

STATE OF ALASKA  
DEPARTMENT OF COMMERCE AND ECONOMIC DEVELOPMENT  
BEFORE THE DIVISION OF INSURANCE

In the Matter of )  
 )  
 **Benjamin Edward Hack, III** )  
 Respondent )  
 )  
 \_\_\_\_\_ )

Case No. **H95-03**

**Findings of Fact, Conclusions of Law and Proposed Decision**

An administrative hearing was held on December 11, 1995. The Division of Insurance appeared through Ms. Signe Andersen, Assistant Attorney General for the State of Alaska. Mr. Hack appeared representing himself. Based on the evidence and testimony submitted the Administrative Hearing Officer makes the following Findings of Fact, Conclusions of Law and Proposed Decision.

**Findings of Fact**

1. Respondent Benjamin Hack III was licensed by the Division of Insurance as a producer for life insurance under license no. 12541, issued on March 16, 1995. Hack was employed by Primerica Financial Services under an insurance agreement dated 11/18/94 and submitted to the Division in March 1995. Mr. Hack voluntarily surrendered his license on October 18, 1995. Exhibit 1.

2. To receive a license, Hack completed an application for an individual working in a firm and submitted it to the Division. The application was signed by Hack and notarized on March 6, 1995. The Division received the application on or about March 10, 1995.

3. On the application, Hack was required to answer a series of questions regarding his background, including the following:

12...(a) Do you have any pending criminal charges against you?...

(e) Have you ever been convicted of a felony or misdemeanor? Ex. 1.

Hack answered "no" to both questions and signed the application certifying under penalty of perjury that the statements he signed were true and correct.

4. After licensing Hack, the Division learned he had plead no contest to two misdemeanor counts of theft, information the Division alleges that Hack failed to completely and truthfully disclose on his license application.

5. The evidence shows that on or about November 25, 1994, Hack was charged by the State of Alaska with theft in the second degree, a Class C felony; falsifying business records, a Class C felony; and theft in the fourth degree, a Class "A" misdemeanor. These charges arose out of Hack's employment at Sears Department store in Anchorage, Alaska, where he credited his Sears charge account with an alleged payment on two separate occasions without making an actual payment, and where he took a pair of gloves without paying for them. Under a plea agreement, the charges against Hack were reduced to two misdemeanor counts of theft in the third degree. Hack does not contest these charges.

6. On or about February 17, 1995, Hack entered a plea of no contest to two misdemeanor counts of theft in the third degree. A judgment of guilty was entered by Judge Elaine Andrews, who also imposed a Suspended Imposition of Sentence ("SIS"). Under the SIS Hack was to serve five days in jail and perform 120 hours of community service. Ex. 9.

7. The Division alleges that at the time Hack completed his application for an insurance producer license, he knew that criminal charges were pending or that he had been convicted of misdemeanor theft, yet failed to disclose this information on his application. The Division alleges that this demonstrates untrustworthiness and is grounds to revoke a license and impose penalties pursuant to AS 21.27.040, 410 and 440.

8. Hack does not deny the circumstances of his criminal charges. He does deny that he was required on his application to disclose any more than he did, since it was his understanding based on statements by the court and his attorney that an "SIS" was not a "conviction". It is this basic question which is at issue in this proceeding.

9. On May 22, 1995 Hack talked with Mr. Jones, an investigator for the State of Alaska, Division of Insurance and explained what his understanding was of the insurance application as well as the legal definition of an "SIS". This explanation was consistent with his explanation at the hearing. See, Exhibit 10.

10. Mr. Jones discussed with Hack a police report dated April 24, 1994 which resulted in his indictment for burglary in the first degree and two counts of assault in the third degree. He was acquitted in January of 1995 of all charges. This incident arose out of a single domestic dispute with his girlfriend and another man. Hack admits that he showed very poor judgment, but denied that there was any criminal intent involved. The jury agreed since he was acquitted. The Administrative Hearing Officer has not considered this incident to be significant in terms of the background of this case. The explanation by Hack supported his contention that it was a one-time incident, as a result of a difficult personal situation which was uncharacteristic of his life as a whole. In

addition, he is entitled to the presumption accorded anyone else by virtue of the judgment of acquittal.

