

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
OFFICE OF FINANCIAL AND INSURANCE REGULATION
Before the Commissioner of Financial and Insurance Regulation

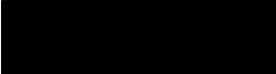
Kelly Hernandez,
Petitioner

v

Case No. 11-814-L
Docket No. 2011-204

Office of Financial and Insurance Regulation,
Respondent

For the Petitioner:

Kelly Hernandez


For the Respondent:

Daniel Feinberg
Office of General Counsel
Office of Financial and Insurance Regulation
P.O. Box 30220
Lansing, MI 48909

Issued and entered
this 22nd day of July 2011
by R. Kevin Clinton
Commissioner

FINAL DECISION

This case concerns the application of Kelly Hernandez (Petitioner) for a resident insurance producer license. Petitioner filed her application with the Office of Financial and Insurance Regulation (OFIR) in November 2010. On the application, Petitioner failed to disclose that she had been convicted in 2001 of two misdemeanors, assault and embezzlement less than \$1,000.00. Following a pre-licensing review, the convictions were discovered and the license application was denied based on the Petitioner's failure to disclose those convictions.

Petitioner challenged the license denial. A hearing was held on March 22, 2011. The administrative law judge issued a Proposal for Decision (PFD) dated May 18, 2011 recommending that the Commissioner uphold the license denial. Neither party filed exceptions.

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. Those findings and conclusions are adopted. The PFD is attached and made part of this final decision.

In addition to the considerations above, it is noted that the Petitioner did not file exceptions to the Proposal for Decision. 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).

ORDER

Therefore, it is ordered that the refusal to issue an insurance producer license to Petitioner Kelly Hernandez is upheld.



R. Kevin Clinton
Commissioner

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM

In the matter of	Docket No.	2011-204
Kelly P. Hernandez, Petitioner	Agency No.	11-814-L
v	Agency:	Office of Financial and Insurance Regulation
Office of Financial and Insurance Regulation, Respondent	Case Type:	Intent to Deny Refusal to License

Issued and entered
this 18th day of May 2011
by Lauren G. Van Steel
Administrative Law Judge

PROPOSAL FOR DECISION

PROCEDURAL HISTORY

Appearances: Kelly P. Hernandez, Petitioner, appeared on her own behalf. Daniel A. Feinberg, Attorney at Law, appeared on behalf of the Office of Financial and Insurance Regulation, Respondent.

This proceeding commenced with the filing of a Notice of Hearing dated February 17, 2011, scheduling the contested case hearing for March 22, 2011. The Notice of Hearing was issued pursuant to a Request for Hearing received by the State Office of Administrative Hearings and Rules (now the Michigan Administrative Hearing System) and an Order Referring Petition for Hearing and Order to Respond, dated February 8, 2011, issued by Stephen R. Hilker, Chief Deputy Commissioner of the Office of Financial and Insurance Regulation, under the provisions of the Michigan

Insurance Code of 1956, being 1956 PA 218, as amended, MCL 500.100 *et seq.* (hereafter "Insurance Code").

Attached to the Request for Hearing was a Complaint dated February 8, 2011, and Applicant's Petition for Contested Case Hearing to Appeal Agency Denial of Application for Insurance Producer License, received January 25, 2011.

On March 22, 2011, the hearing was held as scheduled. Respondent called Joellen Babcock, Licensing Technician, and Jean M. Boven, Deputy Commissioner, to testify as witnesses. The following exhibits were offered by Respondent and admitted as evidence into the record:

1. Respondent's Exhibit A is a blank form of the Uniform Application for Individual Producer License/Registration.
2. Respondent's Exhibit B is a record of Petitioner's Individual License Application information, dated November 12, 2010.
3. Respondent's Exhibit C is a copy of an ICHAT printout, dated November 17, 2010.
4. Respondent's Exhibit D is a copy of a letter to Petitioner from Joellen Babcock, Licensing Technician, Licensing and Product Review Division, Office of Financial and Insurance Regulation, dated November 29, 2010.
5. Respondent's Exhibit E is a copy of a response letter from Petitioner to the Office of Financial and Insurance Regulation, received December 15, 2010.
6. Respondent's Exhibit F is an excerpt from the Insurance Code of 1956, Chapter 12, MCL 500.1200 *et seq.*

7. Respondent's Exhibit G is a copy of the Office of Financial and Insurance Regulation's "Guiding Principles for the Processing of Resident and Non-Resident Insurance Producer Licensing Applications, Revised June 2010."
8. Respondent's Exhibit H is a copy of a Notice of License Denial and Opportunity for Hearing signed by Jean M. Boven, Deputy Commissioner, dated January 13, 2011.

