STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

VINCENT ROBERT FUGETT, SR.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 05-4037
	)	
DEPARTMENT OF FINANCIAL SERVICES,	)	
	)	
Respondent.	)	
	)	

AMENDED RECOMMENDED ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the formal hearing in this proceeding on April 25, 2006, in St. Petersburg, Florida, on behalf of the Division of Administrative Hearings (DOAH). The ALJ conducted the hearing by telephone conference from Tallahassee, Florida. Petitioner, his witness, counsel for Respondent, and the court reporter attended the hearing in St. Petersburg.

APPEARANCES

For Petitioner: Vincent Robert Fugett, Sr., pro se
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For Respondent: Angelique Knox, Esquire
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STATEMENT OF THE ISSUE

The issue presented is whether Respondent should deny Petitioner's application for licensure as a resident life insurance agent, including variable annuity and health insurance.

PRELIMINARY STATEMENT

Petitioner submitted a license application to Respondent on May 2, 2005. On September 22, 2005, Respondent notified Petitioner that Respondent proposed to deny the license application. Petitioner timely requested a formal hearing, and Respondent referred the matter to DOAH to conduct the hearing.

At the hearing, Petitioner testified in his own behalf, presented the testimony of one witness, and submitted seven exhibits for admission into evidence. Respondent called no witnesses, but submitted six exhibits for admission into evidence.

The identity of the witnesses and exhibits and the rulings regarding each are reported in the one-volume Transcript of the hearing filed with DOAH on May 1, 2006. Respondent filed its Proposed Recommended Orders (PROs) on May 12, 2006. Petitioner did not submit a PRO.

FINDINGS OF FACT

1. Respondent is the state agency responsible for licensing insurance agents in the state pursuant to Chapter 626,

Florida Statutes (2004). On May 2, 2005, Respondent received Petitioner's application to be licensed as a resident life, variable annuity, and health agent (insurance agent).

2. On September 22, 2005, Respondent issued a Notice of Denial to Petitioner. Respondent based the denial on several grounds that may be divided into three parts.

3. The first part is based on Petitioner's prior criminal history. In relevant part, the Notice of Denial denies the application because Petitioner pled guilty to two crimes allegedly punishable by imprisonment of one year or more.

4. The Notice of Denial further states that the crimes were crimes of moral turpitude and that Subsection 626.611(14), Florida Statutes (2004), makes denial of the application compulsory. Even if the crime were not one of moral turpitude, the Notice of Denial states that the guilty pleas provide a discretionary ground to deny the application pursuant to Subsection 626.621(8), Florida Statutes (2004).

5. The second part of the grounds for denial is also compulsory. The second part of the grounds may be fairly summarized as alleging a lack of fitness or trustworthiness to engage in the business of insurance within the meaning of Subsections 626.611(7), 626.785(1), and 626.831(1), Florida Statutes (2004).

6. The second part of the grounds for denial is a tautology of the criminal offenses. The Notice of Denial states that Petitioner lacks one or more qualifications for the license because of the criminal convictions.

7. The third part of the grounds for denial relates to waiting periods. The Notice of Denial states that Florida Administrative Code Rule 69B-211.042(9)(a) requires Petitioner to wait a longer period of time before applying for a license as an insurance agent due to the multiple criminal offenses.

8. The remaining findings of fact address the factual sufficiency of the second part of the grounds for denial. The conclusions of law, in relevant part, address the legal sufficiency of the first and third parts of the grounds for denial.

9. The criminal record of Petitioner is undisputed. On October 17, 1986, the Circuit Court of Broward County, Florida, adjudged Petitioner guilty of the felony of possession of cannabis, withheld adjudication of guilt pertaining to a felony charge of possession of cocaine, and sentenced Petitioner to two years' probation. Petitioner satisfactorily completed his probation.

