

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL)
SERVICES,)
)
Petitioner,)
)
vs.) Case No. 05-1314PL
)
RICARDO CABRERA,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, the parties agreed, on June 8, 2005, to forego a final hearing and, in lieu thereof, to file proposed recommended orders in this case before Larry J. Sartin, an Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Casia R. Sinco, Esquire
Department of Financial Services
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200 East Gaines Street
Tallahassee, Florida 32399-0333

For Respondent: Anthony Dieguez, Esquire
Anthony Dieguez, P.A.
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STATEMENT OF THE ISSUE

The issue in this case is whether Respondent, Ricardo Cabrera, committed the offenses alleged in an Administrative Complaint issued by Petitioner, the Department of Financial Services, on March 9, 2005, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On March 9, 2005, Petitioner issued an Administrative Complaint alleging that Respondent had violated certain statutory provisions governing the application process of Florida fire equipment dealers. On March 28, 2005, Respondent filed a document titled Election of Proceedings, disputing the factual allegations of the Administrative Complaint and requesting a hearing pursuant to Section 120.57(1), Florida Statutes (2004). A copy of the Administrative Complaint and the Election of Proceedings was filed with the Division of Administrative Hearings on April 12, 2005. The matter was designated DOAH Case No. 05-1314PL and was assigned to the undersigned.

The final hearing, to be conducted by video teleconference, was scheduled for June 10, 2005, by Notice of Hearing issued April 19, 2005.

On May 31, 2005, Petitioner filed a Motion to Relinquish Jurisdiction claiming that there were no longer any disputed

issues of material fact to be resolved in this case. A hearing on the Motion was held by telephone on June 8, 2005. During the hearing Petitioner indicated that a Motion for Leave to Amend the Administrative Complaint, requesting leave to add allegations of prior disciplinary action against the Respondent to the Administrative Complaint, had been filed. That Motion was granted.

As to the Motion to Relinquish Jurisdiction, Respondent agreed that the factual allegations of the Administrative Complaint, as amended, were not in dispute. Despite this concession, Respondent suggested that there still remained mixed issues of law and fact concerning the application of Section 633.061(3)(c)6.c., Florida Statutes,¹ which should be addressed in a recommended order. It was agreed, therefore, that the final hearing of this case would be cancelled and that the parties would be given an opportunity to file proposed recommended orders or memoranda of law addressing in general the charges against Respondent and, in particular, the application of Section 633.061(3)(c)6.c., Florida Statutes, to Respondent based upon the facts alleged in the Administrative Complaint, as amended. The Motion to Relinquish Jurisdiction was, therefore, denied.

The parties were given until July 8, 2005, to file proposed recommended orders. Both parties filed Proposed Recommended

Orders, which have been fully considered in entering this Recommended Order.

FINDINGS OF FACT

A. The Parties.

1. Petitioner, the Department of Financial Services (hereinafter referred to as the "Department"), is the agency of the State of Florida charged with the responsibility for, among other things, the licensure of individuals who wish to install and maintain fire suppression equipment and the investigation and prosecution of complaints against individuals who have been licensed in Florida. See Ch. 633, Fla. Stat.

2. Respondent, Ricardo Cabrera, is and has been at all times material hereto a licensed Fire Equipment Dealer, Class C, in the State of Florida.

3. Mr. Cabrera, who first applied for licensure as a Fire Equipment Dealer, Class C, on or about October 10, 1989, was issued license number 70219300011990 on January 17, 1990.

4. The Department has jurisdiction over Mr. Cabrera's licenses.

B. Criminal Case.

5. On or about October 20, 1989, after Mr. Cabrera had first applied for licensure by the Department, a criminal Information was filed in case number 89-38498, in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County,

Florida, charging that on September 30, 1989, Mr. Cabrera, unlawfully and feloniously had in his actual or constructive possession cocaine, a controlled substance.

6. On or about December 12, 1989, Mr. Cabrera pled nolo contendere to possession of cocaine, a third degree felony, in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida. Adjudication was withheld on the charge, and Mr. Cabrera was sentenced to probation for a period of one year and was ordered to successfully complete the T.A.S.C. drug program, a narcotics treatment program.

