STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

| | | |
|---|---|---|
| PETER J. SOTO,<br><br>Petitioner,<br><br>vs.<br><br>DEPARTMENT OF FINANCIAL SERVICES,<br><br>Respondent. | ) | Case No. 05-1241 |

RECOMMENDED ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the administrative hearing of this case, on June 8, 2005, in Orlando, Florida, on behalf of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Peter J. Soto, pro se
14028 Island Bay Drive, Apartment 103
Orlando, Florida 32828

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 in this proceeding is whether Respondent should deny Petitioner's application for licensure as a general lines insurance agent on the grounds that Petitioner was convicted of

a crime of moral turpitude that is punishable by more than one year of imprisonment and committed a material misstatement or misrepresentation within the meaning of Subsections 626.611(2) and (14), and 626.621(8), Florida Statutes (2003), and Florida Administrative Code Rules 69B-211.042(21)(s) and 69B-211.042(2).

## PRELIMINARY STATEMENT

On June 23, 2004, Petitioner submitted a license application to Respondent. By letter dated January 20, 2005, 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 administrative hearing.

The ALJ conducted the hearing by videoconference. Petitioner and the court reporter participated in the hearing in Orlando, Florida. Respondent and the ALJ participated by videoconference from Tallahassee, Florida.

At the hearing, Petitioner testified and submitted no exhibits for admission into evidence. Respondent presented the testimony of Petitioner and submitted six exhibits for admission into evidence. The identity of the witnesses and exhibits and any attendant rulings are reported in the one-volume Transcript of the hearing filed with DOAH on June 20, 2005.

Respondent timely filed its proposed recommended order (PRO) on July 1, 2005. Petitioner did not file a PRO.

## FINDINGS OF FACT

1. Respondent is the state agency responsible for the licensure of insurance agents in the State of Florida, pursuant to Chapter 626, Florida Statutes (2004). On June 23, 2004, Petitioner electronically filed (on-line) a completed application for licensure as an agent authorized to sell resident life, variable annuity, and health insurance (the license).

2. In the on-line application, Petitioner answered "no" to the following question:

> [i]n the past 12 months, have you been arrested, indicted, or had an Information filed against you or been otherwise charged with a crime by any law enforcement authority anywhere in the United States . . . ?

3. On May 19, 2004, Petitioner was arrested in New York for grand larceny, a third degree felony in that state. The allegations were that Petitioner received unemployment benefits from the State of New York after Petitioner found employment.

4. The State of New York eventually convicted Petitioner on one count of grand larceny in the third degree. The sentence placed Petitioner on probation for five years and required Petitioner to pay restitution in the amount of $11,573.57. Petitioner is not scheduled to be released from probation until December 1, 2009.

5. Petitioner's failure to disclose the arrest in New York is a material misstatement within the meaning of Subsection 626.611(2), Florida Statutes (2003). The arrest in New York occurred within approximately 35 days of the date that Petitioner submitted the application. A preponderance of the evidence does not support a finding that the failure to disclose the criminal history on the application was inadvertent.

6. Petitioner knew, or should have known, the importance of accurate answers to questions on the license application. The final section of the on-line application, entitled "Applicant Affirmation Statement" contained the following language:

> Whoever knowingly makes a false statement in writing with the intent to mislead a public servant in the performance of his/her official duty shall be guilty of a misdemeanor of the second degree.
>
> * * *
>
> Under penalties of perjury, I declare that I have read the foregoing application for license and that the facts stated in it are true. I understand that misrepresentation of any fact required to be disclosed through this application is a violation of The Florida Insurance and Administrative Codes and may result in the denial of my application and/or the revocation of my insurance license(s).

7. The material misstatement or misrepresentation of the arrest history of Petitioner was an intentional, false

statement. Petitioner knew that the answer he supplied in the application was not true. The failure to disclose the arrest was a reckless and careless act. The false statement evinces a "lack of fitness or trustworthiness to engage in the business of insurance" within the meaning of Subsection 626.611(7), Florida Statutes (2003).

8. Petitioner has now been convicted of a felony that is a crime of moral turpitude. The preponderance of evidence does not support a finding that the crime is punishable by imprisonment for one year or less.

9. Petitioner is on probation through December 1, 2009. After a final order denying the application, Petitioner is subject to the presumption and waiting periods prescribed in Florida Administrative Code Rule 69B-211.042(6).

CONCLUSIONS OF LAW

10. DOAH has jurisdiction over the parties and subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2003). DOAH provided the parties with adequate notice of the administrative hearing.

11. 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. Petitioner failed to satisfy his burden of proof.

12. Petitioner was convicted of a crime of moral turpitude defined in Florida Administrative Code Rule 69B-211.042(21)(s). A preponderance of the evidence does not support a finding that the crime is punishable by imprisonment of one year or less.

13. The denial of the application is mandatory. In relevant part, Subsections 626.611(2) and (14), Florida Statutes (2003), provide that Respondent "shall deny" the application of Petitioner if Petitioner has been found guilty of a crime of moral turpitude that is punishable by more than one year imprisonment.

14. Subsection 626.621(8), Florida Statutes (2003), also gives Respondent discretionary authority to deny the license application upon a finding that Petitioner has been convicted of a crime that is punishable by more than one year of imprisonment. A preponderance of the evidence does not support a finding that the denial of the license is an abuse of discretion.

15. The failure to disclose a recent arrest in the application was a material misstatement within the meaning of Subsections 626.611(2) and (14), Florida Statutes (2003). Both subsections require Respondent to deny the application of Petitioner on that ground.

16. Petitioner's failure to disclose his criminal history on the application also violated Florida Administrative Code

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

> 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.

17. The material misstatement on the application evidenced a reckless and careless disregard of the truth of the matter asserted. The material misstatement was a false statement that Petitioner intentionally made in an effort to obtain the license. See Hernandez v. AMISUB (American Hospital), Inc., 714 So. 2d 539 (Fla. 3d DCA 1998)(intentional misrepresentation can be shown by recklessness or carelessness as to the truth of the matter asserted). The false statement demonstrates a "lack of fitness or trustworthiness to engage in the business of insurance" within the meaning of Subsection 626.611(7), Florida Statutes (2003).

18. Upon the entry of a final order denying the application and the expiration of any appeal, Petitioner must wait 15 years before submitting a new application unless Petitioner demonstrates mitigating factors to support a shorter waiting period. Contrary to the assertion in Respondent's PRO, Petitioner is entitled to a separate administrative hearing to

shorten the waiting period or to demonstrate that he has been rehabilitated before the expiration of the waiting period prescribed in the relevant rule.

## RECOMMENDATION

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

RECOMMENDED that Respondent enter a final order denying the license application.

DONE AND ENTERED this 19th day of July, 2005, in Tallahassee, Leon County, Florida.

DANIEL MANRY
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of July, 2005.

COPIES FURNISHED:

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

Peter J. Soto
14028 Island Bay Drive, Apartment 103
Orlando, Florida 32828

Honorable Tom Gallagher
Chief Financial Officer
Department of Financial Services
The Capitol, Plaza Level 11
Tallahassee, Florida 32399-0300

Carlos G. Muñiz, General Counsel
Department of Financial Services
The Capitol, Plaza Level 11
Tallahassee, Florida 32399-0300

## 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.