

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE DEPARTMENT OF COMMERCE

In the Matter of the Athlete Agent  
Registration Application of Donald  
Walthall

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND RECOMMENDATION**

The above-entitled matter came on for hearing before Administrative Law Judge Jim Mortenson on October 14, 2015, and continued on October 30, 2015. The hearing was convened at the Office of Administrative Hearings (OAH), 600 North Robert Street, St. Paul, Minnesota 55101. The record closed on October 30, 2015.

Christopher Kaisershot, Assistant Attorney General, appeared on behalf of the Department of Commerce (Department). Bobby J. Champion, Attorney at Law, appeared on behalf of Donald Walthall (Applicant).

**STATEMENT OF THE ISSUE**

The issue presented in this case is whether the Applicant can show cause as to why his application for registration as an athlete agent should not be denied based on any of the following:

- 1) Conviction of a crime involving moral turpitude or felonies;
- 2) Having engaged in conduct that would disqualify him from serving in a fiduciary capacity;
- 3) Having engaged in conduct that significantly adversely reflects on his credibility, honesty, and integrity; or
- 4) Having engaged in an act or practice which demonstrates that he is untrustworthy, financially irresponsible, or otherwise incompetent or unqualified to act under the authority or license granted by the Commissioner of the Minnesota Department of Commerce (Commissioner)?

**SUMMARY**

Applicant has demonstrated by a preponderance of the evidence that his application for athlete agent registration should not be denied.

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

## FINDINGS OF FACT

### Applicant's Criminal History

1. In 2002, Applicant founded and became the Chief Executive Officer of Universal Mortgage, Inc. (Universal).<sup>1</sup>

2. Universal was a residential mortgage originator, also known as a mortgage broker.<sup>2</sup> As a mortgage broker, Universal acted as a fiduciary agent for lenders.<sup>3</sup>

3. Universal was required to provide truthful information to lenders on behalf of loan applicants and assist with the processing of loans approved by lenders, for the purpose of facilitating loan applicants' efforts to purchase homes.<sup>4</sup>

4. In 2005, Applicant purchased eight residential properties in Minneapolis with financing provided through Universal.<sup>5</sup>

5. Each of the eight properties was purchased with a loan from a different lender.<sup>6</sup>

6. The loan applications included false information regarding: (1) Applicant's assets and liabilities; (2) Applicant's intended usage of the properties, including the false statement that he intended to live in them; and (3) the purchase price paid by Applicant to the seller.<sup>7</sup>

7. The loans for each of the eight properties were for more than the purchase price of the subject properties.<sup>8</sup>

8. Applicant retained the difference between the loan amounts and the purchase prices of the eight properties.<sup>9</sup> The amount of money Applicant retained from the loans (referred to as kickbacks) totaled \$240,000.<sup>10</sup>

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<sup>1</sup> Ex. 105 at 1-2; Testimony (Test.) of Donald Walthall.

<sup>2</sup> Ex. 105 at 2.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 2, 6.

<sup>5</sup> *Id.* at 2-3.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 4-5.

<sup>8</sup> *Id.* at 2-3.

<sup>9</sup> *Id.* at 5; Test. of D. Walthall.

<sup>10</sup> Ex. 105 at 5.

9. Applicant had the kickbacks from the loans first distributed to someone other than himself for the purpose of hiding the kickbacks, and the checks were endorsed over to Applicant after closing.<sup>11</sup>

10. At about the time Applicant was engaged in the activity described above, the Hennepin County Attorney's office began to investigate and take action against criminal mortgage fraud, which had become rampant in the mortgage industry across the country.<sup>12</sup>

11. In December 2007 and January 2008, following an investigation Applicant was charged in Hennepin County with racketeering and several counts of theft by swindle related to the eight fraudulent loan applications discussed above.<sup>13</sup>

12. Applicant has no prior or subsequent criminal history.<sup>14</sup>

13. On August 13, 2008, following a bench trial, Applicant was found guilty of eight counts of theft by swindle over \$35,000.<sup>15</sup>

