STATE OF UTAH

DEPARTMENT OF INSURANCE

MICHAEL PALMER, Petitioner, vs. **UTAH INSURANCE DEPARTMENT,** Respondent.	**ORDER** Docket No. 2019-4072 Lisa Watts Baskin Administrative Law Judge

This matter came before the undersigned on May 1, 2019, on a Motion for Summary Judgment, pursuant to Rules 7 and 56 of the Utah Rules of Civil Procedure. Petitioner, Mr. Michael Lynn Palmer, (hereafter "Mr. Palmer"), appeared by and through his counsel, Mr. Jared L. Anderson, from the firm Seiler, Anderson, Fife & Marshall, LC. Respondent, Utah Insurance Department, (hereafter "the Department"), appeared by and through counsel, Ms. Helen Frohlich, Assistant Attorney General.

PROCEDURAL BACKGROUND

On January 17, 2019, Petitioner Palmer filed a Request for Agency Action Re: 18 U.S.C. § 1033(e)(2), (hereafter "§ 1033"), seeking *written consent* from the Utah Insurance Commissioner (hereafter "the Commissioner") to engage or participate in the business of insurance. (Emphasis added). The § 1033 Request was made pursuant to Utah Code § 63G-4-201(3) and Utah Admin. Code R590-278, which rule became effective on December 24, 2018.

On March 22, 2019, the Department filed a Motion for Summary Judgment and Supporting Memorandum (hereafter "MSJ"), seeking the effective dismissal of the § 1033 Request. On April 19, 2019, Mr. Palmer filed his Memorandum Opposing the MSJ. On April 26, 2019, the Department filed its Reply Memorandum to the Opposition. The MSJ hearing was held as a formal proceeding. The matter was recorded.

FINDINGS OF FACT

1. Mr. Palmer's license expired and lapsed on October 31, 2014. His license was not revoked.[1]
2. Mr. Palmer applied for a resident producer individual license on October 9, 2017.
3. The Department denied Mr. Palmer's application on October 25, 2017.
4. On November 13, 2017, Petitioner requested a hearing to challenge the Department's denial of his license application.
5. A formal administrative hearing was held on January 10, 2018.
6. On April 12, 2018, the Department's denial of Mr. Palmer's license application was upheld on numerous grounds: Utah Code Subsections 31A-23a-111(5)(b)(i) (unqualified in general); (iv) (failure to pay final judgment); (xiv) (felony conviction); (xxi) (child support obligation in arrears); (xxii) (failure to pay state income tax); (xxiii) (18 U.S.C. §1033 – felony conviction); and 31A-23a-107(2)(a)(not met character requirement of competence and trustworthiness).[2] No specific finding was made regarding written consent.

---

[1] Declaration of Michael Palmer, ¶ 5, April 19, 2019. There is no evidence that Mr. Palmer violated any insurance laws per se during this period of time.

[2] Order, Utah Insurance Department v. Michael Lynn Palmer, Docket No. 2017-104 LC (April 12, 2018).

7. On December 24, 2018, the Department made effective a new administrative rule, Utah Admin. Code R590-278-1 et seq., requiring a license applicant to first apply to the Utah Insurance Commissioner pursuant to § 1033 before applying for a license pursuant to Utah Code § 31A-23a-111.[3]
8. On January 17, 2019, Mr. Palmer filed his Request for Agency Action under § 1033.
9. In the § 1033 Request, Mr. Palmer submitted several new supporting documents.[4]

ANALYSIS

The Department argues that summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, citing Salt Lake City Corp. v. Big Ditch Irrigation Co., 2011 UT 33, ¶ 18, 258 P.3d 539. The Department also argues that the only issue of material fact in this matter was whether or not Mr. Palmer is trustworthy--which was determined by this court's Order upholding the license application denial. Therefore, the Department invokes the doctrine of issue preclusion, as set forth in Fowler v. Teynor, 2014 UT App 66, 323 P.3d 594.

Mr. Palmer argues that summary judgment is inappropriate in the instant case. Mr. Palmer cites to authority that the courts "view the facts and inferences to be drawn therefrom in

---

[3] On June 16, 2019, Utah Admin. Code R590-281, License Applications Submitted by Individuals Who have a Criminal Conviction, became effective. This rule explicitly requires a license applicant who is a convicted felon of crimes of dishonesty or breach of trust to obtain written consent *first* before he or she may apply for a license pursuant to Utah Code § 31A-23a-105. It also sets specific time periods to elapse from conviction date or sentence completion date, whichever has occurred last, before a license applicant "is eligible to apply." This new rule identifies the flux in the administrative law herein.