10. On January 13, 2005, Petitioner entered a plea of guilty to a felony charge of willful and malicious damage to real or personal property. The court withheld adjudication of

guilt, imposed fines and costs of $450, required restitution in an amount of at least $1,000 and not more than $2,500, and placed Petitioner on probation for two years.

11. Petitioner's son had run away from home. Petitioner had information that his son was residing in the residence for which Petitioner was charged with property damage. Petitioner was attempting to locate his son and bring him home.

12. Petitioner did not satisfactorily complete probation. Petitioner changed residences without prior notice to his probation officer.

13. Petitioner testified that he undertook every reasonable effort to notify his probation officer before moving. The trier of fact finds the testimony concerning Petitioner's notice to the probation officer to be credible and persuasive.

14. The probation officer had constructive knowledge of the new residence. The move caused no harm to the state or the public.

CONCLUSIONS OF LAW

15. Respondent lacks statutory authority to deny Petitioner's license application. The application was approved on August 1, 2005, by operation of Subsection 120.60(1), Florida Statutes (2004).

16. Respondent did not deny the application within 90 days of May 2, 2005, when Petitioner submitted the application.

Respondent purported to deny the application on September 22, 2005. If Respondent were to issue a final order inconsistent with the statute, Respondent's final order may be subject to remand upon timely appeal by Petitioner. § 120.68(7)(e)1., Fla. Stat. (2005); Florida Academy of Cosmetic Surgery, Inc. v. State of Florida, Department of Health, Board of Medicine, 771 So. 2d 602 (Fla. 1st DCA 2000).

17. Petitioner submitted his application on May 2, 2005. Respondent issued the proposed denial on September 22, 2005.

18. No evidence of record shows that the application was incomplete when Respondent received it. No evidence of record shows that Petitioner voluntarily waived or extended the 90-day statutory time limit. No evidence of record shows that Respondent provided oral notice of intent to deny the license application within the 90-day statutory time limit. Compare Department of Transportation v. Calusa Trace Development Corporation, Inc., 571 So. 2d 543 (Fla. 4th DCA 1990); Sumner v. Department of Professional Regulation, 555 So. 2d 919 (Fla. 1st DCA 1990).

19. An administrative agency organized under the executive branch of government, including Respondent, cannot interpret a statute in a manner that amends, modifies, enlarges, or contravenes the statute. § 120.58(1), Fla. Stat. (2005). Agency action that interprets a statute in such a manner risks

violation of the separation of powers clause. Art. 2, § 3, Fla. Const.; Ch. 20, Fla. Stat. (2005).

20. The statutory time limit may not be interpreted as delegating the right to exercise unbridled discretion in applying the law. The non-delegation doctrine requires the legislature to provide standards and guidelines in an enactment that are ascertainable by reference to the terms of the enactment. Bush v. Schiavo, 885 So. 2d 321 (Fla. 2004); B.H. v. State, 645 So. 2d 987, 992-994 (Fla. 1994); Askew v. Cross Key Waterways, 372 So. 2d 913, 925 (Fla. 1978).

21. If Respondent were to have statutory authority to deny the application, DOAH would have jurisdiction over the parties and subject matter in this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2002). DOAH provided the parties with adequate notice of the formal hearing.

22. 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 the grounds stated in the Notice of Denial are factually and legally insufficient to deny the license application.

23. Petitioner satisfied his burden of proof concerning the second part of the grounds for denial. Petitioner showed by a preponderance of the evidence that he does not lack one or

more of the qualifications for licensure; and that he has not failed to demonstrate the necessary fitness and trustworthiness to engage in the business of insurance. §§ 626.611(1), 626.611(7), 626.785(1), and 626.831(1), Fla. Stat. (2004).

