

Before the
Administrative Hearing Commission
State of Missouri



DIRECTOR OF THE DEPARTMENT OF)
INSURANCE, FINANCIAL INSTITUTIONS)
AND PROFESSIONAL REGISTRATION,)
STATE OF MISSOURI,)
)
Petitioner,)
)
vs.)
)
MICHAEL DEAN McLAIN,)
)
Respondent.)

No. 14-0083 DI

DECISION

We grant partial summary decision, and find Michael Dean McLain is subject to discipline because he committed criminal offenses, including two felonies involving moral turpitude, and did not disclose them on his application for licensure submitted to the Department of Insurance, Financial Institutions and Professional Registration (the “Department”).

Procedure

On January 1, 2014, the Director of the Department (“the Director”) filed a complaint seeking to discipline McLain. On January 29, 2014, we served McLain with a copy of the complaint and our notice of complaint/notice of hearing by certified mail. McLain did not file an answer or other responsive pleading, as required by 1 CSR 15-3.380(1).¹

¹ All references to the CSR are to the Missouri Code of State Regulations as current with amendments included in the Missouri Register through the most recent update.

On March 20, 2014, the Director filed a certificate of service certifying that Petitioner's First Set of Requests for Admissions, Interrogatories, and Request for Production of Documents Directed to Respondent were served on McLain on March 20, 2014. McLain did not respond to the Director's discovery.

On April 28, 2014, the Director filed a motion for summary decision ("the motion"). Our Regulation 1 CSR 15-3.446(6) provides that we may decide this case without a hearing if the Director establishes facts that McLain does not dispute and entitle the Director to a favorable decision.

In the motion, the Director argues that McLain did not respond to his discovery. 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.² Such a deemed admission can establish any fact or any application of law to fact.³ Section 536.073⁴ and our Regulation 1 CSR 15-3.420(1) apply that rule to this case. Moreover, because McLain failed to answer or otherwise respond to the complaint, we order that he is also deemed to have admitted the facts pleaded and defaulted on any issue raised in the complaint.⁵

The following facts are not disputed.

Findings of Fact

1. The Department issued an insurance agent license to McLain on February 28, 1989. His license expired on February 28, 2007.
2. On August 3, 2011, McLain applied to the Department as a new applicant and submitted an electronic Uniform Application for Individual Producer License/Registration (the "Application"). That same day, the Department issued a producer license to McLain.

² *Killian Constr. Co. v. Tri-City Constr. Co.*, 693 S.W.2d 819, 827 (Mo. App., W.D. 1985).

³ *Linde v. Kilbourne*, 543 S.W.2d 543, 545-46 (Mo. App., W.D. 1976).

⁴ RSMo 2000. Statutory references, unless otherwise noted, are to the 2013 Supplement to the Revised Statutes of Missouri.

⁵ 1 CSR 15-3.380(7).

3. In his Application, McLain attested under penalty of perjury to the truthfulness and completeness of the information provided therein, including his answer to the “Background Questions” in the section relating to criminal history.
4. Background Question No. 1 of the Application asked, in relevant part, “Have you ever been convicted of a crime, had a judgment withheld or deferred, or are you currently charged with committing a crime?”
5. McLain answered “No” to Background Question 1 of the Application.
6. On April 2, 1998, McLain pled guilty in Greene County Associate Circuit Court to two counts of Violation of an Order of Protection in violation of §§ 455.050 and 455.085, RSMo Supp. 1995, a Class A Misdemeanor, based on two separate incidents in September and October, 1997. He was sentenced to ninety days in jail, to be served concurrently, and two years of unsupervised probation, with the requirements that he have no contact with Lisa McLain and no contact with two minor children except as authorized by any child protective order. (*State v. McLain*, Greene County Assoc. Cir. Ct. Case No. 31397CM8333.)
7. On March 6, 2002, McLain pled guilty in Greene County Circuit Court to Sexual Misconduct in the First Degree in violation of § 566.090, RSMo 2000,⁶ a Class A misdemeanor, based upon conduct occurring in May, 2000. He was sentenced to one year in jail and two years of unsupervised probation, and ordered to complete alcohol rehabilitation and sex offender treatment, not consume alcohol, and register as a sex offender. (*State v. McLain*, Greene County Cir. Ct. Case No. 31300CF10275.)
8. On June 23, 2011, McLain was charged by Information in the Texas County Circuit Court with Driving While Intoxicated – Persistent Offender, in violation of §§ 577.010

⁶ In 2013, § 566.090 was transferred, and is now § 566.101. For our purposes, there is no substantive difference between the two.

and 577.023, a Class D felony. On September 26, 2011, McLain pled guilty to that crime, and was sentenced to four years in prison, with the execution of that sentence suspended, fifteen days of shock time, and five years of unsupervised probation. (*State v. McLain*, Texas Co. Cir. Ct., Case No. 11TE-00216-01.)

