

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TANYA C. LOLLIE,)
)
 Petitioner,)
)
 vs.) Case No. 04-1982
)
 DEPARTMENT OF FINANCIAL)
 SERVICES,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

In accordance with notice, this cause came on for final hearing, before P. Michael Ruff, duly-designated Administrative Law Judge of the Division of Administrative Hearings, on July 27, 2004, in Brooksville, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Tanya C. Lollie, pro se
4732 Elwood Road
Spring Hill, Florida 34608

Elizabeth Penny, Certified Legal Intern
Ladasiah Jackson, Esquire
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399-0333

STATEMENT OF THE ISSUE

The issue to be determined in this case is whether Petitioner's application for licensure as a Resident Customer Representative insurance agent should be granted.

PRELIMINARY STATEMENT

The Petitioner, Tanya C. Lollie, submitted an application for licensure as a customer representative to the Department of Financial Services (Department) on October 22, 2003. The Department reviewed the application and advised the Petitioner on April 5, 2004, that her application was denied. The denial occurred because, in essence, the Petitioner had pled nolo contendere to the charges of forgery of a check and of uttering a forged check, on March 16, 1995. Each charge is a felony, related to the same factual transaction.

The Petitioner filed a request for hearing concerning the denial of her license application in accordance with Section 120.57(1), Florida Statutes. The case was transferred to the Division of Administrative Hearings and assigned to the undersigned administrative law judge.

The cause came on for hearing as noticed, at which the Petitioner testified on her own behalf and presented the testimony of Donald Whiting and Patricia A. Phillips. Petitioner's Exhibit 1 was admitted into evidence. The Respondent presented the testimony of Diana Fink and

Matthew Coxe. The Respondent's Exhibits 1-12 were admitted into evidence. Upon conclusion of the proceeding a transcript thereof was prepared. After two agreed-upon extensions were granted, the Proposed Recommended Orders were filed by the parties on or about October 7, 2004. Those Proposed Recommended Orders have been considered in the rendition of this Recommended Order.

FINDINGS OF FACT

1. The Petitioner is a receptionist for an insurance agency and is seeking licensure as a Florida Resident Customer Representative from the Department of Financial Services. The Department is an agency of the State of Florida responsible for the licensing of insurance agents and customer representatives in the State of Florida, in accordance with the provisions of Chapter 626, Florida Statutes.

2. On October 22, 2003, the Petitioner filed a license application (electronically) with the Department seeking licensure as a Resident Customer Representative insurance agent.

3. On her application for licensure, the Petitioner answered the following question in the negative:

Have you ever been convicted, found guilty, or pled guilty or nolo contendere (no contest) to a crime punishable by imprisonment of one year or more under the laws of any municipality, county, state, territory or country, whether or not

adjudication was withheld or a judgment of conviction was entered?

4. When the Petitioner signed her application for licensure she signed an "Applicant Affirmation Statement" and mailed it to the Department. In that statement, she swore that all the answers on the questions on the application were true and correct to the best of her knowledge and belief. She knew of the requirement to be truthful and honest on the application and that had been stressed to her by her instructor for the insurance pre-licensing course which she attended.

5. On March 16, 1995, the Petitioner entered a plea of nolo contendere to one count of forgery and one count of uttering a forged instrument, both felonies. The related arrest had occurred on November 10, 1994. The Petitioner was sentenced to three years probation, required to make restitution, pay court fines and costs and to perform fifty hours of community service. She was to write a letter of apology to the victim and to have no contact with the victim. Adjudication of guilt was withheld. She performed all of the requirements of her sentence.

6. She was excused by the court from providing the fifty hours of community service because she was pregnant at the time. The Petitioner acknowledges that she answered the question incorrectly and had made a mistake, because she felt the phrase

"punishable by one year or more" meant that she had been imprisoned for one year or more, which she had not. She testified that she intentionally answered the question in the negative because she was not aware that her felony crimes were potentially punishable by one year or more.

7. She signed the 1995 plea agreement, which indicated that it was then her understanding that the offenses could carry a maximum sentence of ten years imprisonment. At the time she answered the relevant question on her application, however, she did not have a present understanding or recollection that that would be the case. The point is, she answered in good faith. She did not intentionally answer the question untruthfully but rather due to a mistaken impression, after some nine or so years had elapsed, concerning the nature and effect of the punishment or potential punishment her crimes carried.

8. The Petitioner has not had a criminal history since her 1995 plea, with the exception of a June 7, 2000 arrest in Hernando County, Florida, after her return to Florida from Tennessee, for purported violation of probation with regard to the 1995 felony case. The Petitioner's testimony demonstrates in a credible way that indeed she had fulfilled the requirements of her probation. The judge had released her from her community service requirement and the reason for the arrest, because she was believed to have failed to pay relevant costs and

restitution, apparently was a mistake. She established that at or around the time of her moving to Tennessee she had paid the relevant monetary sums required with two cashiers checks. The court terminated her probation. It is found that this arrest was based upon a mistake.

