6-4-04

FLORIDA
DEPARTMENT OF
FINANCIAL SERVICES

FILED

AUG 5 2004

Docketed by: [illegible]

TOM GALLAGHER
CHIEF FINANCIAL OFFICER
STATE OF FLORIDA

AP

IN THE MATTER OF:

CASE NO. 70515-03-AG

03-3804PL

LARRY LORENZO JONES

SML-Clos

FINAL ORDER

THIS CAUSE came on for consideration and final agency action. On September 17, 2003, a two (2) count Administrative Complaint was issued by the Department of Financial Services against the Respondent, Larry Lorenzo Jones. In Count I of the Administrative Complaint, Petitioner alleged that the Respondent violated Sections 648.442(1), 648.45(2)(e), (f), (g), (h, (j), (n), and (p), and 648.571(1), Florida Statutes, by failing to return collateral to an indemnitor, Hugh Clarke. In Count II of the Administrative Complaint, Petitioner alleged that Respondent violated Sections 648.387(1) and 648.45(2)(j), Florida Statutes, by failing to comply with a directive in a November 13, 2002 Consent Order that the Department had issued, requiring Respondent to file with the Department, within 30 days of the Consent Order, the designated primary agent for each of Respondent's bail bond agency locations. The Respondent disputed "one or more of the Department's factual allegations" and requested a hearing. The Respondent timely filed a request for a proceeding pursuant to Section 120.57(1), Florida Statutes. Pursuant to notice, the matter was heard before Stuart M. Lerner, a duly designated Administrative Law Judge of the Division of Administrative Hearings (DOAH) on February 10, 2004 and March 22, 2004, by video teleconference at sites in Fort Lauderdale and Tallahassee, Florida.

After consideration of the evidence, argument and testimony presented at hearing, the Administrative Law Judge issued his Recommended Order. (A true and correct copy of the said Recommended Order is attached hereto as Exhibit A). The Administrative Law Judge recommended that the Department enter a Final Order dismissing the Administrative Complaint issued against Respondent in the instant case.

On June 23, 2004, the Petitioner filed exceptions to the Recommended Order. The exceptions were to certain Conclusions of Law (and attendant Endnotes) and to the Administrative Law Judge's Recommendation. The Respondent filed neither exceptions nor responses to Petitioner's exceptions. The exceptions have been considered and are addressed below.

RULINGS ON PETITIONER'S EXCEPTIONS

1. In Exception # 1, the Petitioner excepts to the Administrative Law Judge's Conclusion of Law # 43, in which the Administrative Law Judge concluded that the Department was required to show personal wrongdoing on the part of the Licensee, Mr. Larry Lorenzo Jones, by proving that he knew of the misconduct of his employee (that despite repeated phone calls by the indemnitor demanding the return of the collateral, these demands were not communicated to the Licensee by the employee). It is settled that the Department may prove personal wrongdoing by demonstrating that the licensee either knew or should have known of employee misconduct. See Section 626.734, Florida Statutes. Thus, to the extent, if any, that the Administrative Law Judge does not, in Conclusion of Law 43, acknowledge both alternatives for proving the personal wrongdoing of a licensee, that conclusion is modified accordingly.

Under the particular circumstances of this case, it is determined that there is insufficient evidence to establish that the Mr. Jones knew or should have known of the indemnitor's attempts to contact him to obtain the collateral in question. There is also insufficient testimony to

establish that the Respondent was negligent or lacked diligence in training and supervising his employees. See Pic N' Save v. Department of Business Regulation, 601 So.2d 245 (Fla. 1st DCA 1992). However, it should be noted that Section 648.25, Florida Statutes defines "primary bail bond agent" as a licensed bail bond agent who is responsible for the overall operation and management of a bail bond agency location and "whose responsibilities include hiring and supervising all individuals within that location." (Emphasis supplied). Mr. Jones was the primary bail bond agent at the location in question. (TR-169) As Counsel for Petitioner aptly points out, "the holder of an agent's license stands in a fiduciary relationship to both the client and the insurance company". Natelson v. Department of Insurance, 454 So.2d 31 (Fla. 1st DCA 1984). This case and its progeny impose upon insurance agents (including bail bond agents) a higher degree of responsibility to their customers than other non-fiduciary service providers. In the case of Ganter v. Department of Insurance, 620 So.2d 202 (Fla.1st DCA 1993), cited by the Administrative Law Judge, the First District Court, while concluding that the Department must establish that the licensee knew or should have known of the conduct of its employee, clarified that "a licensee may not remove himself from the responsibility by not being present on the premises by claiming ignorance of repeated violations." The Ganter Court, in determining that Ganter should have known of the improprieties of his employees, emphasized that there was no evidence that Ganter took any measures to attempt to discourage such violations. In the instant case, the conduct of the Respondent and his staff is clearly problematic, and there is no evidence that the Respondent took any action to discourage the office communication breakdowns at issue.

