

OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
14 DOJ 02248

KERRY GRAVES,)
Petitioner,)
v.)
N.C. PRIVATE PROTECTIVE)
SERVICES BOARD,)
Respondent.)

**PROPOSAL FOR
DECISION**

Donald W. Overby, Administrative Law Judge heard this case on June 24, 2014 at the Office of Administrative Hearings in Raleigh, NC.

APPEARANCES

For Petitioner: Michael C. Byrne
Law Offices of Michael C. Byrne
Raleigh, NC

For Respondent: Jeffrey P. Gray
Bailey & Dixon
Raleigh, NC.

ISSUE

Whether Petitioner's Private Investigator license should be suspended for permitting an employee to engage in private protective services when not licensed by the Board, willful failure or refusal to render to a client service as agreed between the parties and for which compensation had been paid or tendered in accordance with the agreement of the parties, and failure or refusal to offer a written report to a client.

APPLICABLE STATUTES AND RULES

Official notice is taken of the following statutes and rules applicable to this case:
N.C.G.S. §§ 74C-12(a)(6), (7) & (20); 12 NCAC 7D .0700.

BURDEN OF PROOF

The burden of proof by the greater weight of the evidence lies with the Respondent.

FINDINGS OF FACT

1. Respondent Board is established pursuant to N.C. Gen. Stat. §74C-1, *et seq.*, and is charged with the duty of licensing and registering individuals engaged in the private protective services business, which includes Private Investigators.
2. Petitioner is licensed with Respondent Board as a Private Investigator and has continually held a license since September, 2006. Petitioner owns Graves Investigations, Inc. Petitioner is a licensee of the Board
3. This matter arose from a complaint submitted to the Board from Ms. Cynthia Nykamp of Walnut Cove, North Carolina. Ms. Nykamp sought Petitioner's assistance with investigating her husband. Her Complaint was assigned to Investigator Kim Odom.
4. As a result of the investigation into Ms. Nykamp's complaint, the Board voted on February 20, 2014, to suspend Petitioner's license. Petitioner was sent a notice of the Board's action, entitled "Board Findings" on February 24, 2014.
5. Petitioner requested a hearing on Respondent's suspension of his license.
6. A hearing was held at the Office of Administrative Hearings, 1711 New Hope Church Road, Raleigh, North Carolina 27609 on June 24, 2014. Petitioner appeared at the hearing and was represented by counsel. Anthony Bonapart, Deputy Director of Respondent Board, testified at the hearing on behalf of Respondent.
7. On August 27, 2014 the Board staff received a Complaint Form from Cynthia Nykamp against Kerry Graves of Graves Investigation, Inc. (Respondent's Exhibit 4.) She stated that she hired Graves Investigations on June 4, 2013 for assistance in investigating her husband for marital infidelity. She first talked with Kerry Graves by telephone, and then went to his office on June 10, 2013 to obtain a tracker to put on her husband's car to get an idea of his habits.
8. At the time, Petitioner's brother, Kobie Graves, was working in his office providing administrative assistance. Kobie Graves is not a licensed private investigator. Kobie Graves no longer works for the Petitioner.
9. Kobie Graves, Petitioner's brother, showed her how the tracker operated and demonstrated how to place it on her husband's vehicle. Ms. Nykamp was told they could find out on a computer where her husband was going, and that they would take pictures and video for her when she went out of town the week of June 25th. She put the tracker on his car on June 10, 2013 knowing the battery would only last 2 weeks.
10. Ms. Nykamp was quoted a fee of \$750.00, and she paid one-half, \$375.00, to Graves Investigations on June 10th. She received a receipt from Kobie Graves for her payment. (Respondent's Exhibit 5)

