

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GUIDO PEROU,)
)
 Petitioner,)
)
 vs.) Case No. 03-2859RX
)
 DEPARTMENT OF FINANCIAL)
 SERVICES,)
)
 Respondent.)
 _____)

FINAL ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in Tallahassee, Florida, on September 22, 2003. The sole witness testified by videoconference from Miami where the court reporter was located. The Administrative Law Judge and attorneys were in Tallahassee.

APPEARANCES

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For Respondent: S. Marc Herskovitz
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STATEMENT OF THE ISSUE

The issue is whether Rule 4-211.042(8), Florida Administrative Code, contravenes Section 626.641(2), Florida Statutes, by imposing a waiting period in excess of two years for licensee whose license has been revoked to reapply for licensure.

PRELIMINARY STATEMENT

By Petition for a Determination of the Invalidity of an Existing Rule filed August 5, 2003, Petitioner alleged that Rule 4-211.042(8), Florida Administrative Code, is an invalid exercise of delegated legislative authority because the rule "enlarges, modifies and contravenes" the specific provisions of Section 626.641, Florida Statutes (2002), which is purportedly implemented by the rule. Specifically, the petition alleges that the rule imposes a 15-year waiting period for reapplication following the commission of a specified felony, but the statute requires only a two-year waiting period. The petition also states an additional issue is whether the rule is arbitrary or capricious.

Respondent's Pre-Hearing Stipulation, which was filed September 17, 2003, raises the issue of whether Petitioner has standing to maintain this rule challenge.

At the hearing, Petitioner called one witness, himself. He testified solely on the issue of standing. Petitioner offered into evidence four exhibits: Petitioner Exhibits 1-4. Respondent called no witnesses and offered into evidence three exhibits: Respondent Exhibits 1-3. All exhibits were admitted.

The court reporter filed the transcript on September 26, 2003. The parties filed their proposed final orders on October 31, 2003.

FINDINGS OF FACT

1. From 1984 through November 28, 2000, Petitioner was licensed as a general lines insurance agent.

2. On May 15, 2000, the Miami-Dade County State Attorney charged Petitioner with a felony violation of Section 817.034(3)(d), Florida Statutes (2003). The information alleged that Petitioner had participated in an organized scheme to defraud a person of less than \$20,000 from December 1, 1997, through January 31, 1999. (All references to Sections are to Florida Statutes (2003), unless the context indicates otherwise.)

3. On September 14, 2000, Petitioner entered a plea of no contest to the charge, and the court entered a finding of guilt, but withheld adjudication. The court ordered that Petitioner remain on probation and pay court costs. The period of

probation was specified in a separate order that is not part of the present record.

4. On the same day, Petitioner entered into a Settlement Stipulation for Consent Order with Respondent. The settlement stipulation acknowledges that Respondent has alleged that Petitioner misappropriated homeowners and flood insurance premiums and uttered forged insurance documents. The settlement stipulation memorializes Petitioner's "voluntary return" to Respondent of all licenses previously issued to him by Respondent and Petitioner's understanding that the return of the licenses has the same effect as a revocation of these licenses, pursuant to Section 626.641, Florida Statutes (2000).

5. The final paragraph of the settlement stipulation states:

No person whose licenses, appointments and eligibility for licensure have been revoked by the Department shall have the right to apply for another license or appointment under the Insurance Code within two (2) years from the date of the Consent Order to be issued in this case. The Department shall not, however, grant a new license or appointment or reinstate eligibility to hold such license or appointment if it finds that the circumstance or circumstances for which the eligibility was revoked or for which the previous license or appointment was revoked still exist or are likely to recur.

6. After the Treasurer and Insurance Commissioner approved the settlement stipulation, Respondent issued a Consent Order,

which incorporates the settlement stipulation and revokes Petitioner's "licensure and eligibility for licensure as an insurance agent . . . pursuant to Section 626.641(2), Florida Statutes (2000)." The final paragraph of the Consent Order, which was filed November 28, 2000, contains a paragraph identical to the final paragraph, quoted above, of the settlement stipulation, except for minor rewording and the addition of a citation in the second sentence to Section 626.641(1), Florida Statutes (2000).