However, there is still insufficient evidence in the record to establish that the supervision exercised by Mr. Jones relative to the indemnitor's demands for return of collateral was negligent and violative of statutory standards. Further, as there was no evidence to establish that the failure of

the Respondent's bail bond agency to respond to Indemnitor Clarke's demands was anything other than an isolated incident, an unfair business practice was not proven. It is also noteworthy that the evidence indicated that the court discharging the bond did not always mail discharge documentation to out-of-town bail bond agents. Accordingly, based upon all of the particular circumstances of this case, Petitioner's Exception #1 is rejected to the extent provided herein.

2. Petitioner next excepts to the ALJ's Conclusion of Law #45 and Endnote 15 on the basis that bond collateral must be returned "immediately" to the indemnitor upon the discharge of the bond. Petitioner argues that the requirement in Section 648.442(1), Florida Statutes, which states that collateral security or other indemnity, accepted by a bail bond agent "shall be returned upon final termination of liability on the bond " (emphasis provided), should be construed to mean that the collateral must be returned immediately following the final termination of liability. However, in his Conclusions of Law # 45-47, the Administrative Law Judge properly construed that cited statutory provision to mean that a bail bond agent has a reasonable period of time in which to return collateral from the time he or she learns that the debt has been discharged. In Conclusion of Law # 45, the Administrative Law Judge opines that the Legislature could not have intended Section 648.442(1) to impose upon a bail bond agent, who is unaware of the final termination of liability on a collaterally secured bond, the obligation to return such collateral immediately following the final termination of liability. It should first be noted that the obligation is upon the licensee to return collateral. As demonstrated above, in the context of respondeat superior / employee misconduct cases, applicable case law has consistently imposed upon the licensee the standard of whether the licensee knew or should have known of the misconduct of their employees. Pic N' Save, supra at 250; Ganter, supra; at 204-205, see Section 626.734, Florida Statutes. A similar standard of proof must necessarily be applied to a bail bond agents' knowledge regarding the discharge of a bond. Thus, the applicable

standard is when the licensee knew or should have known that the bond was discharged. Notwithstanding this standard, in the instant case, for the reasons previously stated, there is insufficient evidence to establish that the Respondent should have known, by virtue of Mr. Clark's demands, that the bond had been discharged. However, to the extent, if any, that the Recommended Order suggests that the bail bond agent must actually be aware that the bond has been discharged for a violation to be found, Conclusion of Law # 45 is rejected. To find otherwise, as Counsel for Petitioner properly notes, would permit bail bond agents to relieve themselves of their statutory obligations to return collateral through the simple device of avoiding direct contact with indemnitors.[1]

Additionally, to the extent, if any, that the Recommended Order suggests that a reasonable time for a bail bond agent to return collateral "upon demand" is the 21-day period provided by Section 648.571, Florida Statutes, that Conclusion is rejected. The 21-day requirement merely operates as a "backstop" to ensure that collateral is returned within 21 days of the date a bail bond agent is provided with the discharge order the court has issued. Further, although the statutory language "returned upon final termination of liability" utilized in Section 648.442(1) may not strictly require the immediate return of the collateral, the statutory use of the term "upon demand" by its plain meaning imposes a requirement that there must be no undue delay in returning the collateral. Thus, the statutory term "returned upon" is construed by the Department, based upon its agency expertise, to mean that the collateral must be returned with reasonable alacrity, as soon as reasonably possible. See Wallace Corp. v. City of Miami Beach, 793 So.2d 1134 (Fla. 1st DCA 2001). Regardless, under the circumstances of this case, it has not been proven by clear and convincing

