

On October 5, 2012, Petitioner filed a Request for Hearing with the Department. On October 22, 2012, the Department's Presiding Officer issued a Notice of Conversion to Formal Proceeding and Notice of Hearing, which set a formal hearing date of November 20, 2012. The formal hearing was held, as scheduled, on November 20, 2012.

At the November 20, 2012 hearing, Petitioner appeared *pro se* and the Department was represented by M. Gale Lemmon, Assistant Attorney General, State of Utah. Petitioner appeared as his only witness and Kris Redmond, Insurance Specialist, Producer Licensing Division, Utah Insurance Department and Randall Overstreet, Director, Producer Licensing Division, Utah Insurance Department appeared as witnesses on behalf of the Department. In the course of the hearing, there was no dispute related to the presented facts that:

- Petitioner is a resident of Utah;
- The Department has proper authority over this matter;
- Petitioner plead guilty to two second degree felonies in June of 2011, based on events occurring in July 2010; and
- Petitioner had, at a minimum, two outstanding final civil judgments entered most recently in June 2011.

Petitioner timely filed this Petition for Review on December 18, 2012. However, Petitioner has not filed or cited any evidence or documents, including transcripts, supporting his Petition outside of the information and documents already contained in the record. On January 2, 2013, counsel for the Department timely filed a Motion to Dismiss Petition for Agency Review and Memorandum in Support of the Utah Insurance Department's Motion to Dismiss Petition for Agency Review. On February 27, 2013, counsel for the Department filed Notice to Submit for Decision, which requests the Department's Motion to Dismiss Petition for Agency Review be decided. Brett J. Barratt, Deputy Commissioner of Insurance ("Designee") reviewed the instant matter pursuant to UCA 63G-4-301 and ACR R590-160 and submits this document for the review of the Utah Commissioner of Insurance.

Statutes and Rules Governing Agency Review

This agency review is governed by Utah Code Annotated Section 63G-4-301(1) and ACR R590-160-5(10) and R590-160-8(6)(d). The applicable subsection of Section 63G-4-301 provides:

- (1) (a) If a statute or the agency's rules permit parties to any adjudicative proceeding to seek review of an order by the agency or by a superior agency, the aggrieved party may file a written request for review within 30 days after the issuance of the order with the person or entity designated for that purpose by the statute or rule.
 - (b) The request for agency review shall:
 - (i) be signed by the party seeking review;
 - (ii) state the grounds for review and the relief requested;
 - (iii) state the date upon which it was mailed; and
 - (iv) be mailed to the presiding officer and to each party.

The applicable subsection of ACR R590-160-5(10) reads: “(10) Standard of Proof. All issues of fact in administrative proceedings before the commissioner shall be decided upon the basis of a preponderance of the evidence.”

The applicable subsection of ACR R590-160-8(6)(d) states: “(6) Memoranda . . . (d) Any final reply memoranda in support of the request for agency review shall be filed no later than 5 days after the filing of a response to the request for agency review and any memoranda supporting that response. . .” .

Issues

The issues that must be determined to resolve the instant matter are:

- 1) Whether the Petition for Review fails to comply with the essential requirements for filing a petition for review;
- 2) Whether sufficient evidence, based on a preponderance of evidence standard, was presented at the November 20, 2012 hearing to allow the Presiding Officer to reasonably conclude that Petitioner does not meet the character requirements of UCA 31A-23a-107 and, therefore, affirm the Department’s October 1, 2012 denial letter and deny Petitioner’s application for licensure as a resident individual producer; and
- 3) Whether the Presiding Officer acted in an arbitrary or capricious manner.

Findings of Fact, Conclusions of Law and Discussion

As reflected in the record and as outlined above, Petitioner’s application for a resident producer license was denied by the Department for, among other things, failure to meet the character requirements of 31A-23a-107(2)¹. Subsequently, Petitioner requested, and the Department held, a hearing regarding this matter. The Order on Hearing issued by the Presiding Officer after the hearing provided Petitioner with the following notice and citations related to properly filing a Petition for 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

¹ **UCA 31A-23a-107. Character requirements.**

An 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) (a) if a natural person, the applicant is competent and trustworthy; or
(b) if the applicant is an agency:
 - (i) the partners, directors, or principal officers or persons having comparable powers are trustworthy; and
 - (ii) that it will transact business in such a way that the acts that may only be performed by a licensed producer, surplus lines producer, limited line producer, 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.

the date of entry of said Order consistent with the Utah Code Ann. Section 63G-4-301 and Administrative Rule R590-160-8."

Order on Hearing, at p. 10 (emphasis in original).

UCA 63G-4-301(1)(a)² and ACR R590-160-8(4)(b) and (c)³ specifically address the procedure and requirements for filing a petition for agency review of an administrative order. Petitioner's "Petition for Review" filed December 18, 2012 is very brief and simply requests a meeting with the commissioner to "plead my case . . .". The Petition for Review fails to comply any of the requirements, even the most basic that the request be signed and be dated.

