REPRESENTING
ALEX SINK
CHIEF FINANCIAL OFFICER
STATE OF FLORIDA

FILED
SEP 17 2009
Docketed by

IN THE MATTER OF:

Case No. 103622-09-FM

JOSEPH EDGERTON
_____/

FINAL ORDER

This cause came on for consideration of and final agency action on the Recommended Order filed on June 19, 2009, by Administrative Law Judge (ALJ) John G. Van Landingham, after a formal hearing conducted on May 6, 2009. A copy of that Recommended Order is attached as Exhibit A. The Department timely filed exceptions to the Recommended Order.

The Recommended Order, the transcript of proceedings, the exhibits admitted into evidence, the Department's exceptions, and applicable law have all been considered during the promulgation of this Final Order.

In the Recommended Order, the ALJ indulged in a constitutional analysis of the effects of a restoration of civil rights to a convicted felon as that restoration relates to eligibility for licensure. However, that analysis is inapposite to this proceeding because constitutional issues are beyond the province of the Division of Administrative Hearings to resolve. *Department of Revenue v. Young American Builders*, 330 So.2d 864 (Fla. 1st DCA 1976); *Department of Transportation v. Morehouse*, 350 So.2d 529 (Fla. 3rd DCA 1977); *Department of Revenue v. Amrep Corp.*, 358 So.2d 1343 (Fla. 1978); *Gulf Pines Memorial Park, Inc.*, 361 So.2d 695 (Fla. 1978); *Myers v. Hawkins*, 362 So.2d

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926 (Fla. 1978); *Metropolitan Dade Cty. v. Dept. of Commerce*, 365 So.2d 432 (Fla. 3rd DCA 1978); *Rice v. Department of Health and Rehabilitative Services*, 386 So.2d 844 (Fla. 1st DCA 1980); *PPI, Inc. v. Dept. of Bus. and Prof. Reg.*, 917 So.2d 1020 (Fla. 1st DCA 2006). Moreover, even treating that analysis as merely being mindful but not determinative of constitutional considerations, it is inherently flawed because it treats civil rights restorations as being the same, and having the same effect, as full pardons, which they are not and do not. The ALJ's misapprehension of the effect of a civil rights restoration makes that analysis inapposite to this controversy, as shown below.

In Florida, a full pardon removes all disabilities resulting from a crime; it has the effect of both restoring all civil rights lost by a felon upon conviction, as well as erasing any notion of guilt of the underlying felony. *Sandlin v. Cr. Just. Standards & Tr. Com'n*, 531 So.2d 1344 (Fla. 1988). In contrast, a civil rights restoration does not remove all disabilities resulting from the crime or remove the guilt of the underlying felony, but is limited exclusively to the restoration of those particular civil rights stripped from a felon upon conviction, viz; the right to bear arms, the right to serve on a jury, the right to vote, and the right to stand for public elective office. *See*, Art VI Section 4, Fla. Const.; Section 40.022, Fla. Stat.; Section 97.041(2)(b), Fla. Stat; and Section 790.23, Fla. Stat. No other civil rights are lost by virtue of a felony conviction. Restoration can, by definition, bring back no more civil rights than were lost.

Obtaining government licensure to engage in any particular trade, occupation, profession, etc., is a privilege, not a constitutionally protected civil right. *See, 8 Fla. Jur. 2d* "Businesses and Occupations" Section 32; *Wilson v. Pest Control Commission of Fla.*, 199 So.2d 777 (Fla. 4th DCA 1967) Licenses, generally, carry no constitutionally

secured guarantees prior to granting. *See, e.g., Crane v. Department of State, Division of Licensing*, 547 So.2d 26 (Fla. 3rd DCA 1989). It is long-established that it is well within the police power of the state to regulate trades, occupations and professions affected with a public interest so as to protect the public health, safety, welfare and morals. *Junco v State Bd. of Accountancy*, 390 So.2d 329 (Fla. 1980); *Golden v. McCarty*, 337 So.2d 388 (Fla. 1976). This includes legislation regulating the licensure of both restored and unrestored felons. *See, Vetter v. Dept. of Bus. and Prof. Reg.*, 920 So.2d 44 (Fla. 4th DCA 2005); *Scherer v. Dept. of Bus. and Prof. Reg.*, 919 So.2d 62 (Fla. 5th DCA 2006) Therefore, absent equal protection considerations not present here, applications for governmental licensure generally do not implicate constitutionally protected civil rights, but are instead governed by statute.