9. The Petitioner's supervisor corroborated the testimony of the Petitioner and established that the circumstances and mental impression leading to the Petitioner's negative answer show no intent to be untruthful or to defraud. The Petitioner and her witnesses (her supervisors) established that she has been fit and trustworthy in her work with the insurance agency. Petitioner has routinely handled sums of money for the agency and for insurance clients, always with proper accounting and never with any funds being missing or mis-appropriated.

10. The Petitioner's employment provides her family's only livelihood for her and her child. Her employment is dependent on her being granted licensure as a Customer Representative. Denial of the license application will create a hardship for her. She was nineteen years of age at the time of the arrest and plea, made full restitution and complied with the terms of her probation.

CONCLUSIONS OF LAW

11. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2003).

12. The Petitioner bears the ultimate burden of proving entitlement to the license. Florida Department of Transportation vs. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981); Pershing Industries, Inc. v. Dept. of Banking and Finance, 591 So. 2d 991 (Fla. 1st DCA 1991). The Petitioner must demonstrate by preponderant evidence that she meets all of the relevant statutory criteria to justify licensure. Department of Banking and finance v. Osborne Stern and Company, 670 So. 2d 932, 934 (Fla. 1996).

13. The Department alleged that the Petitioner violated various provisions of the Florida Insurance Code by failing to disclose her criminal history on the licensure application, as set forth in the notice of denial. The pertinent statutes and rules upon which the Department relies in denying the application for licensure are set forth as follows:

Section 626.611, Florida Statutes:

The department . . . shall deny an application for . . . the license . . . of any applicant . . . if it finds that as to the applicant . . . any one or more of the following applicable grounds exist:

(1) Lack of one or more qualifications for the license or appointment as specified in this code.

(2) Material misstatement, misrepresentation, or fraud in obtaining the license or appointment or in attempting to obtain the license or appointment.

* * *

(7) Demonstrated lack of fitness or trustworthiness to engage in the business of insurance.

* * *

(14) Having been found guilty of or having pleaded guilty or nolo contendere to a felony or a crime punishable by imprisonment of 1 year or more under the law of the United States of America or of any state thereof or under the law of any other country which involves moral turpitude, without regard to whether a judgment of conviction has been entered by the court having jurisdiction of such cases.

Section 626.7351, Florida Statutes:

The Department shall not grant or issue a license as customer representative to any individual found by it to be untrustworthy or incompetent

Florida Administrative Code Rule 69B-211.042(8):

Required Waiting Period 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 in this rule) before licensure. All waiting periods run from the trigger date.

Florida Administrative Code Rule 69B-211.042(4)(b)1:

Effect of Failure to Fully Disclose Law Enforcement Record on Application. If an applicant fails to fully and properly disclose the existence of law enforcement records, as required by the application, the application will be denied and a waiting period will be imposed before the applicant may reapply for any license.

Section 626.621, Florida Statutes states:

The department . . . may, in its discretion, deny an application for . . . the license . . . of any applicant . . . if it finds that as to the applicant . . . any one or more of the following applicable grounds exist under circumstances for which such denial . . . is not mandatory under s. 626.611:

* * *

(8) Having been found guilty of or having pleaded guilty or nolo contendere to a felony or a crime punishable by imprisonment of 1 year or more under the law of the United States of America or of any state thereof or under the law of any other country, without regard to whether a judgment of conviction has been entered by the court having jurisdiction of such cases.

14. Florida Administrative Code Rule 69B-211.042, is the rule by which the Department interprets Sections 626.611 and 626.621, Florida Statutes. That rule provides in pertinent part as follows:

Required Waiting Periods After Commission of Single Felony Crime. The Department construes sections 626.611 and 626.621, Florida Statutes, to require that an

applicant whose law enforcement record includes a single felony wait for a period of time before becoming eligible for licensure in order to assure that the criminal tendency or weakness has been overcome. 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, so that licensure is granted without undue risk to the public good. 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. (23) Class "A" crimes include all those listed in this subsection, and all are of equal weight notwithstanding from which subparagraph drawn. The department finds that each felony crime listed in this subsection [Class A crimes] is a crime of moral turpitude.

* * *

(n) Forgery.

* * *

(qq) Uttering of a forged check.

Florida Administrative Code Rule 69B-211.041(11) states in pertinent part as follows:

'Trigger Date' is the date on which an applicant was found guilty, or pled guilty, or pled no contest to a crime; or, where that date is not ascertainable, the date of the charges or indictment.

