Before the
Administrative Hearing Commission
State of Missouri

MICHAEL POLSKY,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 06-1458 DI
	)	
DIRECTOR OF INSURANCE,	)	061006 309C
	)	
Respondent.	)	

DECISION

We deny the insurance producer license application ("application") of Michael Polsky because he committed and was recently convicted of wire fraud and mail fraud.

Procedure

Polsky filed his complaint on September 29, 2006, seeking our review of a decision by the Director of Insurance ("the Director") denying the application. We convened a hearing on the complaint on January 17, 2007. Polsky presented his case. The Director's attorney Kevin Hall represented the Director. We take notice of our file in ***Director of Insurance v. Polsky***[1] ("the earlier case"). This case was ready for decision on February 23, 2007, when Polsky filed a letter stating that he would file no written argument.

---

[1]Case No. 04-1351 DI (June 23, 2005). In that case, we found cause for the Director to discipline Polsky.

Findings of Fact

1. The Director licensed Polsky on March 12, 1982, as an insurance agent. The Director replaced that license with an insurance producer license on January 1, 2003. The insurance producer license expired on March 25, 2004.

2. Polsky, his brother, and his sister ("the defendants") operated Polsky Motors, Inc., a car dealership, in St. Joseph, Missouri. On October 1, 2002, a federal grand jury in the United States District Court for the Western District of Missouri ("the court") indicted the defendants on 12 counts of felony mail fraud and wire fraud. The indictment alleged that victims of the defendants' frauds included employees and customers of Polsky Motors, Inc., financial and lending companies, and government agencies.

3. On January 31, 2003, Polsky pled guilty to Counts 1, 3, and 6 of the indictment. Count 1 alleged:

> On or about December 2, 1998 . . . the defendants . . . aiding and abetting each other for the purpose of executing and attempting to execute the scheme and artifice to defraud and to obtain money by means of material false and fraudulent pretenses, representations, and promises, did place and cause to be placed in the post office and an authorized depository for mail matter to be delivered by the Postal Service, to wit: a SBA 504 loan application mailed from MoKan Development, St. Joseph, Missouri, to Neida Heusiakvelt, Kansas City, Missouri.
>
> All in violation of Title 18, United States Code, Sections 1341 and 2.

Count 3 alleged:

> On or about April 25, 2000 . . . the defendants . . . aiding and abetting each other for the purpose of executing and attempting to execute the scheme and artifice to defraud and to obtain money by means of material false and fraudulent pretenses, representations, and promises, did place and cause to be placed in the post office and an authorized depository for mail matter to be delivered by the Postal Service, to wit: a letter containing check number 3030 in the amount of $5,180.22 payable to Managed Health Funding

(MHF) drawn on the account of Benefits Assistance Company, mailed from Benefits Assistance Company[.]

All in violation of Title 18, United States Code, Sections 1341 and 2.

Count 6 alleged:

> Beginning on or about June 8, 1999, and continuing until on or about November 18, 1999 . . . the defendants . . . aiding and abetting each other for the purpose of executing the scheme and artifice to defraud and to obtain money by means of material false and fraudulent pretenses, representations, and promises, did transmit and cause to be transmitted in interstate commerce, by means of an electronic communication, the items listed below, on the dates listed below:
>
> * * *
>
> ITEM Electronic Funds Transfer in the amount of $51,620.60 which included $42,153.60 in receipts received by Polsky Motors for the purchase of a 1999 Lincoln Navigator by Michael and Patricia Morrow on or about May 18, 1999.
>
> * * *
>
> All in violation of Title 18, United State Code, Sections 1343 and 2.

Polsky committed the crimes to which he pled guilty to obtain cars, money, and credit to keep the financially failing dealership operating.

4. On July 1, 2003, the court found Polsky guilty on Counts 1, 3, and 6. It sentenced him to 33 months in prison on each of the three counts, to be served concurrently, and three years of parole on each count to run concurrently upon release from imprisonment. The court also ordered total restitution of $990,494.68.

