

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA SURETY AGENTS )  
ASSOCIATION, INC., )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 06-0597RU  
 )  
DEPARTMENT OF FINANCIAL )  
SERVICES, )  
 )  
Respondent, )  
 )  
and )  
 )  
ATHENA SOLUTIONS, LLC, )  
 )  
Intervenor. )  
\_\_\_\_\_ )

FINAL ORDER

This cause came on for final hearing on March 6, 2006, in Tallahassee, Florida, before Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Harold F. X. Purnell, Esquire  
Rutledge, Ecenia, Purnell &  
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Tallahassee, Florida 32302-0551

For Respondent: R. Terry Butler, Esquire  
Department of Financial Services  
200 East Gaines Street  
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For Intervenor: D. Andrew Byrne, Esquire  
Cooper & Byrne  
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STATEMENT OF THE ISSUE

The issue is whether Respondent has a policy regarding the approval of on-line continuing education courses for bail bond agents, which are rules as defined in Section 120.52(15), Florida Statutes, and which have not been promulgated as required by Section 120.54(1)(a), Florida Statutes.

PRELIMINARY STATEMENT

On February 15, 2006, Petitioner Florida Surety Agents Association, Inc. (Petitioner) filed a Petition Challenging Agency Statement Defined as a Rule. Petitioner alleged that Respondent Department of Financial Services (Respondent) had violated Section 120.54(1)(a), Florida Statutes, by approving a continuing education school that provides bail bond agents with on-line courses, which do not have a supervising instructor or a monitored exam.

On February 17, 2006, the undersigned issued a Notice of Hearing, scheduling the hearing for March 6, 2006.

On February 24, 2006, Respondent filed a Motion to Dismiss for Lack of Evidence. On March 2, 2006, Petitioner filed an Amended Response to Motion to Dismiss. The motion was denied on the record during the hearing.

On March 3, 2006, Intervenor Athena Solutions, LLC (Athena), filed a Petition for Leave to Intervene and Motion for Continuance. On March 6, 2006, the undersigned issued an Order Granting Intervenor Status and Denying Motion to Continue.

On March 5, 2006, Respondent filed a Motion to Dismiss for Lack of Standing. The motion was denied on the record during the hearing.

When the hearing commenced, Petitioner did not present the testimony of any live witnesses. Petitioner offered 13 exhibits, P-A through P-M, which were accepted as evidence. Petitioner's Exhibit P-K was Hazel C. Muhammad's deposition in lieu of live testimony at hearing. Petitioner's Exhibit P-L was Dave Valentine's deposition in lieu of live testimony at hearing.

Respondent presented the testimony of one witness, Melissa Vilella. Respondent offered four exhibits, R-1 through R-4, which were admitted into the record as evidence.

Athena did not present any witnesses or offer any exhibits for admission into evidence.

The court reporter filed the hearing Transcript on March 24, 2006.

The Petitioner filed its Proposed Final Order on April 3, 2006. Respondent and Intervenor filed a Joint Proposed Final Order on April 4, 2006.

All citations hereinafter shall refer to Florida Statutes (2005) unless otherwise indicated.

FINDINGS OF FACT

1. Petitioner is a non-profit corporation that represents the interest of bail bond agents within the State of Florida. Petitioner is also a provider of continuing education courses for bail bond agents. Petitioner's courses are classes with supervising instructors, who ensure the quality of the course material and who verify the identity of students at least two times during each class. Petitioner's classes do not require an examination.

2. Petitioner's primary purpose is to advocate and promote, on behalf of its members, the professionalism of bail bond agents by improving, maintaining, and advancing the standards for bail bond agents, including licensing and educational requirements. Among the requirements for licensure renewal, bail bond agents must complete a minimum of 14 hours of continuing education courses every two years. Therefore, Petitioner has standing to bring this proceeding.

3. Respondent is a state agency with the duty and responsibility to regulate bail bond agents pursuant to Chapter 648, Florida Statutes, and related administrative rules. Respondent must approve all continuing education course providers and continuing education courses for bail bond agents.

4. On May 10, 2005, Respondent approved Athena, as an on-line provider of continuing education courses for bail bond agents.

