
STATE OF UTAH
DEPARTMENT OF INSURANCE

UTAH INSURANCE DEPARTMENT,

Complainant,
vs.

RICK C. GATES,

Respondent.

ORDER

Docket No. 2018-4001

Lisa Watts Baskin
Administrative Law Judge

This matter came before the undersigned on July 6, 2018, at 10:00 a.m., for an appeal of the Utah Insurance Department Commissioner's denial of applicant's Utah Resident Producer Individual License (hereafter "License Application") and denial of applicant's request for written consent to work in the insurance industry (hereafter "Written Consent Application"). Both written denials were issued on May 9, 2018. The applicant, Mr. Rick C. Gates (hereafter "Respondent"), appeared by and through counsel of record, Mr. Sean A. Monson. Ms. Helen Frohlich, Assistant Utah Attorney General, appeared for the Utah Insurance Department, hereafter ("Complainant"). The formal administrative hearing was held pursuant to the June 7, 2018 Order of Conversion to Formal Proceeding. The matter was recorded.

PROCEDURAL BACKGROUND

Respondent filed a License Application for a Resident Producer Individual License on February 22, 2018. Respondent also filed a Written Consent Application for the Commissioner

of Insurance (hereafter “Commissioner”) to waive the felony restriction and to receive official authorization to engage or participate in the insurance business as a Title Marketing Representative. Respondent’s Written Consent Application was made pursuant to The Violent Crime Control and Law Enforcement Act of 1994, 18 U.S.C. § 1033(e)(2) (hereafter § 1033) which must be referenced in the Commissioner’s consent.¹ On May 9, 2018, Respondent’s License Application and Written Consent Application were denied. On May 22, 2018, Respondent filed a timely request for an administrative hearing to contest the denials. On June 18, 2018, Respondent filed an Issues Brief. On June 26, 2018, Complainant filed Objections and Responses to the Issues Brief and identified its issues for the court’s determination. On July 2, 2018, both parties exchanged and filed Witness and Exhibits Lists.

On July 6, 2018, the formal administrative hearing was conducted. On July 23, 2018, both parties filed Post-Hearing Memoranda pursuant to court order.

LEGAL STANDARD

The parties must prove by a preponderance of the evidence that the Commissioner’s application of Utah Code § 31A-23a-111(5)(b)(xxiii) was proper or in error. Utah Admin. Code R.590-160-5(10). A preponderance of the evidence “means the greater weight of the evidence, or as sometimes stated, such degree of proof that the greater probability of truth lies therein.” *Handy v. United States Bank, NA.*, 2008 UT App 9, ¶ 25, 177 P.3d 80 (quoting *Wightman v. Mountain Fuel Supply Co.*, 302 P.2d 471, 473 n.5 (1956) (further citation omitted)).

¹ The boldface language to 18 U.S. Code describes §1033 which reads: “Crimes by or affecting persons engaged in the business of insurance whose activities affect interstate commerce.”

Based on the analysis of the foregoing, using the preponderance of evidence standard, weighing Complainant's exhibits and witness testimony and Respondent's testimony, witness testimony, letters of references, and exhibits, and reviewing the parties' Post-Hearing Memoranda, the undersigned makes the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. Respondent was convicted of a second degree felony on March 31, 2008, pleading guilty to Unlawful Dealing with Property by Fiduciary, in violation of Utah Code § 76-6-513.
2. On December 3, 2012, the court reduced the felony conviction by a stipulated 2-step 402 reduction, amending the conviction to a Class A misdemeanor.²
3. Respondent paid all of his restitution in full, satisfied outstanding tax liens, and completed his probation with Adult Probation and Parole and was transferred to Court Probation which he also completed.³
4. On February 22, 2018, Respondent, a resident of Utah, filed a written License Application with the Utah Insurance Department for a Resident Producer Individual License.

² Complainant's Ex. 1, pp. 011-012; Respondent Gates' Ex. D-3.