9. The Texas County Circuit Court subsequently revoked McLain's probation, and sentenced him to the 120-day institutional treatment program in prison under § 559.115. However, that court found it would constitute an abuse of discretion to release McLain after 120 days of treatment, and ordered McLain's full, four-year sentence executed.
10. McLain did not report in his Application that he had been charged by Information in June 2011 in Texas County Circuit Court with Felony Driving While Intoxicated – Persistent Offender.
11. While licensed as an insurance producer, McLain failed to report to the Director that he was criminally prosecuted for a felony within thirty days of the initial pretrial hearing date, and never reported his prosecution or conviction for this offense to the Director.
12. McLain did not report in his Application his 1998 convictions for Violation of an Order of Protection, or his 2002 conviction for Sexual Misconduct in the First Degree.
13. The Director's issuance of an insurance producer license to McLain in August 2011 was based upon McLain's representation in the Application that he had no criminal history or convictions.
14. In October, 2012, the Department's Consumer Affairs Division (the "Division") received a fraud report via the National Association of Insurance Commissioners' On-Line Fraud Reporting System indicating that McLain was incarcerated, according to one of his clients. An investigator with the Division confirmed that McLain had been imprisoned,

and uncovered the information that he failed to provide in his Application related to his criminal history.

15. On November 21, 2012, the Division sent a letter to McLain at his address of record via first class mail to inquire regarding McLain's failure to report his criminal convictions and charge on his Application. The letter was not returned by the United States Postal Service as undeliverable.
16. The Division gave McLain until December 17, 2012 to respond to the inquiry, but McLain did not do so, nor did he demonstrate a reasonable justification for delay.
17. On December 19, 2012, the Division sent a second letter of inquiry to McLain, reiterating that his response was required by January 2, 2013. The letter was not returned by the United States Postal Service as undeliverable.
18. McLain never responded to the Division's December 19, 2012 letter, nor did he demonstrate a reasonable justification for delay.
19. McLain did not renew his license before it expired on August 3, 2013.

Conclusions of Law

We have jurisdiction to hear this complaint.⁷ The Director has the burden of proving McLain has committed an act for which the law allows discipline.⁸ When deciding a motion for summary decision, we view the facts and the inferences from those facts in the light most favorable to the non-moving party. The burden is on the movant to establish both the absence of a genuine issue of material fact and that he is entitled to a favorable determination as a matter of law.⁹

Because he failed to respond to the complaint and to the Director's discovery, McLain has admitted facts and that those facts authorize discipline. But statutes and case law instruct us

⁷ Section 621.045.

⁸ *Missouri Real Estate Comm'n v. Berger*, 764 S.W.2d 706, 711 (Mo. App., E.D. 1989).

⁹ *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993).

that we must “separately and independently” determine whether such facts constitute cause for discipline.¹⁰ Therefore, we independently assess whether the facts admitted allow discipline under the law cited.

The Director argues there is cause for discipline under § 375.141.1, which states:

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:

- (1) Intentionally providing materially incorrect, misleading, incomplete or untrue information in the license application;
- (2) Violating any insurance laws, or violating any regulation, subpoena or order of the director or of another insurance commissioner in any other state;
- (3) Obtaining or attempting to obtain a license through material misrepresentation or fraud;

* * *

- (6) Having been convicted of a felony or crime involving moral turpitude[.]

The Director also relies on § 374.141.4:

The director may also revoke or suspend pursuant to subsection 1 of this section any license issued by the director where the licensee failed to renew or has surrendered such license.

Section 375.141.7 provides:

Within thirty days of the initial pretrial hearing date, a producer shall report to the director any criminal prosecution for a felony or a crime involving moral turpitude of the producer taken in any jurisdiction. The report shall include a copy of the indictment or information filed, the order resulting from the hearing and any other relevant legal documents.

Finally, 20 CSR 100.4.100(2)(A) provides, in relevant part:

Upon receipt of any inquiry from the division, every person shall mail to the division an adequate response to the inquiry within twenty (20) days from the date the division mails the inquiry. An envelope’s postmark shall determine the date of mailing. When the requested response is not produced by the person within twenty (20) days, this nonproduction shall be deemed a violation of this rule,

¹⁰ *Kennedy v. Missouri Real Estate Commission*, 762 S.W.2d 454, 456-57 (Mo. App., E.D. 1988).

unless the person can demonstrate that there is reasonable justification for that delay.

