

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

KEITH LUTHER FERNANDEZ,)
)
 Petitioner,)
)
 vs.) Case No. 03-4495
)
 DEPARTMENT OF FINANCIAL)
 SERVICES,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the administrative hearing of this case on behalf of the Division of Administrative Hearings (DOAH), on May 27, 2004, in Orlando, Florida.

APPEARANCES

For Petitioner: Keith Luther Fernandez, pro se
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Winter Springs, Florida 32708

For Respondent: Dana M. Wiehle, Esquire
Department of Financial Services
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STATEMENT OF THE ISSUES

The issue for determination is whether Respondent should deny Petitioner's application to be licensed as a resident

insurance adjuster pursuant to Florida Administrative Code Rule 69B-211.042, because Petitioner is on probation and is participating in a pre-trial intervention program; and, if so, whether Petitioner is entitled to a default license because Respondent did not grant or deny the license within 90 days pursuant to Subsection 120.60(1), Florida Statutes (2002).

PRELIMINARY STATEMENT

On April 3, 2003, Petitioner applied to be licensed as a resident insurance adjuster. By letter dated September 25, 2003, Respondent notified Petitioner that Respondent proposed to deny the license application. Petitioner timely requested an administrative hearing, and Respondent referred the matter to DOAH to conduct the hearing.

On February 3, 2004, Petitioner challenged Florida Administrative Code Rule 68B-211.042(6), (8), and (14) pursuant to Section 120.56, Florida Statutes (2003). Pursuant to the parties' agreement, the ALJ consolidated the rule challenge with this proceeding. The ALJ addresses the issues raised in the rule challenge in a separate Final Order issued on the same date as the date of this Recommended Order.

At the hearing, Petitioner presented the testimony of eight witnesses, including Petitioner, and submitted seven exhibits for admission into evidence. Respondent presented the testimony of two witnesses and submitted 11 exhibits for admission into

evidence. The identity of the witnesses and exhibits and the rulings regarding each are reported in the Transcript of the hearing filed with DOAH on June 24, 2004.

Pursuant to Petitioner's unopposed request to extend the deadline for filing proposed recommended orders (PROs), the parties' respective PROs were to be filed with DOAH no later than July 16, 2004. Each party timely filed a PRO on July 16, 2004.

FINDINGS OF FACT

1. Respondent is the state agency responsible for licensing insurance agents in the State of Florida, pursuant to Chapter 626, Florida Statutes (2002). On April 3, 2003, Petitioner applied for a license as a resident company employee property and casualty adjuster (resident adjuster license). Petitioner truthfully answered all questions on the application, including those questions pertaining to Petitioner's criminal history and plea of guilty to a felony charge in Georgia.

2. On September 25, 2003, Respondent issued a Notice of Denial of Petitioner's license application. Respondent based the denial on the grounds that Petitioner pled guilty to a crime of moral turpitude, within the meaning of Subsection 626.611(14), Florida Statutes (2002), for which denial of his application is mandatory; that Petitioner pled guilty to a crime not involving moral turpitude, within the meaning of Subsection

626.621(8), Florida Statutes (2002), for which denial of his application is discretionary; that Florida Administrative Code Rule 69B-211.042(6) and (14) prohibits Respondent from granting the application while Petitioner is on probation or in a pre-trial intervention program; and that Florida Administrative Code Rule 69B-211.042(8) requires Petitioner to wait five years after the plea dated May 14, 2002, before applying for a license.

3. On a date not disclosed in the record, Respondent issued a Second Amended Notice of Denial (the Amended Notice of Denial). The record does not disclose a first amended notice of denial. The Amended Notice of Denial deletes the ground that Petitioner pled guilty to a crime of moral turpitude, but retains the other grounds for denial stated in the Notice of Denial issued on September 25, 2003.

4. On May 14, 2002, Petitioner pled guilty to a single felony charge of possession of cocaine. A Georgia court sentenced Petitioner under Georgia's First Offender Act. If Petitioner successfully completes probation, Georgia will dismiss the felony charge. If Petitioner does not successfully complete probation, the Georgia court may revoke Petitioner's probation, adjudicate Petitioner guilty as charged, and sentence Petitioner to the maximum sentence authorized under Georgia law.

5. When Georgia authorities arrested Petitioner for possession of cocaine on November 4, 2001, Petitioner held a

Florida nonresident company all-lines adjuster license pursuant to license number A082918 (a nonresident adjuster license).

