

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SARA KACZMEREK SCHUBERT,)
)
 Petitioner,)
)
vs.) Case No. 03-2359
)
DEPARTMENT OF FINANCIAL)
SERVICES,)
)
 Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case before Larry J. Sartin, an Administrative Law Judge of the Division of Administrative Hearings, on November 17, 2003, in Fort Lauderdale, Florida.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner, Sara Kaczmerek Schubert, should be licensed as a limited surety (bail bond) agent pursuant to Chapter 648, Florida Statutes.

PRELIMINARY STATEMENT

In October 2002 Petitioner filed an application with Respondent, the Department of Financial Services, seeking licensure as a limited surety (bail bond) agent.¹ By letter dated April 18, 2003, Respondent informed Petitioner that her application was denied.

On or about April 23, 2003, Petitioner executed an Election of Proceeding Form disputing the facts alleged by Respondent in support of its preliminary decision to deny her application and requesting a formal administrative hearing. By letter dated June 24, 2003, Respondent filed Petitioner's request for hearing with the Division of Administrative Hearings. The request for hearing was designated case number 03-2359 and was assigned to the undersigned.

On July 14, 2003, Respondent filed a Motion for Leave to Amend Denial Letter. Respondent sought leave to amend its April 18, 2003, denial letter by adding two statutory references in support of its decision. It was represented in the Motion that Petitioner did not object to the Motion. By Order entered July 17, 2003, the Motion was granted.

At the final hearing of this matter, Petitioner testified on her own behalf and presented the testimony of James A. Moore. Three exhibits, Petitioner's Exhibits numbered 1 through 3, were offered and admitted. Respondent presented the testimony of Hazel Muhammad, Glenda Ostreich, Patricia Anthony, Ronald S. Blum, and Petitioner. Twenty-four exhibits, Respondent's Exhibits number 1 through 24, were offered and admitted. Portions of the deposition testimony of Petitioner, offered by Respondent, were also accepted.

At the commencement of the final hearing, the parties filed a Pre-Hearing Fact Stipulation, containing facts which the parties had agreed upon. Those stipulated facts have been incorporated into this Recommended Order.

On December 5, 2003, the Transcript of the final hearing, consisting of two volumes, was filed with the Division of Administrative Hearings. Proposed recommended orders were, therefore, to be filed on or before December 15, 2003. An extension of time until December 22, 2003, was requested by Respondent on behalf of the parties. The extension was granted. Both parties filed proposed recommended orders on December 22, 2003. Those post-hearing submittals have been fully considered.

FINDINGS OF FACT

A. The Parties.

1. Respondent, the Department of Financial Services (hereinafter referred to as the "Department"), is the state agency responsible for, among other things, licensing of temporary bail bond agents and bail bond agents in the State of Florida. Chap. 648, Fla. Stat. In particular, the Department's Division of Agent and Agency Services, Bureau of Licensing, has been designated within the Department to review applications and make decisions thereon.

2. Petitioner, Sara Kaczmarek Schubert, is an individual residing in Florida who is seeking licensure as a bail bond agent.

B. Ms. Schubert's Temporary Bail Bond Agent License and Her Application for Licensure.

3. Section 648.355, Florida Statutes, authorizes the Department to issue a temporary license to an individual as a bail bond agent under certain conditions. Those conditions include the requirements, among others, that the applicant complete basic certification courses within four years prior to the date an application is filed and that the applicant "be employed full time at the time of licensure, and at all times throughout the existence of the temporary license, by only one licensed and appointed supervising bail bond agent, who

supervises the work of the applicant and is responsible for the licensee's conduct in the bail bond business. . . ."

§ 648.355(1)(d) and (e), Fla. Stat.

4. On August 24, 2001, Ms. Schubert was issued a certificate by Florida Bail Bond School, Inc., for successfully completing courses in criminal justice for bail bond agents required as a prerequisite to applying for a temporary bail bond agent license.² (Stipulated fact).

5. On October 30, 2001, Ms. Schubert was issued a certificate by the University of Florida, Division of Continuing Education, certifying her completion of the requirements of "INS 3 - Bail Bond Agent Qual Crse - Self Study."³ (Stipulated fact).

6. On or about December 12, 2001, the Department received an application from Ms. Schubert seeking licensure as a temporary bail bond agent (hereinafter referred to as a "temporary license") pursuant to Section 648.355, Florida Statutes. Ms. Schubert designated Jenny Garcia, Florida License number A03131, Manager of Estrella Bail Bonds, on the application as her supervising bail bond agent. (Stipulated fact).