§ 375.141.1(1) – Intentionally Providing Materially Incorrect, Misleading, Incomplete or Untrue Information in the Application

The Director asserts that McLain gave a false answer in response to Background Question No. 1, and thereby made intentional misstatements of material fact on his Application. We agree.

McLain denied having any criminal convictions or being currently charged with a crime when he responded “No” to Background Question No. 1 on his August 2011 Application. In fact, he had pled guilty to and been sentenced for two counts of the Class A misdemeanors of Violation of an Order of Protection in 1998, and in 2002 for Sexual Misconduct in the First Degree. In June 2011, less than three months prior to his Application, McLain was charged with Felony Driving While Intoxicated – Persistent Offender, a fact which he was required to disclose in response to Background Question No. 1.

We find McLain’s misrepresentation of his criminal history on the Application was intentional. Direct evidence of intent is rarely susceptible to direct proof and therefore must generally be established by circumstantial evidence.¹¹ We may infer the requisite mental state from the conduct of the licensee “in light of all surrounding circumstances.”¹²

Here, the fact that McLain had been previously licensed, the extent of McLain’s criminal history, and the close proximity of his most recent arrest and charge to the date of his Application make it improbable that McLain’s response to Background Question No. 1 was inadvertent. McLain separately attested to the truth and completeness of his Application, and was thereby made aware of the consequences of giving false or misleading information. From

¹¹ *State v. Agee*, 37 S.W.3d 834, 837 (Mo. App., S.D. 2001).

¹² *Missouri Bd. for Arch’ts, Prof’l Eng’rs & Land Surv’rs v. Duncan*, 744 S.W.2d 524,533 (Mo. App., E.D. 1988).

these circumstances, we easily infer McLain intentionally provided false information on his Application.

We further find McLain's misrepresentation of his criminal background on the Application was material. Information is "material" if it "[has] real importance or great consequences[.]"¹³ Without question, an applicant's criminal history has real importance in the Director's consideration of whether to grant a license. Conviction of a felony or crime of moral turpitude is grounds for the Director to deny licensure.¹⁴ McLain's criminal history was plainly material.

There is cause to discipline McLain under § 375.141.1(1).

§ 375.141.1(2) – Violation of Insurance Laws and Regulations by Failing to Provide an Adequate Response to Division Inquiries

A licensee is required to respond to any inquiry from the Division within twenty days, or to demonstrate reasonable justification for any delay.¹⁵ The Division twice sent correspondence to McLain by regular mail to inquire about additional information it uncovered regarding his incarceration and criminal history, but McLain never responded.

Because the evidence establishes the Division's letters were not returned undeliverable, there is a rebuttable presumption they were delivered to McLain in the due course of the mails.¹⁶ However, at the time the letters were mailed to McLain's address of record, the Division had uncovered information that McLain was not residing at that address, but was incarcerated. While we appreciate that it is the licensee's responsibility to keep the Director apprised of his current mailing address,¹⁷ the Director's actual knowledge that McLain was not residing at his address of

¹³ Merriam-Webster's Collegiate Dictionary 765 (11th ed. 2004).

¹⁴ See § 375.141.1(6).

¹⁵ 20 CSR 100-4.100(2)(A).

¹⁶ *Hughes v. Estes*, 793 S.W.2d 206, 209 (Mo. App. S.D. 1990).

¹⁷ Section 375.018.7.

record rebuts the presumption of delivery. There is no evidence that the Director attempted to mail inquiries to McLain at the prison where he was serving time for a felony DWI conviction.

Therefore, we conclude that McLain's failure to respond to the Division's two letters of inquiry mailed to his address of record did not violate a regulation of the Department. We find no ground for discipline under § 375.141.1(2).

§ 375.141.1(2) – Violation of Insurance Laws and Regulations by Failing to Timely Notify the Director of a Felony Prosecution

The Director contends that McLain's failure to report that he was charged by Information with a felony DWI in Texas County violated § 375.141.7, and is further grounds for discipline under § 375.141.1(2) for violation of an insurance law. The record establishes that McLain never reported the fact of his criminal felony charge to the Director, and certainly failed to report it within thirty days of his initial pretrial hearing date, as required by § 375.141.7.

Grounds exist to discipline McLain for this insurance law violation under § 375.141.1(2).

§ 375.141.1(3) – Obtaining a License Through Material Misrepresentation or Fraud

The Director asserts that McLain is subject to discipline because he obtained his insurance producer license through material misrepresentation or fraud. As discussed above, we found McLain made an intentional misrepresentation of a material fact on his Application—that he had not been convicted of any crime and had no criminal charges pending.

A “misrepresentation” is defined as a falsehood or untruth made with the intent and purpose of deceit.¹⁸ “Fraud is the intentional perversion of truth to induce another, in reliance on it, to part with some valuable thing belonging to him.”¹⁹ Regardless of which label best applies, we find McLain's deliberate concealment of his criminal convictions and pending charge on his Application was clearly aimed at gaining licensure, a goal which he attained.

