

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ROBERT J. BOPP, JR.,)
)
 Petitioner,)
)
 vs.) Case No. 05-3341
)
 DEPARTMENT OF FINANCIAL)
 SERVICES,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was conducted in this case before Daniel M. Kilbride, Administrative Law Judge of the Division of Administrative Hearings, on November 8, 2005, in Orlando, Florida.

APPEARANCES

For Petitioner: Robert J. Bopp, Jr., pro se
1534 Jaguar Circle
Apopka, Florida 32712

For Respondent: R. Terry Butler, Esquire
Angelique Knox, Qualified Representative
Department of Financial Services
200 East Gaines Street
Room 612 Larson Building
Tallahassee, Florida 32399

STATEMENT OF THE ISSUE

Whether Petitioner, Robert J. Bopp, Jr.'s, application for licensure as a resident independent all lines insurance adjuster

should be approved or denied by Respondent, Department of Financial Services.

PRELIMINARY STATEMENT

On or about May 18, 2005, Robert J. Bopp, Jr. (Petitioner), filed an application with the Department of Financial Services (Respondent) seeking licensure as a resident independent all lines insurance adjuster, Code 05-20. By letter dated August 18, 2005, Respondent advised Petitioner that his application was denied. Petitioner timely requested a formal hearing, and this cause was thereafter transferred to the Division of Administrative Hearings on September 14, 2005, to conduct an evidentiary proceeding. The hearing was scheduled and discovery ensued.

At the formal hearing, Petitioner testified on his own behalf, called one witness to testify, and submitted one exhibit into evidence without objection. Respondent offered no direct testimony and offered four exhibits into evidence without objection. Respondent's Exhibits: 1) Certified copy of application for licensure submitted by Petitioner; 2) Certified copy of Notice of Denial issued August 18, 2005; 3) Composite Exhibit of Petitioner's criminal court records; 4) Certified copy of two letters submitted to Respondent by Petitioner. Respondent also cross-examined Petitioner and his witness.

The Transcript of the hearing was filed on December 2, 2005. Respondent timely filed its Proposed Recommended Order on December 15, 2005. Petitioner submitted a letter dated November 21, 2005, as his post-hearing submittal.

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 (2005).^{1/}

2. On May 18, 2005, Petitioner filed an on-line application with Respondent seeking licensure as a resident independent all lines insurance adjuster. Petitioner had recently completed all prerequisites for an adjuster's license.

3. The on-line application form, filled out by Petitioner, included the following screening question:

Have 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 judgment of conviction was entered?

Petitioner answered in the negative.

4. The criminal history records obtained by Respondent during the application review process revealed that on or about March 29, 1994, Petitioner was charged, via Information, with "Fraudulently Making Application for a Florida Driver's License

or Identification Card," a third-degree felony, in violation of Subsection 322.212(5), Florida Statutes (1993), in the Circuit Court of the Fifth Judicial Circuit of the State of Florida in and for Lake County, Florida, Case No. 94-362-CFA-DS.

5. On or about May 31, 1994, Petitioner pled guilty to the charge, as set forth in the Information. Subsequently, a judgment was entered placing Petitioner on probation for a period of 30 months supervised by the Department of Corrections, ordering Petitioner to perform 50 hours of Community Service, pay \$250 in court costs, as well as \$250 into the Fine and Forfeiture Fund of Lake County, and withholding adjudication of guilt. Petitioner successfully completed probation, which was then terminated.

6. The criminal charges in question arose when Petitioner, then age 25, supplied a friend, Patrick C. Ruddell, then age 20, with Petitioner's Social Security card and Birth Certificate for the purpose of obtaining a false identification card for Ruddell to enable Ruddell to gain access to bars.

7. In explaining his "No" response to the criminal history question on his license application, Petitioner asserts that he inadvertently provided a negative response because he had to submit the on-line application approximately eight times because of a problem with the programming and/or transmission. In addition, he testified that he had not realized that the charge

was a felony, but assumed that it was a misdemeanor. At the time, he did not realize the seriousness of the charge.

