

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF INSURANCE,)
)
 Petitioner,)
)
vs.) Case No. 01-4541PL
)
MICHAEL SCOTT KELLY,)
)
 Respondent.)

)

RECOMMENDED ORDER

Upon due notice, William R. Cave, an Administrative Law Judge for the Division of Administrative Hearings, held a formal hearing in this matter on February 20-21, 2002, in Daytona Beach, Florida.

APPEARANCES

For Petitioner: Dickson E. Kesler, Esquire
 Department of Insurance
 Division of Legal Services
 200 East Gaines Street
 612 Larson Building
 Tallahassee, Florida 32399-0333

For Respondent: Steven G. Casanova, Esquire
 100 Rialto Place, Suite 510
 Melbourne, Florida 32935

STATEMENT OF THE ISSUES

Should Respondent's license as a bail bond agent in the State of Florida be disciplined for the alleged violation of certain provisions of Chapter 648, Florida Statutes, as set

forth in the Administrative Complaint and, if so, what penalty should be imposed?

PRELIMINARY STATEMENT

By an Administrative Complaint dated September 7, 2001, and filed with the Division of Administrative Hearings (Division) on November 27, 2001, the Department of Insurance (Department) is seeking to revoke, suspend, or otherwise discipline Respondent's license as a bail bond agent in the State of Florida.

As grounds therefor, the Department alleges in the Administrative Complaint that Respondent violated Subsections 648.442(1) and (3); and 648.45(2)(d),(e),(g),(h),(j), and (n), and (3)(a),(c),(d), and (e), Florida Statutes. By an Election of Rights dated September 13, 2001, Respondent disputed the charges and requested an administrative hearing. By letter dated November 21, 2001, the Department referred this matter to the Division for the assignment of an Administrative Law Judge and for the conduct of an administrative hearing.

At the hearing, the Department presented the testimony of Johnny Lamb, Linda Jones, William Travis, Jeanette Halstead, and Charles A. Parish. The Department's Exhibits 1 and 2, and Composite Exhibit 3(3A-3H) were admitted in evidence. Respondent testified in his own behalf and presented the testimony of Linda Jones, Randall Ecker, Therese Ecker, Mary Ann

Hinckle, and Selena Kelly. Respondent's Exhibits 1-4 were admitted in evidence.

The second volume of a two-volume Transcript of this proceeding was filed with the Division on March 7, 2002, with the first volume being filed on March 13, 2002. The parties timely filed their Proposed Recommended Orders.

FINDINGS OF FACT

Upon consideration of the oral and documentary evidence adduced at the hearing, the following relevant findings of fact are made:

1. The Department is the agency of the State of Florida vested with the statutory authority to administer the disciplinary provisions of Chapter 648, Florida Statutes.

2. Respondent, at all times relevant to this proceeding, was licensed as a bail bond agent in the State of Florida and subject to the provisions of Chapter 648, Florida Statutes.

3. Respondent, at all times relevant to this proceeding, was employed by Alliance Bail Bonds (Alliance), which was owned by Linda Jones. There was a verbal employment agreement between Alliance and Respondent, which provided for, among other things, Respondent's salary. However, the verbal employment agreement did not require that Respondent write bail bonds exclusively for Alliance.

4. At all times relevant to this proceeding, Alliance's office was located in Respondent's home in Titusville, Brevard County, Florida, which had a separate entrance and separate telephone for Alliance. Alliance's files, both active and inactive, were also housed in this office.

5. On March 30, 2000, a person identifying himself as Johnny Lamb contacted Respondent by telephone concerning a bail bond for an individual known as Bernard J. Dougherty who was being held in the Brevard County, Florida, jail. The bond amount was \$8,500.00. Since Dougherty was not a resident of the State of Florida, Respondent wanted Lamb to put up the full amount of the bond as collateral. However, Lamb advised Respondent that he did not have enough cash to put up the full amount of the bond. Therefore, Respondent and Lamb eventually agreed on \$7,000.00 cash as collateral. Additionally, Respondent advised Lamb that the premium for writing the bail bond would be \$850.00 (10 percent of the bond amount).

6. Later that same day, Lamb came to Respondent's office to complete the paperwork and put up the necessary funds for the collateral and bond premium. Lamb paid Respondent the collateral and bond premium in cash (U.S. currency, 20's, 50's, and 100's).

