices as defined by K.A.R. §40-2-14.

24. The Commissioner finds from the same facts that Respondent’s license may also be revoked pursuant to K.S.A. 40-4909(a)(8) because Respondent either used

fraudulent or dishonest practices or demonstrated incompetence in the conduct of his business.

25. Finally, the Commissioner concludes that Respondent's license may be revoked pursuant to K.S.A. 40-4909(b) because it is not serving the interests of insurers or the insurable interests of the public.

26. Based on the facts and circumstances set forth herein, it appears that the use of summary proceedings in this matter is appropriate, in accordance with the provisions set forth in K.S.A. 77-537(a), in that the use of summary proceedings does not violate any provision of the law, the protection of the public interest does not require the KID to give notice and opportunity to participate to persons other than Respondent, and after investigation, KID believes in good faith that the allegations will be supported to the applicable standard of proof.

Policy to be Served

Before issuing an insurance agent license, the Commissioner must determine that the applicant is qualified and has not committed any act that would be grounds for denial, suspension, or revocation. K.S.A. 40-4905(b) and K.S.A. 40-4906. Further, the Commissioner may revoke any license issued under the Insurance Agents Licensing Act if the Commissioner finds that the interests of the insurer or the insurable interests of the public are not properly served under the license. K.S.A. 40-4909(b). Thus, the Commissioner is charged licensing, or continuing to license, persons or entities to sell, solicit, or negotiate insurance in the State of Kansas only if their conduct indicates they are both qualified and trustworthy. The following action is appropriate to promote the security and integrity of the insurance business and protect insurance consumers.

THE COMMISSIONER OF INSURANCE THEREFORE ORDERS that the Kansas nonresident insurance agent's license of **DAVID A. HERLICKA** is hereby **REVOKED**, and **DAVID A. HERLICKA** shall **CEASE and DESIST** from the sale, solicitation, or negotiation of insurance, doing any act toward the sale, solicitation, or negotiation of insurance, and/or receiving compensation deriving from the sale, solicitation, or negotiation of insurance in Kansas or on Kansas risks through business conducted on and after the effective date of this order. **IT IS FURTHER ORDERED** that reinstatement will only be considered upon satisfactory proof that all requirements of the FINRA order have been fully satisfied.

IT IS SO ORDERED THIS 8th DAY OF APRIL 2015, IN THE CITY OF TOPEKA,
COUNTY OF SHAWNEE, STATE OF KANSAS.



 /s/ Ken Selzer
Ken Selzer, CPA
Commissioner of Insurance

BY:

 /s/ Diane Minear
Diane Minear
Interim General Counsel

NOTICE OF RIGHTS TO HEARING AND REVIEW

Within fifteen (15) days of the date of service of this Summary Order, Respondent may submit a written request for a hearing pursuant to K.S.A. 77-537 and K.S.A. 77-542. Any request for a hearing should be addressed to the following:

Diane Minear, Interim General Counsel
Kansas Insurance Department
420 S.W. 9th Street
Topeka, Kansas 66612

If a hearing is requested, the Kansas Insurance Department will serve notice of the time and place of the hearing and information on procedures, right of representation, and other rights of parties relating to the conduct of the hearing.

If a hearing is not requested in the time and manner stated above, this Summary Order shall become effective as a Final Order upon the expiration of time for requesting a hearing. In the event Respondent files a Petition for Judicial Review, pursuant to K.S.A. 77-613(e), the agency officer to be served on behalf of the Kansas Insurance Department is

Diane Minear, Interim General Counsel
Kansas Insurance Department
420 S.W. 9th Street
Topeka, Kansas 66612

Certificate of Service

The undersigned hereby certifies that she served a true and correct copy of the above and foregoing **Summary Order** and accompanying **Notice of Rights** on this __8th__ day of April 2015 by causing the same to be placed in the United States Mail, first class postage prepaid, addressed to the following:

David A. Herlicka
Herlicka Financial Group
1339 Hooksett Road
Hooksett, NH 03106-1847

_ /s/ Brenda J. Clary _____
Brenda J. Clary
Staff Attorney