STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MICHAEL C. BIVONA,

Petitioner,

vs. Case No. 16-4358

DEPARTMENT OF FINANCIAL SERVICES,

Respondent.
_____/

RECOMMENDED ORDER

On January 11, 2017, the final hearing was held before Elizabeth W. McArthur, Administrative Law Judge, Division of Administrative Hearings (DOAH), in Tallahassee, Florida.

APPEARANCES

For Petitioner: John E. Terrel, Esquire
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For Respondent: Matthew R. Daley, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner's application for licensure as a resident all-lines adjuster should be approved or denied.

PRELIMINARY STATEMENT

On April 25, 2016, the Department of Financial Services (DFS or Respondent) issued its notice of intent to deny the application filed by Michael C. Bivona (Mr. Bivona or Petitioner) for licensure as a resident all-lines adjuster. Petitioner apparently timely filed with Respondent a petition for an administrative hearing to contest the proposed denial; although the original petition is not part of the record in this proceeding, Respondent has not contested the timeliness of that petition. On July 21, 2016, while the matter was still pending before Respondent, Petitioner filed an Amended Petition for Formal Hearing. On July 29, 2016, Respondent transmitted its notice of intent to deny Petitioner's application and the amended petition to DOAH for assignment of an Administrative Law Judge to conduct the hearing.

The final hearing was set for October 12, 2016, by video teleconference with sites in Sarasota and Tallahassee, based on the parties' input. Petitioner's subsequent unopposed motion for continuance was granted for good cause shown, and the video teleconference hearing was rescheduled for January 11 and 12, 2017. Before the hearing, Petitioner moved to change venue to Tallahassee only, due to a change in planned Sarasota witnesses. DFS did not oppose, and an Amended Notice of Hearing was issued, changing the hearing to a live hearing in Tallahassee only.

The parties did not enter into a joint pre-hearing stipulation; instead, each party filed unilateral pre-hearing statements. A comparison of the unilateral statements shows that the parties indeed had agreed to some facts. To the extent the separate pre-hearing statements revealed agreement by the parties as to certain facts regarding the matter at issue in this case, those agreed facts have been incorporated in the findings below.

The parties could not agree on how to frame the issues in dispute, because in addition to Petitioner's application for licensure and Respondent's proposed denial of that application, Petitioner wanted to raise and litigate a separate dispute between the parties. As addressed on the record, primarily at the outset of the hearing, the undersigned determined that DOAH lacks subject matter jurisdiction in this proceeding over the separate controversy between the parties. The only proposed agency action on which Petitioner was offered an administrative hearing, transmitted to DOAH to give rise to this proceeding, was Respondent's proposed denial of Petitioner's license application.

At the hearing, Petitioner testified on his own behalf and also presented the testimony of Amelia Spears, a DFS senior management analyst supervisor. Petitioner's Exhibits 2, 11, 12, 15, and 16 were admitted in evidence. In addition, Petitioner's Exhibits 7 and 8 were admitted for limited purposes described on the record. Respondent did not present the testimony of any

additional witnesses. Respondent's Exhibits 2, 3, and 4 were admitted in evidence.

Both parties had filed Motions for Official Recognition shortly before the hearing. The motions were addressed on the record towards the end of the hearing. Respondent withdrew its motion.

Petitioner's motion, seeking official recognition of a New Jersey statute, was taken up and provisionally denied, with leave for Petitioner to file another motion that included additional statutes that the undersigned determined were necessary to consider in relation to the single statute offered. After the hearing and within the time allowed, Petitioner filed an Amended Motion for Official Recognition, with additional New Jersey statutes attached, but one particular statute, identified at hearing, was not provided. Accordingly, on February 9, 2017, an Order was issued attaching the statute that Petitioner had not provided and giving notice that the undersigned would either deny Petitioner's Amended Motion for Official Recognition or grant Petitioner's Amended Motion for Official Recognition on condition that the additional statute provided with the Order would also be officially recognized. The parties were permitted to file written objections to official recognition being taken of the additional New Jersey statute attached to the Order. No written objections were filed. Thus, Petitioner's Amended Motion for

Official Recognition is granted, and official recognition is also taken of section 2A:167-5, New Jersey Statutes, a copy of which was provided to the parties with the February 9, 2017, Order.

At the conclusion of the evidentiary hearing, the parties were informed that the deadline provided by rule for submission of proposed recommended orders (PROs) was 10 days after the filing of the original final hearing transcript at DOAH. Petitioner requested an extended deadline of 30 days because of conflicting obligations on Petitioner's counsel's calendar; Respondent did not object, and Petitioner's request was granted.

The final hearing Transcript was filed on January 27, 2017. Both parties timely filed their PROs on Monday, February 27, 2017, and their filings have been given due consideration in the preparation of this Recommended Order.

FINDINGS OF FACT

1. DFS is the state agency responsible for licensing and regulating insurance adjusters and agents pursuant to chapters 624 and 626, Florida Statutes.

2. On April 20, 2016, Petitioner filed with DFS his application to become licensed as an all-lines adjuster in the state of Florida.

3. On the second page of the application form, Petitioner answered "yes" to the question asking whether he has ever pled nolo contendere, no contest, or guilty to, or ever had

adjudication withheld for, or ever been convicted of or found guilty of, any felony crime under the laws of any state.

4. Despite answering yes to that question, on the third and fourth pages of the application, Petitioner answered "no" to the following three questions: First, Petitioner was asked whether his felony crime(s) fell within the following categories: any first-degree felony; a capital felony; a felony involving money laundering, fraud of any kind, or embezzlement; or a felony directly related to the financial services business. Second, Petitioner was asked whether his felony crime(s), if not falling in one of the above categories, were crimes involving moral turpitude. Lastly, Petitioner was asked whether his felony crime(s) were within the category of "all other felonies."

5. The questions asking how to categorize the felony crime(s) that Petitioner acknowledged on page two of the application correlate to the statute prescribing a range of consequences depending on the type of felony criminal background an applicant has. According to the statute, an applicant with felony criminal history falling in the first group above (first degree felony, etc.) is permanently barred from applying for licensure in Florida as an insurance agent or adjuster. For an applicant whose felony criminal history does not fall in the first group, but is categorized as a felony (or felonies) involving moral turpitude, the statute provides for a long period

of disqualification. If an applicant's felony criminal history does not fall in either of the first two categories, then a shorter period of disqualification is provided by the statute. See § 206.207, Fla. Stat., adopted in its current form in 2011 (with one immaterial amendment in 2014 to change a statutory cross-reference).

6. Petitioner's admitted felony history must, of necessity, fall within one of the three groups: the felony history must have involved one or more felonies identified for permanent bar, other felonies involving moral turpitude, and/or all other felonies. The application answers were internally inconsistent and at least one of the answers on pages three and four was wrong. At hearing, Petitioner did not offer any explanation for his incorrect answer(s).[1/]

7. Petitioner did not file with his April 2016 application submitted to DFS, and did not offer into evidence at hearing any proof of the felony criminal history to which he admitted in his application. Petitioner gave little information at all about his criminal background at hearing. He testified that he identified his prior criminal history on page two of the application (by answering "yes" to the question asking whether he had ever been convicted, etc. of any felony crimes). The only detail he was asked by his counsel to address was as follows:

Q: Now the criminal history that you identified, is that something that occurred a while ago?

