

7-21-05



FLORIDA
DEPARTMENT OF
FINANCIAL SERVICES

FILED
2005 AUG 31
DIVISION OF ADMINISTRATIVE HEARINGS
SEAL OF THE STATE OF FLORIDA
IN GOD WE TRUST

TOM GALLAGHER
CHIEF FINANCIAL OFFICER
STATE OF FLORIDA

FILED

AUG 30 2005

WS closed

IN THE MATTER OF:

Docketed by: 

05-1314 PL

RICARDO CABRERA

AT

CASE NO: 79541-04-FM

FINAL ORDER

THIS CAUSE came on for consideration and final agency action. On March 9, 2005, an Administrative Complaint was issued by the Department of Financial Services, against the Respondent, Ricardo Cabrera, alleging that he pled nolo contendere to a felony and failed to reveal that fact on his applications for renewal of his fire equipment dealer licenses. Respondent timely filed a request for a proceeding pursuant to Section 120.57(1), Florida Statutes. On June 8, 2005, the Department's Motion for Leave to Amend Administrative Complaint was granted. Pursuant to notice, the matter was heard before Larry J. Sartin, Administrative Law Judge, Division of Administrative Hearings, on June 8, 2005.

After consideration of the record and argument presented at hearing, the Administrative Law Judge issued his Recommended Order on July 21, 2005. (Attached as Exhibit A). The Administrative Law Judge recommended that the Department enter a Final Order finding that the Respondent did not violate Section 633.162(4)(f), Florida Statutes; that the Respondent did

violate Section 633.162(4)(g), Florida Statutes; and revoking the Respondent's license for a period of four (4) years.

On August 1, 2005, the Respondent filed exceptions to the Recommended Order. The exceptions were to the Recommendation. On August 8, 2005, the Petitioner filed a Response to Respondent's Exceptions. The exceptions have been considered and are addressed below.

RULING ON RESPONDENT'S EXCEPTIONS

1. The Respondent's exceptions number 1 and 2 both rely on the finding in the Recommended Order that Respondent did not violate Section 633.162(4)(f), Florida Statutes, and therefore they will be joined together for purposes of discussion.

Respondent excepts to recommendation number 2 of the Recommended Order, arguing that because Respondent was found not to have violated Section 633.162(4)(f), Florida Statutes, and did not fail to meet the qualifications outlined in Section 633.061(3)(c)6.c., Florida Statutes, Respondent did not make a "material misstatement or misrepresentation" by answering "no" to the criminal history question. Respondent argues that his incorrect answer to the question is not a material misstatement because the question (and his nolo contendere plea) was irrelevant to his licensure.

The Department of Financial Services is charged with enforcing and determining the fitness of applicants for licenses. Respondent's truthfulness on his application is a separate issue from his criminal history. Regardless of whether or not Respondent's nolo contendere plea would have disqualified him from licensure, Respondent should have answered the questions concerning his criminal history truthfully. Misstatements can be determined to be material, even if truthful disclosure of the facts would not have established a valid basis for denial of a license. See, Wagman v. Florida Board of Medicine, 590 So.2d 12 (Fla. 1st DCA 1991) and Gentile v.

Department of Professional Regulation, Board of Medical Examiners, 448 So.2d 1087 (Fla. 1st DCA 1984).

Respondent's failure to disclose his criminal history was a material misstatement or misrepresentation, regardless of the actual facts of his criminal history. Accordingly, Respondent's exceptions numbered 1 and 2 are denied.

2. Respondent excepts that, even if Respondent's misstatement is deemed to be material, there is no evidence that he deliberately lied or misrepresented the true facts deliberately.

Although there is an element of intent involved in a misrepresentation, and it must be supported by competent substantial evidence, circumstantial evidence can be used to prove the intentional act. See, Walker v. Department of Business and Professional Regulation, 705 So.2d 652 (Fla. 5th DCA 1998). That intent can be established by a showing of "carelessness or recklessness as to the truth of the matter asserted." See, Samuel Hernandez v. AMISUB, 714 So.2d 539 (3rd DCA 1998), citing Ocean Bank of Miami v. Inv-Uni Inv. Corp., 599 So.2d 694, 697 (Fla. 3rd DCA), rev. den: 606 So.2d 1165 (Fla. 1992).

