

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
INSURANCE DIVISION**

In the Matter of)	Case No: INS 12-08-008
)	
CHERIE G. SMITH and)	RULING ON SUMMARY
BEST INSURANCE CONSULTANTS,)	DETERMINATION AND
LLC)	PROPOSED ORDER

HISTORY OF CASE

On August 22, 2012, the Director of the Department of Consumer and Business Services Insurance Division (Division) issued a Notice of Proposed Action (Notice) proposing to revoke the expired Oregon resident individual insurance producer license and the Oregon resident individual insurance consultant license issued to Cherie G. Smith (Smith), as well as the Oregon resident business entity insurance producer license and the Oregon resident business entity insurance consultant license issued to Best Insurance Consultants, LLC (Best) pursuant to ORS 744.074(1) and ORS 731.428. On September 7, 2012, Smith and Best (collectively Appellants), through counsel, requested a hearing challenging the proposed action. On September 19, 2012, the Division referred this matter to the Office of Administrative Hearings (OAH) for hearing.

The OAH assigned the matter to Senior Administrative Law Judge Alison Greene Webster. ALJ Webster held a prehearing telephone conference on November 8, 2012. Senior Assistant Attorney General (AAG) Judith K. Anderson represented the Division. Attorney John Guinn represented Appellants. During the conference, deadlines for filing prehearing motions, including motions for summary determination, were established. The hearing was set for March 22, 2013 if necessary.

On January 25, 2013, AAG Anderson, on behalf of the Division, filed a Motion for Summary Determination seeking a ruling in its favor on all issues as a matter of law, along with supporting documents pursuant to OAR 137-003-0580. On February 8, 2013, Appellants filed a response to the motion. The Division's reply was received February 19, 2013. The motion was taken under advisement at that time.

ISSUES

1. Whether Smith was convicted of a felony or misdemeanor involving dishonesty or breach of trust in violation of ORS 744.074(1)(f).

2. Whether Smith failed to report to the Director the criminal prosecutions against her in violation of ORS 744.089(2).

3. Whether Smith provided incorrect, misleading, incomplete or materially untrue information in a license application in violation of ORS 744.074(1)(a).

4. If Smith committed one or more Oregon Insurance Code violations, whether the Division may revoke her insurance producer licenses.

5. Whether the Division may also revoke the business entity licenses of Best Insurance Consultants pursuant to ORS 744.074(3) based on Smith's violations of the Insurance Code and failure to report the violations to the Division.

DOCUMENTS REVIEWED

In support of its Motion, the Division submitted Exhibits 1 through 8, plus an Affidavit of Stephanie J. Noren. The exhibits and affidavit were made part of the record. Exhibits 101 and 102, submitted by Appellants in response to the Motion, were also made a part of the record.

FINDINGS OF FACT

1. Cherie G. Smith was licensed in Oregon as a resident individual insurance producer from March 22, 1999 until the license expired on May 31, 2012. (Ex. 1.) Smith has also had an Oregon resident insurance consultant license since July 21, 2004. That license will expire on May 31, 2013. (Ex. 2.)

2. Smith's is a member of, and the registered agent for, Best Insurance Consultants, LLC in Portland, Oregon. Best is Smith's last recorded principal place of business. Best was licensed in Oregon as a resident business entity insurance producer and a business entity insurance consultant until the licenses expired in November 2012. (Exs. 1, 3 and 4; Noren Aff.)

3. On December 14, 2009, Smith was charged in Washington County, Oregon with one count of Theft in the Second Degree, a misdemeanor, pursuant to ORS 164.045. The incident precipitating the charge occurred on December 6, 2009. Smith appeared before the court for arraignment on December 17, 2009. On January 12, 2010, following a plea of guilty, Smith was convicted of one count of Theft in the Second Degree in Washington County Circuit Court (Case No. D095844M). (Ex. 5.)

4. On September 22, 2010, Smith was indicted in Multnomah County, Oregon with one count of Theft in the First Degree, a Class C Felony, pursuant to ORS 164.055. The incident precipitating the charge occurred on or about March 8, 2010. Smith first appeared before the court on the charge on December 9, 2010. On August 18, 2011, following a plea of guilty, Smith was convicted of one count of Theft in the First Degree, a felony, in Multnomah County Circuit Court (Case No. 100933493). (Ex. 6.)

