

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ALEJANDRO S. CONTRERAS,)
)
 Petitioner,)
)
 vs.) Case No. 04-3871
)
 DEPARTMENT OF FINANCIAL)
 SERVICES,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice a formal hearing was held in this case by video teleconference on December 15, 2004, with the Petitioner appearing from Fort Lauderdale, Florida, before J. D. Parrish, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Alejandro S. Contreras, pro se
300 Northeast 12th Avenue, Apartment 405
Hallandale Beach, Florida 33009

For Respondent: Dana M. Wiehle, Esquire
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399-0333

STATEMENT OF THE ISSUE

Whether the Petitioner, Alejandro S. Contreras,
(Petitioner or applicant) is entitled to have his application
for licensure as a general lines agent be granted.

PRELIMINARY STATEMENT

This case began on September 9, 2004, when the Respondent, Department of Financial Services (Respondent or Department) issued a Notice of Denial regarding the Petitioner's application for license. The denial alleged that the applicant had failed to accurately respond to a question on the application for license. More specifically, the denial maintained that the Petitioner had failed to disclose a plea of nolo contendere to the criminal charge of possession of forged/fictitious registration or indicia of ownership of a motor vehicle. When he received notice of the denial, the Petitioner timely requested an administrative hearing to review the matter.

The case was forwarded to the Division of Administrative Hearings for formal proceedings on October 27, 2004. Thereafter the matter was scheduled for formal hearing and was set for video teleconference, as it was anticipated the amount of time needed to try the case would not be great.

At the hearing, the Petitioner testified on his own behalf and offered testimony from his employer, Tiffanie Tedesco. The Respondent's Exhibits numbered 1-6 were admitted into evidence.

The transcript of the proceedings was filed with the Division of Administrative Hearings on December 23, 2004.

Thereafter, the Respondent timely filed a Proposed Recommended Order that has been fully considered in the preparation of this Recommended Order. The Petitioner did not timely file a proposed order.

FINDINGS OF FACT

1. The Petitioner is an applicant for licensure as a general lines agent. He is employed by the Twin Peaks Insurance Agency and is considered a valued employee.

2. The Respondent is the state agency charged with the responsibility of regulating the insurance industry in Florida and must make determinations regarding the licensure of general lines agents.

3. In January of 1988, when he was approximately 21 years old, the Petitioner purchased an automobile from "a friend." Subsequently, the Petitioner was charged with possession of forged/fictitious registration or indicia of ownership of a motor vehicle. The Petitioner quickly discovered why the vehicle had been a good buy: it had been stolen.

4. Regardless, after being charged, the Petitioner entered a plea of nolo contendere to the matter and the judge withheld adjudication, placed the Petitioner on a one-year probation, and imposed community service. The Petitioner successfully completed the terms of his probation.

5. The crime, as charged, was a third-degree felony. Such felonies may be punishable with up to five years of imprisonment. Clearly, by acknowledging the wrong doing and taking responsibility for his actions, the Petitioner saved himself from a potentially harsher penalty.

6. Since the incident described, the Petitioner has not been charged with any criminal conduct. The Petitioner is now 38 years of age, has worked at the insurance agency for the past year, and has successfully completed classes and training to become licensed.

7. To that end, the Petitioner completed an application for licensure at the Department's online website. According to Petitioner the form was completed at an early hour and he scanned the questions quickly.

8. One of the application questions asked the following:

Have you ever been convicted, found guilty, or pled guilty or nolo contendere (no contest) to a crime punishable by imprisonment of one (1) 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?

9. The Petitioner's response was "no." According to the Petitioner, he believed the question meant "had he been punished with a year in prison for anything." In fact, the Petitioner has not been in prison for anything. He was, however, charged with a crime that could have been punished

with one year in prison. He did, in fact, plead nolo contendere to that crime. His correct answer should have been "yes."

10. When the Department ran the background checks for licensure the incorrect answer was discovered and the Petitioner's application was denied for giving a false response.

11. Prior to his employment the Petitioner disclosed his past to his employer. He did not attempt to hide any information from the employer and was helpful in providing all requested information to the Department when the issue of the answer first arose. It took an exchange of several letters before the Petitioner comprehended the information and findings relied upon by the Department.

12. In denying the licensure, the Department has deemed the Petitioner's incorrect response a material misstatement, misrepresentation, or fraud in attempting to obtain the license.