[4] Correspondence, Palmer's Request Letter to the Commissioner, submitted January 17, 2019; Correspondence, Jared Nathan Watts's Reference Letter to the Commissioner, submitted January 17, 2019; Correspondence, Kyle Palmer's Reference Letter to the Commissioner, submitted January 17, 2019; Correspondence Mikenna McLachlan's Reference Letter to the Commissioner, dated January 2, 2019; Correspondence, Ty Empey's Reference Letter, Steps Recovery Center, dated January 9, 2019; Orders Granting Motion for Conviction of Lower Degree Offense, In Re: Michael L. Palmer, Cases No. 131100984 and 13110411, Fourth District Court - American Fork District, dated October 2, 2018 and August 13, 2018, respectively.

the light most favorable to the nonmoving party." Marziale v. Spanish Fork City, 2017 UT 51, ¶ 8. Mr. Palmer argues issue preclusion is not applicable because the premise "that a controversy should be adjudicated only once" can apply only when the second adjudication would go to "the same facts under the *same* rule of law."[5] (Emphasis added). Mr. Palmer relies heavily upon Salt Lake Citizens Cong. v. Mountain States Tel. & Tel. Co., 846 P.2d 1245, 1251 (Utah 1992). Focusing on the new § 1033 procedure and articulated criteria therein in R590-278-4, Mr. Palmer argues the § 1033 procedure and administrative rule do not address the identical issue as was addressed in the Order on April 12, 2018. He also argues that the same Order was not a final judgment on the merits.[6]

SUMMARY JUDGMENT

The Department requests the court to declare summary judgment and effectively deny Mr. Palmer's § 1033 Request to the Commissioner for written consent to engage or participate in the business of insurance. The Department posits that Mr. Palmer's lack of trustworthiness has been litigated and adjudicated fully in the April 12, 2018 Order, which upheld the denial of his insurance license, and therefore, there are no issues remaining for the Commissioner to decide. Summary judgment is appropriate only when "there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law," and the court "views the facts and inferences to be drawn therefrom in the light most favorable to the nonmoving party." Marziale v. Spanish Fork City, 2017 UT 51, ¶ 8, 423 P.3d 1145. See also Salt Lake City Corp. Big Ditch Irrigation Co., 2011 UT 33, ¶ 18, 258 P.3d 539.

---

[5] Palmer Brief, Memorandum Opposing Department's Motion for Summary Judgment, April 19, 2019, p. 4.
[6] At the hearing, Mr. Palmer withdrew his argument which alleged a due process violation based upon a misunderstanding that he was "forever barred" from working in the insurance industry. The Department clarified in its Reply Memorandum that there was no such lifetime ban.

THE DOCTRINE OF ISSUE PRECLUSION

Issue preclusion prevents parties or their privies from relitigating facts and issues in the second suit that were fully litigated in the first suit. In general, issue preclusion protects litigants from the burden of relitigating an identical issue with the same party or his privy and promotes judicial economy by preventing needless litigation.

Issue preclusion applies only when the following four elements are satisfied: (i) the party against whom issue preclusion is asserted was a party to or in privity with a party to the prior adjudication; (ii) the issue decided in the prior adjudication was identical to the one presented in the instant action; (iii) the issue in the first action was completely, fully, and fairly litigated; and (iv) the first suit resulted in a final judgment on the merits. Fowler v. Teynor, 2014 UT App 66, ¶ 10, 323 P.3d 594, 597.[7]

Based upon the briefing and oral argument, there is no genuine dispute between the parties that the elements (i) and (iii) have been met. The parties are the same. The burden of proof is identical and the issue was completely, fully, and fairly litigated in the first action. However, Mr. Palmer argues points (ii) and (iv) that the trustworthiness issue is not identical to the one presented in the instant action due to the new administrative rule in place and the order is not a final judgment on the merits.

DOES ISSUE PRECLUSION APPLY?

At issue is whether or not the factual issue of Mr. Palmer's trustworthy character, or lack thereof, was decided in the first action (license application) and essential to the resolution of that

[7] The reference made to these four factors is hereafter referred to as "the Fowler test." All four prongs must be satisfied to find issue preclusion.

final determination and is the identical factual issue to be raised in the second action, the § 1033 request, and therefore summary judgment is appropriate.