5. On May 10, 2005, Respondent approved Athena's application for Melissa H. Villella to serve as the school official.

6. On July 14 or 15, 2005, Respondent approved the following on-line courses provided by Athena: Bail Bond Rules and Regs Refresher Course, Part I; Bail Bond Rules and Regs Refresher Course, Part II; Bail Bond Ethics; The New Castle Doctrine Laws; and Concealed Carry Rights and Responsibilities. The five applications for these courses did not refer to a supervising instructor or a monitored examination.

7. The On-Line Training Course Checklist for each course states as follows in relevant part:

Provider: Athena Solutions, LLC d/b/a  
OnDemandCE

\* \* \*

2. Information pertaining to subject:  
a. On-Line Access Instructions: Go to:  
<http://ondemandce.coursehost.com/>

\* \* \*

c. Sample Exams: All exam questions are provided in the text copy . . . of the course. Two banks of questions are provided for each of the four quarterly exams. A total of 50 questions are provided, 25 per bank. However, the OnDemandCE learning

system randomizes all quizzes, including question order and answer order, so that no two quizzes are ever the same. An unlimited number of quizzes will be generated from the questions written in this course.

\* \* \*

g. Student Identity, Assessment and Control:

When students enter the OnDemandCE learning system, a login form must be filled out in order to enter any course. The system will require the agent to provide his or her bail license number, full name, address, email address, and phone number. In addition, each student must agree to the following Terms of Use to enter the course:

"By accepting these terms of service, you acknowledge your understanding that you must complete this entire course and achieve a passing grade of 70% or greater in order to receive the defined credit hours. You also agree to read the entire contents of this course, including all corresponding laws and rules. No partial credit will be given for this course.

Throughout this course, you will be tested for comprehension of course material through graded quizzes. By accepting these terms of service, you acknowledge your understanding that the on-line course testing must be completed unassisted by any person, the course material or other materials. You also acknowledge understanding that violation of the above said rule shall result in the loss of course credit and administrative sanction by the Florida Department of Financial Services.

Upon completion of this course with a passing grade of 70% or better and confirmed payment of all applicable course fees, the system administrator will submit earned

credit hours to the Department of Financial Services Agent Education Database within 30 days. You may verify your credit hours at: [https://dice.fldfs.com/public/pb\\_index.asp](https://dice.fldfs.com/public/pb_index.asp)

By accessing any information beyond this page, you agree to these Terms of Use in full."

Once the student information is submitted and the terms of use are accepted, the OnDemandCE learning system issues the student a temporary license to take the course. The temporary licensee is tracked by the OnDemandCE learning system throughout the entire course.

Students have unlimited access to the course during the temporary license term, but must login each time to re-establish student identity. The OnDemandCE learning system will not allow students to advance to the lesson assessment or to the next lesson until the student has completed the current lesson material.

Finally, the OnDemandCE learning system will verify that the student has completed each lesson assessment and achieved a passing grade of 70% or greater before issuing a certificate of completion. The course administrator will review and evaluate each student's course progress and test results before his or her credit is submitted to the DFS Education System.

### 3. Procedures for Marketing Course

- a. Student identity is assessed and controlled upon registration and throughout the duration of the course. See explanation under 2(g).
- b. To respond to questions regarding course requirements and materials, students will be provided access to the School Official on a ratio of 30:1. Through the OnDemandCE

learning system, course enrollment will be limited to 30 students to ensure that the instructor/student ratio is not exceeded.

c. Student progress is assessed through quarterly quizzes. Upon completion of each quiz, the OnDemandCE learning system will notify the student of their score. Students must score at least 70% in order to pass the course and receive a certificate of completion.

d. On-line testing: See 2(g), and student acknowledgement: See 3(c).

8. The syllabus for each of Athena's on-line courses includes the following statements in pertinent part:

#### Student Responsibilities

Students must complete this entire course and achieve a passing grade of 70% or greater on internal tests in order to receive credit hours. Students must read the entire contents of this course, including corresponding laws. Throughout this course, students will be tested for comprehension of course material through graded quizzes.

Students are required to acknowledge their understanding that the on-line course testing must be completed unassisted by any person, the course material or other materials. Each student must also acknowledge understanding that a violation of such standards shall result in the loss of course credit and administrative sanction by the Florida Department of Financial Services.

\* \* \*

#### On-line Assistance

Course assistance is available to each student registered and active in this course. The course administrator may be contacted through email available from the On-Demand CE system and will receive assistance during regular business hours. Messages received after regular business hours will be returned the following day. Live customer service can be reached at (850) 906-9111.