7. After review of Ms. Schubert's application, the Department concluded that she met the requirements of Section 648.355, Florida Statutes, and on or about April 22, 2002,

issued her a temporary license, license number E023179.

(Stipulated fact).

8. Ms. Schubert was employed by Estrella Bail Bonds and was under the supervision of Ms. Garcia upon the issuance of her temporary license. Between July 2002 and December 2002, Ms. Schubert completed her temporary license internship hours of employment with Estrella Bail Bonds. (Stipulated fact).

9. In October 2002, in anticipation of completing her internship, Ms. Schubert filed an application for the bail bond agent license at issue in this proceeding.

10. By letter dated April 18, 2003, the Department denied Ms. Schubert's license application based upon the following alleged facts:

You, Sara K. Schubert, have acted in the capacity of, and held yourself out as bail bond agent without being properly licensed and appointed, in violation of the Florida Insurance Code. You have established a place of business, designated by you as "A Bunny Bail Bonds Agency," which is not under the active full-time charge of a licensed and appointed bail bond agent; you have provided, or had provided on your behalf, internet advertising and business cards which identify you as the agent/owner of "A Bunny Bail Bonds Agency" and advertise the services of that agency; you have entered into a lease agreement for office space for "A Bunny Bail Bonds Agency," representing yourself as the President of that agency; you have provided for the advertising of the services of "A Bunny Bail Bonds Agency" at the leased location; you have acquired and maintained telephone services for "A Bunny

Bail Bonds Agency," and have advertised the availability of the bond agency's services through the availability of that telephone service. You are operating a bail bond agency separate from your supervising agent's business address.

C. Ms. Schubert's Business Planning and General Activities.

11. As early as the beginning of 2001, Ms. Schubert decided that she wanted to become licensed as a bail bond agent and began planning accordingly.

12. In addition to taking the steps required by the Department to obtain licensure as a bail bond agency, including obtaining a temporary license, Ms. Schubert began taking certain actions to ensure that she could begin to operate her bail bond agency immediately upon being licensed as a bail bond agent.

13. The steps which Ms. Schubert took to prepare her business included the naming of her business, the creation of a corporate entity, logo, and business slogan, obtaining local and toll-free telephone numbers for the business, having a business plan prepared, having an internet web-page readied, executing a lease for office space, arranging for a yellow-pages advertisement, and obtaining advertising materials, including business cards, key chains, pens, and stickers. In addition to planning for her future business, Ms. Schubert also actually advertised her future business.

14. The evidence failed to prove that Ms. Schubert or anyone on her behalf was actually "appointed by an insurer by power of attorney to execute or countersign bail bonds in connection with judicial proceedings who receives or is promised money or other things of value therefor" or that that she "pledge[d] United States currency, United States postal money orders, or cashier's checks as security for a bail bond in connection with a judicial proceeding and receive[d] or [was] promised therefor money or other things of value."

15. The evidence also failed to prove that Ms. Schubert, based upon the facts alleged by the Department in support of its denial of her license application, is incompetent, untrustworthy, unfit as to character and background or lacking in one or more of the required qualifications for license or appointment, or has demonstrated a course of conduct or practice which indicate that she is incompetent, negligent, or dishonest.

16. The following is a summary of the timing of the events pertinent to this matter, each of which is discussed in further detail, infra.:

2001

- a. April: Future business is named.
A Bunny Bail Bonds, Inc. formed.
- b. Aug. to Oct.: Courses required for temporary license taken.
- c. December: Application for temporary license filed.

2002

- a. March: 1 year lease for office space executed.
- b. April: Temporary bail bond agent license issued.
- c. Spring: Business cards, stickers, pens, and other advertisements purchased.
Internet web page created.
Sign placed on door of office, mail box, and office-building information board.
- d. July to Dec.: Internship for Estrella Bail Bonds.
- e. October: Ms. Schubert filed application for licensure.
- f. November: Telephone service contract entered into. Department investigation begun.

2003

- a. February: Telephone approval to arrange for yellow-pages advertisement obtained from Department.
- b. April: Business plan prepared.
Department denied license application.
- c. May: Department's investigation closed with letter of guidance.
- D. Naming and Incorporating the Future Business.

17. In April 2001, at least eight months prior to filing her application for temporary license with the Department, Ms. Schubert decided that she would call her bail bond agency "A Bunny Bail Bonds."

18. Toward that end, on April 16, 2001, Ms. Schubert filed documents with the Department of State creating a corporate entity named "A Bunny Bail Bonds Agency, Inc."

