

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

IN RE THE APPLICATION OF:

BRANDON TUTTLE



License Pending

ORDER ON HEARING
(Formal Hearing)

DOCKET No. 2014-109-LC
Enf. Case No. 3542

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 Monday, November 3, 2014 at 9:30 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 9:30 (9:32) A. M., November 3, 2014 and adjourned at 10:15 A. M. on said same day.

Appearances:

Gary D. Josephson, Assistant Attorney General, State of Utah, Heber Wells State Office Building, Salt Lake City, Utah 84114.

Brandon Tuttle, Applicant, *pro se*.

By the Presiding Officer:

Pursuant to an October 15, 2014 "*Notice of Conversion to Formal Proceeding and Notice of Hearing*", and a joint consented to re-scheduling a hearing was conducted on November 3, 2014 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 offered a brief opening statement and the Applicant reserved and then waived an opening statement.

Thereafter, evidence was offered and received.

SUMMARY OF THE EVIDENCE

Witnesses:

For the Applicant:

1. Brandon Tuttle, Applicant.

For the Department:

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

Both of whom were sworn and testified.

Exhibits:

The Department offered the following exhibits:

1. **State's Exhibit(s)**, consisting of Utah Bureau of Criminal Investigation (“BCI”) Report and Utah Court Exchange record. (SEE FILE).

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

The Applicant offered the following exhibits:

1. Previously filed “letters of recommendation” and “letter(s) of explanation” filed by the Applicant with his application and or at request of the Department.

Additionally the Presiding Officer took judicial notice of the files and records of the Department particularly the Applicant’s July 31, 2014 application; the Department’s September 18, 2014 denial letter and Applicant’s September 30, 2014 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, Brandon Tuttle:

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

[REDACTED]; 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 July 31, 2014 filed his application with the Department for issuance of a “*Resident Producer Individual License*”. (SEE Administrative file.)

4. The Department on or about September 18, 2014 in writing denied Applicant's application for “one or more of the following reasons”:

UCA Section 31A-23a-105(2)(b) & (c) - failure to report at the time of filing the license application a criminal prosecution against you;

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

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

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 filed a timely “*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 15, 2014 “*Notice of Conversion to Formal Proceedings and Notice of Hearing*”, *sua sponte*, and a joint consented to re-scheduling, both mailed to the Applicant at his referenced address this present formal hearing was set for November 3, 2014 at 9:30 A. M. Mountain Time.

Operative Facts
(Paragraphs 8 -9)

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

9. The Applicant plead guilty to a Class “B” Misdemeanor, “retail theft” on November 3, 2014. (SEE FILE

DISCUSSION-ANALYSIS

(Paragraphs 1-9)

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 18, 2014 letter of denial of the Applicant’s July 31, 2014 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 18, 2014 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”):

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 record would appear that the Applicant has no other criminal convictions other than the current 2014 Class “B” misdemeanor “retail theft” conviction. While not minimizing the same such would appear to be resultant as presented by the Applicant as a result of some employer-employee miscommunication and or misunderstanding.¹

5. a. Giving the Applicant the benefit of the doubt and while like any person the Hearing Officer would and can empathize with the Applicant or anyone in his position it is also clear the offense(s) are current and active as recently as less than twenty-four (24) hours of the instant hearing of November 3, 2014.

d. Of greatest impact though is the Applicant’s initial failure to disclose such background and pending matter(s). Such gives the Presiding Officer as it did when the state legislature enacted binding direction via legislation and as it would any person an abiding deep concern.

6. What the Presiding Officer is faced with though even with a degree of empathy with the Applicant is the absolute direction from the state legislature that an individual with such a current conviction and still to be fulfilled court obligation(s) no matter how reasonably explained and for whatever reason cannot be issued a state sanctioned license of any nature. Here with such makes even a probationary license (which the Applicant inferentially plead for) let alone a full-fledged non-restrictive a “non-starter”.²

¹ Applicant being an employee at Wal-Mart he basically testified that he had retrieved some glass frames from the garbage for a “costume” accessory and such was on tape and risk management questioned him growing out of a “veggie” tray investigation which apparently was either not charged or dismissed in a plea bargain resolving the glass frame incident or vice versa. SEE footnote no.s 2 and 3, infra.

7. a. Without belaboring Applicant's present difficulties it is a basic pre-requisite to work in any capacity in any profession or occupation or business venture, especially the insurance business that the characteristic of trustworthiness becomes **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.

b. Such is not to say the present Applicant presents himself as not trustworthy. Far from it. The Applicant freely and fully owned up to his past and current difficulties. It is by legislative *fiat* in the present instance that handcuffs the Presiding Officer from doing anything but affirming the Department's September 18, 2014 denial.

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

9. 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

² The Hearing Officer in reviewing the Department December 2, 2014 advanced "docket" of the North Logan Justice Court notes the Applicant was placed on 12 months probation with a review set for August 17, 2015. It would seem the earliest any sort of probationary insurance license might be entertained would be some period of time, 12 months or more, **after** the Applicant's Court obligations have been completed.

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

c. This the Applicant has failed to do.

d. The Applicant's July 31, 2014 application was properly denied based on the record before the Department as well as the present direction from the state legislature..

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 a recently resolved criminal proceeding wherein he plead “Guilty” on November 3, 2014 to “retail theft”, a Class “B” misdemeanor in the North Logan (Utah) Justice Court³ obligation(s) creates an irrebuttable presumption as to 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

³ Such apparently being in the P. M. after the instant administrative hearing. The hearing officer keeping the record open until the close of business, 5:00 P. M., Tuesday, November 10, 2014. The Applicant emailing the “results” of the proceeding on November 13, 2013. The Department advancing on December 2, 2014 a copy of the Justice Court’s relevant docket and the hearing officer taking administrative notice of the same.

“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 18, 2014 should be affirmed.

5. The Applicant's July 31, 2014 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

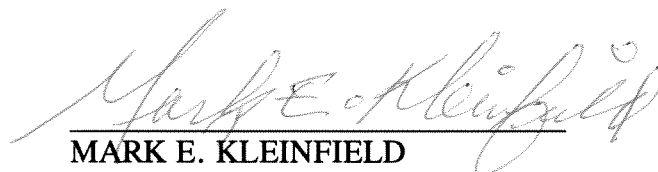
WHEREFORE, IT IS ORDERED that:

1. The Department’s “*letter of denial*” under date of September 18, 2014 is affirmed; and

2. The Applicant’s July 31, 2014 application for licensure as a “*Resident Producer Individual*” is denied.

DATED and ENTERED this 15 day of December, 2014.

**TODD E. KISER,
INSURANCE COMMISSIONER**



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ADMINISTRATIVE LAW JUDGE
and
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.