

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

IN RE THE APPLICATION OF:

RENELLE SMITH



License Pending

ORDER ON HEARING
(Formal Hearing)

DOCKET No. 2015-001-LC
Enf. Case No. 3566

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, January 27, 2015 at 10:00 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 10:00 (10:22) A. M., January 27, 2015 and adjourned at 11:21 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.

Renelle Smith, Applicant, *pro se*.

By the Presiding Officer:

Pursuant to an January 7, 2015 "*Notice of Conversion to Formal Proceeding and Notice of Hearing*" a hearing was conducted on January 27, 2015 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*".

Both the Department and the Applicant offered brief opening statements.

Thereafter, evidence was offered and received.

SUMMARY OF THE EVIDENCE

Witnesses:

For the Applicant:

1. Renelle Smith, 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 No. "D1"**, consisting of one (1) page, being Applicant's December 18, 2014 "denial" letter from the Department.
2. **State's Exhibit No. "D2"**, consisting of nine (9) pages, being a copy of a Sixth Judicial District, Manti-Sanpete County, State of Utah district court docket in regards to the (criminal) matter of State of Utah vs. Renelle Smith.
3. **State's Exhibit No. "D3"**, consisting of nine (9) pages, being a copy of a Utah Bureau of Criminal Investigation ("BCI") background check regarding the Applicant.
4. **State's Exhibit No. "D4"**, consisting of six (6) pages, being a copy of a Fourth Judicial District, American Fork-Utah County, State of Utah district court docket in regards to the (civil) matter of Portfolio Recovery Associates vs. Renelle Smith.

The Applicant offered the following exhibits:

1. A one (1) page hand-written listing of "character references" setting forth nine (9) individuals' names, titles and telephone numbers.

(No objections being made by either party all of which was accepted and entered.)

Additionally the Presiding Officer took judicial notice of the files and records of the Department particularly the Applicant's December 7, 2014 application; the Department's December 18, 2014 denial letter and Applicant's December 29, 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, Renelle Smith:

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 December 7, 2014 filed her application with the Department for issuance of a “*Resident Producer Individual License*”. (SEE Administrative file.)

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

UCA 31A-23a-107 - failure to meet the character requirements for licensing.
UCA 31A-23a-111(5)(b)(i) – unqualified for a license.

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*” under date of December 29, 2014 which was received on January 5, 2015. (SEE Department Exhibit No. “D1”.)

7. That based on the preliminary facts as set forth in Paragraphs 1 through 6, immediately above, through means of an January 7, 2015 “*Notice of Conversion to Formal Proceedings and Notice of Hearing*”, *sua sponte*, mailed to the Applicant at her referenced address this present formal hearing was set for January 27, 2015 at 10:00 A. M. Mountain Time.

Operative Facts
(Paragraphs 8 -9)

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

9.a. i. The Applicant on November 15, 2012 was charged in the Sixth Judicial District, Manti-Sanpete County, State of Utah district court with:

- (A) False or fraudulent insurance claim, 76-6-521(1)(b), a 2nd Degree felony;
- (B) Attempted theft of services, 76-6-409, a 3rd Degree felony;
- (C) Communications fraud, 76-10-1801(1)(d), a 2nd Degree felony; and

(D) False or fraudulent insurance application, 76-6-521(1)(a), a Class “B” Misdemeanor;

ii. The Applicant on February 20, 2013 resolved such charges as follows:

- (A) dismissed without prejudice;
- (B) plead guilty to an amended “402 motion” Class :A: misdemeanor;
- (C) dismissed without prejudice; and
- (D) plead guilty to the original Class “B” misdemeanor;

iii. The Applicant was sentenced on May 29, 2013 in summary as follows:

- (A) 0-5 years, which was suspended;
- (B) 6 months in (County) jail, which was suspended;
- (C) fines totaling \$11,466.00 of which \$10,516.00 were suspended leaving aq balance due of \$950.00;
- (D) \$6,742.00 victim restitution;
- (E) \$1,200.00 investigative costs; and
- (F) placed on 36 months probation;

iv. The Applicant’s probation was terminated successfully on April 2, 2014.

(SEE Department Exhibit No. “D2”).

b. The Applicant had a civil judgment in the amount of \$1,622.54 entered against her on May 17, 2013 in the Fourth Judicial District, American Fork-Utah County, State of Utah district court which remains presently outstanding or more than sixty (60) days delinquent. (UCA 31A-23a-111(5)(b)(iv).