Petitioner voluntarily cancelled the nonresident adjuster license on October 21, 2002.

6. On January 22, 2003, Respondent sent a letter to Petitioner inquiring into the Georgia arrest in accordance with Subsections 626.611(14), 626.621(8), and 626.631, Florida Statutes (2002). In response to the letter from Respondent, Petitioner filed the application for a resident adjuster license that is at issue in this proceeding. Petitioner attached a letter explaining the circumstances of the criminal proceeding in Georgia and three letters of recommendation.

7. The second page of the application that Petitioner submitted notifies Petitioner that Respondent will not consider the application while Petitioner is under probation or in a pre-trial intervention program. In relevant part, the second page of the application provides:

NOTE: IF YOU ARE CURRENTLY ON PROBATION OR PARTICIPATING IN A PRE-TRIAL INTERVENTION PROGRAM, YOU MAY WANT TO WAIT TO FILE YOUR APPLICATION WITH THE DEPARTMENT UNTIL YOUR PROBATION OR PRE-TRIAL PROGRAM HAS TERMINATED. (For other than minor traffic violations, the rules of the Department prohibit the approval of licensure for an individual who is currently serving a probationary term or participating in a pre-trial intervention program. . . .) (emphasis not supplied)

8. After receiving the application for a resident adjuster license, Respondent issued a letter dated April 7, 2003, stating Respondent's intent to deny the application. The letter did not state that Respondent intended to deny the application on the ground that Petitioner violated Subsection 626.621(8), Florida Statutes (2002), by pleading guilty to a crime that does not involve moral turpitude. In relevant part, the letter stated:

[W]e are in receipt of the certified documents, however, a review of the documents indicate[s] that you are still on probation. The rules of the Department prohibit the approval of licensure for an individual who is currently serving a probationary term. Please write and let us know if we need to close or withdraw your application.

9. The position stated by Respondent in the letter dated April 7, 2003, is substantially similar to that taken by Respondent during the hearing and in its PRO. Respondent does not assert that Respondent should deny the application on the ground that Petitioner pled guilty to a crime for which Subsection 626.621(8), Florida Statutes (2002), gives Respondent discretionary authority to deny the application.

10. Respondent's position is consistent with the preponderance of evidence. The preponderance of evidence shows that Petitioner is rehabilitated and has no propensity to commit the crime for which he is under probation in Georgia. Rather, Respondent relies upon a rule that Respondent interprets as

imposing specific waiting periods following the plea agreement in Georgia before Petitioner may apply for a resident adjuster license in Florida.

11. Respondent proposes to deny Petitioner's application for a resident adjuster license on the basis of Respondent's interpretation of Florida Administrative Code Rule 69B-211.042. Respondent interprets Florida Administrative Code Rule 69B-211.042(6) as prohibiting Respondent from considering the application of any applicant who is on probation until the applicant has satisfactorily completed the probation. Respondent interprets Florida Administrative Code Rule 69B-211.042(8) as requiring Petitioner to wait five years after the plea in Georgia before Petitioner is eligible for licensure in Florida. Respondent interprets Florida Administrative Code Rule 69B-211.042(14)(b) as prohibiting Respondent from granting a license application to Petitioner while Petitioner is in a pre-trial intervention program.

12. The enabling legislation for Florida Administrative Code Rule 69B-211.042 is Subsection 626.207(1), Florida Statutes (2002). Subsection 626.207(1), Florida Statutes (2002), authorizes Respondent to adopt rules establishing specific waiting periods after Respondent denies, suspends, or revokes Petitioner's license pursuant to specifically enumerated Florida

statutes. In relevant part, Subsection 626.207(1), Florida Statutes (2002), provides that Respondent:

. . . shall adopt rules establishing specific waiting periods for applicants to become eligible for licensure following denial, suspension, or revocation. . . .
(emphasis supplied)

13. Subsection 626.207(1), Florida Statutes (2002), prescribes a statutory prerequisite to the imposition of any waiting period pursuant to Florida Administrative Code Rule 69B-211.042. The statutory prerequisite is that Respondent must first deny, suspend, or revoke an existing license based on statutory provisions enumerated in the enabling legislation; enumerated provisions that are independent of any waiting periods. Thereafter, Respondent may impose relevant waiting periods to any application that follows the denial, suspension, or revocation of the existing license.