5. On August 4, 2003, Polsky began his prison sentence. While in prison, Polsky began paying restitution as ordered by the court. He has continued to do so through the date of the hearing.

6. On June 23, 2005, we issued our decision in the earlier case. We determined that Polsky's crimes constituted felonies and involved moral turpitude. We did not decide whether Polsky violated professional standards as charged by the Director because the Director did not, in the complaint that initiated the earlier case, allege the facts underlying the criminal charges.

7. On September 29, 2005, Polsky was released from prison to a halfway house. On October 3, 2005, he began work at an automobile dealership in the positions of salesperson and floor manager. He held that position as of the date of the hearing.

8. An insurance producer, aware of his convictions, would like Polsky to work for it. On June 20, 2006, Polsky filed the application. The Director denied the application on September 19, 2006.

9. Polsky is still on parole.

Conclusions of Law

We have jurisdiction to hear Polsky's complaint under § 375.141.2:[2]

> Appeal of the . . . denial of the application for a license shall be made pursuant to the provisions of chapter 621, RSMo.

Polsky has the burden of proof on the issues.[3]

The issue before us, the Director argues, is whether he had sufficient legal and factual grounds for his denial for us to affirm it. The Director cites no authority for that standard of review, and it is contrary to any authority on the issue. Section 621.135, RSMo 2000, provides that this case is governed by Chapter 536, RSMo. By referring to Chapter 536, RSMo, the legislature is instructing us to make the Board's decision[4] "de novo," meaning "anew," on the

[2]Statutory references are to RSMo Supp. 2006 unless otherwise noted.
[3]Section 621.120, RSMo 2000.
[4]***J.C. Nichols Co. v. Director of Revenue***, 796 S.W.2d 16, 20-21 (Mo. banc 1990).

evidentiary record that the parties make before us.[5] That decision is whether to grant Polsky's application. We base our decision on the facts alleged and law cited in the amended answer.[6]

I. Collateral Estoppel

Each party claims to have already prevailed on the issues. The amended answer cites facts and law that appeared in the earlier case:

- Section 375.141.1(3), RSMo 2000, and, in the alternative, § 375.141.1(6) allow denial of the application if Polsky has "[b]een convicted of a felony or a crime involving moral turpitude."
- Section 375.141.1(4), RSMo 2000, and, in the alternative, § 375.141.1(8) allow denial of the application based on lack of competence and trustworthiness.

Issues of fact and law are immune to re-litigation under the doctrine of collateral estoppel.

Collateral estoppel applies if the parties to this action and the earlier case are the same and the issue addressed in the earlier case was:

- identical to that in the present action;
- resolved by a decision on the merits; and
- subject to a full and fair opportunity to litigate.[7]

The full and fair opportunity to litigate includes: (1) whether we may afford procedural opportunities not available in the earlier case; (2) whether our decision in the earlier case may be inconsistent with another existing decision and, as to the party against whom the doctrine is asserted, (3) whether there was a strong incentive to litigate the earlier case; and (4) whether this Commission was a substantially inconvenient forum.[8] We apply those factors as follows.

---

[5] ***Lederer v. Department of Social Servs.***, 825 S.W.2d 858, 864 (Mo. App., W.D. 1992).
[6] ***Ballew v. Ainsworth***, 670 S.W.2d 94, 103 (Mo. App., E.D. 1984).
[7] ***Missouri Bd. of Pharmacy v. Tadrus***, 926 S.W.2d 132, 136 (Mo. App., W.D. 1996).
[8] ***Integrity Ins. Co. v. Tom Martin Constr. Co.***, 765 S.W.2d 679, 683-84 (Mo. App., W.D. 1989).