A: Yes, sir.

Q: And can you give me the approximate time period?

A: The offense? It was in 1994, I believe.

Q: Okay. And do you recall when you finished all your restitution and probation concerning any of these prior convictions?

A: 1999. (Tr. 32).

8. Petitioner later acknowledged on cross-examination, as suggested by his attorney's attempted correction in his follow-up question, that there was not just one ("the") offense--there was more than one offense and more than one conviction. Other than correcting that error, Petitioner volunteered no information regarding his prior convictions. He did, however, offer into evidence documentation generally corroborating his testimony regarding when he completed probation for his prior convictions. Two letters from New Jersey Superior Court personnel state that court records reflect that Mr. Bivona completed three different probationary terms associated with three different indictment numbers, as follows: for indictment number 96-03-0031-I, probation was completed as of August 9, 1999; for indictment number 95-10-0453-I, probation was completed as of May 2, 1999;

and for indictment number 95-05-0206-I, probation was completed as of September 27, 1998.

9. Although Petitioner offered no details or documentation for his prior felony convictions, either with his application or at hearing (other than the letters documenting when he completed probation), Petitioner said that he had previously provided documentation to Respondent regarding his felony convictions, a fact confirmed by Respondent. Respondent had in its files certified copies of court records for Petitioner's felony convictions in New Jersey, obtained by Respondent in 2010 in connection with a prior license application by Petitioner.[2/]

10. Respondent offered into evidence at hearing certified copies of court records regarding Petitioner's felony criminal history, including indictments issued by grand juries setting forth the original charges, and the subsequent judgments of conviction issued by New Jersey Superior Court judges. Because Respondent was willing to use the criminal history documentation previously provided by Petitioner that was already in Respondent's files, Respondent did not require Petitioner to obtain or submit the same documentation again in connection with his new license application.[3/]

11. The indictment numbers identified in the three judgments of conviction match the three indictment numbers contained in Petitioner's exhibit offered to prove when he

completed his probationary terms for his prior convictions. Thus, although Petitioner was evasive at hearing, unwilling to identify the court records of his prior convictions, the records themselves establish the missing information about Petitioner's felony criminal history that Petitioner only alluded to at hearing.

12. In a September 28, 1995, judgment of conviction issued by Judge Leonard N. Arnold, New Jersey Superior Court for Somerset County, Mr. Bivona pled guilty to, and was convicted of, the charges set forth in indictment 95-05-0206-I. As enumerated in the judgment of conviction, these were: four counts of fraudulent use of a credit card, a third-degree felony; one count of unlawful theft or receipt of a credit card, a fourth-degree felony; four counts of forgery, a fourth-degree felony; and one count of theft by deception, a fourth-degree felony. For sentencing purposes, the court merged nine of the counts into count two (one of the charges for fraudulent use of a credit card), and imposed the following sentence: three years of probation, restitution of $271.60, a $500.00 fine, and other monetary assessments.

13. On May 3, 1996, another judgment of conviction was issued by Judge Leonard N. Arnold. The judgment of conviction shows that Mr. Bivona pled guilty to, and was convicted of, the charges set forth in indictment 95-10-0453-I. As enumerated in

the judgment of conviction, these were: three counts of fraudulent use of a credit card, a third-degree felony; and one count of theft, a fourth-degree felony. The sentence imposed by the judgment of conviction was incarceration for 180 days in the county jail, a three-year probationary term, restitution of $380.02, and monetary assessments.

14. On August 9, 1996, a judgment of conviction was issued by Judge Marilyn Hess, New Jersey Superior Court for Hunterdon County. As shown on the judgment of conviction, Mr. Bivona pled guilty to, and was convicted of, the charges set forth in indictment 96-03-00031-I. As enumerated in the judgment of conviction, these were: one count of theft by deception, a third-degree felony; one count of forgery, a fourth-degree felony; and one count of credit card theft, a fourth-degree felony. The sentence imposed by the judgment of conviction was a three-year probationary term, restitution of $2,488.30, and monetary assessments.

15. As noted, Mr. Bivona testified that he completed the probationary terms for his prior convictions in 1999. He provided documentation corroborating that he served the three probationary terms and completed them on three different dates in 1998 and 1999, the last of which was August 9, 1999.

16. No evidence was presented to prove that Mr. Bivona has paid all restitution, fines, and other monetary assessments

imposed in the three judgments of conviction, and, if so, when all payments were completed.

17. Petitioner's application was initially denied by DFS because of Petitioner's felony criminal history. DFS determined that at least two of the judgments of conviction, and possibly all three, were for felony crimes involving fraud. DFS did not undertake a review of Petitioner's rehabilitation from his past crimes or his present trustworthiness and fitness to serve as an insurance adjuster, because in DFS's view, Petitioner was subject to the statutory permanent bar from applying for licensure. DFS did not determine that Petitioner did not otherwise meet the requirements for licensure as a resident all-lines adjuster.

18. At hearing, neither party went into any detail regarding the requirements for licensure as an all-lines adjuster. Instead, the focus of both Petitioner and Respondent was on whether Petitioner's criminal history renders him disqualified from applying for licensure as an adjuster, either permanently or for a period of time, and, if the latter, whether mitigating circumstances reduce the disqualifying period. No evidence was offered of aggravating circumstances.

19. Respondent has not disputed whether, aside from the implications of Petitioner's criminal history, Petitioner otherwise qualifies for licensure. Therefore, it is inferred that Respondent was and is satisfied that, aside from the

implications of Petitioner's criminal background (including questions about rehabilitation, trustworthiness, and fitness), Petitioner otherwise meets the requirements for licensure as an all-lines adjuster.

20. Petitioner presented evidence addressed to the mitigating factors in Respondent's rule to shorten the period of disqualification in certain circumstances, where there is no permanent bar.

21. Petitioner testified that he moved to Florida with his wife in 1998 (apparently before he had completed his probationary terms for at least two of his convictions). He and his wife started a business in the Sarasota area, a corporation that has operated under two different names, but has remained essentially the same since 1998. The business has always been small; although it has gone up and down in size over the years, Petitioner said that the business has had at least five employees for over three years. Since 1998, the nature of his business has been to provide technical support and assistance to insurance adjusters. The business has not been engaged in the actual adjuster work; instead, his clients are licensed adjusters who perform the actual adjuster work.

22. Petitioner testified that he has been employed by the corporation he owns, working at least 40 hours per week for a continuous two-year period within the five years preceding the

filing of his application. This parrots one of the mitigation factors in Respondent's rule, and although no documentation of his employment hours was provided for any period of time, the undersigned accepts Petitioner's testimony as sufficient under the mitigation rule. If Petitioner is determined to be disqualified for a period of years and subject to the mitigation rule, this mitigation factor would reduce the disqualification period by one year.

23. To meet another mitigation factor, Petitioner submitted five letters of recommendation in evidence. Three of those letters appear to be from someone who has known Petitioner for at least five years (one undated letter states that the author has known Petitioner for three years; another letter, more of a business reference from an insurance company representative in Maryland, does not state how long the author has known Petitioner). Those letters that are dated bear dates after the license application was submitted and initially denied, but there is no impediment to receiving and considering them in this de novo hearing. The letters meet the requirement in Respondent's rule for mitigation. If Petitioner is determined to be disqualified for a period of years and subject to the mitigation rule, this mitigation factor would reduce the disqualification period by one year.

