

**BEFORE THE COMMISSIONER OF INSURANCE  
OF THE STATE OF KANSAS**

**In the Matter of the Application for a   )  
Kansas Resident Insurance Agent's   )  
License of MARCUS E. AUSTIN,   )             Docket No.: 77720  
NPN 8236279   )**

**FINAL ORDER**

**(Pursuant to K.S.A. 40-4909 and K.S.A. 77-501 *et seq.*)**

The Presiding Officer called this matter for a prehearing conference on May 14, 2019. Marcus E. Austin (“Respondent”) appeared in person, *pro se*. The Kansas Insurance Department (“the Department”) appeared by its staff attorney, Steven M. Lehwald. The parties waived prehearing and converted the matter to a formal hearing. The Applicant did not dispute the facts alleged by the Department or the applicable law but appeared to present mitigating evidence on disposition and request leniency from the Commissioner.

**Having considered the evidence and arguments of the parties, the Commissioner finds the evidence supports the Department’s revocation of the agent license of Respondent, Marcus E. Austin.**

**Findings of Fact**

1. Respondent obtained a Kansas resident insurance agent license on November 4, 2013, and remains licensed to date.
2. Respondent’s legal (residential) and mailing address of record is ██████████, Overland Park, KS ██████████

3. On March 26, 2019, the Missouri Department of Insurance notified the Department that Respondent was convicted on October 4, 2017, in Johnson County District Court, Case No. 16DV01668, of two felony counts of criminal threat.
4. Upon investigation, the Department determined that Respondent was charged with two counts of aggravated assault and plead guilty to the two counts of criminal threat.
5. Respondent did not notify the Department of the convictions.
6. In support of his request for leniency, Respondent testified at the hearing as follows:
  - a. That the charges arose out of conflict with his son, Justin, who returned home from four years of service in the army in 2015 as an angry man with a drinking problem. Respondent and his wife allowed Justin to live with them and their other adult son.
  - b. Respondent was not in a position to deal with Justin's issues at that time because Respondent was recovering from cancer surgery.
  - c. On the date of the incident, Respondent tried to get Justin to wash dishes and turn off a video game. Justin threatened to kill the Respondent if he changed a TV channel in the middle of a video game he was playing.
  - d. When the Respondent tried to call the police to make Justin leave the house, his son knocked the phone out of his hand, and then chased him upstairs to Respondent's bedroom. Respondent grabbed his gun to protect himself.
  - e. Alternatively, Respondent stated he retrieved his gun from his bedroom, stood on the stairs and pointed at his son in the basement, and told his son it was time for him to leave the house. Justin then chased Respondent upstairs to the bedroom.
  - f. Justin hit him, knocked him down, and put him in a strangle hold. According to Respondent, he fired the gun under the bed as he was passing out. At that point,

Justin let him go. The next morning Respondent called the police to file a report.

The police interviewed him and arrested him.

7. Respondent's wife's and two adult sons' accounts differed significantly from what Respondent claimed. They told the police that Respondent started harassing Justin and ordered him to do the dishes. When he refused, Respondent told him to leave and a verbal altercation followed. Respondent went upstairs and returned with a handgun. He pointed it at both boys. Respondent went to his bedroom and both sons followed him. Respondent pistol-whipped Justin leaving a small wound on his forehead which the police observed. The boys restrained Respondent on the bed. When he rolled off onto the floor, Justin tried to grab the gun and it went off. Justin took the gun and put it in a drawer in the basement, and the boys left the residence. Respondent left several threatening texts on their cell phones, which they showed the police. When the police searched the basement, they found the gun where the boys said they had placed it.

8. It is noted that by all accounts it was Respondent who introduced a gun into a volatile situation.

9. Respondent testified that he pled guilty to the lesser offences because he did not want his son to have to testify.

10. Respondent was placed on a one year probation. He indicated he violated the conditions of his probation twice, including violating a "no contact" order and testing positive in an alcohol screen. He completed his probation on October 23, 2018.

