Before the
Administrative Hearing Commission
State of Missouri

MICHAEL CHERRY, Petitioner, vs. DIRECTOR OF DEPARTMENT OF INSURANCE, FINANCIAL INSTITUTIONS AND PROFESSIONAL REGISTRATION, Respondent.	)))))))))))	No. 08-1917 DI

DECISION

We deny the application of Michael Cherry to renew his bail bond agent license because he pled guilty to a felony within 15 years of when he was originally issued the license on January 18, 2005.

Procedure

On November 6, 2008, Cherry filed a complaint to appeal the denial of his application. The Director of the Department of Insurance, Financial Institutions and Professional Registration ("the Director") filed an answer on November 20, 2008. We held a hearing on March 12, 2009. Cherry represented himself. Tamara Kopp represented the Director. The reporter filed a transcript on March 31. 2009.

Findings of Fact

1. On March 4, 2002, the Prosecuting Attorney of Cass County filed an information in the Circuit Court of Cass County charging that:

> between the date of November 1, 2000 and April 30, 2001, one Michael Dale Cherry, in violation of Section 568.040, RSMo, committed the class D felony of non-support . . . in that between the dates of November 1, 2000 and April 30, 2001, 6 months within a 12 month period of April, 2000 and April, 2001 in the County of Cass the defendant knowingly failed to provide, without good cause, adequate support for JESSICA LYNN HIBDON CHERRY, the defendant's minor children for whom defendant was legally obligated to provide such support.[[1]]

2. On April 15, 2002, the court found Cherry guilty upon his plea of guilty to the charge in the information, a Class D felony. The court suspended the imposition of sentence and placed Cherry on unsupervised probation for five years.

3. Cherry successfully completed probation and is no longer in arrears for child support.

4. On January 18, 2005, the Director issued a bail bond agent license to Cherry. The license expired on January 1, 2008.[2]

5. Cherry submitted his renewal application.[3] The Director denied the application on October 7, 2008.

Conclusions of Law

We have jurisdiction to hear Cherry's complaint.[4] The applicant has the burden to show that he or she is entitled to licensure.[5] We decide the issue that was before the Director,[6] which

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[1]Ex. 2.

[2]The Director alleged in his answer that Cherry's bail bond agent license expired on December 31, 2007. The affidavit that the Director offered as Exhibit A contains the averment that the license expired on January 1, 2008. We base our finding on the affidavit.

[3]The record does not show when Cherry applied for renewal.

[4]Section 621.045. Statutory references are to RSMo Supp. 2008, unless otherwise noted.

[5]Section 374.750 and § 621.120, RSMo 2000.

[6]***Department of Soc. Servs. v. Mellas***, 220 S.W.3d 778 (Mo. App., W.D. 2007).

is the application. We exercise the same authority that has been granted to the Director.[7] Therefore, we simply decide the application as if for the first time.[8] When an applicant for renewal files a complaint, the agency's answer provides notice of the grounds for denial of the application.[9]

Section 374.730 provides:

> All licenses issued to bail bond agents and general bail bond agents under the provisions of sections 374.700 to 374.775 shall be renewed biennially, which renewal shall be in the form and manner prescribed by the department and shall be accompanied by the renewal fee set by the department.

Cherry's license expired on January 1, 2008. Although neither Cherry's application nor the date he submitted it to the Director is in evidence, both parties referred to the Director's decision as pertaining to an application to "renew" Cherry's license. The parties provide no explanation of how an application to "renew" can be considered after the license has expired. However, 20 CSR 700-6.100 provides:

> (3) Failure to Timely Apply for Renewal. If a general bail bond agent, bail bond agent or surety recovery agent fails to file for renewal of his/her license on or before the expiration date, the department will issue a renewal of the license upon payment of a late renewal fee of twenty-five dollars ($25) per month or fraction of a month after the renewal deadline. In the alternative to payment of a late renewal fee, the former licensee may apply for a new license except that the former licensee must comply with all provisions of section 374.710 and 374.784, RSMo regarding issuance of a new license.

Because the Director denied the application on its merits and not on the basis of failure to pay the late renewal fee, we conclude that Cherry submitted the renewal application after his license expired and he paid the late renewal fee.

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[7] ***J.C. Nichols Co. v. Director of Revenue***, 796 S.W.2d 16, 20 (Mo. banc 1990).
[8] ***State Bd. of Regis'n for the Healing Arts v. Finch***, 514 S.W.2d 608, 614 (Mo. App., K.C.D. 1974).
[9] ***Ballew v. Ainsworth***, 670 S.W.2d 94, 103 (Mo. App., E.D. 1984).

The Director sets forth two reasons why Cherry's guilty plea to felony non-support should be the basis for denying Cherry's renewal application. First, we have the discretion to deny the renewal application for a guilty plea pursuant to § 374.755.1(2), as made applicable by § 374.750.[10] Second, Supreme Court Rule ("Rule") 33.17(c)(1), as incorporated within § 374.715, requires that we deny the renewal application with no exercise of discretion.