24. Petitioner satisfied his burden of proof concerning the third part of the grounds for denial involving waiting periods. Subsection 626.207(1), Florida Statutes (2004), requires Respondent to "adopt rules establishing specific waiting periods for applicants to become eligible for licensure following denial." (emphasis supplied)

25. Respondent incorrectly construes the phrase "following denial" to mean following Petitioner's entry of a plea of guilty to the relevant crimes. Similarly, Respondent misconstrues the quoted phrase to mean that Respondent may utilize a waiting period as a ground for initial denial of a license rather than as a ground "following denial."

26. A state agency, including Respondent, is statutorily prohibited from interpreting a statute in a manner that modifies or amends the statute. § 120.52(8), Fla. Stat (2004). A state agency organized under the executive branch of government that modifies or amends a statute, violates the separation of powers clause. Art. 2, § 3, Fla. Const.; Ch. 20, Fla. Stat. (2005).

27. The statutory authority in Subsection 626.207(1), Florida Statutes (2004), for Respondent to adopt rules

pertaining to waiting periods cannot be construed to authorize Respondent to adopt a rule that amends or modifies the statutory phrase "following denial." A statute may not delegate to the executive branch of government the power to enact a law or the right to exercise unrestricted discretion in applying the law. Schiavo, 885 So. 2d at 321; B.H., 645 So. 2d at 992-994; Cross Key Waterways, 372 So. 2d at 925. Statutes granting power to the executive branch must clearly define the power delegated, preclude unbridled discretion, preclude the enlargement or modification of the law implemented, and ensure the availability of meaningful judicial review. Schiavo, 885 So. 2d at 332.

28. Even if the statutory waiting periods were to operate as grounds for initial denial of an application, the waiting periods would not operate to deny the license application based on the first criminal offense in 1986. The first criminal offense occurred approximately 20 years before the date of application and preceded the effective date of the statute authorizing rules prescribing waiting periods.

29. The first part of the grounds for denial presents issues that are largely issues of law rather than issues of fact. Subsections 626.611(14) and 626.621(8), Florida Statutes (2004), in relevant part, authorize Respondent to deny Petitioner's license application if Petitioner pled guilty to a felony involving moral turpitude.[1]

30. Mere possession of marijuana is not a crime of moral turpitude within the meaning of Subsection 625.611(14), Florida Statutes (2004). Pearl v. Florida Board of Real Estate, 394 So. 2d 189 (Fla. 3d DCA 1981). Nor is criminal destruction of property a crime of moral turpitude. Nelson v. Department of Business and Professional Regulation, 707 So. 2d 378, 379-380 (Fla. 5th DCA 1998) (exploding a smoke bomb to protest the agency action of a water management district is not moral turpitude).

31. The remaining issue is whether either of the criminal offenses committed by Petitioner is a felony. A felony is defined in Subsection 775.08 (1), Florida Statutes (2005), whenever the term is used in the laws of this state. While other statutes classify various crimes as a felony, a felony is defined, whenever the term is used in the laws of this state, in the following manner:

> When used in the laws of this state:
>
> (1) The term "felony" shall mean any criminal offense that is punishable under the laws of this state . . . by . . . imprisonment in a state penitentiary. . . . A person shall be imprisoned in the state penitentiary for each sentence which . . . exceeds 1 year. (emphasis supplied)

32. A determination of whether the offenses committed by Petitioner satisfy the statutory definition of a felony is not essential to the disposition of this proceeding. However, the agency may, or may not, wish to address the issue in its final

order or through subsequent legislative amendment. See McDonald v. Department of Banking and Finance, 346 So. 2d 569, 582-583 (Fla. 1st DCA 1977) (§ 120.57(1), Fla. Stat. (2005), requires ALJ to record, recommend, and critique agency policy as it is revealed in the record and to serve the public interest by exposing and challenging agency policy).

33. The term "punishable" is not defined by statute. The common and ordinary meaning of the term is "liable to punishment." The American Heritage Dictionary of the English Language, page 1060 (Houghton Mifflin Company 1981).