None of the aforementioned particular civil rights or their restoration are at issue in this proceeding. The application in question is not constitutionally affected by either the removal or the restoration of those particular civil rights. Moreover, the pertinent statutes, discussed *infra*, have no limiting effect on the restoration of those civil rights by the executive, and thus cannot and do not unconstitutionally intrude upon the executive's restoration prerogatives. In short, there is no constitutional issue to be decided or even to be considered as providing guidance to the proper outcome of this controversy. That question is to be determined by the record evidence and the controlling statutes.

RULINGS ON THE DEPARTMENT'S EXCEPTIONS

The Department's first exception takes issue with the ALJ's synopsis of the issue to be decided in this matter. Essentially, the exception re-states the synopsis in a

fashion that does not materially alter the issues to be decided or change the burden of proof in this case. Moreover, the exception is worded in terms that suggest that the Department had already decided to deny the application in question. To that extent, the exception misapprehends the administrative process. An administrative hearing is not an appellate review of final agency action. Administrative hearings are part and parcel of an agency's decision making process; no decision is arrived at until a Final Order is issued. All actions taken by an agency prior to the entry of a Final Order are preliminary, and, at best, indicate an agency's intent at a given point in time. Thus, no application is or can be "denied" prior to the exhaustion of the Chapter 120 administrative process. Therefore, this exception is rejected.

The Department's second exception takes issue with the ALJ's constitutional analysis of the matter at hand. For the reasons stated above, this exception is accepted, and the whole of that analysis from the beginning of Paragraph 20 to the next to the last sentence of Paragraph 23 are rejected. The exception also takes issue with the finding in Paragraph 15 that Edgerton meets all the requirements for licensure save passing an examination not yet administered. That portion of the second exception is better dealt with in conjunction with the third exception.

The Department's third exception challenges the ALJ's finding that Edgerton meets all the requirements for licensure save passing an examination not yet administered. This finding is based on an erroneous misunderstanding of the effect of Edgerton's civil rights restoration, addressed above, and an erroneous construction of the pertinent statutes, addressed later herein. Absent that erroneous misunderstanding and erroneous construction, a review of the entire record shows that there is no

competent, substantial evidence to support that finding. Accordingly, that portion of the third exception is accepted and Paragraph 15 is struck in its entirety.

The third exception also challenges the ALJ's statutory construction conclusions reached in Paragraphs 23 through 30 of the Recommended Order, wherein it was concluded that the statutes at issue should be constructed to avoid a constitutional infirmity, the result of which was to recommend the approval of Edgerton's application for licensure.

The statutes at issue are, on the one hand, Sections 633.081(2)(b) and 633.081(6)(d), Fla. Stat., and on the other hand, Section 112.011(1)(b), Fla. Stat. Section 633.081(2)(b), Fla. Stat., by use of the word "shall" requires that applicants such as Mr. Edgerton must not have been found guilty of a felony involving moral turpitude; the existence of such a conviction is thus an automatic disqualifier to the applicant. Section 633, 081(6)(d), Fla. Stat., by use of the word "may" gives the department the discretion to deny an applicant who has been convicted of a felony. Mr. Edgerton has two felony convictions, one for possession of cocaine with intent to distribute, and one for conspiracy to sell cocaine. Under Florida law, both such convictions involve moral turpitude. *Millikin v. Department of Business and Professional Regulation*, 709 So.2d 595 (Fla. 5th DCA 1998).

Section 112.011(1)(b), Fla. Stat., in pertinent part, provides that felons who have had their civil rights restored cannot be disqualified from government licensure "solely because of a prior conviction for a crime". In an attempt to harmonize the apparently conflicting statutes, the ALJ concluded that in order to avoid constitutional infirmity the pertinent statutes had to be construed in such a fashion so as to disallow them from

serving as an automatic disqualifier ('absolute bar") to restored felon applicants, despite the express and mandatory language of Section 633.081(2)(b), Fla. Stat. However, as explained above, no constitutionally guaranteed civil rights are at issue here; there simply is no constitutional aspect to this case. The ALJ's constitutional predicate for his statutory construction being absent, his dependent conclusions are necessarily erroneous.

