

BEFORE THE
INSURANCE COMMISSIONER
STATE OF CALIFORNIA

In the Matter of the Statement of Issues
Against:

RUSLAN ALEXANDROVICH BIZHKO

Respondent.

File No. LBB 3304-AP (AR)

OAH No. N2006080281

PROPOSED DECISION

On October 27, 2006, in Sacramento, California, Leonard L. Scott, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter.

Darrel Secret, Staff Counsel, and Antonio Pataca, Law Student, represented complainant.

Ruslan Alexandrovich Bizhko, respondent, appeared in his own behalf.

Evidence was received and the record remained open until November 3, 2006, for respondent to submit two letters, one from his employer and one from his church. However, respondent failed to provide those letters. The record was closed and the matter was submitted on November 3, 2006.

FACTUAL FINDINGS

1. Shannon Carrion, Senior Investigative Analyst, acting on behalf of John Garamendi, Insurance Commissioner, Department of Insurance (Department), State of California, filed the Statement of Issues against respondent. Carrion acted in her official capacity.

2. On or about September 11, 2005, respondent filed an application for licensure to act as a life agent in the State of California with the Insurance Commissioner. The license has not been issued and the matter is pending the outcome of this hearing.

3. The application includes a "Background Information" form that applicants must complete. Question number 1 of that form asks:

Have you ever been convicted (please read definition of crime below before answering) of, or are you currently charged with, committing a crime, whether or not adjudication was withheld?

"Crime" includes a misdemeanor, a felony or a military offense. You may exclude 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verdict of a judge or jury, having entered a plea of guilty or nolo contendere, having had any charge dismissed or plea withdrawn pursuant to Penal Code 1203.4, or having been given probation, a suspended sentence or a fine.

If you answer yes, you must attach to this application:

- a) a written statement with original signature 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.

Respondent knowingly and falsely marked "No" in answer to question number 1 even though he has three convictions and he failed to attach the required documents.

4. On January 27, 2000, in the Superior Court, County of Sacramento, State of California, in the matter entitled *People v. Ruslan Alexandrovich Bizhko*, case number 99T02394, respondent was convicted on his plea of nolo contendere of a violation of Vehicle Code section 23152, subdivision (a), (driving under the influence of alcohol), a misdemeanor.

Imposition of judgment and sentence were suspended and he was placed on three years informal probation with various terms and conditions, including serving 48 hours in jail, enrolling in the first offender program within 72 hours, and payment of fines and fees.

The facts and circumstances of respondent's crime are that respondent was stopped while driving a motor vehicle on the public roadway and had a 0.14 blood alcohol level.

5. On January 27, 2000, in the Superior Court, County of Sacramento, State of California, in the matter entitled *People v. Ruslan Alexandrovich Bizhko*, case number 99T05138, respondent was convicted on his plea of nolo contendere of a violation of Vehicle Code section 23152, subdivision (a), (driving under the influence of alcohol), a misdemeanor.

Imposition of judgment and sentence were suspended and he was placed on three years informal probation with various terms and conditions, including serving 10 days in jail, enrolling in the first offender program within 72 hours, and payment of fines and fees.

The facts and circumstances of respondent's crime are that respondent was stopped while driving a motor vehicle on the public roadway and had a 0.14 blood alcohol level.

6. On July 25, 2001, in the Superior Court, County of Sacramento, State of California, in the matter entitled *People v. Ruslan Alexandrovich Bizhko*, case number 00F05982, respondent was convicted by a jury of violations of Vehicle Code sections 20001, subdivision (a), (fleeing the scene of an accident), and 14601.2, subdivision (a), (driving with a suspended or revoked license), misdemeanors.

Imposition of sentence was suspended and he was placed on three years formal probation with various terms and conditions, including serving 90 days on the work furlough program and 10 days in jail, and payment of fines and fees.

The facts and circumstances of respondent's crime are that respondent drove a motor vehicle on the public roadway while his California driver's license was suspended, was involved in a motor vehicle accident and left the scene of the accident.

7. Respondent was born in the Ukraine on August 22, 1977 and moved to the United States on November 13, 1998. He graduated from high school and attended college in the Ukraine before coming here. Respondent testified that, after they arrive here, money was tight and he needed a job to help support himself, his mother and siblings. He had difficulty finding good employment, and drank to relieve the stress. He drank too much, drove a motor vehicle, and was caught. He completed the driving under the influence program and attended Alcoholics Anonymous while in the program. Respondent stated that he now has a valid California driver's license.

Respondent stated that since his convictions, he has changed. He has worked at a job for six years, has a house and two children. He wants to improve his financial situation by continuing his education and getting a life agent license.

Respondent said that he is not involved in any community betterment efforts.

Respondent admitted that he has the three convictions, but explained that he marked "No" on the application and did not provide the required documents because his convictions were only misdemeanors and he did not think he had to report misdemeanors. Respondent agreed that a life agent must carefully read and fill out various documents when selling insurance, but claimed he did not read the Background Information form carefully, so he thought that he did not have to list any convictions over five years old.

