

**BEFORE THE ADMINISTRATIVE HEARING COMMISSION
STATE OF MISSOURI**

SCOTT B. LAKIN, Director)	
Department of Insurance)	
State of Missouri,)	
)	
Petitioner,)	Case No. 04-1128 DI
)	
)	
v.)	
)	
VERSATILE MANAGEMENT GROUP,)	
Respondent.)	
)	
AND)	
)	
DEMITRIUS GLASS)	
)	
Petitioner,)	Case No. 04-0979 DI
)	
)	
v.)	
)	
SCOTT B. LAKIN, Director of)	
Insurance, State of Missouri)	
)	
Respondent.)	

RESPONDENTS' BRIEF

INTRODUCTION

Through a series of unfortunate circumstances, Respondents Versatile Management Group ("VMG") and Demitrius Glass ("Glass"), who has been licensed in the State of Missouri since the year 1998 without prior incident, now find themselves before this Commission. Nonetheless, in spite of these circumstances, the Department has not met its burden of proving by substantial and competent evidence that grounds exist to support the discipline of VMG's business entity producer's license or the Department's refusal to renew Glass's producer's license for Accident and Health, Life, Life and Variable Contracts. Likewise, the evidence does not support the Department's denial of Demitrius Glass's application for a Property and Casualty

producer's license. The evidence to support such severe consequences must be as substantial as the consequences. The evidence in the cases before this Commission does not rise to that level.

PROCEDURAL BACKGROUND

Mr. Glass is the principal/owner of VMG and acted in that capacity at all times relevant to the matters involved these cases. Prior to June 24, 2004, Glass had been licensed in the State of Missouri since 1998. (Tr. 64, L. 3-6) He has never had any prior complaints. (Tr. 45, L. 15-19 and 46, L. 1-5; Tr. 108, L. 9-15) In the time he has been in business, his Company has been responsible for writing approximately 350 insurance policies. (Tr. 66, L. 16-25)

On or about August 19, 2004, the Director of the Missouri Department of Insurance (the "Department") filed its Complaint against VMG, Cause No. 04-1128 DI, alleging various violations of Missouri State Statutes and/or regulations by Respondent VMG and requesting that this Commission find cause to discipline the insurance business entity producer's license of VMG. The Department charge Respondent VMG with the following violations:

375.141.1 The director may suspend, revoke, refuse to issue or refuse to renew an insurance producer license for any one or more of the following causes:

(2) Violating any insurance laws or violating any regulation, subpoena or order of the director or of another insurance commissioner in any other state;

(4) Improperly withholding, misappropriating or converting any moneys or properties received in the course of doing insurance business;

(8) Using fraudulent, coercive, or dishonest practices, or demonstrating incompetence, untrustworthiness or financial irresponsibility in the conduct of business in this state or elsewhere; ...

Further, the Department alleged that Respondent VMG violated 20 CSR 700-1.140(2) (D) which provides that:

Insurance producers shall remit all premium payments associated with a personal insurance policy to those persons entitled to them as soon as is reasonably possible after their receipt by the licensee, but in no

event later than thirty (30) days after the date of receipt, provided, however, that premiums may be remitted at a later point in time if the licensee is so authorized under a written agreement between the licensee and the person legally entitled to the premium. In no event, however, shall a licensee retain premium payments if to do so will result in the failure to obtain or continue coverage on behalf of an insured or prospective insured.

On or about May 12, 2004, Mr. Glass completed and submitted to the Department the Producer Renewal notice to renew his Accident and Health, Life, Life and Variable Contracts license, proof of completion of the necessary continuing education hours and the required fees. (Respondents' Exhibit J; Tr. 109, L. 13-25 and 110, L. 1) Additionally, Demetrius Glass filed his application for a Property and Casualty insurance producer's license with the Department on or about May 12, 2004. Mr. Glass passed the Producer Property and Casualty insurance examination, paid the required fees and completed all the necessary requirements. (Respondents' Exhibit J; Tr. 110, L. 5-25 and 111, L. 1-9)

On or about June 28, 2004, Mr. Glass was notified by the Department that his application for a Property and Casualty insurance producer's license was denied and that his Producer Renewal for a Accident and Health, Life, Life and Variable Contracts license was refused. (Petitioner's Exhibit 8) Thereafter, on or about July 21, 2004 Mr. Glass filed his appeal, Cause No. 04-0979 DI, of the Department's decision to deny his request for a Property and Casualty insurance producer's license and its refusal to renew his Missouri insurance producer's license for Accident and Health, Life and Variable Contracts.