On December 24, 2018, the Department enacted a new procedure for the Commissioner to utilize the § 1033 process by administrative rule. Findings of Fact, ¶ 7. Subsequent to the enactment of Utah Admin. Code R590-278, another administrative rule became effective on June 21, 2019, Utah Admin. Code R590-281, with § 1033 administrative implications that the Commissioner *solely* will address. The new rule states, in summary, that an individual convicted of a felony involving dishonesty or breach of trust, must *first* obtain written consent to engage or practice in the insurance industry before seeking a license application. "An individual who obtains written consent under R590-278 may apply for a license. That individual remains subject to all other license application requirements." See R590-278-4 (3)(b).[8]

Utah Admin. Code R590-278-1 et seq. created this new rule pursuant to Utah Code Subsection 31A-2-201(3) (rulemaking authority) and Subsection 31A-23a-111(5)(a) (authority for the Commissioner to make determinations regarding insurance licensure). Among the 24 statutory grounds for insurance license denial, a license application may be denied pursuant to Subsection 31A-23a-111(5)(b)(xiv)(A) based upon an applicant's felony conviction and pursuant to Subsection 31A-23a-111(5)(b)(xxiii) based upon the federal Violent Crime Control and Law Enforcement Act of 1994, 18 U.S.C.1033.

[8] The significance cannot be overlooked here because Mr. Palmer submitted new evidence to the court pursuant to R590-278. R590-281 is now at play at the time of this determination. The sequence of requests has been reversed, with written consent now the first prong, in a two-prong analysis. The denial of the license application has been completed but the condition precedent has not, and under new facts now presented, the outcome may be different. Such procedural facts do not satisfy summary judgment motions. To rule otherwise would amount to an absurd result.

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 relevant language of § 1033 reads:

> (e)(1)(A) 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.
>
> (B) Any individual who is engaged in the business of insurance whose activities affect interstate commerce and who willfully permits the participation described in subparagraph (A) shall be fined as provided in this title or imprisoned not more than 5 years, or both.
>
> (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. (Emphasis added).

Mr. Palmer filed his § 1033 request for written consent on January 17, 2019, which process he had not utilized before, nor could he have, because the new rule had not been enacted and implemented at the time of his first action, which spanned from October 9, 2017, to April 12, 2018. Findings of Fact, ¶¶ 2, 3, 4, 5, 6.

Rule 590-278-4 provides the burden of proof and criteria to be satisfied by the petitioner for the Commissioner to grant or deny the written consent request, affirming the decision is the Commissioner's *sole* discretion:

R590-278-4. Determining Consent Request.

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. The following are relevant to that determination:

(1) Any materially false or misleading statement or omission in the request for agency action;

(2) The nature, severity and number of the petitioner's crimes;

(3) The petitioner's age at the time the crimes were committed;

(4) The lengths of the sentences;

(5) The length of time since the petitioner's most recent conviction;

(6) The petitioner's rehabilitation, including evidence of counseling, community service, completion of probation, and payment of restitution, fines and interest if applicable;

(7) Any reference letter;

(8) The presence of any fact or circumstance in the petitioner's current life that may have motivated the petitioner to commit crime in the past;

(9) Any unpaid judgment; or

(10) Information received from the National Association of Insurance Commissioners and any insurance regulatory official.

Clearly, the issue of Mr. Palmer's trustworthiness is central to his ability to engage and participate in the insurance industry. The Department argues that issue preclusion applies when there has been a prior adjudication of a factual issue and an application of the same facts under the same rule of law. Nevertheless, Mr. Palmer provided new facts, subject to review by the Commissioner, in response to the requirements of a new procedure.

Administrative agencies, like courts, have authority to establish rules of law, and they do so in two ways: by promulgating rules, such as here in R590-278-1 et seq., and by issuing decisions as a necessary incidence of adjudication. Salt Lake Citizens Congress v. Mountain States Tel. & Tel. Co., 846 P.2d 1245, 1251 (1992). In the instant case, Mr. Palmer's pursuit of an insurance license has been placed in administrative limbo. There were no clear lines drawn between quasi-judicial adjudication and quasi-legislative rulemaking. The rub is that Mr. Palmer could not avail himself of the new rule because his license application was under review and in the hands of the selfsame rule makers and decision makers.