9. Neither the On-Line Training Course Checklist nor the syllabus for any of Athena's courses refers to a supervising instructor, a monitor, a monitor group, or a monitored examination. The On-line Training Course Checklist states that students have access to a school official for course assistance. The On-line Training Course Checklist refers to a system or course administrator who will evaluate tests and report the results to Respondent. The syllabus for each course states that students have on-line access to the course administrator for course assistance.

10. On July 25, 2005, Ms. VILLELLA sent Respondent a memorandum by e-mail. The purpose stated was to reassure Respondent that Athena's on-line system was "a fully monitored system." The letter explained that the "system monitors each student's progress through the course and through all exams." Additionally, the letter asserts that Ms. VILLELLA monitors "the integrity of the OnDemandCE system to ensure that the application remains stable, secure, and operational." Finally,

the letter states that "no other interactive on-line provider is required to send their students outside of their on-line system for testing, nor are bail agents required to take any quiz in a classroom course."

11. On July 26, 2005, Ms. Vilella sent Respondent a memorandum by e-mail. The memorandum refers to administrative rules that Ms. Vilella asserts support her position that the on-line internal testing of an interactive on-line self-study course is equal to a monitored exam.

12. Lisa Miller, Respondent's Chief of Staff, wrote a letter dated September 7, 2005, to Janet Collins, president of the Bail Agents Independent League of Florida. The letter stated that Florida Administrative Code Rule 69B-228.080 formed the legal basis for approving on-line continuing education courses for bail bond agents. Ms. Miller also indicated that Ms. Vilella was Athena's school official and not its instructor. The September 7, 2005, letter does not contain any reference to a supervisory instructor or monitored exams.

13. On January 9, 2006, Ms. Vilella sent Respondent a memorandum by e-mail. The memorandum cites to administrative rules that, according to Ms. Vilella, authorize the on-line internal testing of an interactive on-line self-study course as the equivalent of a monitored exam.

14. In a letter to Petitioner's counsel dated January 10, 2006, Respondent's Chief of the Bureau of Licensing, Hazel Muhammad, responded to a request for public records regarding the name of an approved supervising instructor for Athena. The letter did not state that Athena was not required to have an approved supervising instructor. Instead, the January 10, 2006, letter stated that Respondent's records did not contain the name of an approved supervising instructor for Athena's on-line courses. At that time, Athena had withdrawn an initial application for a supervising instructor with the intent to file another such application.

15. The January 10, 2006, letter from Ms. Muhammad stated that Respondent did "not have any public records for monitored examinations for bail bond continuing education courses." The letter did not state that such courses do not require a monitored exam.

16. On January 25, 2006, Respondent approved the application of Warren Eugene Stewart as the supervising instructor for Athena's on-line continuing education courses.

17. Ms. Villella is the owner and operator of Athena. She developed the course material that is contained in the on-line courses. Prior to forming Athena in 2005, Ms. Villella worked for Petitioner for over six years. During her employment with Petitioner, Ms. Villella assisted in the development of

continuing education courses and coordinated the presentation of the courses throughout the State of Florida.

18. Athena's on-line courses use the Learning Management System. The system is offered through a vendor known as Mind Flash.

19. When students go on-line to study the course material or to take a quiz, Ms. Villella is able to observe the amount of time spent on each page of content material and/or each test. She is able to determine how the students answer the questions on the tests. Ms. Villella stays in contact with students through e-mail. She verifies that the students successfully complete the course and advises Respondent of their passing grades.

20. There is no documentation showing that Respondent has approved Ms. Villella as a monitor or part of a monitor group for Athena's on-line examinations. Ms. Villella believes that she has Respondent's tacit approval as a monitor based on her communications with Respondent's staff regarding Athena's on-line internal testing process.

21. A course provider of an interactive on-line course with on-line internal testing, to include Athena, cannot confirm the identity of the person taking an on-line examination. The provider must except the student's on-line acknowledgement that

he or she is not being assisted by another person or using a textbook or other material to answer test questions.

22. Athena's supervising instructor only becomes involved if a student has a content question that Ms. Villella cannot answer. The supervising instructor acts as a consultant with expertise in content areas.

23. As of the date of the hearing, at least 51 bail bond agents had received credit for taking Athena's continuing education courses.