Petitioner testified on her own behalf. No other witnesses were presented. Petitioner did not offer any exhibits as evidence. The record was closed at the conclusion of the hearing.

ISSUE AND APPLICABLE LAW

The central issue presented in this matter is whether Respondent has properly denied Petitioner's application for a resident insurance producer license under Sections 1205(1)(b) and 1239(1)(a)&(h) of the Insurance Code, which provide in pertinent part as follows:

Sec. 1205. (1) A person applying for a resident insurance producer license shall file with the commissioner the uniform application required by the commissioner and shall declare under penalty of refusal, suspension, or revocation of the license that the statements made in the application are true, correct, and complete to the best of the individual's knowledge and belief. An application for a resident insurer producer license shall not be approved unless the commissioner finds that the individual meets all of the following: * * *

(b) Has not committed any act listed in section 1239(1).
MCL 500.1205(1)(b).

Sec. 1239. (1) In addition to any other powers under this act . . . the commissioner shall refuse to issue a license under section 1205 or 1206a, for any 1 or more of the following causes:

(a) Providing incorrect, misleading, incomplete, or materially untrue information in the license application.

* * *

(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)(a)&(h).

SUMMARY OF EVIDENCE

Joellen Babcock was first called to testify by Respondent. Ms. Babcock stated that she is a "Department Tech" within the Office of Financial and Insurance Regulation. In that position, she reviews and approves, or refers for denial, individual insurance producer applications. The applicants for licensure apply online, after which there is an initial background check of the applicant run by a vendor, Prometric, on a national sex offenders list, an offender tracking list, and an administrative database. Respondent then runs a Westlaw background check and an Internet Criminal History Accessing Tool (ICHAT) background check for Michigan resident applicants. Respondent's Exhibit A is a sample of the online application form. Question #1 on the application under "Background Information" asks, "Have you ever been convicted of a crime, had a judgment withheld or deferred, or are you currently charged with committing a crime?" The application form states that the definition of "crime" includes a misdemeanor. Petitioner answered "No" to Question #1 on the online application form. [Resp. Exh. B, p 2].

Ms. Babcock testified that when an ICHAT background check was run on Petitioner, there was a "hit" found, as shown on Respondent's Exhibits B and C. There were two convictions for Petitioner found on ICHAT: 1) a September 21, 2001 misdemeanor guilty-plea conviction for Assault or Assault and Battery in the 54A District

Court in Lansing, Michigan; and 2) a December 20, 2001 misdemeanor guilty-plea conviction for Embezzlement – Agent or Trustee \$200 or more but less than \$1000 in the 55th District Court in Mason, Michigan. Respondent's established process is to write a letter to applicants who have indicated that they were not convicted of a crime when conviction(s) are found on ICHAT, to verify the ICHAT conviction information. Such a letter was sent to Petitioner on November 29, 2010. On December 15, 2010, Petitioner sent a response back, in which she verified that the conviction information in Respondent's letter was correct and that she "did not disclose this information for two reasons." [Resp. Exh. C & D]. Ms. Babcock then took the documents to a "file review meeting," at which it was concluded that Petitioner's application would be denied for failure to disclose her conviction information.

Jean M. Boven, Deputy Commissioner for the Licensing & Product Review Division within the Office of Financial and Insurance Regulation, was called to testify by Respondent. Ms. Boven stated that an application for insurance licensure is first reviewed by an Application Technician. If an application is not initially approved, the file is then taken to a supervisor to concur on the denial. The supervisor reviews the denial to make sure that it is correct in fact and in documentation. If the supervisor concurs with the denial decision, it is signed. The file then goes back to the Application Technician for the denial to be issued to the applicant.

Ms. Boven stated that Chapter 12 of the Insurance Code regulates insurance producers. [Resp. Exh. F]. Section 1205(1)(b) of the Insurance Code states that an application for a resident insurance producer license shall not be approved unless the Commissioner finds that the individual has not committed any act listed in

Section 1239(1). The Division provides guidance to license applicants in the form of "Guiding Principles," which is a document available to the public on the Office of Financial and Insurance Regulation's website. The Guiding Principles document states in part as follows:

Having a misdemeanor on your record is NOT a reason used in Michigan to deny licensure. Failing to report that you have a misdemeanor on your record, unless it is one of those exempted below, IS a reason to deny licensure. When in doubt, disclose it and report it.

Many applicants with past misdemeanors on their record believe that the misdemeanor will be dropped after the passing of five or ten years. This is incorrect. The only way that a misdemeanor will be removed from a record is by an action by the court and courts do not go back through old records and remove convictions unless prompted to do so. [Resp. Exh. G].

