

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION, BOARD)
OF PROFESSIONAL ENGINEERS,)
)
Petitioner,)
)
vs.) CASE NO. 94-4312
)
ALBERTO RAMIREZ,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was conducted in this case on November 8, 1994, in Miami, Florida, before J. Stephen Menton, a duly designated Hearing Officer of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Charles F. Tunnicliff, Chief Attorney
Mary Ellen Clark, Attorney
Department of Business
and Professional Regulation
1940 North Monroe Street, Suite 60
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For Respondent: Reydel (Sonny) Santos, Esquire
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STATEMENT OF THE ISSUES

The issue in this case is whether Respondent committed negligence in the practice of engineering as alleged in the amended administrative complaint filed by Petitioner and, if so, the penalty that should be imposed.

PRELIMINARY STATEMENT

On March 23, 1994, Petitioner, the Department of Business and Professional Regulation (the "Department"), filed an Administrative Complaint against Respondent charging him with violating Chapter 471, Florida Statutes, in connection with Respondent's activities as a special inspector for Dade County. The allegations focus on Respondent's inspection of a re-roofing job for a single family residence located at 8050 SW 92nd Avenue in Miami and his preparation of a Daily Field Inspection Form which states "[t]he entire roof completed as per the codes and specifications". Petitioner alleges that Respondent and/or his designee did not inspect the entire roof but merely performed a spot check. A supplemental inspection by the Metropolitan Dade

County Building and Zoning Department allegedly found the roof to be deficient, requiring corrections. Count I of the Administrative Complaint alleged that Respondent is guilty of fraud or deceit, negligence, incompetence, or misconduct in the practice of engineering in violation of Section 471.033(1)(g), Florida Statutes. Count II charges Respondent with making or filing a report which he knew was false in violation of Section 471.033(1)(e), Florida Statutes.

Respondent submitted an Election of Rights Form on May 16, 1994, disputing the material facts contained in the Administrative Complaint and requesting a formal hearing pursuant to Section 120.57(1), Florida Statutes. The case was referred to the Division of Administrative Hearings and assigned to Hearing Officer William J. Kendrick who noticed a formal hearing for November 8, 1994, in Miami, Florida.

On October 21, 1994, the parties filed a Joint Stipulation for Continuance which was rejected by Hearing Officer Kendrick in an Order entered October 24, 1994. On November 1, 1994, Petitioner filed a Motion for Leave to Amend Administrative Complaint. The proposed Amended Administrative Complaint only changed the allegations regarding the date and location of the inspection at issue. On November 3, 1994, Petitioner filed a Motion to Disqualify Counsel for Respondent. On November 5, 1994, Respondent filed a Motion for Expedited Request for Production of Documents. On November 7, 1994, Hearing Officer Linda Rigot, in anticipation of taking over this case, conducted a telephonic hearing on the pending motions. In accordance with Hearing Officer Rigot's instructions, the parties were able to resolve Respondent's Motion for Expedited Request For Production of Documents through Petitioner's production of the most crucial documents requested by Respondent. The remaining pending Motions were deferred until the formal hearing.

During the late afternoon of November 7, 1994, this matter was assigned to Hearing Officer J. Stephen Menton. At the hearing on November 8, 1994, Respondent filed three pleadings: a Motion to Strike Petitioner's Motion to Disqualify as Sham Pleadings and Impose Sanctions Against Petitioners; a Motion to Dismiss Administrative Complaint; and a Motion to Strike Petitioner's Motion For Leave to Amend Administrative Complaint. Respondent also filed a Witness List and made a separate ore tenus motion to dismiss.

At the commencement of the hearing, the pending Motions were addressed. Petitioner's Motion to Disqualify Counsel for Respondent was denied. Respondent's Motion to Dismiss The Administrative Complaint was denied and Petitioner's ore tenus motion to dismiss was also denied. Ruling was reserved on Respondent's Motion To Strike Petitioner's Motion to Disqualify as Sham Pleadings and Impose Sanctions Against Petitioners.

In addition, Petitioner's Motion For Leave to Amend Administrative Complaint was granted. Since Respondent was on notice of the inspection at issue and no prejudice was shown, the Amended Administrative Complaint was accepted and the hearing proceeded as scheduled. At the commencement of the presentation of its case, Petitioner dismissed Count II of the Amended Administrative Complaint.

