
STATE OF UTAH
DEPARTMENT OF INSURANCE

DAVID SMILEY,

Petitioner,

vs.

UTAH INSURANCE DEPARTMENT,

Respondent.

**ORDER DENYING
REQUEST FOR AGENCY ACTION RE:
18 U.S.C. § 1033 (e)(2)**

Docket No. 2018-4041

The Utah Insurance Commissioner has reviewed the Administrative Law Judge's Recommended Order Request for Agency Action Re: 18 U.S.C. § 1033(e)(2) in this proceeding. Adopting in part and rejecting in part that recommendation, the Commissioner enters the following Findings of Facts, Conclusions of Law and Order.

FINDINGS OF FACT

1. On November 2, 2002, Petitioner entered a plea of guilty to aggravated theft in the first degree, a Class B Felony, in Oregon.¹ He was approximately 46 years old. He was ordered to pay \$32,374.13, complete 100 hours of community service, and complete two-year probation. He completed community service (Boy Scouts of America), all the conditions of probation, and paid the fines and restitution in full. Probation was terminated on October 14, 2004.

2. On November 27, 2002, Petitioner entered a plea of guilty to misdemeanor harassment in Oregon.² On December 19, 2002, Petitioner was ordered to complete drug and alcohol

¹ Respondent Ex. 1, Oregon v. Smiley, (Cir. Court Washington County), Case No. C022556CR, November 2, 2002.

evaluation and follow any related recommendations. He was placed on probation for 24 months. The court revoked his Deferred Sentencing Program for breaching the no contact agreement. He left the state shortly thereafter. Petitioner testified that he did not attempt to expunge the misdemeanor offenses and a Class B Felony in Oregon cannot be expunged. R. at 13:51-13:55.

3. On March 17, 2003, Petitioner entered a plea of guilty to Class B misdemeanor Driving under the Influence of Alcohol or Drugs in Utah.³ Petitioner was assessed fines and after testing for alcohol abuse which was deemed nonexistent, no further corrective action was needed.⁴ He was placed on probation for three years and served no jail time due to a suspended sentence.

4. In a December 4, 2013 reference letter, Guy Morris of Morris and Dredge, wrote: "As a CPA of 35 years I have seen lots of accountants and controllers. Dave [Smiley] is one of the best and you could not go wrong in hiring him."

5. In a December 4, 2013 reference letter, Dan Burt wrote: "Dave [Smiley] is extremely highly skilled. Dave made a pivotal difference in allowing AWD to stay in business, and he did an excellent job in managing Pool Cover Specialists finances. Dave is among the elite 99 % percentile [sic] of both work ethic and ability as a financial controller. Dave is not only a hard worker, but Dave is dedicated enough to analyze problems on an individual basis."

² Respondent Ex. 1, Oregon v. Smiley, (Cir. Court Multnomah County), Case No. 0211-52981, December 19, 2002.

³ Respondent Ex. 1, Spanish Fork City v. Smiley, Fourth District Court, Case No. 035300562, March 17, 2003.

⁴ Respondent Ex. 1, Second Letter from Mr. Smiley to Mr. Overstreet, undated. Respondent said he voluntarily attended some AA and substance abuse meetings "sponsored by my church." "I subsequently quit all drinking of any kind and at present still do not. Further, I started regular church meeting attendance. Both not drinking and attending church helped me immensely through both a difficult time then and since."

6. Petitioner has worked primarily as a self-employed bookkeeper, a CFO for Chris and Dicks, and Gallina Accounting. R. at 22:22-25:08.

7. Petitioner believes that he was “let go” from his job at Gallina Accounting because of his criminal felony which was not investigated or disclosed until Gallina merged with another company. R. at 25:05-25:08.

8. Petitioner seeks to work as a bookkeeper for captive insurance managers. He described his work as entry level management with captive insurers which would include management, audits, but no tax return preparation. He did not anticipate his signature on any bank accounts. He testified that he hopes to become a captive manager someday. R. at 11:24-12:32; 20:38-21:57.

9. Petitioner did not submit in this proceeding “a sworn declaration from [his] anticipated employer that: (a) describes in detail the petitioner’s employment duties; and (b) contains the employer’s unequivocal opinion that the petitioner’s performance of those duties does not constitute a threat to the public.”

10. Petitioner complied with the requests for information regarding the 16-year-old felony conviction to the best of his ability and explained the context of his guilty plea in writing.⁵

⁵ Respondent Ex. 1, First Letter from David Smiley to Utah Insurance Department, undated. Smiley described his difficult financial circumstances such as divorce, loss of business partner, and loss of his business, and explained: “I chose to forge signatures on company checks to myself. I tracked each check in the form of photo copies and a ledger with every intention of returning those funds immediately. Fortunately, my fraud was discovered. The discovery was one check but upon discovery, I presented them with the check copies and ledger detailing my error in judgements. I say fortunately because the discovery led to stopping the fraud that was then and continues to be a breach to myself, my then employer, his employees, my children, family, fellow church members and now past and future employers.” He is a self-employed bookkeeper now but states he “would very much enjoy an opportunity to work with some friends in the insurance industry.”

