

BEFORE THE BOARD OF REALTY REGULATION
STATE OF MONTANA

IN THE MATTER OF DOCKET NO. CC-07-0200-RRE REGARDING:

THE LICENSE APPLICATION OF) Case No. 1642-2007
THOMAS RAYMOND CLEMENT.)
)
)

**ORDER GRANTING SUMMARY JUDGMENT AND
RECOMMENDING DENIAL OF LICENSE APPLICATION**

I. INTRODUCTION

On June 12, 2007, the Business Standards Division (BSD) of the Montana Department of Labor and Industry filed a motion for summary judgment in this matter. In the motion, BSD indicated that (1) the respondent had failed to respond to requests for admissions, (2) that those admissions should, therefore, be deemed admitted, and (3) that based on those admissions, summary judgment in this matter was appropriate.

The respondent failed to respond to the motion for summary judgment. The respondent also failed to appear at the final pre-hearing conference despite having ample notice of both the final pre-hearing conference and the need to respond to the pending motion for summary judgment. Having read and considered BSD's motion, the hearing examiner finds that it is well taken. Summary judgment is appropriate in this matter for the reasons stated below.

II. FINDINGS OF FACT

1. On or about May 10, 2007, BSD served the respondent with BSD's *First Set of Combined Discovery Requests*.

2. The respondent had 30 days from the date of service in which to respond to the Discovery Requests. Despite the passage of more than 30 days (excluding time for mailing), respondent neither answered the Discovery nor requested an extension of time. Discovery closed in this case on June 12, 2007.

3. The May 10, 2007 Discovery Requests propounded to the respondent contained the following Requests for Admission.

REQUEST FOR ADMISSION NO. 1: Please admit the truth and accuracy of the assertions of fact (pages 2 through 3) contained in the Board's *Notice of Proposed Board Action and Opportunity for Hearing*. If you admit part of an assertion of fact but deny another part of the same assertion please identify in detail those portions which you admit and those portions which you deny.

REQUEST FOR ADMISSION NO. 2: Please admit that the documents described in attached Exhibit A, copies of which were previously, or are hereby, served on you, are true, complete and authentic copies of the original documents and that there is no objection to the admissibility of each item, or a copy thereof, at hearing on this matter.

REQUEST FOR ADMISSION NO. 3: Please admit that you submitted an application for licensure as a property manager to the Montana Board of Realty Regulation on or before its regularly scheduled meeting on March 2, 2007.

REQUEST FOR ADMISSION NO. 4: Please admit that your application revealed a criminal conviction for misdemeanor theft against you.

REQUEST FOR ADMISSION NO. 5: Please admit that the facts underlying your criminal conviction were that you used a credit card belonging to the State of Montana to pay a number of personal bills.

REQUEST FOR ADMISSION NO. 6: Please admit that prior to or during your employment with the State of Montana you had signed forms dealing with the proper use of the credit card.

REQUEST FOR ADMISSION NO. 7: Please admit that you were not authorized to use the credit card belonging to the state of Montana to pay personal bills.

REQUEST FOR ADMISSION NO. 8: Please admit that you made the following unauthorized personal expenditures/purchases with the aforementioned State of Montana credit card:

<u>Date</u>	<u>Amount of Transaction</u>	<u>Paid to:</u>	<u>State</u>
		<u>Reimbursed on:</u>	
10/20/2002	\$177.92	Dish Network	10/29/03
12/16/2002	\$79.60	Hertz Rent A Car	01/16/03
12/20/2002	\$152.95	Dish Network	01/14/2003
01/09/2003	\$75.70	Hertz Rent A Car	after sentencing

09/19/2003	\$173.96	Dish Network	09/24/2003
02/09/2004	\$372.45	Hertz Rent A Car	02/27/2004
10/20/2004	\$184.93	Hertz Rent A Car	10/25/2004
01/16/2004	\$276.00	Worldres Hotel	01/27/2004
03/22/2006	\$287.92	Dish Network	05/12/2006
03/23/2006	\$263.89	Quest Communications	05/12/2006
04/27/2006	\$1,508.36 + \$42.23	Northwestern Energy	06/02/2006

REQUEST FOR ADMISSION NO. 9: Please admit that as a result of the above-mentioned unauthorized credit card charges, you were fired from your employment with the State of Montana.

REQUEST FOR ADMISSION NO. 10: Please admit that on or about 08/03/2006, the Helena Police Department issued a Notice to Appear against you charging you with Felony theft (Common Scheme).

REQUEST FOR ADMISSION NO. 11: Please admit that on or about 09/29/2006, you appeared with your lawyer and entered an Alford plea of guilty to an amended charge of misdemeanor theft.

REQUEST FOR ADMISSION NO. 12: Please admit that as a result of the previously mentioned plea of guilty to misdemeanor theft, you were given a six month suspended sentence and a \$100 fine.

REQUEST FOR ADMISSION NO. 13: Please admit that you informed the Board of Realty Regulation that the charges were merely an inadvertent 'mistake'.

REQUEST FOR ADMISSION NO. 14: Please admit that the credit card charges for which you were fired and convicted of misdemeanor theft occurred repeatedly and over an extended period of time of approximately three and one half years.

REQUEST FOR ADMISSION NO. 15: Please admit that your conviction was finalized approximately 1 month before you submitted your application to the Board.

REQUEST FOR ADMISSION NO. 16: Please admit that property managers are extensively involved with handling other people's money and checks.

