**STATE OF MICHIGAN**
**DEPARTMENT OF INSURANCE AND FINANCIAL SERVICES**

**Before the Director of Insurance and Financial Services**

**Noah James Borwick,**
**Petitioner**

**v**

**Case No. 20-1048-L**
**Docket No. 20-001755**

**Department of Insurance and Financial Services,**
**Respondent.**
_____/

**For the Petitioner:**
Noah James Borwick
In Pro Per
[redacted]
Email: [redacted]

**For the Respondent:**
Conrad L. Tatnall (P69785)
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_____/

**Issued and entered**
**This 23rd day of June 2020**
**by Randall S. Gregg**
**Senior Deputy Director**

## FINAL DECISION

## I. INTRODUCTION

On April 9, 2020, Administrative Law Judge Christopher Saunders (Judge Saunders) issued a Proposal for Decision Granting Respondent's Motion for Summary Disposition (PFD). Judge Saunders recommended that the Director issue a final decision consistent with the Findings of Fact and Conclusions of Law as outlined in his PFD. The factual findings in the PFD are in accordance with the preponderance of the evidence and the conclusions of law are supported by reasoned opinion. In addition, neither party filed

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'n*, 136 Mich App. 52 (1984); *see also* MCL 24.281. For these reasons, and as set forth below, the PFD is adopted in full and Petitioner's appeal of Respondent's Notice of License Denial is dismissed.

## II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Findings of Fact in the April 9, 2020 PFD are adopted in full and made part of this Final Decision. The Conclusions of Law set forth in the April 9, 2020 PFD are also adopted in full, made a part of this Final Decision, and restated herein as follows:

1. The Insurance Code provisions in effect at the time of the at-issue application for licensure mandate that the Director "shall refuse to issue a license" to an applicant who has been convicted of a felony. MCL 500.1239(1)(f).

2. There is no genuine issue of material fact relevant to Respondent's claim that Petitioner's felony convictions render him ineligible for issuance of a non-resident insurance producer license.

3. As was required by law, the Director denied Petitioner's application for licensure.

## III. ORDER

Therefore, it is ORDERED that:

1. The PFD is adopted and made part of this Final Decision.

2. Petitioner's appeal of Respondent's Notice of License Denial is dismissed.

Randall S. Gregg
Senior Deputy Director

**STATE OF MICHIGAN**
**MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES**

| | |
|---|---|
| **IN THE MATTER OF:** | **Docket No.: 20-001755** |
| **Noah James Borwick,**<br>**Petitioner** | **Case No.: 20-1048-L** |
| **v** | **Agency: Department of Insurance and Financial Services** |
| **Department of Insurance and Financial Services,**<br>**Respondent** | **Case Type: DIFS-Insurance** |
| _____/ | **Filing Type: License Denial** |

**Issued and entered**
**this 9th day of April 2020**
**by: Christopher S. Saunders**
**Administrative Law Judge**

## PROPOSAL FOR DECISION
## GRANTING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

## PROCEDURAL HISTORY

This proceeding is held under the authority of the Michigan Insurance Code of 1956, being 1956 PA 218, as amended, MCL 500.100, *et seq.* (hereafter 'Code').

On or about November 12, 2019, Noah James Borwick, (hereafter 'Petitioner') submitted an application for licensure as a non-resident insurance producer in the state of Michigan. On December 23, 2019, the Department of Insurance and Financial Services (hereafter 'Respondent') issued a Notice of License Denial and Opportunity for Hearing (Notice of Denial). The Notice of Denial advised the Petitioner that his application for licensure was denied because he failed to satisfy the minimum licensing requirements of Section 1206a of the Code. Specifically, the Notice of Denial informed the Petitioner that his June 20, 1996, and April 19, 1999, felony convictions rendered him disqualified for licensure under Section 1239(1)(f) of the Code.

The Petitioner timely appealed the Notice of Denial, thereby triggering his right to a contested case hearing before an Administrative Law Judge.

On January 24, 2020, the Michigan Office of Administrative Hearings and Rules (MOAHR) issued a Notice of Hearing scheduling a hearing in this matter to convene at 9:00 a.m. on March 10, 2020. On February 19, 2020, the Respondent filed a Motion for Summary Disposition (Respondent's Motion) under 2015 AACS R 792.10129 (Rule 129), asserting there are no genuine issues of any material fact and that it is entitled to a decision in its favor as a matter of law. The Respondent's Motion also requested that the contested case hearing be converted to an oral argument hearing on its Motion. On February 25, 2020, Petitioner filed a written response to the Respondent's Motion.