The Department filed an answer and counterclaim in cause No. 04-0979 DI alleging the violations set forth in Cause No. 04-1128 DI against Respondent VMG involving the Sonya James and Veronica Osborne matters as the basis for the denial of Mr. Glass's Property and Casualty insurance producer's license and its refusal to renew Mr. Glass Missouri insurance producer's license.

DISCUSSION

I. THERE WAS NOT SUBSTANTIAL AND COMPETENT EVIDENCE PRESENTED AT THE HEARING TO SUPPORT THE DEPARTMENT'S REQUEST TO DISCIPLINE VMG'S INSURANCE BUSINESS ENTITY PRODUCER'S LICENSE OR, TO REFUSE TO RENEW GLASS'S MISSOURI INSURANCE PRODUCER'S LICENSE.

Contrary to the statement made by Department investigator Frank Smith at the hearing on these causes, the Department has the burden of proof in proceedings where it seeks the discipline, non-renewal or revocation of a license and the Mr. Glass has the burden of proof in a license application case. As the Court stated in Tonkin v. Jackson County Merit System, 599 S.W.2d 25 (Mo.App.1980):

“The substantive law creates a certain status and when an attempt is made to change the status, the party seeking the change becomes the “moving party” or the party having the affirmative. Thus, in a license application case like State ex rel. Bruno v. Johnson, 270 S.W.2d 99 (Mo.App.1954), the substantive law requires that a license be applied for and granted upon a showing of qualification. Thus, the status which the law fixes upon the applicant is that of an unlicensed person and the applicant is the movant who seeks a change in that status and must sustain the affirmative of showing the necessary qualifications. On the contrary, when licensed status has been acquired and the issue is revocation, the agency is, by the substantive law, required to show a violation to justify denial of the status. In the instance of revocation, the agency becomes the moving party having the affirmative of the basic issue, the occurrence of the violation.” Id. at 31.

Further, the moving party must prove their case by substantial evidence. “Substantial evidence, is evidence that if true has probative force upon the issues; it includes only competent evidence, not incompetent evidence. (citations omitted) Competent evidence in turn is relevant and admissible evidence that is capable of establishing the fact in issue,” (citations omitted) that which the very nature of the thing to be proven requires..... (citations omitted). Marshall Knapp v. Missouri Local Government Employees Retirement System, 738 S.W.2d 903,913 (Mo.App. 1987). It is axiomatic that when the proceeding may result in the loss of a valuable business or

professional license, the critical matters in issue should be supported by evidence which is indubitably as substantial as the consequences.

Based on the evidence at the hearing, the Department did not meet its burden of proof by substantial and competent evidence, on the record as a whole, that grounds exist to support its request to discipline VMG's insurance producer's license or its refusal to renew Mr. Glass's Missouri insurance producer's license for Accident and Health, Life, Life and Variable Contracts. That being the case, the evidence would also not support the Department's denial of Mr. Glass's request for a Property and Casualty license.

FACTS

The following summarizes the evidence presented at the hearing on these causes by Respondents VMG and Demetrius Glass.

SONYA JAMES

The evidence presented at the hearing by Respondents was that Mr. Glass first met Ms. James on or about February 10, 2003. Ms. James came to the office. As the principal of VMG, Mr. Glass met with her at that time because Nicole Childress, who had previously quoted Ms. James for property and casualty insurance, was not in the office. (Tr. 68, L. 19-28; Tr. 69, L. 1-6) Mr. Glass presented evidence that Nicole Childress was duly licensed to sell Property and Casualty insurance. (Respondents' Exhibit B; Tr. 68, L. 4-11)

Prior to meeting her that day, Mr. Glass had not spoken with Ms. James nor provided her any quotes for property and casualty insurance. Notably, neither Ms. James's Affidavit nor complaint state that Mr. Glass quoted her rates for property and casualty insurance. (Petitioner's Exhibit 3) As the principal of VMG, he took her application and check in the amount of \$898.00. Following his meeting with Ms. James, her application was turned over to Nicole Childress for processing and the check was deposited into the Company's business account. (Tr.

