

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

Brad Anthony Witecha,
Petitioner,

v

Office of Financial and Insurance Regulation,
Respondent.

Case No. 13-908-L
Docket No. 13-000140-OFIR

Issued and entered
this 30th day of April 2013
by Randall S. Gregg
Special Deputy Director

FINAL DECISION

I. BACKGROUND

This case concerns the application of Brad Anthony Witecha (Petitioner) for a nonresident insurance producer license.

The Petitioner, a resident of Texas, applied for a nonresident insurance producer license on September 9, 2012. On December 5, 2012, Respondent issued to the Petitioner a Notice of License Denial and Opportunity for Hearing. The denial was based on the Petitioner's disclosure of a criminal conviction in the state of Georgia in 1996. Petitioner challenged the license denial by filing a Petition for Contested Case Hearing. A hearing was held March 25, 2013.¹

The administrative law judge issued a Proposal for Decision (PFD) on March 28, 2013, recommending that the license denial be upheld. The Petitioner did not file exceptions to the PFD. Michigan courts have long recognized that the failure to file exceptions constitutes a waiver of any objections not raised. *Attorney General v Public Service Comm*, 136 Mich App 52 (1984).

With one exception, the findings and recommendation in the PFD are adopted and made a part of this Final Decision.

1. On March 18, 2013, the Governor, by Executive Order 2013-1, transferred the authority, powers, duties, functions, and responsibilities of the Commissioner of Financial and Insurance Regulation to the Director of the Department of Insurance and Financial Services (the Director). The Director has the authority to issue final decisions in administrative hearings such as the present case.

The statement on page 5 of the PFD regarding the burden of proof is not adopted. The PFD indicates that the Respondent "has the burden of proof in this matter to show by a preponderance of the evidence the legal basis for the action to deny Petitioner's application for licensure."

The Respondent has the initial burden of proof to establish that the Petitioner engaged in conduct which would justify a license denial. The Georgia records showing his criminal conviction (Respondent's Exhibit #4) establish that the Respondent has met that burden. It is then the Petitioner's burden to prove facts which would support granting him a license. The administrative law judge was in error in asserting that the Respondent alone had the burden of proof. That portion of the PFD is, therefore, not adopted.

II. FINDINGS OF FACT

The Director finds that the Petitioner was convicted of seven misdemeanors in 1996. This and the remaining findings of fact in the PFD are adopted and made a part of this final decision.

III. CONCLUSIONS OF LAW

Sec. 1239(1)(h) of the Insurance Code provides:

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

* * *

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

The conduct which resulted in his criminal conviction establishes that the Petitioner engaged in dishonest practices and demonstrated untrustworthiness in the conduct of business. An individual who has engaged in such conduct must, under section 1239(1)(h), be denied an insurance producer license.

This and the remaining conclusions of law in the PFD are adopted and made a part of this final decision. The PFD is attached and made a part of this Final Decision.

IV. ORDER

The refusal to issue an insurance producer license to Brad Anthony Witecha is upheld.

R. Kevin Clinton
Director

For the Director:

A handwritten signature in black ink, appearing to read "Randall S. Gregg", is written over a horizontal line.

Randall S. Gregg
Special Deputy Director

RECEIVED

MAR 28 2013

OFIR/OGC

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM

IN THE MATTER OF:

Brad Anthony Witecha,
Petitioner

v

Office of Financial and Insurance
Regulation,
Respondent

Docket No.: 13-000140-OFIR

Case No.: 13-908-L

Agency: Department of
Insurance and
Financial Services

Case Type: DIFS-Insurance

Filing Type: Appeal

Issued and entered
this 28th day of March, 2013
by: Kandra K. Robbins
Administrative Law Judge

PROPOSAL FOR DECISION

PROCEDURAL HISTORY

This proceeding under the Michigan Insurance Code of 1956, being 1956 PA 218, as amended, MCL 500.100 *et seq.* (hereafter "Insurance Code"), commenced with the issuance of a Notice of Hearing dated February 13, 2013, scheduling a contested case hearing for March 25, 2013. The Notice of Hearing was issued pursuant to a Request for Hearing received by the Michigan Administrative Hearing System on February 8, 2013, and an Order Referring Petition for Hearing and Order to Respond dated February 8, 2013, issued by Annette E. Flood, Chief Deputy Commissioner of the Office of Financial and Insurance Regulation under the provisions of the Insurance Code.