19. The Articles of Incorporation for the corporation, which were signed by Ms. Schubert on or about April 10, 2001, designated Ms. Schubert as the president of, and the registered agent for, the corporation. The Articles of Incorporation do not describe the nature of the business to be conducted by the corporation.

E. Telephone Services for A Bunny Bail Bonds.

20. At roughly the same time that Ms. Schubert decided on the name of her business in April 2001, Ms. Schubert contacted AT&T to inquire about obtaining a toll-free number for A Bunny Bail Bonds. Ms. Schubert selected and reserved "866 The-Buny" (843-2869) as the toll-free number for A Bunny Bail Bonds. The evidence failed to prove, however, that any calls were actually made to this number. The evidence also failed to prove whose name the toll-free service was contracted under.

21. Effective November 1, 2002, just over six months after receiving her temporary license and two months before she completed her required internship with Estrella Bail Bonds, Ms. Schubert opened an account for telephone services for A Bunny Bail Bonds. The account was opened with BellSouth

Telecommunications, the local telephone provider for Fort Lauderdale.

22. Ms. Schubert contracted for basic service for three separate phone lines at a monthly charge of \$27.75: telephone numbers (954) 462-1600; 462-5800; and 469-1300. Ms. Schubert also selected three optional services for A Bunny Bail Bonds: the "Complete Choice for Business Messaging Package," the "Complete Choice for Business Maintenance 3 Line Package," and the "Complete Choice for Business 3 Line Package."⁴

23. Ms. Schubert committed to pay \$164.00 a month for the optional services she agreed to.⁵

F. Office Space Rental.

24. On or about March 13, 2002, almost a month before Ms. Schubert was issued her temporary license, Ms. Schubert entered into a one-year lease agreement for a 350 square-foot office (hereinafter referred to as the "Office"), identified as "suite 3" and located at 521 South Andrews Avenue, Fort Lauderdale, Broward County, Florida. (Stipulated fact).

25. The Office is conveniently located across the street from the Broward County courthouse.

26. The lease agreement identifies "A Bunny Bail Bonds Agency, Inc., Sara Schubert, President" as the Lessee of the Office and was entered into by Ms. Schubert as "President" of A Bunny Bail Bonds Agency, Inc. (Stipulated fact).

27. The one-year lease period commenced April 1, 2002, the month Ms. Schubert received her temporary license. She made a security deposit in the amount of \$873.50 and has paid a monthly rental fee of \$463.75 for the Office. (Stipulated fact).

28. The evidence failed to prove that the Office was actually used to carry out any bail bond business.⁶

29. The mailbox for the Office was located with other mailboxes for the building at a central location. To ensure that she received mail addressed to the Office, Ms. Schubert placed a small yellow-sticky on the box which had "#3, S. Schubert, A Bunny Bail Bonds" hand-written on it.

G. Web-Page for A Bunny Bail Bonds.

30. Ms. Schubert arranged to have an internet web page created for A Bunny Bond Bonds. The web page identifies Ms. Schubert as "Agent/Owner" of A Bunny Bail Bonds, identifies the business address as 521 South Andrew Street, Suite 3, Fort Lauderdale, Florida 33001 (the address for the Office), and lists three telephone numbers: the toll-free telephone number she had reserved with AT&T; (305) 606-9662 a Dade County telephone number; and (954) 439-2211, a Broward County telephone number. The Broward County telephone number is listed as Ms. Schubert's home telephone number on Respondent's Exhibits 13 through 15.

31. The web page represents that A Bunny Bail Bonds accepts all major credit cards.

32. The A Bunny Bail Bonds web page was accessible in December 2002 and it is inferred, because of the telephone numbers listed on the web page, that the web page was developed after March 2002 (when the lease was entered into) and before November 2002 (when local telephone services were contracted for).

33. The web page was not registered with any internet search engine and, therefore, could only be accessed if the web address was known. The web-address was, however, included on the business cards Ms. Schubert purchased. The evidence failed to prove whether anyone other than someone at the Department ever accessed the web page.

H. Yellow-Page Advertisement.

34. Ms. Schubert had applied for licensure in October 2002 and, therefore, she began planning to place an advertisement in the newest addition of the telephone book yellow pages for 2003, when she anticipated that she would be able to open her business.

35. Because of concern over whether she would receive her license before the deadline for taking out a yellow-pages advertisement expired, she arranged for James Moore, a friend and licensed bail bond agent, to contact the Department about

going forward with the advertisement in anticipation of the approval of her license. (Stipulated fact). Despite the fact that Ms. Schubert had not received her license and had in fact been the subject of an investigation by the Department, the Department, through its agents, approved the placement of the yellow pages advertisement by Ms. Schubert.

