State of Missouri

DEPARTMENT OF INSURANCE, FINANCIAL INSTITUTIONS AND PROFESSIONAL REGISTRATION

IN RE:	)	
	)	
FRANKLIN D. COMER,	)	**Case No. 14-0729580C**
	)	
Applicant.	)	

ORDER REFUSING TO ISSUE MOTOR VEHICLE EXTENDED SERVICE CONTRACT PRODUCER LICENSE

On September 9, 2014, the Consumer Affairs Division submitted a Petition to the Director alleging cause for refusing to issue a motor vehicle extended service contract (MVESC) producer license to Franklin D. Comer. After reviewing the Petition and the Investigative Report, the Director issues the following findings of fact, conclusions of law, and order:

FINDINGS OF FACT

1. Franklin D. Comer ("Comer") is a Missouri resident with a residential address of record of 8850 Highway DD, O'Fallon, Missouri, 63368.

2. On March 31, 2011, the Director issued a Refusal to Issue Insurance Producer License ("2011 Refusal"), refusing to issue an individual insurance producer license to Comer.[1]

3. On November 12, 2013, the Department of Insurance, Financial Institutions and Professional Registration ("Department") received Comer's Application for Motor Vehicle Extended Service Contract Producer License ("2013 Application").

4. Background Question No. 1 of the 2013 Application asks the following:

> Have you ever been convicted of a crime, had a judgement withheld or deferred, or are you currently charged with committing a crime?
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> "Crime" includes a misdemeanor, felony or a military offense. You may exclude misdemeanor traffic citations or convictions involving driving under the influence (DUI) or driving while intoxicated (DWI), driving

[1] *In the Matter of Franklin David Comer*, Before the Director of the Department of Insurance, Financial Institutions and Professional Registration, State of Missouri, Case No. 110104004C.

> without a license, reckless driving, or driving with a suspended or revoked license or juvenile offenses. "Convicted" includes, but is not limited to, having been found guilty by verdict of a judge or jury, having entered a plea of guilty or nolo contendere, or having been given probation, a suspended sentence or a fine.
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> "Had a judgement withheld or deferred" includes circumstances in which a guilty plea was entered and/or a finding of guilt is made, but imposition or execution of the sentence was suspended (for instance, the defendant was given a suspended imposition of sentence or a suspended execution of sentence—sometimes called an "SIS" or "SES").
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> If you answer yes, you must attach to this application:
> a) a written statement explaining the circumstances of each incident,
> b) a copy of the charging document, and
> c) a copy of the official document which demonstrates the resolution of the charges or any final judgement[.]

5. Comer answered "Yes" to Question No. 1 and attached to his 2013 Application a transcript of a guilty plea to ten counts of the Class D Felony of Unlawful Merchandising Practices, a written explanation of the circumstances surrounding the plea, a letter to the Director, a copy of a letter to the judge in that case, and a copy of a letter to the Governor of Missouri.

6. The transcript of Comer's guilty plea, and court documents previously obtained by the Department, showed that on October 7, 2004, Comer pleaded guilty in the St. Charles County Circuit Court to ten counts of the Class D Felony of Unlawful Merchandising Practices, in violation of § 407.020, RSMo (2000).[2]

7. In the transcript of the guilty plea, Comer, under oath and answering the court's questions, agreed that the actions to which he admitted had violated § 407.020. Prior to this statement, the prosecutor had described the elements of the felony to which Comer pleaded guilty, as the statute read at the time, to which description Comer's attorney had agreed as accurate:

> All ten counts are under 407.020 of the Revised Statutes of the State of Missouri, which makes an unlawful practice for anyone in connection with the sale or advertisement of any merchandise to make a misrepresentation, concealment or omission of a material fact.

8. The Prosecuting Attorney of St. Charles County had filed an Indictment against Comer in the St. Charles County Circuit Court, Missouri, on June 18, 2004, charging Comer with 10 counts of the Class D felony of Unlawful Merchandising Practices, in violation of

[2] *State of Missouri v. Franklin David Comer*, St. Charles Co. Cir. Ct., No. 04CR127307.

§ 407.020, RSMo (2000).[3]

9. Section 407.020, RSMo (2000), stated, 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 Comer "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 ten 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. Upon Comer's October 7, 2004 guilty plea, the St. Charles County Circuit Court found Comer guilty on all ten counts of the Class D Felony of Unlawful Merchandising Practices, suspended the imposition of sentence, placed Comer on five years' probation and ordered Comer to pay $460,000 in restitution. On November 10, 2008, the Court released Comer from probation, finding that Comer had paid $113,490 in restitution.[4]

12. The charges to which Comer pleaded guilty in *State of Missouri v. Franklin David Comer*, St. Charles Co. Cir. Ct., No. 04CR127307 stemmed from his business operations

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[3] *Id.*
[4] *Id.*

as the owner of American Petroleum Promotion, Inc. ("APP"). APP sold memberships that entitled the consumers who purchased them to the further purchase of gas credit cards at a discount, among other promised benefits. Those cards were issued under agreements with banks and financial institutions, including credit card companies, whose resources and participation were essential to both the issuance of the cards and the retail use of the cards by consumers. On multiple occasions, Comer made loans to himself from APP and used APP funds to finance product development, which transactions appear to have contributed to the financial destruction of APP. The financial destruction of APP led to APP's and Comer's ultimate failures to honor the membership benefits of consumers, whose complaints to the Missouri Attorney General formed the basis of the Unlawful Merchandising Practices charges and guilty plea.