7. Prior to the expiration of two years following the issuance of the Consent Order, the Legislature passed Chapter 2002-206, Laws of Florida. Taking effect on October 1, 2002, Section 11 adds Section 626.207 which provides:

(1) The department shall adopt rules establishing specific waiting periods for applicants to become eligible for licensure following denial, suspension, or revocation pursuant to s. 626.611, s. 626.621, s. 626.8437, s. 626.844, s. 626.935, s. 626.9917, s. 634.181, s. 634.191, s. 634.320, s. 634.321, s. 634.422, s. 634.423, s. 642.041, or s. 642.043. The purpose of the waiting periods is to provide sufficient time to demonstrate reformation of character and rehabilitation. The waiting periods shall vary based on the type of conduct and the length of time since the conduct occurred and shall also be based on the probability that the propensity to commit illegal conduct has been overcome. The waiting periods may be adjusted based on aggravating and mitigating factors established by rule and consistent with this purpose.

8. On October 17, 2002, Respondent adopted Rule 4-211.042, Florida Administrative Code. (All references to Rules are to the Florida Administrative Code.) Rule 4-211.042(8) provides:

(8) Required Waiting Periods for a Single Felony Crime. The Department finds it necessary for an applicant whose law enforcement record includes a single felony crime to wait the time period specified below (subject to the mitigating factors set forth elsewhere in this rule) before licensure. All waiting periods run from the trigger date.

(a) Class A Crime. The applicant will not be granted licensure until 15 years have passed since the trigger date.

(b) Class B Crime. The applicant will not be granted licensure until 7 years have passed since the trigger date.

(c) Class C Crime. The applicant will not be granted licensure until 5 years have passed since the trigger date.

(d) The Department shall not impose any waiting period pursuant to this rule where the only crime in an applicant's law enforcement record is a single felony crime that results from the applicant's passing of a worthless check, or obtaining property in return for a worthless check, and the amount of the check or checks involved in the single felony crime is \$500 or less. However, this subparagraph shall not apply where a felony crime resulting from the applicant's passing of a worthless check, or obtaining property in return for a worthless check is not the only crime in an applicant's law enforcement record.

9. Rule 4-211.042(21) provides that Class A crimes include 64 felonies ranging from treason, murder, and air piracy, to unlawful possession of a postal key and defrauding an innkeeper. Rule 4-211.042(21)(2) includes fraud. Rule 4-211.041(11)

provides that the "trigger date" is the date on which the applicant was found guilty, pleaded guilty, or pleaded no contest. As is apparent from the Notice of Denial, described below, the trigger date is the earliest of these three events.

10. Section 626.641(2) provides:

No person or appointee under any license or appointment revoked by the department or office, nor any person whose eligibility to hold same has been revoked by the department or office, shall have the right to apply for another license or appointment under this code within 2 years from the effective date of such revocation or, if judicial review of such revocation is sought, within 2 years from the date of final court order or decree affirming the revocation. The department or office shall not, however, grant a new license or appointment or reinstate eligibility to hold such license or appointment if it finds that the circumstance or circumstances for which the eligibility was revoked or for which the previous license or appointment was revoked still exist or are likely to recur; if an individual's license as agent or customer representative or eligibility to hold same has been revoked upon the ground specified in s. 626.611(12), the department or office shall refuse to grant or issue any new license or appointment so applied for.

11. On January 10, 2003, Petitioner filed an application for licensure as a general lines agent. On February 13, 2003, Respondent issued a Notice of Denial. The Notice of Denial explains that Section 626.611(14) provides that Respondent shall deny an application for a license if it finds that the applicant has been found guilty of, or pleaded guilty or no contest to, a

felony involving moral turpitude, without regard to adjudication, and that Section 626.621(8) provides that Respondent may deny an application for a license if it finds that the applicant has been found guilty of, or pleaded guilty or no contest to, a felony. The Notice of Denial cites Rule 4-211.042(8) with respect to the waiting time before licensure due to a record of a single felony. The Notice of Denial concludes that Respondent is subject to a waiting period of 14 years from when he was found guilty, pleaded guilty, or pleaded no contest.