14. On August 19, 2008, Applicant pled guilty to racketeering related to the mortgage fraud.<sup>16</sup>

15. Applicant was sentenced to 74 months in prison for all of his crimes.<sup>17</sup>

16. Following his plea and conviction, Applicant assisted the Office of the Hennepin County Attorney in prosecuting other mortgage fraud cases.<sup>18</sup> Applicant met with the lead prosecutor (the same assistant county attorney who prosecuted him) in a series of sometimes lengthy meetings while Applicant was in prison.<sup>19</sup> Applicant was very open, forthcoming, and reliable in his assistance.<sup>20</sup> Applicant understood that he had done wrong, accepted responsibility for what he had done, provided no excuses for what he did, and was interested in redeeming himself.<sup>21</sup> The prosecutor found this very unusual for a convicted person.<sup>22</sup>

17. While incarcerated at Minnesota Correctional Facility St. Cloud (MCF-St. Cloud) Applicant completed several courses available to prisoners. On December 12, 2008, Applicant completed Introduction to Transition and Critical Thinking Skills courses.<sup>23</sup> On August 8, 2009, he completed a workshop on non-violent conflict

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<sup>11</sup> *Id.* at 6.

<sup>12</sup> Test. of Thomas Fabel.

<sup>13</sup> Exs. 103, 104.

<sup>14</sup> Test. of D. Walthall

<sup>15</sup> Ex. 105.

<sup>16</sup> Ex. 106.

<sup>17</sup> Exs. 106, 107.

<sup>18</sup> Ex. 35; Test. of T. Fabel.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Exs. 17, 18.

resolution, communication and affirmation.<sup>24</sup> Applicant began phase I of the Challenge Incarceration Program on December 16, 2009, and completed it on June 15, 2010.<sup>25</sup> This led to his being released to the community supervision phase of the program. He completed a required 96 hours of community work service in July 2010.<sup>26</sup>

18. Applicant completed courses at the University of Minnesota, College of Education/Human Development, and earned a Bachelor of Science degree and a Human Resources Development Certificate on May 12, 2012.<sup>27</sup>

19. Applicant was placed on probation on February 22, 2012.<sup>28</sup> In addition to general requirements for probation, Applicant was subject to the following special conditions set by the Court:

- Must not borrow money, go into debt or do credit/installment buying.
- Must not solicit/offer to obtain financing for investments of any kind.
- Must not engage in real estate transactions.
- Must not engage in business activity without proper licensing.
- Must not be self-employed or own a business.<sup>29</sup>

20. Applicant successfully completed his sentence and his civil rights were restored on November 24, 2014.<sup>30</sup>

### **Department Licensure**

21. In December 2004, Applicant was commissioned by the Department as a Notary Public, and also obtained a Real Estate Closing Agent license from the Department.<sup>31</sup>

22. Applicant's Real Estate Closing Agent license expired on June 30, 2008.<sup>32</sup>

23. Applicant's Notary Public commission expired on February 1, 2009.<sup>33</sup>

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<sup>24</sup> Ex. 19.

<sup>25</sup> Exs. 1, 2.

<sup>26</sup> Ex. 1.

<sup>27</sup> Exs. 6, 7, 8.

<sup>28</sup> Ex. 3.

<sup>29</sup> *Id.*

<sup>30</sup> Ex. 5.

