

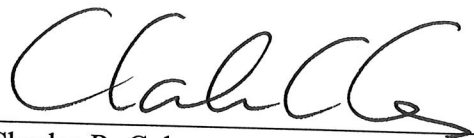
1 making licensure available to those who cannot be determined to fully qualify at the completion of the
2 application process. Therefore, the Petitioner is issued an ordinary life and disability agent's license
3 pursuant to the Administrative Law Judge's Recommended Decision.

4 NOTIFICATION OF RIGHTS

5 Pursuant to A.R.S. § 41-1092.09, the aggrieved party may request a rehearing with
6 respect to this order by filing a written motion with the Director of the Department of Insurance within
7 30 days of the date of this Order, setting forth the basis for relief under A.A.C. R20-6-114(B). Pursuant
8 to A.R.S. § 41-1092.09, it is not necessary to request a rehearing before filing an appeal to Superior
9 Court.

10 The final decision of the Director may be appealed to the Superior Court of Maricopa
11 County for judicial review pursuant to A.R.S. § 20-166. A party filing an appeal must notify the Office
12 of Administrative Hearings of the appeal within ten days after filing the complaint commencing the
13 appeal, pursuant to A.R.S. § 12-904(B).

14 DATED this 2nd of June, 2000

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18 _____
19 Charles R. Cohen
20 Director of Insurance
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1 A copy of the foregoing mailed
this 5 day of June, 2000

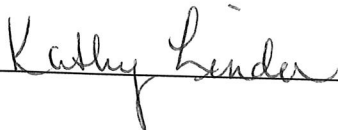
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IN THE OFFICE OF ADMINISTRATIVE HEARINGS

In The Matter Of:

RAYMOND EDWARD KENNEY,
Petitioner.

No. 99A-136-INS
RECOMMENDED DECISION
OF ADMINISTRATIVE
LAW JUDGE

HEARING: August 26, 1999, April 25, 2000, and May 10, 2000

APPEARANCES: David Childers, Esq. and Christy Chisolm-Brown, Esq. on behalf of Petitioner; Assistant Attorney General Michael De La Cruz on behalf of the Arizona Department of Insurance

ADMINISTRATIVE LAW JUDGE: Lewis D. Kowal

FINDINGS OF FACT

1. On April 9, 1999, Raymond Edward Kenney ("Mr. Kenney/Petitioner") filed an application for a life and disability insurance agent's license ("Application") with the Arizona Department of Insurance ("Department").
2. In the Application, Mr. Kenney disclosed that he had been convicted of a felony.
3. On May 3, 1993, a Criminal Complaint was filed in the Second Circuit of the State of Hawaii in State of Hawaii v. Raymond E. Kenney, CR No. 93-0205(3) ("CR No. 93-0205(3)"), charging that from April 21, 1993, through April 25, 1993, Petitioner intentionally obtained hotel services known by him to be available for compensation and such services were obtained by deception, false token, or other means to avoid payment of the services, the value of which exceeded \$300.00, thereby committing the offense of Theft in the Second Degree.
4. In February, 1994, a Criminal Complaint was filed in the Second Circuit Court of the State of Hawaii in State of Hawaii v. Raymond E. Kenney, CR No. 93-0357(3) ("CR No.

Office of Administrative Hearings
1400 West Washington, Suite 101
Phoenix, Arizona 85007
(602) 542-9826

1 93-0357(3") charging two counts of Theft in the Second Degree, Fraudulent Use of a
2 Credit Card, and Negotiating a Worthless Negotiable Instrument.

3 5. On August 10, 1994, Mr. Kenney entered into a plea agreement and the Court
4 entered Judgment in Cases numbered CR No. 93-0205(3) and CR No. 93-0357(3)
5 convicting Mr. Kenney of three counts of Theft in the Second Degree, a Class C felony.
6 Mr. Kenney was sentenced to serve two terms of probation of five years each to run
7 concurrently, perform community service, and pay restitution.

8 6. The evidence of record establishes that on March 29, 1999, the Court discharged
9 Mr. Kenney from parole supervision in the above-mentioned criminal matters.

10 7. On May 12, 1999, the Department denied the Application.

11 8. On June 14, 1999, Mr. Kenney timely appealed the Department's denial of the
12 Application and requested a hearing.

13 9. Mr. Kenny has worked in the insurance industry on and off since 1977. He has
14 been licensed to sell insurance in the states of Hawaii, Arizona, Massachusetts,
15 Alaska, Rhode Island, and Connecticut. Mr. Kenny has also been licensed in the state
16 of Hawaii to sell real estate.

