

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND	)	
PROFESSIONAL REGULATION, CONSTRUCTION	)	
INDUSTRY LICENSING BOARD,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 92-0591
	)	
JULIUS S. BAKER, SR.,	)	
	)	
Respondent.	)	
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RECOMMENDED ORDER

Pursuant to notice, the above matter was heard before the Division of Administrative Hearings by its duly designated Hearing Officer, P. Michael Ruff, in Tallahassee, Florida.

APPEARANCES

For Petitioner: G. W. Harrell, Esquire  
Department of Business and  
Professional Regulation  
1940 North Monroe Street, Suite 60  
Tallahassee, Florida 32399-0792

For Respondent: No appearance

STATEMENT OF THE ISSUE

The issue to be resolved in this proceeding involves whether the Respondent's certification to practice contracting should be subjected to disciplinary action for alleged violations of Section 489.129(1), Florida Statutes, and, if the violations are proven, what, if any, penalty is warranted.

PRELIMINARY STATEMENT

This cause arose upon the filing of an Administrative Complaint by the Petitioner agency against the Respondent named above alleging, in essence, that the Respondent, a licensed and registered general contractor in the State of Florida, contracted to make repairs on a residence without having obtained a permit for the work and without being registered to contract in Leon County, Florida. The Respondent elected to seek a formal proceeding to contest the allegations in the Administrative Complaint, and the cause was ultimately referred to the Division of Administrative Hearings and the undersigned Hearing Officer for adjudication.

The cause came on for hearing as noticed, initially on April 19, 1993. The Respondent failed to appear and the Petitioner, having the burden of proof as moving party in the proceeding, was allowed to put on its prima facie case.

Subsequent to that hearing, the Respondent, in effect, moved to re-open the proceedings, asserting that he had not received notice of the hearing. After considering the motion and the circumstances surrounding it, the motion was granted to the extent that the matter was re-set for hearing on September 7, 1993 in Tallahassee, Florida. The Respondent was required by the order on the motion to present evidence justifying the alleged failure to receive notice of the original hearing. If the evidence was thereupon re-opened because of failure by the Respondent to receive notice, through no fault of his own, the Petitioner was then required to recall its witnesses for direct and cross-examination with the Respondent likewise being prepared at that time to present its witnesses and evidence.

Thereafter, immediately prior to the hearing on September 7, 1993, the Respondent advised the Hearing Officer that his car had been vandalized and as he was then residing at a distant location in the State of Georgia, that he would be unable to have the means to reach the hearing site on September 7, 1993. In considering the totality of the circumstances and the lack of prejudice to any party by a continuance, the telephonic "motion" was treated as an emergency motion and the hearing was once again continued. The Order affording that relief advised the Respondent that one more opportunity would be offered him for hearing, at which time his testimony under oath concerning the reason he had allegedly failed to receive notice of the first hearing and the reason he had failed to attend the second hearing would be taken. Thereafter, the cause was again set for hearing for January 11, 1994.

On or about 4:02 p.m. on January 10, 1994, however, the Respondent's wife advised the Hearing Officer, through his secretary, that he would be unable to attend this third scheduled hearing, allegedly because of insufficient funds for traveling to the hearing site from Georgia. After considering this request, the Hearing Officer entered an Order finding that the telephonic "motion for continuance" was untimely because it did not state an emergency basis for a continuance and was made less than five (5) days prior to hearing. See Rule 60Q-2.017, Florida Administrative Code.

The Respondent has had ample opportunity to show cause why he could not attend the previously-scheduled hearings and to present evidence in opposition to the Administrative Complaint. This is the third opportunity the Respondent has had to thus protect his rights, of which he has failed to avail himself. Accordingly, it has been determined by the Hearing Officer to resolve this proceeding based upon the evidence already adduced by the Petitioner and to enter this Recommended Order. Accordingly, this Recommended Order is entered based upon the testimony of the three witnesses adduced by the Petitioner, as well as the six exhibits which the Petitioner had introduced into evidence at the originally-scheduled hearing.

