STATE OF ARIZONA
FILED

SEP 4 2002

DEPT. OF INSURANCE
BY Kathy

STATE OF ARIZONA

DEPARTMENT OF INSURANCE

In the Matter of:	)	Docket No. 02A-102-INS
	)	
MARK ALAN BROWN,	)	**ORDER**
	)	
Petitioner.	)	
	)	

On August 28, 2002, the Office of Administrative Hearings, through Administrative Law Judge Allen Reed, issued a Recommended Decision of Administrative Law Judge (Recommended Decision), a copy of which is attached and incorporated by this reference. The Director of the Department of Insurance has reviewed the Recommended Decision and enters the following order:

1. Adopting the Recommended Findings of Fact.

2. Adopting the Recommended Conclusions of Law, except for the last sentence of Conclusion no. 7 and the last sentence of Conclusion no. 9 which are rejected.

3. Rejecting the Recommended Order, and upholding the denial of Petitioner's application for an insurance producer's license.

JUSTIFICATION FOR REJECTION

The Administrative Law Judge's Recommended Order is rejected for the following reasons:

1. Petitioner was convicted of the felony of Theft by Check in Texas. The conviction and circumstances, as found by the ALJ, reflect a crime involving dishonesty in financial dealings. The circumstances include prior misdemeanor convictions also related to Insufficient Funds checks. While these misdemeanors are not alleged by the Department as grounds for denial in an of themselves, they

are facts of record that reveal that Petitioner's misconduct culminating in the felony conviction was not an isolated event.

2. Petitioner failed to clearly, properly and completely disclose his material felony theft conviction to the Texas Department of Insurance as required. The facts as found by the ALJ plainly show that Petitioner failed to clearly and properly indicate his conviction on the application and failed to submit the required documentation of same. It was Petitioner's, not Mark Hatcher's nor Old Line Life Insurance Company's, obligation to submit a complete and truthful application to Texas. It was Petitioner's burden in this proceeding to explain his failure to perform that obligation. The ALJ's findings and conclusions plainly reflect that Petitioner failed to meet that burden. Also of record is the fact that Texas revoked Petitioner's license after it discovered his felony convection through its own efforts, that the revocation was upheld on appeal, and that Petitioner's license status in Texas has not changed since that revocation.

3. Thus, Petitioner presents as a convicted felon arising out of financially dishonest conduct who also failed to properly disclose his conviction to another state insurance department. Dealing honestly with consumers in financial matters and dealing honestly with the Arizona Department of Insurance is at the heart of being qualified for an insurance license in this state. The record does not reflect that Petitioner has met his burden to show his qualifications for the license notwithstanding his record of felony conviction and insurance license revocation.

4. The ALJ concludes that the risk to Arizona's insurance consumers is lessened by the proposition that Petitioner intends to work with his wife. In the opinion and experience of the undersigned, this fact has no mitigating effect. In fact, objective standards and parameters for a licensee's conduct are less likely to be present and enforced when the business partner is a family relation.

Based on the facts as found by the ALJ, I reject his Recommended Order and uphold the denial.

NOTIFICATION OF RIGHTS

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

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

DATED this 4th of September, 2002

Charles R. Cohen
Director of Insurance

A copy of the foregoing mailed
this 4th day of September, 2002

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IN THE OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of:	No. 02A-102-INS
MARK ALAN BROWN,	**RECOMMENDED DECISION OF ADMINISTRATIVE LAW JUDGE**
Petitioner.	

HEARING: August 22, 2002

APPEARANCES: Charles Slack-Mendez, Esq. on behalf of the Applicant – Appellant

Mary E. Kosinski, Assistant Attorney General, on behalf of the State

ADMINISTRATIVE LAW JUDGE: Allen Reed

Findings of Fact

1. On or about February 4, 2002, the Applicant-Appellant (Applicant), Mark Alan Brown (Brown), submitted an Application for a Life, Accident and Health or Sickness Producer's License (Application), to the Arizona Department of Insurance (Department).
2. In the Application, Brown disclosed he had been convicted of a felony, had a professional license revoked, surrendered a license and had an administrative order entered against him for obtaining a license by fraud. Brown provided supplementary information explaining the circumstances of these events.
3. Based on the matters listed in paragraph 2 above, the Department denied Brown's Application because of the felony conviction and revocation of an insurance license.
4. Brown appealed the denial of his Application for an Arizona insurance license and the matter was set for the instant hearing.
5. In 1988, Brown pleaded guilty to a felony charge of Theft by Check (Theft), in Tarrant County, Texas. Brown received a 10 year deferred sentence with probation, was assessed costs, and restitution of approximately $15,000.00. The plea

