

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TIMOTHY MYLES,)
)
Petitioner,)
)
vs.) Case No. 05-0168
)
DEPARTMENT OF FINANCIAL)
SERVICES,)
)
Respondent.)
_____)

RECOMMENDED ORDER

This matter was heard pursuant to notice on May 2, 2005, by Stephen F. Dean, assigned Administrative Law Judge of the Division of Administrative Hearings, by video-teleconference between Tallahassee, Florida, and Jacksonville, Florida.

APPEARANCES

For Petitioner: Timothy Myles, pro se
7379 Petrell Drive
Jacksonville, Florida 32222

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

STATEMENT OF THE ISSUE

The issue to be determined is whether Petitioner has demonstrated his eligibility for licensure.

PRELIMINARY STATEMENT

On or about June 13, 2004, Petitioner filed an application with the Department of Financial Services (Department) seeking licensure as a Resident Life Including Variable Annuity and Health Insurance Agent. By letter dated August 26, 2004, the Department advised Petitioner that his application was denied because of his failure to divulge his criminal history in his application, and because of his failure to meet the waiting period applicable to the crime in question. Petitioner timely requested a hearing regarding that denial, but failed to provide all of the information called for by the Florida Administrative Code model rules. The Department sent Petitioner a letter requesting clarification, and Petitioner filed a more detailed request with the Department. The cause was thereafter transferred to the Division of Administrative Hearings to conduct an evidentiary proceeding.

Petitioner testified on his own behalf. Respondent offered no witness testimony, and Respondent's Exhibits numbered 1-6 were admitted into evidence.

After the filing of the transcript, the Department filed a post-hearing submission, which has been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Respondent, Department of Financial Services ("Department"), is the state agency responsible for the licensure of insurance agents in the State of Florida, pursuant to Chapter 626, Florida Statutes.

2. On June 13, 2004, Petitioner filed an online application with Department of Financial Services seeking licensure as a Resident Life Including Variable Annuity and Health Insurance Agent.

3. The online application form filled out by Petitioner for the license at issue in this proceeding included the following question:

[h]ave you ever been convicted, found guilty, or pled guilty or nolo contendere (no contest) to a felony or 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?

4. Petitioner answered this question in the negative.

5. The criminal history records obtained by the Department during the application process revealed that on February 8, 2000, Petitioner was arrested on one felony count of child abuse. According to the information filed against Petitioner, the circumstances that resulted in the arrest occurred on November 28, 1999. More specifically, Petitioner was accused of

striking his then-girlfriend's, now wife's, 15-year-old daughter with a belt on her buttocks for disciplinary purposes, resulting in bruises. Petitioner pled nolo contendere to one count of Child Abuse. Adjudication was withheld, and Petitioner was placed on one-year's probation, ordered to complete 50 hours of community service, and required to enroll in and successfully complete both a parenting skills class and an anger control program.

6. On August 26, 2004, the Department sent Petitioner a Notice of Denial of his application. The Department's denial is based both on Petitioner's answer to the criminal history question contained in the application, and on Petitioner's failure to meet the waiting period set forth in the Department's rules for the crime in question.

7. Petitioner testified at hearing. The circumstances leading up to his arrest and plea involved the disciplining of his then-girlfriend's, now wife's, 15-year-old daughter, whom Petitioner described as "rebellious." He and his wife also have two sons.

8. Petitioner testified at hearing regarding his answer to the question on his criminal history. He interpreted the question to be related to offenses relating to insurance and business matters, and not to include the offense of child abuse.

His testimony is credible given the provisions of Chapter 626, Florida Statutes.

9. Petitioner retired honorably from the U.S. Navy in April of 2000 after 20 years of service.

CONCLUSIONS OF LAW

10. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this case pursuant to Sections 120.57(1) and 120.569, Florida Statutes.

11. As the applicant, 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 that he meets the relevant statutory criteria in order to satisfy this burden.

12. In its Notice of Denial, the Department has alleged that Petitioner violated various provisions of the Florida Insurance Code by failing to disclose his criminal history in his application.^{1/} Section 626.611, Florida Statutes, states:

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 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.