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[1] This Final Order does not address the precise responsibility that a bail bond primary agent and/or owner has for the actions of a bail bond agent or other employee at a particular location under an agent theory of liability, as it is unnecessary to address that issue in light of the evidence presented in this case.

evidence that the Respondent unreasonably delayed the return of the collateral once the evidence established that he knew or should have known of the discharge. Here, the evidence at hearing only established that the Respondent knew or should have known that the bond was discharged upon his notification of the discharge by a Department of Financial Services staff person. The Respondent acted within approximately one week of receiving that notification and returned the collateral to Mr. Clark. Therefore, under the particular facts of this case, it has not been demonstrated that the one-week response time was unreasonable under the circumstances. Accordingly, Petitioner's Second Exception is rejected to the extent provided herein.

3. Petitioner next excepts to the Administrative Law Judge's Conclusion of Law # 47 and Endnote 16 of the Recommended Order. Petitioner contends that it was the Respondent's fiduciary duty to be aware of Mr. Clark's efforts to contact him, by virtue of the Respondent's supervision of that office. The Administrative Law Judge stated in Endnote 16 that there had been no showing that the Respondent was in any way personally responsible for the lack of success of the demand attempts made by Mr. Clark. However, to the extent that the Conclusion of Law # 47 and Endnote 16 suggest that actual awareness of such demands by the licensee must be proven before disciplinary action may be taken, that legal conclusion and endnote are rejected. Nonetheless, for the reasons stated in addressing Exceptions 1 & 2 above, it is concluded that there was insufficient evidence introduced at hearing to establish that the Respondent knew or should have known of Mr. Clark's efforts to contact him. Had the communication failure been more than an isolated incident or had evidence been adduced at hearing to establish that the Respondent failed to properly supervise that office by establishing appropriate standards for staff, a statutory violation might have been proven. In the instant case, it was not established who Mr. Clark spoke to at the agency and whether Mr. Clark's demands were ever communicated to the Respondent. Nor was it proven that the

Respondent failed to take the necessary supervisory steps to prevent the negligence and/or misconduct at issue that occurred in the office for which he was responsible. Therefore, there remains insufficient evidence, under the particular circumstances of this case, to establish either that the Respondent failed in his supervisory responsibility to take appropriate steps to assure that Mr. Clark's demands be communicated to him, or that he knew or should have known that the bond was discharged prior to being informed of that fact by the Department. Accordingly, Petitioner's Exception # 3 is rejected to the extent provided herein.

Therefore, upon careful consideration of the entire record, the submissions of the parties and being otherwise fully advised in the premises, it is hereby ORDERED:

1. The Findings of Fact of the Administrative Law Judge are adopted in full as the Department's Findings of Fact.

2. The Conclusions of Law and attendant Endnotes of the Administrative Law Judge, as clarified and/or modified herein, are adopted as the Department's Conclusions of Law.

3. The Administrative Law Judge's recommendation that the Department enter a Final Order dismissing the Administrative Complaint issued against Respondent in the instant case is approved and accepted as being the appropriate disposition of this case.

ACCORDINGLY, it is ORDERED that the Administrative Complaint issued against the Respondent in the instant case is dismissed.

NOTICE OF RIGHTS

Any party to these proceedings adversely affected by this Order is entitled to seek review of this Order pursuant to Section 120.68, Florida Statutes, and Rule 9.110, Fla.R.App.P. Review proceedings must be instituted by filing a petition or notice of appeal with the General Counsel, acting as the agency clerk, at 612 Larson Building, Tallahassee, Florida 32399-0333, and a copy of

the same and the appropriate filing fee with the appropriate District Court of Appeal within thirty (30) days of rendition of this Order.

DONE and ORDERED this 5th day of August, 2004.

KAREN CHANDLER
Deputy Chief Financial Officer

COPIES FURNISHED TO:

Honorable Stuart M. Lerner
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060

Michael A. Levin, Esquire
444 Brickell Avenue
Suite 51, PMB 217
Miami, Florida 33131-2403

Greg S. Marr, Esquire
Department of Financial Services
Division of Legal Services
612 Larson Building
Tallahassee, FL 32399-0333