36. In reliance upon the Department's approval, Ms. Schubert paid \$28,000.00 for a half-page yellow-pages advertisement for A Bunny Bail Bonds. The advertisement included the corporate name, a picture of Ms. Schubert with her name and "C.E.O." under it, the web page address, the toll-free telephone number, telephone number (954) 462-1600, the address of the Office, and the logos for several credit cards.

J. Business Cards, Stickers, Pens, and Key Chains.

37. In anticipation of becoming licensed as a bail bond agent, Ms. Schubert purchased business cards, stickers, ink pens, and key chains to be used in advertising A Bunny Bail Bond.

38. The business cards, which were purple, included the name of the corporation, a logo which consists of a rabbit with a key in its paw standing behind a rabbit dressed in striped-prison garb (hereinafter referred to as the "Logo"), Ms. Schubert's name as "Agent/Owner," a business slogan, "We'll get your tail out of jail" (hereinafter referred to as the

"Slogan"), the address of the Office, the toll-free telephone number listed as the "Office" number, telephone number (954) 439-2211, Ms. Shubert's home telephone number, as a "Mobile" number, and the internet web page address.⁷

39. The stickers included the name of the corporation, the Logo, and two telephone numbers: the toll-free number and (954) 439-2211, Ms. Schubert's home telephone number.⁸

40. The pens purchased by Ms. Schubert include the name of the corporation, the Logo, and two telephone numbers: the toll-free number and (954) 439-2211, Ms. Schubert's home telephone number.⁹

41. The business cards described in Finding of Fact 38, the stickers, and the pens were purchased sometime after Ms. Schubert leased the Office in March 2002 and before she contracted for local telephone services for the office in November 2002.

42. A later version of business cards was purchased by Ms. Schubert in late 2002 or early 2003.¹⁰ The later version of the business card changed the telephone numbers listed on the card to (954) 462-1600 as the "Office" number, 1-866-The-Buny as a "Toll Free" number, and (305) 366-5532 as a "Pager" number. These cards were purchased after November 2002 when Ms. Schubert contracted for local telephone services.

43. Ms. Schubert also purchased key chains which include the name of the name of the corporation, the logo, the toll-free number, and telephone number (954) 462-1600.¹¹ The key chains were, therefore, purchased after November 2002 when Ms. Schubert contracted for local telephone services.

K. Good Business Planning vs. Public Harm.

44. Most of Ms. Schubert's actions described in this Recommended Order constituted good business planning. Those activities, to the extent there was no public disclosure, also were of little if any potential harm to the public: creating a corporation, selecting the name of a future business, contracting for the office and telephone services, creating a web page not generally accessible to the public, obtaining a business plan, and purchasing advertising materials (business cards, key chains, pens, and stickers). The number of individuals involved with those transactions and who, therefore, were aware of Ms. Schubert's activities, were too insignificant to constitute any potential harm to the public.

45. Ms. Schubert, however, went beyond good business planning when she began to disclose the existence of her company to the public before she obtained her license:

a. In November 2002, if not earlier, a piece of wood shaped like a rabbit and one of the stickers purchased by Ms. Schubert were placed on the door of the Office, which was

located in a building where person seeking the services of bail bond agencies often visited¹²;

b. Ms. Schubert replaced the rabbit on her door with a crow. She placed several of her business cards on top of the crow. The cards were, therefore, available to anyone who passed by the Office¹³;

c. Ms. Schubert had a sign on the door of her automobile with A Bunny Bail Bonds written on it;

d. Ms. Schubert placed a number of her cards, pens, and key chains on the door of a bail bond agency located in the same building the Office was located in. The bail bond agency was Dolphin Bail Bonds, which was owned by Ronald Blum¹⁴; and

e. Ms. Schubert sent a Christmas present to her former employer in an envelope with "Bunny Bail" and the address of the Office as the return address.

L. The Department's Investigation of Ms. Schubert.

46. During the fall of 2002, the Department received a complaint from Mr. Blum of Dolphin Bail Bonds, suggesting that Ms. Schubert was operating A Bunny Bail Bonds.

47. On or about November 25, 2002, as a result of Mr. Blum's complaint, Patricia Anthony, an investigator for the Department, sent a letter to Ms. Schubert informing her of the investigation. (Stipulated fact).

48. On December 5, 2002, Ms. Schubert met with Ms. Anthony to discuss the matter. (Stipulated fact). Ms. Schubert executed an affidavit at Ms. Anthony's request, concerning her use of the Office. (Stipulated fact).