At the hearing, Petitioner presented the testimony of four witnesses: Robert Brombach, the owner of the residence in question; Manuel Jimenez, a roofing inspector for the Metropolitan Dade County Building & Zoning Department; James O. Power, P.E., who was accepted as an expert in engineering; and Raphael

Droz-Seda, P.E., who was also accepted as an expert in engineering. Petitioner offered five exhibits into evidence, all of which were accepted without objection.

Respondent presented the testimony of three witnesses: Naamani, P.E., who was accepted as an expert in engineering; Sergio Alcorta, P.E., who was accepted as an expert in engineering; and Harry Carrasquillo, owner of the roofing company that did the work in question. Respondent offered six (6) Exhibits (A-F) into evidence, all of which were accepted.

A transcript of the proceedings has been filed. At the hearing, the parties agreed to a schedule for filing proposed findings of fact and conclusions of law. Subsequent to the hearing, Petitioner filed a Motion on behalf of the parties requesting an extension of time in which to file the proposed recommended orders. That Motion was granted and both parties timely submitted proposed findings of fact and conclusions of law.

FINDINGS OF FACT

Based upon the oral and documentary evidence adduced at the hearing and the entire record in this proceeding, the following findings of fact are made:

1. At all times pertinent to this proceeding, Respondent was duly licensed as a professional engineer in the State of Florida, having been issued license number PE 0023976.

2. In September, 1992, Dade County passed and adopted an emergency ordinance amending the South Florida Building Code to handle the processing of construction permits and inspections created by the devastation of Hurricane Andrew. Section 6(e) of the Emergency Ordinance addressed roof repairs and required a minimum of six nails to be used for each shingle.

3. By early 1993, Dade County Roofing Inspectors were severely overtaxed by the volume of work occasioned by Hurricane Andrew. To ensure more timely inspections, Dade County Officials approved the use of private practice architects and engineers to assist the county in making inspections and affirming code compliance.

4. At all times pertinent to this case, Robert Brombach (the "Owner") was the owner of a residence (the "House") located at 8050 SW 92nd Avenue, Miami, Florida.

5. In March 1993, the Owner hired Hytek Roofing to re-roof his residence because of damage from Hurricane Andrew. The re-roofing job was to begin on March 8, 1993 and was to be completed by March 23, 1993.

6. At all times pertinent to this case, Respondent was employed by All State Engineering & Testing Consultants, Inc.

7. Hytek Roofing hired Respondent in his capacity as a special inspector for Dade County to perform the shingle inspection/final inspection for the re-roofing of the House.

8. The roof of the House had two separate systems. The front and back of the roof were pitched sufficient to hold shingles. There was also a flat deck portion of the roof that had very little pitch. Prior to the repair work at issue in this case, this flat portion was hot mopped and tarred.

9. Pursuant to the 1988 South Florida Building Code which was in effect at the time of this re-roofing job, composition shingles were not to be applied to roofs having an incline of less than 2 1/2 inches per foot.

10. After it completed re-roofing the shingled section of the roof, Hytek contacted Respondent to do an inspection.

11. On March 23, 1993, Respondent conducted a "shingle inspection/final inspection" of the roof and prepared a Daily Field Inspection Form (the "Inspection Form".)

12. Respondent's Inspection Form states, "JOB DESCRIPTION: The entire roof completed as per the codes and specifications...INSPECTION RESULTS: Placement of shingles comply [sic] with the New South Florida Building Codes [sic] and Requirement."

13. Respondent submitted his Inspection Form to the Metropolitan Dade County Building & Zoning Department.

14. Subsequent to Respondent's inspection, Hytek Roofing applied shingles to the flat deck portion of the roof.

15. After applying the shingles on the flat roof, Hytek contacted Dade County building officials to conduct a roof inspection.

16. At all times pertinent to this proceeding, Manuel Jimenez was a Metropolitan Dade County Building & Zoning Department Roofing Inspector.

17. On March 31, 1993, Jimenez conducted an inspection of the House's roof.

18. During his inspection, Inspector Jimenez performed a spot check of the roof on the front part of the House. All of the 20-30 shingles he examined in the selected area did not comply with the six nail Dade County code requirement. In fact, all of them were found to contain only three (3) nails a piece. In addition, some of the nails were above the tar strip.

