
STATE OF UTAH
DEPARTMENT OF INSURANCE

GARY ARMSTRONG OWEN,

Petitioner,
vs.

UTAH INSURANCE DEPARTMENT,

Respondent.

**FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER DENYING
REQUEST FOR AGENCY ACTION RE:
18 U.S.C. § 1033 (e)(2)**

Docket No. 2018-4044

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. Petitioner filed a false police report regarding a truck theft. As a result of that crime, he pled guilty in 1992 to a felony of false pretenses over \$100 and to a misdemeanor. He was approximately 30 years old at the time. Petitioner's Ex. 1, Criminal Tracking Sheet, Incident Date 11/08/1991; People v. Owen, Michigan District Court, Judicial District No. 48, County of Oakland, Case No. 91-112535-FH, November 22, 1991.

2. Petitioner's sentence consisted of restitution and probation. He paid \$16,154 to the Michigan court and completed two years' probation. R. at 17:50-18:30; 19:55-20:05.

3. Petitioner was not aware that he was on probation and did not complete probation to his recollection. He was unaware fully of this criminal history because it was handled discreetly by his lawyer. He wasn't even aware of his criminal conviction until this year when the Department reminded him of it. R. 14:40 – 15:40.

4. After pleading guilty, Petitioner left Michigan and worked in the auto dealership industry in numerous western states including California, Washington, Wyoming, Montana, Colorado, and Utah.

5. Petitioner retired from managing dealerships in 2016 after engaging in many years of bonded activity and passing numerous executive level background checks.

6. Petitioner testified that his skill set is still relevant and his expertise could be utilized if he were to reenter the workforce in the finance office of an auto dealership. He worked for a Ken Garff auto dealership until he was recently recruited to work at Mike Hale Acura. Among his duties at Mike Hale, he would sell GAP protection and Life, Accident, and Health insurance policies in connection with vehicle sales. R. at 24:20-24:50.

7. Petitioner submitted positive letters of recommendation from employers, collaborators, and customers that were written at the time of the criminal plea in 1992.

8. Petitioner submitted more recent letters showing his positive community service as a volunteer coach to local sports teams and as Santa Claus at Christmas events.

9. Petitioner also provided a November 14, 2018 reference letter from Dr. Hilary Rosenthal, his girlfriend at the time of his conviction. It reads: "I am aware of the circumstances requiring Gary Owen's appearance before the Insurance Board on November 15, 2018." She

emphasized her knowledge of him since 1988. She identified his "exemplary judgment and character" and his value as an "asset and mentor" whenever she needed counsel and guidance "to this day." Petitioner's Exhibit 2.

10. Petitioner did not submit reference letters from the Ken Garff or Mike Hale dealerships or from another recent employer.

11. Petitioner has had no other criminal record or conviction before or since 1992.

12. At the hearing in this matter, Petitioner agreed that the provisions of Utah Admin. Code R590-278-1 et seq. would govern even though the rule would not take effect until after the hearing. R. at 3:20-3:30.

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 to recommend to the Commissioner Findings of Fact, Conclusions of Law and an Order pursuant to Utah Code § 63G-4-201 through 205 and Utah Admin. Code R590-160-1 et seq. and proposed R590-278-1 et seq.

4. Petitioner waived any objection to the application of proposed R590-278-1 et seq. in this matter.

5. 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. Code R590-278-1 et seq.

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. Discretion is properly exercised where there is any evidentiary basis for a decision. *USA Power, LLC v. PacifiCorp.*, 2016 UT 20, ¶ 75, 372 P.3d 629.

8. 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.

9. Petitioner bears the burden of proof in this proceeding.

10. For the following reasons, Petitioner failed to prove by a preponderance of the evidence that he is now trustworthy to engage or participate in the business of insurance in spite of his felony conviction involving dishonesty.

A. Petitioner's reference letters are not persuasive. The Commissioner must assess trustworthiness to engage in the business of insurance, so the issue here concerns Petitioner's

current level of honesty from a business, not personal, perspective. The letters submitted in this case, by contrast, do not address that issue:

- Letters written at the time of Petitioner’s conviction in 1992 are not relevant to Petitioner’s honesty today.
- Letters that state that Petitioner was honest in 1992 are not credible because Petitioner was convicted of a felony involving dishonesty in 1992.
- The community service letters and the letter from Petitioner’s ex-girlfriend reflect on personal relationships and are therefore only marginally relevant to the issue here – honesty in business.

B. In addition to providing reference letters, Petitioner testified that he worked in positions that required him to be bonded or to pass a background check. On the surface, this information could be an indicator of trustworthiness in business. However, on closer examination, the information is neutral – it doesn’t tip the scales either way. Because petitioner was not fully aware of his criminal history – he didn’t even know he was on probation – it is as likely as not that he never disclosed the convictions to the bonding companies and employers who investigated him. And because he never worked in Michigan after his conviction, a search of court dockets in the states where he did work would not have revealed the conviction. Simply put, the evidence indicates that the bonding companies and employers were never aware of Petitioner’s convictions when they assessed him for trustworthiness. For those assessments to carry weight, there must be proof in the record that the convictions were disclosed. Because the record lacks such proof, the bonding and background checks carry little weight.

C. The Department informed Petitioner of a persuasive method of proving honesty in a business environment. The form petition that Petitioner completed 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 [Petitioner’s] performance of those duties does not constitute a threat to the public.” In spite of this instruction, Petitioner did not submit this business-focused reference – nothing from Garff, Hale, or any other employer in recent history.

D. Petitioner’s failure to produce thee references creates a negative inference – either he did not believe he could obtain one or the employer refused to give one. *Cf. Burns v. Cannondale Bicycle Co.*, 876 P.2d 415 (Utah App. 1994) (stating that if a person fails to provide requested evidence the court may infer that the evidence is adverse to that party). In either case, the negative inference overcomes whatever marginal impact the community service and ex-girlfriend’s letters have.

E. The passage of 27 years since Petitioner’s last criminal conviction is a factor that weighs in favor of trustworthiness. But because dishonest business people do not necessarily have criminal records, the absence of a conviction is worth little weight.

F. Based on this evidence, Petitioner has not proved that he is now trustworthy to engage or participate in the business of insurance in spite of his felony conviction involving dishonesty:

- The reference letters lack timeliness, credibility, or business relevance.

- The background checks by employers and bonding companies are minimally persuasive because the evidence indicates that his conviction was not disclosed or considered.
- The absence of other conviction also carries minimal weight.
- Outweighing this meager evidence to support Petitioner is his failure to submit a sworn statement from Garff, Hale, or another recent employer. This statement would have provided the timely, business-focused information needed to assess Petitioner's request and to provide an assurance of trustworthiness. Because the statement was not provided, and because Petitioner offered no excuse for this failure, the fair inference is that the statement would have been negative.

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: 2nd day of January, 2019.



Todd E. Kiser
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