

**BEFORE THE INSURANCE COMMISSIONER
OF THE STATE OF UTAH**

IN RE THE APPLICATION OF:

DERICK JAMES SHUMWAY
423 South State Street
Provo, UT 84606

License Pending

ORDER ON HEARING
(Formal Hearing)

DOCKET No. 2011-240-LC
Enf. Case No. 2959

Mark E. Kleinfield,
Presiding Officer

STATEMENT OF THE CASE

THIS MATTER concerning whether the Applicant's application for a Resident Producer Individual license should be approved came on to be heard before the Commissioner of the Utah State Insurance Department ("*Department*") on Wednesday, December 21, 2012 at 2:30 o'clock P. M. Mountain Time, with Mark E. Kleinfield, Administrative Law Judge, serving as designated Presiding Officer.

Said hearing being held at the Department's offices, Utah State Office Building, Room 3110, Salt Lake City, Utah 84114, having been convened at the designated time of 2:30 (2:25) P. M., December 21, 2012 and adjourned at 3:16 P. M. on said same day.

Appearances:

M. Gale Lemmon, Assistant Attorney General, State of Utah, State Office Building, Room 3110, Salt Lake City, Utah 84114.

Derick James Shumway, Applicant.

By the Presiding Officer:

Pursuant to an October 25, 2011 "*Notice of Conversion to Formal Proceeding and Notice of Hearing*" a hearing was conducted on December 21, 2011 in the above-entitled proceeding. The Applicant was present at that time.

The hearing was convened and conducted as a **formal hearing** in accordance with Utah Code Ann. Sections 63G-4-204, 63G-4-205, 63G-4-206, 63G-4-207 and 63G-4-208 and Administrative Rule R590-160-6.

ISSUE, BURDEN and "STANDARD OF PROOF"

1. The basic issue(s) in this case is (are):

- a. Was Applicant's application for issuance of a Resident Producer Individual license improperly denied?
- b. Has the Applicant presented sufficient evidence to show that the Department's denial was not justified on the record?
- c. Has the Applicant presented sufficient evidence that would justify the reversal of such denial?

(SEE also Paragraph 2 under *DISCUSSION-ANALYSIS*.)

2. The "*burden of proof*" or "*burden of going forward*" in this case as to the above issue(s) is on the Applicant.

3. As per Utah Administrative Code Rule, R590-160-5(10) as to the above and foregoing "issue(s)" or "question(s)" to be answered the "*standard of proof*" as to issues of fact is to be proven by a "*preponderance of the evidence*".

The Department waived an opening statement.

The Applicant first reserved then waived an opening statement.

Thereafter, evidence was pro-offered and received.

SUMMARY OF THE EVIDENCE

Witnesses:

For the Applicant:

Derick James Shumway, Applicant

For the Department:

Randy Overstreet, Director, Producer Licensing, Utah Insurance Department.

Both of whom were sworn and testified.

Exhibits:

The Department offered the following exhibits:

1. **State's Exhibit No. 1**, consisting of three (3) type written or printed pages, being copies of a specific 4th District Court, Utah County, Utah criminal proceeding concerning the Applicant. (SEE file).

(No objection being made which was accepted and entered.)

The Applicant offered the following exhibits:

No formal exhibits were presented by the Applicant.

Additionally the Presiding Officer took judicial notice of the files and records of the Department particularly the Applicant's March 28, 2011 application; an FBI and UCBI records check; the Applicant's June 23, 2011 letter of explanation; the Department's July 19, 2011 denial letter and Applicant's August 1, 2011 request for hearing.

Argument followed.

