

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JAMES GREGORY BASARA,)
)
 Petitioner,)
)
 vs.) Case No. 09-6642
)
 DEPARTMENT OF)
 FINANCIAL SERVICES,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

On March 29, 2010, a hearing was held in Tallahassee, Florida, before Lisa Shearer Nelson, a duly-appointed Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: James Gregory Basara, pro se
1537 Chatham Court
St. Augustine, Florida 32092

For Respondent: Robyn Blank Johnson, Esquire
Department of Financial Services
Division of Legal Services
200 East Gaines Street
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STATEMENT OF THE ISSUE

Whether Petitioner's application for licensure as a resident company employee all lines adjuster should be granted.

PRELIMINARY STATEMENT

Petitioner applied for a license as a resident company employee all lines adjuster. On November 6, 2009, the Department of Financial Services (DFS or Respondent) issued a Notice of Denial with respect to Petitioner's application based upon Petitioner's criminal history. Specifically, the Department indicated it was denying Petitioner's application because of a 1989 felony conviction for aggravated assault in Pennsylvania, and a 2004 plea of nolo contendere to the felony of resisting an officer with violence, in St. Johns County, Florida. The Department relied on Section 626.611 (7) and (14), Florida Statutes, to deny licensure, and, pursuant to Florida Administrative Code Rule 69B-211.042(9)(a), established his waiting period for any future application at 20 years.

Petitioner elected to challenge the denial of licensure and requested a Section 120.57(1) hearing. On December 8, 2009, the matter was referred to the Division of Administrative Hearings for assignment of an administrative law judge. The case was originally scheduled for hearing on February 17, 2010. At the request of Respondent, the matter was rescheduled for March 29, 2010, and proceeded as scheduled.

At the commencement of hearing, Respondent moved to amend the Notice of Denial to reflect that with respect to the Pennsylvania conviction, the Respondent was "convicted by a jury or pled guilty to aggravated assault, a felony." Petitioner did

not object and the Motion to Amend the Notice of Denial is granted. Petitioner presented no witnesses and Petitioner's Composite Exhibit 1 was admitted into evidence. The Department presented the testimony of Amelia Spears and Respondent's Exhibits 1-5 were admitted into evidence. Official recognition was taken of Sections 120.569, 120.57, 120.60, 626.015, 626.171, 626.207, 626.611, 626.621, Florida Statutes (2009), and Florida Administrative Code Rules 28-106.201-217, 69B-211.041 and 69B-211.042.

At hearing, the Department indicated that it was going to order a transcript, and, based upon the transcript being filed April 12, 2010, the parties were given until April 22, 2010, to file their proposed recommended orders. Both parties timely filed their Proposed Recommended Orders, but to date no transcript has been filed and Respondent's Proposed Recommended Order indicates that ultimately, the transcript was not ordered by either party. Both post-hearing submissions have been carefully considered in the preparation of this Recommended Order. All references to Florida Statutes are to the 2009 codification.

In addition, during the preparation of the Recommended Order in this case, an Amended Final Order was issued in Armando Cesar Santana v. Department of Financial Services, Case No. 09-0829RX (DOAH Apr. 29, 2010), which found that portions of Florida Administrative Code Rule subsections 69B-211.042(8)(a) and (9)(b)

are invalid exercises of delegated legislative authority. As a result, on May 11, 2010, the undersigned issued an order in this case advising the parties that the Recommended Order in this case would not issue until the time for filing an appeal in the Santana case had expired. The parties were permitted, if they so chose, to file Supplemental Proposed Recommended Orders addressing the effect of the Santana decision on the decision in this case.

On May 26, 2010, the Department filed a Notice of Appeal in the Santana case, and on May 27, 2010, the Department filed a Status Report in this case to that effect. To date, neither party has submitted or requested to submit supplemental proposed recommended orders. Section 120.56(3), Florida Statutes (2009), "delays the date on which a rule shall become void until after appellate proceedings have ended." Abbott Labs. v. Mylan Pharms., Inc., 15 So. 3d 642, 653 (Fla. 1st DCA), review denied, 26 So. 3d 582 (Fla. 2009). Therefore, inasmuch as Florida Code Rule subsections 69B-211.042(8)(a) and (9)(b) remain valid during the pendency of the appeal, issuance of this Recommended Order is appropriate.

FINDINGS OF FACT

1. The Department is the state agency responsible for licensing and regulation of insurance adjusters in the State of Florida pursuant to Chapter 626, Florida Statutes.

2. On February 21, 1989, Petitioner was found guilty by a jury of aggravated assault, a felony, in the Common Pleas Court of Philadelphia, Case No. CP88-06-0164. The original sentence of probation entered November 13, 1989, was vacated on January 30, 1991. Petitioner was re-sentenced November 26, 1991, to not less than five and not more than ten years of imprisonment. The action taken in Pennsylvania is based on a criminal complaint that alleges Petitioner shot a police officer with a handgun, while the police officer was attempting to arrest him.