In Fowler v. Teynor, 2014 UT 66, 323 P.3d 594, the application of issue preclusion was correct but distinguishable. Fowler had already established in federal court that the drug test was his employer's pretext to discriminate under ADA and not the basis for his termination. Fowler subsequently sought further relief in a state court action, alleging that negligence and negligent misrepresentations regarding the faulty drug test caused him to suffer damages. However, the federal jury had already considered and rejected the negligence argument by finding that employer did not honestly believe or act in good faith on the drug test results. Fowler's attempt to have the state court reconsider the very same issue, i.e., the cause of termination, already decided in federal court, is classic relitigation of an identical issue under the same rule of law,

albeit disguised by artful forum selection and legal theory. In this matter, no such identical issue exists when considered in light of the new § 1033 procedure, criteria, and authority. In this case, the court below made no such determination regarding written consent. Utah Code Subsection 31A-23a-(5)(b)(xxiii) authorizes an otherwise legally abhorrent "second bite at the apple," albeit by federal design, to be played out in the same administrative forum and agency. In short, the two-pronged approach cannot be interpreted to be needless relitigation of the same issue only under a different theory.

Furthermore, Mr. Palmer was unable to utilize the written consent procedure at the time of the ongoing review of his license application denial because the procedure and rule were under review. Although his felony convictions were reasonable bases for his license application denial, § 1033 was identified only as a prohibition, rather than a procedural option, to licensure.[9]

Therefore, Utah Admin. Code R590-278 is a substantive change in the law. The rule created a substantive right: the right to seek written consent solely subject to the Commissioner's discretion, with clearly articulated criteria to be considered and required evidence to be provided. The procedural and substantive implications cannot be minimized. Mr. Palmer's § 1033 Request, dated January 17, 2019, responded to the filing instructions and explicit elements (1) through (10) which he addressed. Mr. Palmer put to use the embellished criteria and provided the requested factual information to the Commissioner about his ability to engage and practice in the insurance industry, and perhaps overcome the hurdle of his past felonies involving dishonesty.

In Collins v. Sandy City Board of Adjustment, 2002 UT 77, 52 P.3d 1267 (2002), the Utah Supreme Court determined whether or not a change in legal precedent amounted to a

[9] Department Ex. 2, Denial Letter, dated October 25, 2017. The actual procedures were unwritten at the time.

change in law which permitted the Collinses to overcome issue preclusion. The issue of the illegality of short-term rentals under Sandy City's ordinance had already been litigated. Collins v. Sandy City Board of Adjustment, 2000 UT App. 371, 16 P.3d 1251 (hereafter Collins I). The Court's focus in Collins II was whether or not a different holding in a different case, subsequent and separate from the Collins I opinion, amounted to a substantive change in the law. The Court of Appeals issued a contrary decision to Collins I in Brown v. Sandy City Board of Adjustment, 957 P.2d 207 (Utah Ct. App. 1998), concluding that Sandy City's ordinance did not prohibit short-term leases. The Supreme Court concluded there was no substantive change in the law which could be applied to Collinses. "An erroneous conclusion reached by the court in the first suit does not deprive the defendants in the second action of their right to rely on the plea of res judicata. . . . A judgment merely voidable because based upon an erroneous view of the law is not open to collateral attack" but may be appealed which Collinses chose not to do. Id. at ¶ 17. (Citations omitted.)

In contrast, this matter involves administrative rulemaking, in a state of flux, while important policy considerations were presumably under examination by the Department. Mr. Palmer provided evidence under the new rule, not pursuant to a contrary court holding, which resulted in a more explicit confession of his drug abuse, its devastating impact on his integrity and existence, and his correction of past wrongs. Between the time that his license application denial was upheld in April 2018 and the new § 1033 protocols were enacted by rule in December 2018, numerous facts reportedly changed regarding his trustworthiness. Granted, the fact determinations and those implications are the Commissioner's to decide.

The court observes that Mr. Palmer reports he is current on his child support obligations. Mr. Palmer reportedly has no unpaid state income tax or other delinquent debts. Mr. Palmer reportedly has no outstanding judgments against him. He reported he has fully completed his probation in his cover letter to the Commissioner. He has restored relationships with friends and family who vouchsafe for him in reference letters. The Utah Fourth District Court in American Fork granted a reduction to his felony convictions, from third degree felonies to Class A misdemeanors.[10] In the first action, Mr. Palmer testified he completed rehabilitation in December 2016. In his § 1033 Request, Mr. Palmer provided probative evidence of successful rehab completion with Steps Recovery Center in a letter from Mr. Ty Empey, dated January 9, 2019. This evidence was provided in response to the required criteria set forth in the written consent protocols as provided in the new rule. When Mr. Palmer was instructed what information to provide under §1033, he did so.