On March 3, 2020, an Order Converting Hearing to Telephone Oral Argument was issued. Oral argument convened as scheduled on March 10, 2020, at 9:00 a.m. Respondent was represented by Attorney Conrad Tatnall. Petitioner appeared In Pro Per.

## APPLICABLE LAW

*Section 1206a*

MCL 500.1206a states in pertinent part:

> **500.1206a Nonresident insurance producer license; requirements; verification of status; change of address; nonresident surplus lines insurance producer license; nonresident limited lines insurance producer.**
>
> 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.

(2) The commissioner may verify the insurance producer's licensing status through the producer database maintained by the national association of insurance commissioners or its affiliates or subsidiaries.

(3) A nonresident insurance producer who moves from 1 state to another state or a resident insurance producer who moves from this state to another state shall file a change of address and provide certification from the new resident state within 30 days of the change of legal residence. No fee or license application is required.

(4) Notwithstanding any other provision of this chapter, a person licensed as a surplus lines insurance producer in his or her home state shall receive a nonresident surplus lines insurance producer license pursuant to subsection (1). Except as otherwise provided in subsection (1), this section does not otherwise amend or supersede any provision of chapter 19.

(5) Notwithstanding any other provision of this chapter, a person licensed as a limited line credit insurance or other type of limited lines insurance producer in his or her home state shall receive a nonresident limited lines insurance producer license, pursuant to subsection (1), granting the same scope of authority as granted under the license issued by the producer's home state. For the purposes of this subsection, limited lines insurance is any authority granted by the home state that restricts the authority of the license to less than the total authority prescribed in the associated major lines under section 1206(1)(a) to (f).

*Section 1239(1)*

MCL 500.1239(1) states in pertinent part:

> **500.1239 Probation, suspension, or revocation of insurance producer's license; refusal to reissue; causes; civil fine; notice of license denial; hearing; license of business entity; penalties and remedies.**
>
> 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:
>
> * * *
>
> (f) Having been convicted of a felony.

## FINDINGS OF FACT

Based upon argument of the parties, review of the hearing file, the respective pleadings and documentary submissions, I find the following material facts:

1. On June 20, 1996, Petitioner tendered a plea of guilty to a charge of theft more than $400.00 but less than $15,000.00 in [redacted] in the state of [redacted]. The crime to which Petitioner entered a plea of guilty is a felony. (Resp. Exhibit 1, Motion for Summary Disposition).

2. On April 19, 1999, Petitioner tendered a plea of guilty to a charge of marijuana distribution in [redacted] in the state of [redacted]. The crime to which Petitioner entered a plea of guilty is a felony. (Resp. Exhibit 1, Motion for Summary Disposition).

3. On November 12, 2019, Petitioner filed an Application for a Non-Resident Producer License in the state of Michigan. The Petitioner responded “yes” on the Application to the question asking him whether he had ever been convicted of a felony. (Resp. Exhibit 2, Motion for Summary Disposition).

4. On December 23, 2019, the Respondent issued a Notice of License Denial and Opportunity for Hearing informing the Petitioner that his Application for a Non-Resident Producer License was denied due to his 1996 and 1999 felony convictions.

5. The Petitioner timely requested a hearing protesting the denial of his application.

## CONCLUSIONS OF LAW

The Respondent's motion for summary disposition under 2015 AACS R 792.10129 is akin to a motion brought under Michigan Court Rule (MCR) 2.116(C)(10). A motion filed under MCR 2.116(C)(10) tests the factual support for a plaintiff's claim. *Skinner v Square D Co*, 445 Mich 153, 161, 516 NW2d 475 (1994); *Babula v Robertson*, 212 Mich App 45, 48, 536 NW2d 834 (1995).

Summary disposition under MCR 2.116(C)(10) is available when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10); *see also Coblentz v City of Novi*, 475 Mich 558, 719 NW2d 73 (2006); *Haliw v City of Sterling Heights*, 464 Mich 297, 627 NW2d 581 (2001); *Veenstra v Washtenaw Country Club*, 466 Mich 155, 645 NW2d 643 (2000).