5. On or about May 31, 2011, Smith submitted to the Division an application to renew

her Oregon resident insurance consultant license. The renewal application contained the statement, "I have not been convicted of a misdemeanor or felony in the last 2 years." By signing the renewal application, Smith represented to the Division that she had not been convicted of a misdemeanor or felony in the preceding two years. (Ex. 8.)

6. On August 12, 2011, Smith was charged in Washington County, Oregon with two counts of Theft in the First Degree, a Class C Felony, pursuant to ORS 164.055 and one count of Theft in the Second Degree, a misdemeanor, pursuant to ORS 164.054. The incident precipitating these charges occurred on July 3, 2011. Smith first appeared before the court on these charges on August 17, 2011. On May 12, 2012, following guilty pleas, Smith was convicted of two felony counts of Theft in the First Degree and one misdemeanor count of Theft in the Second Degree in Washington County Circuit Court (Case No. C111729CR). (Ex. 7.)

7. Smith first notified the Division Director of the criminal prosecutions taken against her in Washington County and Multnomah County in March 2012, in response to an inquiry from a Division investigator. Since she was first notified of the Division's investigation in February 2012, Smith has cooperated with the Division and provided information pertaining to the criminal prosecutions taken against her. (Ex. 102; Noren Aff.)

8. On December 12, 2012, Multnomah County Circuit Court Judge Kenneth Walker issued a Supplemental Judgment, reducing Smith's felony theft conviction in case no. 100933493 to a Class A Misdemeanor. (Ex. 101.)

CONCLUSIONS OF LAW

1. Smith was convicted of a felony or misdemeanor involving dishonesty or breach of trust in violation of ORS 744.074(1)(f).
2. Smith failed to report to the Director the criminal prosecutions against her in violation of ORS 744.089(2).
3. Smith provided incorrect, misleading, incomplete or materially untrue information in a license application in violation of ORS 744.074(1)(a).
4. The Division may revoke Smith's insurance producer licenses.
5. Division may also revoke the business entity licenses of Best Insurance Consultants pursuant to ORS 744.074(3).

OPINION

A. Summary Determination

OAR 137-003-0580 is titled "Motion for Summary Determination" and provides, in relevant part:

(6) The administrative law judge shall grant the motion for a summary determination if:

(a) The pleadings, affidavits, supporting documents (including any interrogatories and admissions) and the record in the contested case show that there is no genuine issue as to any material fact that is relevant to resolution of the legal issue as to which a decision is sought; and

(b) The agency or party filing the motion is entitled to a favorable ruling as a matter of law.

(7) The administrative law judge shall consider all evidence in a manner most favorable to the non-moving party or non-moving agency.

(8) Each party or the agency has the burden of producing evidence on any issue relevant to the motion as to which that party or the agency would have the burden of persuasion at the contested case hearing[.]

* * * * *

(12) If the administrative law judge's ruling on the motion resolves all issues in the contested case, the administrative law judge shall issue a proposed order in accordance with OAR 137-003-0645 incorporating that ruling or a final order in accordance with 137-003-0665 if the administrative law judge has authority to issue a final order without first issuing a proposed order.

The evidence in the record consists of the exhibits and affidavits submitted by the Division as well as exhibits submitted by Appellants in response to the motion. Summary determination in favor of the Division is appropriate if the record, viewed in a light most favorable to Appellants, shows there is no genuine issue of material fact relevant to the resolution of this case and that the Division is entitled to a favorable ruling as a matter of law. For the reasons discussed below, the Division is entitled to summary determination in its favor.

B. Violations of ORS 744.074 and 744.089

The Division proposes to revoke Smith's insurance producer licenses pursuant to ORS 744.074(1) and to revoke Best's business entity licenses pursuant to ORS 744.074(3) based on Smith's violations of Oregon insurance laws. The Division has the burden of proving the allegations in its Notice of Proposed Action by a preponderance of the evidence. *See* ORS 183.450(2) and (5); *Harris v. SAIF*, 292 Or 683, 690 (1982) (general rule regarding allocation of burden of proof is that the burden is on the proponent of the fact or position.); *Cook v. Employment Div.*, 47 Or App 437 (1980) (in the absence of legislation adopting a different standard, the standard in administrative hearings is preponderance of the evidence). In this case, the Division has met its burden.