³ Respondent paid \$15,000 to Utah Insurance Department Fraud Division in full. Respondent paid \$125,965.42 to LandAmerica Insurance in full. In total, Respondent paid \$140,965.42 in restitution. He also satisfied two tax liens for \$536.86 and \$1,628.97. Complainant's Ex. 1, pp. 013-016; Respondent's Ex. D-4. Third District Court, State v. Gates, Case No. 071901195. Complainant's Ex. 1, pp. 017-030; Respondent's Ex. D-6. At the hearing, Respondent tearfully testified that he paid \$1,500 every month, delivering the money in person each month. R. at 8:30 – 9:36. Complainant's Ex. 1, p. 027; Respondent's Ex. D-6.

5. On an unidentified date, Respondent also filed a Written Consent Application with the Commissioner to engage in the business of insurance or participate in such business as a Title Marketing Representative pursuant to the federal provision U.S.C. § 1033(e)(2).⁴
6. On May 9, 2018, Complainant denied both applications *exclusively* on the statutory provision of Utah Code § 31A-23a-111(5)(b)(xxiii) which applied the federal provisions of Subsection 1033(e)(1) and (2).
7. The License Application denial letter stated: “Your application for a resident producer individual license in Utah dated February 22, 2018, is hereby **denied**. [Bold in original]. The denial is based on the following: As a result of having been convicted of a felony involving dishonesty or breach of trust and having no written consent from the insurance commissioner to work in the insurance industry, 18 U.S.C. § 1033 prohibits you from engaging in the business of insurance pursuant to Utah Code Ann. § 31A-23a-111(5)(b)(xxiii).”
8. The same denial letter also stated the Respondent could request a review of the denial decision: “This application denial constitutes an order of the Insurance Commissioner in an informal agency determination pursuant to Utah Administrative Procedures Act (Utah Code. Ann. §§ 63G-4-101, et seq.) and shall become final fifteen (15) days after mailing, unless you request an administrative hearing to contest this determination.” [Emphasis in original].

⁴ There is no record or exhibit of the Respondent’s Written Consent Application, the date of such application, or any documents regarding the procedures, timelines, or a questionnaire provided by Complainant or responses provided by Respondent. Respondent testified that he made an earlier request for written consent in 2013 which was denied. R. at 14:36 – 15:48.

9. The same denial letter provided format and timelines for a request for review. It stated: “Should you request a hearing, the request must be in writing, signed by the party making the request, and must be received by the department within fifteen (15) days from the mailing date of the denial letter.” [Emphasis in original].
10. Respondent filed his timely request for hearing on May 22, 2018.
11. Utah Code § 31A-23-111(5)(a) provides authority to the Commissioner to revoke, suspend, or deny a license, assess a forfeiture, or take a combination of the authorized actions.
12. Utah Code Ann. § 31A-23-111(5)(b) provides the grounds for these sanctions when the Commissioner finds that the licensee: (xxiii) violates or permits others to violate the federal Violent Crime Control and Law Enforcement Act of 1994, 18 U.S.C. Sec. 1033 and therefore under 18 U.S.C. Sec. 1033 is prohibited from engaging in the business of insurance.”
13. On May 9, 2018, the Commissioner issued a second denial letter and Order on the same grounds, denying the Written Consent Application. The denial letter read:
“Your application to engage in the business of insurance was referred to the Utah Insurance Commissioner because of your having been convicted of a felony involving dishonesty or breach of trust. The federal Violent Crime Control and Law Enforcement Act of 1994, 18 U.S.C. § 1033, prohibits persons with such conviction from engaging in the business of insurance or participating in such business. The federal law lifts this prohibition for persons who have written consent to engage or participate in the business of insurance from an authorized insurance regulator.”