34. Prior to the enactment of statutory sentencing guidelines, a person convicted of a crime classified as a felony was liable for imprisonment in the state penitentiary at the discretion of the sentencing court. Crimes classified as a felony satisfied the statutory definition of a felony because any crime classified as a felony was liable for punishment in the state penitentiary subject only to judicial discretion.

35. Subsequent enactment of statutory sentencing guidelines limited the discretion of the sentencing court and prohibited imprisonment in the state penitentiary of any person with a total prison score below the prescribed minimum even though the crime committed was classified as a felony. Statutory sentencing guidelines eviscerated the preexisting symmetry between the definition of a felony based on

imprisonment in the state penitentiary and classification of a crime as a felony.

36. Statutory sentencing guidelines limit a convicted person's liability for imprisonment in the state penitentiary by reference to total prison score. § 921.0014(2), Fla. Stat. (2004). The record does not disclose the total prison score for the earlier of the two crimes at issue in this proceeding. Petitioner's total prison score for his second offense was 10.2 and was insufficient under the laws of this state for the offense to be punishable by imprisonment in the state penitentiary within the meaning of Subsection 775.08(1), Florida Statutes (2004).

37. State prison months are determined by reducing total sentence points by 28 points. § 921.0014(2), Fla. Stat. (2004). When 28 points are subtracted from Petitioner's 10.2 points, the mathematical remainder is a negative 17.8 points.

38. Respondent proposes to exclude from the phrase "the laws of this state" laws that prohibit imprisonment in the state penitentiary for any person with a total prison score below the statutory minimum. The proposed interpretation is not a literal interpretation of the quoted phrase. The proposed interpretation construes terms that are not defined by statute in a manner that departs from their common and ordinary meaning.

39. Respondent did not articulate in the record any underlying technical reasons for deference to agency expertise in the interpretation of statutory terms. Johnston, M.D. v. Department of Professional Regulation, Board of Medical Examiners, 456 So. 2d 939, 943-944 (Fla. 1st DCA 1984). The agency did not explicate policy considerations that infuse the proposed statutory interpretation with agency expertise and entitle it to great deference.

40. The agency's proposed interpretation risks modification of relevant statutory terms. The proposed interpretation would define an offense as a felony by its classification, or label, rather than by the definition in Subsection 775.08(1), Florida Statutes (2005). The statutory definition of a felony requires the state agency to define a crime as a felony based on a determination of whether the crime is punishable under the laws of this state, including the state sentencing guidelines, by imprisonment in the state penitentiary.

41. The outcome of the instant proceeding does not require a resolution of the issue of whether the offenses committed by Petitioner satisfy the statutory definition of a felony in Subsection 775.08(1), Florida Statutes (2005). It is clear the legislature intended the license to be issued to Petitioner by operation of law pursuant to Subsection 120.60(1), Florida

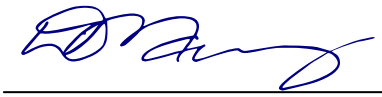
Statutes (2004). Subsection 120.60(1), Florida Statutes (2004), is self-executing and is not an affirmative defense that must be specifically pled by Petitioner.

RECOMMENDATION

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

RECOMMENDED that Respondent enter a final order determining that Petitioner's license application has been granted by operation of law.

DONE AND ENTERED this 22nd day of June, 2006, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of June, 2006.

ENDNOTE

1/ Denial of a license application is mandatory in Subsection 626.611(14), Florida Statutes (2004), but discretionary in Subsection 626.621(8), Florida Statutes. Denial is mandatory if the felony involves moral turpitude, but discretionary if the felony does not involve moral turpitude.

Both statutes authorize denial, in relevant part, upon the entry of a plea of guilty to a crime that is punishable by imprisonment of one year or more in a federal jurisdiction or other state, but the "one year or more" language is inapposite to this proceeding. Goodwin v. Department of Insurance, Case No. 00-3503 (DOAH November 14, 2000).

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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.