

**STATE OF MAINE
DEPARTMENT OF PROFESSIONAL AND FINANCIAL REGULATION
BUREAU OF INSURANCE**

<i>In re</i> MARK FARNHAM]	
]	
Maine License No. PRR22419]	DECISION AND ORDER
National Producer No. 3680818]	
]	
Docket No. INS-10-204]	
]	

The staff of the Bureau of Insurance has requested that the Superintendent suspend the insurance producer license of Mark T. Farnham and to impose other disciplinary sanctions as the Superintendent determines to be appropriate for his admitted violations of the Maine Insurance Code. Mr. Farnham was convicted of unsworn falsification for filing false claims for unemployment benefits, and failed to report the criminal proceeding and conviction to the Bureau of Insurance. For the reasons discussed more fully below, Mr. Farnham's license is suspended for two months, followed by two years of probation, and he is ordered to pay a civil penalty of \$1000. An additional ten-month suspension is deferred subject to the satisfactory completion of probation.

Procedural History

On March 10, 2010, Bureau of Insurance Staff filed a Petition for Enforcement alleging that Mr. Farnham had been convicted of a crime involving dishonesty or false statement in violation of 24-A M.R.S.A. § 1420-K(I)(F); that he failed to report that conviction to the Bureau in violation of 24-A M.R.S.A. § 1420-P(2); and that he had engaged in fraudulent, coercive or dishonest practices or demonstrated incompetence, untrustworthiness, or financial irresponsibility in the conduct of business in violation of 24-A M.R.S.A. § 1420-K(I)(H). The Superintendent issued a Notice of Hearing on April 27, 2010, and held a public adjudicatory hearing on May 13, 2010, with Bureau Staff appearing as a party pursuant to 5 M.R.S.A. § 9054(5).¹ At the conclusion of the hearing, the record was held open to allow for written arguments to be submitted with regard to sanctions, and the record closed with the receipt of Mr. Farnham's reply brief on June 7, 2010.

Findings of Fact

Mr. Farnham was first licensed as a resident insurance producer in 1988. In 2005, he was employed as an insurance agent by Liberty Mutual

Insurance Company in Bangor, but was discharged in July after a disagreement with his manager. He remained unemployed until September 19, 2005, when he accepted a position as a loan officer with Primary Residential Mortgage, Inc. (PRMI). (*Staff Exhibit 5*) Although the offer letter stated that his "compensation will be based on a straight commission" (*Staff Exhibit 7*), he was also paid \$6.50 per hour as a draw against any commissions earned. (*Staff Exhibit 6*) Paragraph 2 of the Compensation Agreement provided that these draws were fully earned when paid, even if commissions earned by Mr. Farnham were not sufficient to cover the draws against them, the weekly payments were fully earned and paid. (*Id.*) The agreement further provided that he was a full-time employee and could not work more than 40 hours per week without the Branch Manager's written approval. (*Id.*)

Mr. Farnham was employed with PRMI until April 10, 2006 and earned a total of \$3835.40 in draws. (*Staff Exhibit 8*) He only closed three loans during the time he worked for PRMI, and one of those was his own loan. (*Transcript at 46-47*) He earned no additional income from these closings, because the commissions, net of fee deductions, were insufficient to repay his draws. (*Staff Exhibit 7; Transcript at 47*) Mr. Farnham was also employed intermittently by the Bangor YMCA between October 22 and December 16, 2005, and earned \$197.26 in wages. (*Staff Exhibit 12*)

From October 8, 2005 until February 4, 2006, Mr. Farnham submitted claims for unemployment insurance, collecting \$5,634.00 in benefits during that time. (*Staff Exhibits 14 and 15*) To collect compensation, Mr. Farnham was required to file weekly statements with the Maine Department of Labor Bureau of Unemployment Compensation (BUC), in which he answered questions concerning his work and earnings status during that weekly compensation period. He filed them by telephone using the BUC's interactive voice response (IVR) system. (*Staff Exhibit 13; Transcript at 171 -73*) In submitting the IVR Claim Responses, Mr. Farnham certified that all of the statements for the week covered by the claim were true and correct. In each of these weeks, he answered "No" to the question "Did you work or earn any money during the week claimed?" (*Staff Exhibit 13*)