Attached to the Request for Hearing was a copy of a Notice of License Denial and Opportunity for Hearing, dated December 5, 2012; the Applicant's Petition for Contested Case Hearing to Appeal Agency Denial of Application for Insurance Producer License, dated December 28, 2012; and Agency Response to Applicant's Appeal of License Denial, dated February 6, 2013. On March 11, 2013, an Order was entered granting the Petitioner's request to participate by telephone.

On March 25, 2013, the hearing commenced as scheduled. Brad Witecha, Petitioner, appeared by telephone on his own behalf. Elizabeth V. Bolden, Administrative Law

Specialist, appeared as a staff attorney representative on behalf of the Office of Financial and Insurance Regulation, Respondent.

Petitioner testified on his own behalf. He did not present any other witnesses or offer any exhibits into evidence. Michele Riddering, Licensing Director, testified on behalf of Respondent. The following exhibits were offered by Respondent and admitted into the record as evidence:

1. Respondent's Exhibit No. 1 is a copy of the online record of Petitioner's Individual License Application, dated September 9, 2012.
2. Respondent's Exhibit No. 2 is a copy of a Notice of License Denial and Opportunity for Hearing issued by Jean M. Boven, Deputy Commissioner, Insurance Licensing & Market Conduct Division, dated December 5, 2012.
3. Respondent's Exhibit No. 3 is a copy of a fax cover sheet from Petitioner, a copy of the Notice of License Denial and Opportunity for Hearing, and Applicant's Petition for Contested Case Hearing To Appeal Agency Denial of Application for Insurance Producer License, dated December 28, 2012.
4. Respondent's Exhibit No. 4 is a copy of a written statement provided by Petitioner and copy of a Sentencing order in the matter of State of Georgia v. Brad A. Witecha, Criminal Action No. 93D-2404-1, dated September 9, 1993; a Negotiated Plea Statement in the matter of State of Georgia v. Brad A. Witecha, Criminal Action No. 93D-2404-1, dated September 9, 1993; a letter from Probation Officer Nicki Long to Brad A. Witecha, dated November 29, 2010; and notice that probation has been completed dated November 29, 2010.

The record was closed at the conclusion of the hearing.

ISSUES AND APPLICABLE LAW

The central issue presented is whether Respondent has properly denied Petitioner's application for a non-resident insurance producer license under Sections 1206a(1) and 1239(1)(h) of the Insurance Code. These sections provide in pertinent part:

Sec. 1206a. (1) Unless denied licensure under section 1239, a nonresident person shall receive a nonresident insurance producer license if he or she meets all of the following:

(a) Is currently licensed as a resident and in good standing in his or her home state.

(b) Has submitted the proper request for licensure and has paid the applicable fees required by section 240.

(c) Has submitted or transmitted to the commissioner the application for licensure that the person submitted to his or her home state or a completed uniform application as required by the commissioner.

(d) The person's home state awards nonresident producer licenses to residents of this state on the same basis. MCL 500.1206a(1). (Emphasis added).

Sec. 1239. (1) In addition to any other powers under this act, the commissioner may place on probation, suspend, or revoke an insurance producer's license or may levy a civil fine under section 1244 or any combination of actions, and the commissioner **shall refuse to issue a license under section 1205 or 1206a**, for any 1 or more of the following causes:

(h) Using fraudulent, coercive, or dishonest practices or demonstrating incompetence, untrustworthiness, or financial irresponsibility in the conduct of business in this state or elsewhere. MCL 500.1239(1)(h) (Emphasis added)

FINDINGS OF FACT

Based on the entire record in this matter, including the testimony and admitted exhibits, the following findings of fact are established:

1. On or about September 9, 2012, Petitioner submitted an application with Respondent to become licensed as a non-resident insurance producer in the state of Michigan. [Resp. Exh. 1].
2. Petitioner responded "yes" on the application to the question asking whether he had ever been convicted of a crime. [Resp. Exh. 1].