7. As a result of the fact that the court withheld adjudication of guilt, Mr. Cabrera did not lose any civil rights.

C. Mr. Cabrera's 1998 License Renewal Application; Count I.

8. Mr. Cabrera applied for renewal of his license as a Fire Equipment Dealer, Class C, on or about December 5, 1998.

9. Mr. Cabrera was asked and answered in the negative the following question on the application for renewal he filed with the Department: "Have you ever been convicted or pled nolo contendere to a felony?"

10. The question, "[h]ave you ever been convicted or pled nolo contendere to a felony" is clear and understandable. Given Mr. Cabrera's plea of nolo contendere to the felony of

possession of cocaine on December 12, 1989, the only reasonable response to this question Mr. Cabrera should have given was "yes." Mr. Cabrera has given no explanation as to why he failed to answer the question truthfully.

11. Mr. Cabrera's license renewal application was received by the Department on or about December 21, 1998, and the renewal of his Fire Equipment Dealer, Class C, license was granted on June 14, 1999.

D. Mr. Cabrera's 1999 License Renewal Application;
Count II.

12. Mr. Cabrera again applied for renewal of his license as a Fire Equipment Dealer, Class C, on or about December 6, 1999.

13. Mr. Cabrera was asked and answered in the negative the following question on the application for renewal he filed with the Department: "Have you ever been convicted or pled nolo contendere to a felony?"

14. The question, "[h]ave you ever been convicted or pled nolo contendere to a felony" is clear and understandable. Given Mr. Cabrera's plea of nolo contendere to the felony of possession of cocaine on December 12, 1989, the only reasonable response to this question Mr. Cabrera should have given was "yes." Mr. Cabrera has given no explanation as to why he failed to answer the question truthfully.

15. Mr. Cabrera's license renewal application was received by the Department on or about December 13, 1999, and the renewal of his Fire Equipment Dealer, Class C, license was granted on December 15, 1999.

E. Mitigating/Aggravating Factors.

16. An Administrative Complaint was filed against Mr. Cabrera on or about December 30, 1994, as Qualifier for BC & ABC Fire Extinguisher Maintenance, alleging that he maintained two places of business without separate Fire Equipment Dealer licenses and qualifiers for each, and that he allowed an unlicensed person to conduct the business of a Fire Equipment Dealer. On or about August 8, 1995, Mr. Cabrera was placed on probation for two years and ordered to pay a fine of \$1,000.00.

17. An Administrative Complaint was filed against Mr. Cabrera on or about June 29, 2004, as Qualifier for BC & ABC Fire Extinguisher Maintenance, alleging that he allowed the insurance required to be carried by Section 633.061, Florida Statutes, for the business to lapse. On or about February 11, 2005, Mr. Cabrera was placed on probation for one year and ordered to pay a fine of \$1,000.00.

CONCLUSIONS OF LAW

A. Jurisdiction.

18. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of

the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2004).

B. The Burden and Standard of Proof.

19. In the Administrative Complaint, the Department has sought, among other penalties, the revocation of Mr. Cabrera's Fire Equipment Dealer, Class C. license. Therefore, the Department has the burden of proving the allegations in the Administrative Complaint by clear and convincing evidence. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); and McKinney v. Castor, 667 So. 2d 387 (Fla. 1st DCA 1995).

20. Clear and Convincing evidence has been defined as evidence which:

[r]equires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

C. The Department's Authority to Discipline Fire Equipment Dealers; The Charges Against Mr. Cabrera.

21. Section 633.162(1), Florida Statutes, gives the head of the Department, acting in his capacity as the State Fire Marshall, the power to revoke, or suspend the license of any person holding a fire equipment dealer license, if he or she is guilty of certain acts specified in the statute.

22. The Department has alleged in Counts I and II that Mr. Cabrera, has violated the following acts proscribed in Section 633.162(4)(f) and (g), Florida Statutes:

(4) In addition to the grounds set forth in subsection (1), it is cause for denial, nonrenewal, revocation, or suspension of a license or permit by the State Fire Marshal if she or he determines that the licensee or permittee has:

. . . .

(f) Failed to obtain, retain, or maintain one or more of the qualifications for a license or permit as specified in this chapter.

(g) Made a material misstatement, misrepresentation, or committed a fraud in obtaining or attempting to obtain a license or permit.