3. On November 15, 2004, Petitioner pled nolo contendere to resisting an officer with violence, a felony, in the Circuit Court in and for St. Johns County, Florida, in Case No. 04001546CF. Adjudication was withheld and Petitioner was sentenced to a term of five years of probation.

4. On July 1, 2009, Petitioner submitted to the Department an application for licensure as a resident company employee all lines insurance adjuster. The application included the following question:

Have you ever been convicted, found guilty, or pled guilty or nolo contendere (no contest) to a felony under the laws of any municipality, county, state, territory or country, whether or not adjudication was withheld or a judgment of conviction was entered?

5. On the form submitted to the Department, Petitioner provides information related to an incident occurring June 13, 2003, in Saint Augustine, Florida, which presumably is related to

the plea of nolo contendere in 2004, referenced in paragraph 3 above.

6. The application does not divulge the Pennsylvania conviction. However, the Department conducts a background investigation on applicants, including a fingerprint check with both state and national law enforcement. Apparently, the Department requested additional information from Mr. Basara, and on August 20, 2009, he provided additional information regarding both the Pennsylvania and Florida crimes. With respect to the Pennsylvania crimes, Petitioner stated:

In this paragraph I hope to outline the Pennsylvania charges. Over two decades ago on May 23, 1988, I was arrested and charged with things that I was not guilty of. I was twenty three years old. I do not claim to be completely innocent, but I was not guilty of the charges filed against me because there was no malicious intent on my part and my actions were in self defense. Never-the-less I accepted responsibility for my actions, was convicted and given probation by the judge. That same year I bought a home, got married, had my first daughter Amanda with my wife Barbara and went on to complete two years of the probationary sentence when I found out that the District Attorney had successfully appealed my probationary sentence. This required me to be re-sentenced to the Pennsylvania Department of Corrections. I appealed this "re-sentencing" and after 22 months I was successful. The Superior Court overruled the Lower Court and vacated my sentence completely. With agreement of the Appellate Superior Court, Common Pleas Judges, the District Attorney and myself we finally agreed on reduced charges and 5 years probation which was the "Final" final disposition. I completed all of the

requirements with no problem and have gone on to live a productive and happy life since then.

7. No documentation was submitted into evidence at hearing to support Petitioner's assertion that upon reversal of his sentence the second time, he pleaded guilty and was once again sentenced to probation.^{1/}

8. On November 6, 2009, the Department issued a Notice of Denial, informing Respondent that denial of his application for licensure was based upon the criminal conviction in Pennsylvania and the plea of nolo contendere in St. Johns County, Florida. Based upon its interpretation of Florida Administrative Code rules establishing eligibility requirements, the Department determined his waiting period to apply for licensure to be 20 years from the date of the second felony, i.e., from the date he pled nolo contendere in St. Johns County.

CONCLUSIONS OF LAW

9. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with Sections 120.569 and 120.57(1), Florida Statutes.

10. Petitioner is the person seeking licensure in this proceeding. He bears the ultimate burden of proving entitlement to a license and that he meets all of the relevant statutory criteria for obtaining a license. Department of Banking and Finance v. Osborne Stern and Co., 670 So. 2d 932, 934 (Fla. 1996).

11. Several statutory and rule provisions are relevant to the Department's determination regarding Petitioner's eligibility for licensure. For instance, Section 626.201, Florida Statutes, provides:

(1) The department or office may propound any reasonable interrogatories in addition to those contained in the application, to any applicant for license or appointment, or on any renewal, reinstatement, or continuation thereof, relating to the applicant's qualifications, residence, prospective place of business, and any other matter which, in the opinion of the department or office, is deemed necessary or advisable for the protection of the public and to ascertain the applicant's qualifications.

(2) The department or office may, upon completion of the application, make such further investigation as it may deem advisable of the applicant's character, experience, background, and fitness for the license or appointment. Such an inquiry or investigation shall be in addition to any examination required to be taken by the applicant as hereinafter in this chapter provided.

(3) An inquiry or investigation of the applicant's qualifications, character, experience, background, and fitness must include submission of the applicant's fingerprints to the Department of Law Enforcement and the Federal Bureau of Investigation and consideration of any state criminal records, federal criminal records, or local criminal records obtained from these agencies or from local law enforcement agencies.

12. Section 626.211, Florida Statutes, provides that under certain circumstances, the Department is compelled to deny

licensure to an applicant. Section 626.611 provides in pertinent part:

The department shall deny application for . . . the license or appointment of any applicant, . . . if it finds that as to the applicant, . . . any one or more of the following applicable grounds exist:

(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.

