BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL FROM THE COMMISSIONER OF THE DEPARTMENT OF COMMERCE, COMMUNITY AND ECONOMIC DEVELOPMENT

In the Matter of:	)	
	)	
MARTIN FERRELL,	)	
	)	
Respondent.	)	OAH No. 06-0582-COL
	)	Agency No. 0950-06-001

DECISION

I. Introduction

Martin Ferrell submitted an application for a license as a collection agency operator under the provisions of AS 08.24. The Division of Corporations, Business and Professional Licensing denied the application on the ground that Mr. Ferrell has a prior felony conviction and that he lacks good moral character, contrary to AS 08.24.110(a)(2) and (4).[1]

Mr. Ferrell requested a hearing. The case was referred to the Office of Administrative Hearings and the assigned administrative law judge conducted a hearing on November 29, 2006.

Based on the record and the testimony at the hearing, the administrative law judge concludes that the application should be granted.

II. Facts

Martin Ferrell owns and operates American Credit Bureau, a collection agency based in Florida. Mr. Ferrell started the business in 1992, primarily servicing doctors and dentists. Over time, the business was successful. It currently services clients in a variety of businesses and is licensed as a collection agency in more than 25 states.[2] Mr. Ferrell's collection agency has never been the subject of a regulatory or licensing action in any of those states, and it has never been denied a license in any state in which it has applied (other than Alaska).[3]

On October 2, 1991, shortly before he opened his collection agency, Mr. Ferrell was found in possession of cocaine at a hotel in Fort Lauderdale. He was arrested and charged with a felony drug offense. On October 26, 1992, on a plea of *nolo contendere* (no contest) to a charge

---

1 R. 3.

2 R. 11 (license status effective December 8, 2005).

3 Testimony of Jennifer Gonzales, David Molot.

of possession of cocaine, a felony in the third degree, the court issued an order of "adjudication withheld" and placed Mr. Ferrell on probation for two years.[4] Mr. Ferrell successfully completed his probation.

Notwithstanding his prior criminal record, Mr. Ferrell has a good reputation in his community for honesty and integrity. On his application for a license, Mr. Ferrell answered "No" to the question, "Have you ever been convicted of any criminal offense(s) other than a minor traffic violation (convictions include suspended imposition of sentences)?" At the time, Mr. Ferrell's understanding was that he had not been convicted for purposes of Florida law, and that he could honestly answer "No." He did not intend to mislead the division regarding the existence of a criminal conviction.

III. Discussion

Under AS 08.24.110(a)(2) and (4), an applicant for a license as a collection agency operator is disqualified if the applicant has been convicted of a felony or is not of good moral character. While the requirement of "good moral character" is absolute, under AS 08.24.110(b) the commissioner may waive or modify the requirement regarding lack of a felony conviction.

Mr. Ferrell asserts that he is of good moral character, and that the commissioner should exercise his discretion to issue the license, notwithstanding the Florida criminal proceeding.

A. Mr. Ferrell Does Not Have a Felony Conviction for Purposes of AS 08.24

1. An Adjudication Withheld is Not a Conviction for All Purposes in Florida

Under Florida law, if the court determines that a defendant is "not likely to again engage in a criminal course of conduct," the court may withhold adjudication of guilt, stay the imposition of sentence, and place a defendant on probation.[5] In 1992, after Mr. Ferrell entered a plea of *nolo contendere* to a felony charge for possession of cocaine, the court entered an order withholding adjudication of guilt and imposition of sentence; Mr. Ferrell was placed on probation and released.

Under Florida law at the time, it appears that a order withholding adjudication following a plea of *nolo contendere* was generally not considered a conviction. In 1988, the Florida Supreme Court had unanimously concluded that "the plea of guilty is an absolute condition precedent before the lack of adjudication can be considered a conviction" for purposes of

[4] R. 31.
[5] F.S.A. 948.01(2).

aggravating the sentence to death in a capital punishment case, where the relevant statute listed a prior conviction as an aggravating factor but did not specifically define the term "conviction."[6] In 1993, the Florida legislature defined the term "conviction" for purposes of a general presumptive sentencing statute, specifically excluding capital cases from the definition.[7] In three cases over the next eight years, Florida courts held that under that statute, a withheld adjudication following a plea of *nolo contendere* was not a "conviction."[8] In 2005, rejecting the three earlier decisions, the Florida Supreme Court in a 4-3 decision interpreted the term "conviction" as defined in the presumptive sentencing statute as including a withheld adjudication following a plea of *nolo contendere*.[9] The court did not disavow its earlier decision construing the term "conviction" in the absence of an applicable statutory definition.