As stated in the preliminary statement of the Recommended Order, the Respondent has "agreed that the factual allegations of the Administrative Complaint, as amended, were not in dispute." As such, the Respondent has agreed that all the facts alleged by the Department in its Administrative Complaint are true. The Department alleged in its Administrative Complaint that the Respondent, while under oath and on two separate occasions, answered "no" to the question of whether or not he had "ever been convicted or pled nolo contendere to a felony". The Administrative Law Judge found that the question was clear and unambiguous. Respondent's criminal plea occurred no more than ten years before his applications. Because Respondent is

not disputing these facts, the Department has proven by competent substantial evidence that Respondent knowingly intended to make a misrepresentation on his applications or, at the least, was careless or reckless in answering the questions on his applications. Moreover, Respondent has provided no explanation for why he made such misrepresentations.

Additionally, intent is a question of fact. See Navarro v. Department of Financial Services, 2005 Fla. Div. Adm. Hear. LEXIS 973 (DOAH 2005), citing Walker v. Department of Business and Professional Regulation, 705 So.2d 652, 655 (Fla. 5th DCA 1998). As the Respondent has agreed that no disputes of material fact remain, this must include the issue of Respondent's intent. Therefore, Respondent has waived his right to dispute the issue of intent. Accordingly, Respondent's exception number 3 is denied.

3. Respondent excepts to the Administrative Law Judge's recommendation that Respondent's license should be revoked for a period of four years and contends that such a recommendation is excessive.

The Administrative Law Judge concluded that, based upon the severity of the violation, a revocation of four years was a sufficient penalty to impose on Respondent. This penalty is well within the statutory provisions provided by Section 633.162(1), Florida Statutes. Moreover, this penalty is warranted, especially when Respondent's double violations and his prior administrative disciplinary record are considered. Accordingly, Respondent's exception number 4 is denied.

Therefore, upon careful consideration of the entire record, the submissions of the parties, and being otherwise fully advised in the premises, it is ORDERED:

1. The Findings of Fact of the Administrative Law Judge are adopted in full as the Department's Findings of Fact.

2. The Conclusions of Law of the Administrative Law Judge are adopted in full as the Department's Conclusions of Law.

3. The Administrative Law Judge's recommendations that the Department enter a Final Order finding that the Respondent did not violate Section 633.162(4)(f), Florida Statutes; that the Respondent did violate Section 633.162(4)(g), Florida Statutes; and revoking the Respondent's license for a period of four (4) years are approved and accepted as being the appropriate disposition of this case.

ACCORDINGLY, it is ORDERED that Respondent's, RICARDO CABRERA's, license(s) and eligibility for licensure as a fire equipment dealer are hereby REVOKED for a period of four (4) years immediately upon the date of the filing of this Final Order. Pursuant to Section 633.162, Florida Statutes, the revocation of Respondent's license(s) and eligibility for licensure is applicable to all licenses and eligibility held by Respondent under Chapter 633, Florida Statutes.

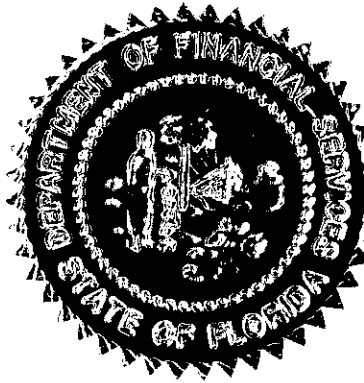
Pursuant to Section 633.162(1), Florida Statutes, during the period of revocation, the Respondent shall not engage in or attempt or profess to engage in any transaction or business for which a license or permit is required under Chapter 633, Florida Statutes, or directly or indirectly own, control, or be employed in any manner by any firm, business, or corporation for which a license or permit under Chapter 633, Florida Statutes is required.

NOTICE OF RIGHTS

Any party to these proceedings adversely affected by this Order is entitled to seek review of the Order pursuant to Section 120.68, Florida Statutes, and Rule 9.110, Fla.R.App.P. Review proceedings must be instituted by filing a petition or Notice of Appeal with the General Counsel, acting as the agency clerk, at 200 East Gaines Street, Tallahassee, FL 32399-0333, and a copy of

the same and the filing fee with the appropriate District Court of Appeal within thirty (30) days of the rendition of this Order.

DONE and ORDERED this 30th day of August, 2005.



Karen Chandler

KAREN CHANDLER
Deputy Chief Financial Officer

COPIES FURNISHED TO:

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