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STATE OF ARIZONA
DEPARTMENT OF INSURANCE

DEPT. OF INSURANCE
BY BB

In the Matter of :)
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GERARD HENRY LILLEY)
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Petitioner.)
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Docket No. 99A-254 -INS

ORDER

On January 31, 2000, the Office of Administrative Hearings, through Administrative Law Judge Daniel G. Martin, issued a Recommended Decision of the Administrative Law Judge ("Recommended Decision"), a copy of which is attached and incorporated by this reference. The Director of the Arizona Department of Insurance has reviewed the Recommended Decision and enters the following Order:

1. The recommended findings of fact and conclusions of law are adopted.
2. The Department's denial of the Petitioner's Application is upheld.

NOTIFICATION OF RIGHTS

Pursuant to A.R.S. § 41-1092.09, the aggrieved party may request a rehearing with respect to this Order by filing 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).

The final decision of the Director may be appealed to the Superior Court of Maricopa County for judicial review pursuant to A.R.S. §§ 12-904 and 20-166. A party filing an appeal must notify the Office of Administrative Hearings of the appeal within ten days after filing the complaint commencing the appeal, pursuant to A.R.S. § 12-904(B).

DATED this 1st day of February, 2000.



Charles R. Cohen
Director of Insurance

1 COPY of the foregoing mailed
this 2nd day of February, 2000 to:

2
3 Daniel G. Martin, Administrative Law Judge
Office of Administrative Hearings
4 1400 West Washington, Suite 101
Phoenix, Arizona 85007

5 Michael J. De La Cruz
6 Assistant Attorney General
1275 West Washington, Room 259
7 Phoenix, Arizona 85007
Attorney for the Department

8 Sara M. Begley, Deputy Director
9 Gerrie L. Marks, Executive Assistant for Regulatory Affairs
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10 John Gagne, Assistant Director
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11 Department of Insurance
2910 North 44th Street, Suite 210
12 Phoenix, Arizona 85018

13 Gerard Henry Lilley
1118 West Breckenridge Avenue
14 Gilbert, Arizona 85223
Petitioner

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16 *Betty B. Bryant*
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IN THE OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of:

GERARD HENRY LILLEY,

Petitioner.

No. 99A-254-INS

**RECOMMENDED DECISION
OF ADMINISTRATIVE
LAW JUDGE**

HEARING: January 25, 2000

APPEARANCES: Petitioner Gerard Henry Lilley appeared on his own behalf. Assistant Attorney General Michael De La Cruz appeared on behalf of the Arizona Department of Insurance.

ADMINISTRATIVE LAW JUDGE: Daniel G. Martin

The issue presented by this matter is the Arizona Department of Insurance's decision to deny Gerard Henry Lilley's application for an insurance license. Based on the entire record, the following Findings of Fact, Conclusions of Law and Recommended Order are made:

FINDINGS OF FACT

1. On October 6, 1999, Gerard Henry Lilley submitted an application to the Arizona Department of Insurance (the "Department") for an individual insurance agent's license (life and disability).

2. By letter dated November 18, 1999, the Department notified Mr. Lilley that his application had been denied pursuant to A.R.S. § 20-290(B)(2) and (B)(6).¹

¹ These provisions are as follows:

20-290. Licensing of agent or broker.

B. The director may refuse to accept any application or issue any license under this article if the director finds one or more of the following:

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1 3. Mr. Lilley appealed the Department's decision by letter dated November
2 23, 1999.

3 4. On December 17, 1999, the Department issued a Notice of Hearing
4 setting forth the factual and legal bases upon which it denied Mr. Lilley's application.
5 The Administrative Law Judge finds all of the facts alleged by the Department in the
6 Notice of Hearing to be substantiated by the evidence presented at the hearing, and
7 hereby incorporates those facts by reference herein. As to the legal bases upon which
8 the Department relied, the Department's Notice of Hearing departs from its November
9 18, 1999 denial letter in one material respect. The November 18 denial letter identifies
10 A.R.S. § 20-290(B)(2) and (B)(6) as the statutory bases upon which the Department
11 denied Mr. Lilley's application, whereas the Notice of Hearing identifies A.R.S. § 20-
12 290(B)(2) and (B)(5) (A.R.S. § 20-290(B)(5) allows the Director of the Department to
13 deny an application if he finds a "record of suspension or revocation of an insurance
14 license in any jurisdiction"). The Administrative Law Judge finds that the Notice of
15 Hearing amended the Department's November 18 denial letter, and that Mr. Lilley
16 received adequate notice of the legal grounds upon which the Department relied to
17 deny his application.²

18 5. Mr. Lilley presented his case through his own testimony and through two
19 exhibits. The Department presented its case through seven exhibits and through the
20 cross-examination of Mr. Lilley.