<sup>31</sup> Ex. 109 at 1-2.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

## Department's Administrative Actions

24. On May 19, 2010, as a result of Applicant's 2008 conviction on the mortgage fraud scheme, the Department initiated an administrative action against Applicant's expired Real Estate Closing Agent license and expired Notary Public commission.<sup>34</sup>

25. As a result of that action, on June 7, 2011, the Commissioner revoked Applicant's already expired Real Estate Closing Agent license and his expired Notary Public commission, having determined:

The misconduct underlying [Applicant's] convictions for felony racketeering and felony theft by swindle demonstrates that he violated a standard of conduct, committed fraudulent, deceptive, or dishonest practices, and engaged in acts that demonstrate that he is untrustworthy, financially irresponsible, or otherwise incompetent or unqualified to act under the authority or license granted by the Commissioner.<sup>35</sup>

26. The Commissioner also barred Applicant from engaging in residential mortgage origination or servicing, and fined Applicant \$330,000.<sup>36</sup> Applicant has not yet paid the \$330,000 fine.<sup>37</sup>

## Applicant's Application for Registration as Athlete Agent

27. Applicant earned a Master of Education degree from the University of Minnesota, College of Education/Human Development, on May 29, 2015.<sup>38</sup> His master's degree focused on sports agency.<sup>39</sup>

28. An athlete agent is "an individual who enters into an agency contract with a student athlete or, directly or indirectly for remuneration, recruits or solicits a student athlete to enter into an agency contract."<sup>40</sup>

29. Agents generally negotiate terms on behalf of athletes with a sports league or sports organization with which the athlete intends to participate.<sup>41</sup>

30. Agents are heavily regulated by various unions representing professional athletes including: the National Football League Players Association; the National Basketball Players Association; and the Major League Baseball Players Association.<sup>42</sup>

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<sup>34</sup> Ex. 108.

<sup>35</sup> Ex. 110 at 3.

<sup>36</sup> *Id.* at 4.

<sup>37</sup> Test. of Cheryl Costello; Ex. 115.

<sup>38</sup> Ex. 9.

<sup>39</sup> Exs. 22, 23, 24, 25, 26, 27, 28.

<sup>40</sup> Minn. Stat. § 81A.02, subd. 3 (2014).

<sup>41</sup> Ex. 38 at 3, Ex. 39 at 4, Ex. 41 at 8-9.

<sup>42</sup> Exs. 38, 39, 41.

31. Agents are paid by their clients from a portion of the proceeds the client earns, subject to limits on structure and amount set by the players associations.<sup>43</sup>

32. In December 2014, Applicant inquired of the Department regarding whether he could obtain an athlete agent registration given his criminal history.<sup>44</sup>

33. On January 16, 2015, Cheryl Costello, Senior Investigator with the Consumer Protection and Education Division of the Department, advised Applicant that “the Department would recommend denial of any application for licensure based upon the nature and seriousness of the underlying conduct resulting in the criminal charges and conviction reflected on your record” and the related administrative actions, including the outstanding \$330,000 fine.<sup>45</sup>

34. Applicant sent a follow-up email on January 26, 2015, informing Ms. Costello that his intention was to pay the fine once he completed his master’s degree, became an athlete agent, and began earning money.<sup>46</sup>

35. Ms. Costello responded the same day, stating the Department:

will recommend denial of any application for licensure with the Minnesota Department of Commerce. This determination was based upon the nature and seriousness of the underlying conduct resulting in the criminal charges and conviction reflected on your record; and which further resulted in the administrative action taken against your licenses previously issued by the Minnesota Department of Commerce.<sup>47</sup>

Ms. Costello also informed Applicant that if he applied and was formally denied, he would have the right to contest the denial.<sup>48</sup>

36. Applicant applied to the Department for a certificate of registration for agent athlete on or about March 12, 2015.<sup>49</sup>

37. In a letter dated April 15, 2015, Ms. Costello advised Applicant that the Department intended to deny the application “based on but not limited to the serious nature of the underlying conduct which resulted in criminal charges and conviction reflected on your record, which further resulted in Administrative Action by the Minnesota Department of Commerce.”<sup>50</sup> No additional detail for the denial was provided.<sup>51</sup>

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<sup>43</sup> Exs. 36, 38, 39, 41.

<sup>44</sup> Ex. 113.

<sup>45</sup> Ex. 114.

<sup>46</sup> Ex. 115.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> Ex. 116.

