STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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| DEPARTMENT OF FINANCIAL SERVICES,<br><br>Petitioner,<br><br>vs.<br><br>LARRY LORENZO JONES,<br><br>Respondent. | ) | Case No. 03-3804PL |

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case on February 10, 2004, and March 22, 2004, by video teleconference at sites in Fort Lauderdale and Tallahassee, Florida, before Stuart M. Lerner, a duly-designated Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Greg S. Marr, Esquire
Department of Financial Services
612 Larson Building
200 East Gaines Street
Tallahassee, Florida 32399-0333

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

## STATEMENT OF THE ISSUE

Whether Respondent committed the violations alleged in the Administrative Complaint issued against him in the instant case and, if so, what disciplinary action should be imposed.

## PRELIMINARY STATEMENT

On September 17, 2003, Petitioner issued a two-count Administrative Complaint against Respondent. In Count I of the Administrative Complaint, Petitioner alleged that 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 Petitioner's predecessor, the Department of Insurance,[1] had issued requiring Respondent to file with the Department of Insurance, within 30 days of the Consent Order, the designated primary agent for each of Respondent's bail bond agency locations. Respondent disputed "one or more of [Petitioner's] factual allegations" and requested "a hearing pursuant to Section 120.57(1), Florida Statutes, to be held before [DOAH]." The matter was referred to DOAH on October 14, 2003, for the assignment of an administrative law judge to conduct the hearing Respondent had requested.

The hearing was originally scheduled for December 17, 2003, but was continued at the request of both parties and rescheduled for February 10, 2004.

At the outset of the hearing on February 10, 2004, Respondent, who was representing himself, asked for additional time to retain counsel. The request, which was unopposed by Petitioner, was granted and the hearing adjourned without any evidence having been taken. On February 12, 2004, the parties were given notice, by regular United States Mail, that the hearing would reconvene on March 22, 2004.

Respondent appeared on March 22, 2004, with counsel. Respondent's counsel, stating Respondent had just recently retained him, requested a further delay of the commencement of the evidentiary portion of the hearing in order to have more time to prepare. The request, which Petitioner opposed, was denied. Cf. The Florida Bar v. Hughes, 824 So. 2d 154, 158 (Fla. 2002)("In the instant case, the Bar filed the petition against the unlicensed practice of law on March 19, 2001. On April 12, 2001, this Court ordered Hughes to appear before the referee at the hearing scheduled for June 15, 2001. On June 13, 2001, two days before the hearing, Hughes filed his motion for continuance, which the referee denied because he concluded that Hughes had waited until the last minute to retain counsel. The referee stated that Hughes knew about the hearing since April

2001, and had sufficient time to secure an attorney and discuss the ramifications involved. Also, Hughes filed his motion for continuance a mere two days before the hearing . . . . [W]e find that the referee in the instant case did not abuse his discretion and we uphold his denial of the motion for continuance."); and Coleus v. Florida Commission on Human Relations, 842 So. 2d 1021, 1022 (Fla. 5th DCA 2003)("The standard of review of an order denying a continuance is abuse of discretion. Here, Coleus who had been represented by counsel in a related worker's compensation case, had ample notice of the hearing date and ample opportunity to obtain counsel before the date of the hearing. There is no abuse of discretion in denying a motion for a continuance to obtain counsel when the motion is made at the hearing.")(citation omitted.).

Six witnesses testified at the hearing: Dickson Kessler, Esquire; Hugh Clarke; Pat Anthony; Respondent; James Jones; and Ronnie Striggles. In addition to the testimony of these six witnesses, 12 exhibits (Petitioner's Exhibits 1 through 11, and Respondent's Exhibit 1) were offered and received into evidence.

At the close of the taking of evidence, the undersigned established a deadline (20 days from the date of the filing of the hearing transcript with DOAH) for the filing of proposed recommended orders.

The hearing transcript (consisting of one volume) was filed with DOAH on April 30, 2004.

On May 20, 2004, Respondent filed a Motion for Extension of Time to File Proposed Recommended Order, requesting a 20-day extension of the deadline for filing proposed recommended orders. Two days earlier, Petitioner had filed an Objection to Respondent's Motion for Extension of Time to File Proposed Recommended Order. On the same day the motion was filed, the undersigned issued an Order giving the parties until May 26, 2004, to file their proposed recommended orders and denying Respondent's motion to the extent that it requested that the filing deadline be extended beyond May 26, 2004.

Petitioner and Respondent both filed their Proposed Recommended Orders on May 26, 2004. These post-hearing submittals have been carefully considered by the undersigned.

## FINDINGS OF FACT

Based on the evidence adduced at hearing, and the record as a whole, the following findings of fact are made:

### Respondent

1. Respondent is now, and has been for the past seven years, a Florida-licensed bail bond agent (license number A134458). He is the owner of Big Larry's Bail Bonds (Agency), a bail bond agency located in Broward County, Florida, with which

two other Florida-licensed bail bond agents, James Jones (who is Respondent's brother) and Ron Striggles, are affiliated.

Count I

2. On April 23, 2002, Hugh Clarke went to the Agency, where he obtained from Respondent a $4,500.00 bail bond for a friend, Richard Dyke, who had been arrested in Palm Beach County, Florida, on a theft charge.