11. The thefts at Sears are a far more serious matter and arose about the same time. Hack's general explanation was that he was under tremendous personal pressure as a result of this first indictment, and had severe financial pressures which caused him to lose his good judgment and engage in acts which he normally would not have done. The Administrative Hearing Officer found Hack a truthful and convincing witness. On the whole, Hack is an honest and hard-working person, as the Court recognized by the imposition of an SIS.

12. The application filled out for Primerica is dated November 18, 1994. At that time he had not been convicted of or pleaded guilty or nolo contendere to any felony or misdemeanor. See, Exhibit 11, Section 8, Question 1.

13. Question 8 of Exhibit 11 asks whether the person is now the subject of any complaint, investigation or proceeding that could result in a "yes" answer to any of the above items, and if so, to explain. Hack answered "no" to this statement, although at the time there were pending misdemeanor charges against him. After he had filled out the paperwork, he took the state insurance exam and passed it. At the time he actually submitted his paperwork to the State of Alaska, Division of Insurance, in March 1995, he had been acquitted of the charges in the first case, and entered a plea of no contest and received an SIS on charges in the second case. Thus, at the time he submitted his paperwork to the State, he explained that he did not change any of the paperwork because an SIS was not a "conviction" and he thought it was only felony convictions he had to report.

14. The State issued him a license on March 16, 1995. As part of its investigation, Ms. Linda Brunette, State of Alaska, Division of Insurance, Licensing Supervisor, received a report from the Alaska Department of Public Safety on May 5, 1995 which showed Hack's plea to two counts of larceny.

15. When Primerica was informed of the theft charges and subsequent SIS, they terminated his employment on September 5, 1995. Hack testified that prior to that he had not had to fill out anything for Primerica which would require him to disclose these convictions, other than what had been required by the State. There is apparently some confusion with Primerica over their policy on theft, since Operating Guideline #10 requires disclosure of any kind of criminal charge, including a felony or a misdemeanor. See, Ex. 12. However, this document had not been circulated in the Anchorage office at the time Hack applied for work. It was only after his voluntary disclosure to Primerica of the criminal case, that the document surfaced and was then circulated to employees.

16. Hack has submitted character references from satisfied clients, as well as Respondent's Exhibit D, which showed that he was a high producer for Primerica in April and May of 1995.

17. As proof that he did not intentionally fail to disclose his conviction, Hack submitted Respondent's Exhibit C, an employment application he filled out for a job at the U.S. Post Office dated September 27, 1995. On this he voluntarily disclosed that he had been fired from a previous job and was released as a result of charges which had been brought against him. He testified that he understood that the Post Office would receive copies of any criminal action which had ever been taken against him, regardless of whether or not there was an acquittal or SIS.

18. Hack also submitted Exhibit E, a letter dated July 22, 1995 from Rex Lamont Butler, his attorney, which confirmed that Mr. Butler does not believe that under the current Alaska statute an SIS is a "conviction". Mr. Butler stated that "...a Suspended Imposition of Sentence means that an actual or technical conviction doesn't occur unless your probation is revoked. Therefore, Mr. Hack is not convicted of an offense and once he successfully completes his SIS, the case will show SIS/DIS meaning the case was dismissed...." Exhibit E.

19. The Division argues that an SIS is a "conviction" and therefore must always be disclosed. Hack's failure to do so is grounds for revocation. Alternatively, if an SIS is not a "conviction", the Division argues that the facts underlying the convictions are so severe as to show continuing untrustworthiness and that his license must be revoked.

20. For the reasons set forth below, the Administrative Hearing Officer disagrees.

### **Conclusions of Law**

1. Reading the cases cited by the State, as well as reviewing the letter from Mr. Butler, it is clear that there is considerable confusion about whether an SIS is a "conviction". The cases cited by the State do not address the issue raised here, but instead deal with a technical legal definition of what appears on the State of Alaska criminal record. The purpose of a Suspended Imposition of Sentence, of course, is to enable those who have gotten into trouble with the law, but whose past activities have been acceptable, to plead guilty to a charge, and eventually have those charges dismissed without incurring any lasting civic penalty. It is clear that defendants in the past have been lead to believe that an SIS has no lasting civil or criminal effect. This interpretation is confirmed by the past practice of some District and Superior Court

judges referenced in Journey v. State, 895, P2d 955, 957, and 962 (Alaska 1995), where the Supreme Court admonished judges to be careful how they explain an SIS to a defendant.

