

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

KEITH LUTHER FERNANDEZ,)
)
 Petitioner,)
)
 vs.) Case No. 04-0625RX
)
 DEPARTMENT OF FINANCIAL)
 SERVICES,)
)
 Respondent.)
 _____)

FINAL ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the administrative hearing in this proceeding 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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605 Casa Park Court M
Winter Springs, Florida 32708

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

The issue is whether Florida Administrative Code Rule 69B-211.042(6), (8), and (14) is an invalid exercise of delegated legislative authority within the meaning of Subsections 120.52(8)(b), (c), and (e), Florida Statutes (2002).

PRELIMINARY STATEMENT

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). The ALJ consolidated the rule challenge with DOAH Case No. 03-4495, in which Petitioner challenges the proposed denial of his application to be licensed in Florida as a resident insurance adjuster. The ALJ addresses the issues raised in DOAH Case No. 03-4495 in a separate Recommended Order issued on the same date as this Final Order (the 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 one-volume Transcript of the hearing filed with DOAH on June 24, 2004.

Pursuant to Petitioner's unopposed request to extend the deadline for filing proposed final orders (PFOs), the parties'

respective PFOs were to be filed with DOAH no later than July 16, 2004. Each party timely filed a PFO 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 guilty plea 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, in relevant part, on the grounds that Florida Administrative Code Rule 69B-211.042(6) and (14) prohibit 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, in relevant part, deletes

grounds for the proposed denial that are not relevant to this Final Order.

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. Petitioner challenges the following provisions in Florida Administrative Code Rule 69B-211.042:

(6) Probation. The Department shall not grant licensure to any person who at the time of application or at any time during the pendency of the application is serving a probationary term on any felony crime, or any misdemeanor crime, except for those crimes specified in Chapter 316, F.S., which are not punishable by imprisonment. The Department shall not substantively consider an application until the applicant has successfully completed his or her probationary term.

* * *

(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.

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

* * *

(14) Pre-Trial Intervention: Specific Policy.

(b) The Department will not grant licensure to any person who at time of application is participating in a pre-trial intervention program. The Department finds it necessary to the public welfare to wait until the pre-trial intervention is successfully completed before licensure will be considered.

6. Petitioner challenges the foregoing provisions in Florida Administrative Code Rule 69B-211.042 on the grounds that each provision violates Subsections 120.52(8)(b), (c), and (e), Florida Statutes (2002). Petitioner alleges that each challenged provision of the rule, respectively, exceeds the grant of rulemaking authority; enlarges, modifies, or contravenes the specific provisions of law implemented; or is arbitrary or capricious within the meaning of Subsections 120.52(8)(b), (c), and (e), Florida Statutes (2002).

7. The challenged provisions of the rule may reasonably be construed in a manner that preserves the validity of the rule. The express terms of the rule do not mandate an interpretation that violates Subsections 120.52(8)(b), (c), and (e), Florida Statutes (2002). However, Respondent interprets the challenged

provisions of the rule in a manner that, if accepted, would violate Subsections 120.52(8)(b) and (c), Florida Statutes (2002).

8. 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 that Respondent must apply 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)

9. 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 Respondent's denial, suspension, or revocation of a license.

10. The express terms of Florida Administrative Code Rule 69B-211.042 do not mandate the imposition of waiting periods without first satisfying the statutory prerequisite prescribed in the enabling legislation. The challenged provisions of the rule may reasonably be construed as authorizing the imposition of waiting periods following Respondent's denial, suspension, or revocation of an existing license.

11. Respondent interprets the challenged provisions of the rule as authorizing Respondent to impose waiting periods without satisfying the statutory prerequisite in the enabling legislation. The waiting period that Respondent proposes to impose against Petitioner does not follow Respondent's denial, suspension, or revocation of a license within the meaning of Subsection 626.207(1), Florida Statutes (2002).

12. 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.

13. Respondent did not deny an application for renewal of the nonresident adjuster license. Nor did Respondent suspend or revoke Petitioner's nonresident adjuster license.

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

15. Respondent proposes to impose a waiting period against Petitioner that that does not follow denial, suspension, or revocation of either Petitioner's previous nonresident adjuster license or the resident adjuster license that Petitioner seeks in this proceeding. The second page of the application that Petitioner submitted states 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)

16. 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. 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.

17. The express terms of Subsection 626.207(1), Florida Statutes (2002), require an interpretation of Florida Administrative Code Rule 69B-211.042 that limits the imposition of relevant waiting periods to periods that follow Respondent's denial, suspension, or revocation of a license. The waiting periods begin on "trigger dates" defined in Florida Administrative Code Rule 69B-211.041(11). The express terms of the enabling legislation do not authorize the imposition of waiting periods unless the waiting periods follow a denial, suspension, or revocation of a license by Respondent in accordance with Florida law.

18. If Respondent were to deny Petitioner's application for a resident adjuster license on the grounds that Petitioner violated one of the statutes enumerated in the enabling legislation, Subsection 626.207(1), Florida Statutes (2002), would authorize Respondent to apply the challenged provisions of Florida Administrative Code Rule 69B-211.042 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, Subsection 626.207(1), Florida Statutes (2002), would have authorized Respondent 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.

CONCLUSIONS OF LAW

19. DOAH has jurisdiction over the parties and subject matter of this proceeding. §§ 120.569 and 120.56, Fla. Stat. (2002). DOAH provided the parties with adequate notice of the administrative hearing.

20. Petitioner bears the ultimate burden of proving the invalidity of the challenged provisions in Florida Administrative Code Rule 69B-211.042. Florida Board of Medicine, et. al v. Florida Academy of Cosmetic Surgery, Inc.,

et al.; 808 So. 2d 243 (Fla. 1st DCA 2002). Petitioner must show by a preponderance of the evidence that the challenged provisions of the rule are invalid as promulgated.

21. Petitioner did not show that the challenged provisions of Florida Administrative Code Rule 69B-211.042 are invalid as promulgated. The express terms of the rule do not mandate an interpretation that invalidates the rule.

22. Petitioner showed that the challenged provisions of Florida Administrative Code Rule 69B-211.042 are invalid as applied by Respondent. The enabling legislation in Subsection 626.207(1), Florida Statutes (2002), authorizes Respondent to promulgate rules establishing waiting periods that follow Respondent's denial, suspension, or revocation of a license based on violations of enumerated statutes. Nothing in the express terms of the enabling legislation authorizes Respondent to impose waiting periods unless the waiting periods follow the requisite denial, suspension, or revocation of a license under Florida law. Respondent's proposed interpretation of its rule would effectively amend the specific terms of the enabling legislation to authorize Respondent to impose waiting periods that do not follow the requisite denial, suspension, or revocation of an existing license.

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

ORDER

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

ORDERED that the challenged provisions in Florida Administrative Code Rule 69B-211.042 are valid as promulgated.

DONE AND ORDERED 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
Division of Administrative Hearings
this 13th day of August, 2004.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of appeal with the Clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.