24. On February 28, 2006, Petitioner took the deposition of Hazel Muhammad, Respondent's Bureau Chief of Licensing. Her deposition was accepted as deposition testimony in lieu of live testimony at the hearing. The deposition, as a whole, creates the impression that the witness was being interrogated to establish her understanding of the rules related to supervising instructors and monitored examinations for bail bond agent continuing education courses. The deposition by its terms did not elucidate preexisting agency policies on these topics, which were not already established by statute or adopted rule.

25. When questioned about specific rules, Ms. Muhammad stated that that a supervising instructor could monitor an on-line continuing education course. According to Ms. Muhammad, the rules allow Respondent to determine whether an on-line course is monitored based on an applicant's outline that

describes the on-line monitoring process, including the monitoring of the on-line tests. Ms. Muhammad would not agree that the rules necessarily distinguish between a monitored examination and an on-line examination depending on the physical presence or absence of a monitor.

26. When questioned about Athena's application, Ms. Muhammad testified that Athena's on-line courses, as initially approved by Respondent, did not reflect supervising instructors. She also testified that the on-line checklists for Athena's courses did not refer to monitored or unmonitored examinations. Applying the rules as she interpreted them, Ms. Muhammed concluded that Athena's courses met the requirements for internal on-line testing and monitored examinations.

#### CONCLUSIONS OF LAW

27. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding pursuant to Section 120.56(4), Florida Statutes, which states as follows in relevant part:

(4) CHALLENGING AGENCY STATEMENTS  
DEFINED AS RULES; SPECIAL PROVISIONS.--

(a) Any person substantially affected by an agency statement may seek an administrative determination that the statement violates s. 120.54(1)(a). The petition shall include the text of the statement or a description of the statement

and shall state with particularity facts sufficient to show that the statement constitutes a rule under s. 120.52 and that the agency has not adopted the statement by the rulemaking procedure provided by s. 120.54.

(b) . . . If a hearing is held and the petitioner proves the allegations of the petition, the agency shall have the burden of proving that rulemaking is not feasible and practicable under s. 120.54(1)(a).

28. Section 120.52(15), Florida Statutes, states as follows:

(15) "Rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule. The term also includes the amendment or repeal of a rule. . . .

29. Section 120.54(1)(a), Florida Statutes, provides as follows in relevant part:

(1) GENERAL PROVISION APPLICABLE TO ALL RULES OTHER THAN EMERGENCY RULES.--

(a) Rulemaking is not a matter of agency discretion. Each agency statement defined as a rule by s. 120.52 shall be adopted by the rulemaking procedure provided by this section as soon as feasible and practicable.

30. Petitioner has standing to bring this proceeding. See NAACP, Inc. v. Florida Board of Regents, 863 So. 2d 294 (Fla. 2004); Coalition of Mental Health Professions v. Department of

Professional Regulation, 546 So. 2d 27 (Fla. 1st DCA 1989);

Florida Home Builders Association v. Department of Labor and  
Employment Security, 412 So. 2d 351 (Fla. 1982).

31. To understand the significance of the petition in this case, resort is made to certain statutory provisions and rules that deal with the subject. The first statute is Section 648.385, Florida Statutes, which states as follows in pertinent part:

648.385 Continuing education required; application; exceptions; requirements, penalties.--

(1) The purpose of this section is to establish requirements and standards for continuing education courses for persons authorized to write bail bonds in this state.

(2)(a) Each person subject to the provisions of this chapter must complete a minimum of 14 hours of continuing education courses every 2 years in courses approved by the department. . . .

\* \* \*

(3)(a) Any bail-related course developed or sponsored by any authorized insurer or recognized bail bond agents' association, or any independent study program of instruction, subject to approval by the department, qualifies for the equivalency of the number of classroom hours assigned to such course by the department. However, unless otherwise provided in this section, continuing education credit may not be credited toward meeting the requirements of this section unless the course is provided by classroom instruction or results in a monitored examination.

32. Section 648.386, Florida Statutes, provides as follows  
in relevant part:

(2) SCHOOLS AND CURRICULUM FOR CONTINUING EDUCATION SCHOOLS.--In order to be considered for approval and certification as an approved limited surety agent and professional bail bond agent continuing education school, such entity must:

(a) Provide a minimum of three continuing education classes per calendar year.