In this action and the earlier case, the parties and the issues are identical, and our decision was on the merits. Also, in the earlier case the parties had a full and fair opportunity to litigate the issues because (1) our decision in the earlier case is not inconsistent with any other decision that the parties have shown us; (2) we afford the same procedural opportunities in both proceedings; (3) each party had a strong incentive to litigate the earlier case, as shown by this litigation over reinstating the license; and (4) this Commission was not a substantially inconvenient forum. We are aware that Polsky was in prison when we decided the earlier case, but we served him with notice of the earlier case and of the hearing date, and he did not seek a decision without a hearing, or participate in the hearing through counsel, as parties before us may do.

II. The Charges

As to the convictions, the Director argues that he prevailed on that issue in the earlier case. In the earlier case, we decided the issues on the merits and concluded that the court convicted Polsky of felonies and crimes involving moral turpitude. Having "[b]een convicted of a felony or a crime involving moral turpitude" is grounds for denial under both § 375.141.1(3), RSMo 2000, and § 375.141.1(6). Those statutes' identical language allows us to deny Polsky's application based on his convictions.

The convictions' factual basis – the conduct to which Polsky pled guilty – is the issue on which Polsky argues that he has already prevailed. But he has not shown us any such decision. Our decision in the earlier case did not address his conduct. His conduct was not among the allegations in the Director's complaint, so we did not address the merits of the charges related to it. We do so now.

Polsky's convictions collaterally estop him from denying the conduct for which the court found him guilty.[9] As to the law, both § 375.141.1(4), RSMo 2000, and § 375.141.1(8) allow

[9] ***Carr v. Holt***, 134 S.W.3d 647, 649 (Mo. App., E.D. 2004).

determines an application by reference to past conduct.[13] Therefore, we determine whether Polsky's conduct constitutes fraudulent, coercive, or dishonest practices, or financial irresponsibility in the conduct of business.

Irresponsible means "not based on sound reasoned considerations . . . unprepared or unwilling to meet financial responsibilities."[14] That definition describes Polsky's conduct. Polsky argues that his conduct did not occur in the conduct of insurance business. That is true, but § 375.141.1(8) is not limited to insurance business. It applies to any "financial irresponsibility in the conduct of business in this state or elsewhere." Polsky's conduct constituted financial irresponsibility in the conduct of business in this state.

A practice is something done customarily.[15] Fraud is an intentional perversion of truth to induce another to act in reliance upon it.[16] Dishonesty is a lack of integrity, a disposition to defraud or deceive.[17] Dishonesty includes actions that reflect adversely on trustworthiness.[18] Polsky's conduct was fraudulent and dishonest, and repeated enough for us to characterize it as a practice.

To coerce is to restrain or dominate by force.[19] There is no evidence of such conduct. The Director has not shown that Polsky's conduct constituted coercive practices, so coercive business practice is not grounds for denial.

---

[13]The retroactive operation of § 375.141.1(8) does not offend Article I, § 13, of the Missouri Constitution (1945), banning retrospective legislation, because § 375.141.1(8) does not address any vested substantive right. The granting of an application is not a vested right; that is, when Polsky committed the conduct, he had no right to be free of consequences that the General Assembly might later impose. Licensing restrictions protect the public, not the applicant. ***State Bd. of Regis'n for the Healing Arts v. Boston***, 72 S.W.3d 260, 264-66 (Mo. App., W.D. 2002).

[14]WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1196 (unabr. 1986).

[15]MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 974 (11th ed. 2004).

[16]***Hernandez v. State Bd. of Regis'n for Healing Arts***, 936 S.W.2d 894, 899 n.2 (Mo. App., W.D. 1997).

[17]MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 359 (11th ed. 2004).

[18]*See* ***In re Duncan***, 844 S.W.2d 443, 444 (Mo. banc 1992).

[19]MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 240 (11th ed. 2004).

We conclude that, based on Polsky's use of fraudulent and dishonest practices, and for demonstrating incompetence, untrustworthiness and financial irresponsibility in the conduct of business in this state, we may deny his application.