21 6. The following facts derive from the Department's exhibits and were not
22 contradicted at the hearing.

- 23 a. On May 1, 1997, Mr. Lilley entered into a Consent Order with the
24 Department (Hearing Exhibit 2) after the Department determined that
25 Mr. Lilley, while a licensed Arizona insurance agent, had
26

27 2. A record of dishonesty on the part of the applicant in business or financial matters.

28 *****

29 6. A record of conviction by final judgment of a felony involving moral turpitude.

30 ² The November 18 denial letter specifically states that the statutory provisions cited in the letter are
"not intended as an exhaustive listing of the grounds to deny your application."

1 misappropriated and converted to his own use \$4,700.00 which had
2 been given to him by a customer for the purchase of a fixed annuity
3 contract.

- 4 b. At the time Mr. Lilley entered into the Consent Order, his agent license
5 had expired. However, as part of the Consent Order Mr. Lilley agreed
6 that the Department had jurisdiction over the matter. The Consent
7 Order required Mr. Lilley to pay restitution in the amount of \$5,031.35
8 (the \$4,700.00 plus interest), and to pay the Department a civil penalty
9 in the amount of \$1,000.00.
- 10 c. On May 15, 1997, Mr. Lilley applied to the Department to renew his
11 previously expired agent license. Question D of the renewal
12 application asks: "Have you had any judgment, order or other
13 determination, including any criminal conviction issued or made
14 against you in any criminal, civil, administrative or other judicial or
15 quasi-judicial proceeding of any kind in any jurisdiction that has not
16 previously been disclosed by you to this agency in a license
17 application based on any of the following: 1. Misappropriation,
18 conversion or the withholding of moneys; 2. Incompetence or a source
19 of injury and/or loss to anyone; 3. Dishonesty in business or financial
20 matters; . . . 5. Any cause arising out of an insurance transaction."
- 21 d. Despite having just entered into the Consent Order with the
22 Department two weeks earlier, Mr. Lilley answered "No" to each of
23 these questions.
- 24 e. Question E of the renewal application asks: "Are any civil,
25 administrative, other judicial or quasi-judicial proceedings of any kind
26 . . . currently pending against you in any jurisdiction based on any of
27 the following: 1. Misappropriation, conversion or the withholding of
28 moneys; 2. Incompetence or a source of injury and/or loss to anyone;
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1 3. Dishonesty in business or financial matters; . . . 5. Any cause arising
2 out of an insurance transaction.”

3 f. Mr. Lilley answered “No” to each of these questions. However, as the
4 Department subsequently learned, on May 14, 1997 – the day
5 immediately preceding his renewal application – Mr. Lilley had
6 executed a “letter of acceptance, waiver and consent” with the
7 National Association of Securities Dealers (NASD Regulation, Inc.) to
8 resolve allegations which the NASD had brought against Mr. Lilley’s
9 securities license arising out of the same conduct for which Mr. Lilley
10 had entered into the Consent Order with the Department.

11 g. The Department approved Mr. Lilley’s May 15, 1997 application and
12 renewed his license.

13 h. On June 15, 1998, Mr. Lilley entered into a second Consent Order with
14 the Department (Hearing Exhibit 4) after the Department discovered
15 the omissions on Mr. Lilley’s May 15, 1997 renewal application. As of
16 this date, Mr. Lilley had not paid either the restitution or civil penalty
17 which he had agreed to pay under the first Consent Order, nor had he
18 made any effort to do so. The Department revoked Mr. Lilley’s license
19 and again ordered him to pay the restitution and civil penalty called for
20 by the first Consent Order.

21 7. On June 16, 1998, the day after he entered into the second Consent
22 Order, Mr. Lilley filed for Chapter 13 bankruptcy protection.

23 8. Mr. Lilley still has not paid the restitution and civil penalty called for by the
24 first Consent Order. At the hearing, Mr. Lilley asserted that his bankruptcy filing
25 prevents him from making the restitution and civil penalty payments.

26 9. Mr. Lilley testified that he understood the NASD letter of acceptance,
27 waiver and consent to relieve him of any disclosure obligations. Yet, under paragraph 6
28 of that letter (Hearing Exhibit A, page 2), Mr. Lilley acknowledges “Having consented to
29 the imposition of sanctions in this matter ‘without admitting or denying’ the allegations of
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1 violation, *I may not deny, directly or indirectly, such allegations to the media or*
2 *otherwise*" (emphasis added).