49. At no time after the investigation was commenced until the investigation was completed, sometime in 2003, was the office found to be open despite the fact that Ms. Anthony visited the office several times. (Stipulated fact).

50. The Department's investigation of Ms. Schubert was concluded with the issuance of a letter of guidance on or about May 29, 2003. (Stipulated Fact).

CONCLUSIONS OF LAW

A. Jurisdiction.

51. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2003).

B. The Burden and Standard of Proof.

52. The burden of proof, absent a statutory directive to the contrary, is on the party asserting the affirmative of the issue of the proceeding. Antel v. Department of Professional Regulation, 522 So. 2d 1056 (Fla. 5th DCA 1988); Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st

DCA 1981); and Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 249 (Fla. 1st DCA 1977).

53. In this matter, Ms. Schubert has sought licensure as a bail bonds agent and, therefore, has the ultimate burden of persuasion to prove her entitlement thereto. Department of Banking and Finance v. Osburne Stern and Co., et. al., 670 So. 2d 932 (Fla. 1996). See also Pershing Industries, Inc. v. Department of Banking and Finance, 591 So. 2d 991 (Fla. 1st DCA 1991). The Department's denial of Ms. Schubert's license, however, is based upon alleged statutory violations which the Department has asserted cause Ms. Schubert to be ineligible for licensure. The Department, therefore, has the burden of establishing by competent, substantial evidence that the violations occurred. Osburne Stern at 934.

54. Once the Department establishes that the violations occurred, Ms. Schubert must overcome the Department's proof and establish entitlement to licensure: "[W]hile the burden of producing evidence may shift between the parties in an application dispute proceeding, the burden of persuasion remains upon the applicant to prove her entitlement to the license." Id.

55. The standard of proof, on both Ms. Schubert and the Department, is by the preponderance of the evidence. Id. at 934.

56. The grounds proven in support of the Department's denial of Ms. Schubert's license application are limited to those specifically alleged in the Department's denial letter.¹⁵ See, e.g., Cottrill v. Department of Insurance, 685 So. 2d 1371 (Fla. 1st DCA 1996); Kinney v. Department of State, 501 So. 2d 129 (Fla. 5th DCA 1987); and Hunter v. Department of Professional Regulation, 458 So. 2d 842 (Fla. 2nd DCA 1984).

C. General Requirements for Licensure.

57. Section 648.27, Florida Statutes, generally governs the licensure of bail bond agents in the State of Florida:

(1) A license may not be issued except in compliance with this chapter, and may not be issued except to an individual. A firm, partnership, association, or corporation, as such, may not be licensed.

58. Section 648.34, Florida Statutes, establishes the more specific requirements for licensure as a bail bond agent. Generally, there is no dispute that Ms. Schubert is entitled to licensure as a bail bond agent pursuant to Section 648.34, Florida Statutes, except as otherwise described in the Department's denial letter.

D. The Department's Grounds for Denial.

59. Factually, the Department has suggested that the following acts constitute individual violations of Chapter 648, Florida Statutes, and that cumulatively, they conclusively show that Ms. Schubert held herself out as a bail bond agent:

a. The establishment of a place of business, designated by Ms. Schubert as "A Bunny Bail Bonds Agency," which was not under the active full-time charge of a licensed and appointed bail bond agent;

b. The provision of internet advertising which identify Ms. Schubert as the agent/owner of "A Bunny Bail Bonds Agency" and advertise the services of that agency;

c. The provision of business cards which identify Ms. Schubert as the agent/owner of "A Bunny Bail Bonds Agency" and advertise the services of that agency;

d. Entering into a lease agreement for office space for "A Bunny Bail Bonds Agency," with Ms. Schubert representing herself as the President of that agency;

e. Providing for the advertising of the services of "A Bunny Bail Bonds Agency" at the leased location;

f. Having acquired and maintained telephone services for "A Bunny Bail Bonds Agency"; and

g. Having advertised the availability of the bond agency's services through the availability of that telephone service.

60. Statutorily, the Department has cited a string of statutory provisions, quoting parts thereof, in support of its denial. The provisions cited by the Department include the following:

(a) Section 648.27(2) and (4), Florida Statutes, which provides general guidelines for the issuance of bail bond licenses;

(b) Section 648.34(2)(e), Florida Statutes, which establishes qualifications for licensure;

(c) Section 648.45(2)(a), (e), (g), (j) and (p), and (3)(c), Florida Statutes, which establishes the specific grounds for denial of a license; and

(d) Sections 648.285, 648.30, 648.421, and 648.44(4), (6)(b), and (7), Florida Statutes, which describe certain prohibited acts.