3. To obtain the bail bond, Mr. Clarke had to pay a bail bond premium fee of $450.00 and provide collateral in the amount of $1,050.00. Payment was made by a single check (check number 611) for $1,500.00 made out to the Agency. Mr. Clarke also signed a promissory note, which read as follows:

> On Demand Hugh McGrath Clarke after date, for value received, I Promise to pay to the order of CONTINENTAL HERITAGE INSURANCE COMPANY Four Thousand Five Hundred DOLLARS, at Big Larry's Bail Bonds, 1310 Sistrunk Blvd., Ft. Laud., Florida[,] [w]ith interest thereon at the rate of 20 percent, per annum[,] from Call Date until fully paid. Interest payable semi-annually. The maker and endorser of this note agrees to waive demand, notice of non payment and protest; and in case suit shall be brought for the collection hereof, or the same has to be collected upon demand of an attorney, to pay reasonable attorney's fees and assessable cost, for making such collection. Deferred interest payment to bear interest from maturity at 20 percent, per annum, payable semi-annually.
>
> It is further agreed and specifically understood that this note shall become null and void in the event the said defendant

> Richard Dyke shall appear in the proper court at the time or times so directed by the Judge or Judges of competent jurisdiction until the obligations under the appearance bond or bonds posted on behalf of the defendant have been fulfilled and the surety discharged of all liability thereunder, otherwise to remain in full force and effect.

4. Respondent provided Mr. Clarke a signed Receipt and Statement of Charges, acknowledging that he had received from Mr. Clarke payment in full for the $450.00 bail bond premium fee.

5. Respondent also presented Mr. Clarke with a pre-printed form entitled "Collateral Receipt and Informational Notice" (Collateral Receipt) that Respondent had filled out and signed (on the appropriate signature line), acknowledging that, on behalf of the surety, Continental Heritage Insurance Company, he had received from Mr. Clarke $1,050.00 as collateral to secure the bail bond that Mr. Clarke had obtained for Mr. Dyke.

6. The Collateral Receipt contained the following "note," "informational notice," and "indemnitor information":

> NOTE: Unless a properly drawn, executed, and notarized legal assignment is accepted and acknowledged by the surety agent and the surety company named above, the collateral listed above will be returned only to the person(s) named on line (1) above [Mr. Clarke]. Collateral, except for those documents the surety must retain as directed by the law, will be returned within 21 days after the bail bond(s) has been discharged in writing by the court. The undersigned

hereby acknowledges receipt of a copy of all collateral documents indicated above, and the Informational Notice printed below.

*  *  *

INFORMATIONAL NOTICE

CONDITIONS OF BOND:

1. The SURETY, as bail, shall have control and jurisdiction over the principal during the term for which the bond is executed and shall have the right to apprehend, arrest, and surrender the principal to the proper officials at any time as provided by law.

2. In the event surrender of principal is made prior to the time set for principal's appearance, and for reason other than as enumerated below in paragraph 3, then principal shall be entitled to a refund of the bond premium.

3. It is understood and agreed that the happening of any one of the following events shall constitute a breach of principal's obligations to the SURETY hereunder, and the SURETY shall have the right to forthwith apprehend, arrest and surrender principal and principal shall have no right of any refund whatsoever. Said events which shall constitute a breach of principal's obligations hereunder are:

(a) If principal shall depart the jurisdiction of the court without the written consent of the court and the SURETY or its Agent.

(b) If principal shall move from one address to another without notifying SURETY or his agent in writing prior to said move.

(c) If principal shall commit any act which shall constitute reasonable evidence of

principal's intention to cause a forfeiture of said bond.

(d) If principal is arrested and incarcerated for any other offense other than a minor traffic violation.

(e) If principal shall make any material false statement in the application.

* * *

INDEMNITOR INFORMATION

In addition to the terms and conditions of any Indemnity Agreement or other collateral documents which you have executed, this is to notify you that:

1. The Indemnitor(s) will have the defendant(s) forthcoming before the court named in the bond, at the time therein fixed, and as may be further ordered by the court.

2. The Indemnitor(s) is responsible [for] any and all losses or costs of any kind whatsoever which the surety may incur as a result of this undertaking. There should not be any costs or losses provided the defendant(s) does not violate the conditions of the bond and appears at all required court hearings.

3. Collateral will be returned to the person(s) named in the collateral receipt, or their legal assigns, within 21 days after the surety has received written notice of discharge of the bond(s) from the court. It may take several weeks after the case(s) is disposed of before the court discharges the surety bonds.

7. Respondent read to Mr. Clarke that portion of the Collateral Receipt that explained that the collateral would be

returned "within 21 days after the surety ha[d] received written notice of discharge of the bond(s) from the court."

8. Nonetheless, for some reason, Mr. Clarke was under the impression that he would be receiving his collateral back within 30 days of April 23, 2002, the date of the transaction, even in the absence of a discharge.

9. In late May 2002, sometime after the 23rd of the month, Mr. Clarke began telephoning the Agency to inquire about the return of his collateral.

10. On each occasion he called, he asked to speak with Respondent, but was told by the person who answered the phone that Respondent was not available. He left messages, but Respondent never returned his calls.[2]

11. Mr. Clarke telephoned the Agency approximately twice a month until November 2002, when, frustrated by his inability to reach Respondent by telephone,[3] he sent, by facsimile transmission, a letter to the Department of Insurance requesting that it help him in his efforts to gain the return of his collateral.

12. Although Mr. Clarke had been advised in September 2002 by Mr. Dyke that Mr. Dyke's criminal case "was over," Mr. Clarke never got to directly communicate this information to Respondent and to personally ask Respondent to give him back his collateral. Any information Mr. Clarke may have provided about

the status of Mr. Dyke's criminal case and any demands Mr. Clarke may have made for the return of his collateral were provided and made to a person or persons at the Agency other than Respondent, who did not communicate them to Respondent.