3 10. Pursuant to the terms of the first and second Consent Orders, Mr. Lilley
4 has admitted violating the following statutes: A.R.S. § 20-291(G) (now (F)) (willful
5 misrepresentation of any fact required to be disclosed in a license application), A.R.S. §
6 20-316(A)(2) (willful violation of, or willful noncompliance with, any provision of title 20
7 or any lawful rule or order of the Director of the Department); A.R.S. § 20-316(A)(3)
8 (misrepresentation or fraud in obtaining or attempting to obtain any insurance license);
9 A.R.S. § 20-316(A)(4) (misappropriation or conversion or illegal withholding of monies
10 belonging to policyholders, insurers, beneficiaries or others and received in or during
11 the conduct of business under an insurance license or through its use); A.R.S. § 20-
12 316(A)(7) (conduct of affairs under the license showing the licensee to be incompetent
13 or a source of injury and loss to, or repeated complaint by, the public or any insurer);
14 and A.R.S. § 20-463(A)(4)(a) and (b) (diversion of monies of an insurer or other person
15 in connection with the transaction of insurance or the conduct of business activities by
16 any insurer, reinsurer or other entity licensed to transact insurance business in
17 Arizona).

18 11. Mr. Lilley apologized for his conduct, and claimed he never intended to
19 harm anyone or to misappropriate funds. Mr. Lilley denied the Department's allegations
20 that he had conducted himself dishonestly.

21 **CONCLUSIONS OF LAW**

22 1. In this proceeding, Mr. Lilley bears the burden of proving, by a
23 preponderance of the evidence, that the Department improperly denied his license
24 application. A preponderance of the evidence is "such proof as convinces the trier of
25 fact that the contention is more probably true than not." Morris K. Udall, ARIZONA LAW
26 OF EVIDENCE § 5 (1960).

27 2. The Administrative Law Judge concludes, on the facts presented, that Mr.
28 Lilley failed to sustain the required burden of proof.
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1 3. A.R.S. § 20-290(B) provides six (6) separate grounds upon which the
2 Director of the Department of Insurance (the "Director") may deny the issuance of an
3 insurance agent's license.

4 4. The preponderance of the evidence was that Mr. Lilley has a record of
5 dishonesty in business or financial matters by virtue of his misappropriation and
6 conversion to his own use of \$4,700.00 which had been given to him by a customer for
7 the purchase of a fixed annuity contract, and that Mr. Lilley has a record of revocation
8 of an insurance license. Thus, grounds existed for the Director to deny Mr. Lilley's
9 license application under A.R.S. § 20-290(B)(2) and (B)(5), and that denial was not
10 unreasonable.³

11 5. Mr. Lilley's objections to the Department's action are not well taken in
12 view of the two Consent Orders into which Mr. Lilley entered, the second one of which
13 revoked Mr. Lilley's license. Further, Mr. Lilley's claim that he was unable to pay the
14 required restitution and civil penalty due to his bankruptcy filing flies in the face of the
15 fact that Mr. Lilley had more than a year prior to his bankruptcy filing (*i.e.*, the time
16 between May 1, 1997, the date Mr. Lilley entered into the first Consent Order, and June
17 16, 1998, the date Mr. Lilley filed for bankruptcy protection) during which he made no
18 efforts to make the required payments.

19 **RECOMMENDED ORDER**

20 In view of the foregoing, it is recommended that the Department's decision to
21 deny Gerard Henry Lilley's application for an insurance agent's license be affirmed.
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27 ³ Although not specifically alleged by the Department, and not relied upon by the Administrative
28 Law Judge here, the preponderance of the evidence would also support the conclusion that Mr. Lilley
29 made a material misrepresentation in his May 15, 1997 renewal application by failing to disclose his
30 admissions under the first Consent Order and by failing to disclose his submission to the NASD letter of
acceptance, waiver and consent, and that Mr. Lilley has a record of misappropriation and conversion.
Thus, grounds existed for the Director to deny Mr. Lilley's license application not only under A.R.S. § 20-
290(B)(2) and (B)(5), but also under (B)(1) and (B)(3).

1 Done this day, January 31, 2000.

2
3 

4 _____
5 Daniel G. Martin
6 Administrative Law Judge

7 Original transmitted by mail this
8 31 day of January, 2000, to:

9 Department of Insurance
10 Charles R. Cohen
11 ATTN: Curvey Burton
12 2910 North 44th St., Suite 210
13 Phoenix, AZ 85018

14 
15 By _____