Florida Administrative Code Rule 69B-211.042(10)(a) states in pertinent part:

The usual waiting period specified . . . shall be shortened upon proof of one or more of the following as are pertinent. Where more than one factor is present the applicant is entitled to add together all the applicable mitigation amounts and deduct that total from the usual waiting period; provided that an applicant shall not be permitted an aggregate mitigation of more than 4 years for the following factors.

* * *

2. One year is deducted if restitution or settlement has been made for all crimes wherein restitution or settlement was ordered

3. One year is deducted if the applicant was under age 21 when the crime was committed, if there was only one crime on the applicant's law enforcement record.

15. Florida Administrative Code Rule 69B-211.042(10)(a)6 also provides for "additional mitigating factors" concerning the imposition of periods of ineligibility for licensure as a Customer Representative in addition to the above two reasons for mitigation of one year each.

16. The additional mitigating factors applicable to the Petitioner, in accordance with this portion of the above rule, are found to be the fact that since the criminal incident she has had no other criminal history; she has worked for a licensed insurance agent and agency with no blemishes on her record and has proven very trustworthy in handling monies of clients and of the agency with no misappropriation of funds and no accounting

irregularities whatever. She is the sole support of herself and her child and has a strong desire to improve her career position in the insurance profession by gaining this licensure. Through her testimony, and through the testimony of the agency owner and managing agent, she has established herself to be fit and trustworthy to engage in the insurance business. That testimony is accepted as credible in this regard, as to mitigating factors and as to her fitness and trustworthiness.

17. It is thus determined, based upon the Petitioner's testimony and evidence, that she has demonstrated her fitness and trustworthiness to engage in the business of insurance and she has demonstrated, given the above Findings of Fact, that she made no intentional misstatement, misrepresentation, or fraudulent representation in seeking to obtain the license, by the answer she gave concerning her criminal history. She made a mistake of law in determining that she was not required to answer in the affirmative concerning her criminal history because of her belief concerning her sentence being less than one year imprisonment. That was a mistake of law because it should have been disclosed, but it was not shown to be an intentional or fraudulent misrepresentation. Thus, she has not been shown to have violated Section 626.611(2) and (7), Florida Statutes, quoted above.

18. She has pled nolo contendere to a felony punishable by imprisonment of one year or more under the law of this state or potentially so and therefore committed a violation of Section 626.611(14), Florida Statutes. But she has established that her untrue answer concerning her criminal history on the application was an unintentional result. See Munch v. Department of Professional Regulation, 592 So. 2d 1136 (Fla. 1st DCA 1992).

19. It is true that even if she had not failed to disclose her criminal history she would still not be eligible for licensure, absent mitigating factors, because she has not met the required fifteen-year waiting period for her specific "Class A" felonies. The criminal act involved is a Class A felony as envisioned in Florida Administrative Code Rule 69B-211.042(21)(n)(qq) quoted above. Because she did not intentionally fail to disclose, with fraudulent intent, the criminal history, the added two years the Department might add to her fifteen-year waiting period should be discounted or removed. The Department has already determined that she is entitled to two years of mitigation because she was only nineteen years of age at the time the crime was committed and because she made full restitution to the victim. Given the above "additional mitigating factors" discussed in the Conclusions of Law and in the circumstances delineated in the above Findings of Fact, it would seem that additional mitigation

should be accorded the Petitioner. She is clearly remorseful about the incident in her past and clearly seeks to continue to be and become a more productive member of society and of the insurance profession. Her work record in the insurance business up to the present time shows that she is fit and trustworthy to continue to do so. She has already had over nine and one-half years elapse since the trigger date for the normal fifteen-year waiting period, which began on March 16, 1995. Accordingly, additional mitigation should be given her so that she can now be licensed after an excess of nine and half years waiting period.

20. Moreover, the Department has discretion in determining fitness and trustworthiness of applicants for licensure.

Department of Banking and Finance v. Osborne, supra at 934. In view of this and in consideration of Section 626.691, Florida Statutes, which provides for the granting of a probationary licensure under certain conditions, delineated therein, it would seem that the Department has discretion to grant her licensure at this time, after the excess of nine and one-half years waiting time and grant her a probationary license. Thus, she can be licensed under this consideration for a period of up to two years probation under reasonable terms specified by the Department in its order. It would seem just in the situation of this Petitioner for the Department to do so.

RECOMMENDATION

Having considered the foregoing findings of fact, conclusions of law, the evidence of record, the candor and demeanor of the witnesses and the pleadings and arguments of the parties, it is, therefore,

RECOMMENDED that a final order be entered by the Department granting the licensure applied; or granting it for a probationary period of two years under reasonable terms and conditions specified by the Department in that final order.

DONE AND ENTERED this 2nd day of December, 2004, in Tallahassee, Leon County, Florida.



P. MICHAEL RUFF
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 2nd day of December, 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.