"A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Attorney Gen v PowerPick Players' Club of Michigan, LLC*, 287 Mich App 13, 26–27, 783 NW2d 515 (2010) (quoting *West v GMC*, 469 Mich 177, 183, 665 NW2d 468 (2003)).

A material fact has been defined as "an ultimate fact issue upon which a jury's verdict must be based." *Estate of Neal v Friendship Manor Nursing Home*, 113 Mich App 759, 763, 318 NW2d 594 (1982). In other words, "[t]he disputed factual issue must be material to the dispositive legal claim[s]." *Auto Club Ins Ass'n v State Auto Mut Ins Co*, 258 Mich App 328, 333, 671 NW2d 132 (2003).

In reviewing a motion brought under MCR 2.116(C)(10), the court must consider the pleadings, affidavits, depositions, admissions, and any other admissible evidence in light most favorable to the nonmoving party. MCR 2.116(G)(5); *Maiden v Rozwood*, 461 Mich 109, 120, 597 NW2d 817 (1999); *Radtke v Everett*, 442 Mich 368, 374, 501 NW2d 155 (1993); *Miller v Farm Bureau Mut Ins Co*, 218 Mich App 221, 233, 553 NW2d 371 (1996). Affidavits or other documentation submitted in support of or in opposition to a

motion for summary disposition under MCR 2.116(C)(10) must contain admissible evidence. MCR 2.116(G)(6); *Maiden,* 461 Mich at 121.

Granting the nonmoving party the benefit of any reasonable doubt regarding material facts, the court must then determine whether a factual dispute exists to warrant a trial. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617–618, 537 NW2d 185 (1995); *Radtke,* 442 Mich at 374. If there is no genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *See Quinto v Cross & Peters Co*, 451 Mich 358, 363, 547 NW2d 314 (1996) (plaintiff failed to present evidence on which reasonable person could find that hostile work environment existed; summary disposition proper); *Helsel v Morcom*, 219 Mich App 414, 417, 555 NW2d 852 (1996).

Here, Respondent contends that Petitioner has two felony convictions in the state of Colorado from 1996 and 1999 respectively. Petitioner does not dispute this fact. Petitioner's argument that he should not be disqualified from licensure as a non-resident insurance producer rests on a pending change to MCL 500.1239. On November 21, 2019, the Lieutenant Governor signed House Bill 4044 (HB 4044). HB 4044 amends MCL 500.1239 (see Petitioner's binder of proposed exhibits, Exhibit 1).

Currently, MCL 500.1239(f) states that the commissioner shall refuse to grant a license if an applicant has been convicted of a felony. HB 4044 changes that language to state as follows:

> Sec. 1239.
>
> (1) In addition to any other powers under this act, the director 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 director shall not issue a license under section 1205 or 1206a, for any 1 or more of the following causes:
>
> * * *
>
> (d) Having been convicted of a felony within 10 years before the uniform application was filed.

HB 4044 therefore changes MCL 500.1239 in that the requirement that the commissioner/director deny a license to an applicant convicted of a felony only applies to applicants convicted of a felony within 10 years of the date of application. At the time Petitioner submitted his application, the commissioner/director was required to deny a

license to an applicant convicted of a felony regardless of the time of conviction, as per the language of MCL 500.1239(f).

Although HB 4044 was signed on November 21, 2019, it states, "This amended section is effective May 21, 2020". Petitioner argues that even though the bill states that the amendment to MCL 500.1239 is not effective until May 21, 2020, the new language contained in HB 4044 should be applied to his November 12, 2019, application. Petitioner argues that the felony convictions at issue took place roughly 24 and 21 years ago, respectively, and that he has changed his life since then. Petitioner argues that he learned from his mistakes and altered his life accordingly. He argues that he should not still be punished for mistakes made during his youthful years and that credit should be given for what he has done with his life since the incidents in question.

Petitioner does not dispute that he has two felony convictions from 1996 and 1999. Therefore, there is no genuine issue of material fact as to the facts of the case. The question then is what version of MCL 500.239 controls for purposes of Petitioner's November 12, 2019, non-resident insurance producer license application. Petitioner argues that the version of MCL 500.1239 as contained in HB 4044 should be applied to his application, despite the language that the amendment to the statute is not effective until May 21, 2020. If the version of MCL 500.1239 as contained in HB 4044 is applied to Petitioner's November 12, 2019, application, the commissioner/director would not be required to deny Petitioner's application because his felony convictions are more than 10 years old. If the current version of MCL 500.1239 (current as of the date of this decision and as of November 12, 2019) is applied, the commissioner/director is required to deny Petitioner's application based on his felony convictions.

