

Under 1 CSR 15-3.446(6),² we may decide this case without a hearing if the Director establishes facts that Tyler does not genuinely dispute and entitle the Director to a favorable decision. Facts may be established by admissible evidence such as a stipulation, pleading of the adverse party, discovery response of the adverse party, affidavit, or any other evidence admissible under law. 1 CSR 15-3.446(6)(B).

Evidence in Support of the Motion

With the motion, the Director filed a licensing records affidavit with copies of Tyler's initial license application and his renewal application (Exhibit 1 with attachments 1A and 1B), and an affidavit of the Department's Special Investigator Andrew Engler with attachments (Exhibit 2 with attachments 2A and 2B). Also in support of the motion, the Director filed the certificate of service and the request for admissions he served on Tyler on January 27, 2015 (Exhibit 3), with attached documents Tyler was asked to confirm were true and accurate copies of the originals (Admission Exhibits 1 through 12). The remaining documents offered in support of the Director's motion are certified court records of the Circuit Courts of St. Charles County and Jefferson County, Missouri (Exhibits 6 through 8) and the Director's administrative order refusing to renew Tyler's license (Exhibit 9).

We note that Tyler failed to respond to the Director's request for admissions and that the Director and this Commission may now rely on those unanswered requests as evidence. Under Supreme Court Rule 59.01, the failure to answer a request for admissions establishes the matters asserted in the request, and no further proof is required. *Killian Constr. Co. v. Tri-City Constr. Co.*, 693 S.W.2d 819, 827 (Mo. App. W.D. 1985). Such a deemed admission can establish any fact, or "application of the facts to the law, or the truth of the ultimate issue, opinion or conclusion, so long as the opinion called for is not an abstract proposition of law." *Briggs v.*

² References to "CSR" are to the Missouri Code of State Regulations, as current with amendments included in the Missouri Register through the most recent update.

King, 714 S.W.2d 694, 697 (Mo. App. W.D. 1986). That rule applies to all parties, including those acting *pro se*. *Research Hosp. v. Williams*, 651 S.W.2d 667, 669 (Mo. App. W.D. 1983). Our Regulation 1 CSR 15-3.420(1) applies that rule to this case.

Based on the foregoing submissions, the following findings are conclusively established.

Findings of Fact

1. On July 25, 2012, the Department issued Tyler a motor vehicle extended service contract producer (MVESC) license.
2. Tyler signed his application for the MVESC license before a notary public on July 18, 2012, attesting, among other things, that the contents of the application were true and complete and acknowledging that providing false information or omitting material information on the application would be grounds for revocation or refusal to issue the license.
3. On the application, Tyler was asked to state whether he had been convicted of a crime, had a judgment in a criminal case against him deferred, or was currently charged with a crime. The explanatory material in the application clearly required him to report any pending felony charge against him at the time of the application.
4. The form stated that if the answer to the criminal history question was yes, the applicant was to attach a copy of the charging document and a written statement explaining the circumstances of the incident giving rise to the charge or conviction.
5. Tyler simply answered the criminal history question in the negative, providing no additional information or documents.
6. When Tyler swore to the contents of his application on July 18, 2012, he had a pending felony charge of driving while intoxicated (DWI), as a persistent offender.

7. Tyler was served with a summons and complaint for the felony DWI charge on March 30, 2012, and he was served with an arrest warrant for the felony charge on May 15, 2012.

8. The Director relied on the false statement as to Tyler's criminal history when he issued Tyler the MVESC license on July 25, 2012.

9. On August 12, 2012, Tyler entered a plea of guilty to the felony DWI charge in the Circuit Court of St. Charles County, Missouri. He was sentenced to incarceration for three years, execution of which was suspended. He completed drug/DWI court and was ordered to serve five years' probation.

10. On July 11, 2014, the Department received Tyler's application for license renewal.

11. Tyler signed his application for MVESC license renewal before a notary public on July 8, 2014, attesting, among other things, that the contents of the renewal application were true and complete and acknowledging that providing false information or omitting material information would be grounds for revocation or refusal to renew his license.

12. On the application, Tyler was asked to state whether he had been convicted of a crime, had a judgment deferred, or was currently charged with a crime. The explanatory material in the application clearly required him to report his felony conviction.

13. The form stated that if the answer to the criminal history question was yes, Tyler was to attach copies of the charging document and the final disposition document and a written statement regarding the circumstances of the crime he committed.

14. Tyler simply answered the criminal history question on the renewal application in the negative, indicating he had neither been charged with nor convicted of a felony, and provided no additional information or documents.

15. In response to the question as to whether he had a child support obligation in arrearage, Tyler indicated that he had an arrearage of \$1,100.

16. On July 21, 2014, an investigator with the Consumer Affairs Division of the Department sent Tyler an inquiry letter notifying him that the Department had discovered his felony DWI conviction, which he failed to disclose on his application for renewal, and ordering him to respond with an explanatory statement and a certified copy of the charging document.