11. Respondent testified that he did not notify the Department of the convictions because the Missouri Department of Insurance had been notified by Johnson County and Missouri had revoked his license. He said he assumed Missouri had notified Kansas.

12. Mr. Robert Phillips, a friend of Respondent and part owner of the American Alliance Insurance Group where Respondent was employed, testified that Respondent is an honest person and a good agent who cares for his customers. He pointed out that the convictions arose out of a domestic dispute, not connected with the insurance business. He urged the Presiding Officer to give Respondent a second chance.

13. Counsel for the Department noted that the crimes involved a violent confrontation with a gun, that Respondent was a mature adult at the time, that the convictions were recent, that Respondent violated the conditions of his probation twice, and that he violated an insurance regulation.

#### **Applicable Law**

14. K.S.A. 40-4909(a) provides, in part, that the commissioner may revoke an agent license, if the commissioner finds that the Respondent has violated any regulation promulgated under chapter 40 of the Kansas Statutes Annotated or been convicted of a felony. K.S.A. 40-4909(a)(2) and (6).

15. K.A.R. 40-7-9 requires that an insurance agent report, within 30 days of occurrence, all details of any conviction of a misdemeanor or felony. K.A.R. 40-7-9(d).

16. Neither the legislature or the Kansas Supreme Court has set forth the factors the Commissioner should consider when exercising his or her discretion under K.S.A. 40-4909(a)(6). However, the Commissioner can take guidance from the nonexclusive list of factors set out in K.S.A. 72-1397(b) to be considered by the Kansas State Board of Education in licensing decisions. Those factors are:

- a. The nature and seriousness of the offense or act;
- b. The conduct of the person subsequent to commission of the offense or act;

- c. The time elapsed since the commission of the offense or act;
- d. The age of the person at the time of the offense or act;
- e. Whether the offense or act was an isolated or recurring incident; and
- f. Discharge from probation, pardon or expungement.” K.S.A. 72-1397(c)(1)-(6).

17. The statutory factors are similar to the factors considered by licensing authorities such as for medicine and law. The Kansas Supreme Court held that the same factors applied in considering reinstatement to practice law were equally relevant to the practice of medicine.

*Vakas v. Kansas Bd. of Healing Arts*, 248 Kan. 589, 600, 808 P.2d 1355, 1364 (1991).

The factors include: (1) the present moral fitness of the petitioner, (2) the demonstrated consciousness of the wrongful conduct and disrepute which the conduct has brought to the profession, (3) the extent of petitioner’s rehabilitation, (4) the seriousness of the original misconduct, (5) conduct subsequent to discipline, (6) the time which has elapsed since the original discipline, (7) the petitioner’s character, maturity, and experience at the time of the disbarment, and (8) the petitioner’s present competence in legal skills.” *Vakas*, 248 Kan. at 600, quoting *State v. Russo*, 230 Kan. 5, 12, 630 P.2d 711 (1981).

The Commissioner considers the direction given on the exercise of discretion in granting legal and medical licenses to be applicable in evaluating applications for insurance agent licenses.

18. Pursuant to K.S.A. 77-526(a), the Assistant Commissioner of Insurance acting on behalf of the Commissioner of Insurance as the agency head, as provided in K.S.A. 77-547, is empowered to render a Final Order.

#### **Policy Reasons**

19. It is in the public interest that the license of an agent who has recently been convicted of a felony involving violence or threats of violence be revoked.

20. It is in the public interest that the license of an agent who failed to notify the Department of a felony conviction be revoked.