ORS 744.074(1) authorizes the Director of DCBS to revoke an insurance producer license for any one or more specifically enumerated reasons. As pertinent to this case, the statute provides as follows:

The Director of the Department of Consumer and Business Services may place a licensee on probation or suspend, revoke or refuse to issue or renew an insurance producer license and may take other actions authorized by the Insurance Code in lieu thereof or in addition thereto, for any one or more of the following causes:

(a) Providing incorrect, misleading, incomplete or materially untrue information in the license application.

(b) Violating any insurance laws, or violating any rule, subpoena or order of the director or of the insurance commissioner of another state or Mexico or Canada.

* * * * *

(f) Having been convicted of a felony, of a misdemeanor involving dishonesty or breach of trust, or of an offense punishable by death or imprisonment under the laws of the United States. The record of the conviction shall be conclusive evidence of the conviction.

ORS 744.074(3) authorizes the Director of DCBS to revoke the insurance producer license of a business entity under the following circumstance:

[i]f the director determines that an individual licensee's violation was known or should have been known by one or more of the partners, officers or managers acting on behalf of the partnership or corporation but the violation was not reported to the director and corrective action was not taken.

In addition, ORS 744.089 requires a licensed insurance producer to report to DCBS any administrative action taken against the licensee or any criminal prosecution against the licensee. It provides, in pertinent part, as follows:

(2) Not later than the 30th day after the initial pretrial hearing date, an insurance producer shall report to the director any criminal prosecution of the insurance producer taken in any jurisdiction. The report shall include a copy of the initial complaint filed, the order resulting from the hearing and any other relevant legal documents.

In this case, the Division asserts that Smith was convicted of multiple counts of theft, a crime involving dishonesty or breath of trust, in violation of ORS 477.074(1)(f) and ORS 731.428(4).¹ The Division also contends that Smith did not report the criminal prosecutions

¹ ORS 731.428 provides, in pertinent part:

(1) A person who is prohibited by 18 U.S.C. 1033 from engaging or participating in the business of insurance because of a conviction of a felony involving dishonesty or a breach of trust or conviction of a crime under 18 U.S.C. 1033 may apply to the Director

against her to the Division Director in violation of ORS 744.089(2) and that she provided materially untrue information in her insurance license renewal application in violation of ORS 744.071(1)(a). The Division also asserts that Smith's violations were not reported to the Director as required under ORS 744.074(3). Based on this alleged misconduct, the Division seeks to revoke both Smith's individual insurance producer licenses and Best's business entity licenses.

1. Felony and Misdemeanor Convictions

As noted above, the Director of DCBS is authorized to revoke an insurance producer license or impose other discipline where the licensee has been convicted of a felony, or of a misdemeanor involving dishonesty or breach of trust. Additionally, under ORS 731.428(4), the Director is *required* to revoke, suspend or refuse to renew the license of a licensee convicted of a felony involving dishonesty.

The record establishes that Smith has been convicted of three felonies, Theft in the First Degree, and two misdemeanors, Theft in the Second Degree. Theft is a crime involving dishonesty. OAR 836-071-0321(1).² On this record, the Director is required to revoke Smith's insurance licenses. Although Smith has since had one of her felony convictions modified and reduced to a misdemeanor, the modification does change the fact she has been convicted of multiple crimes involving dishonesty or breach of trust. Similarly, even if Smith is ultimately successful in getting her other two felony convictions reduced to misdemeanors, the fact remains she has multiple convictions for theft, a crime involving dishonesty or breach of trust. Under ORS 744.074(1)(f), the Director is authorized to take the action proposed in the Notice.

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of the Department of Consumer and Business Services for a written consent to engage or participate in the business of insurance.

* * * * *

(4) If a person issued a license under the Insurance Code has been convicted of a crime referred to in subsection (1) of this section or is subsequently the subject of such a conviction, the director shall revoke, suspend or refuse to renew the license. The person may apply to the director for a written consent as provided in subsection (1) of this section.

(Emphasis added.)

² OAR 336-071-0321(1) provides:

A felony offense involving dishonesty includes but is not limited to any offense constituting or involving theft, burglary, perjury, bribery, forgery, counterfeiting, a false or misleading oral or written statement, deception, fraud, a scheme or artifice to deceive or defraud, a material misrepresentation or the failure to disclose material facts, or any felony the commission of which is determined by the Director to have involved some element of deceit, misrepresentation, untruthfulness or falsification.

2. Failure to Report Criminal Prosecution

Under ORS 744.089(2), licensees are required to report any criminal prosecution against them within 30 days after the initial pretrial hearing date, and submit a copy of the complaint and any other relevant legal documents including the order resulting from the hearing.