arose from the fact that Brown, as a partner in a fledgling restaurant enterprise, issued a number of checks to a restaurant supplier over a period of two to three months and in the amount of $15,000.00. There were insufficient funds to cover the checks resulting in the criminal charge and subsequent guilty plea.

6. Brown also had two Driving While Intoxicated (DWI) and two misdemeanor Insufficient Funds convictions, between 1983 and 1987.
7. During his probation for Theft, Brown was granted permission to travel out of the state because his employment as a paramedic included delivery of drugs to various companies engaged in oil drilling in Louisiana. Brown was allowed to report to his probation officer, Greg Morton (Morton), by mail. However, due to job related issues, Brown fell behind in paying his court assessments-restitution.
8. According to Morton's 1996 affidavit (Exhibit 3b1), Brown was assigned another probation officer who was either unaware of or did not approve of Brown reporting by mail, which resulted in a motion to revoke Brown's probation.
9. In late 1992, Brown's probation was revoked by the Tarrant County District Court. Brown was sentenced to five years imprisonment but appealed. The decision was upheld by the Texas Court of Criminal Appeals in December 1996. Brown submitted an Application for Post Conviction Relief to the Tarrant County District Court asserting in part the ineffective assistance of counsel during the probation revocation proceedings. On January 24, 1997, Brown was sentenced to five years probation (including 60 days incarceration).
10. In 1995, Brown submitted an application for an insurance agent license to the Texas Department of Insurance. Brown marked and scratched over both the "yes" and "no" boxes for the question which asked if he had been convicted of a crime. If the answer marked was "yes", the Applicant was to attach certified documentation of the offense. Brown was told by a licensed insurance agent, Mark Hatcher (Hatcher), who was advising him, that he could submit a handwritten explanation of the offense. This explanation would be attached to the application and submitted to Old Line Life Insurance Company before being forwarded to the Texas Department of Insurance. It is unknown why Hatcher told Brown a handwritten disclosure was all that was needed when the application stated it required certified documents.

11. The Texas Department of Insurance has no record of having received the explanatory documentation regarding Brown's criminal case. Brown was issued an insurance agent license (life, health and accident insurance), on or about January 5, 1996.
12. In approximately February, 1997, the Texas Department of Insurance notified Brown that he had not provided complete information in his application. This was apparently after a criminal history check disclosed the information. The Texas Department then began administrative proceedings to revoke the license. After a hearing, an adverse decision and an appeal, Brown's Texas insurance license was revoked on July 21, 1999.
13. Brown had also obtained insurance licenses in Montana and Utah. These were surrendered as a consequence of the Texas revocation proceedings.
14. Brown moved to Arizona in early 2002. He married in 1996 and currently functions as the office manager for his wife who has insurance licenses in numerous states including Arizona and Texas.
15. Brown made full restitution in the Theft case in 1994, and was discharged from probation early in 2002.

Conclusions of Law

A.R.S. §20-295 provides in pertinent part that the Director of the Department may deny a license for (A)(6), conviction of a felony; and (A)(9), having an insurance producer or equivalent license revoked in another state.

A.R.S. §41-1065 provides in pertinent part that in a hearing on the denial of a permit or license, the Applicant has the burden of proof (see also A.A.C. R2-19-119).

The Department's Notice of Hearing set forth 10 allegations which were admitted by the Applicant. These allegations have been incorporated and restated in the Findings of Fact of this Recommended Decision.

1. In general terms, the function of the Department is to regulate the insurance industry and to protect the public from the harm of unfair, unscrupulous and unsound insurance companies, practices and agents.

. . .

