BEFORE THE HEARING OFFICER PANEL
STATE OF OREGON
for the
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
INSURANCE DIVISION

In the Matter of	)	**Case No: INS 02-01-027**
	)	
DUANE L. McCREERY.	)	**PROPOSED ORDER ON**
	)	**DEFAULT**
	)	

HISTORY OF CASE

Administrative Law Judge (ALJ) Ella D. Johnson conducted a hearing in this matter on May 2, 2001 in Salem, Oregon. Assistant Attorney General Kathleen Dahlin represented the Oregon Department of Consumer and Business Services, Insurance Division (the department). Respondent Duane L. McCreery (McCreery), who represented himself *pro se,* failed to appear and was not present at the hearing.

Pursuant to OAR 137-003-0670(3), if a party who was notified of the time and place of the hearing fails to appear at hearing not due to circumstances beyond his reasonable control, the ALJ may issue a default order only upon a showing of a *prima facie* case made on the record. McCreery failed to appear at hearing either in person or through counsel. Under these circumstances, I find that a default order is appropriate.

At hearing, the department called Cindy Jones, Manager of the Insurance Division's Investigation Unit, as a witness. The record closed following the hearing. McCreery requested a hearing challenging the department's February 5, 2002 Notice of Proposed Action (Notice).

NOTICE

On February 5, 2002, the director of the department issued a Notice, which proposed to revoke McCreery's license and alleged that McCreery is subject to disciplinary action pursuant to ORS 731.428(4) inasmuch as he was convicted on June 7, 2001 of Theft by Deception, a class C felony involving dishonesty, by the Circuit Court of the State of Oregon for the County of Clackamas. The director also alleged that McCreery is subject to disciplinary action pursuant to ORS 744.013(2)(e) by being convicted of the crime, and pursuant to ORS 744.013(2)(o) by engaging in the criminal conduct, which led to his conviction. The director does not intend to give consent to McCreery to engage or participate in the business of insurance.

The allegations concerning McCreery's criminal conduct and conviction have been set forth in detail in the Notice, which was served on McCreery on February 5, 2002 by certified mail addressed to McCreery's last known addresses in Lake Oswego, Oregon. The Notice is specifically incorporated herein and adopted by this reference.

ISSUE

Whether McCreery's conviction of Theft I (Theft by Deception, ORS 164.085), a class C felony involving dishonesty, warrants revocation of his Oregon insurance agent license as provided by ORS 731.428(4), 744.013(2)(e) and 744.013(2)(o).

EVIDENTIARY RULINGS

The department's Exhibits 1 through 11 were received into the record.

FINDINGS OF FACT

McCreery was first licensed to sell life and health insurance in Oregon on February 15, 2000. His license expired on February 28, 2002. (Exs. 1, 11).

On or about May 21, 1999, McCreery filed for unemployment benefits through Oregon Employment Department (OED). From July 12, 1999 through October 4, 1999, OED paid McCreery a weekly benefit amount of $346.00 for a total of payment of $4,498.00 for the period in question. He was also employed during that period by Go Electronics and was paid $461.53 bi-monthly. A routine computer comparison of employer wage reports to benefit payments during that period, revealed that McCreery was employed and received wages from Go Electronics at the same time he was collecting unemployment compensation from OED. (Exs. 3, 4, 5, 7, 9).

When a claimant files a claim for unemployment benefits, the claimant is given a handbook, which explains in detail how to claim benefits and use the weekly telephone claim line. The applicant is advised to accurately report all work and earnings. The weekly reports are made by telephone on the claim line and are recorded. The weekly claim line asks questions that must be answered yes or no and the claimant is instructed that any work and earnings before taxes for the week must be reported, even if the claimant has not yet been paid for the work. The claimant must certify that his answers are true and accurate and cautioned those false answers could result in a penalty under the law. When the claimant receives his unemployment check, there is an endorsement on the back where the claimant must certify that he made no false statements or misrepresentations in connection with qualifying for or obtaining benefits and that he did not perform work that he did not report. (Ex. 3).