<sup>50</sup> Ex. 117.

<sup>51</sup> *Id.*

38. In a letter dated April 27, 2015, Applicant, through his attorney, requested an appeal of the denial of the application for athlete agent registration and a contested case hearing.<sup>52</sup>

39. Any fact referenced in the memorandum below not specifically listed is hereby incorporated into these Findings of Fact.

Based on these Findings of Fact, the Administrative Law Judge makes the following:

### CONCLUSIONS OF LAW

1. The Administrative Law Judge and the Commissioner have jurisdiction in this matter pursuant to Minn. Stat. §§ 14.50, 81A.07, subd. 2 (2014).

2. Minn. Stat. § 45.027, subd. 7 (2014), is not applicable to this matter because the proceeding does not involve an action against a licensee.

3. The Applicant received proper notice of the Notice and Order for Hearing in this matter.

4. The Department has complied with all relevant procedural and legal requirements.

5. Pursuant to Minn. Stat. § 81A.06, subd. 2 (2014), the Commissioner may refuse to issue a certificate of registration to an agent athlete applicant “if the commissioner determines that the applicant has engaged in conduct that has a significant adverse effect on the applicant’s fitness to act as an athlete agent.”<sup>53</sup>

6. In making this determination, “the commissioner shall consider: (1) how recently the conduct occurred; (2) the nature of the conduct and the context in which it occurred; and (3) any other relevant conduct of the applicant.”<sup>54</sup>

7. Additional information the Commissioner may consider includes “whether the applicant has:

- (1) been convicted of a crime, if committed in this state, would be a crime involving moral turpitude or a felony;
- (2) made a materially false, misleading, deceptive, or fraudulent representation in the application or as an athlete agent;

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<sup>52</sup> Ex. 118.

<sup>53</sup> Minn. Stat. § 81A.06, subd. 2(a).

<sup>54</sup> *Id.* at subd. 2(b).

- (3) engaged in conduct that would disqualify the applicant from serving in a fiduciary capacity;
- (4) engaged in conduct prohibited by section 81A.14;
- (5) had a registration or licensure as an athlete agent suspended, revoked, or denied or been refused renewal of registration or licensure as an athlete agent in any state;
- (6) engaged in conduct the consequence of which was that a sanction, suspension, or declaration of ineligibility to participate in an interscholastic or intercollegiate athletic event was imposed on a student athlete or educational institution; or
- (7) engaged in conduct that significantly adversely reflects on the applicant's credibility, honesty, or integrity."<sup>55</sup>

8. Applicant has met his burden and more than a preponderance of the evidence demonstrates that the conduct for which Applicant was convicted in 2008, and which resulted in subsequent administrative penalties, does not have a significant adverse effect on Applicant's fitness to act as an athlete agent.

Based upon these Conclusions of Law, and for the reasons explained in the memorandum below, the Administrative Law Judge makes the following:

### **RECOMMENDATION**

**IT IS HEREBY RECOMMENDED** that: the Commissioner issue a certificate of registration as an athlete agent to Applicant.

Dated: November 30, 2015

s/Jim Mortenson  

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**JIM MORTENSON**  
Administrative Law Judge

Reported: Digitally Recorded

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<sup>55</sup> *Id.* at subd. 2(a).

## **NOTICE**

This Report is a recommendation, not a final decision. The Commissioner of Commerce (Commissioner) will make the final decision after a review of the record. Under Minn. Stat. § 14.61 (2014), the Commissioner shall not make a final decision until this Report has been made available to the parties for at least ten calendar days. The parties may file exceptions to this Report and the Commissioner must consider the exceptions in making a final decision. Parties should contact Michael Rothman, Commissioner, Department of Commerce, Attn: Heidi Retterath, Suite 500, 85 Seventh Place East, St. Paul, MN 55101, (651) 539-1445, to learn the procedure for filing exceptions or presenting argument.