14. In this denial letter, the Director of Producer Licensing Division explained the written consent process and referred to an attached Consent Denial form signed by the Commissioner.⁵
15. The same denial letter explained, “After having reviewed the information supplied by you,⁶ and having reviewed the results of investigations by the Utah Insurance Department, as well as input received from an internal executive review committee, the Utah Insurance Commissioner has decided not to grant you the written consent required by 18 U.S.C. § 1033(e)(2) and to deny you permission to engage in the business of insurance or to participate in such business. Attached is a copy of the Consent Denial form that was executed by the Commissioner. Please be aware that since you do not have the required written consent, it would be a felony for you to engage or participate in the insurance business.”

ANALYSIS

JURISDICTION

Complainant argued that Presiding Officer, as Commissioner’s designee, lacks jurisdiction because there is no state law conferring a right to review the Commissioner’s written consent denial. In Complainant’s Post-Hearing Memorandum, Complainant argued that: 1) the Presiding Officer cannot issue *a decision contrary* to a decision that the Commissioner has already made; and 2) the Commissioner’s decision under the federal law does not fit the review framework provided under Utah Administrative Procedures Act (“UAPA”), Title 63G, Chapter 4

⁵ Complainant’s Ex. 3, p. 033-034; Respondent’s Ex. D-8, D-9.

⁶ The Respondent’s application for written consent and related materials referenced herein were not provided to the court as exhibits although testified to and referenced in this correspondence.

of the Utah Code. Complainant posited that the authority to render written consent under 18 U.S.C. § 1033 (e)(2) is limited to “any insurance regulatory official authorized to regulate the insurer,” i.e., the Commissioner alone, equipped with the necessary expertise. Hence, if the Presiding Officer were to decide when an applicant could reengage in the insurance industry, then the federal requirement that the “regulatory official” makes the decision, would not be satisfied.

One blanches at the sweep of the interpretation by Complainant that a Presiding Officer cannot issue a decision contrary to the Commissioner’s. Such a position, if accepted, would immunize any “actions” of the Insurance Department, which are predicated on the Commissioner’s decision and delegated under his authority, from review. Utah Administrative Rule R590-160-2 “establishes procedures governing the designation and conduct of adjudicative proceedings before the insurance commissioner *or the commissioner’s designee*. [Emphasis added]. The reasonable premise for this administrative rule is that adjudicative proceedings may occur pursuant to due process and in response to the actions of the commissioner to administer, implement, and enforce the Utah Insurance Code, Title 31A. The Commissioner’s authority to act is provided throughout the insurance code and fleshed out in administrative rules. See Utah Code §§ 31A-1-105, 31A-2-201, and 31A-2-308. A presiding officer as a designee must review such authorized actions upon request from a respondent.

Furthermore, the Presiding Officer’s authority to adjudicate this matter falls squarely within the statutory framework of UAPA. The provisions of UAPA as provided in Utah Code § 63G-4-102(1)(a) and (b) “apply to every agency of the state and govern . . . (a) state agency action that determines the legal rights, duties, privileges, immunities, or other legal interests of

an identifiable person, including agency action to grant, deny, revoke, suspend, modify, annul, withdraw, or amend an authority, right, or license; and judicial review of the action.”

The statute by definition authorizes review of agency actions. UAPA defines an “agency” to mean a: “board, commission, **department**, division, **officer**, council, office, committee, bureau, or other administrative unit of this state, **including the agency head, agency employees, or other person acting on behalf of or under the authority to the agency head. . . .**” [Bold added].

In the letter to Respondent denying his insurance license application, the Complainant stated that its denial was an “agency determination pursuant to Utah Administrative Procedures Act” and provided instructions to Respondent about how to request an administrative hearing in response to the denial.⁷ It is disingenuous for Complainant to deny Respondent’s License Application, based upon its interpretation of 18 U.S.C. § 1033, then provide instructions regarding how to seek a review hearing, and then, after the request is filed, claim that the Presiding Officer does not have jurisdiction to hear the appeal.