The Presiding Officer being fully advised in the premises and taking administrative notice of the files and records of the Department, now enters his *Findings of Fact, Conclusions of Law, and Order*, on behalf of the Department:

FINDINGS OF FACT

I, find by a preponderance of the evidence, the following facts:

Preliminary-Procedural Facts
(Paragraphs 1-7)

1. The Utah Insurance Department (“Department”) is a governmental entity of the State of Utah. The Department as per Utah Code Ann. Section 31A-2-101 is empowered to administer the *Insurance Code*, Title 31A, Utah Code Ann., 1953, as amended.
2. The Applicant, Derick James Shumway:
 - a. is a resident of the State of Utah and at the time of his application maintained a residence address of 423 South State Street, Provo, Utah 84606 and at the time of hearing maintained a residence address of 850 South Pheasant Run, Orem, Utah 84058;
and
 - b. has/is not presently nor previously been licensed by the Department to conduct or be engaged in any capacity in the insurance business in the State of Utah.
3. The Applicant on or about March 28, 2011 filed his application with the Department for issuance of a “*Resident Producer Individual License*”. (**SEE** Administrative file.)
4. The Department on or about July 19, 2011 in writing denied Applicant's application for “one or more of the following reasons:

UCA 31A-23a-105(1)(b)(vi) – committing an act that is a ground for denial of a license;

UCA 31A-2-105(2)(b)&(c) – failure to report at the time of filing the license application a criminal prosecution that had been taken against you;

UCA 31A-23a-107 - failure to meet the character requirements for licensing;

UCA 31A-23a-111(5)(b)(i) – unqualified for a license;

UCA 31A-23a-111-5(b)(ix) – providing incorrect, incomplete, misleading, or materially untrue information in the license application.”

5. That included in said denial were instructions informing Applicant of his right to an “*informal hearing*” if a timely request is made in writing within fifteen (15) days.

6. The Applicant under date of August 1, 2011, filed his “*request for hearing*” with the Department. (SEE Administrative file.)

7. That based on the preliminary facts as set forth in Paragraphs 1 through 6, immediately above, through means of an October 25, 2011 “*Notice of Conversion to Formal Proceedings and Notice of Hearing*”, mailed to the Applicant at his referenced address on October 25, 2011, this present formal hearing was set for December 21, 2011 at 2:30 P. M. Mountain Time.

Operative Facts
(Paragraphs 8 -9)

8. The Applicant is a resident of the State of Utah.

9. The Applicant:

a. entered a Plea in Abeyance of “No Contest” to a Class “A”

Misdemeanor of “Theft by Deception” and is presently on Probation until at least January 20, 2012 and was at the time of making his March 28, 2011 application to the Department; and

b. failed to disclose this on his application, although he did reference the particulars in a later June 23, 2011 letter of explanation to the Department.

DISCUSSION-ANALYSIS

(Paragraphs 1-8)

1.a. The Applicant “concur[s]” with the department’s presentation of the facts although differs in the characterization or interpretation and import of the above referenced operative facts, but in substance “concurr[ed]” as to the basic *chronology* and **core** facts.

b. The record now being complete sets forth competent and credible evidence for the entry of the following analysis.

2. The question(s) presented is:

a. “Whether the Applicant has presented sufficient evidence to show that the Department’s July 19, 2011 letter of denial of the Applicant’s March 28, 2011 application for licensure as a “*Resident Producer Individual*” was not justified on the record?”;

b. “Whether the Applicant has presented sufficient evidence that would justify the reversal of such July 19, 2011 denial?”; and

c. “Whether as per U. A. C. Rule, R590-160-5(10) as to each of the above and foregoing “issues” or “questions” the Applicant has so shown such evidence by a “*preponderance of the evidence*” sufficient to carry Applicant’s burden of proof?”

3. Primary Applicable Pertinent Statutes, Administrative Rules and Precedent are as follows (although others may be otherwise specifically cited within the body of this “Order on Hearing”):

a. Section 31A-23a-107, Utah Code Ann., reads as follows:

“31A-23a-107. Character requirements.

Each applicant for a license under this chapter shall show to the commissioner that:

(1) the applicant has the intent in good faith, to engage in the type of business that the license applied for would permit;

(2) if a natural person, the applicant is competent and trustworthy; or, if the applicant is an agency, all the partners, directors, or principal officers or persons having comparable powers are trustworthy, and that it will transact business in such a way that all acts that may only be performed by a licensed producer, limited line producer, customer service representative, consultant, managing general agent, or reinsurance intermediary are performed exclusively by natural persons who are licensed under this chapter to transact that type of business and designated on the agency's license;

(3) the applicant intends to comply with Section 31A-23a-502; and

(4) if a natural person, the applicant is at least 18 years of age.”