#### FINDINGS OF FACT

1. The Petitioner is an agency of the State of Florida charged, as pertinent hereto, with enforcing, administering, and regulating the practice standards and licensure standards for the construction industry in Florida. This authority is embodied in the various provisions of Chapters 489, 455, and 120, Florida Statutes, and rules promulgated pursuant thereto.

2. The Respondent is a licensed general contractor in the State of Florida having been issued license number RG0060516 and is registered to conduct contracting business in his individual capacity.

3. On July 2, 1990, a contractor, Lonnie J. Walker, notified the Building Department of the City of Tallahassee that he had withdrawn as contractor for a job located at 722 Dunn Street, in Tallahassee, Florida. He thereupon withdrew the building permit he had obtained for the work being performed at those premises.

4. On August 8, 1990, the Respondent contracted with Mary N. Spencer, the owner, to make certain repairs at the two-unit apartment building located at 722 Dunn Street, Tallahassee, Leon County, Florida. The contract price agreed upon between the Respondent and Ms. Spencer was \$867.00.

5. The Respondent thereupon performed some of the aforementioned contracting work, consisting of repairs of various types. He was not registered to contract in Leon County, Florida, however. The Department of Growth and Environmental Management of Leon County, Florida, is responsible for issuing construction contractor licenses for the County, including for the City of Tallahassee.

6. There was no proper building permit issued for the job and job site when the Respondent entered into the contracting work at those premises. The Respondent failed to obtain a permit for the repairs and this ultimately came to the attention of the City of Tallahassee Building Department. That agency issued a stop work order on September 5, 1990. The Respondent was not performing work pursuant to Mr. Walker's previous permit, which had been withdrawn. The Respondent was not an employee of Lonnie J. Walker, the previous general contractor for the job.

7. The Petitioner agency submitted an affidavit after the hearing and close of the evidence, with its Proposed Recommended Order. That affidavit asserts that the Petitioner accumulated \$458.10 in investigative costs and \$2,491.30 in legal costs associated with the prosecution of this case, for a total alleged cost of prosecution of \$2,949.40. It moves, in its Proposed Recommended Order, that payment of the costs should be made in accordance with Section 61G4-12.008, Florida Administrative Code. The request for costs was first raised as an issue in the Proposed Recommended Order submitted by the Petitioner and is advanced only in the form of a hearsay affidavit. No prior motion for costs served upon the Respondent is of record in this proceeding.

#### CONCLUSIONS OF LAW

8. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. Section 120.57(1), Florida Statutes (1993).

9. The Florida Construction Industry Licensing Board is empowered to revoke, suspend, or otherwise discipline the license of a contractor for any of the following violations of Section 489.129(1), Florida Statutes:

- (j) Failing in any material respect to comply with the provisions of this part.

- (n) Proceeding on any job without obtaining applicable local building department permits and inspections.

- (m) Being found guilty of fraud or deceit or of gross negligence, incompetency, or misconduct in the practice of contracting.

10. The Respondent has violated Section 489.129(1)(j), Florida Statutes, by correspondingly violating Section 489.117(2), Florida Statutes (1989), which provides, inter alia, that registration allows the registrant to engage in contracting only in the counties, municipalities, or development districts, where he has complied with all local licensing requirements. The Respondent, as found above, was not registered to contract in Leon County, Florida.

11. The Respondent has also violated Section 489.129(1)(n), Florida Statutes (1989), by proceeding on a job without obtaining appropriate, applicable local building department permits and inspections.

12. The Respondent has also violated Section 489.129(1)(m), Florida Statutes (1989), by committing misconduct in the practice of contracting. The foregoing acts described in the above Findings of Fact and supported by the clear and convincing evidence of record, constitute violations of the statutory provisions mentioned above, and of the statutory provision last mentioned above, by constituting "misconduct in the practice of contracting".