The record closes upon the filing of exceptions to the Report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and Administrative Law Judge of the date the record closes. If the Commissioner fails to issue a final decision within 90 days of the close of the record, this Report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a (2014). In order to comply with this statute, the Commissioner must then return the record to the Administrative Law Judge within ten working days to allow the Judge to determine the discipline imposed.

Under Minn. Stat. § 14.62, subd. 1 (2014), the Commissioner is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

## **MEMORANDUM**

This case includes a rare confluence of felonious criminal conduct, imposed and completed correctional consequences, educational advancement, and agency discretion, all of which must be weighed to find justice. On one side of the scale, Mr. Walthall committed the serious crime of mortgage fraud, was convicted and sentenced, and served his time. He then expressed regret and remorse at his one-time criminal activity, and set about to resume a legitimate, productive, and rewarding professional life. On the other side of the scale is the Department's wide charge to protect the public from unscrupulous people and activities, coupled with its broad discretion to grant certifications of registration to athlete agents. Upon a full review of all of the facts, and rejecting a narrow view of only the negative facts related to Applicant's past, the Administrative Law Judge concludes that justice requires that the certificate of registration be granted.

### **Facts**

In 2005 Mr. Walthall, a man without any criminal history, engaged in mortgage fraud while working with and through Universal Mortgage, Inc. Mr. Walthall was convicted and sentenced to over six years of prison. During his time in prison, Mr. Walthall accepted responsibility for his criminal activity. He aided the state in prosecuting others involved in

mortgage fraud, without any direct benefit to himself. He worked closely with the attorney who prosecuted him, expressing his remorse and willingness to be a responsible citizen. The prosecutor, an experienced attorney, found Mr. Walthall to be unusually sincere, remorseful, and desirous of returning to being the productive and law-abiding citizen he had once been.

While incarcerated at MCF-St. Cloud Mr. Walthall successfully completed several courses available to prisoners. Mr. Walthall was also released into the community under supervision where he completed a required 96 hours of community work service. Mr. Walthall was subsequently placed on probation in February, 2012. In addition to general requirements for probation, he was subject to the following special conditions set by the court:

- Must not borrow money, go into debt or do credit/installment buying.
- Must not solicit/offer to obtain financing for investments of any kind.
- Must not engage in real estate transactions.
- Must not engage in business activity without proper licensing.
- Must not be self-employed or own a business.

Mr. Walthall successfully completed his sentence and his civil rights were restored on November 24, 2014. Prior to this time Mr. Walthall completed courses at the University of Minnesota, College of Education/Human Development, and earned a Bachelor of Science degree, and a Human Resources Development Certificate, on May 12, 2012. He then began work on a Master of Education degree from the same college, which was granted on May 29, 2015. Mr. Walthall's work on his master's degree focused on sports agency, and he developed a business plan.

Mr. Walthall was commissioned by the Department as a Notary Public, and also obtained a Real Estate Closing Agent license, in December 2004. His Real Estate Closing Agent license expired on June 30, 2008, and his Notary Public commission expired on February 1, 2009. The Department initiated an administrative action against Mr. Walthall's Real Estate Closing Agent license and Notary Public commission on May 19, 2010. As a result of that action, the Commissioner determined:

The misconduct underlying [Mr. Walthall's] convictions for felony racketeering and felony theft by swindle demonstrates that he violated a standard of conduct, committed fraudulent, deceptive, or dishonest practices, and engaged in acts that demonstrate that he is untrustworthy, financially irresponsible, or otherwise incompetent or unqualified to act under the authority or license granted by the Commissioner.<sup>56</sup>

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<sup>56</sup> Ex. 110 at 3.

As a result, on June 7, 2011, the Commissioner revoked Mr. Walthall's expired license and Notary Public commission. The Commissioner also barred Mr. Walthall from engaging in residential mortgage origination or servicing and fined him \$330,000. The fine remains outstanding, a fact the Department relies on to support its position to deny Mr. Walthall's registration as an athlete agent.