24. Although the letters satisfy one of the mitigation factors in Respondent's rule, the contents of the letters are hearsay, as none of the authors testified. The matters stated in the letters, for the most part, do not corroborate any non-hearsay evidence, except in a few immaterial respects (such as that Petitioner runs his own business and has daughters who play volleyball). Petitioner did not present any testimony from witnesses at hearing who could attest to his character, his business reputation, or his trustworthiness.

25. Petitioner testified that he does volunteer work on a "sporadic" basis. He is active as a volunteer for his three daughters' schools and travel volleyball activities, and he also works with youth groups in his church. Although Petitioner testified that he believes he has volunteered at least 180 hours over the three years preceding the filing of his application, Petitioner did not present any documentation from one or more charitable organizations confirming the number of his volunteer hours.

26. It is undisputed that Petitioner held an insurance adjuster license in Florida for some period of time, until, according to DFS, the license expired by operation of law. Although Petitioner admitted that since 1998, his business has not been engaged in insurance adjuster work, merely holding a

license appears to at least superficially satisfy a mitigation factor in Respondent's rule.

27. No evidence was presented to show that Petitioner has been arrested or charged with any criminal violations since he completed his third probation in August 1999, more than 17 years ago. The length of time without any additional criminal incidents is a positive consideration.

28. Notably lacking from Petitioner were: an explanation for the circumstances underlying the multiple crimes he committed that involved fraud, theft, forgery, and deception, through use of other people's credit cards and checks; express acceptance of responsibility for his criminal past; the expression of genuine remorse for his wrongdoing; and an explanation as to why his criminal history should not present concerns if Petitioner becomes authorized to engage in insurance adjusting. As Petitioner acknowledged, a licensed adjuster "would negotiate settlement [of claims under insurance policies], would offer payment, [and] would have authority to write payment and receive payments" (Tr. 35), placing the adjuster in a position of trust and responsibility in dealing with other people's money. Simply noting that it has been a good number of years since Petitioner completed his probations, that he is running his own business (that does not engage in insurance adjusting), that he has a family, that he is involved with church, and that he does

volunteer work is not enough, when Petitioner's past crimes and the concerns they present go unexplained, to support a finding of rehabilitation, moral fitness, and trustworthiness today. It may well be that Petitioner could prove these things if he had addressed them; it may have been an unfortunate strategic choice to avoid any mention of Petitioner's past crimes in anything but the most general and vague terms.

29. Perhaps in light of decisional law discussed in the Conclusions of Law below, Respondent's licensure application form asks applicants who disclose criminal history whether they have had their civil rights restored. Petitioner answered yes. He was asked to explain, and his response was: "Rights were restored and I have the ability to vote and act as a standard US Citizen." (Pet. Exh. 11 at 4).

30. In the initial review of Petitioner's application, DFS staff apparently accepted Petitioner's representation that his civil rights had, in fact, been restored.[4/] However, in a "deficiencies" listing at the end of the application, DFS noted that Petitioner failed to provide a certificate of civil rights restoration, or other proof of restoration of his civil rights. Petitioner's application was not denied because of these omissions, and Petitioner's failure to provide such evidence in his application would not have been an impediment to receiving

and considering proof of restoration of Petitioner's civil rights at hearing, had such evidence been offered.

31. At hearing, Petitioner attempted to prove that his civil rights were restored. However, Petitioner presented no evidence that he ever applied for restoration of his civil rights, or that his civil rights have been restored by order of the governor in the exercise of clemency power.

32. Instead, the only evidence offered by Petitioner was a Florida voter status printout showing that he is an active registered voter. The exhibit was admitted for the limited purpose of showing that Petitioner was registered to vote in Florida. However, this fact is insufficient to support an inference that Petitioner's civil rights must have been restored or he would not have been allowed to register to vote. If Petitioner has actually had his civil rights restored, there would be direct evidence of that, and Petitioner had no such evidence. It is equally or more plausible that Petitioner was allowed to register to vote in Florida by mistake; Petitioner acknowledged that he represented in his voter registration application that his civil rights were restored (just as he represented to DFS in his license application).

33. Petitioner's counsel argued that Petitioner was allowed to register to vote in Florida because Florida gave full faith and credit to what New Jersey had done. This argument was

unsupported by evidence of how Petitioner became registered to vote in Florida.

34. Regarding what was done in New Jersey, the only evidence offered by Petitioner was a "voter restoration handbook" from the state of New Jersey, which indicates as follows: "In New Jersey, any person who is no longer in prison or on parole or probation, can register to vote. . . . In New Jersey, unlike some other states, those who have been convicted of felony offenses in the past are not forever barred from voting. . . . Any ex-felon who has satisfactorily completed the term of his or her sentence can register to vote." (Pet. Exh. 7, admitted for a limited purpose, at 1 - 2). The rest of the handbook simply describes how one goes about registering to vote in New Jersey.

35. Under New Jersey law, then, one particular civil right--the right to vote--is taken away from convicted felons only until they complete their sentence, parole, and probation. This is confirmed by a New Jersey statute that has been officially recognized, providing that the right of suffrage--the right to vote--is taken away from any person "[w]ho is serving a sentence or is on parole or probation as the result of a conviction of any indictable offense under the laws of this or another state or of the United States." § 29:4-1(8), N.J. Stat.[5/]

36. The right to vote is only one of the civil rights that may be lost by reason of being convicted of a crime. For

example, under another New Jersey law officially recognized in this proceeding, persons convicted of a crime are disqualified from serving on a jury. See § 2C:51-3b., N.J. Stat.

37. Petitioner presented no evidence to prove that he ever sought or received a restoration of his civil rights by executive order of the governor pursuant to an exercise of executive branch clemency power, either in the state of New Jersey or in Florida.

38. In New Jersey, restoration of civil rights and privileges (one of which may be the right to vote) is accomplished pursuant to section 2A:167-5, New Jersey Statutes, officially recognized in this proceeding and providing in pertinent part:

> Any person who has been convicted of a crime and by reason thereof has been deprived of the right of suffrage or of any other of his civil rights or privileges . . . may make application for the restoration of the right of suffrage or of such other rights or privileges . . . which application the governor may grant by order signed by him. (emphasis added).

Similarly, the Florida Constitution vests in the executive branch the following clemency powers:

> [T]he governor may, by executive order filed with the custodian of state records, suspend collection of fines and forfeitures, grant reprieves not exceeding sixty days and, with the approval of two members of the cabinet, grant full or conditional pardons, restore

> civil rights, commute punishment, and remit fines and forfeitures for offenses. (emphasis added).

Art. IV, § 8(a), Fla. Const.

39. Petitioner admitted that he did not apply to the governor for a restoration of civil rights in New Jersey, and he has no order from the governor restoring his civil rights. Similarly, Petitioner did not apply for and receive an order from the governor restoring his civil rights in Florida. Instead, he admitted that he is relying on whatever happened in New Jersey.