* * *

(14) Having been found guilty of 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 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.

13. Section 626.621, Florida Statutes, provides that the Department may in its discretion deny the licensure of an applicant where the denial is not mandatory under Section 629.611, supra.

14. Florida Administrative Code Rule 69B-211.042(2) makes it clear that an applicant must disclose a criminal history:

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.

15. The answer to the criminal history question on Petitioner's application for licensure was incorrect. Based on Petitioner's answer to the criminal history question, the Department charges and argues that Petitioner made a "[m]aterial misstatement, misrepresentation, or fraud in . . . [his] attempt to obtain the license or appointment," and that by providing incorrect information Petitioner has demonstrated a "lack of fitness or trustworthiness to engage in the business of insurance." See § 626.611(2) and (7), Fla. Stat.

16. In order to overcome this allegation, Petitioner must prove that he did not have knowledge that his answer to the criminal history question was not true or that his untrue answer was unintentional. Munch v. Department of Professional Regulation, 592 So. 2d 1136 (Fla. 1st DCA 1992). Petitioner testified that, based on his reading of the application as a whole, the criminal history question was directed at insurance-related matters, and that at the time he answered the question, he felt that his answer was correct.

17. Petitioner's testimony was credible. The credibility of such testimony is a question for the trier of fact. See Walker v. Department of Business and Professional Regulation, 705 So. 2d 652, 655 (Fla. 5th DCA 1998) (the trier of fact is not bound to believe any witness, even a witness who is uncontradicted) (Dauksch, J., concurring specially); Hernandez

v. AMISUB(American Hospital), Inc., 714 So. 2d 539 (Fla. 3rd DCA 1998), pet. rev. den. 728 So. 2d 200 (Fla. 1998) (intentional misrepresentation can be shown by recklessness or carelessness as to the truth of the matter asserted).

18. The Department's also asserts that, regardless of whether Petitioner attempted to obtain the license in question through material misstatement, misrepresentation, or fraud, he is also ineligible for licensure because he has not met the waiting period established in the Department's rules for the crime to which he pled.

19. Section 626.611(14), Florida Statutes, states, that the Department shall deny the license or appointment of any agent if it finds the applicant has been found guilty of, or pleaded guilty or nolo contendere to a felony or a crime punishable by imprisonment of one year or more under the law of the United States of America or any state thereof without regard to whether a judgment of conviction was entered by the court.

20. The Department promulgated Florida Administrative Code Rule 69B-211.042, which states:

(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

* * *

(3)(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.

21. Florida Administrative Code Rule 69B-211.042(21)(r), clarifies the felony to which Petitioner pled nolo contendere as a "Class 'A' crime." Under the Department's rules, a Class A crime carries a waiting period of 15 years from the trigger date. See Fla. Admin. Code R. 69B-211.042(8)(a).

22. According to Florida Administrative Code Rule 69B-211.041(11), the trigger date in this case is the date on which an applicant was found guilty, or pled guilty, or pled nolo contendere to a crime. Petitioner pled nolo contendere on April 7, 2000; therefore, the initial waiting period of 15 years is applied from that date.

23. Petitioner did show at hearing that he was entitled to mitigation of the waiting period. The maximum mitigation is limited by rule to four years. Based upon the Department's

calculation, Petitioner's waiting period for the child abuse plea, without mitigation, runs until April 7, 2015. The general mitigation provision does not provide for the number of years that may be mitigated. Based upon Petitioner's explanation of the basis for the charges brought against him, the maximum allowable mitigation of four years is recommended. Given mitigation of four years, the minimum date would be April 7, 2011.

RECOMMENDATION

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

RECOMMENDED:

It is recommended that Petitioner's application be denied with leave to reapply on April 7, 2011.

DONE AND ENTERED this 9th day of August, 2005, in Tallahassee, Leon County, Florida.



STEPHEN F. DEAN
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of August, 2005.

ENDNOTE

^{1/} The Department has also alleged that Petitioner failed to meet the waiting period applicable to the crime in question. That allegation is discussed infra.

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.