DISCUSSION-ANALYSIS

(Paragraphs 1-10)

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 December 18, 2014 letter of denial of the Applicant’s December 7, 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 or modification of such December 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 referenced matter(s) in the Sixth Judicial District, Manti-Sanpete County, State of Utah district court. While not minimizing the same such would appear to be as presented by the Applicant as a result of some miscommunication and or misunderstanding between herself, her insurance agent and an apparent later on the scene insurance investigator growing out of some water and related damage to a building owned or being bought by the Applicant contemporaneously during an apparent acrimonious divorce of the Applicant and her then husband.¹ (Alleged offenses apparently took place in a March through April 2010 timeframe as referenced in district court docket).

5. a. Giving the Applicant the benefit of the doubt and while like any person the Hearing Officer would and can empathize to some extent with the Applicant or anyone in her then familial position it is also clear the offense(s) are relatively current².

b. Of greatest impact though is the Applicant's initial charges dealt with alleged insurance fraud. While the Applicant's efforts at explanation of the circumstances might be labelled “reasonable” and even arguably understandable it is a hard pill to swallow to presume that the insurance fraud division as well as the criminal enforcement arm(s)

¹ Taking Applicant's clearly self-serving, but not challenged by the Department, testimony on face value such at most is only viewed by the Administrative Law Judge as “mitigation” at best.

² The typical “standard” for granting a license (even a probationary one) has customarily been no sooner than at least passage of five (5) years after conclusion of the proceeding and successful completion of one's sentence. It is noted that the present Applicant's probation was terminated on April 2, 2014.

of Sanpete County and or the Utah Attorney General's Office were mistaken in their it appears aggressive pursuit of the then instant matter.

6. Additionally the Applicant's failure to resolve the outstanding civil judgment for now over eighteen (18) months gives the Hearing Officer great concern as it did the state legislature when it enacted relatively binding direction via legislation concerning financial stability of licensed and prospective licensed individuals. While the statute(s) speak of "may" and permissive denial rather than absolute prohibitory "shall" disapproval language the history of the agency's regulation clearly frowns on financial instability as evidenced by the present Applicant and others in similar circumstances over the almost twenty (20) years the Hearing Officer has heard such matters.

7. What the Presiding Officer is faced with though even with a degree of empathy with the Applicant is the almost irrebuttable presumptive and **absolute** direction from the state legislature that an individual with such a *recent* criminal conviction and as well as *still to be fulfilled* civil court judgment obligation(s) no matter how reasonably explained and for whatever reason still not paid **cannot** be issued a state sanctioned license of any nature. Here such makes even a probationary license (which the Applicant inferentially plead for) let alone a full-fledged non-restrictive a "non-starter".³

³ The Hearing Officer in reviewing the civil matter and the Applicant's pro-offered argument that she simply missed notice of the civil judgment because of the criminal matter sentencing being in the same timeframe has to be looked at with a certain amount of skepticism. It appears the Applicant actively defended the civil matter from its October 9, 2012 filing through discovery, responses and pre-trial (though whether she had engaged counsel appears cloudy from the docket in this regards). From the docket appropriate notices appear to have been sent. Judgment was entered on May 17, 2013. The criminal pre-sentence report was ordered February 20, 2013 before the civil judgment. Sentencing in the criminal matter took place on May 29, 2013 after the civil judgment was entered. The Applicant was represented by counsel in the criminal matter.

8. 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 did not present herself as trustworthy. The Applicant freely and fully owned up to her past and current difficulties. It is by legislative *fiat* in the present instance to a large extent that handcuffs the Presiding Officer from doing anything but affirming the Department's December 18, 2014 denial.

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

10. 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 December 7, 2014 application was properly denied based on the record before the Department as well as the present direction from the 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 relatively recently resolved criminal proceeding as well as an outstanding civil judgment more than sixty (60) days delinquent creates an irrebuttable presumption as to Applicant's inability to meet the character qualification requirement⁴ 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 December 18, 2014 should be affirmed.

5. The Applicant's December 7, 2014 application for licensure as a "*Resident Producer Individual*" should be denied.

⁴ Additionally it is noted the Applicant initiated an *ex parte* telephone contact with the Hearing Officer on January 28, 2015, the day after the hearing, as to obtaining the fax number of the Hearing Officer which could have been obtained from the front desk or Department web site. While arguably innocent in large measure the Hearing Officer notes such for the record.

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 December 18, 2014 is affirmed; and
2. The Applicant's December 7, 2014 application for licensure as a "*Resident Producer Individual*" is **denied**.

DATED and ENTERED this 2nd day of February, 2015.

**TODD E. KISER,
INSURANCE COMMISSIONER**



A handwritten signature in cursive script, reading 'Mark E. Kleinfeld', is written over a horizontal line.

MARK E. KLEINFELD
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.