(b) Submit a course curriculum to the department for approval.

(c) Offer continuing education classes which are comprised of a minimum of 2 hours of approved coursework and are taught by an approved supervising instructor or guest lecturer approved by the entity or the supervising instructor.

\* \* \*

(4) INSTRUCTOR'S DUTIES AND QUALIFICATIONS.--

(a) Each course must have a supervising instructor who is approved by the department. The supervising instructor shall be present at all classes. The supervising instructor is responsible for:

1. All course instructors.
2. All guest lecturers.
3. The course outlines and curriculum.
4. Certification of each attending limited surety agent or professional bail bond agent.
5. Completion of all required forms.
6. Assuring that the course is approved.

Either the entity or the supervising instructor may approve guest lecturers.

(b) In order to obtain department approval as a supervising instructor, the following qualification must be met:

1. During the past 15 years, the person must have had at least 10 years' experience as a manager or officer of a managing general agent in this state as prescribed in s. 648.388;

2. During the past 15 years, the person must have had at least 10 years' experience as a manager or officer of an insurance company authorized to and actively engaged in underwriting bail in this state, provided there is a showing that the manager's or officer's experience is directly related to the bail bond industry;  
or

3. The person has been a licensed bail bond agent in this state for at least 10 years.

\* \* \*

(c) In order to obtain department approval as an instructor or guest lecturer, the person must be qualified by education or experience in the specific area of instruction as prescribed by department rules.

\* \* \*

(e) The department shall adopt rules necessary to carry out the duties conferred upon it under this section.

33. Florida Administrative Code Rule 69B-228.010 states as follows:

69B-228.010 Purpose. The purpose of this rule chapter is to establish requirements and standards for continuing education courses and records for persons:

(1) Licensed to solicit or sell insurance or act as limited surety or bail bond agents in this state;

(2) Licensed to adjust insurance claims in this state; and

(3) Authorized to offer or teach related coursework in this state.

34. Florida Administrative Code Rule 69B-228.020 states as follows:

69B-228.020 Scope.

(1) This rule chapter shall apply to:

(a) All types and classes of agent and customer representative licenses for which an examination for licensure is required before consideration of any examination exception;

(b) All licensed adjusters;

(c) Bail bond agents; and

(d) All course providers, contact persons, instructors, school officials, supervising instructors, and monitors of continuing education courses.

(2) This rule chapter shall govern the implementation and enforcement of continuing education requirements, pursuant to Sections . . . 648.385, 648.386 . . . F.S.

35. Florida Administrative Code Rule 69B-228.030 states as follows, in relevant part:

69B-228.030 Definitions. For purposes of these rules, the following definitions shall apply:

\* \* \*

(5)(a) "Class" means the study method of a course designed to be presented to a group of licensees using lecture, video, satellite, or other audio-visual presentation material which has an approved instructor, supervising instructor or other approved means of oversight and delivery present in the classroom during the presentation.

\* \* \*

(6) "Completion," when used in the context of:

(a) Self-study, means a passing grade of seventy percent (70%) or better on a monitored examination.

(b) "Interactive On-line" means achievement of seventy percent (70%) or better on an internal testing program administered by computer on line or via the internet and that is certified by the provider to the Department with each application for course approval.

(c) Class, means attendance for the full amount of time approved for each course.

\* \* \*

(9) "Course" shall mean any of the following which have been approved by the Department for the purpose of complying with continuing education requirements:

(a) Any class or seminar for

\* \* \*

5. Professional bail bond agents.

(b) Any self-study program for:

\* \* \*

3. Professional bail bond agents,

\* \* \*

(10) "Course Offering" means a unique offering of an approved classroom or seminar course, or a monitored exam of a self-study course, which includes a specific location, date(s), and time for the course or exam to be held; or a location, time and frequency of a monitored exam.

\* \* \*

(17) "Formal program of learning" means:

- (a)1. A structured class with an instructor and detailed outline, or
2. A self-study course with text and structured lesson plans or study guide and exam.
3. Self-study may include videos or cassette tapes.

\* \* \*

- (19)(a) "Hour" means sixty (60) minutes of class or seminar time . . .
- (b) For self-study courses, hour means fifty (50) minutes of time that is determined by the Department to be necessary to study text material in order to successfully complete the monitored final examination or on-line internal testing.