19. Jimenez also noted that the back of the roof did not appear to be properly laid. The back roof shingles were not laid in accordance with the manufacturer's recommendations nor were they straight.

20. After spot checking the front and back of the roof, Inspector Jimenez noticed the shingles on the flat portion at the rear of the House. Using a level, Inspector Jimenez measured the "pitch" on the flat roof as "one and one-quarter to twelve" instead of the code required minimum of "two and one-half to twelve." He concluded that the roof was in violation of the code because shingles were used on the flat roof which did not have an adequate pitch.

21. On April 1, 1993, Jimenez issued a Summons to Hytek Roofing noting the above violations and requiring corrections including the re-nailing of shingles below the tar strip with six (6) nails per shingle, and the removal of the shingles from the flat roof. The county also required that the back of the roof be replaced.

22. The Metro Dade Building & Zoning Roofing Inspections Checklist requires a shingle inspection to include an inspection of the tie-in to any flat

roof. Because the flat deck portion of this roof was in the back, Respondent should have looked at the back of the roof in order to inspect the tie-in to the flat deck.

23. Respondent introduced a number of form documents which reflect language used in the industry by Special Inspectors when certifying the completion of construction work. The standard language on those documents provides that by filling in the designated blanks, the Special Inspector asserts that the work, to the best of his knowledge or belief and professional judgment, is in substantial accordance with the approved plans and the South Florida Building Code. Respondent's Daily Field Inspection report was prepared on his company's letterhead, not a form document and contained Respondent's statement that the entire roof had been completed as per the codes and specifications.

24. Respondent's report did not contain the qualifying language set forth on the forms presented at the hearing. In other words, Respondent did not qualify his statement or state the extent of his investigation leading to that statement.

25. After considering all the evidence, it is concluded that Respondent's inspection was insufficient and that the conclusions set forth in his report were inaccurate. Moreover, at least some of the Code Violations cited by the county should have been detected by a reasonable inspection. Consequently, it is concluded that Respondent failed to utilize due care in the performance of his engineering duties.

CONCLUSIONS OF LAW

26. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this case pursuant to Sections 120.57(1) and 471.033, Florida Statutes.

27. Pursuant to Section 471.033, Florida Statutes, the Board of Professional Engineers is empowered to revoke, suspend, or otherwise discipline the license of a registered engineer who is found guilty of committing any of the offenses enumerated in Section 471.033(1), Florida Statutes. In determining whether a licensee has violated Section 471.033, Florida Statutes, as charged in an administrative complaint, one "must bear in mind that it is, in effect, a penal statute...This being true the statute must be strictly construed and no conduct is to be regarded as included within it that is not reasonably proscribed by it. Furthermore, if there are any ambiguities included such must be construed in favor of...licensee." *Lester v. Department of Professional and Occupational Regulations*, 348 So.2d 923, 925 (Fla. 1st DCA 1977). Disciplinary action with respect to a professional license is limited to the offense or facts alleged in the administrative complaint. *Sternberg v. Department of Professional Regulation, Board of Medical Examiners*, 465 So.2d 1324, 1325 (Fla. 1st DCA 1985).

28. Petitioner has the burden of proving by clear and convincing evidence the allegations against Respondent. See *Ferris v. Turlington*, 510 So.2d 292 (Fla. 1987); *Evans Packing Co. v. Department of Agriculture and Consumer Services*, 550 So.2d 112 (Fla. 1st DCA 1989).

29. The nature of clear and convincing evidence has been described in *Slomowitz v. Walker*, 429 So.2d 797, 800 (Fla. 4th DCA 1983) as follows:

[C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the evidence must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact the firm belief of (sic) conviction, without hesitancy, as to the truth of the allegations sought to be established.

30. In the Amended Administrative Complaint Petitioner asserts that Respondent has violated Section 471.033(1)(g), Florida Statutes, which provides as follows:

(1) The following acts constitute grounds for which the disciplinary actions in subsection (3) may be taken:

* * *

(g) fraud, deceit...negligence, incompetence or misconduct...in the practice of engineering.

31. Petitioner charges Respondent with violating the aforementioned statute by performing "a spot check of the roof" and indicating on his Inspection Form that "[t]he entire roof completed as per the codes and specifications." Petitioner further alleges that Respondent "did not inspect the entire roof as his Inspection Form implies."

