State of Missouri

DEPARTMENT OF INSURANCE, FINANCIAL INSTITUTIONS &
PROFESSIONAL REGISTRATION

IN THE MATTER OF:	)	
	)	
Franklin David Comer,	)	Case No. 110104004C
Applicant.	)	

REFUSAL TO ISSUE INSURANCE PRODUCER LICENSE

On March 24, 2011, Carolyn H. Kerr, Legal Counsel and Counsel to the Consumer Affairs Division, submitted a Petition to the Director alleging cause for refusing to issue an insurance producer license to Franklin David Comer. After reviewing the Petition, the Investigative Report, and the entirety of the file, the Director issues the following findings of fact, conclusions of law and summary order:

FINDINGS OF FACT

1. Franklin David Comer ("Comer") is an individual residing in Missouri.

2. On or about October 22, 2010, the Department of Insurance, Financial Institutions and Professional Registration ("Department") received Comer's electronic Resident Individual Producer License Application ("Application").

3. In his Application, Comer listed his residential, business, and mailing addresses as 8850 Hwy. DD, O'Fallon, Missouri 63368.

4. In the section of the Application headed "Background Questions," Background Question No. 1 asks: "Have you ever been convicted of a crime, had a judgment withheld or deferred, or are you currently charged with committing a crime?"

5. Comer answered "Yes" to Background Question No. 1.

6. With his Application, Comer provided a typed, signed document in which he states: "I, as President of APP, was charged with 10 counts of 'Unlawful Merchandising Practice [sic].' I plead [sic] guilty to the charges and was put on probation for 5 years and was ordered to pay restitution of $460,000." He also provided copies of the circuit court's Memorandum, an October 6, 2004 letter to his attorneys from the Missouri Attorney General's Office, and a list of the conditions of his probation.

7. Comer also indicated that he was released from probation "early, in November of 2008 with all restitution satisfied."

8. An Indictment, filed in the St. Charles County Circuit Court, Missouri, on June 18, 2004, against Comer charged him with 10 counts of the Class D felony of Unlawful Merchandising Practices, in violation of § 407.020, RSMo. *State v. Comer*, Case No. 04CR127307.

9. Section 407.020 (2000)[1] states, in part:

> 1. The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce or the solicitation of any funds for any charitable purpose, as defined in section 407.453, in or from the state of Missouri, is declared to be an unlawful practice. The use by any person, in connection with the sale or advertisement of any merchandise in trade or commerce or the solicitation of any funds for any charitable purpose, as defined in section 407.453, in or from the state of Missouri of the fact that the attorney general has approved any filing required by this chapter as the approval, sanction or endorsement of any activity, project or action of such person, is declared to be an unlawful practice. Any act, use or employment declared unlawful by this subsection violates this subsection whether committed before, during or after the sale, advertisement or solicitation.
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> * * *
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> 3. Any person who willfully and knowingly engages in any act, use, employment or practice declared to be unlawful by this section with the intent to defraud shall be guilty of a class D felony.

10. Each count of the Indictment alleged that Cromer "committed the class D felony of UNLAWFUL MERCHANDISING PRACTICES," in that in 2003 he "willfully and knowingly used a misrepresentation of material fact or willfully and knowingly concealed a material fact in connection with the sale of merchandise in commerce, Discount Gas Cards from American Petroleum Promotion, Inc.," and that the 10 named consumers were "thereby induced to authorize withdrawal from [their] bank account[s]," sums ranging from $480 to 648, "when in fact no such merchandise was delivered and the money was not returned."

11. Comer's actions described in the above-referenced Indictment financially harmed over 350 consumers.

12. On October 7, 2004, Comer entered a plea of guilty to all 10 counts of unlawful merchandising practices enumerated in the Indictment issued in *State v. Comer*, Case No. 04CR127307.

13. On October 7, 2004, the Court accepted Comer's plea of guilty and found him guilty of committing 10 counts of unlawful merchandising practices.

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[1] All statutory references are to RSMo (Supp. 2010) unless otherwise indicated.

14. The Court suspended the imposition of sentence and issued an Order of Probation in Case No. 04CR127307 on October 7, 2004, ordering Comer to pay $460,000 in restitution, suspending the imposition of sentence, and placing him on probation for five years. The Order of Probation also listed 12 conditions of Comer's probation.

15. On November 10, 2008, the Court issued a "Memorandum" in Case No. 04CR127307 releasing Comer from probation and finding that Comer paid a total of $113,490 in restitution.

CONCLUSIONS OF LAW

16. Section 375.141 provides, in part:

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

17. The definition of "trustworthy" is "worthy of confidence" or "dependable." *Stith v. Lakin*, 129 S.W. 3d 912, 918 (Mo. App. S.D. 2004).

18. Incompetency is a "state of being" amounting to an inability or unwillingness to function properly. *Albanna v. State Bd. Of Regis'n for the Healing Arts*, 293 S.W.3d 423, 436 (Mo. banc 2009). It is "general lack of, or lack of disposition to use, a professional ability." *Id.*, citing *Forbes v. Missouri Real Estate Comm'n*, 798 S.W.2d 227, 230 (Mo. App. 1990).

19. "Irresponsible" is defined as "not mentally or financially fit to assume responsibility" or "lacking a sense of responsibility." THE AMERICAN HERITAGE DICTIONARY 678 (2d. College Ed. 1985).