13. On February 4, 2014, the Director issued an Order Refusing to Issue Motor Vehicle Extended Service Contract Producer License ("2014 Refusal"), refusing Comer's 2013 Application.[5]

14. On July 1, 2014, the Department received Comer's completed Application for Motor Vehicle Extended Service Contract Producer License ("2014 Application").

15. Background Question No. 1 of the 2014 Application asked:

> Have you ever been convicted of a crime, had a judgment withheld or deferred, received a suspended imposition of sentence ("SIS") or suspended execution of sentence ("SES"), or are you currently charged with committing a crime, which has not been previously reported to this insurance department?
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> "Crime" includes a misdemeanor, felony, or a military offense. You may exclude any of the following if they are/were misdemeanor traffic citations or misdemeanors: involving driving under the influence (DUI), driving while intoxicated (DWI), driving without a license, reckless driving, or driving with a suspended or revoked license. You may also exclude misdemeanor juvenile convictions.
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> "Convicted" includes, but is not limited to, having been found guilty by verdict of a judge or jury, having entered a plea of guilty or nolo contendere, having entered an Alford Plea, or having been given probation, a suspended sentence, or a fine.
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> "Had a judgment withheld or deferred" includes circumstances in which a guilty plea was entered and/or a finding of guilt was made, but imposition or execution of the sentence was suspended (for instance, the defendant was given a suspended imposition of sentence or a suspended execution of

[5] *In re: Franklin D. Comer*, Before the Director of the Department of Insurance, Financial Institutions and Professional Registration, State of Missouri, Case No. 205638.

sentence—sometimes called an "SIS" or "SES").

Unless excluded by the language above, you must disclose convictions that have been expunged.

If you answer yes, you must attach to this application:
a) a written statement explaining the circumstances of each incident,
b) a certified copy of the charging document, and
c) a certified copy of the official document which demonstrates the resolution of the charges or any final judgment.

16. Comer answered "Yes" to Question No. 1 and attached to his 2014 Application a transcript of a guilty plea to ten counts of the Class D Felony of Unlawful Merchandising Practices and a written explanation of the circumstances surrounding the plea.

17. Background Question No. 2 of the 2014 Application asked:

> Have you ever been named or involved as a party in an administrative proceeding or action regarding any professional or occupational license or registration, or regarding the lack of such license or registration?
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> "Involved" means having a licensed censured, suspended, revoked, canceled, terminated or being assessed a fine, a voluntary forfeiture, a cease and desist order, a prohibition order, a consent order, or being placed on probation. "Involved" also includes the act of surrendering a license to resolve an administrative proceeding or action. "Involved" also means being named as a party to an administrative or arbitration proceeding which is related to a professional or occupational license or is related to the lack of such license. "Involved" also means having a license application denied or the act of withdrawing an application to avoid denial. You must INCLUDE any business so named because of your actions or because of your capacity as an owner, partner, officer, director, or member or manager of a Limited Liability Company. You may EXCLUDE terminations due solely to noncompliance with continuing education requirements or failure to pay a renewal fee.
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> If you answer yes, you must attach to this application:
> a) a written statement identifying the type of license and explaining the circumstances of each incident,
> b) a copy of the Notice of Hearing or other document that states the charges and allegations, and
> c) a certified copy of the official document which demonstrates the resolution of the charges and/or a final judgment.

18. Comer answered "No" to Background Question No. 2 of the 2014 Application and disclosed neither the 2011 Refusal nor the 2014 Refusal.

19. It is inferable, and is hereby found as fact, that Comer falsely answered "No" to Background Question No. 2 of the 2014 Application and failed to disclose the 2011 Refusal and the 2014 Refusal, in order to falsely represent to the Director that he had not been involved in any administrative proceeding or action regarding a professional or occupational license, and, accordingly, to improve the chances that the Director would approve his 2014 Application and issue him an MVESC producer license.

CONCLUSIONS OF LAW

20. Section 385.209 RSMo Supp. 2013,[6] provides, in part:

> 1. The director may suspend, revoke, refuse to issue, or refuse to renew a registration or license under sections 385.200 to 385.220 for any of the following causes, if the applicant or licensee or the applicant's or licensee's subsidiaries or affiliated entities acting on behalf of the applicant or licensee in connection with the applicant's or licensee's motor vehicle extended service contract program has:
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> (3) Obtained or attempted to obtain a license through material misrepresentation or fraud;
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> (6) Used fraudulent, coercive, or dishonest practices, or demonstrated incompetence, untrustworthiness, or financial irresponsibility in the conduct of business in this state or elsewhere;
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> (7) Been found in violation of law by a court of competent jurisdiction in an action instituted by any officer of any state or the United States in any matter involving motor vehicle extended service contracts, financial services, investments, credit, insurance, banking, or finance;
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> * * *
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> (9) Been refused a license or had a license revoked or suspended by a state or federal regulator of service contracts, financial services, investments, credit, insurance, banking, or finance[.]