69, L. 9-25; 70, L. 1) Ms. Childress and Sonya Davis, an administrative assistant in Mr. Glass's office, handled the James matter. (Tr. 69, L. 1-6; Tr. 74, L. 1-21)

There was further testimony from Mr. Glass that on or about February 18, 2003, Graham-Rogers Inc. terminated its producer's agreement with VMG during the period that Ms. James' check was deposited in the Company's account for processing. Graham-Rogers Inc. and VMG had an automatic withdrawal process for premiums once the insurance application was received. The James' application was sent for processing during the time the termination by Graham-Rogers, Inc. became effective. As a consequence, the funds were not withdrawn from the Company's account and no policy of insurance was issued for Ms. James. (Respondents' Exhibit L; Tr. 73, L. 1-25; Tr. 114, L. 22-25 and 115, L. 1-9) In any event, VMG did not fail to remit the funds for the premium payment within 30 days to the insurance company, but rather Graham-Rogers, Inc. did not withdraw the funds from the Company account.

Sometime in October 2003, Mr. Glass received a telephone from Ms. James regarding her homeowner's insurance. Ms. James had a claim for some damaged carpet and upon contacting the insurance company, American Modern Home, she was advised that no policy existed for her. (Tr. 71, L. 9-25 and 72, L. 1-10) Following his own investigation, Mr. Glass learned that indeed no policy had been issued by American Modern Home for Ms. James due to the termination by Graham-Rogers Inc. (Tr. 76, L. 7-25; 77, L. 1-3 and 78, L. 12-23) As the principal of the VMG, he set about to rectify the problem by paying Ms. James \$800.00 for her damaged carpet. This was done before she filed a complaint with the Department. (Respondents' Exhibit G; Tr. 62, L. 14-17 and 72, L. 11-25) Subsequently, he also refunded her the premium paid of \$898.00. (Respondents' Exhibit G; Tr. 77, L. 10-21) It was further Mr. Glass's testimony that he played no role in generating the declaration page that Ms. James received. (Tr. 75, L. 13-25)

It must be emphasized that this Commission should consider Ms. James' credibility in view of the fact that after she discovered she did not have coverage with American Modern

Home, she later attempted to use the declaration page that she knew was not legitimate when she refinanced her mortgage. (Tr. 82, L. 2-25; Tr. 83, 84 and 85, L. 1-4)) Matters of credibility are appropriate for this Commission to consider in proceedings such as these.

Mr. Glass testified that he never quoted nor sold Ms. James an automobile policy.

VERONICA OSBORNE

Mr. Glass testified at the hearing that he first came in contact with Veronica Osborne on June 13, 2003. It was further his testimony that Nicole Childress, who had previously quoted Ms. Osborne rates for homeowner's insurance, was not in the office at that time. (Tr. 86, L. 8-14 and 87, L. 5-25) Again, the evidence at the hearing demonstrated that Nicole Childress was duly licensed to sell Property and Casualty insurance. (Respondents' Exhibit B; Tr. 86, L. 15-25 and 87, L. 1-4) As the principal of VMG, he accepted Ms. Osborne's application and a check for \$163.87. The check was then deposited into the Company's business account. (Tr. 87, L. 5-25 and 88 L. 1-17) It was Mr. Glass's testimony that Nicole Childress and Sonya Davis were the members of his staff who handled the Osborne matter. (Tr. 87, L. 12-18) It is once again notable that neither Ms. Osborne's Affidavit nor her complaint state that Mr. Glass quoted her rates for property and casualty insurance. (Petitioner's Exhibit 4)

Ms. Osborne later called Ms. Childress and advised that she wanted to have the insurance premiums paid by her mortgage company from her mortgage escrow. (Tr. 88, L. 2-6 and 89, L. 12-25) Ms. Osborne was advised at that time that upon receipt of the funds from her mortgage company, VMG would refund the \$163.87 she paid. (Tr. 90, L. 14-25) The evidence further established that Ms. Osborne's mortgage company failed to make the check out to the proper payee, failed forward the check to the proper address and later when the proper address was placed on the envelope, it was then delivered to the wrong address. As a result, the check from the mortgage company was not received until weeks later. (Respondents' Exhibit K; Tr. 91, L. 2-25, 92, L. 1-25 and 93, L. 1-20) By the time VMG did receive the envelope containing the

check from the mortgage company, Ms. Osborne had already filed a complaint with the Department. (Tr. 93, L. 21-25 and 94, L. 1-22) As a result, VMG issued Ms. Osborne a refund check for \$163.87 and delivered to her the original check from her mortgage company in the amount of \$655.50. (Tr. 94, L. 23-25) That check was never cashed by VMG, which was confirmed by Ms. Osborne's affidavit that was submitted by the Department as an exhibit at the hearing. (Petitioner's Exhibit 4; Tr. 96, L. 9-25)