Smith did not timely report to the Director any of the criminal prosecutions against her. Smith's failure to report these criminal prosecutions as required by ORS 744.089(2) provides further grounds for the revocation of her license under ORS 744.074(1)(b), as the Division is authorized to take disciplinary action against any licensee for violating any insurance laws.

3. Materially Untrue Information on License Application

As found above, Smith was convicted of Theft in the Second Degree, a misdemeanor, in Washington County, Oregon on January 12, 2010. On her May 31, 2011 application to renew her insurance consultant license, Smith falsely represented she had not been convicted of a felony or misdemeanor in the preceding two years. Because Smith provided incorrect and materially untrue information in her May 31, 2011 license renewal application, the Division is authorized to take disciplinary action against her pursuant to ORS 744.074(1)(a).

C. Sanctions

1. Sanctions as to Smith

The Division has established that Smith has been convicted of felonies and misdemeanors involving dishonesty or breach of trust in violation of ORS 744.074(1)(f). In addition, she failed to report the criminal prosecutions and convictions in violation of ORS 744.089(2) and 744.074(1)(b). The Division has also shown that Smith provided incorrect and materially untrue information in a license application in violation of ORS 744.074(1)(a). These violations, individually and collectively, entitle the Division to revoke Smith's insurance licenses.

Even though Smith's resident insurance license expired in May 2012, the Director retains authority to take disciplinary action against her. ORS 744.011(1) provides, in pertinent part, as follows:

The expiration of a license or the voluntary surrender of a license by a licensee under this chapter shall not deprive the Director * * * of jurisdiction to proceed with any investigation of, or any action or disciplinary proceedings against, the licensee or to revise or render void an order suspending or revoking the license.

Consequently, the Division is entitled to revoke Smith's Oregon insurance producer and insurance consultant licenses pursuant to ORS 744.011(1) and 744.074(1).

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2. *Sanction as to Best Insurance Consultants, LLC*

The Insurance Division also proposes to revoke Best's expired resident business entity producer license and its business entity insurance consultant license under ORS 744.074(3) based on Smith's violations of the insurance laws, and the failure to report the violations to the Division.

As set out above, pursuant to ORS 744.074(3) the Director may suspend, revoke or refuse to issue a license to a business entity where an individual licensee's violation was known but not reported. In this case, the evidence establishes that Smith was a member of Best, as well as the entity's registered agent. As such, she was obligated to report any insurance law violations of which she knew, or should have known. Smith was certainly aware of her crimes and convictions for theft, as well as the false information in her renewal application. Because Smith did not report her own violations to the Division and no corrective action was taken as required by ORS 744.074(3), the Division is authorized as a matter of law to revoke Best's expired business entity licenses as well. ORS 744.011(1).

RULING ON THE MOTION

The Division's Motion for Summary Determination is GRANTED.

ORDER

I propose that the Insurance Division issue the following order:

The Notice of Proposed Action dated August 22, 2012 revoking Cherie G. Smith's expired Oregon resident individual insurance producer license and her unexpired Oregon resident individual insurance consultant license and the expired Oregon resident business entity insurance producer license and Oregon resident business entity insurance consultant license issued to Best Insurance Consultants, LLC is AFFIRMED.

This ruling on the Motion for Summary Determination is dispositive, so the hearing scheduled for March 22, 2013 is cancelled.

Alison Greene Webster

Senior Administrative Law Judge
Office of Administrative Hearings

Notice of Right to File Exceptions to Proposed Order

If the proposed order is adverse to a party, then the party has the right to file written exceptions to the order and present written argument concerning those exceptions pursuant to ORS 183.460. A party may file the exceptions and argument by sending them to the Insurance Division by delivering them to the Labor and Industries Building, 350 Winter Street NE, Room

440 (4th Floor), Salem, Oregon; or mailing them to P.O. Box 14480, Salem, Oregon 97309-0405; or faxing them to 503-378-4351; or e-mailing them to mitchel.d.curzon@state.or.us. The Insurance Division must receive the exceptions and argument within 30 days from the date this order was sent to the party.

CERTIFICATE OF SERVICE

On the 26th day of February 2013, I mailed the foregoing Ruling on Summary Determination and Proposed Order in Reference No. **1208008**.

BY FIRST CLASS MAIL:

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