

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL)
SERVICES,)
)
Petitioner,)
)
vs.) Case No. 05-2322PL
)
STEVE TORRES,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case on October 5, 2005, in Tallahassee, Florida, before Stuart M. Lerner, a duly-designated Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: David J. Busch, Esquire
Angelique Knox, Qualified Representative
Department of Financial Services
Division of Legal Services
200 East Gaines Street
Tallahassee, Florida 32399-0333

For Respondent: Steve Torres, pro se
8735 Southwest 152nd Street
Apartment 294
Miami, Florida 33193

STATEMENT OF THE ISSUE

Whether Respondent's temporary bail bond agent license should be revoked based upon his no contest plea in Dade County

Circuit Court Case No. 95-1792, as alleged in the Administrative Complaint issued against him.

PRELIMINARY STATEMENT

On June 7, 2005, Petitioner issued an Administrative Complaint against Respondent alleging that his license should be revoked pursuant to Section 648.45(2)(a), (e), and (k), Florida Statutes (2005) because, "on or about November 6, 1995, [he] pled nolo contendere to the charge of Aggravated Battery - Pregnant Victim, a felony, in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, in Case No. 95-1792." Through submission of a completed and signed Election of Proceedings form, Respondent requested "a hearing pursuant to Section 120.57(1), Florida Statutes, to be held before the Division of Administrative Hearings." The matter was referred to DOAH on June 28, 2005, for the assignment of an administrative law judge to conduct the hearing Respondent had requested.

As noted above, the hearing was held on October 5, 2005.¹ Two witnesses testified at the hearing: Hazel Muhammad and Respondent. In addition, six exhibits (Petitioner's Exhibits 1 through 3, and Respondent's Exhibits 1 through 3) 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 with

DOAH of the hearing transcript) for the filing of proposed recommended orders.

The Transcript of the hearing (consisting of one volume) was filed with DOAH on November 3, 2005.

Petitioner and Respondent filed their Proposed Recommended Order on October 24, 2005, and November 17, 2005, respectively.

FINDINGS OF FACT

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

1. On or about February 6, 1995, a two-count criminal information was filed in Dade County Circuit Court Case No. 95-1972 against Respondent. Count I read as follows:

STEVE TORRES, on or about JANUARY 16, 1995, in the County and State aforesaid, did unlawfully and feloniously commit an aggravated battery upon [M. R.] by actually and intentionally touching or striking the person of [M. R.] against her will, while [M. R.] was pregnant and the defendant knew or should have known that she was pregnant, in violation of s. 784.045(1)(b) and s. 775.087, Fla. Stat., contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida.

Count II read as follows:

And the aforesaid Assistant State Attorney, under oath, further information makes that STEVE TORRES, on or about JANUARY 16, 1995, in the County and State aforesaid, did unlawfully, willfully and maliciously injure or damage certain personal property of [M. R.] by BREAKING THE WINDSHIELD OF

[M. R.'S] VEHICLE, such damage being more than two hundred dollars (\$200.00) but less than one thousand dollars (\$1,000.00), in violation of s. 806.13(1)(b)2. Fla. Stat., contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida.

2. On November 6, 1995, Respondent entered a plea of no contest to both counts of the information. Adjudication of guilt was withheld, and the entry of a sentence was suspended.

3. In the summer of 2004, Respondent submitted to Petitioner an application for a temporary bail bond agent license.

4. The application was submitted on an online application form developed by Respondent.

5. One of the questions on the form was: "Have you ever been charged, convicted, found guilty, or pleaded guilty or nolo contendere (no contest) to a crime under the laws of any municipality, county, state, territory or country, whether or not adjudication was withheld or a judgment of conviction entered?"

6. Respondent truthfully answered "yes" to this question.

7. Along with his application, Respondent submitted a "temporary appointment" form that had been completed by Jack Hope of No Limit Bail Bonds, Respondent's then-prospective employer.

8. On the form, Mr. Hope truthfully answered "yes" to the question: "Has the above applicant [Respondent] ever been convicted, found guilty, or pleaded guilty or nolo contendere to a felony?"

9. On October 18, 2004, Petitioner granted Respondent's application and issued him the temporary (18-month) bail bond agent license for which he had applied.

10. Petitioner subsequently determined that, in light of Respondent's criminal history record, the license was issued in error.

11. Although it had already issued Respondent a license, Petitioner, on October 28, 2004, attempted to rescind such action by issuing a Notice of Denial, which purported to deny Respondent's application for licensure because of his criminal history.

12. Respondent requested, and was granted, a proceeding pursuant to Section 120.57(2), Florida Statutes, on the matter.

13. Hearing Officer Beverly Hayes was assigned to conduct the proceeding.

14. On February 16, 2005, a hearing was conducted at which Hearing Officer Hayes received evidence and heard argument from the parties.

15. On April 1, 2005, Hearing Officer Hayes issued a Written Report and Recommended Order recommending that "a Final

Order be entered dismissing the Notice of Denial" inasmuch as the notice was "moot because [Petitioner had already] issued a license to [Respondent] prior to the filing of the Notice of Denial."

16. On May 20, 2005, such a Final Order was issued.

17. Prior thereto, on or about April 13, 2005, Petitioner had sent Respondent the following letter:

A review of your records has been made and it has been determined that an error has been made in processing your application. You were inadvertently issued a Temporary Bail Bond license although you did not meet the qualifications specified in Florida Statutes. Section 648.355(1)(c) states that a person may not be issued a Bail Bond license who has been convicted or plead[ed] 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 is entered.

On November 6, 1995, in the Circuit Court in and for Dade County, Florida, you entered a plea of nolo contendere to the charges of Aggravated Battery which was classified as a felony. Since you did not qualify for the license, it has been cancelled as of the issue date. You are not qualified to act in the capacity of a Bail Bond agent.