In this case, the funds were not submitted to the insurance company within 30 days and no policy of insurance issued because the check from the mortgage company was not in Mr. Glass's possession until after Ms. Osborne filed her complaint with the Department. Once the complaint was filed the check was thereafter returned to Ms. Osborne.

Mr. Glass further testified at the hearing that he never quoted nor sold Ms. Osborne an automobile insurance policy and did not provide Ms. Osborne the "Evidence of Coverage" for an automobile policy. (Tr. 97, L.19-25)

**THERE WAS NO SUBSTANTIAL EVIDENCE OF CONVERSION,
MISAPPROPRIATION OR WITHHOLDING OF FUNDS**

The evidence does not support conversion, misappropriation or improper withholding of funds. Conversion and misappropriation are actions which require intent. To establish conversion one must prove that (1) plaintiff was the owner of the property or entitled to its possession; (2) defendant took possession of the property with the intent to exercise some control over it; and (3) defendant thereby deprived plaintiff of the right to possession. Muir v. Ruder, 945 S.W.2d 33, 35 (Mo.App.1997). Misappropriation is defined as the unauthorized, improper, or unlawful use of funds or other property for purpose other than that for which intended. Monia v. Mehann 876 S.W.2d 709, 713 (Mo.App.1994); See also, Missouri Dept. of Ins. v. Wilkerson, 848 S.W.2d 10, 12 (Mo.App.1992) (agent misappropriated funds by applying premium funds toward personal use or use for which it was unintended).

There was no evidence, let alone substantial evidence, that any funds from Ms. Osborne or Ms. James were converted or used for personal or business expenses of VMG or Mr. Glass. Indeed, Mr. Glass testified that he did not convert or misappropriate funds paid by Ms. James or Ms. Osborne. Mr. Smith testified only that the funds were placed in VMG's business account; he had no information as to how the funds were used. (Tr. 46, L. 6-25 and 47, L. 1-5) The evidence was thus insufficient as to the use made of the funds. Likewise, there was no evidence that the funds were improperly withheld. The evidence established that Mr. Glass returned the premiums paid by both Ms. James and Ms. Osborne. (Tr. 94, L. 23-25; Respondents' Exhibit G; Tr. 77, L. 10-21)

**MR. GLASS TOOK REMEDIAL AND CORRECTIVE
MEASURES TO RESOLVE BOTH MATTERS**

Following the events surrounding Sonya James and Veronica Osborne, Mr. Glass terminated both Nicole Childress and Sonya Davis, the administrative person who worked with Ms. Childress on the James and Osborne matters. (Tr. 78, L. 10-23 and 79, L. 14-25) Mr. Glass recognized the need to take prompt action to avoid similar problems in the future. He had been licensed in Missouri since 1998 and had never had any problems. As the principal of VMG, he accepted full responsibility for the actions of his staff and took corrective actions to make sure that these problems did not occur again.

The evidence further revealed that Mr. Glass returned the premiums paid by Ms. James and Ms. Osborne and took other corrective actions in an effort to undo the harm they suffered as a result of the actions of his staff. (Tr. 94, L. 23-25; Respondents' Exhibit G; Tr. 77, L. 10-21) It was his testimony that he did so in an effort to fix the problems in his office and protect his customers.