Prior to applying for athlete agent registration with the Department, Mr. Walthall inquired of the Department, in December 2014, whether he could obtain the registration given his history. On January 16, 2015, Cheryl Costello, Senior Investigator with the Consumer Protection and Education Division of the Department, responded and advised Mr. Walthall that "the Department would recommend denial of any application for licensure based upon the nature and seriousness of the underlying conduct resulting in the criminal charges and conviction reflected on your record" and the related administrative actions, including the outstanding \$330,000 fine. Upon a second inquiry, Ms. Costello made the same response. Following Mr. Walthall's application for athlete agent registration, Ms. Costello again made the same response, without additional detail or analysis. Mr. Walthall then initiated this action.

## The Law

An athlete agent is a person "who enters into an agency contract with a student athlete or, directly or indirectly for remuneration, recruits or solicits a student athlete to enter into an agency contract."<sup>57</sup> Generally, an athlete agent acting in Minnesota must obtain a certificate of registration, not a license, from the Department.<sup>58</sup>

The Commissioner has discretion and may refuse to issue a certificate of registration to an agent athlete applicant "if the commissioner determines that the applicant has engaged in conduct that has a significant adverse effect on the applicant's fitness to act as an athlete agent."<sup>59</sup> In making this determination, "the commissioner shall consider: (1) how recently the conduct occurred; (2) the nature of the conduct and the context in which it occurred; and (3) any other relevant conduct of the applicant."<sup>60</sup>

Additional information the Commissioner may consider includes "whether the applicant has:

- (1) been convicted of a crime, if committed in this state, would be a crime involving moral turpitude or a felony;
- (2) made a materially false, misleading, deceptive, or fraudulent representation in the application or as an athlete agent;

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<sup>57</sup> Minn. Stat. § 81A.02, subd 3.

<sup>58</sup> Minn. Stat. §§ 81A.02, subd. 12, .04, subd 1 (2014).

<sup>59</sup> Minn. Stat. § 81A.06, subd. 2(a).

<sup>60</sup> *Id.* at subd. 2(b).

- (3) engaged in conduct that would disqualify the applicant from serving in a fiduciary capacity;
- (4) engaged in conduct prohibited by section 81A.14;
- (5) had a registration or licensure as an athlete agent suspended, revoked, or denied or been refused renewal of registration or licensure as an athlete agent in any state;
- (6) engaged in conduct the consequence of which was that a sanction, suspension, or declaration of ineligibility to participate in an interscholastic or intercollegiate athletic event was imposed on a student athlete or educational institution; or
- (7) engaged in conduct that significantly adversely reflects on the applicant's credibility, honesty, or integrity.<sup>61</sup>

## Analysis

The recommended denial of the registration as an athlete agent was not based on a statutory analysis. The Department argues that Mr. Walthall's criminal conduct, alone, justifies rejection of his application. The Department also argues that Mr. Walthall knows how to hide his tracks and seeks to set up a scheme similar to the mortgage fraud scheme to take advantage of student athletes. There is no evidence supporting this conjecture.

The Department argues that Mr. Walthall's conduct following his criminal activity does not outweigh the criminal activity. Minn. Stat. § 81A.06 (2014) requires consideration of that subsequent activity. Upon examination, the evidence shows Mr. Walthall is fit to act as an athlete agent.

The Senior Investigator, Ms. Costello, testified that there was no "automatic denial" and that she looked at Applicant's situation as a "whole." She also testified, consistent with the three written letters and email she sent to Applicant, that it was clear to her that based on the crimes Applicant had committed, he could not be licensed. Her testimony, the documentary evidence, and the arguments of the Department, cannot be reconciled. It is clear the reasons for denial were the crimes Mr. Walthall committed as a mortgage broker in 2005, and the fact that he still owed a \$330,000 civil penalty to the Department. Ms. Costello testified that an outstanding penalty will always preclude licensure. Ms. Costello did not know what an athlete agent did and so could not possibly determine whether the conduct he had engaged in ten years ago would have "a significant adverse effect on [Applicant's] fitness to act as an athlete agent."<sup>62</sup> This limited view of the facts concerning Mr. Walthall's application is not consistent with the statutory requirements for application review. In addition, Mr. Walthall is not seeking license, which is not required for an athlete agent in Minnesota, only to register.