Ms. Boven further testified that on January 13, 2011, a Notice of License Denial and Opportunity of Hearing was issued to Petitioner, which states in part:

Applicant responded "no" on the application for the question asking "Have you ever been convicted of a crime, had a judgment withheld or deferred, or are you currently charged with committing a crime?"

* * *

Because you have provided incorrect, misleading, incomplete, or materially untrue information in the license application, the Commissioner **does not have authority to grant a license to you and your application cannot be approved** and must be denied. [Resp. Exh. H].

Section 1239(1)(h) of the Insurance Code states a cause for denial of license as "Using fraudulent, coercive, or dishonest practices or demonstrating incompetence, untrustworthiness, or financial irresponsibility in the conduct of business in this state or elsewhere." [Resp. Exh. F]. The Office of Financial and Insurance

Regulation's "Guiding Principles" document for prospective licensees indicates in part as follows:

MCL 500.1239(1)(h) is a very broad cause for denial. An application will be denied under this subsection if the application and related background documentation or information from the RIRS or SAD indicates that an applicant used fraudulent, coercive or dishonest practices or that an applicant has demonstrated incompetence, untrustworthiness or financial irresponsibility in the conduct of business. This can be any business, not just an insurance related business. The following are additional considerations under Section 1239(1)(h):

-- Misdemeanor convictions that involve fraud or other coercive or dishonest practices will be considered. [Resp. Exh. G].

Ms. Boven testified that Petitioner's conviction for "Embezzlement" does rise to the level of "fraudulent" or "dishonest" practices or a demonstration of untrustworthiness within the meaning of this section of the Insurance Code. In Embezzlement, there is a deceitful taking of money from another. It is fraudulent and a cause to not trust the person involved.

Petitioner testified that she currently resides in Portland, Michigan. Since October 2010, she has been employed as a telemarketer for Allstate Insurance/Tyler Insurance Agency in Portland. She did not work in the insurance industry prior to October 2010. She has completed about two years at Lansing Community College, but has not yet received a degree.

Petitioner testified that she does have two misdemeanor convictions. One is for "verbal assault" in 2001. Her daughter's father (whom she is not with currently) was harassing her with a girl. She confronted them to stop, and she was charged with

verbal assault. She pled guilty to Assault in 2001; she was not represented by legal counsel in the matter. She also pled guilty to Embezzlement in 2001. She was represented by legal counsel in regard to the Embezzlement charge. Petitioner testified that she had been pregnant and the father of her child convinced her to steal money from her employer, Feldpausch Food Center, which was "very stupid but the choice that I made." She was a cashier and worked in the office. In the summer of 2001, she took around \$200.00 one time, which she returned the same day. She was charged in 2001, after the "state picked it up". She also had a traffic violation a few years ago, in which she pled guilty to Impaired Driving.

Petitioner stated that she is applying for an insurance producer license. She passed the state's examination in January 2011. She has not applied for an insurance producer license previously. She has not held similar licensure in any other state or jurisdiction. If she were granted a license, she would use the license through the Tyler Insurance Agency, working with Allstate Insurance. She has been offered a full-time position with that insurance agency as an insurance producer, if she obtains a license.

On November 12, 2010, Petitioner submitted an online application for licensure. She checked "No" to Question #1 because she did not know that the 2001 convictions would be on her record after 10 years. She had not been told by her attorney or the court that the convictions would be removed. She does not recall being told about the process for having the convictions expunged back when she was convicted. She is now aware that she has to have the convictions expunged from her record. In completing the online application for licensure, she did not consult with the

court or anyone regarding whether the 2001 convictions had been taken off her record. She testified, "I just thought after 10 years that it would not be on my record. I should have looked into it, and if I would have known that they would be on there, I would have checked 'Yes'." She testified that she definitely did not intend to give false information on the application. She acknowledged her conduct leading to her misdemeanor convictions, but "that's not the person I am today." She did not consult the "Guiding Principles" document online, and did not know that it was online. She just filled out the license application. She has not applied for any other licensure since her convictions. About four years ago, she did fill out a form for a "tax license" to own a Mexican deli with her husband, but there were no questions on criminal history. To her knowledge, she has not had a criminal history check run other than for the application at issue here.

Petitioner testified that before she started working for the Tyler Insurance Agency, she was a manager at Tom's Food Center for over two years. In that job, she was in charge of hundreds to thousands of dollars, and never had a problem there. She testified that she apologizes for not putting, "Yes" on the application form, and that is "not the person that I am."