13. Pat Anthony, a Special Investigator with the Department of Insurance,[4] was assigned the task of looking into the allegations Mr. Clarke had made in his letter.

14. Ms. Anthony met with Mr. Clarke on December 6, 2002, and took his statement. The statement was reduced to writing (by Ms. Anthony, who wrote down what she understood Mr. Clarke to have said), and it then was "subscribed and sworn to" by Mr. Clarke. Mr. Clarke's statement read as follows:

> On 4/23/02, I went to Larry Jones' office to put up bail for Richard Dyke. I gave him a $450 check and a $1,050 check.[5] Richard told me the case was over with in 9/02.[6] I started calling Larry about a week later.[7] He had told me the $450 was his premium and I would get the $1,050 when the case was completed.[8] I have called several times. The man who answered the phone tells me Larry is not there.

15. In January 2003, Ms. Anthony telephoned the Office of the Clerk of the Circuit Court of Palm Beach County (Clerk's Office) to inquire about the status of Mr. Dyke's criminal case. She was told by the person who answered the telephone that the case had concluded and that Mr. Dyke's bond had been discharged, but that there was "no way to know" whether Respondent had been

notified of this information inasmuch as the Clerk's Office did not "always notify the out of town bondsman."

16. Ms. Anthony subsequently advised Respondent as to what she had been told and suggested that he go to the Palm Beach County Courthouse to confirm the information she had been provided.

17. Respondent followed Ms. Anthony's suggestion and went to the Palm Beach County Courthouse on January 21, 2003 (which was "within a week" of his conversation with Ms. Anthony).

18. There, he obtained a certified copy (under seal of the Clerk's Office) of a summary or disposition sheet reflecting that Mr. Dyke's bond had been discharged.

19. That same day, when Respondent returned to the Agency, he telephoned Mr. Clarke and made arrangements to have Mr. Clarke come by the Agency on January 27, 2003, to sign paperwork and pick up a check from Respondent for $1,050.00 (the amount of the collateral Mr. Clarke had given Respondent).

20. Mr. Clarke picked up the check on January 27, 2003, as scheduled.

21. It was not until March 2004 that Respondent received from the Clerk's Office a copy of the actual court order discharging Mr. Dyke's bond.

Count II

22. On or about September 1, 2002, the Department of Insurance filed a one-count Administrative Complaint (in Department of Insurance Case No. 43742-02-AG) against Respondent, alleging that "he [had] failed to return collateral and charged an amount in excess of the bond premium."

23. On November 13, 2002, the Department of Insurance issued a Consent Order in Case No. 43742-02-AG, which provided as follows:

> THIS CAUSE came on for consideration and final agency action. Upon consideration of the record including the Settlement Stipulation for Consent Order dated October 25, 2002, and being otherwise advised in the premises, the Insurance Commissioner hereby finds:
>
> 1. The Treasurer and Insurance Commissioner, as head of the Department of Insurance, has jurisdiction over the subject matter of this case and parties hereto.
>
> 2. The entry of this Consent Order and compliance herewith by the Licensee, LARRY LORENZO JONES, shall conclude the administrative proceeding of Case No. 43742-02-AG before the Department of Insurance of the State of Florida.
>
> IT IS THEREFORE ORDERED:
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> a. The Settlement Stipulation for Consent Order dated October 25, 2002, is hereby approved and fully incorporated herein by reference;
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> b. Within thirty (30) days of the date of issue of the Consent Order, pursuant to

> Section 648.387, Florida Statutes, Licensee shall file[9] notice with the Department of the designated primary agent for each location of all bail bond agencies owned by the Licensee. Failure to file said notice will result in immediate suspension of Licensee's license and eligibility for licensure.
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> c. Licensee shall be placed on probation for a period of twelve (12) months. As a condition of probation, Licensee shall strictly adhere to the Florida Insurance Code, Rules of the Department and the terms of this agreement. If during the period of probation period [sic] the Department has good cause to believe that Licensee has violated a term or condition of probation, it shall suspend, revoke, or refuse to issue, renew or continue the license of appointment of Licensee.
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> d. Licensee shall pay a fine of two thousand five hundred dollars ($2500.00) within thirty (30) days of the date of issue of the Consent Order, pursuant to Section 648.52, Florida Statutes. Failure of Licensee to pay the fine within the specified time limit shall result in the immediate suspension of Licensee's license and eligibility for licensure in this state without further proceeding for a period of sixty (60) days. Reinstatement shall be conditioned upon Licensee's compliance with all terms of the Consent Order, including payment of the administrative fine.[10]

24. Sometime in December 2002, Sally Burke, who was then a Bail Bond Coordinator with the Department of Insurance, visited the Agency for purposes of conducting an audit of the Agency's records. Ms. Anthony accompanied her on the visit.

25. During the audit, Ms. Burke asked Respondent if he had completed and "turned in [the] designation form" required by Section 648.387, Florida Statutes. Respondent replied that he had "never received" a blank form to fill out. At Ms. Burke's request, Ms. Anthony handed Respondent a blank designation form. Respondent proceeded to complete it in Ms. Burke's and Ms. Anthony's presence. When he was finished, he attempted to give the completed form to Ms. Burke, but she told him, "Larry, you have to mail it in yourself, but make me a copy for my file." As requested, Respondent made a copy and gave it to Ms. Burke, who, in turn, handed it to Ms. Anthony. He then left the Agency and mailed the original to the Department of Insurance. When he returned to the Agency, Ms. Burke and Ms. Anthony were still there.