40. The following testimony reveals Petitioner's misconception of the process in New Jersey for restoration of civil rights:

> Q: Okay. Mr. Bivona, what's your understanding of how your civil rights were restored in New Jersey?
>
> A: My understanding is that once probation and restitution and everything is completed, that civil rights are restored in the State of New Jersey.
>
> Q: And did that happen, to your knowledge?
>
> A: The completion?
>
> Q: Yes.
>
> A: Yes, sir. I also verified that with the State of New Jersey. I called them.
>
> The Court: I can't consider that.[6/]
>
> A: I understand. I'm sorry.

> The Court: Do you have any exhibits that show that civil rights have been restored?
>
> Mr. Terrell: There's a handbook from New Jersey that's also how the rights are restored. [Pet. Exh. 8, in evidence for limited purpose] (Tr. 44).

CONCLUSIONS OF LAW

41. The Division of Administrative Hearings has jurisdiction over the subject matter and parties, pursuant to section 120.569 and 120.57(1), Florida Statutes (2016).[7/]

42. Petitioner, as the applicant for a resident all-lines adjuster license, has the ultimate burden of persuasion to prove his entitlement to licensure by a preponderance of the evidence. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932, 934 (Fla. 1996).

43. Respondent contends that Petitioner's application should be denied because of his felony convictions, pursuant to section 626.207, Florida Statutes. Respondent has the burden of presenting evidence of the grounds asserted for denial. Id.

44. Section 626.207 provides in pertinent part:

> (1) For purposes of this section, the term "financial services business" means any financial activity regulated by the Department of Financial Services, the Office of Insurance Regulation, or the Office of Financial Regulation.
>
> (2) For purposes of this section, the terms "felony of the first degree" and "capital felony" include all felonies designated as such by the Florida Statutes, as well as any

felony so designated in the jurisdiction in which the plea is entered or judgment is rendered.

(3) An applicant who commits a felony of the first degree; a capital felony; a felony involving money laundering, fraud, or embezzlement; or a felony directly related to the financial services business is permanently barred from applying for a license under this part. This bar applies to convictions, guilty pleas, or nolo contendere pleas, regardless of adjudication, by any applicant, officer, director, majority owner, partner, manager, or other person who manages or controls any applicant. (emphasis added).

(4) For all other crimes not included in subsection (3), the department shall adopt rules establishing the process and application of disqualifying periods that include:

(a) A 15-year disqualifying period for all felonies involving moral turpitude that are not specifically included in the permanent bar contained in subsection (3).

(b) A 7-year disqualifying period for all felonies to which neither the permanent bar in subsection (3) nor the 15-year disqualifying period in paragraph (a) applies.

(c) A 7-year disqualifying period for all misdemeanors directly related to the financial services business.

(5) The department shall adopt rules providing for additional disqualifying periods due to the commitment of multiple crimes and other factors reasonably related to the applicant's criminal history. The rules shall provide for mitigating and aggravating factors. However, mitigation may not result in a period of disqualification of less than 7 years and may not mitigate the disqualifying periods in paragraphs (4)(b) and (c).

> (6) For purposes of this section, the disqualifying periods begin upon the applicant's final release from supervision or upon completion of the applicant's criminal sentence, including payment of fines, restitution, and court costs for the crime for which the disqualifying period applies.
>
> (7) After the disqualifying period has been met, the burden is on the applicant to demonstrate that the applicant has been rehabilitated, does not pose a risk to the insurance-buying public, is fit and trustworthy to engage in the business of insurance pursuant to s. 626.611(1)(g), and is otherwise qualified for licensure.

Permanent Bar - Section 626.207(3)

45. Respondent's primary position is that Petitioner is permanently barred from applying for licensure as an insurance adjuster, because he committed, pled guilty to, and was convicted of felony crimes involving fraud.

46. Respondent proved that Petitioner pled guilty to and was convicted on two separate occasions of crimes involving fraud. Pursuant to section 626.207(3), Petitioner's conviction of even one felony involving fraud would require application of the statutory permanent bar. Petitioner's separate convictions for at least two felonies involving fraud mean that Petitioner is subject to the statutory permanent bar. Petitioner does not argue otherwise. Instead, as addressed below, Petitioner relies on a defense that the permanent bar cannot be interpreted to

apply to his crimes, based on his contention that his civil rights have been restored.

47. Respondent contends that Petitioner's third felony conviction was for a crime involving fraud. In the judgment of conviction that did not include a charge for fraudulent use of a credit card, Petitioner was convicted of forgery, credit card theft, and theft by deception. Arguably, one or more of these crimes may be considered as involving fraud, but unlike fraudulent use of a credit card, the element of fraud is not expressly included in the crime's name. Such a determination is unnecessary, since the statutory permanent bar is triggered by one felony crime involving fraud, and Respondent proved that Petitioner committed two such crimes; adding a third would add nothing to the determination.

Restoration of Civil Rights Defense

48. Petitioner argues that the statutory permanent bar, though seemingly applicable, cannot be interpreted to apply to his crimes, because he contends that his civil rights have been restored. Since Petitioner asserts the affirmative of this issue, he bears the burden of proof. See Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778, 788 (Fla. 1st DCA 1981).

49. Petitioner's defense invokes a line of cases holding that statutory permanent bars from licensure for certain convicted felons, such as in section 626.707(3), cannot

constitutionally be applied to applicants who have been pardoned or whose civil rights have been restored by exercise of the executive branch's constitutional clemency power in article IV, section 8(a) of the Florida Constitution.

50. Petitioner contends that this case is just like Kauk v. Department of Financial Services, 131 So. 3d 805 (Fla. 1st DCA 2014). In Kauk, the court held that it was required to follow precedent established by Sandlin v. Criminal Justice Standards & Training Commission, 531 So. 2d 1344 (Fla. 1988), and G.W. Liquors of Collier, Inc. v. Department of Business Regulation, 556 So. 2d 464 (Fla. 1st DCA 1990), to interpret the permanent bar established by section 626.707(3) for applicants who committed certain felonies as not applying to convicted felons whose civil rights were restored by order of the governor in an exercise of the executive branch's constitutional clemency power. As the court summarized the precedent established by Sandlin and G.W. Liquors, by which it felt bound:

> [A] statute precluding licensure or certification for a particular occupation due to the conviction of a crime may not be interpreted as imposing an automatic bar against the licensure of those who have received a pardon or restoration of rights under the clemency power granted to the Governor in article IV, section 8(a) of the Florida Constitution.

Kauk, 131 So. 3d at 808.

51. In Sandlin, the Florida Supreme Court considered a constitutional challenge to section 943.13, Florida Statutes, which, read literally, provided that convicted felons were disqualified from certification as law enforcement officers. Certification was being sought by someone who had a felony conviction, but who had received a full pardon from the governor in an exercise of the constitutional clemency power. The constitutional challenge, expressed in the alternative, was either that the statute should be declared unconstitutional, or else the statute should be interpreted in this context to avoid an "unconstitutional legislative incursion into the executive's power over pardons." Id. at 1345.

52. As the court noted, "the pardoning power is a function exclusive to the executive, derived from the state constitution. Art. IV, § 8(a), Fla. Const." Id. Thus, in the court's view, the absolute prohibition in section 943.13 against certifying a convicted felon who has been pardoned "creates a head-on confrontation between the legislature's power to enact laws to protect the public and the executive's power to pardon convicted felons. Contrary to the district court, we do not find that this statute should be held to override the executive's pardon power." Id. at 1346.