12. Petitioner is substantially affected by Rule 4-211.042(8)(a). The effect of this rule is to preclude Petitioner's application from consideration for 14 years from the trigger date. Given the resolution of this case, it is unnecessary to determine if Petitioner has standing to contest the remaining subsections of Rule 4-211.042(8).

CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction over the subject matter, pursuant to Section 120.56(3). Petitioner has standing, pursuant to Section 120.56(1)(a) and (3)(a).

14. Pursuant to Section 120.56(3)(a), Petitioner has the burden of proving that Rule 4-211.042(8) is an invalid exercise of delegated legislative authority.

15. Petitioner argues that the 15-year waiting period in Rule 4-211.042(8)(a) contravenes the two-year waiting period in Section 626.641(2). However, there is no conflict between these provisions. The statute deprives a licensee whose license has been revoked of the right to reapply for two years. The rule does nothing to change this statutory prohibition.

16. Petitioner finds a negative implication in the statute that limits to two years the period during which the revoked-licensee may not reapply. However, such a negative implication results in a conflict between Section 626.641(2) and the newer Section 626.207(1). A reasonable interpretation that avoids any conflict between the older and newer statutes limits the older statute to its two-year term and finds no implication that, after two years, previously revoked applicants may file applications. By this interpretation, Section 626.207(1) merely builds upon the two-year waiting period in the older statute by specifying waiting periods of five, seven, and fifteen years, depending on the type of felony.

17. Petitioner also relies on language in the second sentence of Section 626.641(2) that prohibits Respondent from issuing a license "if it finds that the circumstance or circumstances for which the eligibility was revoked or for which the previous license or appointment was revoked still exist or are likely to recur." This provision imposes an additional

restriction upon Respondent that, when any statutory waiting period has expired, Respondent may not issue a new license if the factual basis for revocation still exists or the acts or omissions on which revocation was based are likely to recur. This provision applies even after the expiration of the longer waiting periods authorized by Section 626.207(1) and adopted by Rule 4-211.042. The statute and rule establish these periods as the minimum terms required for the applicant to demonstrate his or her suitability for licensure and do not assure the applicant that his or her applicant will be granted after the waiting period has run.

18. Respondent contends that Petitioner has not adequately raised the issue of whether Rule 4-211.042(8) is arbitrary or capricious. The petition mentions this issue, but does not provide any explanation of how the rule is arbitrary or capricious. In his proposed final order, Petitioner argues only that the rule is arbitrary and capricious due to the perceived conflict between the rule's 15-year waiting period and the two-year waiting period in Section 626.641(2). However, for the reasons set forth above, no such conflict exists, so Rule 4-211.042(8) is not arbitrary or capricious for the reason advanced by Petitioner.

ORDER

It is

ORDERED that the Petition for a Determination of the Invalidity of an Existing Rule is dismissed.

DONE AND ORDERED this 7th day of November, 2003, in Tallahassee, Leon County, Florida.

S

ROBERT E. MEALE
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of November, 2003.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

This decision is final unless an adversely affected party:

- a) brings a civil action within 30 days in the appropriate federal district court pursuant to Section 1415(i)(2)(A) of the Individuals with Disabilities Education Act (IDEA); [Federal court relief is not available under IDEA for students whose only exceptionality is "gifted"] or
- b) brings a civil action within 30 days in the appropriate state circuit court pursuant to Section 1415(i)(2)(A) of the IDEA and Section 1003.57(5), Florida Statutes; or
- c) files an appeal within 30 days in the appropriate state district court of appeal pursuant to Sections 1003.57(5) and 120.68, Florida Statutes.