Taken together, these Florida Supreme Court cases indicate that under Florida law, in the absence of an applicable statutory definition, a "conviction" generally does not include a plea of *nolo contendere* when adjudication is withheld. This view is supported by other authorities as well. For example, courts have found that where adjudication is withheld the defendant is not a convicted felon for purposes of Florida's felon in possession statutes,[10] and that such a disposition after a plea of *nolo contendere* is insufficient to allow impeachment by prior conviction,[11] or administrative disciplinary proceedings for being "guilty of a crime."[12] Similarly, the Florida Attorney General has opined that when adjudication is withheld, the defendant "has not been convicted" for purposes of the loss of civil rights.[13] For these reasons, it

---

[6] Garron v. State, 528 So.2d 353, 360 (Florida 1988). Although the court did not specifically cite to the Florida statute at issue, a prior case identifies it as F.S.A. 921.141(5)(b). *See* McCrae v. State, 395 So.2d 1145, 1154 (Florida 1980), *cert. den.*, 454 U.S. 1041 (1981).

[7] F.S.A. §921.0011 (ch. 93-406, Laws of Florida), repealed and replaced by §921.0021 (ch. 97-194, Laws of Florida).

[8] *See* Negron v. State, 799 So.2d 1126 (Fla. App. 2001); State v. Freeman, 775 So.2d 344 (Fla. App. 2000); Batchelor v. State, 729 So.2d 956 (Fla. App. 1999).

[9] Montgomery v. State, 897 So.2d 1282 (Florida 2005).

[10] United States v. Gispert, 864 F.Supp. 1193 (S.D. Fla. 1994).

[11] Raydo v. State, 696 So.2d 1225 (Fla. App. 1997), *approved in part and quashed in part,* 713 So.2d 996 (Fla. 1998).

In Montgomery, the court noted the existence of an old Florida case, cited by the State, in which the court had concluded that a sentence may be imposed following a plea of *nolo contendere*, even in the absence of a judgment of conviction. *Id*., 897 So.2d at 1285. *See* Pensacola Lodge No. 497 v. State, 77 So. 613 (Fla. 1917). The Montgomery decision does not suggest that the 1917 decision has any precedential value for purposes of the issue in that case, or for purposes of the common law meaning of the term "conviction" outside of the sentencing context.

[12] Holland v. Florida Real Estate Commission, 352 So.2d 914 (Fla. App. 1977) (imposition of sanction would be inconsistent with the "obvious purpose of this statute [providing for withholding adjudication] to avoid giving certain persons a criminal record when the prospects are good for rehabilitation.").

[13] Fla. Op. Att'y. Gen., 064-163 (November 6, 1964).

appears that Mr. Ferrell's plea of *nolo contendere*, coupled with the 1992 court order withholding adjudication, would not be considered a "conviction" under Florida law except as specifically provided by law; in particular, such a disposition would not be deemed sufficient to support administrative disciplinary proceedings in Florida based on guilt of a crime.[14]

2. An Adjudication Withheld is Not a Conviction for Purposes of AS 08.24

The Florida courts have the authority to determine the consequences that attach to an adjudication withheld for purposes of Florida law. However, the treatment of such a disposition in Florida does not control its treatment in Alaska: whether an order withholding adjudication following a plea of *nolo contendere* is a "conviction" within the meaning of AS 08.24.110(b)(2) is a question of Alaska law, not Florida law.[15]

Alaska law has no precise counterpart to the Florida procedure of an order of "adjudication withheld" following a plea of *nolo contendere*. Alaska law provides that when the judge determines that "there are circumstances in mitigation of the punishment or that the ends of justice will be served" the court may enter a judgment of conviction and suspend the imposition of sentence.[16] The nature and consequences of a suspended imposition of sentence under Alaska law have been the subject of several Alaska Supreme Court cases,[17] whose holdings are summarized in a recent administrative case, In re Pyle:[18]

