

BEFORE THE
INSURANCE COMMISSIONER
STATE OF CALIFORNIA

In the Matter of the Application of:

YVONNE DARLENE MOORE,

Respondent.

Case No. LBB 2993-ap

OAH No. N 2006010585

PROPOSED DECISION

On March 3, 2003, in Oakland, California, Perry O. Johnson, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter.

Darrell Secrest, Staff Counsel, represented the Complainant.

Respondent Yvonne Darlene Moore appeared for the hearing in this matter, but she was not otherwise represented.

On March 3, 2006, the parties submitted the matter and the record closed.

FACTUAL FINDINGS

1. On September 23, 2005, the Insurance Commissioner through the Department of Insurance (Department) received an Individual Application for Insurance License (application) from Yvonne Darlene Moore (Respondent). By the application, Respondent sought licensure as a life agent.

The application remains pending because personnel of the Department believe acts or omissions by Respondent preclude her from acquiring the license.

2. On approximately December 1, 2005, the Statement of Issues in this matter was prepared that named Respondent. On December 10, 2005, Respondent signed a Notice of Defense form by which she requested a hearing to present her defense to the charges contained in the Statement of Issues.

Record of Criminal Conviction

3. On May 31, 2005, in case number SC13802A, the California Superior Court in and for the County of Marin convicted Respondent, on her plea of guilty, of violating Penal Code section 503 (Embezzlement), a felony. The court continued pronouncement of judgment because the matter was referred to the county's probation department for the purpose of securing a presentence investigation report. On July 18, 2005, the court

conducted a sentencing hearing and upon noting that restitution had been paid to the crime victim, the court granted Respondent's motion to reduce the criminal basis of the conviction to a misdemeanor.

4. The offense of embezzlement, for which the superior court convicted Respondent in May 2005, is substantially related to the qualifications, functions or duties of an insurance licensee. Hence, the California Superior Court convicted Respondent of a public offense that has as one of its necessary elements a fraudulent act or an act of dishonesty in acceptance, custody, or payment of money or property.

5. The facts and circumstances of Respondent's act that led to her conviction occurred during an unknown period of time in 2004. During such time Respondent was employed by an automobile dealership known as Marin Honda/Marin Acura as a "DMV clerk." Under the guise of her position with the business, Respondent caused several checks of the dealership to be signed by the general manager and the supervisor whereby the checks were written to pay various debts owed by Respondent. Over an unknown period of time Respondent fraudulently appropriated money of the automobile dealer, while she occupied a position of trust as an employee. Respondent's theft resulted in her employer's loss of money in an amount of, at least, \$17,848.86.

On November 30, 2004, a felony criminal complaint was filed. On December 20, 2004, Respondent appeared in a felony arraignment proceeding. On January 18, 2005, Respondent entered a plea of not guilty. On May 31, 2005, Respondent pled guilty to the criminal offense of felony embezzlement. On July 18, 2005, the court entered judgment on a misdemeanor offense of embezzlement.

6. As a consequence of the July 18, 2005 sentencing hearing, the court suspended imposition of sentence upon Respondent and placed her on supervised probation for a term of three years. The supervised probation was to be conducted by a probation officer of the County of Marin.

The terms of probation included jail time of 60 days in the custody of the Marin County Sheriff; however, the court allowed Respondent to perform the time in the home detention program. The court ordered Respondent to pay fines and fees in an amount of \$420. The court directed Respondent to complete 80 hours of community service as directed by the probation officer. The court directed Respondent to attend "Debtors' Anonymous" meetings weekly or as directed by the probation officer. The court commanded Respondent to participate in any treatment, therapy or counseling program as directed by the probation officer. The court noted that Respondent had been obligated to make restitution to the crime victim in an amount of \$17,848.86. The court required Respondent to seek and maintain full-time employment, education or vocational training as directed by the probation officer. The court prescribed that Respondent "shall not accept nor change employment without the advance approval of the probation officer. [Respondent] shall not accept employment which involves maintenance of financial records, or handling cash, checks, or other financial proceeds." The court ordered Respondent to pay a supervised probation fee of \$350. The

court commanded Respondent not to contact the crime victim – Marin Acura. And the court directed Respondent to “disclose her conviction to [her] current employer and any future employer” and “provide proof to probation [office] within 10 days of obtaining/changing employment.”