Petitioner also testified that at the time he was signing up for the adjustor's course, he asked the instructor whether his prior conviction would prevent him from obtaining a license and was informed that it would not. He relied on that statement and completed the course.

8. Petitioner and his witness testified that he is of good moral character, is fit, and can be trusted to hold this license. He has learned from his mistake. No additional criminal charges have been filed against Petitioner.

9. Petitioner has failed to meet his burden to demonstrate that he is fit and trustworthy to engage in the business of insurance.

CONCLUSIONS OF LAW

10. The Division of Administrative Hearings has jurisdiction over the parties hereto and the subject matter thereof, pursuant to Section 120.569 and Subsection 120.57(1), 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). Furthermore, Petitioner bears this burden at each and every step of the licensure proceedings. Department of Banking

and Finance v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996).

Petitioner must show that he meets all of the relevant statutory criteria in order to satisfy this burden.

12. In its Notice of Denial, Respondent alleged that various Florida Statutes were applicable to Petitioner's application for licensure, specifically Petitioner's criminal history and his failure to disclose the same.

13. Section 626.611, Florida Statutes, states, in pertinent part:

The department shall deny an application for . . . 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 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.

14. Section 626.621, Florida Statutes, states, in pertinent part:

The department may, in its discretion, deny an application for . . . the license . . . of any applicant . . . if it finds that as to the applicant, licensee, or appointee any one or more of the following applicable grounds exist under circumstances for which such denial . . . is not mandatory under s. 626.611:

* * *

(8) 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, without regard to whether a judgment of conviction has been entered by the court having jurisdiction of such cases.

15. Pursuant to Subsections 626.611(14) and 626.821(8), Florida Statutes, an applicant's criminal history is relevant to Respondent's decision regarding the licensure of an applicant.

16. Florida Administrative Code Rule 69B-211.042(2) makes clear an applicant's duty with regard to disclosure of criminal history records, stating:

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. Petitioner's answer to the criminal history question on his application for licensure was false. Petitioner must prove that he did not have knowledge that his answer to the criminal history question was not true and that his untrue answer was unintentional. Munch v. Department of Professional Regulation, 592 So. 2d 1136 (Fla. 1st DCA 1992). Petitioner has acknowledged that his answer to the criminal history question was not true. Additionally, Petitioner has asserted that, because the internet application did not go through, he had to re-do it eight times before it finally went through. In resubmitting it each time, he did not change his answer to the question, although he reviewed it each time.

18. The testimony produced at the hearing calls Petitioner's assertion that the omission was unintentional into question. By completing the application from beginning to end approximately eight times, Petitioner was very familiar with the contents of the application and the questions therein. Additionally, Petitioner had enough knowledge of his criminal history to inquire once, prior to purchasing the pre-licensing course, and a second inquiry being that of the instructor of the pre-licensing course as to whether there would be a denial of

the license Petitioner sought. Further, knowing his criminal history and its potentially negative impact on his application, he made no inquiry with the circuit court as to the nature of the charge (whether it was a felony or misdemeanor) before answering the question and submitting the application.

Furthermore, there were no other discrepancies with Petitioner's application which was submitted to Respondent, notwithstanding Petitioner's assertions.

19. His application failed to disclose that he had committed a felony. In providing a false answer to the criminal history question, Petitioner made a "material misstatement, misrepresentation, or fraud in . . . [his] attempt to obtain the license or appointment" and demonstrated a "lack of fitness or trustworthiness to engage in the business of insurance."

§ 626.611(2) and (7), Fla. Stat.

20. Subsection 626.207(1), Florida Statutes, states, in pertinent part:

(1) The department shall adopt rules establishing specific waiting periods for applicants to become eligible for licensure following denial . . . The waiting periods may be adjusted based on aggravating and mitigating factors established by rule and consistent with this purpose.

21. Respondent has promulgated a rule providing guidelines and waiting periods for individuals with criminal histories and for determining fitness and trustworthiness for licensure.