4. The Applicant failed to overcome the Department’s presentation.

5. a. The Applicant’s failure to fully disclose at the time of his filing of his application shows a primary lack of responsibility revolving around a basic pre-requisite to work in any capacity in any profession or occupation or business venture, especially the insurance business ----- *the ability to tell the truth and be honest.*

b. The characteristic of trustworthiness is **the** prime character qualification of Section 31A-23a-107, U. C. A., for all other characteristics requisite to engage in the insurance industry for the protection of the public interest of necessity flow from it. and the March 28, 2911 application **failure to disclose.**

6. The Department in issuing a license to the Applicant or any individual in comparable circumstances to the Applicant would be breaching its responsibilities to the public.

7. a. The Presiding Officer having heard the testimony and reviewed the documentary evidence can only weight what is before him. The Applicant is presently still probation although arguably may soon be released.

b. Here in the **present** instance the burden is/was on the Applicant to:

i. **Present** sufficient evidence to show that the Department's denial was not justified on the record; and

ii. **Present** sufficient evidence that would justify the reversal of such denial.

c. This the Applicant has failed to do.

d. The Applicant's March 28, 2011 application was properly denied based on the record before the Department.

BASED ON THE ABOVE AND FOREGOING FINDINGS OF FACT and discussion-analysis the Presiding Officer enters the following:

CONCLUSIONS OF LAW

1. The Applicant does not meet the character qualifications for licensing outlined in Section 31A-23a-107, UCA, 1953, as amended.

2. The issuance of a “*Resident Producer Individual*” license would be in contravention of the intent and purpose of Section 31A-23a-107, UCA , which based on “Conclusions of Law” No.1, immediately above, the Department in the practice of good public policy and the protection of the public welfare cannot at this time do.

3. The Department’s “*letter of denial*” under date of July 19, 2011 should be affirmed.

5. The Applicant's March 28, 2011 application for licensure as a “*Resident Producer Individual*” should be denied.

AND BASED ON THE ABOVE AND FOREGOING CONCLUSIONS OF LAW the Presiding Officer enters the following:

ORDER

WHEREFORE, IT IS ORDERED that:

1. The Department's "*letter of denial*" under date of July 19, 2011 is **affirmed**;
- and
2. The Applicant's March 28, 2011 application for licensure as a "*Resident Producer Individual*" is **denied**.

DATED and ENTERED this 4th day of January, 2012.

**NEAL T. GOOCH,
INSURANCE COMMISSIONER**



MARK E. KLEINFELD
ADMINISTRATIVE LAW JUDGE and
PRESIDING OFFICER
Utah Insurance Department
State Office Building, Room 3110
Salt Lake City, Utah 84114
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ADMINISTRATIVE AGENCY REVIEW

Administrative Agency Review of this Order may be obtained by filing a Petition for Review with the Commissioner of the Utah Insurance Department within thirty (30) days of the date of entry of said Order consistent with Utah Code Ann. Section 63G-4-301 and Administrative Rule R590-160-8.

Failure to seek agency review shall be considered a failure to exhaust administrative remedies.

(R590-160-8 and Section 63G-4-401)

JUDICIAL REVIEW

As an **“Formal Hearing”** after agency review judicial review of this Order may be obtained by filing a petition for such review consistent with Utah Code Ann. Section 63G-4-403.

CERTIFICATE OF MAILING

I do hereby certify that on this date I mailed, by regular mail, postage prepaid a true and correct copy of the attached:

ORDER ON HEARING

To the following:

Derick James Shumway
850 S Pheasant Run
Orem, UT 84058-2256
&
Derick James Shumway
423 South State Street
Provo, UT 84606

DATED this 5th day of January, 2012



Linda Hardy
Utah Department of Insurance
State Office Building, Room 3110
Salt Lake City, UT 84114-6901