McCreery gave false answers and misrepresented that he was unemployed on 13 separate weekly claim line filings and checks for the benefits. On the unemployment benefit checks he certified as follows:

> I hereby certify I am the payee on this check; that I have filed a claim for unemployment insurance benefits under the laws of the State of Oregon and I am entitled to the proceeds of this check; that no false statements and/or misrepresentations have been made by me in any way whatsoever in connection with qualifying for and/or obtaining the

> proceeds of this check; that during the week(s) for which I am being paid, I did not perform any work that I have not properly reported.

He falsely stated that he had no earnings to report in order to obtain unemployment benefits during the period at issue when he was working and receiving earnings which were greater than the weekly unemployment benefit. His explanation was that he needed the money to pay his bills. (Exs. 3, 6, 7).

On June 7, 2001, McCreery was convicted in Clackamas County circuit court in Case No. 002128 of Theft I (Theft by Deception, ORS 164.085), a class C felony involving dishonesty. He was placed on probation for 24 months and ordered to pay a fine in the amount of $1,000 and restitution in the amount of $4,498. (Exs. 2, 3).

On September 6, 2001, Derek Smith, McCreery's parole and probation officer, notified the department that McCreery had been convicted of Theft I. (Ex. 3).

On March 7, 2002, McCreery was notified by first class and certified mail that a hearing in this matter was set for May 2, 2002 at 8:30 AM and the Hearing Officer Panel office.

McCreery failed to appear at the hearing and was not represented by counsel.

CONCLUSIONS OF LAW

McCreery's conviction of Theft I (Theft by Deception, ORS 164.085), a class C felony involving dishonesty, warrants revocation of his Oregon insurance agent license as provided by ORS 731.428(4), 744.013(2)(e) and 744.013(2)(o).

OPINION

The issue to be resolved in this agent sanction case is whether McCreery's criminal conviction of Theft by Deception warrants revocation of his Oregon insurance agent license. In this regard, the department bears the burden of proving the allegations 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).

There is no question on this record that McCreery committed the crime of Theft by Deception, a class C felony, that this crime involves dishonesty or that the department has the authority to revoke his license based on his conviction. ORS 731.428(4) states:

> 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)[1] of this section.

Additionally, ORS 744.013 provides in relevant part:

> (2) The director may take any disciplinary action under subsection (1) of this section on one or more of the following grounds:
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> * * * * *
>
> (e) Conviction, by final judgment, in any jurisdiction, of an offense which if committed in this state, constitutes a felony, a misdemeanor involving dishonesty or breach of trust * * *. The record of the conviction shall be conclusive evidence of the conviction.
>
> * * * * *
>
> (o) Dishonesty, fraud or misrepresentation not related to the business of an agent, adjuster or insurance consultant.

The unrebutted evidence establishes that McCreery was convicted by final judgment in Clackamas County circuit court of the felony of Theft in the First Degree (Theft by Deception). The record of the conviction found at Exhibit 2 is conclusive evidence of McCreery's conviction. The evidence also establishes that this crime involved dishonesty, fraud or misrepresentation on at least thirteen different occasions not related to McCreery's business of an licensed insurance agent. McCreery's explanation was that he worked only part-time and needed the money to pay his bills. I do not find his explanation constitutes a mitigation factor, which could have been considered in determining whether to allow him to continue to transact or participate in the business of insurance. Consequently, under the circumstances, I conclude that the department established a *prima facie* case on the record supporting the allegations contained in the Notice and that revocation of McCreery's license is warranted.

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[1] Subsection (1) states:

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

ORDER

I recommend that the department issue a Final Order revoking McCreery's Oregon insurance agent license based on his felony criminal conviction of Theft by Deception, a crime involving dishonesty, as provided by ORS 731.428(4), 744.013(2)(e) and 744.013(2)(o).

IT IS SO ORDERED.

Dated this 7th day of May 2002.

/s/ Ella D. Johnson
Ella D. Johnson, Administrative Law Judge
Hearing Officer Panel

NOTICE OF OPPORTUNITY FOR ADMINISTRATIVE REVIEW

NOTICE: Pursuant to ORS 183.460, the parties are entitled to file written exceptions to this Proposed Order and to present written argument concerning those exceptions to the Director. Written exceptions must be received by the Department of Consumer and Business Services within 30 days following the date of service of this Proposed Order. Mail exceptions to:

Department of Consumer and Business Services
Insurance Division
c/o Cindy Jones
350 Winter Street NE
Salem, OR 97301-3883

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