III. Discretion

The General Assembly used the words "may refuse to issue" a license in § 334.100, which means:

> The legislature did not intend, and the Board does not argue, that an applicant should be invariably and automatically disqualified[.[20]]

That is because:

> The use of the term "may" necessarily implies that the denial is not mandatory, and that the conferee of the power has the discretion in exercising it. And since there is a discretion to be exercised, it follows that there are factual considerations to be taken into account[.[21]]

Section 375.141.1 uses "may," which signifies an option and means an exercise of discretion.[22]

If the law delegates discretion to the Director, we must also exercise that discretion because a discretionary decision must stand on facts of record, and ours is the only procedure provided by law for doing so.[23] Unlike license discipline under § 621.110, the General Assembly has provided no separate contested case before the licensing agency on which to base an exercise of discretion.

> [I]n the case of license revocations, the legislature purposefully and distinctly set forth a precise division of functions, leaving no room for doubt or speculation as to the legislative intention. No similar division of functions has been specified with respect to original licensure covered by § 161.302.[[24]]

---

[20] ***State Bd. of Regis'n for the Healing Arts v. Finch***, 514 S.W.2d 608, 614 (Mo. App., K.C.D. 1974).
[21] *Id* (citation omitted).
[22] ***S.J.V. ex rel. Blank v. Voshage***, 860 S.W.2d 802, 804 (Mo. App., E.D. 1993).
[23] ***Finch***, 514 S.W.2d at 614.
[24] Now numbered § 621.045. ***Finch***, 514 S.W.2d at 615.

There is no other procedure for applying discretion to the record. Therefore, we have the same degree of discretion as the Director, and we need not exercise it in the same way.[25]

In determining whether we should license Polsky despite his conduct and convictions, we analogize to the General Assembly's treatment of convictions when used as evidence of character. We examine:

> [1] the nature of the crime committed in relation to the license which the applicant seeks, [2] the date of the conviction, [3] the conduct of the applicant since the date of the conviction and [4] other evidence as to the applicant's character.[[26]]

As to the last two factors, Polsky offered letters of recommendation to show his character in general and his behavior since the convictions. Those convictions are recent, however, and are closely related to the practice of an insurance producer. Those matters weigh against Polsky under the first two factors.

We have noted above the close connection between Polsky's criminal conduct and the practice of an insurance producer. Polsky used false documents to obtain money, which an insurance producer has the opportunity to do every day. His argument that he committed such fraud in a business other than insurance is unpersuasive. Polsky's convictions for that conduct are so recent that he has not even completed his parole. It would be anomalous and incongruous if we were to deem him prepared to practice as an insurance agent when the conduct for which he lost such a license and his liberty remains under court scrutiny.

A license "places the seal of the state's approval upon the licentiate and certifies to the public that he possesses [the statutory] requisites."[27] The conduct for which Polsky was

---

[25] ***Finch***, 514 S.W.2d at 615

[26] Section 314.200, RSMo 2000.

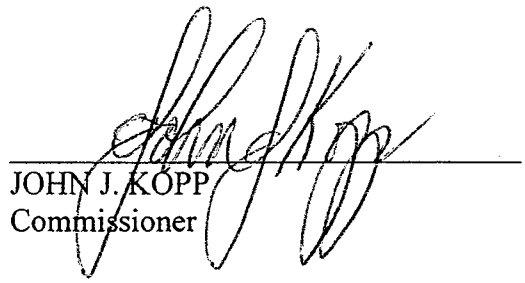
[27] ***State ex rel. Lentine v. State Bd. of Health***, 65 S.W.2d 943, 950 (Mo. 1933).

convicted in federal court is recent and intimately related to the license he seeks. Polsky has not shown that he merits the State's seal of approval as an insurance producer.

Summary

We deny Polsky's application under § 375.141.1(6) and (8).

SO ORDERED on April 24, 2007.



JOHN J. KOPP
Commissioner