Florida Administrative Code Rule 69B-211.404, et seq., became effective October 17, 2002, which was before Petitioner filed his application and before the Notice of Denial was issued by Respondent. This rule is applicable to the present case.

22. Florida Administrative Code Rule 69B-211.041(11)

states:

(11) "Trigger Date" is the date on which an applicant was found guilty, or pled guilty, or pled nolo contendere to a crime; or, where that date is not ascertainable, the date of the charges or indictment.

23. Florida Administrative Code Rule 69B-211.042(3)(a)

states:

(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.

24. Florida Administrative Code Rule 69B-211.042(4)(a)

states:

(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.

25. Florida Administrative Code Rule 69B-211.042(4)(b)1.

and 4.a. states:

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

* * *

(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.

* * *

4. Waiting periods shall be calculated as follows:

a. Class A or B crime omitted, where the trigger date was more than 10 years before time of application, add 1 year. If the trigger date was 10 years prior, or less than 10 years prior, to the time of application, add 2 years.

26. Florida Administrative Code Rule 69B-211.042(8)(a)

states:

(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.

27. On or about May 31, 1994, Petitioner pled guilty to the felony charge of "Fraudulently Making Application for a Florida Driver's License or Identification Card." Respondent has the duty of protecting the public of the State of Florida. Therefore, it is Respondent's duty to inquire as to the criminal history of license applicants. Additionally, Respondent is required by law to have rules that require an applicant to wait for a period of time prior to becoming licensed if that applicant has a felonious criminal record. See generally Chapter 626, Fla. Stat., and Fla. Admin. Code Chap. 69B.

28. While the rules do not provide for Petitioner's specific felony, it is analogous to the crime of Fraud. (See Florida Administrative Code Rule 69B-211.042(7)(d)), which provides that when a particular crime is not expressly listed in the rule, Respondent is to analogize the crime to the most

similar crime listed.) Pursuant to Subsection 322.212(5), Florida Statutes, "[i]t is unlawful for any person to use a false or fictitious name in any application for a driver's license or identification card or knowingly to make a false statement, knowingly conceal a material fact, or otherwise commit a fraud in any such application."

29. Here, Petitioner supplied Ruddell with Petitioner's Social Security card and Birth Certificate for the purpose of obtaining a false identification card for Ruddell to enable Ruddell to gain access to bars.

30. Respondent defines fraud as a "Class A" crime, pursuant to Florida Administrative Code Rule 69B-211.042(21). Based upon his criminal record and the failure to disclose it, Petitioner is subject to a 16-year waiting period from his trigger date, less any mitigation, to have commenced on May 31, 1994, before Petitioner may be eligible for licensure. See generally Fla. Admin. Code R. 69B-211.042(4) and (8). Therefore, absent any mitigating or further aggravating factors, Petitioner would be eligible for licensure on May 31, 2010.

31. Petitioner filed one exhibit and called one witness as evidence to consider mitigation of Petitioner's waiting period. Pursuant to Florida Administrative Code Rule 69B-211.042(10)(b), the burden is on Petitioner to prove mitigating circumstances. Character arguments alone are insufficient to meet the burden to

prove mitigating circumstances. None of the information in Petitioner's exhibit or the testimony provided by Janet Garmont, Petitioner's witness, serves as any effective mitigation. The 16-year waiting period should stand.

RECOMMENDATION

Based on the foregoing Findings of Facts and Conclusions of Law, it is

RECOMMENDED that a final ordered be entered: 1) finding Petitioner has not met his burden to prove entitlement to a license; 2) denying the application for licensure of Petitioner as a resident independent all lines insurance adjuster (Code 05-20); and 3) finding that the 16-year waiting period from Petitioner's trigger date should not be reduced.

DONE AND ENTERED this 9th day of January, 2006, in Tallahassee, Leon County, Florida.



DANIEL M. KILBRIDE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of January, 2006.

ENDNOTE

^{1/} Unless otherwise indicated, all citations are to Florida Statutes (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.