53. The court did not declare the absolute statutory prohibition against certifying convicted felons to be

unconstitutional. Instead, the Court noted that it should uphold the statute if it "can be fairly construed in a constitutional manner. . . . Such a construction is possible in this case." Id. The court held that, in order to avoid the separation of powers problem described above, it should interpret the absolute disqualification imposed by statute to be removed by a full pardon issued under the executive branch's constitutional clemency power. However, the court emphasized that the Commission could still consider the felony conviction as part of its close examination of the pardoned felon's character.

54. In G.W. Liquors, the First District Court of Appeal extended Sandlin's holding to apply where the executive branch's exercise of clemency powers resulted in a restoration of civil rights. The court's holding was as follows:

> We hold that Wilner's prior conviction is not an absolute bar or per se disqualification from consideration for an alcoholic beverage license since his civil rights have been restored pursuant to constitutional executive clemency powers. At the same time, however, the department may take into account and rely upon the circumstances surrounding his prior conviction and may give weight to the general policy expressed in [the statute providing automatic disqualification for certain convicted felons]. (emphasis added).

G.W. Liquors, 556 So. 2d at 465.

55. Petitioner has not shown the predicate to trigger the limiting interpretation found constitutionally necessary in Sandlin, G.W. Liquors, and Kauk. In this case, there has not been an exercise of the executive branch's constitutional clemency power under article IV, section 8(a) of the Florida Constitution. There is no "head-on confrontation" between the Legislature's exercise of its power in 2011 to adopt the permanent bar in section 626.707(3) and the executive branch's exercise of its constitutional clemency power. There is no separation of powers problem, and thus, no need to apply the limiting interpretations found necessary in Sandlin, G.W. Liquors, and Kauk to keep otherwise constitutional statutes from being applied in a way that would violate the separation of powers by encroaching on the executive branch's clemency powers.

56. Where there has been no executive branch exercise of constitutional clemency power, statutory disqualifications from licensure or certification for applicants who have a prior felony conviction (defined variously to include a guilty plea or plea of nolo contendere/no contest, regardless of adjudication) have been routinely upheld and applied.

57. For example, in Giamberini v. Department of Financial Services, 162 So. 3d 1133 (Fla. 4th DCA 2015), the court upheld the denial of an application for certification as a fire safety inspector, based on the applicant's 1993 no contest plea to a

felony charge of aggravated battery without a firearm, because of a statutory disqualification from fire safety inspector certification applicable to applicants who have pled no contest to a felony, despite adjudication of guilt being withheld. The court distinguished Kauk, as follows:

> We also find that appellant's reliance upon Kauk is misplaced. Here, appellant did not receive a pardon or a restoration of his civil rights. In fact, appellant never lost his civil rights, as confirmed by his own testimony and the fact that adjudication was withheld on the felony charge. . . . Thus, because appellant never received a pardon or a restoration of his civil rights, applying the statute to appellant would not unconstitutionally infringe on the governor's clemency power.
>
> We do not agree with appellant's suggestion that the Department's interpretation of the relevant statutes leads to absurd results. It cannot be said that it would be absurd for the legislature to bar applicants with felony histories from receiving certification as a firesafety inspector (even if the applicant had already obtained certification as a firefighter under an earlier statutory scheme that did not disqualify the applicant), so long as the automatic denial is not an unconstitutional infringement on the governor's clemency power as applied to a particular applicant.

Id. at 1138-1139.

58. In Jacques v. Department of Business & Professional Regulation, 15 So. 3d 793 (Fla. 1st DCA 2009), the same court that extended Sandlin in G.W. Liquors affirmed the denial of applications for slot machine licenses based on a statutory

disqualification that applied to an officer's convictions for felony charges of possession and production of marijuana. The court found no constitutional impediment to applying a statutory disqualification enacted after the disqualifying offenses, because the statutory disqualification was enacted prior to the license applications being filed. See also Diaz v. Fla. Dep't of Law Enf., 164 So. 3d 24 (Fla. 5th DCA 2015), rev. denied, 192 So. 3d 36 (Fla. 2015) (affirming a final order determining that Diaz was statutorily disqualified from certification as a corrections officer because of a 1998 New York conviction for possession of cocaine, because the crime would have constituted a felony under Florida law; statutory bar made an assessment of the applicant's moral fitness unnecessary); Calhoun v. Dep't of Health & Rehabilitative Servs., 500 So. 2d 674, 678 (Fla. 3d DCA 1987) ("[T]he state of Florida, plainly, has the constitutional authority to deny basic civil rights--such as the right to vote, to serve on a jury, to hold public office--as well as the right to engage in state-licensed occupations, to a person, like Mrs. Calhoun, who has been previously convicted of a felony." (citations to federal and Florida decisions omitted)); compare Yeoman v. Constr. Ind. Licensing Bd., 919 So. 2d 542 (Fla. 1st DCA 2005) (holding that the licensure statutes at issue contained no automatic categorical disqualification for an applicant with a prior felony conviction, agreeing with the applicant's argument

that the Legislature knows how to promulgate absolute bars to licensure based on prior felony convictions, and collecting cases discussing and applying such absolute bars).

59. Based on these authorities, the undersigned concludes that the permanent bar in section 626.707(3), prohibiting licensure as an insurance adjuster of a person convicted of a felony involving fraud, applies to Petitioner and requires denial of his application. Petitioner has two prior felony convictions for crimes involving fraud (fraudulent use of a credit card); under the statute as amended in 2011, one such conviction gives rise to the permanent bar. Further, applying the statutory bar as written creates no separation of powers problem, as in Sandlin, G.W. Liquors, and Kauk, because there has been no executive branch exercise of clemency power, through an order of the governor pardoning Petitioner or restoring his civil rights, pursuant to article IV, section 8(a) of the Florida Constitution.

60. Presumably, an exercise of clemency power by the governor of New Jersey would not create the same sort of head-on confrontation with an exercise of Florida legislative power, but that specific issue need not be decided, because Petitioner failed to prove that there was an exercise of the New Jersey executive branch's clemency power that resulted in an order by the governor of New Jersey to restore Petitioner's civil rights. See § 2A:167-5, N.J. Stat. (providing for application for

restoration of civil rights, which may be granted by order of the governor). Instead, Petitioner showed only that pursuant to legislative action in New Jersey, one of Petitioner's civil rights was only taken away from him until he completed his probation. See § 19:4-1(8), N.J. Stat.[8/]

Alternative Disqualifying Period -- Section 626.707(4)

61. Respondent's alternative position is that if the permanent bar in section 626.207(3) is not applicable to Petitioner's felony convictions, then Petitioner's crimes would be subject to the disqualifying period provided in section 626.707(4) and the implementing rule.

62. If Petitioner's felony convictions are not considered under the permanent bar provision in section 626.207(3), then section 626.707(4)(a) would apply, requiring "a 15-year disqualifying period for all felonies involving moral turpitude that are not specifically included in the permanent bar contained in subsection (3)."

63. In State ex rel. Tullidge v. Hollingsworth, 108 Fla. 607, 611, 146 So. 660, 661 (Fla. 1933), the Court provided the following description of moral turpitude:

> Moral turpitude involves the idea of inherent baseness or depravity in the private social relations or duties owed by man to man or by man to society. It has also been defined as anything done contrary to justice, honesty, principle, or good morals.
> (citations omitted).