13. With regard to the issue of the penalty to be imposed, it has not been demonstrated that this is other than an initial violation by this Respondent. There is no evidence that any monetary or other harm to the licensee's customer or to any other person, including physical harm, has occurred. Section 61G4-17.001, Florida Administrative Code, provides, inter alia:

The following guideline shall be used in disciplinary cases, absent aggravating or mitigating circumstances and subject to the other provisions of this chapter:

(2) 489.117: Contracting in the city or county not licensed in. First violation, letter of guidance; repeat violation, \$250.00 to \$750.00 fine.

(5) 489.129(1)(d): Permit violations. (b) Job finished without a permit having been pulled, or no permit until caught after job, or late permit during the job resulting in missed inspection or inspections. First violation, \$250.00 to \$750.00 fine; repeat violation, \$1,000.00 to \$2,000.00 fine.

(19) 489.129(1)(m): Gross negligence, incompetence, and/or misconduct, fraud or deceit. (a) Causing no monetary or other harm to licensee's customer, and no physical harm to any person. First violation, \$250.00 to \$750.00 fine; repeat violation, \$1,000.00 to \$1,500.00 fine and three to nine months suspension.

14. Section 21E-17.002, Florida Administrative Code, provides, inter alia, that circumstances which may be considered for the purposes of mitigation or aggravation of penalty shall include, but not be limited to the following:

(11) Any efforts at rehabilitation.

(12) Any other mitigating or aggravating circumstances.

15. The Respondent's actions did not cause any monetary or physical harm to a customer or any other person. There is no evidence that they are other than first violations. Although the Respondent has not shown to have previously committed any violations and has not been shown by clear and convincing evidence to have caused monetary or physical harm to any person, it is also established

that no effort to accept responsibility for his actions or to rehabilitate himself from a result of these violations has been engaged in by the Respondent nor has he made any effort to attempt to meet local licensing requirements since he failed to be properly licensed in the county, so that he could practice contracting within the City of Tallahassee. Consequently, considering these various factors on balance, it has been demonstrated to the Hearing Officer's satisfaction that a penalty within the above-referenced guidelines of a letter of guidance with regard to the violation of Section 489.117, Florida Statutes, is appropriate, and that an aggregate fine in the amount of \$600.00 for the violations of Sections 489.129(1)(n)&(m), Florida Statutes, should be imposed.

16. It is further concluded that no costs of investigation or prosecution of this proceeding should be assessed. No timely evidence was adduced in support of the imposition of costs. The Petitioner merely filed an affidavit of the Petitioner's counsel, submitted with the Proposed Recommended Order, concerning the costs and their general categories allegedly expended by the Petitioner in this proceeding. No motion for costs was timely filed and served upon the Respondent and no evidence of costs was adduced prior to the close of the record evidence in this proceeding. The submission of counsel's hearsay affidavit, after the close of the evidence is not sufficient proof of costs, and it is not an issue properly before the Hearing Officer at this point in the proceeding.

#### RECOMMENDATION

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

RECOMMENDED that a Final Order be entered by the Construction Industry Licensing Board finding the Respondent guilty of the violations charged in the Administrative Complaint and assessing a penalty in the form of a letter of guidance and an aggregate fine of \$600.00, as described with more particularity hereinabove.

DONE AND ENTERED this 9th day of March, 1994, in Tallahassee, Florida.

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P. MICHAEL RUFF  
Hearing Officer  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, FL 32399-1550  
(904) 488-9675

Filed with the Clerk of the  
Division of Administrative Hearings  
this 10th day of March, 1994.

APPENDIX TO RECOMMENDED ORDER, CASE NO. 92-591

Petitioner's Proposed Findings of Fact

1-8. Accepted.

Respondent's Proposed Findings of Fact

Respondent submitted no post-hearing pleading.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit to the agency written exceptions to this Recommended Order. All agencies allow each party at least ten days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should contact the agency that will issue the Final Order in this case concerning agency rules on the deadline for filing exceptions to this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.