26. Months later, in September 2003 at around the time of the issuance of the instant Administrative Complaint, Respondent received a telephone call from Greg Marr, an attorney with Petitioner, who told Respondent that Petitioner had never received his completed designation form.[11] Respondent informed Mr. Marr that the completed form had been mailed in December 2002. Mr. Marr responded, "[O]ur records show that it's not in,"[12] and asked Respondent to "send in another one," which Respondent did (on or around September 19, 2003). Petitioner received this completed designation form on September 26, 2003.

## CONCLUSIONS OF LAW

27. DOAH has jurisdiction over the subject matter of this proceeding and of the parties hereto pursuant to Chapter 120, Florida Statutes.

28. In Florida, the activities of bail bond agents are regulated by the provisions of Chapter 648, Florida Statutes, which are part of the Florida Insurance Code. § 624.01, Fla. Stat.

29. Petitioner has been statutorily delegated the authority "to administer the provisions of this chapter." § 624.26, Fla. Stat.

30. Among the provisions in Chapter 648, Florida Statutes, are the following relating to "[c]ollateral security" and the "[f]ailure to return collateral":

> 648.442 Collateral security.--
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> (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. Such collateral security or other indemnity required by the bail bond agent must be reasonable in relation to the amount of the bond. Collateral security may not be used by the bail bond agent for personal benefit or gain and must be returned in the same condition as received. . . .
>
> (2) When a bail bond agent accepts collateral, a written, numbered receipt shall be given, and this receipt shall give

in detail a full account of the collateral received. . . .

(3) 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. . . .

(4) When the obligation of the surety on the bond or bonds has been released in writing by the court, the collateral shall be returned to the rightful owner named in the collateral receipt unless another disposition is provided for by legal assignment of the right to receive the collateral to another person.

* * *

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(7) No bail bond agent or insurer shall solicit or accept a waiver of any of the provisions of this section or enter into any agreement as to the value of the collateral.

* * *

(11) Any person who violates this section is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

* * *

648.571 Failure to return collateral; penalty.--

(1) A bail bond agent who has taken collateral or an insurer or managing general agent who holds collateral as security for a bail bond shall, upon demand, make a written request for a discharge of the bond to be delivered to the surety or the surety's agent. A copy of the written request for discharge must be given to the indemnitor or the person making the request for the

> collateral, and a copy must be maintained in the agent's file. If a discharge is provided to the surety or the surety's agent pursuant to chapter 903, the collateral shall be returned to the indemnitor within 21 days after the discharge is provided.
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> (2) Upon demand, following the written request for discharge and upon diligent inquiry by the surety or surety's agent to determine whether the bond has been discharged, the failure of the court to provide a written discharge to the surety or surety's agent pursuant to chapter 903 within 7 days automatically cancels the bond, and the collateral shall be returned to the indemnitor within 21 days after the written request for discharge.
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> * * *
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> (4) In addition to the criminal penalties and any other penalties provided in this chapter, the department shall impose against any person violating this section an administrative fine of five times the dollar amount of the collateral.

31. Chapter 648, Florida Statutes, also contains the following provisions, found in Section 648.387, Florida Statutes, dealing with "primary bail bond agents":

> (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.

> (2) The primary bail bond agent is responsible for the overall operation and management of a bail bond agency location, whose responsibilities may include, without limitations, hiring and supervising of all individuals within the location, whether they deal with the public in the solicitation or negotiation of bail bond contracts or in the collection or accounting of moneys. A person may be designated as primary bail bond agent for only one location.
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> * * *
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> (5) A bail bond agency location may not conduct surety business unless a primary bail bond agent is designated at all times. The failure to designate a primary agent on a form prescribed by the department, within 10 working days after an agency's inception or a change of primary agent, is a violation of this chapter, punishable as provided in s. 648.45.

A "bail bond agency," as that term is used in Chapter 648, Florida Statutes, is defined in Section 648.25(1), Florida Statutes, as follows:

> (a) The building where a licensee maintains an office and where all records required by ss. 648.34 and 648.36 are maintained; or
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> (b) An entity that:
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> 1. Charges a fee or premium to release an accused defendant or detainee from jail; or
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> 2. Engages in or employs others to engage in any activity that may be performed only by a licensed and appointed bail bond agent.

32. Pursuant to Section 648.30, Florida Statutes, persons acting as bail bond agents in Florida must be licensed by Petitioner.

33. Petitioner may suspend or revoke a bail bond agent license it has issued on any of the grounds enumerated in 648.45(2), Florida Statutes. Pursuant to Section 648.52, Florida Statutes, Petitioner "may, in its discretion, in lieu of or in addition to such suspension [or] revocation . . ., and except on a second offense, impose upon the licensee an administrative penalty in an amount up to $5,000 or, if [it] has found willful misconduct or willful violation on the part of the licensee, $20,000. The administrative penalty may, in the discretion of [Petitioner], be increased by an amount equal to any commissions or other pecuniary benefits received by or accruing to the credit of the licensee in connection with any transaction related to the grounds for suspension [or] revocation . . . ." Pursuant to Section 648.53, Florida Statutes, Petitioner "may, in lieu of or in addition to such suspension [or] revocation . . . or in connection with any administrative monetary penalty imposed under s. 648.52, place the offending licensee on probation for a period, not to exceed 2 years, as specified by ]Petitioner] in its order."