General Guidelines for the Issuance of Licenses; Section 648.27(2) and (4), Florida Statutes.

61. Section 648.27(2) and (4), Florida Statutes, provides the following:

(2) For the protection of the people of this state, the department may not issue . . . any license or appointment except in compliance with this chapter. The department may not issue . . . a license or appointment for any individual found to be untrustworthy or incompetent who has had his or her eligibility to hold a license or appointment revoked, or who has not established to the satisfaction of the department that he or she is qualified therefor in accordance with this chapter.

. . . .

(4) If upon the basis of the completed application for a license or appointment and such further inquiry or investigation the

department deems the applicant to be unfit as to character and background or lacking in one or more of the required qualifications for the license or appointment, the department shall disapprove the application.

. . . .

62. Given the evidence presented by the Department in this case and the specific facts alleged by the Department in support of its decision, it has not been shown that Ms. Schubert is "untrustworthy or incompetent" or that she is "unfit as to character and background or lacking in one or more of the required qualifications." What the evidence proved is that Ms. Schubert was too exuberant in her planning and that she prematurely advertised her future business of a few, isolated, occasions, not that she was unfit or untrustworthy.

Qualifications for Licensure; Section 648.34(2)(e), Florida Statutes.

63. Section 648.34(2)(e), Florida Statutes, provides the following pertinent qualifications for bail bond agents:

(2) To qualify as a bail bond agent, it must affirmatively appear at the time of application and throughout the period of licensure that the applicant has complied with the provisions of s. 648.355 and has obtained a temporary license pursuant to such section and:

. . . .

(e) The applicant is a person of high character and approved integrity and has not been convicted or pleaded guilty or no contest to a felony, a crime involving moral

turpitude, or a crime punishable by imprisonment of 1 year or more under the laws of any state, territory, or country, whether or not a judgment or conviction has been entered.

64. Again, the evidence in this case failed to prove that Ms. Schubert's actions constitute the failure to comply with Section 648.355, Florida Statutes, which sets out the requirements for a temporary license, or that she is not a person of high character and approved integrity. Ms. Schubert's actions constituted activities consistent with preparing to operate a bail bond business and were taken in open and plain view.

Specific Grounds for License Denial; Section 648.45(2)(a), (e), (g), (j), and (p), and (3)(c), Florida Statutes.

65. The actual authority for denial of an application for a bail bond agent license comes from Section 648.45, Florida Statutes. It is through this provision that the Department may exercise its discretion.

66. In this case, the Department has alleged that Ms. Schubert's actions come within the following grounds of Section 648.45, Florida Statutes, for denial of a license:

(2) The department shall deny . . . any license or appointment issued 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 if the person:

(a) Lacks one or more of the qualifications specified in this chapter for a license or appointment.

. . . .

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

. . . .

(j) Has willfully failed to comply with or willfully violated any proper order or rule of the department or willfully violated any provision of this chapter or the insurance code.

. . . .

(p) Has demonstrated a course of conduct or practices which indicate that the licensee is incompetent, negligent, or dishonest or that property or rights of clients cannot safely be entrusted to him or her.

(3) The department may deny . . . any license or appointment issued 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:

. . . .

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

. . . .

67. In its Proposed Recommended Order, the Department has simply concluded that all of the provisions quoted in paragraph 66 apply to Ms. Schubert. When these provisions, however, are

applied to Ms. Schubert's activities, as alleged in the amended denial letter, it is clear that most do not apply. In particular, the evidence failed to prove that Ms. Schubert violated any of the alleged provisions of Section 648.45(2), Florida Statutes, because the Department failed to prove that she: "Lacks one or more of the qualifications specified in this chapter for a license or appointment"; "Has demonstrated lack of fitness or trustworthiness to engage in the bail bond business"; "Has willfully failed to comply with or willfully violated any proper order or rule of the department or willfully violated any provision of this chapter or the insurance code"¹⁶; or "Has demonstrated a course of conduct or practices which indicates that the licensee is incompetent, negligent, or dishonest or that property or rights of clients cannot safely be entrusted to him or her."

68. The evidence did prove, however, that Ms. Schubert's conduct violated Section 648.45(3)(c), Florida Statutes, by violating several of the cited provisions of Chapter 648, Florida Statutes, discussed, infra.

Prohibited Acts: Sections 648.285, 648.30, 648.387(1), 648.421, and 648.44(4), (6)(b), and (7), Florida Statutes.