Respondent's attempts to rationalize and justify his failure to disclose and provide the required documents regarding his convictions were not credible.

8. In addition, respondent's convictions are still relatively recent and he was only released from probation about two years ago. Regarding the time respondent spent on probation, the court in *In Re Gossage* (2000) 23 Cal.4th 1080, 1099, wrote:

Since persons under the direct supervision of correctional authorities are required to behave in exemplary fashion, little weight is generally placed on the fact that a bar applicant did not commit additional crimes or continue addictive behavior while in prison or while on probation or parole.

Thus, respondent's actions while on probation are of very little weight in determining whether he has rehabilitated himself and whether he would or would not present a danger to the public welfare if licensed. Only by continuing in his efforts to change for some period of time after his release from probation can respondent demonstrate that he does not present a danger to the public welfare and is an appropriate person to hold a license.

9. Driving under the influence on public roads, by its very nature, endangers the general public, while driving with a suspended driver's license and fleeing the scene of an accident display a disregard for the law and the safety of others. Not only does respondent have these convictions, but he compounded the situation by failing to disclose them on his license application. His failure to disclose the convictions raises concerns about his truthfulness, honesty and candor, critical character traits for an insurance licensee. Respondent failed to demonstrate that he is an appropriate person to hold an insurance license at this time.

LEGAL CONCLUSIONS

1. Respondent applied for and was denied licensure as a bail agent, then appealed the denial. The issue of which party has the burden of proof in such circumstances was dealt

with by the court of appeal in *McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, as follows:

"As in ordinary civil actions, the party asserting the affirmative at an administrative hearing has the burden of proof, including both the initial burden of going forward and the burden of persuasion by a preponderance of the evidence..."

Respondent is asserting the affirmative by claiming that he should be granted a license and has the burden of proof, which means that he was required to prove by a preponderance of the evidence that he is an appropriate person to be granted a license.

2. Insurance Code section 1668 provides, in relevant part:

The commissioner may deny an application for any license issued pursuant to this chapter if:

...

(b) The granting of the license will be against public interest;

...

(e) The applicant is lacking in integrity;

...

(h) The applicant has knowingly or willfully made a misstatement in an application to the commissioner for a license, or in a document filed in support of such an application, or has made a false statement in testimony given under oath before the commissioner or any other person acting in his stead;

A judgment, plea or verdict of guilty or a conviction following a plea of nolo contendere is deemed to be a conviction within the meaning of this section.

3. In *Griffiths v. Superior Court* (2002) 96 Cal.App. 4th 757, the court held that a license may be disciplined or denied for conduct occurring outside the exercise of the licensed activity if such conduct reflects on a licensee's fitness and qualifications to hold the license.

4. In *Golde v. Fox* (1979) 98 Cal.App. 3d 167, 176, the court held that a licensed professional must have more than mere knowledge and ability, the licensee must have honesty and integrity.

5. The court in the case entitled *In re Edward E. Gehring* (1943) 22 Cal. 2d 708, held that the failure by an applicant for a license to make a full disclosure of all of the required information was cause for denial of the license.

6. Black's Law Dictionary (4th Ed.Rev.) defines moral turpitude as "conduct contrary to justice, honesty, modesty or good morals," citing *Marsh v. State Bar of California* (1930) 210 Cal. 303.

The court in *Clerici v. Department of Motor Vehicles* (1990) 224 Cal.App.3d 1016, wrote that "Moral turpitude has also been described as any crime or misconduct committed without excuse, or any 'dishonest or immoral' act not necessarily a crime. (*In re Higbie* (1972) 6 Cal.3d 562, 569.)"

The California Supreme Court in *People v. Castro* (1985) 38 Cal.3d 301, 315, wrote that: "Moral turpitude' means a general 'readiness to do evil' i.e., 'an act of baseness, vileness or depravity' in the private and social duties which a man owes to his fellowmen, or to society in general, contrary to the accepted and customary rule of right and duty between man and man." The *Castro* court noted that "moral turpitude does not depend on dishonesty ... a witness' moral depravity of *any kind* has some 'tendency in reason' to shake one's confidence in his honesty."

While California courts have held that a single driving under the influence conviction is not a crime involving moral turpitude, even though the person who drives under the influence subjects other users of the roadway to the risk of death or serious injury due to a severely diminished capacity to drive safely, the courts have held that repeated convictions for driving under the influence constitute moral turpitude because the repeated crimes demonstrate an extreme disregard for the lives of others. (See *People v. Forster* (1994) 29 Cal.App.4th 1746, 1757; *People v. Ochoa* (1993) 6 Cal.4th 1199, 1208; and *Taylor v. Superior Court* (1979) 24 Cal.3d 890, 897-899)

Specifically, the California Supreme Court in *People v. Ochoa* held that a person who continues to drive while under the influence in spite of prior driving under the influence convictions knows or should know the serious risks which such conduct imposes upon other drivers and that continuing to drive in such circumstances is indicative of a "conscious indifference" or "I don't care attitude" concerning the ultimate consequences of his actions.