A proper construction of these statutes, which in pertinent part address the same subject matter of eligibility for state licensure, requires an *in pari materia* reading which focuses on the express language of both Section 112.011(1)(b), Fla. Stat., and Sections 633.081(2)(b) and (6), Fla. Stat., relative to eligibility for state licensure. *State v. Fuchs*, 769 So.2d 1006 (Fla. 2000); *Ray v. Pensacola Sertoma Club, Inc.*, 809 So.2d 81 (Fla. 1st DCA 2002), reh. den., rev. den 832 So.2d 105. Section 112.011(1)(b), Fla. Stat., states that a person such as Mr. Edgerton cannot be denied his application for state licensure solely "because of **a** prior conviction for **a** crime." (e.s.) "A" is singular; Mr. Edgerton has *two* prior convictions. By using the singular term "a", the Legislature has limited the application of the statute to restored felons who have but a single conviction to be "forgiven" relative to qualification for licensure after the restoration of civil rights. In contrast, the ALJ's construction of this language re-writes the statute to apply to felons who have unlimited multiple convictions and restorations to be considered. Had the Legislature wished to forgive restored felons for "all prior convictions" or two, three, four, etc., prior convictions, it could easily have done so; but it did not. By its terms, the statute arguably forgives restored felons of but one otherwise disqualifying conviction.

That same language does not grant that same forgiveness to felons with multiple convictions and restorations.

Moreover, implication and inference cannot be substituted for clear legislative expression. *Carlile v. Game and Fresh Water Fish Commission*, 354 So.2d 362 (Fla. 1977); *Professional Consulting Services v. Hartford Life and Accident Ins. Co.*, 849 So.2d 446 (Fla. 2nd DCA 2003). To warrant implied words of modification, so as in this instance to imply the application of the statute to multiple convictions for crimes, the presumption of a legislative intent to make the statute in question operate as it would when so altered must be so strong that the contrary thereof cannot be reasonably supposed. *Owen v. Cheney*, 238 So.2d 650 (Fla. 2nd DCA 1970), cert. discharged 253 So.2d 869. No such unreasonable intent is evident here, rendering any attempt to imply its application to restored felons with multiple crime convictions untenable.

Finally, seen as an exemption to the otherwise disqualifying features of Sections 633.081(2)(b) and (6), Fla. Stat., Section 112.011(1)(b), Fla. Stat., which the Legislature was under no constitutional obligation to enact, should be narrowly construed against those claiming its benefits. *Pal-Mar Water Management Dist. v. Board of County Comn'rs of Martin County*, 384 So.2d 232 (Fla. 4th DCA 1980).

As noted by the ALJ, the "forgiveness aspect" of Section 112.011(1)(b), Fla. Stat., discussed above, must be read *in pari materia* to be harmonized, if possible, with the provisions of Sections 633.081(2)(b) and (6), Fla. Stat., because, as acknowledged, all those statutes address the same subject matter, which is eligibility for state licensure. So read, the statutes provide that a restored felon who has but one felony conviction to be "forgiven" by Section 112.011(1)(b), Fla. Stat., cannot be denied licensure solely

because of that single prior conviction, but that those restored felons who have multiple convictions for crimes are subject to the strictures of Sections 633.081(2)(b) and 633.081(6), Fla. Stat., which the Legislature has constitutionally enacted in the exercise of its police power to regulate certain occupations, trades, and professions. *See, 8 Fla. Jur. 2d* "Businesses and Occupations" Section 1. Construed in this harmonious fashion, the statutes are not repugnant, each is given effect, and each has its own sphere of action.

The Department also excepts to the ALJ's conclusion that a statute [Section 633.081(2)(b), Fla. Stat.] that contains a further criteria of consideration (moral turpitude) must be treated the same as a statute which operates to deny licensure for simply for the conviction of a felony, for purposes of a Section 112.011 analysis. Section 633.081(2)(b), F.S., is a bar to persons who "have been found guilty of, or having pleaded guilty or nolo contendere to... a felony... *which involves moral turpitude* ... without regard to whether a judgment of conviction has been entered by the court having jurisdiction of such cases." (Emphasis added.)