On June 12, 2006, the BUC notified Mr. Farnham that an audit of his claims showed that he had earned wages during the periods in which he claimed benefits. (*Staff Exhibit 15*) The BUC conducted a fact-finding interview, in which Mr. Farnham asserted: "I did not report my work or my earnings from Primary Mortgage because it was expenses to cover gas, mileage and mail. There were no taxes of any kind taken out Gary Gray, my manager, told me I could continue to [file] for benefits because this was expense money I did not report my wages from the Bgr YMCA because I am a gym rat and am there all the time," often

working on a volunteer basis. (*Staff Exhibit 18; Transcript at 59, 110*) He continued: "I worked per diem The hours were entered manually. I felt I was doing them a favor. I didn't report the money because I didn't know I was being paid. I have direct deposit at the Y and my wife does the checking account." (*Staff Exhibit 18*)

On July 13, 2006, the BUC issued a decision finding that Mr. Farnham made false statements or representations in connection with his applications for benefits, and ordered him to pay \$8451.00 in restitution and penalties. (*Staff Exhibit 19*) Mr. Farnham appealed the BUC decision, but later withdrew his appeal on August 17, 2006. (*Staff Exhibits 20 and 21*)

A portion of the amount due was collected by garnishing Mr. Farnham's 2007 income tax refund, but as of June 27, 2007, he had made no other payments to the BUC, and had failed to respond to the BUC's repeated requests for payment and written offers to set up a repayment plan. (*Transcript at 113-116; Staff Exhibits 22 through 25*) On that date, the BUC notified Mr. Farnham that he could be facing criminal prosecution for Unemployment Fraud (*Staff Exhibit 26*), and BUC Claims Adjudicator Richard Tompkins interviewed Mr. Farnham on July 9, 2007. (*Staff Exhibit 27*)

The matter was referred for criminal prosecution, and on January 9, 2008, Mr. Farnham was charged with Class C Theft by Deception. (*Staff Exhibits 33, 34, 35 and 36*) On January 10, 2008, he paid restitution for the full amount of the overpayment, plus penalties and interest. (*Staff Exhibit 41*) He entered a *nolo contendere* plea to the lesser offense of Unsworn Falsification (Class D) and was found guilty on July 9, 2008 (*Staff Exhibit 38*) The Theft by Deception charge was dismissed in connection with that plea. (*Staff Exhibit 39*) Mr. Farnham did not report the criminal matter to the Bureau of Insurance. It was not until after a letter from Bureau Staff dated November 6, 2009 that Mr. Farnham provided the Bureau with information concerning the conviction. (*Staff Exhibits 40 and 41*)

Although Mr. Farnham testified repeatedly that he accepted responsibility for his misconduct and is deeply sorry (*e.g., Transcript at 79, 91, 209*), he also consistently sought to minimize that responsibility, explaining that he recognizes that his unemployment claims were false "from today's perspective" (*Transcript at 46*), and that he "now" agrees with the BUC's finding that he knowingly made false statements (*Transcript at 91, 108*).

His testimony that his manager at PRMI encouraged him to misreport his earnings is not implausible, but that is irrelevant. It is Mr. Farnham's own conduct that is at issue here. Even if his manager told him he did not

need to report his work or his earnings at PRMI until he began to receive commission income, BUC told him he did need to report. (*Transcript at 107-108*) If he had any questions about what exactly he needed to report, he should have asked BUC, and he did not do so. (*Transcript at 79*)

He knew he signed an "Employment Agreement." (*Staff Exhibit 5; Transcript at 95*) He knew he was receiving an hourly payment. Even if he was instructed orally that he should consider that payment his expense reimbursement, rather than using the expense reimbursement procedure spelled out in the written employment agreement, he knew or should have known that such an arrangement was irregular, and that his manager's preference to do business that way was not sufficient to make it legal. (*Transcript at 109*)

His attempts to rationalize his failure to report his other earnings, the payments he received from the YMCA, are inconsistent and incoherent. If he did not know he was getting paid, why did he set up a direct deposit arrangement?

Finally, he admits that he had no excuse for his failure to report his criminal prosecution and conviction to the Bureau of Insurance. He was deeply concerned at the time about the criminal charges, and aware that a conviction would affect his license status, but he tried to ignore it: "Yes, I knew but I didn't know. I didn't think at the time." (*Transcript at 119*)

Remedies

Mr. Farnham has committed a crime involving dishonesty and false statements, and is therefore subject to disciplinary action, pursuant to 24-A M.R.S.A. § 1420-K(I)(F) and 5 M.R.S.A. § 5301(2)(A), "but only if the licensing agency determines that the applicant, licensee, registrant or permit holder so convicted has not been sufficiently rehabilitated to warrant the public trust. The applicant, licensee, registrant or permit holder shall bear the burden of proof that there exists sufficient rehabilitation to warrant the public trust." 5 M.R.S.A. § 5302(1).