34. Petitioner may take such punitive action only after the licensee has been given reasonable written notice of the

charges and an adequate opportunity to request a proceeding pursuant to Sections 120.569 and 120.57, Florida Statutes.

35. An evidentiary hearing must be held if requested by the licensee when there are disputed issues of material fact. §§ 120.569(1) and 120.57(1), Fla. Stat.

36. At the hearing, Petitioner bears the burden of proving that the licensee engaged in the conduct, and thereby committed the violations, alleged in the charging instrument.

37. Proof greater than a mere preponderance of the evidence must be presented by Petitioner to meet its burden of proof. Clear and convincing evidence of the licensee's guilt is required. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932, 935 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292, 294 (Fla. 1987); Pou v. Department of Insurance and Treasurer, 707 So. 2d 941 (Fla. 3d DCA 1998); and § 120.57(1)(j), Fla. Stat. ("Findings of fact shall be based upon a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute . . . .").

38. Clear and convincing evidence "requires more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" In re Graziano, 696 So. 2d 744, 753 (Fla. 1997). It is an "intermediate standard."

Id. For proof to be considered "'clear and convincing' . . . the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established." In re Davey, 645 So. 2d 398, 404 (Fla. 1994), quoting, with approval, from Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983). "Although this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous." Westinghouse Electric Corporation, Inc. v. Shuler Bros., Inc., 590 So. 2d 986, 989 (Fla. 1st DCA 1991).

39. In determining whether Petitioner has met its burden of proof, it is necessary to evaluate its evidentiary presentation in light of the specific allegations of wrongdoing made in the charging instrument. Due process prohibits an agency from taking penal action against a licensee based on matters not specifically alleged in the charging instrument, unless those matters have been tried by consent. See Shore Village Property Owners' Association, Inc. v. Department of Environmental Protection, 824 So. 2d 208, 210 (Fla. 4th DCA 2002); Hamilton v. Department of Business and Professional

Regulation, 764 So. 2d 778 (Fla. 1st DCA 2000); Lusskin v. Agency for Health Care Administration, 731 So. 2d 67, 69 (Fla. 4th DCA 1999); Cottrill v. Department of Insurance, 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996); and Delk v. Department of Professional Regulation, 595 So. 2d 966, 967 (Fla. 5th DCA 1992).

40. The charging instrument Petitioner issued in the instant case alleges that 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 Mr. Clarke's collateral (Count I); and 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 of Insurance had issued requiring that he file with the Department of Insurance, within 30 days of the date of issuance of the Consent Order, the designated primary agent for each of his bail bond agency locations (Count II). The charging instrument then advises Respondent that Petitioner intends to suspend or revoke his license or impose other authorized penalties for his having committed these alleged violations.

41. As noted above, Petitioner's authority to suspend and revoke a bail bond agent's license is derived from Section 648.45, Florida Statutes. Subsections (2)(e), (f), (g), (h),

(j), (n), and (p) of the statute (the provisions Respondent is alleged to have violated) read 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 if the person:
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> * * *
>
> (e) Has demonstrated lack of fitness or trustworthiness to engage in the bail bond business.
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> (f) Has demonstrated lack of reasonably adequate knowledge and technical competence to engage in the transactions authorized by the license or appointment.
>
> (g) Has engaged in fraudulent or dishonest practices in the conduct of business under the license or appointment.
>
> (h) Is guilty of 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.
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> * * *
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> (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.
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> * * *
>
> (n) Has failed to return collateral.

* * *

> (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.

42. The statutory provisions that Petitioner claims Respondent has violated are "in effect, . . . penal statute[s] . . . This being true the[y] must be strictly construed and no conduct is to be regarded as included within [them] that is not reasonably proscribed by [them]. Furthermore, if there are any ambiguities included such must be construed in favor of the . . . licensee." Lester v. Department of Professional and Occupational Regulations, 348 So. 2d 923, 925 (Fla. 1st DCA 1977); see also Whitaker v. Department of Insurance and Treasurer, 680 So. 2d 528, 531 (Fla. 1st DCA 1996)("Because the statute [Section 626.954(1)(x)4, Florida Statutes] is penal in nature, it must be strictly construed with any doubt resolved in favor of the licensee."); and Elmariah v. Department of Professional Regulation, Board of Medicine, 574 So. 2d 164, 165 (Fla. 1st DCA 1990)("Although it is generally held that an agency has wide discretion in interpreting a statute which it administers, this discretion is somewhat more limited where the statute being interpreted authorizes sanctions or penalties against a person's professional license. Statutes

providing for the revocation or suspension of a license to practice are deemed penal in nature and must be strictly construed, with any ambiguity interpreted in favor of the licensee.").