### Findings of Fact and Conclusions of Law

21. The Commissioner has jurisdiction over Respondent as well as the subject matter of this proceeding, and such proceeding is held in the public interest.
22. The Assistant Commissioner of Insurance is acting on behalf of the Commissioner of Insurance as the agency head and is empowered to render a Final Order.
23. It is not appropriate to retry the underlying case against Respondent in this hearing. Respondent has been pled guilty to two felony counts of criminal threat, and it is accepted in this administrative action that he is guilty.
24. The Assistant Commissioner has considered the *Vakas* factors and other factors most favorable to Respondent, specifically that there is nothing in the record to indicate that Respondent has violated the law on other occasions, that Respondent has completed his probation, and that the convictions arose out of a family dispute.
25. The Assistant Commissioner has also considered the *Vakas* factors and other factors that weigh most heavily against Respondent including that he introduced a gun into a volatile situation, that he threatened a family member with a gun to get the family member to either wash dishes, change a television channel or leave the house, that he does not appear to take responsibility for his actions but considers himself the victim, that his actions were recent, that he was a mature adult at the time interacting with adult children, and that the conduct was violent.
26. The Commissioner has jurisdiction over **MARCUS E. AUSTIN** as well as the subject matter of this proceeding, and such proceeding is held in the public interest.
27. The Commissioner finds that Respondent's Kansas license may be revoked because **MARCUS E. AUSTIN** has been convicted of two felony counts of Criminal Threat.

28. The Commissioner finds that Respondent's Kansas license may be revoked because he failed to report the convictions to the Department. The Commissioner does not consider the Respondent's failure to notify the Department to be excusable because he mistakenly thought the Missouri Department had notified the Kansas Department.

29. The Commissioner finds, pursuant to K.S.A. 40-4909(b), that the interests of the public are not properly served under Respondent's license.

30. Accordingly, the Commissioner concludes that sufficient grounds exist for the revocation of the insurance agent's license of **MARCUS E. AUSTIN**, pursuant to K.S.A. 40-4909(a) and (b).

**IT IS THEREFORE ORDERED BY THE COMMISSIONER OF INSURANCE THAT:**

31. The Kansas resident insurance agent's license of **MARCUS E. AUSTIN** is hereby **REVOKED** the effective date of this Order.

32. **IT IS FURTHER ORDERED** that **MARCUS E. AUSTIN** shall **CEASE** and **DESIST** from the sale, solicitation or negotiation of insurance and/or receiving compensation derived from the sale, solicitation or negotiation of insurance conducted after the effective date of this Order.

**IT IS SO ORDERED THIS 13<sup>th</sup> DAY OF JUNE 2019, IN THE CITY OF TOPEKA, COUNTY OF SHAWNEE, STATE OF KANSAS.**



VICKI SCHMIDT  
COMMISSIONER OF INSURANCE

BY: Barbara W. Rankin  
Barbara W. Rankin  
Assistant Commissioner  
Presiding Officer

**NOTICE**

Pursuant to K.S.A. 77-601 *et seq.*, Respondent is entitled to judicial review of this Final Order. The petition for judicial review must be filed within thirty (30) days of service of this Final Order (plus three [3] days for service by mail pursuant to K.S.A. 77-531). In the event Respondent files a petition for judicial review pursuant to K.S.A. 77-613(e), the Agency Officer to be served on behalf of the Kansas Insurance Department is:

Justin McFarland, General Counsel  
Kansas Insurance Department  
420 SW 9th Street  
Topeka, KS 66612

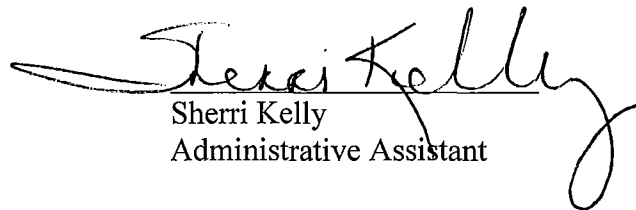
**CERTIFICATE OF SERVICE**

I hereby certify that I served a true and correct copy of the above-and foregoing Final Order upon Respondent by causing a copy of the same by United States mail, first class postage prepaid, on the 13<sup>th</sup> day of June 2019, addressed to the following:

Marcus E. Austin  
[REDACTED]  
Overland Park, KS [REDACTED]

and by hand-delivery to the following:

Steven M. Lehwald  
Staff Attorney  
Kansas Insurance Department  
420 S.W. 9<sup>th</sup> Street  
Topeka, KS 66612-1678

  
Sherri Kelly  
Administrative Assistant