Matters in Extenuation

7. At the time of Respondent’s theft, her husband had lost his employment position. Even though the monthly debts remained constant, the diminished income to the household put Respondent under great stress.

8. At the time of the embezzlement of more than \$17,000 from her employer, Respondent was pregnant with her fourth child. She viewed the money as being essential to maintain proper care and good health for her household and unborn child.

9. Respondent adamantly represented that her immediate supervisor at the automobile dealer gave consent to Respondent taking short term “loans” from the employer’s checking account.

Matters in Mitigation and Respondent’s Background

10. Respondent is 34 years old as she has a date of birth of November 29, 1971.

11. For more than 10 years, the California Department of Motor Vehicles had licensed Respondent to hold a VIN Registration certificate. With the DMV issued registration, Respondent worked as a “DMV clerk” and “DMV supervisor.” At the time of her crime, Marin Honda employed Respondent as a DMV supervisor. (Respondent described a relationship between her employing automobile dealer and Marin Acura that caused her to handle checks of Marin Acura during the DMV registration process.) After she was discharged from her employment at Marin Honda in September 2004, Respondent went to work for Fremont Toyota in September 2004 as a DMV supervisor. She worked for Fremont Toyota until September 2005.

Before working for Marin Honda, which is affiliated with her crime victim –Marin Acura, Respondent had worked as DMV supervisor for Alameda County Auction. She worked for that company from July 1996 until August 2002. And from April 1993 until July 1996, Respondent worked for Bay Cities Auto Auction, where she held a position of DMV clerk.

Matters in Rehabilitation

12. Respondent is the mother of four children, who have ages of 13 years, five years, four years, and one year. Her 13-year-old daughter is the product of her first marriage

13. Respondent has the support of family and friends in her pursuit of rehabilitation.

a. Respondent called two witnesses to the hearing.

i. Mr. David S. Kusch is Respondent's uncle by marriage. He has known Respondent since she was 8 years old.

Mr. Kusch first learned of Respondent's criminal acts in the "Spring of 2005." He paid \$4,000 to hire a criminal defense lawyer to represent Respondent after she received a felony criminal complaint that alleged her embezzlement.

Mr. Kusch believes Respondent's misconduct stemmed from the pressure of her husband being unemployed for about six months.

Mr. Kusch views Respondent as an honest person who made an error in judgment.

However Mr. Kusch has been misinformed to believe Respondent had "borrowed" money from her employer and that Respondent is not a thief.

Mr. Kusch has a motive to have Respondent employed in a well-paying position because Respondent owes him \$4,000 for the attorney's fees Mr. Kusch paid in mid-2005.

ii. Ms. Joan Leslie Miller is Respondent's former mother-in-law because Respondent's first husband was the son of Ms. Miller. Ms. Miller has known Respondent since 1987. Respondent was married to Ms. Miller's son until 1996. Ms. Miller is the grandmother of Respondent's 13 year old daughter.

Ms. Miller has great affection and respect for Respondent. In the past when Ms. Miller was homeless and had dependent children, Respondent implored her husband to invite Ms. Miller to live with the couple. Ms. Miller continues to remain in close contact as the women attend the same church.

Ms. Miller compellingly expressed that in about October 2004, which was about one month before the criminal complaint was filed against Respondent, Respondent came to her in tears. Respondent made admissions that included her commission of an offense that "even God will not forgive [Respondent]." Respondent told Ms. Miller about her wrongdoing at her workplace.

b. Respondent offered the letter of Ms. Cynthia Glover to supplement and explain other evidence that came into evidence through the hearing in this matter.