23. In support of the Department's allegation that Mr. Cabrera violated Section 633.162(4)(f), Florida Statutes, the Department has alleged that Mr. Cabrera has failed to retain or maintain the qualification for licensure specified in Section 633.061(3)(c)6.c., Florida Statutes:

D. The Alleged Violation of Section 633.162(4)(f), Florida Statutes.

24. Section 633.061(3)(c)6.c., Florida Statutes, the qualification for licensure which the Department has alleged that Mr. Cabrera violated, provides that a licensee "[m]ust not have been convicted of, or pled nolo contendere to, any felony. . . ."

25. Section 633.061(3)(c)6.c., Florida Statutes, goes on to provide an exception to the disqualification from licensure proscribed therein: "If an applicant has been convicted of any such felony, the applicant must comply with s. 112.011(1)(b)."

26. Section 112.011(1)(b), Florida Statutes, provides, in pertinent part, the following:

(b) Except as provided in s. 775.16, a person whose civil rights have been restored shall not be disqualified to practice, pursue, or engage in any occupation, trade, vocation, profession, or business for which a license, permit, or certificate is required to be issued by the state, any of its agencies or political subdivisions, or any municipality solely because of a prior conviction for a crime. However, a person whose civil rights have been restored may be denied a license, permit, or certification to pursue, practice, or engage in an occupation, trade, vocation, profession, or business by reason of the prior conviction for a crime if the crime was a felony or first degree misdemeanor and directly related to the specific occupation, trade, vocation, profession, or business for which the license, permit, or certificate is sought.

27. Although somewhat awkwardly worded, when read as a whole it is clear that, while a person convicted, or who pled nolo contendere to, any felony will not qualify for licensure as a fire equipment dealer, if that person has his or her civil rights restored, he or she will not be disqualified from licensure as a fire equipment dealer unless the felony related to the person's fire equipment dealer business.

28. Based upon a strict application of Section 633.061(3)(c)6.c., Florida Statutes, Mr. Cabrera does not qualify for licensure as a fire equipment dealer, because of his plea of nolo contendere to the possession of cocaine in 1989. This literal reading of the statute gives the Department authority to discipline Mr. Cabrera's license pursuant to Section 633.162(4)(f), Florida Statutes.

29. Mr. Cabrera, while not disputing the foregoing conclusion, contends that the Department is attempting to misapply Section 633.061(3)(c)6.c., Florida Statutes, because the Department's interpretation and application of the statute will render it unconstitutional.

30. Mr. Cabrera's argument is based upon the fact that the Department's strict facial reading of Section 633.061(3)(c)6.c., Florida Statutes, denies him the equal protection of the law. In particular, Mr. Cabrera convincingly argues that the Department's interpretation creates two classes of people which

it treats in an arbitrarily different way: (a) those who are convicted of a felony or who have been adjudicated guilty after entering a plea of nolo contendere; and (b) those who plea nolo contendere but for whom the court withholds adjudication of guilt.

31. An individual in the first class, who has been found or adjudicated guilty of a felony, will lose his or her civil rights as a result thereof and, will, therefore, be eligible to have his or her civil rights restored under Section 112.011(b), Florida Statutes. Such an individual will, upon restoration of his or her civil rights, be eligible for licensure as a fire equipment dealer.

32. Individuals, such as Mr. Cabrera, who have not been found or adjudicated guilty of a felony, will not lose their civil rights. As a consequence, those individuals, including Mr. Cabrera, can never have their civil rights restored. Those individuals, including Mr. Cabrera, will, therefore, never be eligible to obtain a license.

33. The Department's interpretation of the statute allows the use of the exemption from disqualification from licensure provided in Section 112.011(b), Florida Statutes, by the worst offenders, those who have been found or adjudicated guilty of a felony, while denying any possible use of the exemption for lesser offenders, those for whom adjudication has been withheld.

The Department's interpretation of Section 633.061(3)(c)6.c., Florida Statutes, by denying any possibility that a lesser offender, such as Mr. Cabrera, who pled nolo contendere but was not adjudicated guilty, will ever become eligible to obtain a license, leads to an absurd result.

34. This forum does not have the authority to hold statutes unconstitutional. See Central Florida Investments, Inc. v. Orange County Code Enforcement Board, 790 So. 2d 593 (Fla. 5th DCA 2001); and Department of Revenue v. Young American Builders, 330 So. 2d 864 (Fla. 1st DCA 1976). Nor does this forum have the authority to recommend that the Department find a statute unconstitutional. This forum, however, is not prohibited from suggesting to the Department, in the exercise of its discretion to interpret the statutes which it has been charged with enforcing, that it interpret a statute in a manner which would avoid the possibility of the statute being declared unconstitutional by a court of competent jurisdiction.

