

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF INSURANCE,)
)
 Petitioner,)
)
 vs.) Case No. 99-4363
)
 DONNA M. JAQUITH,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on March 28, 2000, at Fort Lauderdale, Florida, before Claude B. Arrington, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Miguel Oxamendi, Esquire
Department of Insurance
Division of Legal Services
612 Larson Building
200 East Gaines Street
Tallahassee, Florida 32399-0333

For Respondent: Richard L. Rosenbaum, Esquire
Suite 1500
One East Broward Boulevard
Fort Lauderdale, Florida 33301

STATEMENT OF THE ISSUES

Whether Respondent committed the offenses alleged in the Amended Administrative Complaint and, if so, the penalties that should be imposed.

PRELIMINARY STATEMENT

On August 23, 1999, Petitioner filed an Amended Administrative Complaint against Respondent, a licensed limited surety agent (bail bondsman), alleging that an advertisement placed by Respondent in the telephone yellow pages was misleading or false and that it constituted a deceptive trade practice. Respondent timely challenged the allegations of the Amended Administrative Complaint, the matter was referred to the Division of Administrative Hearings, and this proceeding followed.

At the formal hearing, Petitioner presented the testimony of Sally Burt, Wayne Summerlin, and Wayne Spath. Petitioner presented four exhibits, each of which was admitted into evidence. Ms. Burt is employed by Petitioner. Mr. Summerlin and Mr. Spath are licensed bail bondsmen.

Respondent testified on her own behalf and presented the additional testimony of William Sheppard, Larry Reinfeld, Ted Moss, Russell Faibisch, Mark Hefferman, and Albert Guilder. Mr. Fabisch is a national general agent for American Banker's Insurance company. Mr. Guilder is a former customer of Respondent. The remaining witnesses are licensed bail bondsmen. Respondent offered five exhibits, four of which were accepted into evidence. Respondent's Exhibit 3 was presented as a proffer, but it was not accepted into evidence.

In addition to the foregoing, the parties entered into a prehearing stipulation, which stipulated to certain facts. Those facts have been incorporated as findings of fact to the extent they are relevant.

A Transcript of the proceedings was filed on April 18, 2000. The Petitioner and Respondent filed proposed recommended orders, which have been duly-considered by the undersigned in the preparation of this Recommended Order.

FINDINGS OF FACT

1. At all times pertinent to this proceeding, Respondent was licensed as a limited surety agent pursuant to Chapter 648, Florida Statutes.

2. At all times pertinent to this proceeding, Respondent was an agent of American Banker's Insurance Company with authority to write surety bonds and/or bail bonds.

3. At all times pertinent to this proceeding, Respondent was doing business as, or on behalf of, a bail bond business known as A Aachen Express Bail and/or A Aachen Bail Out, 521 South Andrews Avenue, Suite 2, Fort Lauderdale, Florida.

4. On January 13, 1999, Respondent entered into an agreement with BellSouth Advertising and Publishing Corporation that resulted in an advertisement for A Aachen Express Bail in the April 2000 Greater Fort Lauderdale BellSouth Yellow Pages.

5. The subject advertisement contained the following:
"GUARANTEED LOWEST RATES!" Underneath that statement, in smaller lettering, was the following: "ALLOWED BY LAW."¹

6. There is only one approved bail bond rate in the State of Florida. The only bail bond rate that has been approved by Petitioner is ten percent (10%) for state bonds and fifteen percent (15%) on Federal bonds, with a minimum premium of fifty dollars. Respondent, as well as all other bail bond agents in Florida may only charge a consumer those approved rates.

7. In addition to the foregoing bond rates, bail bond agents are authorized to impose against consumers certain incidental charges pursuant to Section 648.44(1)(i), Florida Statutes.²

8. It was Respondent's policy to charge ten percent (10%) for state bonds and fifteen percent (15%) on Federal bonds, with a minimum premium of fifty dollars. It was Respondent's policy not to impose any other charges against consumers, including the incidental charges authorized by Section 648.44(1)(i), Florida Statutes.

CONCLUSIONS OF LAW

9. The Division of Administrative Hearings has jurisdiction of the parties to and the subject of this proceeding. Section 120.57(1), Florida Statutes.