11. Ms. Nykamp called Graves Investigations on June 20, 2013 and June 21, 2013, leaving messages that the battery on the tracker was dead and that she needed to pick up another tracker. No one returned her calls.
12. According to Ms. Nykamp, when she got no response to her voice mail messages regarding the battery in the tracker, she then left a message stating that she wanted to return the tracker, but never heard back from them.
13. According to Ms. Nykamp, no one from Graves ever asked whether the vehicle was in her name and never asked her for ownership paperwork. She has never personally met Kerry Graves and her only dealings with Graves Investigations was through his brother, Kobie. Ms. Nykamp was not aware that Kobie was not licensed.
14. Ms. Nykamp reiterated that she spoke with Kerry Graves only once, by telephone, which was her initial contact with his office. She has a record of three phone calls from her cell phone to Graves Investigations. The other calls were made from her home telephone.
15. Kerry Graves Investigations never conducted surveillance of her husband to determine his habits.
16. Ms. Nykamp wrote Kerry Graves on September 12, 2014 to express her frustration and displeasure. She also requested in writing a copy of the investigative report in her case. In response, Kerry Graves contends that she decided against surveillance and that she would have to provide proof of ownership of the vehicle before he could proceed with the tracking. He further stated that it was “unlawful” for him to track her husband’s car without proof of ownership. His contention of the law is not correct.
17. Kerry Graves also stated in his letter that he had filed a police report against her for “stolen property” (i.e. the GPS tracking device.) This contention was false. Kerry Graves admitted that he did not file a police report as he stated in his letter to Ms. Nykamp.
18. Ms. Nykamp reiterated that she was never told that she had to provide proof of ownership prior to Graves Investigations activating the tracking device. Kerry Graves was not present when she went to the office and was initially given the tracking device.
19. Kerry Graves admitted to Investigator Odom that he talked by telephone with Ms. Nykamp sometime in June 2013, and that Ms. Nykamp wanted surveillance and a tracker on her husband since she was suspicious of him cheating on her.
20. Kerry Graves contends that he told Ms. Nykamp that they could do that and that she called back at the end of the week stating that she wanted to get started the following Monday. Kerry Graves further contends that he asked Ms. Nykamp whose name the vehicle was in and she stated that the vehicle was in her husband’s name. He stated that he told her that he would be out of town when she came in, but he would have the contract ready. He again stated that he told Ms. Nykamp to bring paperwork to show dual ownership of the vehicle.

21. Kerry Graves contends that Ms. Nykamp called back later stating that she did not want them to do surveillance at this point, only the tracker.
22. Kerry Graves contends that he told Kobie Graves to tell Ms. Nykamp that they could not use the tracker unless they had the vehicle ownership paperwork. He says that he also told Kobie to let Ms. Nykamp know that it would take four to five days to turn the tracker on. He says that he told Kobie to tell her to be patient. If he did indeed tell Kobie all that, Kobie never told Ms. Nycamp. Kerry Graves told Investigator Turner that Kobie Graves should not have given her the tracker.
23. This Tribunal does not believe that Ms. Nycamp was ever told that she needed to provide evidence of ownership of the car or that she needed to produce any paperwork showing the ownership of the car to be tracked. Petitioner's contentions in that regard are not credible.
24. Kerry Graves contends that after he came back from being out of town he received a voice mail from Ms. Nykamp telling him she was going to the beach and would call back when she returned or would come by his office to return the tracking device since the battery had died. He stated that that was the last he heard from her.
25. Kerry Graves acknowledges that Ms. Nykamp paid him \$375.00, which is half of the \$750.00 amount quoted. He endorsed the check accepting that payment. He contends that it was a non-refundable retainer and that she still had his tracking device.
26. Kerry Graves was unaware that Kobie Graves went to the car with Ms. Nykamp and showed her how to install the tracking device or that Kobie gave her instruction on its use.
27. Kerry Graves was not in the office when Ms. Nykamp signed the contract. He stated that if he had been, he would have given her a copy of the contract.
28. The purported contract states that the client Ms. Nykamp must pay 75% of the total fee due to Graves prior to the commencement of any work. Ms. Nykamp paid half the fee, which was accepted by Kobie Graves, and he provided her with the tracker. Ms. Nycamp's signature is dated 6/4/13. Kobie Graves' signature is dated a week later, 6/11/13. Although the written document identified as the contract bears both parties signatures, there was never a meeting of the minds on the terms of the contract, and parts were filled in after Ms. Nycamp signed. That is not a valid contract. The contractual agreement between the parties is an oral contract based principally on what Kobie told Ms. Nycamp while acting in apparent authority on Petitioner's behalf. She tendered payment expecting that she was paying for five hours of surveillance which was half of what she was agreeing to. Payment was accepted and she was given a tracking device with the expectation that Graves would be tracking her husband's movement for two weeks—the life expectancy of the battery in the device.