CONCLUSIONS OF LAW

1. The Commissioner has jurisdiction over the parties and this formal proceeding pursuant to Utah Code §§ 31A-1-105 and 31A-2-201.
2. The Commissioner has legal authority to deny or grant written consent to engage or participate in the business of insurance pursuant to Utah Code § 31A-2-308 and 18 U.S.C. § 1033(e)(2).
3. The Presiding Officer has authority to conduct proceedings in this matter and recommend a decision to the Commissioner pursuant to Utah Code § 63G-4-201 through 205 and Utah Admin. Rule R590-160-1 et seq. and proposed Rule R590-278-1 et seq.
4. Petitioner was convicted of a felony involving dishonesty or breach of trust and is therefore prohibited from engaging or participating in the business of insurance unless the Commissioner consents in writing that he may do so. 18 U.S.C. § 1033 (e)(1) and (2). See, proposed Utah Admin. Rule R590-278-1 et seq.
5. Petitioner waived any objection to the application of the proposed administrative rule, R590-278-1 et seq., in this matter.
6. Petitioner's request for written consent "may be granted if, in the commissioner's sole discretion, a preponderance of the evidence shows that the petitioner is trustworthy to engage or participate in the business of insurance." Utah Admin. Code R590-278-4.

7. For the following reasons, Petitioner failed to prove by a preponderance of the evidence that he is trustworthy to engage or participate in the business of insurance.

A. A primary factor in determining trustworthiness is the “nature [and] severity” of the petitioner’s crimes. Utah Admin. Code R590-278-4. Here, Petitioner was convicted of first degree aggravated felony theft. He stole tens of thousands of dollars from a company when he was 46 years of age – a crime far from a youthful indiscretion. In Utah, this crime is so severe that, in order to protect the “public interest”, it cannot be expunged. Utah Code §§ 77-40-107(8)(e), 77-40-105(2)(a)(ii). Because it would be contrary to the public interest to expunge Petitioner’s conviction, it would similarly be contrary to the consumer interest to overlook that conviction and allow Petitioner to engage or participate in the insurance business. A person should not work in the insurance business if his criminal record is so troublesome that the legislature has to protect the public by making sure that the record cannot be expunged.

B. The severity of Petitioner’s crime was confirmed by his former employer, Gallina Accounting. Petitioner apparently did not disclose his theft conviction to Gallina, and Gallina’s successor terminated him when the conviction came to light. If the conviction disqualified Petitioner from doing accounting work, then it should also preclude him from engaging in the business of insurance.

C. Petitioner’s references are not sufficient to rebut the severity of his crime. His reference letters are five-years old. They say that Petitioner is a skilled accountant and works hard, traits that are at best marginally related to the question of trustworthiness. Petitioner knew the importance of current references concerning trustworthiness because the application

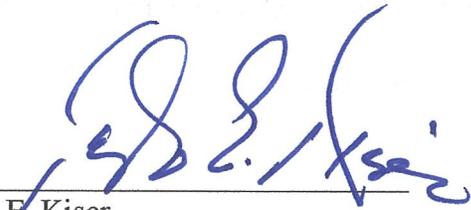
specifically instructed him to provide a “sworn declaration” from his employer “that: (a) describes in detail [his] employment duties; and (b) contains the employer’s unequivocal opinion that [Owen’s] performance of those duties does not constitute a threat to the public.” (*Finding of Fact No. 9*) He should have been able to produce this document because he testified that he wants to work with his friends in the captive insurance industry. His failure to do so creates an inference that Petitioner either did not want to request a current reference concerning trustworthiness or requested but was unable to obtain one.

D. Because Petitioner speculates about where he might work, it is impossible to know the roles or roles that he may ultimately fill in the insurance industry. Knowing the nature of the Petitioner’s insurance employment is critical to determining the scope of consent if it is given. Best practice guidance from the National Association of Insurance Commissioners makes this clear: “The written consent should also be made conditional upon the applicant remaining in the approved position with its associated insurance activities considered not to be a risk or threat to insurance consumers or the insurer.” Here, Petitioner has not met his burden of proof because he provided no information about his anticipated position in the insurance industry (*Finding of Fact No. 9*).

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, and for good cause, it is ordered that Petitioner's Request for Agency Action Re: 18 U.S.C. § 1033(e)(2) is denied.

Dated: January 2, 2019



Todd E. Kiser
Utah Insurance Commissioner
Utah Insurance Department
State Office Building, Room 3110
Salt Lake City, UT 84114

RIGHT TO JUDICIAL REVIEW

This Order Denying Request for Agency Action Re: 18 U.S.C. § 1033 (e)(2) is a final agency action resulting from a formal adjudicative proceeding. To seek judicial review, you must file a petition for review of agency action with the appropriate appellate court in the form required by the rules of the appropriate appellate court. Utah Code § 63G-4-403. The petition must be filed within 30 days after the date that this Order is issued. Utah Code § 63G-4-401(3)(a). Failure to file a petition within the 30-day time limit may constitute a waiver of any right to seek review.