> In general, only low risk, first-time offenders are eligible to receive a suspended imposition of sentence (SIS). A judge who has ordered an SIS "has evaluated the defendant's background and offense and decided the defendant deserves a chance to show that he or she has 'reformed' and therefore should be rewarded with a clean record." After a defendant successfully completes the probationary period, the judge may issue a set-aside order, which "reflects a substantial showing of rehabilitation." A set-aside order is, at a minimum, an implicit indication that the defendant poses "little threat of committing new crimes." A set-aside order is in the nature of a pardon.
>
> However, a set-aside does not change the fact that the conviction took place, or that the defendant did not commit the act for which he or she was

---

[14] Holland v. Florida Real Estate Commission, *supra* at note 13.

[15] *See* People v. Latino, 87 P.3d 27 (Cal. 2004); People *ex rel*. Cassarino v. New York State Division of Parole, 649 N.Y.S.2d 323, 326 (N.Y. App. 1996).

[16] *See* AS 12.55.085(a).

[17] *See* Doe v. State, Department of Public Safety, 92 P.3d 398 (Alaska 2004); Boyd v. State, Department of Commerce and Economic Development, Division of Occupational Licensing, 977 P.2d 113 (Alaska 1999); Spenard Action Committee v. Lot 3, Block 1, Evergreen Subdivision, 902 P.2d 766 (Alaska 1995); Journey v. State, 895 P.2d 955 (Alaska 1995). *See also* Larson v. State, 688 P.2d 592 (Alaska App. 1984); Wickham v. State, 844 P.2d 1140 (Alaska App. 1993).

[18] In Re Pyle, OAH No. 05-0797-CNA (Board of Nursing, June 9, 2006).

> convicted. Neither does a set-aside order expunge the crime from the defendant's record. Rather, members of the public may research court records or require a job applicant to divulge the fact of a prior conviction. [footnotes omitted]

The Alaska procedure differs from the Florida procedure in two respects: first, under Alaska law a judgment of conviction is issued that may later be set aside, while under Florida law no adjudication of guilt is issued in the first place; second, under Alaska law the court need not find that the defendant is unlikely to re-offend, while under Florida law the court must conclude that the "defendant is not likely again to engage in a criminal course of conduct."[19] These distinctions support the conclusion that a Florida "adjudication withheld" after a plea of *nolo contendere* is a lesser sanction than an Alaska judgment of conviction with suspended imposition of sentence.

In Alaska, whether a disposition by suspended imposition of sentence should be considered a "conviction" for purposes of administrative disciplinary proceedings has not been conclusively established: a number of prior administrative decisions have concluded that a suspended imposition is a conviction for purposes of licensing certified nurse aides,[20] but the superior court rejected that conclusion in a decision that is currently on appeal to the Alaska Supreme Court.[21]

For several reasons, a disposition by withholding adjudication under Florida law should not be treated as if it were a prior conviction for purposes of AS 08.24. First, as previously observed, an order of adjudication withheld following a plea of *nolo contendere* is not equivalent to a suspended imposition of sentence under Alaska law: in Florida, no judgment of conviction is issued, and the court must find that the defendant is unlikely to re-offend. Second, the most authoritative relevant Alaska precedent is a superior court decision holding that a suspended imposition of sentence is not a prior conviction for licensure purposes; although a superior decision is not a binding precedent, it is persuasive authority. Third, unlike the certified nurse aides for whom a prior conviction has previously been considered to include a suspended imposition of sentence under Alaska law, collection agencies do not have the authority to enter into the private residences of vulnerable patients and do not have access to their private property.

---

[19] *See* note 5, *supra*.

[20] *See, e.g.*, In re Pyle, No. 05-0797-CNA (2006); In Re Wenger, No. 05-0526-CNA (2006); In re Schwantes, No. 2306-99-022 (Department of Commerce and Economic Development, June 29, 2001).

[21] Platt v. State, Division of Occupational Licensing, No. 3 KN-04-0663 CI (Superior Court, October 10, 2006); *appeal pending sub nom.* State, Board of Nursing v. Platt, No. S-12173.