43. None of these provisions, so construed, authorize the Petitioner to discipline a Florida-licensed bail bond agent for the misconduct of the employees of the licensee's bail bond agency where there is no showing of personal wrongdoing on the part of the licensee. Cf. Ganter v. Department of Insurance, 620 So. 2d 202 (Fla. 1st DCA 1993)("In Pic N' Save Central Florida v. Department of Business Regulation, Div. of Alcoholic Beverages and Tobacco, 601 So. 2d 245 (Fla. 1st DCA 1992), this court recognized the distinction between imposing liability under the theory of respondeat superior and revoking a party's right to conduct business. In Pic N' Save, supra, the court held that while the governing statute itself did not require proof of licensee's knowledge that in order to suspend a party's liquor license, the department must establish that the licensee knew or should have known of the misconduct of its employee. The court went on to acknowledge that this construction of the statute is consistent with the idea 'that one's license to engage in an occupation is not to be taken away except for misconduct personal to the licensee.' Pic N' Save, supra at 250. There is no rational basis for not imposing the same

standard for revocation of an insurance license."); Pic N' Save v. Department of Business Regulation, 601 So. 2d 245, 250, 256 (Fla. 1st DCA 1992)("Although the statutory language in section 561.29(1) has since 1957 spoken in terms of the Division's power to revoke or suspend a beverage license for violations of the beverage law committed by a licensee, or 'its agents, officers, servants, or employees,'[13] the courts of this state have consistently construed and applied this disciplinary authority only on the basis of personal misconduct by the licensee. Thus, while an employee may violate the beverage law in making illegal sales of alcoholic beverages to minors, the licensee's culpable responsibility therefor is measured in terms of its own intentional wrongdoing or its negligence and lack of diligence in training and supervising its employees regarding illegal sales. This limitation on the licensee's liability is consistent with the notion, also long recognized by the courts of this state, that one's license to engage in an occupation is not to be taken away except for misconduct personal to the licensee. . . . While the statute Pic N' Save allegedly violated in this case, section 562.11, Florida Statutes, is the same statute that was involved in Davis [v. Shiappacossee, 155 So. 2d 365 (Fla. 1963], this case is not a civil negligence action for personal injury damages resulting from harm caused by the alleged illegal sales; the principles of respondeat superior

applied in Davis have no application in determining whether Pic N' Save's license should be revoked or suspended; and the burden of proof to establish the licensee's personal misconduct is significantly stricter than that applicable to civil cases such as Davis."); McDonald v. Department of Professional Regulation, Board of Pilot Commissioners, 582 So. 2d 660, 669 (Fla. 1st DCA 1991)("There is no language to clearly evidence a legislative intent to impose on a state licensed pilot vicarious responsibility for the neglect or misconduct or others, i.e., to hold the pilot strictly responsible for the conduct of all other personnel involved in operating and maneuvering the vessel at the time the allision occurred. The statute does not purport to impose any nondelegable duties on a state licensed harbor pilot that would give rise to personal responsibility for the negligent acts of others. Under Florida law, disciplinary statutes such as section 310.101 are penal in nature and must be strictly construed against the enforcing agency; thus, without a clear, unambiguous provision in the statute indicating legislative intent to hold the licensee responsible for the negligent or wrongful acts committed by another,[14] the administrative agency is not authorized to so extend the effect of the statute."); and Federgo Discount Center v. Department of Professional Regulation, Board of Pharmacy, 452 So. 2d 1063, 1066 (Fla. 3d DCA 1984)("We conclude that if the Legislature

desired to make community pharmacy permittees strictly liable for the acts of pharmacists who are separately licensed by the State, then it could have done so in no uncertain terms. In the absence of a clear expression from the Legislature making these permittees subject to discipline for the misdeeds of their chosen licensed pharmacist, we are obliged to reverse the Board's order of revocation.").

44. The gravamen of Count I of the charging instrument Petitioner issued in the instant case is the allegation that, in connection with his handling of the collateral Mr. Clarke had given him to secure Mr. Dyke's bond, Respondent failed to act in accordance with provisions of Chapter 648, Florida Statutes, dealing with the return of collateral (specifically, Sections 648.442(1) and 648.571(1), Florida Statutes) and that he therefore is subject to discipline pursuant to Section 648.45(2)(n), Florida Statutes. While Petitioner has also alleged in this count of the charging instrument violations of Section 648.45(2)(e), (f), (g), (h), and (p), Florida Statutes, it is apparent, particularly in light of the facts alleged in charging instrument, that these other alleged violations are derivative claims dependent upon a finding that Respondent violated Sections 648.442(1) and 648.571(1), Florida Statutes.

45. Section 648.442(1), Florida Statutes, requires that collateral security "be returned upon final termination of

liability on the bond." "In a statute which provides for one event 'upon' some other contingency, the word 'upon' is a word of variable meaning. It may mean 'at the time of' or 'with little or no interval thereafter.' On the other hand, it may mean 'in consequence of' or 'on condition of,' without implying contemporaneity." Walsh v. Board of Administration, 6 Cal. Rptr. 2d 118, 133 (Cal. App. 1992); see also Ashmus v. Calderon, 31 F. Supp. 2d 1175, 1186 (N.D. Cal. 1998)("'[U]pon' can mean either 'on condition of' or 'at the time of . . . with little or no interval thereafter.' In the first instance, upon implies no temporal limit; in the second, however, upon means immediately following.")(citation omitted.). Reading Section 648.442(1), Florida Statutes, together with the remaining provisions of the statute, as well as with the provisions of Section 648.571, Florida Statutes, and, further, taking into consideration that a violation of Section 648.442(1), Florida Statutes, subjects a bail bond agent not only to administrative penalties, but to felony criminal penalties as well, the undersigned is confident that the Legislature did not intend Section 648.442(1), Florida Statutes, to impose upon a bail bond agent, unaware of the "final termination of liability on [a collateral-secured] bond," the obligation to return such collateral immediately following the "final termination of liability."[15] See State v. Fuchs, 769 So. 2d 1006, 1009 (Fla. 2000)("[S]tatutes which relate to the