¹⁸ MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 359 (11th ed. 2004).

¹⁹ *State ex rel. Williams v. Purl*, 128 S.W. 196, 201 (Mo. 1910).

McLain never sought to correct his misstatement; in fact, had the Division not learned through a hotline call from one of McLain's clients that he was incarcerated, the full extent of his criminal history might never have come to light. Under penalty of perjury, McLain denied having ever been convicted of a crime or having any criminal charges pending against him – a statement he knew to be false, misleading, and material to the Director's decision. We infer from these circumstances that McLain obtained his insurance producer license through material misrepresentation and fraud.

We find cause for discipline under § 375.141.1(3).

§ 375.141.1(6) – Conviction of a Felony or Crime of Moral Turpitude

Through the certified court records of McLain's guilty plea and conviction for felony DWI and subsequent incarceration, the Director established McLain is subject to discipline under § 375.141.1(6). The Director also argues McLain committed crimes involving moral turpitude.

Moral Turpitude is:

an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellowman or to society in general, contrary to the accepted and customary rule of right and duty between man and man; everything “done contrary to justice, honesty, modesty, and good morals.”^[20]

In our determination of whether McLain's crimes involve moral turpitude, we are guided by the analysis in *Brehe v. Missouri Dept. of Elementary & Secondary Education*,²¹ which referred to three categories of crimes:

1. crimes that necessarily involve moral turpitude, such as fraud (Category 1 crimes);
2. crimes “so obviously petty that conviction carries no suggestion of moral turpitude,” such as illegal parking (Category 2 crimes); and
3. crimes that “may be saturated with moral turpitude,” yet do not necessarily involve it, such as willful failure to pay income

²⁰ *In re Frick*, 694 S.W.2d 473, 479 (Mo. banc 1985) (quoting *In re Wallace*, 19 S.W.2d 625 (Mo. banc 1929)).

²¹ 213 S.W.3d 720 (Mo. App. W.D. 2007).

tax or refusal to answer questions before a congressional committee (Category 3 crimes).²²

Category 1 crimes, such as murder, rape, and fraud, are invariably crimes of moral turpitude, and Category 3 crimes require inquiry into the circumstances.²³

McLain was convicted of Felony Driving While Intoxicated – Persistent Offender, in violation of § 577.010 and § 577.023. A person commits the crime of “driving while intoxicated” if he operates a motor vehicle while in an intoxicated or drugged condition.²⁴ A “persistent offender” is a person who has pled guilty or has been found guilty of two or more intoxication-related offenses, or has pled or been found guilty of involuntary manslaughter, assault in the second degree, or assault of a law enforcement officer in the second degree.²⁵ We find that a felony DWI, particularly with the aggravating circumstances of a “persistent offender,” is a category 1 crime. McLain’s willful choice to repeatedly defy the law violated his duty to society and unnecessarily exposed the public to great risk of harm.

McLain was twice convicted of the Class A misdemeanor of Violation of an Order of Protection, a violation of §§ 455.050 and 455.085. An order of protection is granted to protect a person from domestic violence.²⁶ Violation of an order of protection is a willful act, contrary to justice, and a violation of one’s social duty. We find this crime to come within category 1 and, therefore, a crime of moral turpitude.

Lastly, McLain was convicted of Sexual Misconduct in the First Degree, a class A misdemeanor. A person commits the offense if he purposely subjects another to sexual contact

²² *Id.* at 725 (quoting *Twentieth Century Fox Film Corp. v. Lardner*, 216 F.2d 844, 852 (9th Cir. 1954)).

²³ *Id.*

²⁴ Section 577.010.1.

²⁵ Section 577.023.1(5).

²⁶ *See* § 455.050.1.

without consent.²⁷ Again, we find McLain's crime within category 1, as his conduct was base, vile, depraved, and in contravention of the most basic social duties.

Because McLain was convicted of three crimes involving moral turpitude, we find the Director met his burden of proof and established cause for discipline under § 375.141.1(6).

Summary

We grant partial summary decision and find there is cause to discipline McLain's insurance producer license under § 375.141.1(1), (2), (3) and (6). As the case is scheduled for hearing on June 12, 2014, the parties should advise us immediately of their intention to seek a hearing on the remaining issue--whether grounds exist for discipline under § 375.141.1(2) for failure to provide adequate responses to inquiries.

SO ORDERED on June 5, 2014.

\s\ Mary E. Nelson
MARY E. NELSON
Commissioner

²⁷ See § 566.101.1, formerly § 566.090.