17 10. The evidence of record establishes that Mr. Kenney has never had any disciplinary
18 action taken or complaints made against him, that he is aware of, in the above-
19 mentioned jurisdictions and has an unblemished record of licensure in the fields of
20 insurance and real estate.

21 11. Mr. Kenney testified that the Hawaii Departments of Insurance and Real Estate
22 knew of his felony conviction in the above-mentioned criminal matters and did not take
23 any disciplinary action against him.

24 12. Mr. Kenney has worked in the insurance field as an insurance agent/solicitor in
25 connection with his employment with Banker's Life Insurance Company ("Bankers") and
26 has been a Regional Sales Marketing Director for the states of Hawaii and Alaska. He
27 has also been an Assistant Sales Manager for Bankers in the State of Arizona under
28 the supervision of Jerry Bjordahl ("Mr. Bjordahl").
29
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1 13. Mr. Kenney has trained thousands of insurance agents during his tenure with
2 Bankers and has received awards from Bankers as well as industry associations for his
3 accomplishments in the insurance field.

4 14. As a result of a change in the operation of the Alaska and Hawaii insurance
5 business, Mr. Kenney was offered a position within Bankers to work with Mr. Bjordahl in
6 Arizona. The offer of employment from Mr. Bjordahl came at a time when Mr. Kenney
7 was still under probation in CR No. 93-0205(3) and CR No. 93-0357(3). According to
8 the terms of his probation, Mr. Kenney was not allowed to leave Hawaii unless he
9 received approval from his probation officer.

10 15. Mr. Kenney testified that his wife and children were located in Arizona and that,
11 from prior discussions he had with his probation officer, he was led to believe that there
12 would not be a problem in his returning to the "mainland". However, Mr. Kenny, unable
13 to reach his probation officer to obtain approval to relocate to Arizona despite attempts
14 to contact him, left Hawaii for Arizona to pursue the employment opportunity with Mr.
15 Bjordahl.

16 16. Mr. Kenney was arrested in Arizona and returned to Hawaii, because he violated
17 the terms and conditions of his probation.

18 17. The Administrative Law Judge notes that in 1993, Mr. Kenney discontinued selling
19 insurance because he suffered from Bells Palsy, which incapacitated him for
20 approximately one year. Just as he recuperated from that disease, Mr. Kenney
21 suffered a heart attack, which was another setback for him.

22 18. It is determined that Mr. Kenney has been punished for his parole violation by
23 having served the full 14 months of incarceration in jail and therefore, the Administrative
24 Law Judge does not view the probation violation as a matter in aggravation to be
25 considered with respect to Mr. Kenney's character.

26 19. Mr. Kenney admitted to having made an error in judgment in being involved in the
27 activities that led to the above-mentioned conviction. He also admitted that he should
28 have obtained authorization from his probation officer before he left Hawaii for Arizona
29 and that he was solely motivated by the employment opportunity, particularly because
30

1 of his prior criminal record and medical incapacitation that forced him to leave the
2 insurance industry.

3 20. Mr. Kenney contends that none of his criminal acts involve a breach of the trust or
4 duties that an insurance agent engages in during the transaction of insurance
5 business.

6 21. In support of his good character and reputation, Mr. Kenney had four witnesses
7 testify on his behalf; Mr. Bjordahl, James Gahler ("Mr. Gahler"), Dr. Mark Hagedone
8 ("Dr. Hagedone"), and Pastor Daniel Vargas ("Pastor Vargas").

9 22. James Gahler is an assistant vice-principal of an elementary school and is currently
10 on sabbatical. Mr. Gahler testified that he has known Mr. Kenney since the mid 1970's
11 and that Mr. Kenney used to be his next door neighbor.

12 23. Mr. Gahler was aware that Mr. Kenney had been convicted of a crime and was
13 incarcerated but was never informed, nor did he inquire, as to any further information
14 concerning Mr. Kenney's problems with the law.

15 24. Mr. Gahler testified that he and Mr. Kenney, along with their respective families,
16 engaged in social functions during the time they were next door neighbors and that they
17 had continued to be friends after Mr. Kenney had moved to another location.

18 25. According to Mr. Gahler, Mr. Kenney is a friendly, sensitive, and honest person
19 who has helped him with general friendly advice concerning insurance questions he
20 has had. Mr. Gahler's wife utilized Mr. Kenney's services in the insurance industry and
21 never experienced a problem with Mr. Kenney during the time he provided such
22 service.