17. Tyler's response letter states he was unaware that the persistent offender DWI with which he was charged, but not yet convicted, in 2012 was a felony, and that he failed to disclose the resulting conviction on his 2014 renewal application because he thought he had already disclosed it to the Department.

18. On November 24, 2014, the Director entered his Order Refusing to Renew Motor Vehicle Extended Service Contract Producer License against Tyler, citing the failure to disclose the felony DWI charge on his application and failure to disclose the resulting felony conviction on his application for license renewal as the facts authorizing refusal under § 385.209.1(1), (3) and (5).

Conclusions of Law

This Commission has jurisdiction to decide this matter. Section 621.045. The applicant has the burden to show he is entitled to licensure. Section 621.120.³ When an applicant for licensure files a complaint, the agency's answer provides notice of the issues. *Ballew v. Ainsworth*, 670 S.W.2d 94, 103 (Mo. App., E.D. 1984). The granting of a motor vehicle extended service contract producer license is governed by §§ 385.200-385.220. According to the Director's answer, the Director refused to renew Tyler's license under § 385.209.1:

³ RSMo 2000.

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:

(1) Filed an application for license in this state within the previous ten years, which, as of the effective date of the license, was incomplete in any material respect or contained any incorrect, misleading, or untrue information;

* * *

(3) Obtained or attempted to obtain a license through material misrepresentation or fraud;

* * *

(5) Been convicted of any felony;⁴

* * *

(12) Failed to comply with an administrative or court order imposing a child support obligation[.]⁵

The Director has alleged that Tyler was issued his MVESC license due to material misrepresentation or fraud perpetrated by Tyler in failing to disclose his pending felony charge to DWI as a persistent offender in July of 2012. Further, the Director takes the position that the failure to disclose the felony charge in his 2012 application and his subsequent failure to

⁴ In his answer, the Director states he also has grounds to refuse the renewal based on § 385.209.1(12) for an alleged failure to comply with an administrative or court ordered child support obligation. Because the Director's administrative order of refusal neither cites this provision nor addresses Tyler's child support obligations as grounds for the refusal, we find Tyler has not been afforded adequate notice of the additional grounds for refusal relating to his child support payment history. Although the Director's answer states that negative child support payment information was discovered in the course of the Department's investigation, the inquiry letter from the Department's investigator mentioned only the criminal history portion of Tyler's applications and his undisclosed felony conviction. We cannot sanction based on uncharged conduct. See *Dental Bd. v. Cohen*, 867 S.W.2d 295, 297 (Mo. App. W.D. 1993). Moreover, the Director asks us to find cause for refusal based on alleged arrearages as of February 2015, when Tyler's disclosure of an arrearage was made in July of 2014.

⁵ The Director's ground to deny renewal of Tyler's license under § 385.209.1 (12) was not set out in the Director's order of November 14, 2014.

disclose the resulting conviction on Tyler's renewal application in 2014 constituted the provision of false, incorrect, and misleading information.

A "misrepresentation" is a falsehood or untruth made with the intent of deceit rather than an inadvertent mistake. *Hernandez v. State Bd. of Registration for the Healing Arts*, 936 S.W. 2d 894, 899, n. 3 (Mo. App. W.D. 1997). Fraud is defined "generally under the common law as an intentional perversion of truth to induce another, or to act in reliance upon it." *Id.* at 899 n.2. Tyler materially misrepresented his criminal history when he applied for his MVESC license in the first instance, in July of 2012. The application that Tyler filled out and attested by his notarized signature required him to disclose any pending felony charges against him at the time, and he did not do so. By the time Tyler applied for the license, he had been served with the complaint and summons and an arrest warrant that provided notice of the offenses with which he was charged, including the felony DWI. Further, any contention that the failure to disclose the felony charge on the first application was unintentional and not done for the purpose of inducing the Director to issue/renew the MVESC license is belied by the fact that Tyler continued to omit information about his crime, even after being convicted of it. When asked on the renewal application if he had been convicted of a felony not previously disclosed to the Department, Tyler simply indicated no.

Based on the foregoing, the Director had grounds to refuse to renew Tyler's MVESC license pursuant to § 385.209.1(1), (3) and (5).

Lack of Discretion

Section 385.209.2 provides, in relevant part:

Notwithstanding section 621.120, the director shall retain discretion in refusing a license or renewal and such discretion shall not transfer to the administrative hearing commission.

We have no authority under this provision to substitute our discretion for the Director's in this matter or to order the Director to renew a license when, as here, we find there is cause for his refusal to do it.

Summary

We find the Director had cause to refuse to renew Tyler's MVESC license. We cancel the hearing.

SO ORDERED on April 14, 2015.

\s\ Nicole Colbert-Botchway
NICOLE COLBERT-BOTCHWAY
Commissioner