In Paragraph 22 of the Recommended Order, the Administrative Law Judge states that, "[t]he decisions in *Sandlin [v. Criminal Justice Standards & Training Com'n,* 531 So.2d 1344 (Fla. 1988)], *Padgett [v. Estate of Gilbert*, 676 So.2d 440, (Fla. 1st DCA 1996)], and *G.W. Liquors [of Collier, Inc. v. Department of Business Regulation*, 556 So.2d 464 (Fla. 1st DCA 1990)] constrain the undersigned to construe Section 633.081(1)(b), F.S., as an absolute bar to licensure with respect only to felons whose crimes involved moral turpitude and whose civil rights have not been restored, and Section 633.081(6)(d) as a discretionary bar that may be applied, based solely on the

fact of a criminal conviction, against unrestored felons only," and that "[t]his is because, as the referenced authorities make clear, neither statute may be applied constitutionally as a prohibition against licensing a convicted felon, qua convicted felon, if the felon's civil rights have been restored."

However, unlike the statutes in *Sandlin, G.W. Liquors,* and *Padgett*, Section 633.081(2)(b), F.S., is not an absolute bar to convicted felons. Rather, Section 633.081(2)(b), F.S., is a bar to persons who "have been found guilty of, or having pleaded guilty or nolo contendere to... a felony... *which involves moral turpitude* ... without regard to whether a judgment of conviction has been entered by the court having jurisdiction of such cases." (Emphasis added.)

In *Sandlin*, the Criminal Justice Standards and Training Commission relied on Section 943.13(4), F.S. (1985) to deny licensure to an individual pardoned from robbery, escape, and assault, because a law enforcement officer shall, "[n]ot have been convicted of any felony or of a misdemeanor involving perjury or a false statement or have received a dishonorable or undesirable discharge from any of the Armed Forces of the United States..." (Emphasis added.)

Section 561.15(2), F.S. (1985), at issue in *G.W. Liquors*, stated in part, "[n]o license under the Beverage law shall be issued to any person who has been convicted within the last past 5 years of any offense against the beverage laws of this state, the United States or any other state; who has been convicted within the last past 5 years in this state or any other state or the United States of soliciting for prostitution, pandering, letting premises for prostitution, keeping a disorderly place, or illegally dealing in narcotics; or who has been convicted in the last past 15 years of any felony in this state

or any other state or the United States; or to a corporation, any of the officers of which shall have been so convicted." (Emphasis added).

In *Padgett*, the statute at issue, Section 733.303, F.S. (1993), merely stated that, "[a] person is not qualified to act as a personal representative [of an estate in probate] if... [h]e has been convicted of a felony." (Emphasis added).

Because these cases involve interpreting statutes substantially different from Section 633.081(2)(b), F.S., and applying them differently, it is inappropriate to construe these cases as automatically bringing Section 633.081(2)(b), F.S., within the prohibitions of Section 112.011, Fla. Stat. A legislative enactment is presumed to be constitutional. *Lawnwood Medical Center, Inc. v. Seeger*, 990 So.2d 503, 508 (Fla. 2008). If a statute's language is clear, unambiguous, and addresses the matter in issue, then it must be enforced as written. *Id.* at 511.

Neither a pardon nor a restoration of civil rights prevents a licensing agency from examining the facts underlying a felony. *Sandlin* (pardon) and *G.W. Liquors* (restoration of civil rights); *See also R.J.L. v. State*, 887 So.2d 1268 (Fla. 2004) (a pardon does not have the effect of eliminating guilt or the fact of conviction); and *Randall v. Florida Department of Law Enforcement*, 791 So.2d 1238 (Fla. 1st DCA 2001) (a full pardon does not obliterate the fact of the commission of the crime and the conviction thereof).

Just as it is reasonable that the Legislature determined that the facts underlying a crime of child abuse should bar licensure in a child care facility, it is also reasonable for the Legislature to determine that the facts underlying a crime of moral turpitude should be bar to licensure as a fire inspector, which is a position of trust, integral to the protection of the public health, safety, and welfare.

The Legislature acted in accordance with the principles of *Sandlin* and *G.W. Liquors*, and consistent with Section 112.011(1)(b), F.S., in determining that the facts underlying a felony crime involving moral turpitude, rather than the felony conviction itself, may justify a bar to licensure as a fire inspector and remove that statutory section from the ambit of Section 112.011(1)(b), Fla. Stat.

Therefore, in consideration of all of the above, it is concluded that "a" as used in Section 112.011(1)(b), Fla. Stat., means but a singular prior felony conviction and restoration, thus rendering the statue inapplicable to applicants with multiple prior felony convictions and restorations, or those applicants who have been convicted of a crime involving moral turpitude.

