

APR 29 2015

DEPT OF INSURANCE
BY ms

STATE OF ARIZONA
DEPARTMENT OF INSURANCE

In the Matter of:

No. 15A-017-INS

WINNER, GARY SCOTT,

ORDER

Petitioner.

On April 27, 2015, the Office of Administrative Hearings, through Administrative Law Judge Diane Mihalsky, issued an Administrative Law Judge Decision ("Recommended Decision"), received by the Director of the Department of Insurance ("Director") on April 28, 2015, 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. The Director adopts the Recommended Findings of Fact and Conclusions of Law.
2. The Director denies Gary Scott Winner's application for an Arizona insurance producer license.

NOTIFICATION OF RIGHTS

Pursuant to Arizona Revised Statutes ("A.R.S.") § 41-1092.09, Petitioner may request a rehearing with respect to this order by filling 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.

1 payer was Medicare and there are a myriad of rules that
2 Medicare has in order to receive payments.

3 I set up a Medical Supply company called Planned
4 Eldercare Inc. in 2005. I set up a telemarketing sales team
5 that contacted seniors directly which violates the Medicare
6 marketing rules. There rule is seniors have to contact the
7 suppliers first. That was the primary violation that led to my
8 felony plea.

9 The actual charges that I pled to were [:] 2 counts of health
10 care fraud (telemarketing and forgiving seniors from paying
11 their 20% co-payment), providing a non FDA approved
12 product and money laundering (all paperwork included).

13 I pled to a 37 month incarceration and paid back \$2.2 million
14 of restitution in full. During my incarceration I went through
15 and graduated from a cognitive behavioral therapy program
16 (called RDAP) which helped me understand my faulty
17 thinking, admit responsibility for my actions and live my life
18 by 8 positive core attitudes (honesty, humility, open
19 mindedness, objectivity, gratitude, willingness, responsibility
20 and caring). I learned a lot from my experiences and I
21 believe it made me a better person.

22 However, during my incarceration period the department of
23 insurance of Illinois (where I am originally from) revoked my
24 license due to the felony charge. I am not able to reapply
25 for my Illinois insurance license until 2016, with no
26 guarantee of acceptance.

27 I have had many challenges in getting employment since my
28 release from prison in 2013. I tried to get employment and
29 licenses on numerous occasions, but I've been denied due
30 to the felony. The reality is I've been in the insurance
industry since 1990, it's what I know, what I'm most qualified
to do and I want to get back into it. I have been unemployed
since my release from prison and want to start working and
get back into life again. I have an opportunity with a Life
Insurance Company now and it's contingent on getting my
insurance license and I would very much like to get it.

1 I relocated to the Arizona 2 months ago and want to make
2 this my home. . . .³

3 4. On or about February 10, 2015, the Department sent a letter to Mr. Winner to
4 notify him that it had determined to deny his license application under A.R.S. § 20-
5 295(A)(1), (3), (6), (7), (8), and (9).⁴ Mr. Winner requested a hearing on the
6 Department's decision.⁵

7 5. The Department referred the matter to the Office of Administrative Hearings,
8 an independent state agency, for an evidentiary hearing. A hearing was held on April
9 20, 2015. The Department submitted six exhibits and presented the testimony of
10 Steven Fromholtz, its Producer Licensing Administrator. Mr. Winner submitted four
11 exhibits and testified on his own behalf.

12 HEARING EVIDENCE

13 6. On or about February 10, 2012, the United States District Court for the
14 District of Rhode Island entered a judgment against Mr. Winner in Case No.
15 1:11CR00169-01S, finding him guilty pursuant to his plea of violating the following
16 federal statutes: (1) 18 U.S.C. § 1347, Health Care Fraud (two counts); (2) 21 U.S.C. §
17 331(a) and 333, Introduction of Adulterated and Misbranded Medical Devices into
18 Interstate Commerce; and (3) 18 U.S.C. § 1957, Money Laundering.⁶ As a result, the
19 Court sentenced Mr. Winner to 37 months' imprisonment in a federal prison and to
20 three years' supervised probation upon his release from prison. The Court also
21 required Mr. Winner to pay \$2,210,152.00 in restitution for his offenses.⁷

22 7. The Department submitted the press release published by the United States
23 Attorney for the District of Rhode Island dated February 10, 2012, that described the
24 circumstances that led to Mr. Winner's criminal convictions in relevant part as follows:

25
26 ³ The Department's Exhibit 1 at 10.