Please immediately return the license to the address shown below.

18. As noted above, on June 7, 2005, Petitioner issued an Administrative Complaint against Respondent alleging that his

license should be revoked based on his 1995 no contest plea in Dade County Circuit Court Case No. 95-1972.

CONCLUSIONS OF LAW

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

20. "A person may not act in the capacity of a bail bond agent or temporary bail bond agent or perform any of the functions, duties, or powers prescribed for bail bond agents or temporary bail bond agents under [Chapter 648, Florida Statutes 2005)] unless that person is qualified, licensed, and appointed as provided in [Chapter 648]." § 648.30(1), Fla. Stat. (2005).

21. Petitioner is the state agency that has been delegated the responsibility of overseeing the licensure of bail bond agents and temporary bail bond agents. § 648.26, Fla. Stat. (2005); and § 648.27, Fla. Stat. (2005).

22. Petitioner is authorized to issue a temporary bail bond agent license only if the "conditions" set forth in Section 648.355(1), Florida Statutes (2005) are met. These "conditions" include the following requirement:

The applicant is a person of high character and approved integrity and has never been convicted of 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 law

of any state, territory, or country, whether or not a judgment or conviction is entered.

§ 648.355(1)(c), Fla. Stat. (2005); see also § 648.44(8)(a), Fla. Stat. (2005)("A person who has been convicted of or who has pleaded guilty or no contest to a felony or a crime involving moral turpitude or a crime punishable by imprisonment of 1 year or more under the law of any state, territory, or country, regardless of whether adjudication of guilt was withheld, may not act in any capacity for a bail bond agency or participate as a director, officer, manager, agent, contractor, or employee of any bail bond agency or office thereof or exercise direct or indirect control in any manner in such agency or office or own shares in any closely held corporation which has any interest in any bail bond business. Such restrictions on engaging in the bail bond business shall continue to apply during a pending appeal.").

23. A temporary bail bond agent license is "effective for 18 months, subject to earlier termination at the request of the employer or if suspended or revoked by [Petitioner]."

§ 648.355(3), Fla. Stat. (2005).

24. Petitioner may revoke a temporary bail bond agent license if, among other reasons, the licensee "[l]acks one or more of the qualifications specified in this chapter for a license or appointment"; "[h]as demonstrated lack of fitness or

trustworthiness to engage in the bail bond business"; or "[h]as been found guilty of, or has 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 law of any state, territory, or country, whether or not a judgment or conviction has been entered." § 648.45(2)(a), (e), and (k), Fla. Stat. (2005).

25. Petitioner may take such 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 (2005).
§ 120.60(5), Fla. Stat. (2005).

26. 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. (2005).

27. At the hearing, Petitioner bears the burden of proving the existence of the grounds for revocation 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 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); Russell v. Department of Insurance, 668 So. 2d 276, 278 (Fla. 2d DCA 1996); Newberry v. Florida

Department of Law Enforcement, 585 So. 2d 500 (Fla. 3d DCA 1991); and Section 120.57(1)(j), Florida Statutes ("Findings of fact shall be based on a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute. . . .").

28. 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).

29. In determining whether Petitioner has met its burden of proof, it is necessary to evaluate its evidentiary presentation in light of the specific allegation(s) 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); and Luskin v. Agency for Health Care Administration, 731 So. 2d 67, 69 (Fla. 4th DCA 1999).

30. In the instant case, Petitioner has alleged in its Administrative Complaint that it is authorized, pursuant to Section 648.45(2), Florida Statutes (2005), to revoke Respondent's temporary bail bond agent license because, "[a]s a result of [Respondent's 1995] felony plea [in Dade County Circuit Court Case No. 95-1972], [he is] not qualified" to hold such a license.

31. At the final hearing, Petitioner established by clear and convincing evidence that Respondent entered such a plea and that he therefore is not qualified to be licensed as a temporary bail bond agent.

32. Accordingly, his temporary bail bond agent license should be revoked pursuant to Section 648.45(2), Florida Statutes (2005).²

RECOMMENDATION

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

RECOMMENDED that Petitioner issue a Final Order finding that Respondent is not qualified to hold a temporary bail bond agent license because of the no contest plea he entered in Dade County Circuit Court Case No. 95-1972 and revoking his license based on this finding of disqualification.

DONE AND ENTERED this 21st day of November, 2005, in Tallahassee, Leon County, Florida.



STUART M. LERNER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of November, 2005.

ENDNOTES

¹ The hearing was originally scheduled for August 31, 2005, but, at Respondent's request, was rescheduled for October 5, 2005.

² The fact that Petitioner knew or should have known of Respondent's no contest plea in Dade County Circuit Court Case No. 95-1972 at the time it granted Respondent's application for temporary licensure as a bail bond agent does not estop Petitioner from now seeking to revoke Petitioner's license based upon this conviction. See Donaldson v. Department of Health and Rehabilitative Services, 425 So. 2d 145, 147 (Fla. 1st DCA 1983)("[W]e find without merit appellant's argument that the Department's issuance of a license [to sell hearing aids] to appellant during the pendency of administrative proceedings through its own administrative error amounted to a 'ratification' of appellant's unlawful conduct."); and Cirigliaro v. Florida Police Standards and Training Commission, 409 So. 2d 80 (Fla. 1st DCA 1982)(Florida Police Standards and Training Commission not barred from revoking police officer's certificate based upon officer's pre-certification federal conviction that officer had disclosed to sponsoring law enforcement agency and that sponsoring law enforcement agency, during pre-certification conversation, had made known to Commission).

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.