Matters in Aggravation

14. The testimony from Respondent at the hearing of this matter is neither wholly candid nor trustworthy. Respondent is not believed when she asserted that her immediate supervisor and the company's general manager authorized her to borrow the money from the bank account of Marin Acura. It is wholly implausible that Respondent would have gained the consent of her supervisors to have checks of the business issued in the aggregate of nearly \$18,000, and for Respondent to not be able to have either or both of the supervisors to make representations to the District Attorney for Marin County or to appear as witnesses when Respondent confronted a felony criminal complaint.

Other Matters that Negatively Impact Upon Respondent's Rehabilitation from Her Past Acts of Criminal Misconduct

15. Respondent remains on probation for the embezzlement until July 18, 2008.

16. Despite a term of probation, Respondent has not faithfully attended counseling or behavior modification therapy with "Debtors' Anonymous." Respondent has only attended a "couple of meetings" in January 2006 and February 2006. Respondent unpersuasively advances an excuse that because her husband was partially responsible for the couple's debts he too should attend the meetings of Debtors' Anonymous. Because her husband's work schedule prevents him from attending the meetings, Respondent unconvincingly expressed that she has not seen fit to go to the meetings. Yet, Respondent does not recognize that her husband was not convicted of a crime for which the superior court prescribed a specific term of probation to which Respondent must comply. Respondent showed no evidence that the court or county probation office has excused her from the apparent violation of probation.

17. Respondent owes more than \$300 in fines and fees to the court that placed her on probation in July 2005.

18. Respondent has not completed all of the eighty (80) hours of community service that is a term or condition of the probation as prescribed by the superior court in July 2005. (Respondent has volunteered about 40 hours at the Faith Fellowship Church in the child care section on Sundays, and in the food service program on Wednesday evenings.)

19. At the hearing of this matter, Respondent was not credible when she sought to collaterally attack the facts that underpin the conviction of the crime to which she pled guilty. Respondent repeatedly asserted that she had borrowed nearly \$18,000 from her employer even though she lacked even a crude or basic written loan agreement with the company whose money she procured.

Respondent advanced an implausible story that her supervisor and the automobile dealer's general manager were aware that she "was borrowing" the money she took from the automobile dealer that employed her as a VIN registration clerk. She unpersuasively

attempted to portray herself as an unwitting individual who simply did not secure a written memorandum of the loan arrangement that her supervisors had authorized. She asserted that the criminal complaint came about after the dealership was sold and an audit of the books of the sold company indicated grave shortages of money. But Respondent failed to account for the failure of her supervisor and the dealer's general manager to offer evidence at the criminal proceeding against her so as to mitigate or eliminate the criminal conviction.

20. Respondent does not accept full responsibility for her conscious criminal scheme to unlawfully benefit from stolen money that belonged to a business that had provided her employment opportunities.

21. Other than the mandatory community service required by the terms of probation from the May 2005 criminal conviction, Respondent did not show by competent, corroborating evidence that she has significant and conscientious involvement in community, church or privately-sponsored programs designed to provide social benefits or to ameliorate social problems.

22. Respondent has not been employed since September 2005 when Fremont Toyota terminated her when that company learned of her embezzlement of money from Marin Honda/Marin Acura.

Ultimate Finding

23. Respondent's manner of providing testimony, her attitude towards her past criminal misconduct and her current effort to deceive and mislead regarding her past corrupt behavior indicate Respondent is not fully rehabilitated from the crime of embezzlement.