69. The specific "law[s] relating to the business of bail bond insurance" which the Department has alleged Ms. Schubert violated contrary to Section 648.45(3)(c), Florida Statutes, are

Sections 648.285, 648.30, 648.387, 648.421, and 648.44(4), (6)(b), and (7), Florida Statutes.

70. Section 648.285(1), Florida Statutes, prohibits any person from owning, controlling, or otherwise having a pecuniary interest in a bail bond agency unless the person is licensed and appointed. The evidence failed to prove that Ms. Schubert violated this provision.

71. A "bail bond agency" is defined in Section 648.25(1), Florida Statutes, as follows:

(1) "Bail bond agency" means:

(a) The building where a licensee maintains an office and where all records required by ss. 648.34 and 648.36 are maintained; or

(b) Any entity that:

1. Charges a fee or premium to release an accused defendant or detainee from jail, or

2. Engages in or employs others to engage in any activity that may be performed only by a licensed and appointed bail bond agent.

72. Because the evidence failed to prove that Ms. Schubert was actually carrying on the activities that bail bond agents carry on, it cannot be concluded that she owned or controlled a "bail bond agency." All that she owned or controlled was an office that she intended at some date in the future to operate as a bail bond agency, but that is not specifically prohibited by Chapter 648, Florida Statutes. Without actually conducting

bail bond business at the office, which the Department failed to prove Ms. Schubert did, the office was nothing more than office space.

73. Section 648.30(1), Florida Statutes, provides the following prohibition:

(1) A person may not act in the capacity of a bail bond agent . . . or perform any of the functions, duties, or powers prescribed for bail bond agents . . . under this chapter unless that person is qualified, licensed, and appointed as provided in this chapter.

74. For the reasons discussed in paragraph 81, infra, it is concluded that Ms. Schubert violated Section 648.30(1), Florida Statutes, by advertising A Bunny Bail Bonds, an act she was not qualified to do.

75. Section 648.387(1), Florida Statutes, prohibits the following:

(1) The owner or operator of a bail bond agency shall designate a primary bail bond agent for each location, and shall file with the department the name and license number of the person and the address of the location on a form approved by the department. The designation of the primary bail bond agent may be changed if the department is notified immediately. Failure to notify the department within 10 working days after such change is grounds for disciplinary action pursuant to s. 648.45.

76. Section 648.421, Florida Statutes, requires the following:

Each licensee under this chapter shall notify in writing the department, insurer, managing general agent, and the clerk of each court in which the licensee is registered within 10 working days after a change in the licensee's principal business address or telephone number. The licensee shall also notify the department within 10 working days after a change of the name, address, or telephone number of each agency or firm for which he or she writes bonds and any change in the licensee's name, home address, or telephone number.

77. The evidence failed to prove that the provisions quoted in paragraphs 75 and 76 apply to Ms. Schubert. She was not operating a "bail bond agency" and, therefore, she could not violate Section 648.387(1), Florida Statutes. Nor did she have any change in address or telephone number to notify the Department of as required by Section 648.421, Florida Statutes.

78. Finally, Section 648.44, Florida Statutes, defines the following prohibited acts:

(4) A place of business, including a branch office, may not be established, opened, or maintained unless it is under the active full-time charge of a licensed and appointed bail bond agent.

(6)(a)

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

(7) Any permissible advertising by a bail bond agent or agency must include the address of record filed with the department.

79. The evidence in this case failed to prove that Ms. Schubert established and maintained a place of business and, therefore, she did not violate Section 648.44(4), Florida Statutes. All that she did was maintain office space.

80. As to Section 648.44(6)(b), Florida Statutes, the particular prohibited misleading or false advertisement or deceptive trade practice prohibited by Chapter 626, Florida Statutes, the Department has alleged Ms. Schubert violated is Section 626.954(1)(b), Florida Statutes, which describes the following prohibited practice:

Knowingly making, publishing, disseminating, circulating, or placing before the public, or causing, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public:

1. In a newspaper, magazine, or other publication,
2. In the form of a notice, circular, pamphlet, letter, or poster,
3. Over any radio or television station, or
4. In any other way,

an advertisement, announcement, or statement containing any assertion, representation, or statement with respect to the business of insurance, which is untrue, deceptive, or misleading.

81. The evidence in this case proved that Ms. Schubert did in fact place advertisements which were untrue, deceptive, or misleading in that they suggested that A Bunny Bail Bonds was an approved and operating bail bond agency. She advertised A Bunny

Bail Bonds when she placed a sticker and business cards on the Office door and Mr. Blum's office door, she included the name of her future business as a return address on a letter sent to her former employer, and she advertised A Bunny Bail Bonds on the side of her automobile. All of these advertisements were untrue, deceptive, and misleading, because they all suggested A Bunny Bail Bonds was an operating bail bond business, which it was not.