35. Surely, the Legislature could not have intended to preclude a person who has pled nolo contendere without being adjudicated guilty to never be eligible to obtain a license as a fire equipment dealer, while allowing a person who was found or adjudicated after entering a plea of nolo contendere guilty to obtain such a license. It is well-settled law in Florida that the courts will not attribute to the Legislature an intent to

create an absurd result, and that the strict letter of the law might be required to yield to the obvious legislative intent. See Foley v. State ex rel. Gordon, 50 So. 2d 179 (Fla. 1951).

36. In order to avoid the absurd result which would be result in this case under the Department's interpretation of Section 633.061(3)(c)6.c., Florida Statutes, the Department should conclude that Section 633.061(3)(c)6.c., Florida Statutes, only applies to prohibit licensure where an individual has either been found guilty or has pled nolo contendere and been adjudicated guilty, to a felony.

37. Based upon the foregoing, it is concluded that the Department has failed to prove clearly and convincingly that Mr. Cabrera has violated Section 633.162(4)(f), Florida Statutes, by failing to retain or maintain to qualification for licensure set out in Section 633.061(3)(c)6.c., Florida Statutes.

E. The Alleged Violation of Section 633.162(4)(g), Florida Statutes.

38. The evidence in this case supports a conclusion that Mr. Cabrera violated Section 633.162(4)(g), Florida Statutes. The Department clearly and convincingly proved that Mr. Cabrera made a "material misstatement or misrepresentation" when he answered the question, "[h]ave you ever been convicted or pled

nolo contendere to a felony?" in the negative on his 1998 and 1999 license renewal applications.

39. The question was clear and understandable. Mr. Cabrera knew or should have known that on October 20, 1989, he had pled nolo contendere to the felony of unlawfully and feloniously actual or constructive possession of cocaine, a felony. Despite this knowledge, he answered the question incorrectly and provided no explanation for why he did so.

F. The Appropriate Penalty.

40. The Department is authorized, upon finding a violation of Section 633.162, Florida Statutes, to impose discipline upon a fire equipment dealer's license for any violation of Section 633.162, Florida Statutes. That discipline may include, in relevant part, the revocation or suspension of a license.

41. Section 633.162(1), Florida Statutes, limits a suspension to two years from the date of the suspension order and a license revocation to a period not exceeding five years from the date of the revocation.

42. The Florida Administrative Code Rules governing Chapter 633, Florida Statutes, do not set forth guidelines concerning violations of Section 633.162, Florida Statutes.

43. Consistent with the statutory limits, the Department has recommended that Mr. Cabrera's Fire Equipment Dealer, Class C, license be revoked for five years. This recommendation,

however, was based upon a finding that Mr. Cabrera had violated Section 633.162(4)(f) and (g), Florida Statutes. Given the fact that it has been concluded in this Recommended Order that Mr. Cabrera has only violated Section 633.162(4)(g), Florida Statutes, and taking into account the severity of that violation, Mr. Cabrera's Fire Equipment Dealer Class C license should be revoked for a period of four years.

RECOMMENDATION

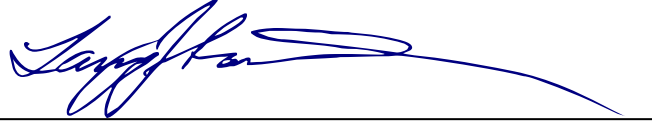
Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered by the Department:

1. Finding that Mr. Cabrera, did not violate Section 633.162(4)(f), Florida Statutes, as alleged in Counts I & II of the Administrative Complaint;

2. Finding that Mr. Cabrera, violated Section 633.162(4)(g), Florida Statutes, as alleged in Counts I & II of the Administrative Complaint; and

3. Revoking Mr. Cabrera's license for a period of four years from the date of the final order.

DONE AND ENTERED this 21st day of July, 2005, in
Tallahassee, Leon County, Florida.



LARRY J. SARTIN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of July, 2005.

ENDNOTE

1/ All references to statutes are to the Florida Statutes applicable during the relevant time periods that the events at issue in this case took place, unless otherwise noted.

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.