20. "Fraud is the intentional perversion of truth to induce another, in reliance on it, to part with some valuable thing belonging to him." *State ex rel. Williams v. Purl*, 128 S.W. 196, 201 (Mo. 1910); *Hernandez v. State Bd. of Regis'n for Healing Arts*, 936 S.W.2d 894, 899 n. 2 (Mo. App. W.D. 1997).

21. Fraud "necessarily involves dishonesty, which is a lack of integrity or a disposition to defraud or deceive." *Missouri Real Estate Comm'n v. Simpson*, Mo. Adm. Hrg. Comm'n, No. 00-0474 RE (Oct. 5, 2000), citing MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 333 (10th ed. 1993).

22. "Dishonesty includes actions that reflect adversely on trustworthiness." *In re Duncan*, 844 S.W.2d 443, 444 (Mo. banc 1992).

23. It is a dishonest practice and demonstrates untrustworthiness and financial irresponsibility for Comer to willfully and knowingly use misrepresentations of material fact or willfully and knowingly conceal material facts in connection with the sale of merchandise, namely, Discount Gas Cards from American Petroleum Promotion, Inc.

24. A plea of guilty to a criminal charge is admissible as an admission against penal interest in any subsequent proceeding against the one who made it, for it is a solemn confession of the truth of the charge, though it is not conclusive and may be explained. *Pruiett v. Wilform*, 477 S.W.2d 76, 80 (Mo. 1972).

25. "Fraud and dishonesty are essential elements of unlawful merchandising practices under section 407.020." *Simpson*, Mo. Adm. Hrg. Comm'n, No. 00-0474 RE.

26. The principal purpose of § 375.141 RSMo is not to punish licensees or applicants, but to protect the public. *Ballew v. Ainsworth*, 670 S.W.2d 94, 100 (Mo. App. 1984).

CAUSE FOR ORDER REFUSING TO ISSUE AN INSURANCE PRODUCER'S LICENSE

27. The Director may refuse to issue an insurance producer license to Comer pursuant to § 375.141.1(8) because his actions in the conduct of his American Petroleum Promotion, Inc. business in Missouri were fraudulent, coercive, and dishonest and demonstrated incompetence, untrustworthiness, and financial irresponsibility.

28. Each count of the Indictment against Comer is a separate and independent cause to refuse to issue Comer a producer's license, in that Comer's guilty plea to all 10 counts of the Indictment is an admission against his interest and is admissible in this matter as evidence that Comer used fraudulent, coercive, or dishonest practices and demonstrated untrustworthiness or financial irresponsibility in the conduct of business for purposes of § 375.141.1(8). *Pruiett*, 477 S.W.2d at 80.

29. Comer was charged with 10 counts of unlawful merchandising practices, a class D felony, in connection with the sale of Discount Gas Cards from his business, American Petroleum Promotions, Inc. By pleading guilty to all 10 counts of the indictment, Comer admitted to "willfully and knowingly" engaging in a business practice "with the intent to defraud" his customers. Although Comer received a suspended imposition of sentence for these charges, was ordered to serve five years probation and to pay over $400,000 in restitution, Comer's business practices led to financial harm to hundreds of consumers. Comer's fraudulent practices and actions relative to American Petroleum Promotions, Inc. involved the handling of money, which is closely related to the duties of an insurance producer who handles clients' premium dollars. As such, granting Comer's Missouri insurance producer license would not be in the interest of the public.

30. The Director has considered Comer's history and all of the circumstances surrounding Comer's Application. Conway admitted, by way of a guilty plea, to conduct involving fraudulent and dishonest practices, which demonstrated untrustworthiness and

financial irresponsibility in the conduct of business in this state. For these reasons, the Director exercises his discretion and refuses to issue an insurance producer license to Conway.

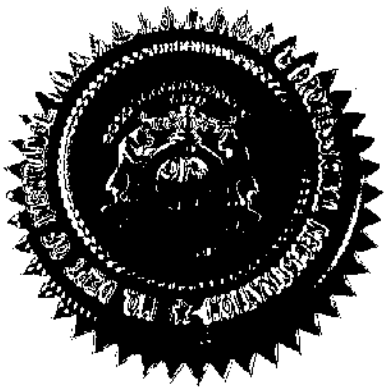
31. The requested order is in the public interest.

ORDER

IT IS THEREFORE ORDERED that the insurance producer license of FRANKLIN DAVID COMER is hereby summarily REFUSED.

SO ORDERED.

WITNESS MY HAND THIS 31 DAY OF MARCH, 2011.



JOHN M. HUFF
DIRECTOR

NOTICE

TO: Applicant and any unnamed persons aggrieved by this Order:

You may request a hearing in this matter. You may do so by filing a complaint with the Administrative Hearing Commission of Missouri, P.O. Box 1557, Jefferson City, Missouri within (30) days after the mailing of this notice pursuant to Section 621.120, RSMo. Pursuant to 1 CSR 15-3.290, unless you send your complaint by registered or certified mail, it will not be considered filed until the Administrative Hearing Commission receives it.

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of April, 2011, a copy of the foregoing notice and order was served upon Franklin David Comer in this matter by certified mail at the following address:

Franklin David Comer
8850 Highway DD
O'Fallon, MO 63368

Certified Mail # 70041350000314135591

Kathryn Randolph