

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL )  
SERVICES, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 04-0004PL  
 )  
JEAN-RENE JOSEPH, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on March 3, 2004, in Miami, Florida, before Administrative Law Judge Michael M. Parrish of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Dickson E. Kesler, Esquire  
Department of Financial Services  
401 Northwest Second Avenue, Suite N-321  
Miami, Florida 33128

For Respondent: Hernan Hernandez, Esquire  
1431 Ponce de Leon Boulevard  
Coral Gables, Florida 33134

STATEMENT OF THE ISSUES

This is a license discipline case in which Petitioner seeks to take disciplinary action against Respondent on the basis of allegations of misconduct set forth in an Administrative Complaint dated August 13, 2003.

PRELIMINARY STATEMENT

At the final hearing on March 3, 2004, Petitioner presented the testimony of two witnesses; Ms. Gina Michelle Santacroce ("Santacroce"), a customer who obtained a bail bond on behalf of a friend; and Mr. William Darryl May ("May"), an investigator in Petitioner's Bureau of Investigation. Petitioner also offered two exhibits, both of which were received in evidence.

Respondent testified in his own behalf and also presented the testimony of another witness: Mr. Benjamin Elisio Hernandez, Jr. ("Hernandez"), a bail bond agent who worked on resolving a forfeiture of the subject bail bond. Respondent also offered one exhibit, which was received in evidence.

At the conclusion of the hearing the parties were allowed ten days from the filing of the transcript within which to file their respective proposed recommended orders. The transcript of the final hearing was filed with the Division of Administrative Hearings on April 5, 2004. On April 15, 2004, Petitioner filed its Proposed Recommended Order containing proposed findings of fact and conclusions of law.

On May 6, 2004, a full twenty-one days past the deadline, and without benefit of either a motion seeking an extension of time or an explanation or excuse showing good cause for his tardiness, Respondent's counsel filed a document entitled Respondent's Proposed Order. This unexplained tardiness in

document submission reflects an indifference to or disregard for clear instructions designed to implement the fair and orderly disposition of administrative litigation. The undersigned is not disposed to excuse, disregard, or reward such unexplained conduct. Accordingly, Respondent's late-filed document entitled Respondent's Proposed Order, is being treated as an unauthorized document and is included in the record as an unauthorized document, the substance of which has not been considered by the undersigned.

#### FINDINGS OF FACT

1. At all times material to this case, Respondent Jean-Rene Joseph has been licensed in the State of Florida as a bail bond agent. At all times material to this case, Respondent worked as a bail bond agent with a bail bond company named America's Best Bail Bonds, Inc.

2. At approximately 2:30 or 3:00 a.m. on the morning of January 29, 2002, Santacroce contacted Respondent for the purpose of arranging bail for a friend of hers named John Raymond Moyer ("Moyer"). Moyer needed a bond in the amount of \$1,500.00. Respondent agreed to provide, and did provide, the requested bail bond for a fee of \$150.00. On the morning of January 29, 2002, Santacroce paid \$150.00 cash for the bail bond fee. Santacroce also agreed to furnish collateral for the bail bond issued on behalf of Moyer. In this regard, Santacroce

agreed that she would either deliver the title to a specified automobile as collateral, or she would make payments of \$250.00 per week until the bail bond on behalf of Moyer was fully collateralized.

3. In the early morning hours of January 29, 2002, Santacroce did not have an original certificate of title to an automobile with her. Instead, she gave Respondent a color photocopy of title number 50460657, which was a certificate of title to an automobile. The certificate showed title to a 1986 Chevrolet in the name of a registered owner named Oliver C. Todd ("Todd"). Handwritten information on the certificate indicated that the registered owner had sold the automobile to AAA National Auto Sales, who in turn had sold the automobile to Santacroce. Santacroce also had with her at that time an affidavit signed by Todd that authorized Santacroce to retrieve the subject automobile from a towing company, as well as a document from Festa Towing Service, Inc, itemizing towing and storage charges.

4. During the early morning hours of January 29, 2002, Respondent and Santacroce both signed a receipt document numbered 11122. Section 4 of that document describes the collateral or collateral documents as consisting of a promissory note and "Fl car title #50460657 or weekly payment of \$250.00."