10. Because this is a penal proceeding, Petitioner has the burden of establishing the allegations against Respondent by clear and convincing evidence. See Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); and Department of Banking and Finance, Division of Securities and Investigator Protection v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996).

11. Section 648.44(6)(b), Florida Statutes, pertains to bail bondsmen and provides as follows:

(b) Any misleading or false advertisement or deceptive trade practice is prohibited as provided in part X of chapter 626.

12. Respondent has challenged this prohibition on constitutional grounds. That challenge is rejected because the undersigned is without jurisdiction to rule a statute unconstitutional. See Department of Business Regulation, Division of Alcoholic Beverages & Tobacco v. Ruff, 592 So. 2d 668 (Fla. 1992); and Palm Harbor Special Fire Control District v. Kelly, 516 So. 2d 249 (Fla. 1987).

13. Section 626.954, Florida Statutes, is included in Part X of Chapter 626. Section 626.954(1)(b), Florida Statutes, prohibits a licensee, such as Respondent, from knowingly publishing an advertisement with respect to the business of insurance which is untrue, deceptive, or misleading.

Section 626.9541(1)(e), Florida Statutes, prohibits a licensee from placing before the public a false statement.

14. The challenged statement in the advertisement is literally true, but it is also misleading and deceptive because it implies that bail bondsmen charge different rates. The clear inference is that you can get a lower rate from Respondent's company than you can from other bail bondsmen, which provides Respondent with an unfair advantage over its competitors.

15. Petitioner established by clear and convincing evidence that Respondent caused a deceptive and misleading advertisement to be published in violation of Section 626.954(1)(b), Florida Statutes. Petitioner did not establish by clear and convincing evidence that Respondent published a false statement in violation of Section 626.9541(1)(e), Florida Statutes.

16. The Amended Administrative Complaint also charged that Respondent demonstrated a lack of fitness or trustworthiness to engage in the bail bond business in violation of Section 648.45(2)(e), Florida Statutes; that Respondent committed a fraudulent or dishonest practice in the conduct of her business in violation of Section 648.45(2)(g), Florida Statutes; and that Respondent willfully failed to comply with, or willfully violated, a proper order or rules of the Petitioner in violation

of Section 648.45(2)(j), Florida Statutes. Petitioner failed to establish those violations.

17. In making the recommendation that follows, the undersigned has considered the fact that Respondent corrected her advertisement at her earliest opportunity. The undersigned has also considered that there was no evidence that any person was harmed by the deceptive and misleading advertisement.

18. Petitioner has cited no penalty guidelines pertinent to this proceeding.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Petitioner enter a final order that finds Respondent guilty of violating the provisions of Sections 648.44(6)(b) and 626.954(1)(b), Florida Statutes, and imposes against her an administrative fine in the amount of \$100. It is further recommended that the other violations alleged in the Amended Administrative Complaint be dismissed.

DONE AND ENTERED this 23rd day of May, 2000, in
Tallahassee, Leon County, Florida.

CLAUDE B. ARRINGTON
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 23rd day of May, 2000.

ENDNOTES

^{1/} After Respondent became aware of the subject complaint, she changed her advertisement by removing the language at issue in this proceeding.

^{2/} Section 648.44(1)(i), Florida Statutes, prohibits a bail bondsman from accepting ". . . anything of value from a principal for providing a bail bond except the premium and transfer fee authorized by the department, except that the bail bond agent may accept collateral security or other indemnity from the principal or another person in accordance with the provisions of s. 648.442, together with documentary stamp taxes, if applicable."

COPIES FURNISHED:

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Honorable Bill Nelson
State Treasurer and Insurance Commissioner
Department of Insurance
The Capitol, Plaza Level II
Tallahassee, Florida 32399-0300

Daniel Y. Sumner, General Counsel
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The Capitol, Lower Level 26
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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.

¹ After Respondent became aware of the subject complaint, she changed her advertisement by removing the language at issue in this proceeding.

² Section 644.44(1)(i), Florida Statutes, prohibits a bail bondsman from accepting "... anything of value from a principal for providing a bail bond except the premium and transfer fee authorized by the department, except that the bail bond agent may accept collateral security or other indemnity from the principal or another person in accordance with the provisions of s. 648.442, together with documentary stamp taxes, if applicable. ..."