Earlier the California Supreme Court in *Coulter v. Superior Court* (1979) 21 Cal.3d 144, 152-154, held that: "One who wilfully consumes alcoholic beverages to the point of intoxication, knowing that he thereafter must operate a motor vehicle, thereby combining sharply impaired physical and mental faculties with a vehicle capable of great force and speed, reasonably may be held to exhibit a conscious disregard of the safety of others. The effect may be lethal whether or not the driver had a prior history of drunk driving incidents."

The *Coulter* Court further noted that: "one who voluntarily commences, and thereafter continues, to consume alcoholic beverages to the point of intoxication, knowing from the outset that

he must thereafter operate a motor vehicle demonstrates, in the words of Dean Prosser, 'such a conscious and deliberate disregard of the interests of others that his conduct may be called wilful or wanton.' (*Prosser*, § 2, at pp. 9-10.)"

The *Forster* court stated that continuing to drive while intoxicated despite the knowledge of the serious risks it imposes upon other drivers is indicative of a "conscious indifference" concerning the consequences of the activity, from which can be inferred "depravity in the private and social duties which a man owes to his fellowmen, or to society in general, contrary to the accepted and customary rule of right and duty between man and man." (Citation omitted.)

Therefore, respondent's repeated convictions for driving under the influence constitute moral turpitude, because they show a conscious indifference to the potentially tragic consequences to the public. They are substantially related to the qualifications, functions and duties of the licensed activity because life agents often drive motor vehicles to transact insurance. And they demonstrate that it would be against the public interest to grant respondent a license.

7. Driving with a suspended or revoked driver's license and fleeing the scene of an accident, in conjunction with respondent's convictions for driving under the influence, are crimes of moral turpitude pursuant to the same analysis as explained above for the driving under the influence convictions alone, are substantially related to the licensed activity and thus demonstrate that it would be against the public interest to grant respondent a license.

In addition, driving with a suspended or revoked driver's license and fleeing the scene of an accident are also crimes that involve conduct contrary to justice and honesty. (*Marsh v. State Bar of California* (1930) 210 Cal. 303.) Respondent committed the crimes without any reasonable excuse. (*In re Higbie* (1972) 6 Cal.3d 562, 569.) And, his acts demonstrated a willingness to violate the law and ignore the "social duties which a man owes to his fellowmen, or to society in general, contrary to the accepted and customary rule of right and duty between man and man." (*People v. Castro* (1985) 38 Cal.3d 301, 315.) Thus, his actions and convictions constitute moral turpitude, are substantially related to the licensed activity, and demonstrate that it would be against the public interest to grant respondent a license.

8. Respondent's failure to admit the convictions on the application was an act of dishonesty and was "conduct contrary to justice, honesty" (*Marsh v. State Bar of California* (1930) 210 Cal. 303) and was "misconduct committed without excuse, or any 'dishonest or immoral' act not necessarily a crime." (*Clerici v. Department of Motor Vehicles* (1990) 224 Cal.App.3d 1016; *In re Higbie* (1972) 6 Cal.3d 562, 569.) Respondent failure constitutes moral turpitude, is substantially related to the licensed activity, and demonstrates that it would be against the public interest to grant respondent a license.

9. Cause for denial of respondent's application for a license was established for violation of the California Insurance Code section 1668, subdivision (b), because respondent's two driving under the influence convictions, especially when coupled with his convictions for driving with a suspended or revoked driver's license and fleeing the scene of an accident demonstrate that he has a reckless disregard for the safety of the public and for legal requirements enacted to protect the public. This is important because not only do insurance agents commonly drive motor vehicles while transacting insurance but also because they must comply with laws and regulations while carrying out those transactions. Thus, it would be against the public interest to permit respondent to transact insurance in California, as found in Findings 2, 3, 4, 5 and 6.

10. Cause for denial of respondent's application for a license was established for violation of the California Insurance Code section 1668, subdivision (e), because he is lacking in integrity as demonstrated by his failure to disclose his three convictions, as found in Findings 2, 3, 4, 5 and 6.

11. Cause for denial of respondent's application for a license was established for violation of the California Insurance Code section 1668, subdivision (h), because he knowingly or willfully made a misstatement in his application for a license, as found in Findings 2, 3, 4, 5 and 6.

ORDER

The application of respondent Ruslan Alexandrovich Bizhko for licensure as a life agent is denied pursuant to Legal Conclusions 9, 10 and 11, separately and for all of them.

Dated: November 29, 2004


LEONARD L. SCOTT
Administrative Law Judge
Office of Administrative Hearings