3. On September 9, 1993, Petitioner pled *Nolo Contendere* to seven counts of Theft by Deception in Gwinnett County, Georgia. [Resp. Exh. 4].
4. On or about December 5, 2012, Jean M. Boven, Deputy Commissioner, Insurance Licensing and market Conduct Division within the Office of Financial and Insurance Regulation, Respondent, issued a Notice of License Denial. [Resp. Exh. 2].
5. On or about December 28, 2012, Petitioner submitted Applicant's Petition for Contested Case Hearing to Appeal Agency Denial of Application for Insurance Producer License. [Resp. Exh. 3]
6. A properly noticed hearing was held on March 25, 2013, at which Petitioner testified by telephone pursuant to an Order issued on March 11, 2013.
7. Petitioner credibly testified that he resides in Little Elm, Texas.
8. In Petitioner's hearing testimony, he credibly asserted that he has been licensed as an Insurance Producer in Texas since 2007. He has been licensed as a Non-resident Producer in 36 other states. He credibly testified that he has never had any complaints filed regarding his licensure. He expected that the same rules for licensure or registration would apply in Michigan.
9. Petitioner credibly testified that he is currently employed with Time Insurance. He testified that as a condition of his employment he was requested to obtain licensure in Michigan.
10. Petitioner credibly testified that he was truthful on his application for licensure in Michigan by indicating that he had been convicted of a crime. He testified that this incident was an isolated incident that occurred over 19 years ago.
11. Petitioner testified that in 1993 he was a magazine salesman. He testified that he would submit orders for magazine sales to the company. He testified that some orders were not filled. He testified that it was not his responsibility to fill the orders.
12. Petitioner testified that it was a disorganized way to do business.

13. Petitioner admits that he pled no contest to seven counts of theft by deception. He contends that he was young and did not know what else to do. Theft by Deception is a misdemeanor.
14. The failure to provide goods in exchange for the purchase price is a fraudulent or dishonest practice.
15. Furthermore, even if the failure to produce goods was a result of "disorganized way to do business" as testified to by Petitioner, this demonstrates incompetence or financial irresponsibility in the conduct of business.
16. Petitioner completed all sentencing terms including payment of fines and costs and probation terms. [Resp. Exh. 4]

Respondent has the burden of proof in this matter to show by a preponderance of the evidence the legal basis for its action to deny Petitioner's application for licensure. See MCL 500.1239(2).

Under Sections 1206a and 1239 of the Insurance Code, *supra*, the Commissioner shall deny an application for a non-resident insurance producer license where an applicant has used fraudulent, coercive, or dishonest practices or demonstrated incompetence, untrustworthiness, or financial irresponsibility in the conduct of business. See MCL 500.1206a(1) and MCL 500.1239(1)(h).

Petitioner objects to using a no contest plea against him in an administrative hearing. He contends that he was not responsible. However, a *nolo contendere* plea conclusively resolves issues of guilt in favor of the state. *People v Moore*, 169 Mich App 265; 416 NW2d 407 (1987).

Based on the above findings of fact, it is concluded that Respondent has met its burden of proof. A preponderance of the evidence shows that Petitioner was properly denied licensure as a non-resident insurance producer in the state of Michigan under Sections 1206a(1) and 1239(1)(h) of the Insurance Code.

PROPOSED DECISION

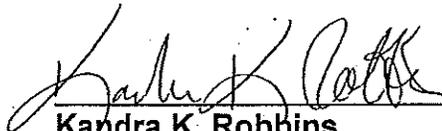
Based on the above findings of fact and conclusions of law, the undersigned Administrative Law Judge proposes the following to the Commissioner:

1. That the above findings of fact and conclusions of law be adopted in the Commissioner's final decision and order;

2. That the Commissioner deny Petitioner's application for a non-resident insurance producer license under Sections 1206a(1) and 1239(1)(h) of the Insurance Code; and
3. That the Commissioner take any other action in this matter deemed appropriate under the applicable provisions of the Insurance Code of 1956, as amended.

EXCEPTIONS

Any Exceptions to this Proposal for Decision should be filed in writing with the Office of Financial and Insurance Regulation, Division of Insurance, Attention: Dawn Kobus, P.O. Box 30220, Lansing, Michigan 48909, within twenty (20) days of the issuance of this Proposal for Decision. An opposing party may file a response within ten (10) days after Exceptions are filed.



Kandra K. Robbins
Administrative Law Judge