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AGENCY FINAL ORDER

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STATE OF FLORIDA  
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION  
CONSTRUCTION INDUSTRY LICENSING BOARD

DEPARTMENT OF BUSINESS AND  
PROFESSIONAL REGULATION,

Petitioner,	DOAH Case No: 92-0591
vs.	Case No: 90-14225
JULIUS S. BAKER SR.,	License No: RG 0060516
Respondent.	

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FINAL ORDER

THIS MATTER came before the Construct ion Industry Licensing Board (hereinafter referred to as the "Board") pursuant to Section 120.57(1)(b), Florida Statutes, on May 12, 1994, in Ft. Lauderdale, Florida, for consideration of the Recommended Order (a copy of which is attached hereto and incorporated herein by reference). The Petitioner was represented by Cathleen E. O'Dowd. The Respondent was neither present nor represented by counsel at the proceedings.

Upon consideration of the Hearing Officer's Recommended Order, and the arguments of the parties and after a review of the complete record in this matter, and the exceptions filed, the Board makes the following:

FINDINGS OF FACT

1. The Hearing Officer's Findings of Fact are hereby approved and adopted in toto except where they are in conflict with Petitioner's Exceptions to Recommended Order.

2. There is competent, substantial evidence to support the Hearing Officer's Findings of Fact.

CONCLUSIONS OF LAW

3. The Board has jurisdiction of this matter pursuant to the provisions of Section 120.57(1), and Chapter 489, Florida Statutes.

4. The Hearing Officer's Conclusions of Law are hereby approved and adopted except where they are in conflict with Petitioner's Exceptions to Recommended Order which is hereby approved and adopted and incorporated herein by reference.

5. Respondent is guilty of violating Section 489.129(1)(j), (m) and (n), Florida Statutes.

6. The penalty recommended by the Hearing Officer is hereby approved and expanded to include the additional penalties requested in Petitioner's Exceptions to Recommended Order.

7. There is competent, substantial evidence to support the Board's findings and conclusions.

THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED:

Respondent is hereby issued a Letter of Guidance.

Respondent shall pay a fine of Six Hundred dollars (\$600) and costs of Two Thousand Nine Hundred Forty-Nine dollars and Forty cents (\$2,949.40) to the Board, within thirty (30) days of the filing of this Order.

To assure payment of the fine and costs, it is further ordered that all of Respondent's licensure to practice contracting shall be suspended with the imposition of the suspension being stayed for thirty (30) days. If the ordered fine and costs are paid within that thirty (30) day period, the suspension imposed shall not take effect. Upon payment of the fine and costs after the thirty (30) days, the suspension imposed shall be lifted. If the licensee does not pay the fine and costs within said period, then immediately upon expiration of the stay, the licensee shall surrender the license to the Department of Business and Professional Regulation or shall mail it to the Board office.

In addition, the Respondent will be required to pay interest on fines due to the Board at a rate of 18 percent per annum, beginning on the thirty-first (31) day after the issuance of this Order.

Pursuant to Section 120.59, Florida Statutes, the Parties are hereby notified that they may appeal this Order by filing one copy of a Notice of Appeal with the clerk of the Department of Business and Professional Regulation, Northwood Centre, 1940 North Monroe Street, Suite 60, Tallahassee, Florida 32399-0792, and by filing the filing fee and one copy of the Notice of Appeal with the District Court of Appeal within thirty (30) days of the effective date of this Order.

This Order shall become effective upon filing with the Clerk of the Department of Business and Professional Regulation.

DONE AND ORDERED this 13th day of May, 1994.

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WARREN SUTTON, Chairman  
Construction Industry  
Licensing Board



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order has been provided via certified mail to Julius S. Baker, Sr., Route 4, Box 1010, Havana, Florida 32333 and P.O. Box 253, Morrow, Georgia 30260 and P.O. Box 1582, McDonough, Georgia 30253-1582 and via U.S. Mail to the Board Clerk, Department of Business and Professional Regulation and its counsel, Northwood Centre, 1940 North Monroe Street, Suite 60, Tallahassee, Florida 32399-0792 this 19th day of May, 1994.

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Brandon L. Moore  
Deputy Agency Clerk