23 26. Mr. Gahler testified that he believes the problems Mr. Kenney has had with the law
24 to be an aberration of his character.

25 27. Dr. Hagedone was a tenant in a townhouse owned by Mr. Kenney wherein they
26 shared space for a period of approximately one year in 1989. Since then, they have
27 remained friends.

28 28. Dr. Hagedone testified that he became aware approximately two years ago that Mr.
29 Keeney had some problem with the law and had been convicted of a felony.
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1 29. Dr. Hagedone is the President and Technical Director of Industrial Analytical Labs,
2 a laboratory that performs work in the field of forensic chemistry, environmental
3 chemistry, occupational health chemistry, and general lab activities.

4 30. Dr. Hagedone was surprised to learn of Mr. Kenney's problems with the law and
5 testified that it was out of character for Mr. Kenney. According to Dr. Hagedone, Mr.
6 Kenney is professional and responsible. He has not known him to do any fraudulent or
7 dishonest acts other than the above-mentioned felony conviction.

8 31. Dr. Hagedone believes Mr. Kenney to be a trusting and responsible individual with
9 whom he would have no reservations confiding in or purchasing insurance.

10 32. Pastor Vargas testified that he became acquainted with Mr. Kenney in late 1997 or
11 early 1998. Mr. Kenney came into a program known as Project Renewal, a
12 rehabilitation program, as a volunteer worker. During the program, Mr. Kenney worked
13 on a regular schedule and resided in the Church receiving rehabilitation. His job duties
14 involved telephone procurement for funds for the program.

15 33. Pastor Vargas testified that Mr. Kenney handled money for the program, he was
16 very business like and courteous, and was an example for others.

17 34. Pastor Vargas was aware that Mr. Kenney had been convicted of a felony but not
18 aware of the particulars. He believes Mr. Kenney to be an honest and straight forward
19 person.

20 35. Mr. Bjordahl testified as to Mr. Kenney's outstanding performance during his tenure
21 at Bankers. Mr. Bjordhal also testified that he is willing to support Mr. Kenney in his
22 attempt to not only obtain an insurance agent's license but also his attempt at being
23 employed with Bankers if he obtains such a license, even with the knowledge of Mr.
24 Kenney's prior criminal record.

25 36. Mr. Bjordahl testified that it would be unusual for Bankers to hire a person with a
26 prior felony conviction. However, Mr. Bjordahl believes Mr. Kenney to be honest and
27 reliable with respect to business matters.

28 37. The testimony of the above-mentioned character witnesses is determined to be
29 credible but is discounted to some degree because of the lack of continuous and recent
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1 contact between each of them and Mr. Kenney. In particular, the testimony of Mr.
2 Bjordahl is discounted a little more because of his economic motivation in having Mr.
3 Kenney licensed and working under his supervision, which may provide him some
4 future economic benefit.

5 38. During the hearing, the Department raised Mr. Kenney's veracity as an issue and
6 contended that he should have disclosed a Colorado felony conviction on the
7 Application.

8 39. The evidence of record establishes that in Colorado, Mr. Kenney pled guilty to a
9 felony conviction, but according to the plea, it would not be entered as a conviction.

10 40. James Fahrenholtz ("Mr. Fahrenholtz"), an attorney admitted to practice law in
11 Colorado, testified as to the Colorado felony charge. Mr. Fahrenholtz was Mr. Kenney's
12 lawyer with respect to that criminal action, and is a former deputy district attorney.
13 According to Mr. Fahrenholtz, once the plea agreement is entered into, there is no
14 record of conviction unless there is a proceeding to revoke the plea. There was no
15 evidence presented that such a proceeding was commenced. In the Colorado matter,
16 the restitution provision in the plea agreement was stayed pending Mr. Kenney's appeal
17 of the plea, which was unsuccessful. Mr. Kenney has not paid restitution because he
18 has no funds to do so. Mr. Kenney represented that the time for paying restitution has
19 not expired and it is his intention to pay it if he is successful in obtaining an insurance
20 agent's license and becomes gainfully employed.

21 41. Mr. Fahrenholtz also testified that the time specified in the plea agreement of
22 ninety days within which the terms are to be complied with is unusual. Therefore, Mr.
23 Fahrenholtz believes it is unclear what the status of the matter is in light of such
24 provision and the procedural history of that matter.