2. Brown's felony conviction, relating as it does to financial matters (Theft by Check), and issues which have to do with responsible and honest business dealings, is a legally imposed and legitimate concern of the Department. The evidence of the Applicant's conviction is not disputed. The facts surrounding the conviction are somewhat clouded. The Applicant testified he anticipated that the overdrawn checks would be made good at some point (whether through his partners or otherwise is uncertain). It was not quite clear how reasonable this expectation was. In any event, an extended period of time issuing a series of checks amounting to thousands of dollars with insufficient funds to cover those checks, is not something to be taken lightly (the two misdemeanor convictions for the same conduct cannot be completely ignored). However, the events are at least 15 years old and absent further aggravation, should not in and of themselves bar the Applicant from being licensed by the Department.
3. Based on the most competent evidence, the violation of probation in 1992 should not negatively impact the Brown's application for a license.
4. The next and most critical issue is the Texas insurance license application and subsequent license revocation. Brown testified that he submitted the required documentation and made full disclosure to the Texas Department of Insurance. Nevertheless, the agency did not find the documentation and did not accept Brown's explanation, and after a hearing, revoked his license. The Applicant's exhibits, 3C(4) and (5), presented some question about destruction of records by the insurance carrier who was to forward the application and the Texas Department of Insurance. This issue was not fully explained by the evidence of record. The Texas license revocation was upheld by the court.
5. It is not for this Administrative Law Judge (ALJ) to review a final agency decision which has been upheld by a court of competent jurisdiction. However, full faith and credit notwithstanding, the ALJ in this case must still make an independent determination based on the evidence presented. Brown submitted letters from his insurance sponsor (Mark Hatcher) in Texas to show that he disclosed the Theft conviction in his Texas insurance application. The fact that the rules of evidence do not apply in administrative hearings does not mean all types of evidence deserve

equal weight. The letters from Hatcher raise more questions than answers. This is not to say the letters are untrue but only that their veracity and reliability cannot be ascertained through cross examination. Another factor regarding the Texas insurance application is the obvious manner in which Brown marked the answer to the question of criminal history. The argument was made that if Brown had intended to falsify or not disclose the information, it is unlikely he would have drawn so much attention to that particular question on the application. There are counter arguments to this interpretation and neither supposition is the basis for a sound conclusion on the issue.

6. The Applicant submitted numerous letters of reference which were submitted to the Texas Department of Insurance during the revocation proceeding. The letters are five years old but speak highly of the Applicant. The letters can only be given minimal weight in light of the inherent evidentiary unreliability of such documentation.

7. There is no evidence that Brown had any problems regarding the manner in which he conducted his insurance business while he was licensed in Texas. If licensed in Arizona, the Applicant intends to work with his wife. It is unlikely that Brown would jeopardize his and possibly his wife's position by engaging in conduct which would be a violation of the insurance laws.

8. Counsel for the Applicant properly points out that there are no objective standards for determining exactly how the cited portions of the statute (A.R.S. §20-295) are to be applied, or that give some direction of how the Department's discretion should be exercised. Absent such clear standards it is understood that some decisions to grant or deny a license may possibly hinge on unknown or subjective criteria and be subject to the criticism that the decision was arbitrary or capricious. This is the possibility under the law. Absent clear and objective standards, the law only requires a justifiable and reasonable basis for the decision which is made with respect to the application.

. . .

. . .

9. Based on the evidence, it cannot be reasonably said that the Department acted arbitrarily in initially denying the license. The record shows that there are some questions which have no certain answers. However, having particularly assessed the evidence, the Applicant and his testimony, the ALJ is of the opinion that the Applicant has met his burden of proof and does not pose a threat to the Arizona public which utilizes the products and services of the insurance industry, or to the integrity and well being of the insurance industry doing business in Arizona.

Recommended Order

In view of the foregoing it is recommended that the initial decision denying the application of Mark Alan Brown be reversed and the Department grant the application of Mark Alan Brown for an Arizona Department of Insurance, Life, Accident and Health or Sickness Producer's License.

Done this day, August 28, 2002

Allen Reed
Administrative Law Judge

Original transmitted by mail this 29 day of August, 2002, to:

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By Chris Crawford Thomson