32. The clear and convincing evidence in this case establishes that Respondent was guilty of the violation charged.

33. Respondent's unqualified statement that the entire roof was completed per the codes and specifications was not based on an adequate inspection. The evidence established that the back portion of the roof (not including the flat deck portion) had to be replaced due, in part, to the use of an insufficient number of nails and placement of shingles above the tar strip. An appropriate inspection would have revealed these defects and the failure to note them in a final inspection constitutes negligence.

34. Respondent is also guilty of negligence and/or incompetence in the practice of engineering as a result of his certification of the completion of the entire roof as having been completed in compliance with the codes and specifications when the flat portion of the roof had not been. The evidence established that shingles were not installed in the flat portion of the roof until after Respondent conducted his inspection. Thus, it cannot be concluded that Respondent improperly certified a shingled roof with an inadequate pitch. However, Respondent's Inspection Form inaccurately indicated that the entire roof had been completed. If Respondent had properly inspected the entire roof, Respondent should have inspected the tie-in between the flat roof and the newly shingled roof. A proper inspection report should have, at a minimum, noted the flat portion had not been repaired and noted the condition of the tie-in.

35. Respondent points out that it is impossible to inspect every shingle of a roof and he contends that he conducted reasonable spot checks which did not reveal any defects. Before signing a final inspection report, Respondent was responsible for inspecting the roof in a manner that would reveal all reasonably

obvious defects. The existence of a single shingle without the required nails may not be sufficient to establish that the inspection was negligently conducted. Here, however, the evidence established that large portions of the roof were not installed in accordance with Code. The failure of Respondent's inspection to reveal these obvious defects establishes that the inspection was negligently devised and/or conducted. In this regard, it should be noted that Respondent's Inspection Form did not say he made spot checks or even that in his opinion the roof was all right. Instead, he unequivocally affirmed that the roof had been installed in accordance with Code.

36. Upon establishment of a violation of subsection 1 of Section 471.033, Florida Statutes, subsection 3 of the statute authorizes the Board of Professional Engineers to revoke or suspend a license, impose an administrative fine not to exceed \$1,000.00 for each count or separate offense, issue a reprimand, place a licensee on probation for a period of time subject to such conditions as the Board may specify and/or restrict the authorized scope of practice by a licensee.

37. Rule 61G15-19, Florida Administrative Code, sets forth the disciplinary guidelines adopted by the Board. Rule 61G15-19.004(2)(m), Florida Administrative Code sets forth a range of penalties to be imposed upon a licensee found guilty of negligence under Section 471.033(1)(g), Florida Statutes. That range is from a minimum of a reprimand, two year probation and \$1,000.00 fine to a reprimand, \$1,000.00 fine, 5 years suspension and 10 year probation.

38. The Board can deviate from the stated range upon a showing of aggravating or mitigating circumstances as set forth in Rule 61G15-19.004(3). In this case, there is no evidence of prior disciplinary action against Respondent. It appears that all defective work has been corrected to the satisfaction of the Owner and there is no evidence of any other violations by Respondent. Thus, a penalty in the minimum range is appropriate.

39. The final issue to be resolved in this case is Respondent's request for the imposition of sanctions against Petitioner due to Petitioner's filing of a Motion to Disqualify Respondent's counsel five days before the final hearing in this matter. The Motion to Disqualify sought to preclude Respondent's counsel from representation in this case on the grounds that Respondent's counsel was formerly employed by Petitioner. In support of its Motion to Disqualify, Petitioner cited Section 112.313(9)(a)4., Florida Statutes. At the outset of the hearing in this matter, Petitioner's Motion to Disqualify was denied on the grounds that there was no authority for applying the cited statutory provision to proceedings conducted before the Division of Administrative Hearings and because there was no indication that counsel for Respondent had any direct involvement in the pending case while he was employed by Petitioner. In support of his request for sanctions, counsel for Respondent has pointed to some disturbing facts. Specifically, the Motion to Disqualify was not filed until five days before the formal hearing in this case after a motion to continue had been denied. Counsel for Respondent points out that he had entered an appearance in this matter more than two months earlier and all of the facts alleged in the Motion to Disqualify were known at that time. Moreover, counsel for Respondent contends that Petitioner had filed a similar motion which was denied in an unrelated case brought by Petitioner in which counsel for Petitioner had entered an appearance. The facts cited by Respondent raise some concern as to Petitioner's motivation in filing the Motion to Disqualify. However, the Motion was summarily denied at the outset of the hearing after limited argument. While the undersigned has concluded that the

prohibitions in Section 112.313(9)(a)4., Florida Statutes, are not applicable in this case, it is recognized that there has been minimal interpretation as to the scope of that statute. After considering all of the circumstances, it is concluded that the imposition of sanctions in this case is not warranted.