25 42. Technically, the Colorado plea agreement should have been disclosed to the
26 Department in the Application because of the language contained in Section V,
27 paragraph Application A of the Application¹. However, the Department's purpose in
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29 ¹ That question asks: "Have you Ever been convicted of a felony? For the purposes of this application
30 "convicted" includes, but is not limited to, having been found guilty by judge or jury or pled guilty or no

1 raising this issue was to attack the veracity of Mr. Kenney. It is determined that the
2 uncertainty as to the status of the Colorado matter is ruled in favor of Mr. Kenney to the
3 extent that, under the circumstances, he acted reasonably in believing the plea
4 agreement did not have to be disclosed. Thus, this Judge determines that the
5 Department fails in attacking Mr. Kenney's veracity on this basis.

6 43. During the hearing, Mr. Kenney expressed his acceptance of full responsibility for
7 the Hawaii conviction as well as the activities leading up to that conviction and
8 represented that it was a poor error in judgment.

9 44. Mr. Kenney established at the hearing that he is rehabilitated and is sincere in his
10 efforts to become assimilated within society and the business community.

11 45. It is determined that Mr. Kenney's testimony, as set forth above, is credible.

12 CONCLUSIONS OF LAW

13 1. The evidence of record establishes that, based upon the above-mentioned Hawaii
14 conviction, Mr. Kenney has a record of dishonesty in business or financial matters
15 within the meaning of A.R.S. §20-290(B)(6).

16 2. Mr. Kenney's Hawaii felony conviction, as set forth above, constitutes a record of
17 conviction of a judgment of a felony involving moral turpitude within the meaning of
18 A.R.S. §20-290(B)(6).

19 3. Based on the above, grounds exist for the Director of the Department to deny the
20 application.

21 4. The evidence of record establishes that Petitioner has met his burden of
22 establishing that he meets the requisite character and qualifications to hold an
23 insurance agent's license and that the denial of the Application should be reversed.

24 5. Probationary licenses are not specifically provided for in the statutes governing the
25 Department. However, administrative agencies have express as well as implied powers
26 conferred upon them by the legislature. Cracchiolo v. State 146 Ariz. 452,457, 706
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28 contest to any felony charge. A "No" response is incorrect if applicant has had any conviction dismissed,
29 expunged, pardoned, appealed, set aside or reversed, or had its (sic) civil rights restored, had a plea
30 withdrawn or has been given probation, a suspended sentence or a fine, or successfully completed a
diversion program."

1 P.2d 1219,1224 (App. 1985). The standards for the exercise of those powers need not
2 be expressly stated. State v. Birmingham, 95 Ariz. 310, 390 P.2d 103 (1964). The
3 Department has the authority to issue licenses, suspend or revoke licenses. Therefore,
4 based upon the governing case law referenced above, the Administrative Law Judge
5 believes the Department has the authority to take action that falls in between issuance
6 and revocation, such as a provisional or conditional license.²

7 **RECOMMENDED ORDER**

8 This case was a difficult case to decide and the evidence to be considered
9 supported the positions asserted by both parties. Under the particular facts and
10 circumstances of this matter, Mr. Kenney's long standing unblemished work and
11 licensure history both as an insurance agent and real estate agent was the deciding
12 factor that caused the undersigned Administrative Law Judge to rule in favor of Mr.
13 Kenney, although the nature of the Hawaii conviction is still a concern. Therefore, it is
14 recommended that the Application be granted on the express condition that Mr. Kenney
15 be placed on a two year active probationary period, during which time he shall submit
16 monthly reports as to his insurance business activities on dates and in a manner
17 specified by the Department. The failure of Mr. Kenney to comply with the directives of
18 the Department with respect to such reporting shall constitute sufficient grounds for
19 disciplinary action to be taken against the license.

20 However, in the event that the Director of the Department determines that the
21 Department will not issue Mr. Kenney an insurance agent's license with probation, then
22 and in that event, it is recommended that the Director exercise his discretion favorably,

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29 ² In fact, the Department issues conditional licenses pursuant to A.A.C. R20-6-706 giving an applicant an
30 opportunity to work in the insurance field pending completion of a fingerprint check and criminal
background analysis.

1 that the Application be granted, and that the Department issue Mr. Kenney an
2 insurance agent's life and disability agent's license.

3 Done this day, May 25, 2000

4 

5 Lewis D. Kowal
6 Administrative Law Judge

7
8
9 Original transmitted by mail this
10 26th day of May, 2000, to:

11 Department of Insurance
12 Charles R. Cohen
13 ATTN: Curvey Burton
14 2910 North 44th Street, Ste. 210
15 Phoenix, AZ 85018

16
17 By Maurice Bromert
18