14. Respondent proposes to impose a waiting period against Petitioner without first satisfying the statutory prerequisite of a denial, suspension, or revocation of an existing license within the meaning of Subsection 626.207(1), Florida Statutes (2002). The waiting period proposed by Respondent does not follow a denial, suspension, or revocation of an existing license. Rather, the proposed waiting period follows a plea entered by Petitioner in Georgia on May 14, 2002.

15. The application for a resident adjuster license that is at issue in this proceeding indicates that no administrative action was ever taken against Petitioner's nonresident adjuster license, and Respondent stipulated that Petitioner answered all questions on the application truthfully. The Florida licensure file that Respondent maintains shows no administrative action against Petitioner's nonresident adjuster license.

16. Respondent proposes to apply a waiting period in a manner that does not follow denial, suspension, or revocation of either the previous nonresident adjuster license or the resident adjuster license that Petitioner seeks in this proceeding. In effect, Respondent's proposed agency action would effectively amend Subsection 626.207(1), Florida Statutes (2002), by denying Petitioner's application for a resident adjuster license on the basis of a waiting period, rather than on the basis of one of the statutory provisions enumerated in the enabling legislation. Such action would have the effect of enlarging or modifying the specific provisions of Subsection 626.207(1), Florida Statutes (2002), that require the imposition of a waiting period to follow Respondent's denial, suspension, or revocation of an existing license.

17. Respondent orally advised Petitioner that Respondent was authorized by rule to approve Petitioner's application if Petitioner were successful in terminating the Georgia probation

early. However, Subsection 120.60(1), Florida Statutes (2002), required Respondent to approve or deny the application no later than July 2, 2003. Petitioner sought additional time to petition the Georgia court to terminate his probation early.

18. On June 27, 2003, Petitioner signed a "Waiver of Deemer Date" (Waiver) that suspended for 60 days the requirement in Subsection 120.60(1), Florida Statutes (2002), for Respondent to approve or deny the license application within 90 days after receipt of the application. In relevant part, the Waiver stated:

I hereby voluntarily and knowingly waive the time requirement regarding final action on my license application as specified in Section 120.60(1), Florida Statutes. Specifically, I waive the provision that requires the Department of Financial Services to either approve or deny my pending application for licensure as a company employee property & casualty adjuster within 90 days after receipt of the completed application. This waiver is effective for 60 days. (emphasis supplied)

19. The 60 days in which the Waiver was effective, expired on August 31, 2003. However, approximately six days remained in the 90-day statutory period when Petitioner signed the Waiver on June 27, 2003. The 90-day statutory period expired six days after August 31, 2003, on or about September 6, 2003.

20. Petitioner attended a court hearing in Georgia sometime in August 2003, in an attempt to persuade the Georgia

court to terminate Petitioner's probation. Petitioner was unsuccessful and remained on probation at the time of the administrative hearing in this proceeding.

21. Petitioner did not advise Respondent of the outcome of the Georgia hearing until September 4, 2003, when Respondent inquired of the status of Petitioner's application. On September 4, 2003, Respondent had actual notice from Petitioner that Petitioner had been unsuccessful in his attempt at early termination of his probation. Respondent did not issue its Notice of Intent to Deny the license until September 25, 2003.

22. Respondent's letter dated April 7, 2003, provided Petitioner with written notice of Respondent's intent to deny the license application unless Petitioner was successful in obtaining early termination of his probation. Oral communications from Respondent's authorized representative also indicated that Respondent intended to deny the license application if Respondent were unable to license Petitioner temporarily. The author of a cover letter issued with the Waiver on June 26, 2003, stated, in relevant part, that the author did not have an answer to the issue "we discussed" regarding a temporary license. The author indicated that she would contact Petitioner as soon as she had an answer. The record discloses no answer prior to the Notice of Intent to Deny dated September 25, 2003.

CONCLUSIONS OF LAW

23. DOAH has jurisdiction over the parties and subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2002). DOAH provided the parties with adequate notice of the administrative hearing.

24. Petitioner bears the ultimate burden of proving entitlement to a license. Florida Department of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981). Petitioner must show by a preponderance of the evidence that he satisfied relevant statutory criteria for the license or that he is entitled to a license because Respondent failed to approve or deny his application within 90 days of the application plus the 60 days authorized in the Waiver.

