

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL
SERVICES, DIVISION OF STATE FIRE
MARSHAL,

Petitioner,

vs.

Case No. 18-5338PL

EDWARD G. WHITAKER, JR.,

Respondent.

_____ /

RECOMMENDED ORDER

Administrative Law Judge D. R. Alexander conducted a hearing in this case by video teleconference on January 14, 2019, at sites in Sarasota and Tallahassee, Florida.

APPEARANCES

For Petitioner: Catherine Thrasher, Esquire
Colleen D. Mullen, Esquire
Department of Financial Services
Office of the General Counsel
200 East Gaines Street
Tallahassee, Florida 32399-0333

For Respondent: Edward G. Whitaker, Jr., pro se
5012 Woodlawn Circle West
Palmetto, Florida 34221-8531

STATEMENT OF THE ISSUE

The issue is whether Respondent's certification as a Firefighter II Compliance should be permanently revoked for the reasons stated in the Administrative Complaint (Complaint), dated June 6, 2018.

PRELIMINARY STATEMENT

On June 6, 2018, the Department of Financial Services, Division of State Fire Marshal (Department), issued its Complaint alleging that Respondent, certified as a Firefighter II Compliance, had entered a plea of nolo contendere to aggravated assault with a weapon, a third-degree felony punishable by imprisonment of one year or more. The Complaint alleges further that Respondent's plea requires that his firefighter's certification be permanently revoked. Respondent timely requested a hearing, and, after disputed facts arose during an informal hearing, the matter was referred by the Department to the Division of Administrative Hearings to resolve the dispute. On October 25, 2018, the case was transferred from former Administrative Law Judge J. L. Johnston to the undersigned.

At the hearing, the Department presented the testimony of four witnesses. Department Exhibits 1 through 27 were accepted in evidence. Respondent testified on his own behalf.

A one-volume Transcript of the hearing was prepared. Proposed findings of fact and conclusions of law were filed by the Department, and they have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Department is the state agency responsible for licensing and regulating firefighters in the State.

2. Respondent is certified in Florida as a Firefighter II Compliance. He holds Certificate No. 139586. Until the incident underlying this controversy arose, Respondent was employed by the Sarasota County Fire Department as a firefighter/paramedic. He now is working in the emergency room of a local hospital.

3. The parties have stipulated that on March 21, 2018, Respondent entered a plea of nolo contendere to aggravated assault with a weapon, a third-degree felony punishable by imprisonment of one year or more under Florida law. Adjudication was withheld, Respondent was placed on probation for a period of two years, and he was ordered to pay court costs, fines, and fees in the amount of \$1,525.00. See also Dep't Ex. 19.

4. In response to the Complaint, Respondent essentially argues that: (a) he should not have been charged with the underlying criminal offense because he was defending himself against an aggressor in a road rage incident, and (b) he entered a nolo contendere plea based on bad advice from his attorney.

5. At hearing, Respondent gave his version of the events resulting in his arrest. Also, two police officers involved with his arrest testified to what they observed and reported. Their testimony conflicts in many respects with Respondent's testimony. The undersigned will not attempt to reconcile the conflicts, as this proceeding is not the appropriate forum in which to relitigate the criminal charge.

6. During the criminal case, Respondent was represented by a criminal law attorney who presented him with two options: enter into a plea arrangement or go to trial and risk a harsher penalty if he were found guilty. Respondent says he accepted his counsel's recommendation that he enter a plea of nolo contendere on the belief that he would not have a felony arrest on his record.

7. After the plea agreement was accepted by the court, Respondent learned that the plea required revocation of his certification and loss of his job. Respondent also testified that even though he paid counsel a \$15,000.00 fee, his counsel did little or no investigation regarding what happened, as he failed to depose a single witness before making a recommendation to take a plea.^{1/} In hindsight, Respondent says he would have gone to trial since he now believes he had a legitimate claim to the "castle defense," and the so-called victim in the incident (the driver of the other car) has a long criminal history and is

now incarcerated. At this point, however, if Respondent believes an error in the legal process occurred, his only remedy, if one exists at all, is through the court system and not in an administrative proceeding.

8. A felony plea constitutes noncompliance with the certification statute and requires permanent revocation of a certification. According to a Department witness, however, five years after all requirements of the court's sentencing have been met, the Department has the authority "in a formal process" to make a "felony conviction review" that may result in the reissuance of a certification.

9. Except for this incident, Respondent has no other blemishes on his record. He served in the United States Marine Corps, with combat tours of duty in Iraq and Afghanistan, he was honorably discharged, and he was honored for saving a life at a Target store while off-duty. He has apologized for his actions, taken an anger management course, and received further treatment for Post-traumatic Stress Disorder at a local Veteran's Administration facility.

CONCLUSIONS OF LAW

10. The Department has the burden of proving by clear and convincing evidence that Respondent's certificate must be revoked.

11. Section 633.426(3)(a)2., Florida Statutes (2018), provides that the certification of an individual "shall be permanently revoked" if the individual is "[c]onvicted of a felony or a crime punishable by imprisonment of 1 year or more under the law of the United States or any state thereof."

12. Section 633.426(1)(c) defines "convicted" as "a finding of guilt, or the acceptance of a plea of guilty or nolo contendere, in any federal or state court or a court of another country, without regard to whether a judgment of conviction has been entered by the court having jurisdiction of the case."

13. Respondent argues that he should be allowed to present the circumstances surrounding his nolo contendere plea and convince the Department that he is not guilty of a crime. See Ayala v. Dep't of Prof'l Reg., 478 So. 2d 1116 (Fla. 1st DCA 1985). Under the statutory scheme in place when Ayala was decided, a nolo contendere plea was considered conclusive proof that a crime had been committed and justified disciplinary action by the agency against a doctor's license. In reversing that decision, the court held that the agency could presumptively consider the plea as evidence of a conviction, but it must allow the licensee the opportunity to rebut this presumption and assert his innocence of the underlying criminal charges. 478 So. 2d at 1118.

14. Under the statutory scheme in chapter 633, however, the Department does not consider a plea of nolo contendere conclusive evidence of the wrongdoing. Rather, the entry of a plea creates noncompliance with section 633.426(3), which, under section 633.426(3)(a)2., results in revocation of certification. Therefore, the Department did not improperly convert Respondent's plea of nolo contendere into a conviction of a felony. See McNair v. Crim. Just. Stds. & Tr. Comm'n, 518 So. 2d 390, 391 (Fla. 1st DCA 1987) (revocation of license permitted where licensee pled nolo contendere to a felony and entry of plea created noncompliance with the licensing statute). Pursuant to section 633.426(3)(a)2., permanent revocation of the certification is required.

RECOMMENDATION

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

RECOMMENDED that the Department of Financial Services enter a final order permanently revoking Respondent's certification.

DONE AND ENTERED this 15th day of February, 2019, in
Tallahassee, Leon County, Florida.



D. R. ALEXANDER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of February, 2019.

ENDNOTE

^{1/} Department Exhibit 16 reflects that on November 20, 2017, Respondent's counsel noticed for deposition on January 18, 2018, the alleged victim and five witnesses. Presumably, the depositions were never taken because subsequent settlement negotiations with the state resulted in the plea arrangement.

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.