In Mr. Palmer's Opposition Memorandum to the MSJ, he filed a sworn declaration that addressed the same disputed facts as mentioned above.[11] "It is inappropriate for courts to weigh disputed facts in ruling on a summary judgment, regardless of whether the evidence on one side may appear to be strong or even compelling. One sworn statement under oath is all that is needed to dispute the averments on the other side of the controversy and create an issue of fact, precluding the entry of summary judgment." Davis v. Sperry, 2012 UT App 278, ¶22. (Citations omitted).

---

[10] Fourth District Court, American Fork, In Re: Michael L. Palmer, Order Granting Motion for Conviction of Lower Degree Offense, Case No. 131101411, August 13, 2018; and Case No. 131100984, October 2, 2018. In Case No. 131101411, two counts of Forgery and two counts of Identity Fraud, Theft by Deception, and Falsely Obtaining/Dispensing Prescription Drugs were reduced to Class A misdemeanors. In Case No. 131100984, two counts of Falsely Obtaining/Dispensing Prescription Drugs and three counts of Identity Fraud were reduced to Class A misdemeanors.

[11] Ex. A, Declaration of Michael Palmer, ¶¶ 6 – 10, April 19, 2019.

Next, Mr. Palmer's dishonest response on his original application regarding past misdemeanor convictions is not dispositive here as to issue preclusion. This court will not expand its decision in its previous Order, beyond its stated scope. The court does not elevate its earlier sua sponte discussion in footnote 7, that applicant's dishonesty alone on his application "should warrant denial of a license application," to be a holding and sufficient basis to determine lack of trustworthiness.[12] The applicant's misstatement can in no wise be proven without the presence of an underlying conviction, and therefore, the two conditions must and did exist for a license denial.

FINAL JUDGMENT ON THE MERITS

The Order, dated April 12, 2018, upheld the denial of the applicant's license on several grounds. No challenge was filed—by Mr. Palmer or any other party—within the statutory thirty-day deadline. To preserve the right to challenge an agency decision, an interested party must file a request for review within thirty days. Utah Code § 63G-4-301(1)(a). If no such request is filed, the agency action is final and conclusive and may not be subject to collateral attack. Id., see also Utah Admin. Code R590-160-8 (2016). Time limits on administrative petitions for review are not just arbitrary cutoffs. They are important markers, establishing the point at which a party to an administrative proceeding may move forward in reliance on the finality of an agency decision. Living Rivers v. U.S. Oil Sands, Inc., 2014 UT 25, ¶ 26, 344 P.3d 568. Therefore, Mr. Palmer does not meet his burden of proof that the judgment is not final in the first action.

[12]See Utah Insurance Department v. Michael Lynn Palmer, Docket No. 2017-104 LC, E. No. 3952 (April 12, 2018).

CONCLUSION

The Fowler test for issue preclusion has not been satisfied. Issue preclusion is inappropriate because the issue of trustworthiness decided in the prior action is not identical to the one presented in the instant § 1033 action. The introduction of the new disputed facts and averments in support of and in compliance with the § 1033 Request are sufficient to defeat summary judgment, particularly so when taken in the light most favorable to the nonmoving party.

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

CONCLUSIONS OF LAW

1. The Department has not proved as a matter of law that Mr. Palmer's § 1033 Request is barred by issue preclusion under the four-pronged Fowler test.
2. The enactment of Utah Admin. Code R590-278-1 et seq., which effectuated § 1033 filing procedures and criteria, was a substantive change in the law and disproves the Department's claim that issue preclusion applies. The Fowler test to determine issue preclusion under prong (ii), "the issue decided in the prior adjudication was identical to the one presented in the instant action," is not met.
3. The original Order upholding the denial of applicant's license "resulted in a final judgment on the merits," subject to appeal which right was not exercised. Therefore, prong (iv) is satisfied.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law and for good cause, it is ORDERED that:

1. The Department's Motion for Summary Judgment is denied.
2. The § 1033 Request is remanded for further proceedings consistent with this opinion.

Dated this 2nd day of July, 2019.

Lisa Watts Baskin

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 uidadmincases@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.