27 ⁴ See the Department's Exhibit 5. The Department did not present any evidence at hearing to establish
28 cause to deny Mr. Winner's license application under A.R.S. § 20-295(1), which allows the Department to
29 deny a license application if the applicant has "[p]rovid[ed] incorrect, misleading, incomplete or materially
30 untrue information in the license application." The Department did not argue cause to deny Mr. Winner's
application under A.R.S. § 20-295(2), which allows the Department to deny a license application if the
applicant has "[v]iolat[ed] any provision of this title or any rule, subpoena or order of the director."

⁵ See the Department's Exhibit 6.

⁶ See the Department's Exhibit 2 at 14.

1 Winner admitted to targeting arthritic and/or diabetic
2 Medicare beneficiaries through telemarketing, then ensuring
3 that his company ordered and shipped medical equipment
4 and supplies to the beneficiaries contacted that they did not
5 order and/or were not medically necessary.

6

7 At the time of his guilty plea, Winner admitted to the court
8 that from 2005 through early 2009, he instructed Planned
9 Eldercare employees, upon successfully reaching
10 individuals as a result of unsolicited telemarketing calls, to
11 inquire if they suffered from diabetes or arthritis. Once call
12 recipients identified themselves as suffering from either
13 ailment, as an inducement for recipients to provide their
14 Medicare and physician information, employees were
15 instructed to inform recipients that Planned Eldercare could
16 provide them with products to help with their ailments "at no
17 cost to you." Once employees obtained Medicare
18 beneficiaries' agreement to receive certain products, Winner
19 instructed employees to order as many products as possible
20 whether or not the beneficiaries requested them or had a
21 medical need for the equipment. Winner admitted that
22 Medicare was billed for thousands of products that
23 beneficiaries did not order.

24 Winner also admitted to the court that he instructed his
25 employees to falsely inform male diabetic beneficiaries that
26 an "erectile pump" was good for prostate problems, and was
27 designed to help blood circulation exclusively in the urinary
28 tract and prostate region. Winner admitted that as part of
29 the scheme, he ordered penis enlargers from an x-rated
30 website for \$26.00 each, repackaged them with an
information sheet that regular use of the enclosed "erectile
pump" helps with bladder control, urinary flow and prostate
comfort, and then shipped them to recipients. Winner
received in reimbursement from Medicare and average of
\$284 per item.

Winner also admitted that he waived copayments for all
Medicare patients, a practice which is prohibited by
Medicare. By waiving copayments they otherwise would be
responsible for, Winner induced beneficiaries to accept

⁷ See *id.* at 14, 16.

1 products they had not ordered and not report the alleged
2 fraudulent billing to Medicare.⁸

3 8. The Department also submitted a printout from the National Association of
4 Insurance Commissioners that showed that effective January 28, 2013, the Illinois
5 Department of Insurance revoked Mr. Winner's license in Illinois as a result of his
6 conviction in the United States District Court for the District of Rhode Island Case No.
7 1:11CR00169-01S.⁹

8 9. Mr. Fromholtz testified that the Department was concerned about licensing
9 Mr. Winner because only a little more than three years have passed since he was
10 convicted of felonies that were related to his license to sell insurance. Mr. Fromholtz
11 explained that a licensed insurance producer is expected to discuss healthcare
12 products with his clients.