13. The Petitioner did not, however, understand the question on the application form and did not understand that he had incorrectly answered it. It is entirely possible that the Petitioner's comprehension of English (or lack thereof) compounded the problem. Regardless, the Petitioner did not intend to misstate his criminal past. Further, such an effort

would have been inconsistent with having disclosed the past to his employer.

14. The Petitioner is hard-working and trusted by his employer and will be considered a loss if the license is not approved.

CONCLUSIONS OF LAW

15. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of these proceedings. §§ 120.569 and 120.57(1), Fla. Stat. (2004).

16. As the applicant, the Petitioner bears the burden of proof in this case to establish he is entitled to the license sought.

17. Section 626.611, Florida Statutes (2004), provides in pertinent part:

The department shall deny an application for, suspend, revoke, or refuse to renew or continue the license or appointment of any applicant, agent, title agency, adjuster, customer representative, service representative, or managing general agent, and it shall suspend or revoke the eligibility to hold a license or appointment of any such person, if it finds that as to the applicant, licensee, or appointee any one or more of the following applicable grounds exist:

(1) Lack of one or more of the 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.

* * *

(13) Willful failure to comply with, or willful violation of, any proper order or rule of the department or willful violation of any provision of this code.

(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.

18. Rule 69B-211.042(2) Florida Administrative Code, provides, in part:

(1) General Policy Regarding Conduct Prior to Licensure. The Department is concerned with the law enforcement record of applicants for the purpose of ascertaining from those records whether the person would represent a significant threat to the public welfare if licensed under Chapter 626, Florida Statutes. It is no part of the Department's responsibilities, and the Department does not attempt, to "penalize", "discipline", or "punish" any person concerning any conduct prior to licensure.

(2) Duty to Disclose Law Enforcement Record. Every applicant shall disclose in writing to the Department the applicant's

entire law enforcement record on every application for licensure, as required therein, whether for initial, additional, or reinstatement of licensure. This duty shall apply even though the material was disclosed to the Department on a previous application submitted by the applicant.

(3) Policy Specifically Concerning Effect of Criminal Records.

(a) The Department interprets Sections 626.611(14) and 626.621(8), Florida Statutes, which subsections relate to criminal records, as applying to license application proceedings. The Department interprets those statutes as not limiting consideration of criminal records to those crimes of a business-related nature or committed in a business context. More specifically, it is the Department's interpretation that these statutes include crimes committed in a non-business setting, and that such crimes are not necessarily regarded as less serious in the license application context than are crimes related to business or committed in a business context.

* * *

(4) Effect of Failure to Fully Disclose Law Enforcement Record on Application.

(a) The Department finds that all matters that are part of an applicant's law enforcement record are material elements of the application, and finds that the omission of any part of the law enforcement record required to be disclosed on the application is a material misrepresentation or material misstatement in and of itself. The applicant shall have violated Section 626.611(2) or 626.621(1), Florida Statutes, if the applicant fails to provide the Department with the documentation required by this rule.

(b)1. 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.

* * *

(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.

19. In this case the Petitioner has demonstrated he is trustworthy and fit to engage in the business of insurance. He is a valued employee at the agency where he works. Petitioner fully disclosed his criminal history to his employer before the application was answered. He made no attempt to conceal his criminal history that consisted of one incident and cooperated with the Department when he was questioned regarding the matter.

20. It is evident the Petitioner failed to accurately answer the application but did so out of confusion and error, not in an attempt to evade the truth. Any "misstatement" was unintentional and may have resulted from the Petitioner's flawed understanding of the criminal justice language used or

English in general. It is inconceivable that he would have fully disclosed the criminal past to an employer and attempted to withhold the same information from the Department.

21. The single criminal act occurred in 1988. By the most stringent standard set forth in the Department's rule, a period of 16 years has elapsed without additional incident. Moreover, at age of 38 the Petitioner has demonstrated a maturity that in his youth evaded him. He made a poor decision, took the consequences for that act, performed his probation and, from all accounts, is ready to become a responsible, valued general lines agent for his employer.

22. In this case the Petitioner has shown that he did not realize he was incorrectly answering the question regarding his criminal history. He misread the application. If a command of the English language is a requirement for licensure the Department has not cited the Petitioner for that deficiency. Accordingly, as the requisite time has run for the crime committed in 1988, the Department should allow the Petitioner to become licensed. No public interest is served by requiring additional waiting time in this case.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Financial

Services enter a Final Order approving the application of the
Petitioner.

DONE AND ENTERED this 28th day of January, 2005, in
Tallahassee, Leon County, Florida.



J. D. PARRISH
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of January, 2005.

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.