same or closely related subjects should be read in pari materia."); McLaughlin v. State, 721 So. 2d 1170, 1172 (Fla. 1998)("Where criminal statutes are concerned, the rules are even stricter: '[I]t is a well-established canon of construction that words in a penal statute must be strictly construed. Where words are susceptible of more than one meaning, they must be construed most favorably to the accused.'"); and § 775.021(1), Fla. Stat. ("The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused."). To construe Section 648.442(1), Florida Statutes, otherwise would place an unreasonable burden on bail bond agents that the Legislature could not have intended them to shoulder. Cf. Burnsed v. Seaboard Coastline Railroad Co., 290 So. 2d 13, 19 (Fla. 1974)("A reasonable interpretation of Section 357.08, Florida Statutes, would include a reasonable time within which to set the lighted fuses or other visual warning devices. The statute implies the allowance of a reasonable time after the blocking of a crossing to provide the requisite lighting and the question as to such reasonable time is a question of fact to be determined under the circumstances of each case. Neither the courts nor the Legislature expect the impossible and this Court recognizes that the warning device cannot be put out instantaneously, but

rather a reasonable time is permitted to train personnel to comply with this statute."); and Newport v. MFA Insurance Co., 448 N.E.2d 1223, 1228-29 (Ind. App. 1983)("Although there is no Indiana law directly on point, we discern some guidance in an analogous circumstance where a policy condition requires the insured to give timely notice of an accident to the insurer. This court has said that such timeliness must be measured from the time the insured actually knew of the accident. Such policy condition cannot be construed to require an insured to do an impossible thing--to give notice of an accident before it knew about it.").

46. Unlike Section 648.442(1), Florida Statutes, Section 648.571(1), Florida Statutes, contains a specific time frame within which a bail bond agent must return collateral given to secure a bond that has since been discharged. That specific time frame is 21 days from the date the bail bond agent is provided with the discharge order the court has issued. It is the responsibility of the bail bond agent, pursuant to Section 648.571(1), Florida Statutes, "upon demand," to "make a written request" that (s)he "be delivered" the discharge order.

47. In the instant case, Respondent was first made aware of the discharge of the bond Mr. Clarke had obtained for Mr.Dyke, not by Mr. Clarke, but by Petitioner (through Ms.Anthony), whom Mr. Clarke had contacted after having been

unsuccessful in his efforts to telephonically communicate with Respondent.[16] Within a week of being so advised, Respondent went to the Palm Beach County Courthouse and obtained from the Clerk's Office a certified copy of a summary or disposition sheet reflecting that Mr. Dyke's bond had been discharged.[17] That same day, he made arrangements to have Mr. Clarke come by the Agency to get his $1,050.00 collateral back. In accordance with these arrangements, on January 27, 2003, Mr. Clarke went to the Agency and was given a check in the amount of $1,050.00. Inasmuch as it establishes that Respondent returned Mr. Clarke's collateral less than 21 days from the date Respondent had been told by Ms. Anthony about the discharge of Mr. Dyke's bond (and well before he was provided a copy of the court's discharge order), the evidentiary record in the instant case does not support a finding that, in connection with Respondent's handling of this collateral, he violated Section 648.442(1), Florida Statutes, Section 648.571(1), Florida Statutes, or any of the other statutory provisions cited in Count I of the charging instrument. Petitioner having failed to prove these violations by clear and convincing evidence, Count I of the charging instrument must be dismissed.

48. In Count II of the Administrative Complaint, Petitioner alleges that it is authorized, pursuant to Section 648.45(2)(j), Florida Statutes, to take disciplinary action

against Respondent because Respondent had not (as of September 17, 2003, the date the charging instrument was issued) "filed with [Petitioner] the designated primary agent for each location of all bail bond agencies [he] own[ed]," as required by Section 648.387(1), Florida Statutes, and by a Consent Order that the Department of Insurance had issued November 13, 2002. Disciplinary action is warranted under Section 648.45(2)(j), Florida Statutes, only if the violation alleged is shown to have been willfully committed. The record evidence in the instant case, however, does not clearly and convincingly establish that Petitioner even violated Section 648.387(1), Florida Statutes, or the Department of Insurance's November 13, 2002, Consent Order, much less that he did so willfully.

49. To prove that Respondent acted in derogation of Section 648.387(1), Florida Statutes, and the Department of Insurance's November 13, 2002, Consent Order, Petitioner had to show that Respondent failed to file the requisite paperwork with the Department of Insurance within the prescribed time period. Petitioner could have met its burden by offering, if available, evidence of the type described in Section 90.803(10), Florida Statutes, which provides as follows:

> The provision of s. 90.802 to the contrary notwithstanding, the following are not inadmissible as evidence, even though the declarant is available as a witness:

* * *

> (10) ABSENCE OF PUBLIC RECORD OR ENTRY.--Evidence, in the form of a certification in accord with s. 90.802, or in the form of testimony, that diligent search failed to disclose a record, report, statement, or data compilation or entry, when offered to prove the absence of the record, report, statement, or data compilation or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation would regularly have been made and preserved by a public office and agency.

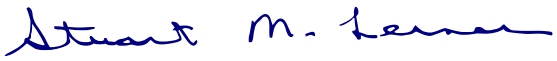
Petitioner presented no such evidence, nor did it offer any other evidence establishing the non-filing (within the prescribed time period) of the completed designation form Respondent was required to file. Respondent, for his part, gave credible testimony that, sometime in December 2002, upon being given the proper designation form to fill out, he immediately did so, hand-delivered a copy of the completed form to a Department of Insurance employee, and mailed the original to the Department of Insurance.[18] In view of Petitioner's failure to effectively rebut this testimony and present clear and convincing evidence establishing that the Department of Insurance's office of the agency clerk did not receive this mailing on or before December 13, 2002 (that is, within the 30-day time frame Respondent was given, in the November 13, 2002, Consent Order, to file a completed designation form), Count II of the charging instrument, like Count I, must be dismissed.