13. While denial of an application for licensure based upon the grounds enumerated in Section 626.611 is compulsory, the Legislature has authorized the Department to adopt rules establishing specific waiting periods for a person to become eligible for licensure following a denial pursuant to several provisions within the Insurance Code, including denial pursuant to Section 626.611. "The purpose of the waiting periods is to provide sufficient time to demonstrate reformation of character and rehabilitation" and "may be adjusted based on aggravating and mitigating factors established by rule and consistent with this purpose." § 626.207, Fla. Stat.

14. Consistent with this directive, the Department has adopted rules establishing classifications of crimes, the length of the waiting period for each class; and how the waiting period for multiple crimes is to be calculated. Florida Administrative Code Rule 69B-211.042 provides in pertinent part:

(7) Classification of felony crimes.
(a) The Department makes a general classification of felony crimes into three classes: A, B and C, as listed in subsections (21), (22) and (23) of this rule. The lists refer only to such crimes when they are felonies, since certain of the crimes could be misdemeanors in some jurisdictions and felonies in other jurisdictions.

* * *

(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.

(b) Class B Crime. The applicant will not be granted licensure until 7 years have passed since the trigger date.

(c) Class C Crime. The applicant will not be granted licensure until 5 years have passed since the trigger date.

(9) Applicants with Multiple Crimes.

(a) The Department construes Sections 626.611 and 626.621, Florida Statutes, to require that an applicant whose law enforcement record includes multiple felony crimes wait longer than those whose law enforcement record includes only a single felony crime before becoming eligible for licensure in order assure that such

applicant's greater inability or unwillingness to abide by the law has been overcome. Therefore, the Department finds it necessary that a longer waiting period be utilized in such instances, before licensure can be safely granted. Accordingly, where the applicant has been found guilty or pled guilty or nolo contendere to more than one felony or to a felony and one or more misdemeanors, . . . the Department shall add 5 years to the waiting period for each additional felony or insurance-related misdemeanor, . . .

(b) The additional periods are added to the basic waiting period for the one most serious crime, and the combined total waiting period then runs from the trigger date of the most recent misdemeanor or felony crime.

15. Aggravated assault is classified as a Class A felony. Fla. Admin. Code R. 69B-211.042(21)(yy). Based on the Pennsylvania felony alone, Petitioner's waiting period would be 15 years. Fla. Admin. Code R. 69B-211.042(8)(a). The plea of nolo contendere in St. Johns County constitutes his second felony, mandating an additional five years. Fla. Admin. Code R. 69B-211.042(9)(a).

16. The "trigger date" from which the waiting period would begin is defined as the date on which an applicant was found guilty, pled guilty, or pled nolo contendere to a crime, or where that date is not ascertainable, the date of the charges or indictment. Fla. Admin. Code R. 69B-211.041(11). Respondent's most recent trigger date is the date he pled nolo contendere in St. Johns County, i.e., November 15, 2004. Because Rule 69B-211.042(9)(b) requires that the combined total waiting period run

from the trigger date of the most recent crime, the waiting period for Petitioner expires November 15, 2024.

17. Rule 69B-211.042(10) provides for certain mitigating factors to be considered which could reduce the waiting period. However, inasmuch as Petitioner did not present any evidence of mitigation, these factors need not be considered.

18. Petitioner maintains that the Department should grant his application for licensure because there are other convicted felons who have received licensure. However, the Consent Orders submitted as Petitioner's Composite Exhibit 1 are not sufficiently similar to Petitioner's case to establish any sort of precedent. For example, many of the consent orders involved applicants who had committed Class C crimes or single crimes, or the applicable waiting period was close to expiring at the time of the settlement agreement. Moreover, it cannot be determined from Petitioner's Composite Exhibit 1 whether mitigating factors identified by rule may have been presented in support of the entry of the Settlement Agreement. Here, both crimes were Class C felonies; the waiting time extends several years into the future; and no evidence was presented in support of mitigation.

RECOMMENDATION

Upon consideration of the facts found and conclusions of law reached, it is

RECOMMENDED:

That the Department of Financial Services enter a Final Order denying Petitioner's application for licensure as a resident company employee all lines adjuster, and establishing that his waiting period in terms of eligibility expires November 14, 2024.

DONE AND ENTERED this 27th day of May, 2010, in Tallahassee, Leon County, Florida.



LISA SHEARER NELSON
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of May, 2010.

ENDNOTE

1/ In discovery submitted to the Department and filed with the Division, Petitioner included a written plea colloquy from Pennsylvania, wherein he pleaded guilty to what appears to be aggravated assault and possessing an instrument of crime. He agrees to time served for the possession charge and five years of probation for the aggravated assault charge. Neither the colloquy nor any order accepting the guilty plea was entered into evidence. Regardless, the result remains the same. Whether based upon the original conviction or a subsequent plea of guilty, the Notice of Denial is based in part upon the action in Pennsylvania emanating from the charge of aggravated assault. Moreover, because there was a subsequent felony charge, pursuant to Fla. Admin. Code R. 69B-211.042(9)(b), the waiting period runs from the St. Johns County plea as opposed to the Pennsylvania action.

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.