

SEP 5 2002

DEPT. OF INSURANCE
BY Kath

STATE OF ARIZONA
DEPARTMENT OF INSURANCE

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In the Matter of:)	Docket No. 02A-108-INS
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DUANE H. RIEKE, JR.,)	ORDER
)	
Petitioner.)	
_____)		

On August 9, 2002, the Office of Administrative Hearings, through Administrative Law Judge Robert I. Worth, issued a Decision of Administrative Law Judge, a copy of which is attached and incorporated by this reference. The Director of the Department of Insurance has reviewed the Hearing Decision and enters the following Order:

IT IS ORDERED:

1. Adopting the Findings of Fact, except for Finding no. 10 which is rejected.
2. Adopting the Conclusions of Law, except Conclusions nos. 6 and 7 which are rejected.
3. Modifying the Recommended Order and granting Petitioner's application for an insurance license.

JUSTIFICATION FOR REJECTION

The Administrative Law Judge (ALJ) is required by A.R.S. § 41-1092.08 to issue a written "decision" that I can accept, reject, modify or decline to review. In this case, the ALJ has provided me with two possible decisions that I must choose between, to either issue the Petitioner a license outright or to issue him a license with a condition derived from the implied powers of my office. Consequently, I cannot simply accept or simply decline to review the ALJ's decision because that would leave the matter unresolved as to what the Petitioner gets. I am left with the choices of rejecting or

1 modifying the recommended order. Because I am able to modify it in a way that supports the issuance
2 of a license, I grant the application for a license.

3 One of the modifications I could make to the ALJ's recommended order would be to
4 choose his option to issue a license subject to a condition that Petitioner periodically confirm his
5 compliance with the conditions of his ongoing criminal parole and that his license be "“automatically
6 revoked, suspended or not renewed after a future proven violation of the terms of his parole or any of the
7 State's insurance laws after notice of hearing and hearing.” The ALJ has presumed to rely upon the
8 implied powers of the Director of Insurance, pursuant to A.R.S. § 20-142(B), as the basis for this
9 recommendation.

10 First, the Department of Insurance does not have any legal requirements, program,
11 policies and procedures, personnel, funds, information management systems or other resources needed to
12 properly administer a conditional insurance license program. The issuance of a “probationary” license to
13 Petitioner represents the creation of a new program at the Department of Insurance, the conditional
14 license program. Out of fairness, the program would have to be available to other applicants as well,
15 which recalls the point that the Department is not required to, and does not have the resources to,
16 administer such a program. In delegating authority to the ALJ to recommend a decision in this one case,
17 I did not intend or contemplate that he would take the opportunity to change or augment the operations
18 of the Department.

19 Second, the ALJ's operational recommendations do not make practical sense. The
20 Petitioner is subject to conditions of parole in a criminal proceeding wherein there is a proper program
21 for monitoring compliance and punishing violations. There is no need for this agency to expend
22 resources to shadow or duplicate that program. Further, the ALJ's recommended device negates itself.
23 He recommends “automatic” action against Petitioner's license after future violations are proven at a
24

1 hearing. There is nothing “automatic” about that. Whether I were to include the condition or not, any
2 grounds for future action against Petitioner’s license would ultimately have to be established by the State
3 in a due process proceeding. A.R.S. § 41-1092.11.B. already provides me with proper legal authority to
4 summarily suspend Petitioner’s license pending the due process proceedings, if necessary to protect the
5 public. There are also proper legal requirements for Petitioner to disclose material developments in his
6 criminal proceeding. He will be required to disclose at the time of license renewal, pursuant to A.R.S. §
7 20-289.D. He is also required to report certain legal actions against him within 30 days, pursuant to
8 A.R.S. § 20-301.

9 The other, and therefore only, modification I could make to the ALJ’s recommended
10 order would be to issue a license to Petitioner “outright”.

11 The “decision” that must ultimately be made in a license application proceeding at the
12 Department of Insurance is whether to grant or deny the application. I believe A.R.S. § 41-1092.08
13 obligates the ALJ to recommend to me one of those dispositions of the matter. If the rules applicable to
14 this proceeding would permit me to remand the matter to the ALJ with an instruction to make such a
15 recommendation, I would do so. However, it does not appear such a remand is permitted. In fact,
16 according to the policies and procedures of the Office of Administrative Hearings I may not even discuss
17 the case with the ALJ, though discussion before or after the issuance of a recommended order would be
18 helpful and efficient in some cases, and commonly and naturally occurs between the ultimate decision
19 maker and his delegee hearing officer in many other judicial and quasi-judicial settings. Under the
20 circumstances, and because I find that the ALJ’s Findings of Fact adopted in their entirety (with the
21 exception of no. 10 which is a statement of opinion rather than fact) support the conclusion that
22 Petitioner has met his burden of proof in this matter, I modify the ALJ’s Recommended Order to grant
23 the application for an insurance license.