I. Discretionary Refusal

Section 374.750[11] provides:

> The department may refuse to issue or renew any license required pursuant to sections 374.700 to 374.775 for any one or any combination of causes stated in section 374.755. The department shall notify the applicant in writing of the reasons for the refusal and shall advise the applicant of his right to file a complaint with the administrative hearing commission as provided by chapter 621, RSMo.

Section 374.755.1 provides as a cause for denial:

> (2) Final adjudication or a plea of guilty or nolo contendere within the past fifteen years in a criminal prosecution under any state or federal law for a felony or a crime involving moral turpitude whether or not a sentence is imposed, prior to issuance of license date[.]

"May" means an option, not a mandate.[12] The appeal vests in this Commission the same degree of discretion as the Director, and we need not exercise it in the same way.[13] We are mindful that the primary purpose of professional licensing is to protect the public[14] and that "the license granted places the seal of the state's approval upon the licen[see.]"[15] Nevertheless, the public policy of Missouri is that "[e]xcept as otherwise specifically provided by law," a person

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[10]RSMo 2000.
[11]RSMo 2000.
[12]***S.J.V. ex rel. Blank v. Voshage***, 860 S.W.2d 802, 804 (Mo. App., E.D. 1993).
[13]***State Bd. of Regis'n for Healing Arts v. Finch***, 514 S.W.2d 608, 614 (Mo. App., W.D. 1974).
[14]***Lane v. State Comm. of Psychologists***, 954 S.W.2d 23, 25 (Mo. App., E.D. 1997).
[15]***State ex rel. Lentine v. Sate Bd. of Health***, 65 S.W.2d 943, 950 (Mo. 1933).

rehabilitated from the commission of criminal conduct that has resulted in a conviction can obtain licensure.[16] Even more so then, those persons who have pled guilty but did not suffer a conviction[17] may be found rehabilitated and allowed licensure. Section 314.200[18] sets forth the factors that determine how an applicant may gain licensure despite a conviction:

> the nature of the crime committed in relation to the license which the applicant seeks, the date of the conviction, the conduct of the applicant since the date of the conviction and other evidence as to the applicant's character.

Even though Cherry has no convictions and the Director has not put Cherry's good moral character into issue, the factors set forth in the statute provide useful guidance for our discretion. Also, an applicant claiming rehabilitation should at least acknowledge guilt and embrace a new moral code.[19]

Section 568.040[20] provides:

> 1. A person commits the crime of nonsupport if he knowingly fails to provide, without good cause, adequate support for his spouse; a parent commits the crime of nonsupport if such parent knowingly fails to provide, without good cause, adequate support which such parent is legally obligated to provide for his child or stepchild who is not otherwise emancipated by operation of law.
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> * * *
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> 4. Criminal nonsupport is a class A misdemeanor, unless the person obligated to pay child support commits the crime of nonsupport in each of six individual months within any twelve-month period, or the total arrearage is in excess of five thousand dollars, in either of which case it is a class D felony.

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[16]Section 314.200, RSMo 2000, and § 324.029.

[17]A criminal prosecution ending with a suspended imposition of sentence does not result in a conviction. ***Yale v. City of Independence***, 846 S.W.2d 193, 194 (Mo. banc 1993).

[18]RSMo 2000.

[19]***Francois v. State Bd. of Regis'n for the Healing Arts***, 880 S.W.2d 601, 603 (Mo. App., E.D. 1994).

[20]RSMo 2000.

Section 374.700 sets forth the functions and duties of a bail bond agent:

> (1) **"Bail bond agent"**, a surety agent or an agent of a property bail bondsman who is duly licensed pursuant to the provisions of sections 374.695 to 374.789, is employed by and is working under the authority of a licensed general bail bond agent;
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> (8) **"Property bail bondsman"**, a person who pledges United States currency, United States postal money orders or cashier's checks or other property as security for a bail bond in connection with a judicial proceeding, and who receives or is promised therefor money or other things of value;
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> (9) **"Surety bail bond agent"**, any person appointed by an insurer by power of attorney to execute or countersign bail bonds in connection with judicial proceedings, and who receives or is promised money or other things of value therefor[.]

First, the guilty plea was for conduct that occurred eight years ago. Second, we know of nothing, other than the general duty to obey laws, that shows any specific relationship between the felony of non-support and the duties of a bail bond agent. Nor does the record show that the factual circumstances peculiar to this case demonstrate any conduct by Cherry that specifically relates to the duties of a bail bond agent. Finally, Cherry testified that he successfully completed probation and is no longer in arrears. Cherry has admitted the wrongfulness of his past conduct and that he has in his own words "manned up"[21] to rectify the situation – a change in moral code required for rehabilitation. We conclude that Cherry has made a *prima facie* case that his guilty plea should not be used to deny his application.

The Director has offered no evidence or reasons that rebut Cherry's *prima facie* case. Were we to decide this case on the discretionary basis of § 374.755.1(2), we would grant Cherry's application.

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[21]Tr. at 15.