7. Respondent prepared a Collateral Receipt and Informational Notice (Collateral Receipt), which was signed by

Lamb. The Collateral Receipt indicated that Lamb had deposited the \$7,000.00 collateral with Respondent and had executed an Indemnity Agreement and Promissory Note. Lamb also executed a Bail Application. Respondent gave Lamb the white copy of the Collateral Receipt for his records. The goldenrod copy of the Collateral Receipt was also given to Lamb to be delivered to Dougherty at the jail. The yellow copy and pink copy of the Collateral Receipt were retained by Respondent for Alliance's record.

8. Lamb also paid Respondent \$850.00 in cash (U.S. Currency) for the bail bond premium for which Respondent gave Lamb a receipt (number 20454) indicating that Lamb had paid the bail bond premium in the amount of \$850.00.

9. After completing the bond transaction with Lamb, Respondent prepared a file in Dougherty's name, which included the copies of the Collateral Receipt, Promissory Note, Indemnity Agreement, Bail Application, and a copy of the receipt for the bail bond premium.

10. After preparing the file, Respondent prepared two Powers of Attorney (Powers), one in the amount of \$5,000.00 and one in the amount of \$3,500.00, and proceeded to the Brevard County jail to interview Dougherty.

11. Upon arriving at the Brevard County jail, Respondent was advised that in addition to the Brevard County charges,

there was an outstanding warrant for Dougherty from Volusia County and a hold for a parole violation in the State of Pennsylvania.

12. Lamb was not present at the Brevard County jail at this time. Therefore, Respondent advised Dougherty of the Volusia County warrant and the hold from Pennsylvania. Respondent further advised Dougherty that although he could post bond for the Brevard County charges, Dougherty would not be released because of the Volusia County warrant and the hold for parole violation in Pennsylvania.

13. Dougherty advised Respondent that he did not want to post bond. Whereupon, Respondent attempted to contact Lamb using the telephone numbers furnished Respondent by Lamb but was unsuccessful in locating Lamb.

14. On March 31, 2000, Respondent called the Brevard County jail and had Lamb paged. Upon being advised that Lamb was present in the Brevard County jail, Respondent asked that they instruct Lamb to call Respondent at his office. Lamb called Respondent at his office and was advised of the situation concerning Dougherty. Respondent also advised Lamb that he was on his way to the jail and would bring Lamb's money with him.

15. Upon arriving at the Brevard County jail, Respondent explained the circumstances regarding the posting of bail for Dougherty and proceeded to return Lamb's money. Lamb did not

have the copies of the Collateral Receipt with him that had been given to Lamb on March 30, 2000. Therefore, Respondent took his copy of the Collateral Receipt and documented the return of the \$7,000.00 collateral and the \$850.00 premium fee. Lamb signed the documentation on the Collateral Receipt showing the return of the \$7,000.00 collateral and the \$850.00 premium fee.

16. Respondent then placed all of the documents, including the Collateral Receipt with the documentation showing the return of the \$7,000.00 collateral and the \$850.00 bond premium, in Dougherty's file with Dougherty's name highlighted in blue for filing. Afterwards, Respondent voided the Powers by writing "Void" across the front of the Powers and had them sent to Linda Jones by UPS. Subsequently, the Powers were forwarded by Linda Jones to Charles A. Parish, Agent for Continental Heritage Insurance Co., on whom the Powers were written.

17. On March 31, 2000, Respondent returned the \$7,000.00 collateral plus the \$850.00 bond premium fee to Lamb, notwithstanding the testimony of Lamb to the contrary, which lacks credibility.

18. Respondent did not at any time present any of the paperwork for posting Dougherty's bond, including the Powers, to the Brevard County jail personnel.

19. Since Alliance's Brevard County files were being kept at Respondent's office in Titusville, Florida, Respondent did

not forward Dougherty's file to Linda Jones. However, as a caution, Respondent advised Linda Jones by telephone of what had occurred in regards to Dougherty, notwithstanding Linda Jones' testimony to the contrary, which lacks credibility.

20. Sometime in January 2001, Linda Jones came into Respondent's office in Titusville, Florida, and removed all of Alliance's Brevard County files, both active and inactive, that were in the possession of Respondent. The Alliance files removed by Linda Jones included Dougherty's inactive file with the documentation concerning the return of the \$7,000.00 collateral and the \$850.00 bail bond premium, notwithstanding Linda Jones' testimony to the contrary, which lacks credibility.