Intentional crimes for financial gain that victimize another or others have been consistently deemed crimes involving moral turpitude, as they offend the duties owed by man to man or by man to society, and are contrary to justice, honesty, principle and good morals. See, e.g., Cirnigliaro v. Fla. Police Stds. & Training Comm'n, 409 So. 2d 80 (Fla. 1st DCA 1982) (embezzling less than $100 from a bank is a misdemeanor crime involving moral turpitude); Winkelman v. Dep't of Bank. & Fin., 537 So. 2d 591 (Fla. 3d DCA 1988) (willful assistance in the preparation of a false income tax return is a crime involving moral turpitude); Bruner v. Bd. of Real Estate, Dep't of Prof'l Reg., 399 So. 2d 4 (Fla. 5th DCA 1981) (grand theft is a crime involving moral turpitude); compare Florida Bar v. Davis, 361 So. 2d 159, 162 (Fla. 1978)(issuance of worthless checks, unlike larceny, theft, and other reprehensible offenses, does not involve moral turpitude).

64. To determine the applicable disqualifying period, it is necessary to consider Florida Administrative Code Rule 69B-211.042, promulgated to implement the 2011 statutory amendments to section 626.707, including the specific rule directives in section 626.707(5) quoted above. The first step is to determine the total disqualifying period. Relevant to this consideration is the following provision in rule 69B-211.042:

(4) Applicants With Multiple Crimes.

(a) Where an applicant has more than one crime subject to a disqualifying period, an additional disqualifying period for each of those additional crimes shall be added to the disqualifying period. For each additional crime that is subject to a disqualifying period the Department shall add:

1. Five years to the disqualifying period for each additional felony involving moral turpitude but not subject to the permanent bar in Sections 626.207(3) or 626.9954(2), F.S.;

2. Two years to the disqualifying period for each additional felony not involving moral turpitude and not subject to the permanent bar in Sections 626.207(3) or 626.9954(2), F.S.; and,

3. Two years to the disqualifying period for each additional misdemeanor directly related to a financial services business.

(b) The additional disqualifying period shall be added to the disqualifying period for the most serious crime, and the combined total disqualifying period will then run from the date of the applicant's final release from supervision for the most recent crime that would be subject to a disqualifying period under Sections 626.207(4) or 626.9954(3), F.S.

(c) Multiple crimes arising out of the same act, or related acts, performed over a relatively short period of time and in a concerted course of conduct, and crimes committed in one transaction, episode, or course of conduct are treated by the Department as one crime for application of this rule. The most serious crime will be used as the basis for the disqualifying period. For the crimes to be considered a single crime, the applicant must have pled to

> or been convicted of such crimes on the same date and the judgment and sentence for those crimes must have been imposed concurrently.

65. Here, Petitioner was convicted on three different occasions for crimes fairly characterized as involving moral turpitude, if those crimes are not subject to the permanent bar in section 626.707(3). Under Respondent's rule, each separate judgment of conviction is treated as a single criminal episode, despite the inclusion of multiple crimes in the judgments of conviction. However, the three separate convictions are considered three separate crimes and would not be treated as a single episode, regardless of the circumstances (which were not explained in any event), because the three convictions occurred at different times, and the three judgments and sentences were not imposed concurrently.

66. Applying these rule standards, a 15-year disqualifying period is imposed for the first conviction, to which 10 years is added (five years for each of the other two convictions). The total disqualifying period is 25 years, again, assuming the permanent bar is not applied to Petitioner's felony convictions.

67. The next step is to address mitigating factors that can apply to reduce the total disqualifying period. The relevant provisions on mitigation in rule 69B-211.042 are as follows:

(5) Mitigating Factors.

(a) If applicable, the Mitigating Factors listed below may be used to shorten the total disqualifying period only when the fifteen year disqualifying period established in Section 626.207(4)(a), F.S. is applicable. Where more than one mitigating factor is present the applicant is entitled to add all applicable years of mitigation together and deduct that number from the total disqualifying period only when the fifteen year disqualifying period is applicable; however, the fifteen year disqualifying period may not be reduced to less than seven years. Mitigating Factors cannot be used to reduce the seven year disqualifying periods established by Sections 626.207(4)(b) or (c) or 626.9954(3)(b) and (c), F.S. Mitigating Factors may not be used to reduce the amount of the disqualifying period for failure to answer questions accurately and truthfully established in subparagraph (2)(b)1. The following Mitigating Factors may apply:

1. One year is deducted if the applicant was age twenty-one or younger when the felony crime was committed and if there are no felony crimes on the applicant’s law enforcement record after reaching the age of twenty-two.

2. One year is deducted if the applicant furnishes proof that the applicant was addicted to drugs, suffering from active alcoholism, or suffering from a psychiatric disorder, at the time of the crime and the applicant furnishes a letter from a medical doctor, psychologist, or therapist, who is licensed by a duly constituted state licensing body, that states that the licensed person has examined or treated the applicant and that in his or her professional opinion the condition is currently in remission and has been in remission for at least the previous 12 months.

3. One year is deducted if the applicant provides letters of recommendation from three or more persons who are not relatives of the applicant and who have known the applicant for at least the five years immediately preceding the application.

4. One year is deducted for each associate degree, bachelor's degree, master's degree or other higher education degree earned by an applicant from an accredited institution of higher learning subsequent to the commission of the crime which is the basis for the disqualifying period.

5. One year is deducted if the applicant has performed 180 or more hours of volunteer work for a charitable organization within the three years immediately preceding the application, as evidenced by a letter signed by an official of the charitable organization where the volunteer hours were performed.

6. One year is deducted if the applicant has held one or more professional licenses from any jurisdiction or professional licensing organization for at least one year within the five years immediately preceding application and subsequent to the commission of the crime which is the basis for the disqualifying period, and only if the applicant held the license during that time period without administrative action being taken.

7. One year is deducted if the applicant has been employed at least 40 hours per week for a continuous two year period within the five years immediately preceding the application.

8. One year is deducted if the applicant has served at least one year in the United States Armed Forces, active or reserves, subsequent to the commission of the crime which is the basis for the disqualifying period and provided any discharge was without an Other Than Honorable Discharge designation.

> (b) The burden is on the applicant to establish these Mitigating Factors. Any of the Mitigating Factors above that involve a state or governmental agency, a university or school, or a court must be established by providing a certified true copy of the document proving that Mitigating Factor.

68. From the 25-year disqualifying period, Petitioner would be entitled to deductions of one year each for any proven mitigation factors. As provided in the rule, Petitioner, asserting the affirmative of this issue, has the burden to prove entitlement to any mitigation factors.

69. Based on the findings above, Petitioner is entitled to a deduction of four years, based on mitigation factors three, five, six, and seven.

70. Petitioner failed to prove that he is entitled to a deduction for the mitigation factor for charitable volunteer hours. The rule plainly requires that Petitioner prove his hours volunteering for charitable organizations with evidence in the form of "a letter signed by an official of the charitable organization where the volunteer hours were performed." While Petitioner would have been allowed to submit such evidence at hearing, even though it was not provided with his application, Petitioner did not offer any such evidence at hearing.