The nature of Mr. Farnham's misconduct raises serious concerns, but there are mitigating circumstances. His actions came at a time of significant stress, several years ago, and appear to be out of character with the way he has conducted his life and business before and after that time. The crime he committed was a misdemeanor, and he has already paid full restitution and substantial criminal and civil penalties. However, his assumption of responsibility has not been wholehearted, and his proof of rehabilitation is not conclusive. Accordingly, he should be given a substantial further period of time in which to continue demonstrating his rehabilitation, and I therefore order that his license be placed under a

two-year term of probation, pursuant to 5 M.R.S.A. § 8003(5)(A-1)(4) and 24-A M.R.S.A. § 1420-K(I).²

In addition, Mr. Farnham was obligated, pursuant to 24-A M.R.S.A. § 1420-P(2), to report the criminal charges pending against him to the Superintendent within 30 days after the initial prehearing date.³ Even after he was convicted of the charges, he continued to avoid reporting them until after the Bureau notified him more than a year later that it was aware of the convictions. Both the nature of the offense and the circumstances of his failure to report make this a more serious violation than those in the proceedings cited in Mr. Farnham's brief. I therefore order, pursuant to 24-A M.R.S.A. § 12-A, that Mr. Farnham pay a civil penalty of \$1000, and that his license be suspended for a period of one year, all but two months deferred subject to the satisfactory completion of probation.

Order and Notice of Appeal Rights

It is therefore *ORDERED*:

1. Mr. Farnham shall pay a civil penalty of \$1000, by check payable to the Treasurer of State.
2. Mr. Farnham's insurance producer license shall be *SUSPENDED* for one year, all but two months deferred pending the satisfactory completion of probation.
3. Mr. Farnham's license shall be suspended from August 1, 2010, through September 30, 2010. During that period, Mr. Farnham may not engage in insurance producer activities as defined in the Maine Insurance Code, Title 24-A of the Maine Revised Statutes, and may not participate in the business of an insurance agency or receive compensation to the extent prohibited by 24 A M.R.S.A. § 1412.
4. Mr. Farnham's license shall be on *PROBATION* from October 1, 2010, through September 30, 2012. During the term of probation, Mr. Farnham shall promptly report to the Superintendent any investigations, proceedings, and customer complaints of any type, written or oral, concerning his activities in the insurance industry, and shall comply with any further conditions imposed at the Superintendent's discretion.
5. If Mr. Farnham violates the Maine Insurance Code, other applicable law, or any order of the Superintendent at any time during his term of probation, the Superintendent has the discretion to require Mr. Farnham to serve all or any part of the remaining ten months of the license suspension, in addition to any penalty that might be imposed for the underlying violation.

This Decision and Order is a final agency action of the Superintendent of Insurance within the meaning of the Maine Administrative Procedure Act. It is appealable to the Superior Court in the manner provided in 24-A M.R.S.A. § 236 and M.R. Civ. P. 80C. Any party to the hearing may initiate an appeal within thirty days after receiving this notice. Any aggrieved non-party whose interests are substantially and directly affected by this Decision and Order may initiate an appeal on or before

August 16, 2010. There is no automatic stay pending appeal; application for stay may be made in the manner provided in 5 M.R.S.A. § 11004.

¹ On May 5, 2010, the Superintendent issued an order appointing Bureau of Insurance General Counsel Robert Alan Wake, pursuant to 24 M.R.S.A. § 210, to serve as hearing officer in this proceeding with full authority to take final agency action on her behalf.

² For the same reasons, this term of probation is the appropriate remedy under 24-A M.R.S.A. § 1420 K(I)(H) for his past dishonest practices and conduct demonstrating untrustworthiness.

³ Pursuant to 24-A M.R.S.A. § 1420-P(1), his reporting obligation actually began in August of 2006, 30 days after the BUC's order imposing administrative penalties for unemployment compensation fraud. However, failure to report the administrative action against him was not charged in the Petition for Enforcement, and was part of the same course of conduct in circumstances that would not have justified additional penalties had it been charged.

PER ORDER OF THE SUPERINTENDENT OF INSURANCE

JULY 7, 2010

ROBERT ALAN WAKE
DESIGNATED HEARING OFFICER