25. Petitioner did not show that he is entitled to a license on the ground that Respondent failed to issue the license within the 90-day statutory period prescribed in Subsection 120.60(1), Florida Statutes (2002). The letter dated April 7, 2003, was issued well before the extended deadline of September 6, 2003, and provided adequate notice to Petitioner that Respondent intended to deny Petitioner's application for a resident adjuster license if Petitioner were unable to terminate his probation early or if Respondent were unable to license Petitioner temporarily. See Sumner v. Department of Professional Regulation, 555 So. 2d 919, 921 (Fla. 1st DCA

1990)(oral notice within 90 days that an agency has denied an application is sufficient to avoid a deemed license by operation of law). See also Department of Transportation v. Calusa Trace Development, Corp., 571 So. 2d 543, 546 (Fla. 2d DCA 1990)(oral notice of intent to deny license application that leaves open possibility of granting the application upon satisfaction of certain criteria does not alter notice of intent to deny application under existing circumstances).

26. Respondent should not deny the license application on the ground that Petitioner committed a crime of moral turpitude within the meaning of Subsection 626.611(14), Florida Statutes (2002). Possession of a controlled substance, without more, is not a crime of moral turpitude. Miliken v. Department of Professional Regulation, 709 So. 2d 595, 597 (Fla. 5th DCA 1998); Pearl v. Florida Board of Real Estate, 394 So. 2d 189, 192 (Fla. 3d DCA 1981).

27. Petitioner showed that he is eligible to be licensed as a resident adjuster pursuant to Subsection 626.621(8), Florida Statutes (2002). The authority for Respondent to deny a license application pursuant to Subsection 626.621(8), Florida Statutes (2002), is discretionary rather than mandatory. The preponderance of evidence shows that Petitioner is rehabilitated and has no propensity to commit the crime for which he is under probation in Georgia.

28. Florida Administrative Code Rule 69B-211.042(6), (8), and (14) is inapposite to the facts in this case. Subsection 626.207(1), Florida Statutes (2002), authorizes Respondent to apply specific waiting periods "following denial, suspension, or revocation" of a license pursuant to enumerated Florida statutory provisions. Respondent proposes to impose a waiting period following the plea in Georgia rather than following a denial, suspension, or revocation of a license under Florida law.

29. If Respondent were to deny Petitioner's application for a resident adjuster license on the basis of statutory provisions enumerated in the enabling legislation, Subsection 621.207(1), Florida Statutes (2002), would authorize Respondent to apply the waiting periods prescribed in Florida Administrative Rule 69B-211.042(6), (8), and (14) to prevent Petitioner from applying for a license before the expiration of the applicable waiting period. Similarly, if Respondent were to have suspended or revoked Petitioner's nonresident adjuster license, Respondent would then be authorized by the enabling legislation to apply the relevant waiting period to prevent Petitioner from applying for another nonresident adjuster license; or arguably to prevent Petitioner from applying for the resident adjuster license at issue in this proceeding. In order to preserve the validity of Florida Administrative Rule 69B-211.042(6), (8), and (14), the rule must be construed

in a manner that does not enlarge, modify, or contravene the specific provisions of Subsection 621.207(1), Florida Statutes (2002), that require the imposition of waiting periods to follow administrative action by Respondent in the form of a denial, suspension, or revocation of an existing license.

30. Respondent argues in its PRO that its interpretation of Florida Administrative Code Rule 69B-211.042(6), (8), and (14) is reasonably related to the purpose of Subsection 621.207(1), Florida Statutes (2002), and to the policy of deference to courts exercising jurisdiction over persons under probation or in pre-trial intervention programs. That may be. However, no agency, including Respondent, has authority to adopt a rule solely on the ground that the rule is reasonably related to the purpose of the enabling legislation. Florida Administrative Code Rule 69B-211.042(6), (8), and (14) must be construed in a manner that implements the specific powers and duties granted in Subsection 621.207(1), Florida Statutes (2002). § 120.52(8), Fla. Stat. (2003).

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that Respondent enter a Final Order granting Petitioner's application for a resident adjuster license.

DONE AND ENTERED this 13th day of August, 2004, in
Tallahassee, Leon County, Florida.



DANIEL MANRY
Administrative Law Judge
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Filed with the Clerk of the
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this 13th day of August, 2004.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.