II. Mandatory Refusal

In the alternative, the Director contends that we should apply § 374.715 and its incorporation of the mandatory provisions of Rule 33.17(c)(1) to Cherry's application.[22] However, the terms of § 374.715 apply only to original applications:

> 1. Applications for examination and licensure as a bail bond agent or general bail bond agent shall be in writing and on forms prescribed and furnished by the department, and shall contain such information as the department requires. **Each application shall be accompanied by proof satisfactory to the department that the applicant** is a citizen of the United States, is at least twenty-one years of age, has a high school diploma or general education development certificate (GED), is of good moral character, and **meets the qualifications for surety on bail bonds as provided by supreme court rule.** Each application shall be accompanied by the examination and application fee set by the department. Individuals currently employed as bail bond agents and general bail bond agents shall not be required to meet the education requirements needed for licensure pursuant to this section.

Rule 33.17 provides:

> A person shall not be accepted as a surety on any bail bond unless the person:
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> * * *
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> (c) **Has not, within the past 15 years, been found guilty of or pleaded guilty or nolo contendere to:**
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> **(1) Any felony of this state, any state, or the United States;** or
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> (2) Any other crime of this state, any other state, or the United States involving moral turpitude, whether or not a sentence was imposed[.]

(Emphasis added.)

Section 374.730 and 20 CSR 700-6.100(3) establish a bail bond agent license as a continuing license. A continuing license is one that requires for renewal only that the licensee

[22]The Director does not assert that Cherry lacks the "good moral character" requirement of § 374.715.1.

file an application with a fee; the licensee is not required to again establish his qualifications, as he did on his original application.[23] This raises the issue of whether the Director may deny a renewal application for a disqualification applicable only to original applications for licensure.[24]

Nevertheless, we apply § 374.715 and the disqualification set out in Rule 33.17(c)(1) to Cherry's renewal application because professional licensing statutes "are remedial statutes enacted in the interest of the public health and welfare and must be construed with a view to suppression of wrongs and mischiefs undertaken to be remedied."[25] Further, the law favors a construction in harmony with reason and common sense and that avoids unreasonable and absurd results.[26] We must interpret statutes to be "free from unjust, oppressive or absurd consequences."[27] It would make little sense to apply the disqualification of Rule 33.17(c)(1) to new applicants without applying it also to renewal applicants.[28]

Rule 33.17 uses the term "shall" to describe how the listed disqualifications affect the decision on whether to accept a person as a surety. Unless the context demands otherwise, "shall" is a mandatory term, leaving no discretion in the decision maker.[29] We find nothing in the context of Rule 33.17 to indicate that "shall" has any meaning other than mandatory. Therefore, Rule 33.17 requires denial of an application for licensure if there exists one of the disqualifications listed in section (c). Accordingly, we do not consider the factors that mitigate the effect of Cherry's guilty plea as we did in our analysis under § 374.755.1(2) and § 374.750.[30]

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[23] ***Friedman v. Division of Health***, 537 S.W.2d 547, 549 and n. 4 (Mo. banc 1976).

[24] There is no explanation in the record of why the Director approved Cherry's original application for licensure in 2005 in spite of the 2002 guilty plea.

[25] ***Bhuket v. Missouri St. Bd. of Regis'n for the Healing Arts***, 787 S.W.2d 882, 885 (Mo. App., W.D. 1990).

[26] ***In re B.C.H.***, 718 S.W.2d 158 (Mo. App., 1986).

[27] ***Hyde v. City of Columbia***, 637 S.W.2d 251, 263 (Mo. App., W.D. 1982).

[28] We used Rule 33.17(c)(1) to deny a renewal application in ***Loughary v. Director of Insurance, Finan'l Inst'ns, and Prof'l Regis'n,*** no. 07-1610 DI (Nov. 5, 2008).

[29] ***State v. Teer***, 275 S.W.3d 258, 261 (Mo. banc 2009).

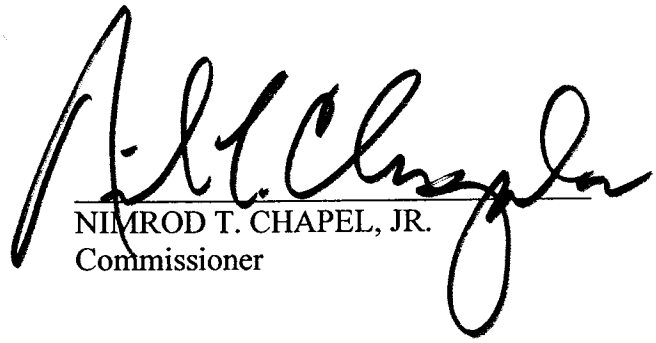
[30] RSMo 2000.

Cherry pled guilty to and the court found him guilty of a Class D felony non-support charge. Because this disqualification is one applicable to the original licensure of a bail bond agent, the relevant date for the 15-year limitation is the date of Cherry's original licensure in 2005. Cherry pled guilty on April 15, 2002, which is within 15 years of his original licensure. Therefore, the law requires us to deny Cherry's renewal application.

Summary

We deny Cherry's renewal application.

SO ORDERED on May 11, 2009.



NIMROD T. CHAPEL, JR.
Commissioner