1 NOTIFICATION OF RIGHTS

2 Pursuant to A.R.S. § 41-1092.09, the aggrieved party may request a rehearing with
3 respect to this order by filing a written motion with the Director of the Department of Insurance within
4 30 days of the date of this Order, setting forth the basis for relief under A.A.C. R20-6-114(B). Pursuant
5 to A.R.S. § 41-1092.09, it is not necessary to request a rehearing before filing an appeal to Superior
6 Court.

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

11 DATED this 4th of September, 2002

12 

13 _____
14 Charles R. Cohen
15 Director of Insurance

16 A copy of the foregoing mailed
17 this 5th day of September, 2002

18 Sara M. Begley, Deputy Director
19 Mary Butterfield, Assistant Director
20 Arnold Sniegowski, Investigations Supervisor
21 Catherine O'Neil, Consumer Legal Affairs Officer
22 Rebecca Sanchez, Producer Licensing Administrator
23 Arizona Department of Insurance
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STATE OF ARIZONA
IN THE OFFICE OF ADMINISTRATIVE HEARINGS

In The Matter Of:

Docket No. 02A-108-INS

DUANE H. RIEKE, JR.,

DECISION OF ADMINISTRATIVE LAW JUDGE

Petitioner.

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HEARING: July 26, 2002.

APPEARANCES: >The Petitioner, Duane H. Rieke, Jr., was represented by his attorney, Christy C. Brown, Esq.
>The Arizona Department of Insurance (herein called the "Department") was represented by Assistant Attorney General, Mary E. Kosinski, Esq.

ADMINISTRATIVE LAW JUDGE: Robert I. Worth

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Evidence and testimony were presented, and based upon the entire record, the undersigned Administrative Law Judge hereby submits the following Findings of Fact, Conclusions of Law and Recommended Order for the review, evaluation, approval, and adoption by the Director of the Department.

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FINDINGS OF FACT

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1. Petitioner, Duane H. Rieke, Jr., (herein called "Rieke"), has submitted an application to the Department for a property and casualty insurance producer's license. In answer to a specific question on the application form as to whether the named applicant had ever been convicted of a felony, Mr. Rieke had responded in the affirmative. Following the Department's denial of the application for licensure, Mr. Rieke timely requested the convening of the instant administrative hearing.

Office of Administrative Hearings
1400 West Washington, Suite 101
Phoenix, Arizona 85007
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2 2. It was uncontroverted that on March 17, 1995, Petitioner had been convicted
3 in Arizona of felony offenses, following his pleas of guilty to charges of Trafficking in
4 Stolen Property, Burglary, and Possession of Dangerous Drugs. The sentences for
5 these offenses were, respectively, incarceration for five years, four years and four
6 years, all to run concurrently and all to receive a credit for 88 days served prior to
7 sentencing. The last-identified charge was subsequently reduced by the Arizona Court
8 from a felony to a misdemeanor and all but the previously served 88-days of
9 incarceration time was deleted from the sentence for that offence. These offenses
10 were committed almost nine (9) years ago during October, 1993, when Petitioner had
11 just reached the age of 22 years.

12
13 3. It was similarly not disputed that on January 24, 1996, Petitioner was
14 subsequently convicted by a Federal Court in Minnesota of another felony following his
15 plea of guilty to charges of Conspiracy to Distribute and Possession with intent to
16 distribute Methamphetamine, a controlled substance. That offense was committed on
17 or about November, 1994. His sentence by the United States District Court was for
18 incarceration for a period of fifty months, to run concurrently with and to terminate
19 together with the Arizona sentences. Additionally, Mr. Rieke's Federal sentence was to
20 be followed by a period of five years of supervised release or parole.

21
22 4. Mr. Rieke did not and does not attempt to shift any blame for his anti-social
23 conduct onto other individuals also charged with crimes arising from the same sets of
24 circumstances, but instead acknowledged the seriousness of his prior criminal conduct
25 which appears to have been a series of occurrences reflecting extremely poor judgment
26 over a rather confined time period in his life.