It is noted that Petitioner appeared *pro se*. It is recognized that certain requirements, especially procedural ones, may be more liberally applied to those appearing *pro se*, though there is no statute or case law that directs *pro se* litigants be held to lower standards. When a party appears *pro se*, "the court must construe his pleadings liberally and hold [him] to a less stringent standard than formal pleadings drafted by lawyers." Erickson v. Pardus, 127 S.Ct. 2197, 2200 (2007). However, a "broad reading of "[a plaintiff's] complaint does not relieve [him] of the burden of alleging sufficient facts on which a recognized legal claim could be based." Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir.1991). The court "will not supply additional factual allegations to round out a plaintiff's complaint or construct a legal theory on a plaintiff's behalf." Whitney v. New Mexico, 113 F.3d 1170, 1173-74 (10th Cir.1997). It is not the court's function to "assume the role of the advocate for the *pro se* litigant," and the dismissal of a *pro se* complaint under Fed. R. Civ. Pro. 12(b)(6) is still proper "where it is obvious that the plaintiff cannot prevail on the facts he has alleged and it would be futile to give him an opportunity to amend." Perkins v. Kan. Dept. of Corrections, 165 F.3d 803, 806 (10th Cir.1999).

² **63G-4-301. Agency review -- Procedure.**

(1) (a) If a statute or the agency's rules permit parties to any adjudicative proceeding to seek review of an order by the agency or by a superior agency, the aggrieved party may file a written request for review within 30 days after the issuance of the order with the person or entity designated for that purpose by the statute or rule.

(b) The request shall:

- (i) be signed by the party seeking review;
- (ii) state the grounds for review and the relief requested;
- (iii) state the date upon which it was mailed; and
- (iv) be mailed to the presiding officer and to each party.

³ **ACR R590-160-8(4)(b) and (c) - (4) Content of a Request for Agency Review.**

(b)(i) A party requesting agency review shall set forth any factual or legal basis in support of that request; and
(ii) may include supporting arguments and citation to appropriate legal authority; and

(A) to the relevant portions of the record developed during the adjudicative proceeding if the administrative proceeding being reviewed is a formal proceeding; or
(B) to the relevant portions of the department's files if the administrative proceeding being reviewed is an informal proceeding.

(c) If a party challenges a finding of fact in the order subject to review, the party must demonstrate:

- (i) based on the entire record, that the finding is not supported by substantial evidence if the administrative proceeding being reviewed is a formal proceeding; or
- (ii) based on the department's files, that the finding is not supported by substantial evidence if the administrative proceeding being reviewed is an informal proceeding. . . .

The final issues are whether sufficient evidence was presented at the November 20, 2012 hearing to allow the Presiding Officer to reasonably conclude that Petitioner does not meet the character requirements of UCA 31A-23a-107 and, therefore, affirm the Department's October 1, 2012 denial letter and deny Petitioner's application for licensure as a resident individual producer and by doing so whether the Presiding Officer acted in an arbitrary and capricious manner. Here, the applicable subsection of ACR R590-160-5(10) reads: "(10) Standard of Proof. All issues of fact in administrative proceedings before the commissioner shall be decided upon the basis of a preponderance of the evidence." The term "preponderance of the evidence" means "the greater weight of the evidence; the burden of proof in a civil trial, in which the jury is instructed to *find for the party that, on the whole, has the stronger evidence, however slight the edge may be.*" BLACK'S LAW DICTIONARY, 494 (1996) (emphasis added).

Pursuant to UCA 31A-23a-105, the commissioner shall issue a license if the specific requirements for issuance of the license are met. Those requirements are:

31A-23a-105. General requirements for individual and agency license issuance and renewal.

(1) (a) The commissioner shall issue or renew a license to a person described in Subsection (1)(b) to act as:

- (i) a producer;
- (ii) a limited line producer;
- (iii) a customer service representative;
- (iv) a consultant;
- (v) a managing general agent; or
- (vi) a reinsurance intermediary.

(b) The commissioner shall issue or renew a license under Subsection (1)(a) to a person who, as to the license type and line of authority classification applied for under Section 31A-23a-106:

- (i) satisfies the application requirements under Section 31A-23a-104;
- (ii) satisfies the character requirements under Section 31A-23a-107;**
- (iii) satisfies any applicable continuing education requirements under Section 31A-23a-202;
- (iv) satisfies any applicable examination requirements under Section 31A-23a-108;
- (v) satisfies any applicable training period requirements under Section 31A-23a-203;
- (vi) if an applicant for a resident individual producer license, certifies that, to the extent applicable, the applicant:
 - (A) is in compliance with Section 31A-23a-203.5; and
 - (B) will maintain compliance with Section 31A-23a-203.5 during the period for which the license is issued or renewed;
- (vii) has not committed an act that is a ground for denial, suspension, or revocation as provided in Section 31A-23a-111;

...

UCA 31A-23a-105(1)(a) and (b), emphasis added.