5. Santacroce never made any payments towards collateralization of the subject bail bond. Moreover, Santacroce never delivered to Respondent the original of the certificate of title described above.

6. Less than two weeks later, Moyer was arrested and jailed on other criminal charges. Through another bail bond company, Moyer posted bail on the second arrest. Santacroce no longer wished to have any liability on the bail bond issued on January 29, 2002. Accordingly, she asked Respondent to "surrender" the bond and have Moyer returned to jail.

7. Moyer failed to appear for his court appearance that was guaranteed by the bail bond obtained by Santacroce. A bond forfeiture order was issued on February 12, 2002. Eventually, Moyer appeared, the forfeiture order was set aside, and the surety was discharged. Respondent's employer incurred expenses in the amount of \$50.00 to have the forfeiture order set aside.

8. At some point after the surety was discharged, Santacroce asked Respondent to return what Santacroce described as the certificate of title she had given to Respondent. Respondent could not return a certificate of title to Santacroce, because Respondent never received a certificate of title from Santacroce. Respondent never returned the photocopy of the certificate of title to Santacroce. That photocopy was

still in Respondent's possession as of the day of the final hearing.

CONCLUSIONS OF LAW

9. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this case. §§ 120.569 and 120.57(1), Fla. Stat.

10. In a case of this nature, Petitioner bears the burden of proving that the licensee engaged in the conduct, and thereby committed the violations, alleged in the charging instrument. 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 Section 120.57(1)(j), Florida Statutes ("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. . . .").

11. 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).

12. In determining whether Petitioner has met its burden of proof, it is necessary to evaluate Petitioner's evidentiary presentation in light of the specific factual allegations made in the charging instrument. Due process prohibits an agency from taking disciplinary action against a licensee based upon conduct not specifically alleged in the charging instrument. See 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); and Cottrill v. Department of Insurance, 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996).

13. Furthermore, "the conduct proved must legally fall within the statute or rule claimed [in the charging instrument] to have been violated." Delk v. Department of Professional Regulation, 595 So. 2d 966, 967 (Fla. 5th DCA 1992). In deciding whether "the statute or rule claimed [in the charging instrument] to have been violated" was in fact violated, as alleged by Petitioner, if there is any reasonable doubt, that doubt must be resolved in favor of the licensee. See Whitaker v. Department of Insurance and Treasurer, 680 So. 2d 528, 531 (Fla. 1st DCA 1996); Elmariah v. Department of Professional Regulation, Board of Medicine, 574 So. 2d 164, 165 (Fla. 1st DCA 1990); and Lester v. Department of Professional and Occupational Regulations, 348 So. 2d 923, 925 (Fla. 1st DCA 1977).

14. The Administrative Complaint in this case seeks to take disciplinary action against Respondent on the basis of allegations that Respondent has violated eight or more statutory provisions by failing to return to Santacroce "the collateral car title #50460657" which he allegedly received from Santacroce as collateral security for a bail bond Respondent wrote for Moyer. The sine qua non of a duty to return "car title #50460657" is proof that Respondent received "car title #50460657." There is no clear and convincing evidence that

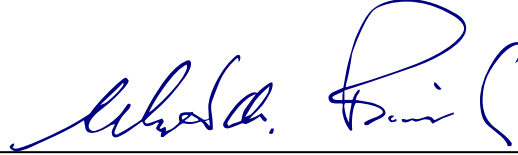


Respondent ever received "car title #50460657." Rather, the evidence establishes that Santacroce gave Respondent a photocopy of car title #50460657 and an unfulfilled promise to give him either the original title certificate or weekly cash payments of \$250.00. The photocopy of the subject certificate of title is a piece of paper with no value, much like a photocopy of a hundred dollar bill. Because the photocopy had no value, it did not constitute collateral security. And because there was nothing of value given to Respondent as collateral security, there was nothing Respondent was required to return when the bail bond was discharged.

#### RECOMMENDATION

On the basis of all of the foregoing, it is RECOMMENDED that the Administrative Complaint in this case be dismissed because there is no clear and convincing evidence that Respondent received "car title #50460657" or anything else of value as collateral security for the subject bail bond.

DONE AND ENTERED this 7th day of May, 2004, in Tallahassee,  
Leon County, Florida.



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MICHAEL M. PARRISH  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 7th day of May, 2004.

COPIES FURNISHED:

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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.