

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

IN RE THE APPLICATION OF:

MICHAEL R. CLARKE



License Pending

ORDER ON HEARING
(Formal Hearing)

DOCKET No. 2013-126 LC
Enf. Case No. 3377

Mark E. Kleinfield.
Presiding Officer

STATEMENT OF THE CASE

THIS MATTER concerning whether the Applicant should be issued a Resident Producer Individual license came on to be heard before the Commissioner of the Utah State Insurance Department (“*Department*”) on Tuesday, November 5, 2013 at 11:00 o’clock A. 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 3112, Salt Lake City, Utah 84114, having been convened at the designated time of 11:00 (11:03) A. M., November 5, 2013 and adjourned at 11:56 A. M. on said same day.

Appearances:

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

Michael R. Clarke, Applicant, *pro se*.

By the Presiding Officer:

Pursuant to an October 2, 2013 "*Notice of Continuance*" of a September 25, 2013 "*Notice of Conversion to Formal Proceeding and Notice of Hearing*" a hearing was conducted on November 5, 2013 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 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 offered and received.

SUMMARY OF THE EVIDENCE

Witnesses:

For the Applicant:

1. Michael R. Clarke, Applicant.

For the Department:

1. Kris Benavidez, Insurance Specialist, Producer Licensing Division, Utah Insurance Department, State Office Building, Room 3110, Salt Lake City, Utah 84114.
2. Randall Overstreet, Director, Producer Licensing Division, Utah Insurance Department, State Office Building, Room 3110, Salt Lake City, Utah 84114.

All of whom were sworn and testified.

Exhibits:

The Department offered the following exhibits:

1. **State's Exhibit No. 1**, consisting of four (4) type written or printed pages, being copies of court docket in 2nd District Court, Layton, Davis County, Utah re Layton City vs. Michael Richmond Clarke, Retail Theft (Shoplifting), Class "B" Misdemeanor. (SEE file).

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

The Applicant offered the following exhibits:

NONE.

Additionally the Presiding Officer took judicial notice of the files and records of the Department particularly the Applicant's August 7, 2013 application; the Department's September 10, 2013 denial letter and Applicant's September 13, 2013 request for hearing

plus Applicant's (dated UNDATED and filed 9/10/13) letter of explanation as well as UCBI report resultant from required fingerprints (dated 9/9/13).

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, Michael R. Clarke:

a. is a resident of the State of Utah and maintains a present residence of

: and

b. has not previously been nor is presently 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 August 7, 2013 filed his application with the Department for issuance of a "*Resident Producer Individual License*". (SEE Administrative file.)

4. The Department on or about September 10, 2013 in writing denied Applicant's application for "one or more of the following reasons:

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

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

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

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

6. The Applicant under date of September 13, 2013, filed a "*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 a September 25, 2013 "*Notice of Conversion to Formal Proceedings and Notice of Hearing*", *sua sponte*, and an October 2, 2013 "*Notice of Continuance*" mailed to the Applicant at his referenced address this present formal hearing was set for November 5, 2013 at 11:00 A. M. Mountain Time.

Operative Facts
(Paragraphs 8 -9)

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

9. The Applicant:

a. was convicted or plead guilty to a Class "B" Misdemeanor, Retail Theft (Shoplifting) in the 2nd District Court, Layton, Davis County, Utah on or about January 22, 2013; and

b. apparently has no other criminal convictions and or civil judgments outstanding.¹

DISCUSSION-ANALYSIS

(Paragraphs 1-7)

1.a. Both the Applicant and the Department in large measure while advocating **clearly** different characterizations or interpretations and import of the above referenced operative facts in substance concurred 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 September 10, 2013 letter of denial of the Applicant’s August 7, 2013 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 September 10, 2013 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”):

¹ While the UCBI report references some sort of bad check arrest in Ventura, California in November 2010 the record is not clear if this was in fact the Applicant and if so this took place when the Applicant would have been 16+ years old and thus a juvenile. As such the Presiding Officer puts no credence in the weighing either for or against Applicant.

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. While the record would appear that the Applicant has no other criminal convictions other than the January 22, 2013 misdemeanor retail theft conviction it is that offense that gives the Presiding Officer as it would any person an abiding concern.

Such was less than seven (7) months before the Applicant filed his August 7, 2013 application. Additionally the Applicant failed to initially disclose such on his application.

Further when inquired of by the Department the Applicant in his written explanation explained it must have been slipped in his bag by an acquaintance. At the hearing when inquired of while he neglected to list such initially on his application the Applicant explained he was given bad direction from his lawyer and the Judge, two (2) years ago.

While it would appear the Applicant has made the Court ordered restitution and fine payments as well as court ordered community service the Applicant is still technically on twelve (12) months probation until at least January 22, 2014.

5. a. Without belaboring Applicant's history it is 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* that is at issue

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.

c. Additionally, it would appear notwithstanding the Applicant's record is arguably negligible and such may in some eyes appear to be an insignificant track record does not equate to sufficient weight to overcome the more than recent 2013 criminal circumstances which by Applicant's failure disclose are enhanced in its seriousness.

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

7. a. The Presiding Officer while having heard the witnesses and reviewed the documentary evidence cannot peer into the heart, mind and conscience of any witness to assist him or her in making the most appropriate decision. The Presiding Officer can only look at and weigh the **present** evidence before him.

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 August 7, 2013 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 having been convicted of a Class "B" misdemeanor less than one (1) year ago infers coupled with Applicant's failure to initially disclose the same on his application infers Applicant's inability to meet the character qualification requirement of UCA Section 31A-23a-107.

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

3. 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.s 1 and 2, immediately above, the Department in the practice of good public policy and the protection of the public welfare cannot at this time do.

4. The Department's "*letter of denial*" under date of September 10, 2013 should be affirmed.

5. The Applicant's August 7, 2013 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 September 10, 2013 is **affirmed**;
and
2. The Applicant's August 7, 2013 application for licensure as a "Resident Producer Individual" is **denied**.

DATED and ENTERED this 9th day of January, 2014.

**TODD E. KISER,
INSURANCE COMMISSIONER**




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PRESIDING OFFICER
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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.