Petitioner is arguing that the amendments to MCL 500.1239 as contained in HB 4044 should be applied retroactively, and therefore to the time he submitted his application and when his application was denied by Respondent. The language of HB 4044 states that the amendments to MCL 500.1239 are to be effective May 21, 2020. It is well settled that statutes and amendments to statutes are to be applied prospectively. In *Davis v State Employee's Retirement Board*, the Michigan Court of Appeals stated, "…statutes and amended statutes are to be applied prospectively unless the Legislature manifests an intent to the contrary." *Davis v State Employee's Retirement Board*, 272 Mich. App. 151, 155 (2006). Additionally, the Court stated, "The Legislature's expression of an intent to have a statute apply retroactively must be clear, direct, and unequivocal as appears from the context of the statute itself." *Id.* at 155-156.

There is no language in HB 4044 and in the amended language of MCL 500.1239 that states the Legislature intended the amended statute to be retroactive. In fact, to the contrary, the language states that the amendments are not to be effective until May 21,

2020. Therefore, absent any clear, direct, and unequivocal legislative intent that the amendments to MCL 500.1239 be retroactive, it must be determined that those amendments are to be applied prospectively: from May 21, 2020, and forward.

Furthermore, the US Supreme Court has acknowledged the presumption against retroactivity of statutes or amendments to statutes absent clear legislative intent. The Court has also explained that the legal effect of conduct should usually be assessed under the law in effect when the conduct took place, *Landgraf v USI Film Products*, 511 U.S. 244, 265 (1996). Therefore, as it is the denial of his application that Petitioner is challenging, the law in effect at the time the decision was made to deny his application is controlling. As discussed above, because there is no clear legislative intent for the amendments to MCL 500.1239 as contained in HB 4044 to be applied retroactively, Respondent properly applied the unamended language of MCL 500.1239 in assessing Petitioner's application and issuing a denial thereof on December 23, 2019.

It is clear that Petitioner has made laudable changes to his life in the over 20 years since his felony convictions. In a philosophical context, I agree with Petitioner that mistakes made so long ago should not continue to hang over his head given the strides he has made. Obviously, the legislature agrees as well given the pending amendments to MCL 500.1239 contained in HB 4044. However, it is not the current state of Petitioner's life or character that is at issue, rather, the law that was in effect at the time his application for licensure was denied and therefore the timing of his application. At the time Petitioner submitted his November 12, 201,9 application and at the time the December 23, 2019, denial was issued, MCL 500.1239 contained a blanket prohibition on applicants with a felony conviction and required that the commissioner/director deny such an application.

Accordingly, as there is no genuine issue of material fact as to Petitioner's felony convictions at the time of his application and subsequent denial, Respondent is entitled to judgment as a matter of law. As discussed above, the controlling version of MCL 500.1239 contains a mandate that the commissioner/director deny an application for an individual with a felony conviction. Therefore, Respondent properly denied Petitioner's November 12, 2019, application for a license as a non-resident insurance producer in the state of Michigan.

## SUMMARY

There is no genuine issue of material fact relevant to Respondent's claim that Petitioner's felony convictions render him ineligible for issuance of a non-resident insurance producer license. Therefore, Respondent is entitled to a decision in favor of its denial of licensure as a matter of law.

**IT IS HEREBY RECOMMENDED THAT THE DIRECTOR ORDER** that**:**

The Respondent's Motion for Summary Decision is **GRANTED**.

The Petitioner has failed to satisfy the minimum licensing requirements of Section 1206a of the Code.

The Petitioner is ineligible for issuance of a non-resident insurance producer license under Section 1239(1)(f) of the Code.

**Christopher S. Saunders**
**Administrative Law Judge**

**NOTICE:**

**The parties may file Exceptions to this Order Granting the Respondent's Motion for Summary Disposition within twenty-one (21) days after it is issued and entered. An opposing party may file a response within fourteen (14) days after initial Exceptions are filed. All Exceptions and Responses to Exceptions must be filed with the Department of Insurance and Financial Services, Ottawa State Office Building, 2nd Floor, P.O. Box 30220, Lansing, Michigan 48909, Attention: Dawn Kobus, and served on all parties to the proceeding.**