82. Finally, the advertisements Ms. Schubert used did not include any address of record filed with the Department because she did not yet have a "bail bond agency" for which an address was required to be filed. She did not, therefore, violate Section 648.44(7), Florida Statutes.

E. Exercise of the Department's Discretion.

83. Having proved that Ms. Schubert committed a few of the statutory violations alleged by the Department in support of its decision to deny her license application, the Department may exercise its discretion in this case. It should not do so, however, unreasonably.

84. Most of the actions taken by Ms. Schubert had little, if any, impact on the public. Creating a corporation, leasing office space, arranging for telephone service, creating an virtually inaccessible internet web site, purchasing advertising materials, and having a business plan drafted created no harm to

the public as long as the public was not informed that these things had taken place.

85. The only prohibited actions taken by Ms. Schubert involved a few, isolated instances where she actually advertised what appeared to be an existing bail bond agency: when she placed a single sticker on the office door, when she placed her business cards on the office door and Ms. Blum's office door, when she included the address on one envelope, and when she placed a sign advertising A Bunny Bail Bonds on the side of her car.

86. Given the lack of evidence that Ms. Schubert actually carried on any bail bond agency business and the minimal public harm she may have caused, the Department should exercise its discretion to grant Ms. Schubert's license, with appropriate conditions, including requiring that she take additional courses and/or placing her on probation.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered by the granting Ms. Schubert's application for licensure as a limited surety (bail bond) agent pursuant to Chapter 648, Florida Statutes, conditioned on her taking additional bail bond agent training and/or placing Ms. Schubert on probation for an appropriate period of time.

DONE AND ENTERED this 26th day of January, 2004, in
Tallahassee, Leon County, Florida.



LARRY J. SARTIN
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Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of January, 2004.

ENDNOTES

- 1/ Section 648.25(2), Florida Statutes, defines a "bail bond agent" as a "limited surety agent" or a "professional bail bond agent."
- 2/ It is inferred that these courses were part of the courses required to obtain a temporary license.
- 3/ Id.
- 4/ The Department has described in greater detail the nature of the services contracted for by Ms. Schubert in paragraph 17 of the Department's Proposed Recommended Order. The scope of services is, however, not relevant to this proceeding.
- 5/ In paragraph 18 of the Department's Proposed Recommended Order, the Department speculates as to why Ms. Schubert contracted for the extra options. This paragraph is speculative and not relevant to this matter.

6/ According to Ms. Schubert, the Office was either empty or contained only a couch and television set. According to James Moore, a friend of Ms. Schubert, there was also a computer in the Office, and, therefore, it is inferred that there was a desk or table upon which the computer sat. Ms. Moore's testimony in this regard is credited.

Although Ms. Schubert was not truthful concerning the contents of the Office, her lack of truthfulness at hearing cannot form any basis for denying her license because the Department's Amended Denial Letter did not include these facts as grounds for the Department's decision. See Cottrill v. Department of Insurance, 685 So. 2d 1371 (Fla. 1st DCA 1996).

7/ Respondent's Exhibit 8.

8/ Respondent's Exhibit 10.

9/ Respondent's Exhibit 23.

10/ Respondent's Exhibits 8 and 22.

11/ Respondent's Exhibit 23.

12/ Ms. Schubert testified at hearing that she had placed the sticker on the door because the mail delivery person and an express mail carrier has suggested that she identify the office to facilitate deliveries. While such advice is reasonable, because she could not operate under the name A Bunny Bail Bond, she should have conducted all of her business prior to be licensed solely in her own name. In that way she would not have violated Chapter 648, Florida Statutes, by holding herself out as a bail bond agency.

13/ Although placing the business cards on the Office door constituted advertising, it was limited at to the likely number of individuals who may have seen the cards.

14/ Again, although these actions constitute advertising, they were very limited in their distribution.

15/ In its Proposed Recommended Order, the Department has raised a number of what the Department perceives to be inconsistencies in Ms. Schubert's testimony. At no time has the Department proposed to deny Ms. Schubert's license application because of any alleged lack of candor on Ms. Schubert's part.

The matters raised in the Department's Proposed Recommended Order have, therefore, only been considered in determining what weight should be given to Ms. Schubert's testimony.

16/ Although Ms. Schubert did indeed violate certain provisions of Chapter 648, Florida Statutes, as discussed, infra, the evidence failed to prove that she did so "willfully."

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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.