\* \* \*

(24) "Interactive On-line" means a self-study course that is delivered to and taken by a student through the use of computer based technology with a connection to either a host home-office computer or the internet.

(25) "Monitor group" means a group designated by a course provider in an eligible occupational class, or an organized eligible group of individuals with a central coordinating person, approved by the Department to monitor self-study exams for approved course providers.

(26) "Monitored examination" means an objective measurement of the comprehension of a self-study program through a written or computer based examination unassisted by any person, textbooks, or other material under the supervision of a monitor from an approved monitor group.

\* \* \*

(29) "On-line internal testing" means objective assessment and measurement of the comprehension of an interactive on-line

self-study program through examination unassisted by any person, text book, access to on-line study program materials, or other materials during the exam.

\* \* \*

(36) "School official" means a natural person appointed by an approved course provider for other than bail bond agent courses . . . .

\* \* \*

(38) "Self-study course" means a course designed to be studied independent of an instructor's presence through:

(a) Written, audio, or video materials, or

(b) Computer technology, including disks, on-line programs, or internet programs.

(39) "Seminar" means a course designed to be presented:

(a) Using lecture, video, satellite, or other audio-visual presentation material by individuals with special expertise that has an approved speaker or instructor present during each presentation.

\* \* \*

(41) "Supervising Instructor" means a natural person who is:

(a) Approved by the Department,

(b) Appointed or employed by an approved course provider of bail bond agent continuing education courses, and

(c) Who may be responsible for one (1) or more of the following activities of a Bail Bond Agent Course:

1. Certification to the supervising instructor of each attending bail bond agent;

2. Assuring that the course is approved prior to instruction;

3. Instruction of courses; and

4. Collection and transfer of course completion and attendance records to the supervising instructor. (Emphasis added).

36. Florida Administrative Code Rule 69B-228.040 states as follows in pertinent part:

69B-228.040 Course Providers.

\* \* \*

(3) General requirements.

\* \* \*

(c) Providers may have a policy of providing a complimentary classroom course for students who fail a monitored exam or interactive on-line testing program.

\* \* \*

(5) Course providers offering courses for bail bond agents shall:

\* \* \*

(d) Offer classes that are taught by an approved supervising instructor . . . . (Emphasis added).

37. Florida Administrative Code Rule 69B-228.060 provides as follows in pertinent part:

69B-228.060 Instructors and Supervising Instructors.

(1) Continuing Education Courses. Instruction in continuing education courses shall be provided by instructors who possess the following qualifications:

\* \* \*

(2)(a) Certification of the instructor's experience or education shall

be furnished by the sponsoring course provider or the instructor . . .

(b) Certification shall be received by the Department or its designee and approved prior to the beginning of the course.

38. Florida Administrative Code Rule 69B-228.080 states as follows in pertinent part:

69B-228.080 Course Approval; Requirements; Guidelines.

(1)(a) Each course shall be approved by the Department prior to the initial course offering and before any advertisement of the course.

\* \* \*

(11) Self-Study Courses; Supplemental Requirements.

(a) Course Approval.

\* \* \*

3. Self-Study course applications, for other than interactive on-line; software-based or other computer-based courses, shall include:

\* \* \*

c. A copy of the detailed instructions to staff, school official, students, and monitor group for the monitoring process;

4. Interactive on-line, software-based, or other computer based training course application shall include:

a. On-line access for the Department to review the course or a copy of course software with instructions;

\* \* \*

d. Details of how access is controlled;

e. For courses with monitored exams, a copy of the detailed instructions to staff, school officials, students, and monitor group for the monitoring process.

f. For interactive on-line courses without a monitored exam, information which demonstrates that:

(I) Student identity is assessed and controlled upon registration and throughout the duration of the course;

(II) Students are provided access to qualified experts or other persons authorized by the provider who can respond to questions regarding course requirements and material. Such qualified experts must be available on a ratio of one (1) per every thirty (30) students enrolled at any one time;

(III) Student's progress is assessed and feedback is provided to the student upon completion of approximately each quarter (25%) of course material.

(IV) On-line testing is administered to determine the level of the student's comprehension of course material. Students are required to acknowledge their understanding that the on-line course testing must be completed unassisted by any person, the course material, or other materials. The student acknowledgement shall also include the student's understanding that a violation of such standards shall result in the loss of course credit and administrative sanction by the Florida Department of Financial Services.