27
28 5. All periods of imprisonment or parole to date have been successfully served
29 by Petitioner without problems of any type. In point of fact, he earned the benefit of
30 spending a maximum allowable 180 days toward the end of his term of incarceration at

1 a Halfway house instead of in prison. Additionally, the portion of the Federal Court's
2 sentence imposed upon Mr. Rieke that consisted of the prolonged five-year period of
3 parole began as supervised but was subsequently modified to unsupervised parole at a
4 point in time before half of the imposed duration had elapsed based upon his ongoing
5 demonstration of good conduct. His remaining overall period of unsupervised parole is
6 scheduled to conclude in mid-2004, unless sooner terminated.
7

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9 6. Mr. Rieke is now 30 years old, and has a wife with whom he lives in a home
10 that they own. He also has compiled a most successful business and social history
11 after his release from incarceration.
12

13 7. Motivated significantly by his incarceration in prison for an extended time
14 period, Petitioner has successfully embarked upon and accomplished a monumental
15 change in his entire character and behavior. He has been open and candid with others
16 about his past indiscretions, compelling an observation that he has learned a costly
17 lesson.
18

19 8. The credible evidence presented at the administrative hearing, featuring a
20 parade of sincere witnesses attesting to Mr. Rieke's good character and reputation all
21 during the post-criminal conduct and post-incarceration periods, supports a
22 determination that any and all potential causes of past problems have been drastically
23 curtailed, if not wholly eliminated. Petitioner has become and has remained highly
24 trustworthy and dependable in all personal and business relationships, serving as a
25 successful example of the ultimate and desired objectives of the justice and penal
26 system. He was shown by credible testimony of individuals who have known him
27 socially and in business to be a person who is most unlikely to repeat past mistakes.
28 On the contrary, he has earned the confidence and respect of numerous people in
29 various walks of life.
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2 9. Aside from the actual prior offense and conviction, aggravating factors during
3 the post-conviction time period were conspicuous by their absence. The very youthful
4 age at which Mr. Rieke had engaged in his course of criminal conduct, the genuine
5 extent of successful rehabilitation demonstrated by his stability in his employment
6 performance, his fine reputation for truthfulness and integrity in the community and
7 perhaps most importantly, the lapse of more than a reasonable time duration since
8 Petitioner's commission of the offenses which were all fully disclosed in the license
9 application, considered in combination, serve to support a finding that the adverse
10 impact of his previous wrongdoing is significantly outweighed by the factors shown in
11 mitigation.

12
13 10. At the very minimum, Mr. Rieke has sufficiently proven by a preponderance
14 of all the evidence that he is presently a person of integrity and entitled to an
15 opportunity, perhaps not totally unrestricted or unconditional, to demonstrate his ability
16 to discharge duties applicable to licensed insurance producers. Any affirming of the
17 Department's prior denial action on the instant license application would have an
18 ultimate impact which is equivalent to a revocation of an existing license. With this in
19 mind, all of the above-described circumstances and factors appear to fully warrant a
20 result in this case that is not tantamount to a revocation but instead should prompt a
21 result that enables the Department to issue the license sought by Petitioner, albeit
22 perhaps not unconditionally.

23 **CONCLUSIONS OF LAW**

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25 1. The Director has jurisdiction over this matter pursuant to the provisions of
26 A.R.S. §§ 20-161 and 20-290.

27
28 2. The Director is empowered by statute with discretion to issue or to deny
29 insurance licenses to applicants who have previously been convicted of a felony after
30

1 full review and evaluation of the entire record in the matter as presented at an
2 administrative hearing.
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5 3. There is little question, under the uncontroverted facts of this case, that
6 statutory grounds do exist for the Director to deny the license application filed by Mr.
7 Rieke. However, the broad discretionary authority granted by said statute should not
8 properly begin and end with a determination of the presence or absence of such
9 grounds.

10
11 4. Although the Petitioner's felony convictions record in this case did provide a
12 basis for upholding the prior denial action by the Department, having sufficiently
13 established the elements set forth in the statutory subsection specified in the Notice of
14 Hearing; namely, A.R.S. § 20-295(A)(6), a favorable exercise of the aforementioned
15 statutory discretion by the Commissioner in granting the instant license application
16 under all the circumstances appears supportable and justified.