**DEPARTMENT INVESTIGATOR FRANK SMITH MAY
HAVE HAD A CONFLICT OF INTEREST**

Given the testimony from Department investigator Frank Smith at the hearing, it is arguable that Mr. Smith's relationship with Andre Terrell, a former agent in Mr. Glass's office, presents the appearance of a conflict. Mr. Glass testified at the hearing that there was friction between him and Mr. Terrell throughout the employment relationship. There were disputes between them over business matters and Mr. Terrell eventually left VMG owing money to the Company. It was Mr. Smith's testimony that he and Andre Terrell had friends in common and that Andre Terrell was a "friend," although during his testimony at the hearing he attempted to clarify what he meant by friend. He also testified that after he retired, he and Andre Terrell played golf together. It was further his testimony that he contacted Mr. Terrell upon submitting his report to the Department recommending that the Department take the action that it now seeks to take against VMG and Demetrius Glass in these proceedings. While he testified that he contacted Mr. Terrell to notify him that he would be a witness in these proceedings, Mr. Terrell did not testify at the hearing. (Tr. 36, L. 23-25, 37, 38, 39, 40, 41,42, L. 1-18)

Under Department regulations, Mr. Smith had an obligation to investigate the matters in the instant proceedings fairly and without bias. Instead, he failed to interview key witnesses, Nicole Childress and Sonya Davis. (Tr. 24, L. 14-25, 25, 26, 27, 28, 29, 30, 31, 32, 33, and 34 L. 1-8) Since Mr. Glass fired Ms. Childress and Ms. Davis, clearly they were not going to cooperate with him. Mr. Smith, however, had the authority to subpoena them. Mr. Smith also took original files from Mr. Glass's office without providing him an opportunity to make copies of same. (Tr. 99, 100, 101, 102, 103, 104, L. 1-13) When Mr. Glass did receive his files back they were not in the same condition and documents were missing. (Tr. 118, L. 11-25 and 119, L. 1-4) These matters should be considered by this Commission, and given appropriate weight.

II. THE EVIDENCE AT THE HEARING DEMONSTRATED THAT MR. GLASS APPLIED FOR AND WAS QUALIFIED TO RECEIVE A PROPERTY AND CASUALTY INSURANCE PRODUCER'S LICENSE AND THE DEPARTMENT IMPROPERLY DENIED HIS REQUEST FOR SAME.

The evidence at the hearing clearly demonstrated that Mr. Glass filed his application with the Department for a Property and Casualty Insurance producer's license on or about May 12, 2004. Mr. Glass passed the Producer Property and Casualty Insurance examination, paid the fees and completed all the necessary requirements. (Respondents' Exhibit J; Tr. 110, L. 5-25 and 111, L. 1-9) On or about June 28, 2004, he was notified by the Department that his application for a Property and Casualty Insurance producer's license was denied. (Petitioner's Exhibit 8) Thereafter, on or about July 21, 2004, Mr. Glass filed his appeal, Cause No. 04-0979 DI, of the Department's decision to deny his request for a Property and Casualty insurance producer's license and its refusal to renew his Missouri insurance producer's license for Accident and Health, Life and Variable Contracts.

The Department alleged the violations set forth in Cause No. 04-1128 DI against Respondent VMG as the basis for the denial of Mr. Glass's request of a Property and Casualty Insurance producer's license. Since the Department failed to meet its burden in that case, the denial of Mr. Glass's application for the Property and Casualty Insurance producer's license cannot be upheld.

CONCLUSION

Given the totality of the evidence presented at the hearing, the Department has failed to

sustain its burden of proving that grounds exist to discipline the Company's producer's license or to refuse to renew Mr. Glass's producer's license for Accident and Health, Life, Life and Variable Contracts. Given the severity of the consequences to Mr. Glass, his family and his Company, it is mandated that the evidence in these proceedings be as substantial as those consequences. Such is not the case here. Therefore, the Department's request for discipline should be denied, and its refusal to renew Mr. Glass's producer's license and denial of Mr. Glass's request for a Property and Casualty license cannot stand.

Respectfully submitted,

WHITE COLEMAN & ASSOCIATES, LLC

By: 
Dorothy White-Coleman, #31693
Susie McFarland, #29992
Attorneys for Respondents Versatile
Management Group and Demetrius Glass
500 Washington Ave., Suite 1080
St. Louis, MO 63101-2396
(314) 621-7676-Telephone
(314) 621-0959-Fax

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by First Class U.S. Mail, postage prepaid, to Stephen R. Gleason, Esq., attorney for the Missouri Department of Insurance, P.O. Box 690, Jefferson City, Missouri 65102, this 20th day of May, 2005.


Dorothy White-Coleman