REQUEST FOR ADMISSION NO. 17: Please admit that your conviction for misdemeanor theft relates to the health, safety and welfare of the public as it applies to the practice of property management.

4. There was no legal or factual justification for the respondent's failure to respond to the requests for admissions in this matter. Accordingly, the hearing examiner deems the requests for admission described in Paragraph 3 to be admitted. Each of the above admissions is found to be a matter of fact in this case.

5. The respondent's conviction related to fraud, deceit or theft in contravention of Montana Code Annotated § 37-1-316(1).

6. The respondent's conviction evidenced unprofessional conduct because he misappropriated funds and his conduct, therefore, violated Montana Code Annotated § 37-1-316(14).

7. The respondent's conviction amounted to unprofessional conduct in violation of Montana Code Annotated § 37-1-316(18).

8. Based on the admissions which are deemed to be the facts of this case, the hearing examiner finds that the respondent's convictions for misdemeanor theft directly and adversely affect the public health, safety and welfare of the public in relation to his fitness to act as a licensed property manager. In addition, based on the length of time over which the respondent's thefts occurred, and the short amount of time that elapsed between the respondent's final conviction and his application for licensure (only 1 month), there has not been sufficient time for him to have been rehabilitated so as to warrant the public's trust in him as a property manager.

III. CONCLUSIONS OF LAW

A. Summary Judgment is Appropriate in This Case.

Pursuant to Mont. R. Civ. P. 36(a), a Request for Admission is admitted unless the opposing party submits a written answer or objection addressed to the matter. In this case, the respondent has failed to answer or object. As outlined herein, the hearing examiner should enter an Order deeming the requests for admission to be admitted and enter summary judgment thereon.

Summary judgment is an appropriate method of dispute resolution in administrative licensing proceedings where the requisites for summary judgment otherwise exist. *Matter of Peila* (1991), 249 Mont. 272, 815 P.2d 139. Summary judgment is appropriate where "the pleadings . . . and admissions on file, together with the affidavits, . . . show that there is no

genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c), Mont. R. Civ. P.

The party seeking summary judgment has the initial burden of establishing the absence of any genuine issue of material fact and entitlement to judgment as a matter of law. Once the moving party meets this burden, the burden then shifts to the party opposing the motion to establish otherwise by more than mere denial or speculation. *Ravalli County Bank v. Gasvoda* (1992), 253 Mont. 399, 883 P.2d 1042. In addition, admissions obtained in response to Rule 36, Mont. R. Civ. P. requests for admissions may be used to demonstrate the absence of any material issue of fact and may serve as the basis for granting summary judgment. *Morast v. Auble* (1974), 164 Mont. 100, 105, 519 P.2d 157, 160.

Here, for no discernable reason, the respondent has failed to answer BSD’s requests for admissions and has further failed to respond to the motion for summary judgment. The request for admissions, being deemed admitted, demonstrate that no material issue of fact or law exists in this case. On the basis of the facts, the respondent’s convictions for misdemeanor theft have been shown to directly and adversely affect the public health, safety and welfare of the public in relation to the respondent’s fitness to act as a licensed property manager and there has not been sufficient time for him to have been rehabilitated so as to warrant the public’s trust in him as a property manager.

B. Respondent’s Conduct Violates Professional Standards.

1. Being convicted of a crime (even by virtue of a nolo contendere plea) which involves fraud, deceit, or theft constitutes unprofessional conduct pursuant to Mont. Code Ann. § 37-1-316(1). Unprofessional conduct also includes misappropriating property or funds from a client or workplace or failing to comply with a board rule regarding the accounting and distribution of a client's property or funds. Mont. Code Ann. § 37-1-316(14). In addition, unprofessional conduct includes conduct that does not meet the generally accepted standards of practice. Mont. Code Ann. § 37-1-316(18).

2. A board may deny an application for a professional license upon a finding that the applicant’s conduct constitutes unprofessional conduct. Mont. Code Ann. § 37-1-307(e).

3. An agency may deny a license based upon the applicant’s conviction for a crime where the agency determines that the criminal offense relates to the public health, safety or welfare as it applies to the license sought by the applicant and there is a finding that the applicant has not been sufficiently rehabilitated to so as to warrant the public trust in the applicant. Mont. Code Ann. § 37-1-203.

4. The facts deemed admitted in this matter demonstrate violations of Montana Code Annotated § 37-1-316(1), (14), and (18). Those facts also show that the respondent’s convictions relate to the public health, safety and welfare as it applies to property managers in

Montana. The facts further demonstrate that there has not been sufficient time for the respondent to have been rehabilitated so as to warrant the public trust in him if he were to be licensed as a property manager.

5. The respondent's application to be licensed as a property manager should be denied for two reasons. First, his conduct violated professional standards contained in Montana Code Annotated § 37-1-316(1), (14) and (18). Second, his criminal offenses directly affect the public health, safety and welfare as it applies to the occupation for which the respondent seeks to be licensed and the respondent has not been sufficiently rehabilitated under Montana Code Annotated § 37-1-203.

IV. RECOMMENDED DECISION

Based on the foregoing, BSD's request for summary judgment is granted. The hearing examiner recommends that the Board of Realty Regulation deny Thomas R. Clement's application for licensure as a property manager.

DATED this 5th day of July, 2007.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ GREGORY L. HANCHETT
GREGORY L. HANCHETT
Hearing Examiner