(b) Monitor Group Approval.

1. For other than interactive on-line self-study courses, the monitor group and the course shall be submitted by the provider to the Department and shall be approved by the Department, pursuant to Rule 69B-228.080, F.A.C., prior to distribution or advertisement of course material to licensees.

\* \* \*

4. The monitor shall:
  - a. Open the sealed examination envelop and observe the student taking the examination;
  - b. Complete a signed written document from the provider stating:

\* \* \*

(IV) The student did not use any study material to complete the examination.,

(V) The student was not assisted by the monitor or anyone else.

(VI) That the monitor verified the identification of the student.

(c) Self-study examinations.

1. Self-study examination questions for other than interactive on-line courses shall be referenced back to the text. . . .

\* \* \*

3. A licensee must achieve a grade of seventy percent (70%) or more on a monitored examination taken through a monitoring process approved by the Department or on the internal testing approved for an interactive on-line course.

4. Instructions to resident licensees of Florida shall be included and prominently located in each course order form or packet of course material sold for other than interactive on-line courses including the following information:

a. The location, dates, and times that the monitored examination will be offered,

\* \* \*

e. A statement of personal responsibility for the student to sign stating that the student completed the exam without assistance.

\* \* \*

5. Instructions to non-resident licensees of Florida shall include:

\* \* \*

f. A statement of the student's personal responsibility that the student would be required to sign and that would be provided to the student and retained by the approved course provider as part of the course completion records.

g. The examination sealed with a resistant seal or wrapping with instructions:

(I) That the examination shall not be opened by anyone other than the monitor,

(II) That the monitor shall send the examination to the approved course provider.

6. Monitors for exams for other than an interactive on-line shall:

a. Be present to observe the exam and shall mail a monitor affidavit to the provider or school official.

b. Collect the disk, CD, or other exam document for other than interactive on-line programs and mail or deliver it to the approved course provider, or school official for grading certification.

7. Self-study examination may be given in the student's place of business if the approved course provider arranges for the approved monitor group to provide a monitor during the examination for other than interactive on-line courses. (Emphasis added).

39. Florida Administrative Code Rule 69B-228.090 states as follows in relevant part:

69B-228.090 Course Offerings and Attendance Records.

(1) Class or Seminar Offerings.

\* \* \*

(2) Self-Study Exam Offerings.

(a) The provider of each self-study course other than approved interactive on-line courses shall furnish a completed Form DFS-H2-397, Schedule of Course Offerings . . . for each examination location in Florida.

(b) Examination locations:

1. Inside Florida.

\* \* \*

2. Out-of-state for non-resident licensees.

\* \* \*

(4) Class, Seminar, or Examination Attendance.

(a) The student's photo ID license or driver's license shall be used for verification of identity by the course provider for each offering.

(b) A Roster submitted to the Department that includes the name of a licensee who was not in attendance shall be grounds for administrative action by the Department. (Emphasis added).

40. Florida Administrative Code Rule 69B-228.100 states as follows in pertinent part:

69B-228.100 Certification of Students.

(2)(a) Classroom study method courses shall be attended or completed in their entirety in order for a licensee to receive credit.

\* \* \*

(3)(a) Seminar study method courses will be evaluated for the total number of hours credit possible at the event.

\* \* \*

(7)(a) Each approved course provider shall maintain accurate attendance records containing:

1. The name, date, and location of the offering;
2. Documentation that an ID was checked;
3. Name and license ID number of licensee;
4. Proof of at least two (2) attendance checks for class and seminar courses over four (4) hours; and
5. A statement signed by the instructor or school official that the attendance records are correct.

41. Florida Administrative Code Rule 69B-228.110 states as follows in pertinent part:

69B-228.110 Textbooks.

\* \* \*

(5) Each self-study course other than approved interactive on-line or other on-line or internet courses shall be sold with the approved textbook and supplemental material. (Emphasis Added).

42. Florida Administrative Code Rule 69B-228.130 states as follows in relevant part:

69B-228.130 Facilities.

(1) Each course, seminar, or self-study examination shall be conducted in a classroom or other facility which is adequate to comfortably accommodate the faculty and the number of participants.

Supervising Instructor

43. The first issue is whether Respondent has a policy to approve on-line continuing education courses for bail bond

agents without a supervising instructor. There is no agency statement, written or oral, to that effect.