RECOMMENDATION

Based upon the foregoing, it is

RECOMMENDED:

That the Board of Professional Engineers enter a Final Order finding Alberto Ramirez guilty of violating Section 471.033(1)(g), Florida Statutes, as alleged in the Amended Administrative Complaint. As a penalty for the violation, impose an administrative fine of one thousand (\$1,000.00) dollars, issue a reprimand, and place the license of Alberto Ramirez on probation for a period of two (2) years with such reasonable terms as may be imposed by the Board.

DONE AND RECOMMENDED this 24th day of July, 1995, in Tallahassee, Leon County, Florida.

J. STEPHEN MENTON
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of July, 1995.

APPENDIX TO RECOMMENDED ORDER, CASE NO. 94-4312

Rulings on the proposed findings of fact submitted by the Petitioner:

1. Adopted in substance in findings of fact 1.
2. Adopted in substance in findings of fact 4.
3. Adopted in substance in findings of fact 8.
4. Adopted in substance in findings of fact 5.
5. Rejected as unnecessary.
6. Adopted in substance in findings of fact 5.
7. Adopted in substance in findings of fact 7.
8. Adopted in substance in findings of fact 6.
9. Adopted in substance in findings of fact 11.
10. Adopted in substance in findings of fact 12.
11. Adopted in substance in findings of fact 13.
12. Adopted in substance in findings of fact 14.
13. Adopted in substance in findings of fact 16.
14. Adopted in substance in findings of fact 17.
15. Adopted in substance in findings of fact 18.
16. Adopted in substance in findings of fact 2.

17. Adopted in substance in findings of fact 9.
18. Adopted in substance in findings of fact 18.
19. Rejected as unnecessary.
20. Rejected as unnecessary.
21. Adopted in substance in findings of fact 19.
22. Adopted in substance in findings of fact 21.
23. Adopted in substance in findings of fact 21.
24. Subordinate to findings of fact 25.
25. Adopted in substance in findings of fact 22.
26. Adopted in substance in findings of fact 22.
27. Adopted in substance in findings of fact 23.
28. Adopted in substance in findings of fact 24.
29. Rejected as a summary of testimony rather than a finding of fact. The subject matter is addressed in Findings of Fact 25 and in the Conclusions of Law.
30. Rejected as a summary of testimony rather than a finding of fact. The subject matter is addressed in Findings of Fact 25 and in the Conclusions of Law.
31. Rejected as a summary of testimony rather than a finding of fact. The subject matter is addressed in Findings of Fact 25 and in the Conclusions of Law.
32. Adopted in substance in findings of fact 25.

Rulings on the proposed findings of fact submitted by the Respondent:

1. Adopted in substance in findings of fact 1.
2. Rejected as unnecessary.
3. Adopted in substance in findings of fact 2.
4. Adopted in substance in findings of fact 3.
5. Adopted in substance in findings of fact 4 and 5.
6. Adopted in substance in findings of fact 8.
7. Adopted in substance in findings of fact 5.
8. Adopted in substance in findings of fact 10.
9. Adopted in substance in findings of fact 11 and 12.
10. Subordinate to findings of fact 25.
11. Rejected as unnecessary and subordinate to findings of fact 25.
12. Adopted in substance in findings of fact 12.
13. Subordinate to findings of fact 25.
14. Adopted in substance in findings of fact 14.
15. Adopted in substance in findings of fact 15.
16. Adopted in substance in findings of fact 16 and 17.
17. Adopted in substance in findings of fact 18.
18. Subordinate to findings of fact 19.
19. Adopted in substance in findings of fact 20.
20. Adopted in substance in findings of fact 20.
21. Adopted in pertinent part in findings of fact 21.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to this Recommended Order. All agencies allow each party at least 10 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.