Complainant suggests an alternative remedy and argument if jurisdiction is lacking, i.e., stating the Respondent suffers no harm because he can reapply for written consent at any time. Respondent Gates testified that he applied for written consent in 2013, but was denied the waiver because he still owed restitution of \$9,200 to the Department. He testified that he understood if he paid off the remaining restitution, satisfied tax liens, and addressed other issues as identified by the Commissioner, which respondent did, that respondent should reapply--which he did. R. at 14:36-15:48; 49:18-52:07. Even if Respondent were to engage in the Written Consent

⁷ Findings of Fact, Nos. 7-9; Complainant’s Ex. 7, p. 031-032; Respondent’s Ex. D-7.

Application process again, there is a lack of procedural uniformity to which no evidence was submitted to prove otherwise.

The Presiding Officer has jurisdiction to review the Commissioner's action and decision to deny the License Application and Written Consent Application. Therefore, jurisdiction is proper.

COMPLAINANT ERRED IN ITS APPLICATION OF 18 U.S.C. § 1033

The Commissioner denied the Respondent's application for insurance based upon the grounds that Respondent had been convicted of a criminal felony or had committed a separate crime under § 1033 -- and then engaged in the insurance business. Respondent argues that the Commissioner misapplied the law.

A straightforward analysis will determine whether or not a state felony conviction alone can prohibit licensure under 18 U.S.C. § 1033. One, was Respondent convicted of a felony involving dishonesty or a breach of trust? If yes, did Respondent engage in the insurance of business post-conviction? If not, § 1033 does not apply. Two, was Respondent convicted of a separate offense under §1033? If yes, did respondent engage in the business of insurance post-conviction? If not, §1033 does not apply. Section 1033 does not prohibit licensure, with or without written consent, because the statute requires both a felony conviction or other distinct conviction under the discrete §1033 and proof that the Respondent engaged in the insurance business after the conviction.

Utah Code Ann. § 31A-23a-111(5)(b)(xxiii) authorizes the denial of a license if the licensee violates or permits another to violate § 1033. The Utah statute reads: "The commissioner may take an action described in Subsection (5)(a) if the commissioner finds that

the licensee: (xxiii) violates or permits others to violate the federal Violent Crime Control and Law Enforcement Act of 1994, 18 U.S.C. Sec. 1033 and therefore under 18 U.S.C. Sec. 1033 is prohibited from engaging in the business of insurance.”

The federal provision, 18 U.S.C. Sec. 1033 (e)(1)(A), sets forth the following elements:

(1) “Any individual who has been convicted of any criminal felony involving dishonesty or a breach of trust, **or** has been convicted of an offense under this section, **and** who willfully engages in the business of insurance whose activities affect interstate commerce or participates in such business, shall be fined as provided in this title or imprisoned not more than 5 years, or both.” (Bold added].

(2) A person described in paragraph (1)(A) may engage in the business of insurance or participate in such business if such person has the written consent of any insurance regulatory official authorized to regulate the insurer, which consent specifically refers to this subsection.”

First, Respondent was convicted of a second degree felony in 2008 involving dishonesty or breach of trust which occurred on December 29, 2004. Findings of Fact, ¶ 1. Respondent’s conviction was reduced to a Class A misdemeanor in December 2012. Findings of Fact, ¶2. As conditions of his sentence, Respondent paid \$15,000 to Utah Insurance Department Fraud Division in full. Respondent paid \$125,965.02 to LandAmerica Insurance in full. In total, Respondent paid \$140,965.42. He also satisfied tax liens and completed two rounds of probation. Findings of Fact, ¶ 3. Third District Court, State v. Gates, Case No. 071901195.

At the instant hearing on July 6, 2018, Respondent humbly and emotionally testified that he paid the restitution of \$1,500 each month, by installment, delivering the money in person, from April 25, 2008 until paid in full to completely satisfy his debt under the law. R. at 8:30 –

9:36. Respondent successfully completed his probation of 36 months with Adult Probation and Parole and then successfully completed his court probation in 2011. Complainant's Ex. 1, p. 028, Respondent's Ex. D-6.