CONCLUSIONS OF LAW

1. Respondent was not credible at the hearing of this matter when she asserted that the money taken from her employer was a loan. Her representations exist as a collateral attack against the basis of the facts upon which the superior court determined Respondent to be guilty of the crime of embezzlement. In an administrative proceeding, a respondent cannot challenge validity of prior conviction. (*Garcia v. Superior Court* (1997) 14 Cal.4th 953; *People v. Coffey* (1967) 67 Cal. 2d 204). A guilty plea is an admission of every element of the charged offense, and may be used as if Respondent had been tried by a jury and been found guilty of all material facts. (*Arenstein v. California State Board of Pharmacy* (1968) 265 Cal.App.2d 179, 190)

Embezzlement is the fraudulent appropriation of property, including money, by a person to whom it has been entrusted, with the intent to defraud the owner of the property. (Pen. Code § 503; Calif. Criminal Defense Practice, Matthew Bender & Company, Inc., 2005, Theft, § 143.01, subd. (b)(3).) "The common law crimes of larceny, embezzlement, and taking under false pretenses have been statutorily combined in California under the rubric of theft. Each of these common law crimes involves an unlawful taking, varying little

more than in the method of acquisition.” (Calif. Criminal Defense Practice id., at § 143.01, subd. (a)(1).)

In an embezzlement case, the defendant is in rightful possession of the property, the crime element of “taking” for the crime of embezzlement occurs when the defendant appropriates for her own purpose property delivered to her for a different, specified purpose. The law is clear that any diversion of property constitutes embezzlement, whether there is a direct, personal benefit or not, as long as the owner is deprived of the use of the property. Embezzlement does not require Respondent’s intent to deprive permanently the owner of the property or money. For embezzlement to manifest place, the fact that the defendant intended to restore the property or actually restores it is no defense. Evidence of a defendant’s poverty or indebtedness generally is inadmissible to establish a motive to commit theft, because reliance on poverty alone as evidence of motive is deemed unfair to the defendant, and the probative value of the evidence is considered outweighed by the risk of prejudice. However, the evidence is admissible to rebut a defendant’s claim that he or she did not commit the theft because he or she did not need the money. (Calif. Criminal Defense Practice id. at § 143.01,, subd. (b)(2).)

Despite Respondent’s protestations that she had “borrowed” money from her automobile dealer employer and had a plan to repay the entire \$17,848.86, she, in fact, committed the crime of embezzlement, which is a crime of theft.

2. Cause to deny respondent’s application for licensure exists under Insurance Code section 1668, subdivision (e), by reason of the matters set forth in Factual Findings 2, 3, 4, and 14.

Respondent’s acts and omissions establish that she lacks integrity to hold a license to act as a life agent.

3. Cause to deny respondent’s application for licensure exists under Insurance Code section 1668, subdivision (b), by reason of the matters set forth in Factual Findings 2, 3, 4, 5, and 14 through 24.

Respondent’s acts and omissions establish that it would be against the public interest to enable her to transact insurance business as a life agent.

4. Cause to deny respondent’s application for licensure exists under Insurance Code section 1668, subdivision (m)(3), by reason of the matters set forth in Factual Findings 3 and 4.

A court of competent jurisdiction convicted Respondent of a public offense that has as one of its necessary elements a fraudulent act or an act of dishonesty in acceptance, custody, or payment of money or property so as to preclude her from holding a license to act as a life agent.

5. Respondent remains on probation. *In Re Gossage* (2000), 23 Cal.4th 1080, 1104-1105, establishes, among other things, that from the standpoint of a licensing agency's regulatory oversight of licensees, rehabilitation from the adverse implication of a conviction cannot begin to be accurately assessed until the licensee is beyond the restrictions of criminal probation and the prospect of incarceration no longer looms over the head of the licensee. In this matter, Respondent will not be released from probation for the criminal convictions until July 18, 2008. Hence, a correct assessment of her progress towards full rehabilitation cannot take place until a point in the future.

Furthermore, Respondent provides inadequate evidence that she is now an honest and trustworthy woman, who will subordinate her self-interests and impulsivity to steal from an employer in place of the higher goals of providing ethical, faith service to clients and fidelity to principals.

ORDER

The application of respondent Yvonne Darlene Moore for licensure as a life agent licensee is denied.

DATED: March 20, 2006

_____/s/_____
PERRY O. JOHNSON
Administrative Law Judge
Office of Administrative Hearings