21. By letter dated May 10, 2001, after talking to William Travis and Linda Jones, Lamb filed a complaint with the Department alleging that Respondent had failed to return the \$7,000.00 collateral and this proceeding ensued.

CONCLUSIONS OF LAW

22. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to Subsections 120.57(1), Florida Statutes.

23. Subsections 648.442(1) and (3), Florida Statutes, provide in pertinent part as follows:

- (1) Collateral security or other indemnity accepted by a bail bond agent, except a promissory note or an indemnity

agreement, shall be returned upon final termination of liability on the bond. . . .

* * *

(3) Such collateral security shall be received and held in the insurer's name by the bail bond agent in a fiduciary capacity and, prior to any forfeiture of bail, shall be kept separate and apart from any other funds or assets of such bail bond agent. When collateral security in excess of \$5,000.00 cash or its equivalent is received by a bail bond agent, the entire amount shall be immediately forwarded to the insurer or managing general agent. . . .

24. Subsections 648.45(2)(d),(e),(g),(h),(j), and (n), and (3)(a),(c),(d), and (e), Florida Statutes, provide in pertinent part as follows:

(2) The department shall deny, suspend, revoke, or refuse to renew any license or appointment issued under this chapter or the insurance code, and it shall suspend or revoke the eligibility of any person to hold a license or appointment under this chapter or the insurance code, for any violation of the laws of this state relating to bail or any violation of the insurance code or for any of the following causes:

* * *

(d) Willful use, or intended use, of the license or appointment to circumvent any of the requirements or prohibitions of this chapter or the insurance code.

(e) Demonstrated lack of fitness or trustworthiness to engage in the bail bond business.

* * *

(g) Fraudulent or dishonest practices in the conduct of business under the license or appointment.

(h) Misappropriation, conversion, or unlawful withholding of moneys belonging to a surety, a principal, or others and received in the conduct of business under a license.

* * *

(j) Willful failure to comply with or willful violation of any proper order or rule of the department or willful violation of any provision of this chapter or insurance code.

* * *

(n) Failure to return collateral.
(Emphasis Furnished.)

* * *

(3) The department may deny, suspend, revoke, or refuse to renew any license or appointment issued under this chapter or the insurance code, or it may suspend or revoke the eligibility of any person to hold a license or appointment under this chapter or the insurance code, for any violation of the laws of this state for any of the following causes:

(a) A cause for which issuance of the license or appointment could have been refused had it then existed and been known to the department.

* * *

(c) Violation of any law relating to the business of bail bond insurance or violation of any provision of the insurance code.

(d) Failure or refusal, upon demand, to pay over to any insurer the bail bond agent represents or has represented any money coming into his or her hands which money belongs to the insurer.

(e) Being found to be a source of injury or loss to the public or detrimental to the

public interest or being found by the department to be no longer carrying on the bail bond business in good faith. (Emphasis furnished.)

25. The burden of proof is on the party asserting the affirmative of an issue before an administrative tribunal, Florida Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981). To meet this burden, the Department must establish facts upon which its allegations are based by clear and convincing evidence. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996) and Subsection 120.57(1)(j), Florida Statutes.

26. The Department has failed to show by clear and convincing evidence that Respondent, Michael Scott Kelly, failed to return the \$7,000.00 collateral and the \$850.00 bail bond premium to Johnny Lamb as alleged in the Administrative Complaint. Thus the Department has failed to establish that Respondent violated Subsections 648.442(1) and (3); and 648.45 (2)(d),(e),(g),(h),(j), and (n), and (3)(a),(c),(d), and (e), Florida Statutes.

RECOMMENDATION

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

RECOMMENDED that the Department enter a final order finding Respondent, Michael Scott Kelly, not guilty of violating Subsections 648.442(1) and (3); and 648.45(2)(d),(e),(g),(h), (j), and (n), and (3)(a),(c),(d), and (e), Florida Statutes, and dismissing the Administrative Complaint filed against Michael Scott Kelly.

DONE AND ENTERED this 23rd day of April, 2002, in Tallahassee, Leon County, Florida.

WILLIAM R. CAVE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 23rd day of April, 2002.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit 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.