17
18 5. Recognizing that the several instances of criminal behavior exhibited in the
19 past by Petitioner can not be and are not to be condoned, especially when committed
20 by an individual seeking licensure in a professional capacity heavily dependent on
21 adherence to many varied statutes, rules and ethical standards, it is nevertheless
22 determined under the totality of the evidence as to all relevant facts and circumstances
23 that Petitioner has met his burden of proof with respect to his entitlement to receive an
24 insurance producer's license at this time. In reaching such conclusion as to his present
25 entitlement to licensure, consideration has been given to the nature, gravity and timing
26 of the criminal conduct and convictions and the unusually persuasive demonstration of
27 Petitioner's significant efforts, apparently all very successful, to have recognized the
28 deleterious impact on his life of any repetition of criminal conduct and his need to
29 immediately and permanently alter his behavior patterns and the direction of his
30 lifestyle. Stated alternatively, the combination of strongly mitigating factors in this case,

1 as enumerated in Finding of Fact Number 9, with special emphasis on the long elapsed
2 time period since the commission of the felony offenses at a youthful age and the highly
3 exemplary business and social behavior demonstrated by this applicant since his
4 instances of anti-social conduct, serve to generate sufficient grounds to support the
5 issuance of a license to Mr. Rieke who has more than sustained his burden of proof in
6 this respect.
7

8
9 6. Notwithstanding the foregoing, it does not necessarily follow that the
10 Director's granting of the license sought hereunder by Mr. Rieke must be outright or
11 unconditional. The provisions of A.R.S. § 20-142(B) contemplate that the Director is
12 vested with powers and authority expressly conferred by or reasonably implied from the
13 provisions of the applicable statutory title. It is concluded that the Director's
14 discretionary authority to grant or to deny license applications includes the inherent
15 power to place a newly issued license on probation for a reasonable time period,
16 thereby discharging his duty to the general public by giving a degree of recognition to
17 legitimate concerns generated by this applicant's prior serious criminal record.

18
19 7. In this case, the terms of probation may and should consist merely of
20 providing periodic written confirmations that all terms and conditions of Petitioner's
21 remaining period of unsupervised parole continue to be satisfactorily adhered to and
22 performed by Petitioner. Any imposed probation should enable Mr. Rieke to perform
23 functions and to engage in activities to the same extent as the holder of any other
24 property and casualty insurance producer's license, but the probation period should be
25 of sufficient length of time, to expire no earlier than the date that his parole terminates
26 either at the end of the imposed duration or on the date that such parole may be earlier
27 terminated, so as to provide an inducement to avoid the commission of any act or
28 omission that would be grounds for discipline against an insurance licensee or that
29 would be violative of the applicable terms of his parole. In the event of a proven future
30 violation, including the failure to cause the required periodic compliance confirmations

1 to be filed with the Department, any unexpired portion of the probation period would
2 automatically become active license suspension and also shall subject such license to
3 revocation or non-renewal.
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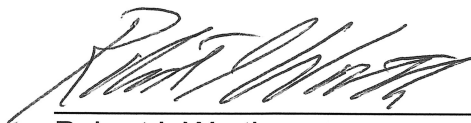
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6 **RECOMMENDED ORDER**

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8 In view of the foregoing, it is recommended that the prior denial action by the
9 Department be vacated and that the Director enter an Order providing that an individual
10 property and casualty insurance producer's license be issued to the
11 Petitioner/Applicant, Duane H. Rieke, Jr.

12
13 It is further recommended that the license sought by Petitioner shall, at the
14 Director's discretion, be either issued outright or provisionally issued and placed on an
15 initial period of probation for a duration equal to the remaining time period that
16 Petitioner remains on parole, in which latter event such license shall be subject to
17 specific conditions (a) that the Petitioner shall provide or cause to be provided periodic
18 written confirmations that he is continuing to comply with all applicable terms of his
19 remaining Federal parole, and (b) that the probationary license so issued shall be
20 automatically revoked, suspended or not renewed after a future proven violation of the
21 terms of his parole or of any of the State's insurance laws, after notice of hearing and
22 hearing.

23 Dated: August 9, 2002.

24 OFFICE OF ADMINISTRATIVE HEARINGS

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27 _____
28 Robert I. Worth
29 Administrative Law Judge
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Original transmitted on August 9, 2002

by: Chris Crawford Thomson, to:

Charles R. Cohen, Director
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ATTN: Kathy Linder