Second, Respondent did not act as an individual "who willfully engage[d] in the business of insurance whose activities affect interstate commerce or participate[d] in such business." To quote from the simply-stated argument of Respondent's counsel, "If an individual is convicted of a felony involving dishonesty or a breach of trust but does not thereafter engage in the business of insurance, then he or she has not violated Section 1033." Respondent's Post-Hearing Memorandum, at 8. Respondent testified that he has not engaged in the insurance business since the date of his conviction and those facts are undisputed. R. at 9:50- 12:56. No evidence or testimony was provided by Complainant to show any improper engagement post-conviction.

The facts are undisputed that Respondent was convicted of a second degree felony for violation of Utah Code § 76-6-513, Unlawful Dealing With Property By Fiduciary. Nevertheless, the facts are undisputed that Respondent was not convicted of any offense under § 1033. The facts are also undisputed that Respondent did not willfully engage in the business of insurance post-conviction. Therefore, the Commissioner erred in determining Respondent's second degree felony conviction, in and of itself, summarily equated to a violation under § 1033. This misapplication of the statute demands correction.

Due to the Findings of Fact and Conclusions of Law, the remaining issues require no discussion. Complainant did not identify the basis for denial pursuant to Utah Code § 31A-23a-111 (5(b)(xiv)(A) or (B)).

Based upon the foregoing Findings of Fact and Analysis, and for good cause, the Presiding Officer enters the following:

CONCLUSIONS OF LAW

1. The Insurance Commissioner has jurisdiction over the parties and this formal proceeding pursuant to Utah Code §§ 31A-1-105, 31A-2-201, 31A-2-308, and 31A-23a-111.
2. The Insurance Commissioner has legal authority to deny or grant licensure pursuant to Utah Code § 31A-2-308.
3. The Presiding Officer has authority to adjudicate this matter pursuant to Utah Code § 63G-4-201 through 203 and Utah Admin. Rule r.590-160-1 et seq. Findings of Fact, ¶¶ 9, 10.
4. Respondent was convicted of a second degree felony for violation of Utah Code § 76-6-513, and therefore subject to provisions of Utah Code § 31A-23a-111(5)(b)(xxiii) which utilized the federal statute, The Violent Crime Control and Law Enforcement Act of 1994, 18 U.S.C. § 1033(e) (1) and (2).
5. Complainant erred in its application of The Violent Crime Control and Law Enforcement Act of 1994, 18 U.S.C. § 1033(e) (1) and (2) for its failure to satisfy the provisions of Subsection (e)(1) that required both a conviction *and* willful engagement in the business of insurance that affects interstate commerce or participation in such a business. Findings of Fact, ¶¶ 6, 7, 8, 13, 14, and 15.

6. Respondent was wrongfully denied his License Application. Findings of Fact, ¶¶ 6, 7, 8, 13, 14, and 15.
7. Respondent was wrongfully denied his Written Consent Application. Findings of Fact, ¶¶ 6, 7, 8, 13, 14, and 15.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law and for good cause, the Presiding Officer enters the following Order:

1. The denial of Respondent's License Application for Resident Producer Individual Insurance License, dated May 9, 2018, is REVERSED.
2. The denial of Respondent's Written Consent Application, dated May 9, 2018, is REVERSED.
3. Respondent is GRANTED the Resident Producer Individual Insurance License to engage in the business of insurance or participate in such business as a Title Marketing Representative.

Dated this 24th day of August, 2018.



Lisa Watts Baskin
Administrative Law Judge
Utah Insurance Department
State Office Building, Room 3110
Salt Lake City, UT 84114

AGENCY REVIEW

To appeal this Order, a party must file a petition for agency review within 30 days from the date of this Order. Petitions for agency review shall be filed in accordance with Utah Code Ann. §§ 63G-4-301 and filed with the commissioner in writing or electronically at uidadminscases@utah.gov. Failure to file a petition for agency review is a failure to exhaust administrative remedies and will result in the order becoming final.

CERTIFICATE OF SERVICE

The undersigned certifies that on this date a true and correct copy of the foregoing

ORDER was electronically mailed to:

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DATED this 24th day of August, 2018.



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