Accordingly, Paragraphs 20 through 31 are rejected in the Recommended Order and are replaced with:

20. By its express language, Section 112.011(1)(b), Fla. Stat., is applicable to felons having but a single prior conviction and civil rights restoration. Mr. Edgerton has two such prior felony convictions and restorations. Further, Mr. Edgerton was convicted of crimes involving moral turpitude. Therefore, Mr. Edgerton is not inevitably entitled to the application of Section 112.011(1)(b), Fla. Stat., and may be subject to the strictures of Sections 633.081(2)(b) and (6), Fla. Stat.

This conclusion of law is as or more reasonable that that which it replaces.

The Department's fourth exception goes primarily to the issue of whether the crimes the Petitioner was convicted of actually involve moral turpitude. The Department takes exception to Paragraph 4 in the Preliminary Statement of the Recommended Order, in which the Administrative Law Judge states that, "the Department's characterization of the offenses as crimes involving moral turpitude is sharply contested,

but that particular dispute is not outcome determinative and need not be decided, for reasons that follow."

However, the determination as to whether a crime involves moral turpitude is a conclusion of law that is key to the applicability of Section 633.081(2)(b), F.S.

Petitioner pled guilty to possession of cocaine with intent to sell and pled guilty to conspiracy to distribute cocaine. Because, "under contemporary community standards, the evil of narcotics trafficking is well known and accepted," both of these crimes involve moral turpitude. *Millikin v. Department of Business and Professional Regulation*, 709 So.2d 595, 597 (Fla. 5th DCA 1998) (possession of cocaine with the intent to sell is a crime of moral turpitude); and *Natelson v. Department of Ins.*, 454 So.2d 31, 32 (Fla. 1st DCA 1984) (agencies are afforded wide discretion in the interpretation of a statute which it administers). As such, the Department correctly denied Petitioner's application to sit for the Fire Inspector I Examination based upon Section 633.081(2)(b), F.S.

Accordingly, the Department's fourth exception is accepted and Paragraph 4 is rejected in the Recommended Order and is replaced with:

4. The crimes of which the Petitioner was convicted involved moral turpitude, which is crucial in determining the applicability of the prohibitions of Section 633.081(2)(b), Fla.Stat.

This conclusion of law is as or more reasonable that that which it replaces.

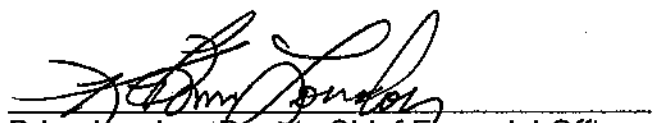
In view of all of the above, and based upon the unique factual circumstances in this case, including but not limited to the fact that the Petitioner has successfully maintained his licensure as a firefighter in this State since 1995:

ACCORDINGLY, IT IS HEREBY ORDERED that except as modified above, the Findings of Fact found by the ALJ are adopted as the Department's Findings of Fact,

and except as modified above, the Conclusions of Law reached by the ALJ are adopted as the Department's Conclusions of Law, and

IT IS FURTHER ORDERED that the Recommendation made by the ALJ is accepted for the reasons stated above, and that Mr. Edgerton's application to sit for the examination to become a fire safety inspector is hereby granted.

DONE AND ORDERED this 17th day of September, 2009.



Brian London, Deputy Chief Financial Officer

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* The effect of that verbal communication fulfills the 90 day deemer requirement of Section 120.60(1), Fla. Stat. *See, State, Department of Transportation v. Calusa Trace Development Corp.*, 571 So.2d 543 (Fla. 2nd DCA 1990); *Sumner v. Department of Professional Regulation, Board of Professional Psychological Examiners*, 555 So.2d 919 (2nd DCA 1990).

NOTICE OF RIGHTS

Any party to these proceedings adversely affected by this Order is entitled to seek review of this 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 Tracey Beal, DFS Agency Clerk, Department of Financial Services, 612 Larson Building, 200 East Gaines Street Tallahassee, Florida, 32399-0390, and a copy of the same with

the appropriate district court of appeal, within thirty (30) days of rendition of this Order. Filing may be accomplished via U.S. Mail, express overnight delivery, or hand delivery. Filing cannot be accomplished by facsimile transmission or electronic mail.

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