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<sup>61</sup> *Id.* at subd. 2(a).

<sup>62</sup> Minn. Stat. § 81A.06, subd 2(a).

An athlete agent is defined in state statute as “an individual who enters into an agency contract with a student athlete or, directly or indirectly for remuneration, recruits or solicits a student athlete to enter into an agency contract.”<sup>63</sup> Agents generally negotiate terms on behalf of athletes with the league or sports organization with which the athlete intends to participate. Agents are heavily regulated by various unions representing professional athletes, including: the National Football League Players Association; the National Basketball Players Association; and the Major League Baseball Players Association. Given this level of private regulation, it is understandable why there is minimal regulation, and no licensure, at the state level. Agents are paid by their clients from a portion of the proceeds the client earns, and the players association regulations limit the structure and amount of fees.

The analysis required to determine whether an applicant’s conduct would have a significant adverse effect on his or her fitness to act as an athlete agent begins with an examination of how recently the conduct occurred.<sup>64</sup> In this case, the conduct occurred in 2005, nearly ten years prior to the application. This is a considerable length of time, given Mr. Walthall’s only crimes involved the short-lived mortgage fraud scheme. Ms. Costello’s testimony asserting that the conduct was much more recent – 2011 – references his failure to pay the \$330,000 civil penalty against him. This is not a reasonable interpretation given Mr. Walthall was a prisoner, did not have his civil rights restored until November 2014, and was a college student. In fact, the evidence shows Mr. Walthall seeks to earn enough money through his sports agent business to pay the penalty he owes.

Second, the nature of the conduct and the context in which it occurred must be examined.<sup>65</sup> Mr. Walthall breached his fiduciary duty to the lenders he was an agent for. He knew exactly what he was doing and knew it was wrong. He was not alone in his scam, both in terms of his own company and the mortgage fraud that was occurring nation-wide. This is no excuse, but it is part of the context in which Mr. Walthall, a man with no prior criminal history, descended into criminal activity.

Third, any other relevant conduct of Mr. Walthall must be considered.<sup>66</sup> Mr. Walthall pled guilty to the racketeering charge. After a bench trial and conviction on the theft by swindle charges, he immediately began to assist the State in prosecutions of other mortgage fraud schemes. Mr. Walthall was not only forthcoming, honest, and helpful, but also expressed and demonstrated remorse at his own actions and sought to make a positive contribution to society. Mr. Walthall’s word is not the only evidence to rely on. The prosecutor, Mr. Fabel, was a very credible witness. Mr. Fabel provided compelling evidence of Mr. Walthall’s rehabilitation and supports the finding that Mr. Walthall is indeed honest and trustworthy, despite his past crimes.<sup>67</sup>

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<sup>63</sup> Minn. Stat. § 81A.02, subd. 3.

<sup>64</sup> Minn. Stat. § 81A.06, subd. 2(b)(1).

<sup>65</sup> *Id.* at subd. 2(b)(2).

<sup>66</sup> *Id.* at subd. 2(b)(3).

<sup>67</sup> This consideration is based on the requirements of Minn. Stat. § 81A.06, not Minn. Stat. §§ 364.01-.10 (2014).

In addition to his assistance to the state, Mr. Walthall worked to prepare himself for an honest and productive life following prison. He completed courses and other opportunities offered through the correction system. While on probation, he went back to college and earned another bachelor's degree and ultimately earned a master's degree in the spring of 2015.