71. Petitioner did not claim entitlement to any other mitigation factors, and it appears that Petitioner would not

qualify for any others, such as the mitigation factor for crimes committed as a young adult, at age 21 or younger and before age 22. Petitioner was in his mid-twenties when he committed the crimes resulting in the three judgments of conviction.

72. Thus, if Petitioner's crimes are deemed subject to the disqualifying period in section 626.207(4), instead of the permanent bar, then four years should be deducted, reducing the disqualifying period to 21 years.

73. The final step is to determine the date from which the disqualifying period runs. Section 626.707(6) provides in this regard that "the disqualifying periods begin upon the applicant's final release from supervision or upon completion of the applicant's criminal sentence, including payment of fines, restitution, and court costs for the crime for which the disqualifying period applies."

74. Petitioner proved the dates on which he completed his three probationary terms. However, he did not prove when he completed payment of all fines, restitution, and court costs imposed as part of his three sentences. The earliest possible date of completion of all of these requirements would be August 9, 1999, the date on which Petitioner completed the last of his probationary terms. If that were shown to be the applicable start date for his disqualifying period, then disqualification would end 21 years later, in August 2020.

75. Thus, if Petitioner is ultimately determined to be subject to this disqualifying period, instead of being permanently barred, then if he submits an application after the disqualifying period, he should be prepared to submit proof of not only when he completed probation, but also, when he completed payment of all fines, restitution, and court costs imposed with his sentences.

Proof of Rehabilitation, Fitness, and Trustworthiness

76. Petitioner contends that his two convictions for crimes involving fraud fall under the permanent bar in section 626.707(3), which, he contends, cannot be applied to him because his right to vote was restored in New Jersey by operation of law, and he was allowed to register to vote in Florida. Petitioner also contends that those two convictions cannot be considered under section 626.707(4), although he concedes that Kauk, et al., do not have any impact on the statutory disqualifying periods. (Pet. PRO at 19). Thus, according to Petitioner, the disqualifying period can only apply to the one conviction that is not deemed a felony involving fraud. This argument is rejected. If, under Kauk, et al., the permanent bar in section 626.707(3) has to be interpreted to not apply to Petitioner's two convictions, then consideration of those two convictions would fall to section 626.707(4), because they would not be subject to the permanent bar.

77. If Petitioner's position were to prevail, then the disqualifying period for one conviction of crimes involving moral turpitude would be 15 years, reduced by four years, to an 11-year disqualifying period. However, Petitioner did not present proof as to the date from which that disqualifying period would run. Thus, even under Petitioner's theory, it still cannot be concluded that Petitioner's disqualifying period has been met.

78. If Petitioner had established that he is not permanently barred and is no longer disqualified from applying for licensure as an insurance adjuster, then section 626.707(7) would apply, providing as follows:

> After the disqualifying period has been met, the burden is on the applicant to demonstrate that the applicant has been rehabilitated, does not pose a risk to the insurance-buying public, is fit and trustworthy to engage in the business of insurance pursuant to s. 626.611(1)(g), and is otherwise qualified for licensure.

79. Respondent does not dispute that, with the exception of Petitioner's criminal history and the implications of that history on Petitioner's trustworthiness and fitness to conduct business as an insurance adjuster, Petitioner is otherwise qualified to be a resident all-lines insurance adjuster. See § 626.866, Fla. Stat.

80. As recognized in Sandlin and Kauk, even if Petitioner had proven that his civil rights had been restored by an

executive branch exercise of constitutional clemency power, Respondent may take into account and rely on the facts underlying the convictions. Here, however, Respondent cannot do that, because Petitioner did not explain the facts underlying his convictions, accept responsibility, or express remorse. On this record, it is impossible to conclude that Petitioner met his burden to prove that he is rehabilitated, and that despite his past crimes, he is trustworthy and fit to engage in insurance adjusting without posing a risk to the public.

81. Petitioner argues, in effect, that DFS could not deny his application based on these considerations, because DFS previously issued a license to him with knowledge of the same felony convictions. This argument is rejected. First, between the time of Petitioner's first application for licensure and the application at issue in this case, the Legislature amended section 626.707, making the qualifications for licensure more stringent by adopting more expansive statutory disqualifications. Petitioner's current application, unlike the prior application, must be judged under the law now in effect. See, e.g., Giamberini, 162 So. 3d at 1138 (applying statutory bar to certification as a fire safety inspector; appellant's prior certification as a firefighter under an earlier statutory scheme that did not disqualify appellant was irrelevant); Carter v. Dep't of Fin. Servs., 117 So. 3d 476 (Fla. 1st DCA 2013)

(affirming DFS final order that applied section 626.707(4), as amended in 2011, to conclude that appellant was disqualified for 15 years from applying to reinstate a suspended resident all-lines adjuster license, based on the same no-contest plea to a felony for aggravated assault by threat, deemed to be a crime involving moral turpitude, that resulted in the license suspension); Emiddio v. Off. of Fin. Reg., 147 So. 3d 587 (Fla. 4th DCA 2014) (Office of Financial Regulation was not precluded from determining appellant's 2002 convictions for felonies involving fraud barred her from obtaining a loan originator's license, even though appellant previously was licensed as a mortgage broker despite those convictions, where amended law required licensed mortgage brokers to file new applications for licensure as loan originators, with more stringent standards and new provisions for permanent bars based on prior convictions).

82. In any event, there is no record evidence proving the basis upon which DFS made its determination to issue a license to Petitioner under prior law. While Petitioner said that he submitted certified court records regarding his convictions, only two of the three sets of certified court records appear to have come from Petitioner's old application file, raising a question regarding whether Petitioner fully disclosed his criminal background. Compare Resp. Exh. 2 (court records of Petitioner's 1996 conviction, certified in 2016) with Resp. Exhs. 3 and 4

(certified court records from Petitioner's two 1995 convictions, bearing Respondent's received stamp dated in 2010).

83. In addition, it is unknown whether and to what extent Petitioner provided Respondent with an explanation of the circumstances surrounding his criminal convictions when Petitioner first applied for licensure in 2009 or 2010, whether and to what extent he took responsibility and expressed remorse for his criminal past, and whether and to what extent he demonstrated his rehabilitation.

84. The determinations in this case can only be made on the basis of the evidence of record presented at hearing. Based on the record evidence, even if Petitioner had proven that his civil rights were restored through an exercise of the executive branch's constitutional clemency power, and that any applicable disqualifying period had passed, Petitioner failed to meet his burden of proving that he is rehabilitated, and that he is trustworthy and fit to engage in business as an insurance adjuster without risk to the public. See § 626.707(7), Fla. Stat. (applicant with a criminal background has the burden to demonstrate that he has been rehabilitated, does not pose a risk to the insurance-buying public, is fit and trustworthy); § 626.866(3), Fla. Stat. (requiring applicant for all-lines insurance adjuster to demonstrate that he is trustworthy, providing reasonable assurance that he will carry out his

business as an insurance adjuster fairly and in good faith without detriment to the public); § 626.611(1)(g), Fla. Stat. (requiring Department to refuse adjuster licensure for a demonstrated "lack of fitness or trustworthiness to engage in the business of insurance.").