29. The fact that the tracking device could not function since its codes had not been activated was not told to Ms. Nykamp by Kobie Graves.
30. Kerry Graves admitted he did not provide Ms. Nykamp a written report within 30 days as required by the Board's law and rules. He testified that the only "report" would be the tracking report from the GPS monitoring service and since he did not have the device turned on there would be no report.
31. It is specifically found that Ms. Nycamp's version of events is more credible than Petitioner's.
32. A copy of the contract for services in this matter was admitted into evidence as Petitioner's Ex. 1. It was not signed by Ms. Nykamp on the day of her only visit to Graves Investigations and the Court concludes it was created at a later date to substantiate Petitioner Kerry Graves' claims.
33. It is acknowledged that a primary problem for Petitioner is his brother Kobie who was actin with apparent authority in the conduct of business on Petitioner's behalf. There was no way for the general public to know that Kobie was not licensed to do the things that he was doing in the conduct of business. Petitioner remains responsible for what Kobie did on behalf of Petitioner's business.

CONCLUSIONS OF LAW

1. The parties properly are before the Office of Administrative Hearings.
2. Under G.S. §74C-12(a)(6) Respondent Board may deny, suspend or revoke a license for permitting any employee to engage in a private protective services profession when not lawfully in possession of a valid license issued under the provisions of this Chapter.
3. Kobie Graves, Petitioner's brother, provided unlicensed services to Ms. Nykamp by giving her the tracking device and showing her how it works. Kobie Graves led Ms. Nycamp to believe that the tracking device would be functioning. Kobie Graves was employed by Petitioner at the time that he, Kobie, provided the services to Ms. Nycamp. The only in person services she received from Petitioner was from Kobie Graves, Petitioner's representative.
4. Under G.S. §74C-12(7) Respondent Board may deny, suspend or revoke a license for willful failure to render to a client services as agreed between the parties and for which compensation has been paid or tendered.
5. Ms. Nycamp tendered payment to Petitioner which was received by Petitioner, and based on representations by both Kerry and Kobie Graves, she expected certain services to be provided for that payment. Petitioner provided no services to Ms. Nycamp at all.

6. Under G.S. §74C-12(20) Respondent Board may deny, suspend or revoke a license for failure or refusal to offer a report to a client within 30 days of the client's written request after the client has paid for services rendered.
7. Though perhaps tardy, Ms. Nycamp requested a written report, and received none. Petitioner's contract does not control or modify the statutory provisions. Petitioner never told Ms. Nycamp that he was not providing any service to her, and felt that he was entitled to keep the money without having provided any service, and thus not responsible for providing any written report or explanation.
8. The foregoing Findings of Fact show by a preponderance of evidence that Petitioner Kerry Graves' violated G.S. § 74C-12(a)(6),(7) and (20) in regards to his handling of Ms. Nykamp's case.

Based on the foregoing, the undersigned makes the following:

DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby recommends that Petitioner's Private Investigator license be suspended for a period of 90 days, all of the period of suspension is suspended with the exception of 30 days, which shall be an active period of suspension wherein he is to offer no services. There should be an additional period of one year's probation.

NOTICE AND ORDER

The Private Protective Services Agency is the agency that will make the Final Decision in this contested case. As the final decision-maker, that agency is required to give each party an opportunity to file exceptions to this proposal for decision, to submit proposed findings of fact, and to present oral and written arguments to the agency pursuant to N.C. Gen. Stat. § 150B-40(e).

It is hereby ordered that the agency serve a copy of the final decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, N.C. 27699-6714.

This the 22nd day of September, 2014.

Donald W. Overby
Administrative Law Judge