3. The Florida Action Does Not Bar Licensure

Even if the order of adjudication withheld is a conviction within the meaning of AS 08.24, the commissioner has discretion to approve Mr. Ferrell's application. In this particular case, the division has not argued that the Florida disposition, in itself, warrants denial of Mr. Ferrell's application. Rather, the division basis its argument for denial "primarily based on the non-disclosure."[22] That argument pertains to the lack of good moral character: it is not an argument that the criminal conduct itself warrants denial of a license.

B. Mr. Ferrell Has Established Good Moral Character

The division argues that Mr. Ferrell intentionally misrepresented that he lacked a criminal conviction, and that his intentional misrepresentation warrants a finding that he lacks good moral character. Neither premise is valid. First, the preponderance of the evidence is that Mr. Ferrell did not intentionally misrepresent his criminal history. Mr. Ferrell was a candid and credible witness. His testimony was that at the time he filed the application, his understanding was that the Florida disposition of the criminal case did not constitute a conviction, and that he did not have to reveal it in response to a question asking about prior convictions. While he speculated that he would have answered the same way to the question if it had specifically inquired about an adjudication withheld, such speculation does not detract from the credibility of his testimony that he did not believe that his Florida disposition was a "conviction": a belief that was not only reasonable, but that is in fact consistent with -- if not compelled by -- Florida law. More fundamentally, even if Mr. Ferrell had intentionally misled the division about his prior criminal history, that single event would not conclusively establish that he lacks good moral character, within the meaning of AS 08.64.110(a)(2).

The term "good moral character" has not been defined for purposes of AS 08.64.110(a)(2).[23] In the absence of any specific definition, "good moral character" should be assessed in light of the entire record and should not be based on any one specific act. Mr. Ferrell

[22] Post Hearing Brief at 4.

[23] In some other licensing contexts, "good moral character" is defined as the lack of a criminal record for a particular period of time. *See* 8 AAC 10.915(7) (employment agency; no conviction of a crime involving moral turpitude within the previous 10 years); AS 08.04.110 (accountant must be of good moral character); 12 AAC 04.990(12) (accountant; no incident of a dishonest or felonious act within the previous 5 years); 12 AAC 52.075 (pharmacist; no conviction of a felony or other crime affecting ability to practice pharmacy safely). In other contexts, where the occupation includes a law enforcement component, "good moral character" is defined more generally. *See* 13 AAC 67.990(3), 13 AAC 85.900(7), 13 AAC 96.900(8), 22 AAC 30.900(6) (process server, police officer, village public safety officer, and sex offender treatment provider, respectively; indicia include illegal conduct and intentional deception in an application)

has a long history of successful and law-abiding conduct of collection activities in many jurisdictions. Several former and current employees (including the firm's accountant and its compliance officer) and personal acquaintances testified that Mr. Ferrell possesses a high degree of honesty and integrity, describing him as a hard-working individual who is generous, active in community organizations, and stable in his personal life. While a dishonest response to a question on the application is a serious matter, it is not listed as a ground for denial of a license, unlike other a number of other occupations for which dishonesty on the application is identified by law as a ground for license denial[24] or disciplinary action.[25] That dishonesty in the application process has not been identified as an independent ground for either denial of a license or a disciplinary action suggests that a misrepresentation in the application should be considered in light of the entire record. In this case, the record as a whole does not support a finding that Mr. Ferrell lacks good moral character within the meaning of AS 08.24.110(a)(2).

C. There is Good Cause to Waive the No-Felony Requirement

Even if, as a legal matter, the disposition of the Florida criminal case had constituted a "conviction" within the meaning of AS 08.24, the commissioner has discretion to waive the no-felony requirement. A finding of good cause to waive the no-felony requirement is an individualized determination by the commissioner based on the entire record. The applicant has the burden of proof with respect to any specific factual findings relevant to that determination, but the commissioner may consider the record as a whole in determining what weight to give to any of those findings, and may exercise his discretion accordingly.[26] In making his decision, the