One of the specific requirements of UCA 31A-23a-105(1)(b) is a character requirement found in UCA 31A-23a-107, which is the reason cited for the Department's denial of the Petitioner's application. UCA 31A-23a-107 states:

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.

UCA 31A-23-107, emphasis added.

The business of insurance is clothed with a public interest. German Alliance Insurance Co. v. Kansas, 233 U.S. 389 (1914). Those that engage in the business of insurance or who sell or solicit insurance are affected with the same interest. La Tourette v. McMaster, 248 U.S. 465 (1919). Consequently, those that engage in the business of insurance must be competent and trustworthy in order to ensure the public's interest is protected. Id. Based on that long-standing precedent, when an individual applying for a license as an insurance producer has a criminal background the prerequisite of trustworthiness in UCA 31A-23a-107 requires the applicant to demonstrate his or her good character and trustworthiness and that the person is fully and completely rehabilitated of the criminal conduct.


The record indicates that the primary reason Petitioner's application for licensure was denied is the character requirement in UCA 31A-23a-107. Petitioner does not disputed his criminal record or outstanding civil judgments. Therefore, based on the foregoing and the record in this matter, it is determined that sufficient evidence, based on a preponderance of evidence standard, was presented at the November 20, 2012 hearing for the Presiding Office to reasonably sustain the Department's October 1, 2012 denial of Petitioner's resident individual producer application.

Recommended Order

In the instant matter, the Petition for Review does not meet the basic requirements for filing of a petition for review and, therefore, is inadequate to be the basis of any review as, among other things, it fails to state the grounds for review and relief requested. The record indicates that Petitioner did not respond to nor proffer any evidence to counter the arguments made in the Department's January 2, 2013 Motion to Dismiss Petition for Agency Review. Consequently, the Motion to Dismiss Petition for Agency Review is granted.

Further, even if the Department's Motion to Dismiss Petition for Agency Review was denied, Petitioner's burden is to present sufficient evidence to demonstrate that, at the time of the formal proceeding, he be trustworthy, of good character, completely rehabilitated of prior criminal conduct and in compliance with the prior orders with regard to terms of any probation. Petitioner provided some evidence of good character in the form of not having any recent criminal arrests and a letter from his attorney in the criminal matter that Petitioner entered into a plea in abeyance, with a twenty-four (24) month period. However, taken together with the evidence presented by the Department and the lack of evidence presented by Petitioner and the Presiding Officer's experience, Petitioner has failed to meet his burden to demonstrate the November 20, 2012 Order on Hearing was improper. Accordingly, I find that the Presiding Officer's November 20, 2012 Order on Hearing upholding the Department's denial of Petitioner's application for licensure as a resident individual producer is reasonable, justified based on the facts presented, was not arbitrary or capricious and is, therefore, upheld.

Dated this 21st day of November 2013.



BRETT J. BARRATT
Deputy Insurance Commissioner
Designee of the Insurance Commissioner

ADOPTION OF ORDER ON REVIEW BY COMMISSIONER

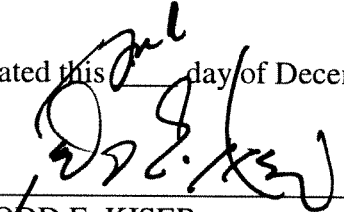
NOW, THEREFORE, IT IS HEREBY ORDERED THAT HAVING REVIEWED THE ORDER ON REVIEW IN THIS MATTER, AND FOR GOOD CAUSE APPEARING, I HEREBY ADOPT THE ORDER ON REVIEW AS MY FINAL ORDER IN THIS MATTER.

APPEAL RIGHTS

Pursuant to Utah Code Ann. § 63G-4-302, any party may file a written request for reconsideration with the agency within 20 days after the date of this order. Agency reconsideration need not be sought before pursuing judicial review.

Pursuant to Utah Code Ann. § 63G-4-401, a party may obtain judicial review of final agency action by filing a petition for judicial review within 30 days after the date that the order constituting final agency action is issued.

Dated this 2nd day of December 2013.



TODD E. KISER
Utah Insurance Commissioner

CERTIFICATE OF MAILING

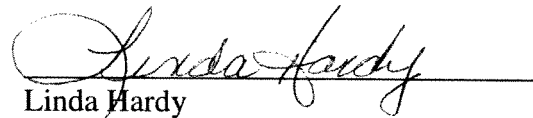
I hereby certify that on the date indicated below, I mailed by regular mail, postage prepaid, a true and correct copy of the above **ORDER ON REVIEW** to the following:

MICHAEL SCOTT DEAN
1099 East 5645 South
Murray, UT 84121

And delivered the same to:

M. Gale Lemmon
Assistant Attorney General
Utah Insurance Department
3110 State Office Building
Salt Lake City, UT 84114

DATED this 2 day of December, 2013.



Linda Hardy
Administrative Docket Clerk
Utah Insurance Department
3110 State Office Building
Salt Lake City, UT 84114-6901