13 10. Mr. Winner testified that he served 15 months in federal prison before he
14 was released early for good behavior. Mr. Winner testified that when he committed the
15 crimes that led to his convictions, he was smoking marijuana regularly, which helped
16 him justify his crime. Mr. Winner testified that during the time he was in prison, he
17 completed a 500-hour Residential Drug Abuse Program.¹⁰ Mr. Winner testified that the
18 program was an intensive one-year cognitive behavioral health program that helped
19 him to understand the effect of drugs and to learn the eight rational behaviors of
20 honesty, humility, gratitude, willingness, responsibility, caring, objectivity, and open-
21 mindedness. His is now able to recognize criminal thinking and faulty core beliefs.

22 11. Mr. Winner testified that while he was in prison, he served as a mentor in
23 the Big Brother Program to help younger prisoners' efforts at rehabilitation. Mr. Winner
24 submitted a Certificate of Leadership in the Big Brother Program for Displaying
25 Responsibility, Caring and Willingness by Volunteering 24/7, as a Mentor in the Big
26 Brother Program.¹¹ Mr. Winner testified that he participated in the Big Brother Program
27 for 11 of the 15 months that he spent in federal prison.

28 _____
29 ⁸ The Department's Exhibit 3 at 41.

30 ⁹ See the Department's Exhibits 4, 4a.

¹⁰ See Mr. Winner's Exhibit B.

¹¹ See Mr. Winner's Exhibit C.

1 12. Mr. Winner submitted a letter from the United States Attorney for the
2 District of Rhode Island dated July 7, 2014, to establish that Mr. Winner has paid the
3 full amount of restitution that he was ordered to pay in United States District Court for
4 the District of Rhode Island Case No. 1:11CR00169-01S.¹²

5 13. Mr. Winner testified that he was released from prison on May 27, 2013.
6 After his release, he spent six months in a half-way house. After his release from the
7 half-way house, he has been looking for work, without success, because all require a
8 license. It has also been challenging to rent an apartment. Mr. Winner testified that he
9 moved to Arizona on November 25, 2014, after he was released from probation.

10 14. Mr. Winner testified that his choice to move to Arizona was not haphazard
11 because attended college at Arizona State University, earning a Bachelor of Science
12 degree in business in 1984.¹³ Mr. Winner testified that while he was licensed as an
13 insurance producer in Illinois, he held numerous non-residential licenses and that none
14 of these licenses have been disciplined. Mr. Winner stated that it has been ten years
15 since he committed the crimes that led to his convictions.

16 15. Mr. Winner initially testified that the gravamen of his crimes was that he
17 marketed durable goods directly to Medicare beneficiaries, in violation of Medicare
18 regulations. But he acknowledged that he was aware of the Medicare rules and that
19 the press release from the District Attorney for the federal District of Rhode Island was
20 not incorrect.

21 CONCLUSIONS OF LAW

22 1. This matter lies within the Department's jurisdiction.

23 2. Mr. Winner bears the burden of proof to establish that he meets statutory
24 qualifications for an insurance producer's license by a preponderance of the
25 evidence.¹⁴

26 3. "A preponderance of the evidence is such proof as convinces the trier of fact
27 that the contention is more probably true than not."¹⁵ A preponderance of the evidence

28 ¹² See Mr. Winner's Exhibit A.

29 ¹³ See Mr. Winner's Exhibit D.

30 ¹⁴ See A.R.S. § 41-1092.07(G)(1); A.A.C. R2-19-119; see also *Vazanno v. Superior Court*, 74 Ariz. 369, 372, 249 P.2d 837 (1952).

1 is "[t]he greater weight of the evidence, not necessarily established by the greater
2 number of witnesses testifying to a fact but by evidence that has the most convincing
3 force; superior evidentiary weight that, though not sufficient to free the mind wholly from
4 all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of
5 the issue rather than the other."¹⁶

6 4. A.R.S. § 20-285(A) includes among the grounds for the Department to deny
7 an insurance producer's license application the following:

- 8 6. Having been convicted of a felony.
- 9 7. Having admitted or been found to have committed any
10 insurance unfair trade practice or fraud.
- 11 8. Using fraudulent, coercive or dishonest practices, or
12 demonstrating incompetence, untrustworthiness or
13 financial irresponsibility in the conduct of business in
14 this state or elsewhere.
- 15 9. Having an insurance producer license, or its equivalent,
16 denied, suspended or revoked in any state, province,
district or territory.