[24] *See, e.g.,* AS 08.18.123(a)(1) (construction contractors); AS 08.38.040(1) (dieticians and nutritionists); AS 08.42.090(1) (morticians); AS 08.55.010(a)(5), AS 08.55.130(a)(1) (hearing aid dealers); AS 08.63.100(a)(3)(A), AS 08.63.210(a)(1) (marriage and family therapists); AS 08.65.050(3), AS 08.65.110(1) (direct-entry midwives); AS 08.68.270(1) (nurses); AS 08.70.110(c)(1) (nursing home administrators); AS 08.72.140(3), AS 08.72.240(a) (optometrists); AS 08.80.261(a)(1) (pharmacists); AS 08.84.120(a)1) (physical and occupational therapists). Arguably, a license may be denied to a psychologist on this ground. *See* AS 08.86.130(a)(2), AS 08.86.204(a)(1).

[25] *See, e.g.,* AS 08.04.450(1) (accountants); AS 08.06.070(1) (acupuncturists); AS 08.11.080(1) (audiologists); AS 08.20.170(a)(1) (chiropractors); AS 08.29.400(3) (licensed professional counselors); AS 08.32.160(1) (dental hygienists); AS 08.36.315(1) (dentists); AS 08.40.320(a)(1) (electrical and mechanical administrators); AS 08.45.060(a)(1) (naturopaths); AS 08.48.111(1) (architects, engineers); AS 08.54.710(a)(3) (big game guides); AS 08.55.130(a) (hearing aid dealers); AS 08.62.150(a)(4) (marine pilots); AS 08.64.326(a)(1) (physicians); AS 08.71.170(1) (dispensing opticians); AS 08.87.200(5) (real estate appraisers); AS 08.88.071(a)(3)(B) (real estate brokers); AS 08.95.050(1) (social workers); AS 08.98.235(1) (veterinarians).

[26] The division argues that the commissioner should sustain the denial of Mr. Ferrell's application if there is substantial evidence to support the division's action. Post Hearing Brief at 3. The division cites cases holding that on appeal to the courts, the department's final action is reviewed for abuse of discretion. Those cases do not hold or suggest that the commissioner should apply an abuse of discretion standard in making a decision following an administrative hearing. The commissioner is not required to defer to his own staff. *See, e.g.,* Baffer v. Department

commissioner may consider, among other things: (1) the nature and circumstances of the offense;[27] (2) the applicant's experience, character, and record as a licensee, if any; (3) other facts or circumstances bearing on the applicant's qualifications for licensure;[28] and (4) prior similar cases.[29] The commissioner should weigh these considerations in light of the nature of the license being applied for.[30]

(1) Nature and Circumstances of the Offense

The division argues that because it was a felony, Mr. Ferrell's offense should be considered serious.[31] But while any felony offense is serious, for purposes of good cause to waive the "no felony" requirement, the issue is whether the offense was particularly serious in comparison to other felonies, not in comparison to misdemeanors. The felony at issue in this case was of the third degree, the least serious felony under Florida law, and equivalent to the least serious felony under Alaska law. The conviction was for possession of a controlled substance, not for drug trafficking, and it occurred more than fifteen years ago.[32] There is no evidence that Mr. Ferrell has engaged in any other criminal activity. As the division acknowledges, the offense appears to have been an isolated incident.[33] Mr. Ferrell was of

---

of Human Services, 553 A.2d 659, 662-3 (Maine 1989) ("the Commissioner [is] the final repository of discretion;" where final administrative decisionmaker thinks he "must defer" to prior exercises of discretion, "[t]his thwarts the purpose of the hearing procedure."); In re Waste Management of Alaska, Inc., (Department of Administration, April 24, 2002), at 9-13; In re Service Oil, (Department of Administration, May 26, 1998), at 4 ("the Commissioner is not obligated to defer to the interpretation advanced by [the Division of General Services].").

The commissioner, through the administrative law judge, hears the evidence and determines the facts independently, since the record before the commissioner is not the same as the record before the division at the time of the initial administrative decision. By law, the exercise of discretion to waive the no-felony requirement is vested in the commissioner. AS 08.24.110(b); *see also* Stalnaker v. Williams, 960 P.2d 590, 595-597 (Alaska 1998) (administrative hearing is in the nature of a trial, not an appellate proceeding). While the courts will review the final agency action for abuse of discretion, it is the commissioner's decision, not the division's, that embodies the final agency action. *See* AS 44.64.060(e).