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

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[6] Statutory references are to the Revised Statutes of Missouri, as supplemented in 2013, unless otherwise indicated.

22. 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).

23. "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).

24. "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. 1997).

25. 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).

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

27. 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).

28. 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.

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

30. Just as the principal purpose of § 375.141, the insurance producer disciplinary statute, is not to punish licensees or applicants, but to protect the public, *Ballew v. Ainsworth*, 670 S.W.2d 94, 100 (Mo. App. 1984), the purpose of § 385.209 is not to punish applicants for an MVESC producer license, but to protect the public.

31. The Director may refuse to issue an MVESC producer license to Comer under § 385.209.1(6) because Comer used fraudulent and dishonest practices, and demonstrated incompetence, untrustworthiness, or financial irresponsibility in the conduct of business in this state or elsewhere. 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 each count of the Indictment is an admission against his interest and is admissible in this matter as evidence that Comer used fraudulent or dishonest practices and demonstrated untrustworthiness or financial irresponsibility in the conduct of business for purposes of § 385.209(6). *See Pruiett*, 477 S.W.2d at 80. Comer's failure as owner of APP to ensure that member benefits were honored as promised, including his questionable business decisions to loan himself money from APP and to fund product development rather than maintain sufficient funds for member benefits, demonstrated incompetence in the conduct of business.

32. The Director also may refuse to issue an MVESC producer license to Comer under § 385.209.1(7) because Comer has been found in violation of law by a court of competent jurisdiction in an action instituted by an officer of the State of Missouri in a matter involving financial services, credit, banking, and/or finance. Comer was found guilty upon his plea of guilty in the St. Charles County Circuit Court of ten counts of the Class D Felony of Unlawful Merchandising Practices, in violation of § 407.020, RSMo (2000), which matter involved financial services, credit, banking and finance. The action was instituted by the Prosecuting Attorney of St. Charles County, who is an officer of the State of Missouri.

33. The Director also may refuse to issue an MVESC producer license to Comer under § 385.209.1(9) because Comer has been refused a license by a state regulator of service contracts, financial services, investments, credit, insurance, banking, or finance. On March 31, 2011, the Director issued a Refusal to Issue Insurance Producer License, refusing to issue an individual insurance producer license to Comer, and on February 4, 2014, the Director issued an Order Refusing to Issue Motor Vehicle Extended Service Contract Producer License, refusing to issue Comer an MVESC producer license.

34. The Director also may refuse to issue an MVESC producer license to Comer under § 385.209.1(3) because Comer attempted to obtain an MVESC producer license through material misrepresentation or fraud. Comer falsely answered "No" to Background Question No. 2 of the 2014 Application and failed to disclose the 2011 Refusal, in order to falsely represent to the Director that he had not been involved in any administrative proceeding or action regarding a professional or occupational license, and, accordingly, to improve the chances that the Director would approve his 2014 Application and issue him an MVESC producer license.

35. The Director also may refuse to issue an MVESC producer license to Comer under § 385.209.1(3) because Comer attempted to obtain an MVESC producer license through material misrepresentation or fraud. Comer falsely answered "No" to Background Question No. 2 of the 2014 Application and failed to disclose the 2014 Refusal, in order to falsely represent to the Director that he had not been involved in any administrative proceeding or action regarding a professional or occupational license, and, accordingly, to improve the chances that the Director would approve his 2014 Application and issue him an MVESC producer license.

36. Comer was charged with 10 counts of unlawful merchandising practices, a Class D Felony, in connection with the sale of discount gas cards from APP. 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" consumers. Comer's fraudulent practices and actions relative to APP signal unacceptably great danger for MVESC consumers. MVESC consumers often rely on an MVESC producer's truthfulness and trustworthiness in providing them with accurate information on which to base a decision to purchase or reject an MVESC. Comer's history of "willfully and knowingly" engaging in a business practice "with the intent to defraud" consumers strongly counsels against putting consumers in a position to trust Comer. As such, granting Comer an MVESC producer license would not be in the interest of the public.

37. The Director has considered Comer's history and all of the circumstances surrounding Comer's Application. Granting Comer an MVESC producer license would not be in the interest of the public. Accordingly, the Director exercises his discretion and refuses to issue an MVESC producer license to Comer.

38. This order is in the public interest.

ORDER

IT IS THEREFORE ORDERED that the motor vehicle extended service contract producer license application of **Franklin D. Comer** is hereby **REFUSED**.

SO ORDERED.

WITNESS MY HAND THIS 10TH **DAY OF** SEPTEMBER**, 2014.**

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 11th day of September, 2014, a copy of the foregoing Order was served upon the Applicant in this matter by UPS, with signature required, at the following address:

Franklin D. Comer
8850 Highway DD
O'Fallon, Missouri 63368

Tracking No. 1Z0R15W84296892817

Kathryn Latimer

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