2. Mr. Butler's explanation to his client is a commonly accepted explanation from criminal defense lawyers and judges. Ex. E. Therefore, a layman who understands that the purpose of pleading to a charge in a certain way will enable him to retain basic civil rights, could easily think that he could truthfully answer, as did Mr. Hack, that he had not been "convicted" of a felony. Hack clearly understood that at any time he could be the subject of a criminal inquiry to the FBI or to the Alaska State Troopers regarding his background, as disclosed by his acknowledgment in seeking the job with the post office that he knew they would be contacting the Alaska State Troopers.

3. Unfortunately, there is no definition under the insurance code, the Administrative Procedures Act or any state statute of which the Administrative Hearing Officer is aware which defines that an SIS is in fact a "conviction" and must be reported as such. Absent this, and given the common interpretation given by defense attorneys and Superior Court Judges, Hack's response was certainly understandable, if not arguably legally correct.

4. The Administrative Hearing Officer has reviewed the employment data and performance evaluations submitted by Hack from his years in the Air Force, Exhibit A. It is clear that he did well in the Air Force, and prior to the incidents which occurred in 1994 had been highly thought of by his superiors, as well as others who had worked with him. While the incidents of which he was convicted are serious, they are not so egregious that the Administrative Hearing Officer agrees that his license should be

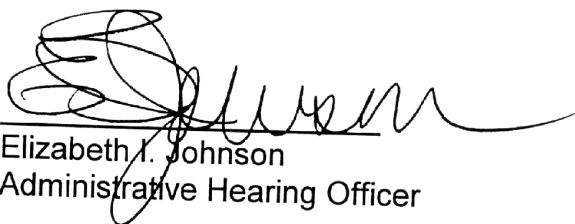
permanently revoked. It is however, important that any prospective employer understand clearly the basis for the Suspended Imposition of Sentence, as well as the actual circumstances surrounding the other charges. With that in mind, the employer should be allowed to make their own decision about whether or not to employ Mr. Hack. That concept appears to be the whole intent of offering a defendant a Suspended Imposition of Sentence. For the State to offer that option on the one hand, and then through its licensing action seek to deny that option by eliminating its usefulness is disingenuous. The Administrative Hearing Officer does agree that issues of trustworthiness are important in dealing with the public in matters of life insurance. However, given the absence of a clear definition of what exactly is a "conviction", and the absence of a definition of a "conviction" for purposes of insurance applications, Respondent should not be held to a higher standard than the generally accepted community definition of "conviction" and "SIS", as reflected by the explanation of the courts and his attorney.



### Proposed Decision

Based on the foregoing Findings of Fact and Conclusions of Law, the Administrative Hearing Officer recommends that the Division permit Mr. Hack to be re-licensed if he so chooses, and that he be placed on probation for a period of two years from the date of re-licensure. Further, that any insurance company to which Mr. Hack applies, be fully informed of the charges which resulted in the Suspended Imposition of Sentence through a written statement by Mr. Hack attached to his application, and that said statement be approved by the Division of Insurance.

Dated at Anchorage, Alaska this 26 day of January, 1996.

  
Elizabeth I. Johnson  
Administrative Hearing Officer

# DIRECTOR'S DECISION AND ORDER

The Director having reviewed the Proposed Decision of the Hearing Officer In the Matter of **Benjamin Edward Hack, III**, Respondent, **Case No. H95-03**, hereby

Option 1:       adopts the Proposed Decision in its entirety and Orders that the Recommendation therein be implemented.

Date: January 26, 1996

By: Marianne K. Burke  
Marianne K. Burke, Director

Option 2       modifies the Findings of Fact, Conclusions of Law, and Proposed Decision as follows:

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and adopts the balance of the Findings of Fact, Conclusions of Law, and Proposed Decision as the Final Decision and Order in this matter.