44. Athena is the only entity that has applied to become an on-line continuing education provider for bail bond agents. Respondent approved Athena's application to be a provider and all of Athena' on-line courses before it approved Mr. Stewart as the supervising instructor. However, the record indicates that Respondent's approval of Athena's on-line courses prior to the approval of the supervising instructor was an inadvertent mistake, which was corrected prior to hearing.

45. Respondent's approach regarding supervising instructors for on-line bail bond agent continuing education courses is to follow the requirements of Florida Administrative Code Rules 69B-228.030(41), 69B-228.040(5), 69B-228.060(1)(b), 69B-228.060(2)(a), and 69B-228.060(2)(b).

#### Monitored Examination

46. The next issue is whether Respondent has a policy to approve on-line continuing education courses for bail bond agents without a monitored examination. Once again, Respondent has not made a written or verbal statement to that effect.

47. Florida Administrative Code Rule 69B-228 deals with self-study courses with monitored examinations and interactive on-line self-study courses with on-line internal testing. The former is a course presented through written, audio, or video

materials, or through computer technology, including computer disks, on-line programs, or internet programs, all of which require a monitored examination under the personal supervision of a monitor from an approved monitor group. See Fla. Admin. Code R. 69B-228.080(11)(a)4.e. The latter is a course presented through an interactive on-line program with on-line internal testing, which does not rely on the supervision of a monitor from an approved monitor group. See Fla. Admin. Code R. 69B-228.080(11)(a)4.f.

48. A monitored examination requires a monitor from an approved monitor group to personally identify a student during the examination and to confirm that the student is not receiving help on the test from anyone or from any written material. See Fla. Admin. Code R. 69B-228.030(25), 69B-228.030(26), 69B-228.080(11)(b)4., and 69B-228.080(11)(c)6.

49. On the other hand, internal testing approved for an interactive on-line course does not require the presence of a monitor during an examination but does require an on-line acknowledgement by students that they are who they say they are and that they are not receiving help on the test from anyone or any written material. See Fla. Admin. Code R. 69B-228.030(7), 69B-228.030(24), 69B-228.030(29), and 69B-228.080(11)(a)4.f.

50. In this case, Athena's internal testing process is analogous to the requirements for interactive on-line courses without a monitored examination. The rules clearly authorize such courses. The problem here is that Respondent has attempted to interpret its rules, and in doing so, has concluded that Athena's internal testing program meets the requirements for interactive on-line courses without a monitored examination, while also meeting the requirements for a monitored examination. This interpretation does not establish a separate policy related to unmonitored exams for bail bond agent continuing education courses.

51. In Environmental Trust v. State Department of Environmental Protection, 714 So. 2d 493, 498 (Fla. 1st DCA 1998), the court found:.

An agency statement explaining how an existing rule of general applicability will be applied in a particular set of facts is not itself a rule. If that were true, the agency would be forced to adopt a rule for every possible variation on a theme, and private entities could continuously attack the government for its failure to have a rule that precisely addresses the facts at issue. Instead, these matters are left for the adjudication process under section 120.56, Florida Statutes.

52. Respondent's explanation of its continuing education rules in this case is drawn from Ms. Muhammed's testimony. She stated that Athena's courses complied with the rule requirements

for interactive on-line courses with internal on-line tests and for monitored examinations. She never took the position that a monitored examination was not required for bail bond agent continuing education courses.

53. In summary, whether Athena's application could be accepted based upon compliance with an internal on-line testing process or a monitored examination is a matter to be determined through the adjudicatory process. The agency response does not constitute the establishment of substantive policy through an unadopted rule. See § 120.57(1), Fla. Stat.; Environmental Trust v. State Department of Environmental Protection, 714 So. 2d at 498.

54. Petitioner has not met its burden of proving that Respondent has a policy, that meets the definition of a rule, to approve bail bond agent continuing education courses without a monitored exam.

ORDER

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

ORDERED that:

Respondent's Petition Challenging Agency Statement Defined a Rule is dismissed.

DONE AND ORDERED this 19th day of April, 2006, in  
Tallahassee, Leon County, Florida.

*Suzanne F. Hood*

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a Notice of Appeal with the agency clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the appellate district where the party resides. The Notice of Appeal must be filed within 30 days of rendition of the order to be reviewed.