17 Mr. Winner has been convicted of felonies involving his sales of durable medical
18 equipment to beneficiaries of Medicare, the federal insurance program for the elderly
19 and disabled. The press release makes clear that Mr. Winner's conviction involved
20 misrepresentation and dishonest business practices, not just an oversight or a technical
21 failure to follow esoteric federal regulations. The Illinois Department of Insurance has
22 revoked Mr. Winner's Illinois license. Therefore, cause exists under A.R.S. § 20-
23 285(A)(6), (7), (8), and (9) for the Department to deny Mr. Winner's license application.

24 5. An insurance producer's license is a privilege, not a right. Even though
25 cause may exist to deny a license application, however, an applicant may establish that
26 he is rehabilitated, has reestablished good character, and no longer poses a threat to
27 the public. The issue of what constitutes good character or a lack thereof is nebulous
28 at best. Former United States Supreme Court Justice Frankfurter noted:

29
30 ¹⁵ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

1 No doubt satisfaction of the requirement of moral character
2 involves an exercise of delicate judgment on the part of
3 those who reach a conclusion, having heard and seen the
4 applicant . . . , a judgment of which it may be said as it was
5 of "many honest and sensible judgments" in a different
6 context that it expresses "an intuition of experience which
7 outruns analysis and sums up many unnamed and tangled
8 impressions; impressions which may lie beneath
9 consciousness without losing their worth." . . . ¹⁷

7 Once good character is shown to be absent, it is not automatically regained by the
8 mere passage of time and positive and affirmative activities are required for a person to
9 regain what was lost. Mr. Winner credibly testified that his business activities that led
10 to his felony convictions were related to his heavy use of marijuana, which clouded his
11 judgment, and that he has acquired skills to make more mindful and ethical decisions in
12 the future. Mr. Winner also credibly testified that while he was in prison, he helped
13 others learn to make better decisions.

14 6. The legislature established the Department to protect consumers.¹⁸ The time
15 period for which a license applicant must establish rehabilitation is commensurate with
16 the period of misconduct and the severity of the offenses. Mr. Winner's criminal acts
17 that led to his convictions were serious, repeated, and occurred over a period of four
18 years that ended only six years ago. It has only been a little more than four months
19 since Mr. Winner was released from probation. Mr. Winner still minimizes the
20 seriousness of his crimes and only acknowledged that the crimes involved
21 misrepresentation in response to the Department's attorney's cross-examination.
22 Given that Mr. Winner's release from his criminal sentence is recent and his crimes
23 were serious, on this record, he has not established sufficient rehabilitation for
24 licensure to avoid exposing the public to an unreasonable risk of harm.

25 ////

26 ////

28 ¹⁶ BLACK'S LAW DICTIONARY at page 1220 (8th ed. 1999).

29 ¹⁷ *Schware v. Board of Bar Examiners of the State of New Mexico*, 353 U.S. 232, 248, 77 S. Ct. 752, 761
30 (1957) (citation omitted; concurring opinion).

¹⁸ See Laws 1990, Ch. 38, § 1.

RECOMMENDED ORDER

1
2 Based on the foregoing, it is recommended that on the effective date of the
3 Department's order, the decision to deny Gary Scott Winner's application for an
4 insurance producer's license be affirmed.

5 *In the event of certification of the Administrative Law Judge Decision by the*
6 *Director of the Office of Administrative Hearings, the effective date of the Order will be*
7 *five days from the date of that certification.*

8 Done this day, April 27, 2015.

9 /s/ Diane Mihalsky
10 Administrative Law Judge

11 Transmitted electronically to:

12 Darren Ellingson, Deputy Director
13 Arizona Department of Insurance
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