85. Petitioner's testimony describing his business activities, his family, and community involvement was helpful, but only to an extent. This evidence did not demonstrate Petitioner's fitness to act as an insurance adjuster. Petitioner acknowledged that his business, started in 1998, does not engage in insurance adjusting; instead, the business has provided technical support services to clients who are licensed adjusters performing the actual adjusting work. The sworn testimony on Petitioner's behalf was provided only by Petitioner and was very limited. The letters of recommendation by persons knowing Petitioner were sufficient to meet the requirements of a mitigation factor, but were not competent evidence in lieu of sworn testimony by character witnesses.

86. Most significantly, Petitioner was vague and evasive about his criminal background, offering no explanation for the circumstances leading to his criminal convictions, not expressly accepting responsibility for his past wrongs, and not expressing remorse. These are glaring omissions. While Petitioner's convictions were a long time ago, they did involve multiple

criminal incidents that spawned multiple charges for fraudulent use of credit cards, theft, forgery, deception--all of which raise concerns about Petitioner's trustworthiness and fitness to deal with other people's money. It was up to Petitioner to alleviate those concerns, but he did not.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Financial Services issue a final order denying Petitioner's application for licensure as a resident all-lines insurance adjuster.

DONE AND ENTERED this 14th day of April, 2017, in Tallahassee, Leon County, Florida.

ELIZABETH W. MCARTHUR
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Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of April, 2017.

ENDNOTES

[1/] In his PRO, Petitioner acknowledged that DFS pointed out that he had incorrectly marked "no" on one of these questions. The only question that DFS asked Petitioner about at hearing was the

first question on page three, asking whether Petitioner had been convicted of certain felony crimes, including crimes involving fraud. Petitioner's PRO proposes a finding that answering this question "no" in the application was an oversight, in that Petitioner had provided DFS with the certified court documents detailing the charges. (Pet. PRO at 4, fn. 1). No record citation is offered for the "oversight" proposed finding; Petitioner did not explain at hearing why he answered no to that question and the other two questions.

[2/] Petitioner's prior license application, filed in 2009 or 2010 and apparently completed with documents filed with DFS in 2010, was approved under then-existing laws. However, DFS considers the prior license expired by operation of law. Petitioner's efforts to have his prior license reactivated are the subject of the separate controversy between the parties. At some point, when Petitioner did not hear from DFS regarding that separate controversy, Petitioner decided to file a new application for licensure, and that is the license application that is the subject of this proceeding. As discussed on the record at hearing, although Petitioner views the two matters as related, they are related only in the sense of being alternative, mutually exclusive pathways towards Petitioner's objective of licensure. Petitioner's failure to successfully resolve the separate controversy is the reason why he chose to file the application to become licensed that is at issue in this case. But his reasons for filing the license application have no bearing on whether the application should be approved or denied.

[3/] Petitioner objected to the admission of certified copies of court records of his convictions in New Jersey, even though he admitted that he provided certified court records to DFS to document his criminal history in connection with his 2010 application. Two of the three sets of certified court records bear DFS "received" stamps in June 2010. One set of certified court records was obtained more recently; it is unknown if Petitioner did not previously supply DFS with records of this third felony conviction. The certified court records (Respondent's Exhibits 2, 3, and 4) were admitted over Petitioner's objections, primarily based on hearsay. The undersigned agrees with Respondent that the documents are self-authenticating and admissible as public records. Moreover, as official court records, those documents are considered sufficiently reliable and indisputable to qualify for official recognition under the judicial notice statute, section 90.202(6), Florida Statutes. See, e.g., N.W. v. Dep't of Child. & Fam., 865 So. 2d 625 (Fla. 4th DCA 2004) (trial court properly took

judicial notice of court orders; per a leading evidence treatise, a court record is not subject to dispute; either it is or is not the record of a court, and when it is shown to the satisfaction of the trial judge that a document is a record of a court, then the judge should judicially notice it). Petitioner was asked to brief his hearsay objection in his PRO, but instead of offering support for his objection, Petitioner proposed findings of fact based solely on the New Jersey courts' three judgments of conviction, accepting the certified court records as appropriate predicates for findings of fact. See Pet. PRO at 5-6.

[4/] Counsel for Petitioner attempted to elicit testimony from his DFS witness that DFS conducted an independent investigation to confirm that Petitioner's civil rights were restored in New Jersey, and that in the "professional opinion" of the DFS witness, Petitioner's civil rights were, in fact, restored in New Jersey. However, restoration of civil rights is an act that is subject to proof; it is not a matter of opinion. The testimony of the DFS witness was not competent to prove that Petitioner's civil rights were, in fact, restored in New Jersey.

[5/] Petitioner requested official recognition of section 19:4-1, New Jersey Statutes, because Petitioner argued that subsection (6) provided indirect evidence from which it can be inferred that Petitioner's civil rights have been restored in New Jersey. Subsection (6) provides that the right to vote is taken away from a person "[w]ho has been convicted of a violation of any of the provisions of this Title, for which criminal penalties are imposed, if such person shall be deprived of such right as part of the punishment therefor according to law, unless pardoned or restored by law to the right of suffrage." (emphasis added). However, Petitioner's convictions were not for violations of any provision of Title 19. Moreover, even if Petitioner had been able to show subsection (6) were applicable to him instead of subsection (8), Petitioner would have also had to show that he had been pardoned or restored by law to the right to vote. Pursuant to section 2A-167-5, New Jersey Statutes: "Any person who has been convicted of a crime and by reason thereof has been deprived of the right of suffrage or of any other of his civil rights or privileges, . . . may make application for the restoration of the right of suffrage or of such other rights or privileges . . . , which application the governor may grant by order signed by him." Petitioner admitted that he never applied for restoration of his civil rights, and he has no order from the governor granting restoration of his civil rights. Instead, subsection (8) applies to Petitioner, not subsection (6), and by

virtue of the applicable law, one of Petitioner's civil rights--the right to vote--was only taken away until his probation ended.

[6/] Petitioner argues in his PRO that it would be appropriate to consider the hearsay testimony regarding confirmation from the state of New Jersey, because it corroborates Petitioner's testimony that his understanding is that his civil rights were restored upon completion of probation "and everything." However, that is not what Petitioner said. He said that he verified the completion (of probation and everything) with the state of New Jersey in a phone call. He did not say that he verified that his civil rights were restored. Regardless, Petitioner failed to offer any competent basis for his understanding, when the law and the voter handbook refute his understanding; even if he had said that he confirmed his understanding regarding restored civil rights with someone in New Jersey, he cannot bolster his unsupportable testimony by recounting that someone on the telephone agreed with him.

[7/] References to Florida Statutes are to the 2016 codification, unless otherwise indicated.

[8/] The law in New Jersey was different before 1970. Section 19:4-1 used to take away the right to vote from persons convicted of a wide variety of crimes, including forgery (which would have implicated Petitioner), unless and until the convicted person was pardoned or restored by law to the right to vote. These disqualification provisions, with the exception of the provision disqualifying persons who commit violations of Title 19 (elections law), were declared unconstitutional in Stephens v. Yeomans, 327 F. Supp. 1182 (D.C.N.J. 1970). Thereafter, the law was amended to provide that persons committing indictable offenses lose the right to vote until they complete their sentence, parole, and probation (§ 19:4-1(8), N.J. Stat.), while those who commit violations of the elections law are disqualified from voting until they are pardoned or restored by law (§ 19:4-1(6), N.J. Stat.).

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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.