## RECOMMENDATION

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

RECOMMENDED that Petitioner issue a final order dismissing, in its entirety, the Administrative Complaint issued against Respondent in the instant case.

DONE AND ENTERED this 4th day of June, 2004, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 4th day of June, 2004.

## ENDNOTES

[1]/ The Department of Insurance's regulatory authority over bail bond agents was transferred to the newly-created Department of Financial Services effective January 7, 2003, by operation of Chapter 2002-404, Laws of Florida.

[2]/ There is no indication in the evidentiary record that Respondent actually received these messages.

[3]/ The evidentiary record does not reveal that Mr. Clarke attempted to contact Respondent by means other than telephoning him.

[4]/ Ms. Anthony is still employed as a Special Investigator, but by Petitioner.

[5]/ In fact, Mr. Clarke gave Respondent one check for $1,500.00.

[6]/ Mr. Clarke did not take any steps to confirm the accuracy of the information Mr. Dyke had provided him about the status of Mr. Dyke's criminal case.

[7]/ At hearing, however, Mr. Clarke testified that he first called the Agency in late May 2002.

[8]/ Mr. Clarke gave testimony at hearing inconsistent with this assertion that he had been told by Respondent that he would "get the $1,050 when the case was completed" (as opposed to within 30 days of his giving that amount to Respondent).

[9]/ Florida Administrative Code Rule 28-106.104(1) provides, in pertinent part, that, "[i]n construing . . . any order of a presiding officer, filing shall mean received by the office of the agency clerk during normal business hours . . . ."

[10]/ This Consent Order contains no findings of guilt, nor does it make reference to any admissions of guilt made by Petitioner, although it does impose disciplinary action against Petitioner in the form of a fine and probation. Absent a finding that Respondent has violated the terms of the Consent Order, Petitioner may not take any further disciplinary action against Respondent based on the allegations made against him in Department of Insurance Case No. 43742-02-AG. See Department of Transportation v. Career Service Commission, 366 So. 2d 473, 474 (Fla. 1st DCA 1979)("Although the Commission may have inartfully used the term 'double jeopardy,' its reversal was based on sound reasoning. D.O.T. not only lacked authority to discipline Woodard twice for the same offense but its action was fundamentally unfair. The same offense may be a proper ground for either a suspension or a dismissal but the statute and rules contemplate that these are mutually exclusive disciplinary alternatives. Otherwise, an agency could repeatedly punish an employee and the employee would never be secure in his employment. . . . [H]aving concluded its investigation and reached its decision as to the disciplinary action it will

administer to an employee, the disciplinary action administered may not be increased at a later date nor may an agency discipline an employee twice for the same offense.").

[11]/ Neither Mr. Marr, nor any one else with personal knowledge of the contents of the Department of Insurance's and Petitioner's records, testified at hearing regarding whether or not these records contained this completed designation form.

[12]/ "[P]roof of mailing of a document to the correct address creates a presumption that the item mailed was, in fact, received. This presumption, however, is a rebuttable one." W.T. Holding, Inc. v. State Agency for Health Care Administration, 682 So.2d 1224, 1225 (Fla. 4th DCA 1996)(citations omitted.). The evidentiary record in the instant case does not contain rebuttal evidence sufficient to establish that the Department of Insurance did not receive the completed designation form that Respondent had mailed to it in December 2002. (Petitioner's Exhibit 1, the first page of which is a signed certification (under seal) of the state's Chief Financial Officer that "the attached three pages represent the Designation of Primary Bail Bond Agent for Bail Bond Agency for Big Larry's Bail Bonds . . . [which] was received by this Department on September 26, 2003," does not constitute such evidence since this certification does not address what other completed designation forms, if any, the Department of Insurance or Petitioner may have received from Respondent prior to September 26, 2003; neither does Mr. Marr's "out-of-court" statement to Respondent regarding the contents of Petitioner's records constitute such evidence since this "out-of-court" statement is hearsay evidence that, standing alone, is insufficient, under Florida law applicable to administrative proceedings (specifically, Section 120.57(1)(c), Florida Statutes), to support a finding of fact.)

[13]/ Section 648.45(2), Florida Statutes, unlike Section 561.29(1), Florida Statutes, does not contain any language suggesting that a licensee may be disciplined for violations committed by the licensee's "agents, officers, servants, or employees."

[14]/ There is no such "clear, unambiguous provision" in Section 648.45(2), Florida Statutes.

[15]/ The undersigned therefore respectfully disagrees with the view expressed in the testimony given at hearing by Dickson

Kessler, an attorney employed by Petitioner, that, "[i]f a principal satisfies the requirement of the court and the bond is discharged, . . . [t]he collateral has to be returned immediately to the person that put that up."

[16]/ There has been no showing that Respondent was in any way personally responsible for the lack of success of these efforts made by Mr. Clarke.

[17]/ It was not until more than a year later that he received a copy of the actual discharge order.

[18]/ Whether this occurred within or outside the 30-day filing period prescribed in the Consent Order, the evidentiary record does not make clear.

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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.