Date: \_\_\_\_\_

By: \_\_\_\_\_  
Marianne K. Burke, Director

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STATE OF ALASKA  
DEPARTMENT OF COMMERCE & ECONOMIC DEVELOPMENT  
DIVISION OF INSURANCE

In the Matter of: )  
BENJAMIN EDWARD HACK, III, )  
Respondent. )

Case No. D95-03

STATEMENT OF ACCUSATION

Marianne K. Burke, Director of the Division of Insurance, Department of Commerce and Economic Development, State of Alaska, states:

1. Benjamin Edward Hack, III ("Hack") is currently licensed by the Division of Insurance ("Division") as a producer for life insurance under license number 12541, issued on March 16, 1995. Hack is employed by Primerica Financial Services.

2. To receive a license, Hack completed an application for an individual working in a firm and submitted it to the Division. The application was signed by Hack and notarized on March 6, 1995. The Division received the application on or about March 10, 1995.

3. On the application, Hack was required to answer a series of questions regarding his background, including the following:

Do you have any pending criminal charges against you?

3601 C STREET, SUITE 1324  
ANCHORAGE, ALASKA 99503-5948  
PHONE (907) 269-7900  
FAX (907) 269-7910  
TDD (907) 465-5437

STATE OF ALASKA  
DEPARTMENT OF COMMERCE AND ECONOMIC DEVELOPMENT  
DIVISION OF INSURANCE  
800 E. DIMOND BLVD., SUITE 560  
ANCHORAGE, ALASKA 99515  
(907) 349-1230

1 Have you ever been convicted of a felony or  
2 misdemeanor?

3 Hack answered "no" to both questions and signed the application  
4 certifying "under penalty or perjury that I have read the  
5 foregoing application and know the contents thereof and that each  
6 statement therein made is full, true, and correct." He further  
7 acknowledged that "pursuant to Secs. 21.27.410 and 21.27.040 of  
8 the Alaska Statutes, any false statement may subject me to  
9 penalties as provided by law and denial, nonrenewal, suspension,  
10 or revocation of the license herein applied for."

11 4. After licensing Hack, the Division learned that  
12 Hack had been convicted of two misdemeanor counts of theft in  
13 Anchorage Superior Court, information that Hack failed to disclose  
14 on his license application. Further investigation revealed the  
15 details of this conviction.

16 5. On or about November 25, 1994, Hack was charged by  
17 the State of Alaska with theft in the second degree, a Class C  
18 felony; falsifying business record, a Class C felony; and theft in  
19 the fourth degree, a Class A misdemeanor. These charges arose out  
20 of Hack's employment at Sears department store in Anchorage,  
21 Alaska, where he credited his Sears charge account with an alleged  
22 payment on two separate occasions without making an actual payment  
23 and where he took a pair of gloves without paying for them. Under  
24 a plea agreement, the charges against Hack were reduced to two  
25 misdemeanor counts of theft in the third degree.  
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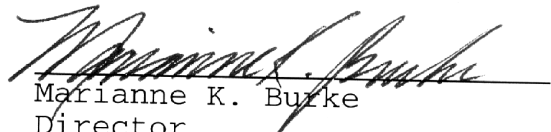
1                   6.    On or about February 17, 1995, Hack entered a plea  
2 of no contest to two misdemeanor counts of theft in the third  
3 degree. A judgment of guilty was entered by Judge Elaine Andrews,  
4 who also imposed a suspended imposition of sentence ("SIS").  
5 Under the SIS, Hack was to serve 5 days in jail and perform 120  
6 hours of community service.

7                   7.    At the time Hack completed his application for an  
8 insurance producer license, he knew that criminal charges were  
9 pending or that he had been convicted of misdemeanor theft. Yet,  
10 he failed to disclose this information on his application and  
11 certified under penalty of perjury that his statements were true  
12 when he knew they were false.

13                   8.    Hack wilfully misrepresented facts that were  
14 required to be disclosed on his application. Such conduct  
15 demonstrates untrustworthiness and is grounds to revoke a license  
16 and impose penalties pursuant to AS 21.27.040, AS 21.27.410, and  
17 AS 21.27.440.

18                   WHEREFORE, the Division of Insurance requests that  
19 Hack's license be revoked and penalties be imposed for his wilful  
20 misrepresentation.

21                   DATED this 10 day of August, 1995 at Anchorage, Alaska.

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25                   Marianne K. Burke  
26                   Director  
                  Division of Insurance