Finally, the discretionary provisions the Department put forth in its Notice for Hearing are examined. First, it is undisputed Mr. Walthall has been convicted of a felony for his orchestration and participation in a mortgage fraud scam involving at least eight properties. This element, according to the Department, is sufficient to deny Mr. Walthall's registration as an athlete agent. If this were true, however, the legislature would certainly have articulated that conviction of a felony, or a particular crime, is sufficient to deny registration. It did not do so, and laid out multiple mandatory factors (discussed above) as well as discretionary factors, of which this is only one.

Second, Mr. Walthall engaged in conduct that did disqualify him from serving in a fiduciary capacity as a real estate closer. Mr. Walthall argues that because agents are paid by their clients after the client is paid by the team, he would not be in a fiduciary capacity. The truth is somewhere in the middle. A fiduciary is one who acts as a trustee for the benefit of another.<sup>68</sup> Even though Mr. Walthall may be paid by his future clients and would not serve as a conduit for their remuneration from the team, as a negotiator of contracts on athletes' behalf, and his own business plan of investing a portion of the fees they will pay him in order to return that money to them makes him a fiduciary.<sup>69</sup> This is reason to pause and consider Mr. Walthall's fitness to act as an athlete agent. However, given all of the other factors, it is not determinative.

Third and finally, Mr. Walthall engaged in conduct that significantly adversely reflected on his credibility, honesty, and integrity at time of said conduct. There is ample evidence in this case that his credibility, honesty, and integrity have been restored, however. The legislature did not, as the Department has argued, make any one factor simple or determinative. Rather, a range of factors must be considered, while others, such as this one, may be considered. Given that Mr. Walthall immediately showed remorse for his conduct, and worked with the state to put a stop to others engaging in that conduct, and worked tirelessly to improve his own situation to be a productive and honest citizen, it cannot be said at this time that the conduct in 2005 significantly adversely reflects on his credibility, honesty and integrity now.

The Department did not consider the other discretionary factors, and was not required to do so. It did, however, put forth a fourth factor from Minn. Stat. § 45.027 (2014), upon which it relied heavily in its denial of the application. This factor is not appropriate to consider because it involves situations where individuals are licensed by the Department. Athlete agents are not licensed by the Department. They are only required to register. Thus, Minn. Stat. § 45.027, subd. 7, is not applicable to this matter.

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<sup>68</sup> BLACK'S LAW DICTIONARY 625 (6<sup>th</sup> ed. 1990); see *also* Minn. Stat. § 520.01, subd 3. (2014).

<sup>69</sup> Ex. 28; See Minn. Stat. §§ 520.01-.33 (2014).

## **Conclusion**

The legislature provided a comprehensive set of factors for the Commissioner to consider when examining an application for registration as an athlete agent under Minn. Stat. § 81A.06. The specific question for the Commissioner is whether Mr. Walthall has engaged in conduct that has a significant adverse effect on his fitness to act as an athlete agent. There are three mandatory factors to consider in answering this question, two of which the Department did not consider in its denial of the application. The third of those factors, a catch-all for any other relevant conduct, leads the Commissioner back to the several discretionary factors the Commissioner is authorized to examine. The Department relies on three of those factors for its recommendation that the application be denied. However, the Department fails to conduct a thorough analysis, as required by statute, and instead uses one or more of the negatives in this case to justify its position. If the legislature wanted such a simple approach to making the determination used, it could have easily done so. It did not. Given a thorough review of all the facts in this case, and in light of the responsibility Mr. Walthall took for his crimes and the efforts he made to redeem himself, it is respectfully recommended that Mr. Walthall be granted a registration as an athlete agent. If the work and commitment Mr. Walthall has made to improving his life is not a sufficient basis to overcome the stigma of his felony conviction, it is difficult to imagine any situation where an individual convicted of such a felony could register. That is not the outcome the legislature expected, based on its comprehensive framework described in the statute. The evidence shows Mr. Walthall's past conduct, as egregious as it was, does not now have a significant adverse effect on his fitness to act as an athlete agent.

**J. R. M.**