FINDINGS OF FACT

Based on the entire record in this matter, the following findings of fact are established:

1. On or about September 21, 2001, Petitioner was convicted of misdemeanor "Assault or Assault and Battery" in the 54A District Court of the State of Michigan, Case No. J014952. [Resp. Exh. C, D & E].

2. On or about December 20, 2001, Petitioner was convicted of misdemeanor "Embezzlement – Agent or Trustee \$200 or more but less than \$1,000" in the 55th District Court of the State of Michigan, Case No. 0122383FY. [Resp. Exh. C, D & E].
3. On or about November 12, 2010, Petitioner submitted an online Application for an Individual Producer License/Registration to the Office of Financial and Insurance Regulation, Respondent. [Resp. Exh. B].
4. On her submitted Application, Petitioner answered "No" to Question #1, "Have you ever been convicted of a crime, had a judgment withheld or deferred, or are you currently charged with committing a crime?" The Application form stated that the term, "crime" included a misdemeanor offense. [Resp. Exh. A & B].
5. By letter dated November 29, 2010, Joellen Babcock, Licensing Technician for the Office of Financial and Insurance Regulation (Respondent), requested that Petitioner verify information regarding Petitioner's history of two 2001 misdemeanor convictions. [Resp. Exh. D].
6. By letter received on December 15, 2010, Petitioner responded and acknowledged the accuracy of Respondent's information regarding her two 2001 misdemeanor convictions. [Resp. Exh. E].
7. Petitioner informed Respondent in her response that she had not disclosed her criminal history on the license application "for two reasons. For one this was a long time ago, and I did not think that they were still on my record. I was very young and made some bad choices because of

peers I was around at the time. I am now married with two daughters. I have grown a lot, and am not the person I was back then. I would never make those choices again. Both of the cases were misdemeanors. I also completed everything that was asked of me as well." [Resp. Exh. E].

8. Petitioner credibly testified that she did not intend to mislead the Office of Financial and Insurance Regulation in completing the online application for licensure. Nevertheless, the information provided by Petitioner was in fact incorrect, incomplete and materially untrue. She answered "No" to the question of whether she had any conviction history, including misdemeanor convictions, and that was not true or complete information. Petitioner reasonably knew this to be the case.
9. Petitioner did not provide any basis in her hearing testimony to conclude that she reasonably thought that her two 2001 misdemeanor convictions were no longer on her criminal history record when she completed the license application. She did not contend, for example, that she had been told that the convictions would be automatically expunged by the courts or by legal counsel. Rather, Petitioner just assumed that the convictions would be expunged after 10 years.
10. The underlying facts to Petitioner's 2001 misdemeanor "Embezzlement" conviction do show "fraudulent" and "dishonest" practices and a demonstration of "untrustworthiness" in the conduct of business in this state, although Petitioner credibly testified that she had returned the money involved in the embezzlement the same day and that she has been

trustworthy in her handling of monies in her subsequent employment.

CONCLUSIONS OF LAW

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 1205 and 1239 of the Insurance Code, *supra*, the Commissioner shall deny an application for a resident insurance producer license where an applicant has provided incorrect, misleading, incomplete, or materially untrue information in a license application, and/or used fraudulent, coercive, or dishonest practices or demonstrated incompetence, untrustworthiness, or financial irresponsibility in the conduct of business in this state or elsewhere. See MCL 500.1205(1)(b) and MCL 500.1239(1)(a)&(h), as amended by 2008 PA 422 & 423, which amendments became effective on January 6, 2009, prior to the license application at issue here.

Based on the above findings of fact, Respondent has shown by a preponderance of evidence in the record that in submitting her November 12, 2010 online license application to Respondent, Petitioner provided "incorrect," "incomplete" or "materially untrue" information within the meaning of Section 1239(1)(a), which precludes her licensure under Section 1205(1)(b) of the Insurance Code. Further, Respondent has shown by a preponderance of evidence that Petitioner's underlying conduct leading to her 2001 misdemeanor conviction for Embezzlement involved the use of "fraudulent" or "dishonest" practices and demonstrated "untrustworthiness" in the conduct of business in this state within the meaning of Section 1239(1)(h), which precludes licensure under Section 1205(1)(b) 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 in this matter; and
2. That the Commissioner deny Petitioner's application for a resident insurance producer license under MCL 500.1205(1)(b); and
3. That the Commissioner take any other action in this matter deemed appropriate by the Commissioner under the provisions of the Insurance Code.

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 issuance of this Proposal for Decision. An opposing party may file a response within ten (10) days after Exceptions are filed.



Lauren G. Van Steel
Administrative Law Judge