[27] *Cf.* 2 AAC 07.091(b)(1), (3), (4), (5), (6).

[28] *Cf.* 2 AAC 07.091(b)(7).

[29] *Cf.* AS 08.01.075(f).

[30] *Cf.* 2 AAC 07.091(b)(2).

[31] Post Hearing Brief at 2.

[32] The division notes that although the courts decline to consider a conviction older than ten years for purposes of presumptive sentencing, there is no equivalent time limit on consideration of prior convictions for purposes of AS 08.24. Post Hearing Brief at 3. This observation does not diminish the fact that the length of time since a prior conviction is an appropriate consideration in considering good cause. *Cf*. AAC 10.915(7) (license for employment agency may be issued if no conviction of a crime involving moral turpitude within the previous 10 years); 12 AAC 04.990(12) (license as accountant may be issued if no incident of a dishonest or felonious act within the previous 5 years).

[33] Post Hearing Brief at 3.

middle age at the time, however, and his conduct cannot be characterized as a youthful indiscretion or misjudgment.[34]

While Mr. Ferrell's offense was serious, it was not aggravated and it was not relatively serious in comparison to other felonies or other forms of misconduct involving controlled substances. Furthermore, the offense did not involve financial or commercial wrongdoing or any sort of fraud or misuse of position: nothing in the nature of the offense relates directly to the conduct of a collection agency or other business activities.[35] As previously noted, the division does not argue that the offense itself warrants denial of a license.[36]

(2) Applicant's Experience, Character, and Record

Mr. Ferrell has successfully operated a collection agency for more than fifteen years, expanding it from a local business into more than two dozen states. There is no evidence that his business has at any time operated in a manner inconsistent with law or with appropriate collection practices. As previously observed, Mr. Ferrell has established his good moral character, and he did not intentionally misrepresent his criminal history in the application process.

(3) Other Relevant Circumstances

Mr. Ferrell's testimony at the hearing was persuasive. He explained that it was his own understanding, based on the information he had when at the time of the disposition of the criminal case, that the Florida adjudication was not considered a conviction and did not have to be disclosed. In light of that understanding and the lack of any connection between a single instance of drug use some fifteen years ago and his obligations as a licensee, he had a reasonable belief that the existence of the Florida action did not need to be disclosed.

(4) Other Cases

---

[34] The division asserts that "a young age is generally considered necessary for a finding of 'good cause' to waive a requirement that an applicant should not have a conviction." Post Hearing Brief at 3. The division cites to no authority for that proposition. While it is true that status as youthful offender is generally considered a mitigating factor, the fact that an offender is not youthful is not in itself a reason to withhold waiver: all of the relevant circumstances must be considered, and the age at the time of the offense is only one among many relevant facts.

[35] The division argues that as a felony, Mr. Ferrell's criminal conduct is related to the operation of a collection agency. Post Hearing Brief at 2. While that is true, the issue here is whether the relationship is sufficiently attenuated from the actual business of running a collection agency to warrant application of the "good cause" wavier. From that perspective, the relationship between a 15-year-old drug possession conviction and the operation of a collection agency is, at best, tenuous.

[36] *See* note 22, *supra*.

There is no evidence that the commissioner has previously considered an application for a license as a collection agency operator from an individual with a felony conviction.

IV. Conclusion

The application should be granted on the grounds that (1) the Florida adjudication is not a "conviction" within the meaning of AS 08.24; (2) Mr. Ferrell is of good moral character; and (3) if the Florida adjudication is considered a conviction for purpose of AS 08.24, there is good cause to waive the no-felony requirement.

DATED June 26, 2007.

By: *Signed*
Andrew M. Hemenway
Administrative Law Judge

Adoption

This Order is issued under the authority of AS 08.24.045, AS 44.17.010 and AS 44.33.010. The undersigned, on behalf of the Commissioner of Commerce, Community and Economic Development and in accordance with AS 44.64.060, adopts this Decision and Order as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 30th day of July 2007.

By: *Signed*
Signature
Emil Notti
Name
Commissioner
Title

[This document has been modified to conform to the technical standards for publication.]