

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
CONSTRUCTION INDUSTRY)
LICENSING BOARD,)
)
Petitioner,)
)
vs.) CASE NO. 96-4296
)
PHILIP A. DIORIO,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a Section 120.57(1) hearing was conducted in this case in Fort Lauderdale, Florida on November 7, 1996, before Stuart M. Lerner, a duly designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Paul F. Kirsch, Senior Attorney
Department of Business and
Professional Regulation
1940 North Monroe Street, Suite 60
Tallahassee, Florida 32399-0792

For Respondent: No Appearance

STATEMENT OF THE ISSUE

1. Whether Respondent committed the violations alleged in the Administrative Complaint?

2. If so, what punitive action should be taken against him?

PRELIMINARY STATEMENT

On July 12, 1995, the Department of Business and Professional Regulation (Department) issued a five count Administrative Complaint against Respondent. The Administrative Complaint alleged that, in his capacity as the primary qualifying agent for a business organization, Loma Linda Homes Corporation, which had entered into a written agreement to construct a residence for Carmen Bennett and her daughter-in-law, Virginia Bennett, Respondent engaged in conduct (in connection with that construction project) violative of Section 489.129(1)(h)2, Florida Statutes (Count I), Section 489.129(1)(j), Florida Statutes (Count II), Section 489.129(1)(k), Florida Statutes (Count III), Section 489.129(1)(m), Florida Statutes (Count IV) and Section 489.129(1)(n), Florida Statutes (Count V). On September 11, 1996, the case was referred to the

Division of Administrative Hearings (Division) for the assignment of a Hearing Officer 1/ to conduct a Section 120.57 hearing on the matter. 2/

The Section 120.57 hearing was scheduled for November 7, 1996. The Department and Respondent were provided with written notice of the hearing in accordance with Section 120.569(2)(b), Florida Statutes (Supp. 1996). 3/

The Department appeared at the hearing, which was held as scheduled on November 7, 1996, through one of its Senior Attorneys, Paul F. Kirsch, Esquire. Respondent did not make an appearance at the hearing, either in person or through counsel or an authorized representative.

At the hearing, the Department presented the testimony of one witness, Carmen Bennett. It also offered four exhibits (Petitioner's Exhibits 1 through 4) into evidence. All four of the Department's exhibits were admitted into evidence.

At the conclusion of the evidentiary portion of the hearing, the undersigned, on the record, announced that proposed recommended orders had to be filed no later than ten days after the undersigned's receipt of the transcript of the hearing. The undersigned received the transcript of the hearing on November 25, 1996. On December 4, 1996, the Department filed a motion seeking an extension of the deadline for the filing of proposed recommended orders in the instant case. On December 5, 1996, the undersigned issued an order granting the Department's motion and extending the filing deadline to January 6, 1997.

On January 6, 1997, the Department filed a proposed recommended order, which the undersigned has carefully considered. Accompanying the Department's proposed recommended order was an affidavit from Kelly Goodman, the custodian of the Department's Complaint Cost Summary Report records. 4/ To date, Respondent has not filed any post-hearing submittal.

FINDINGS OF FACT

Based upon the evidence adduced at hearing, and the record as a whole, the following Findings of Fact are made:

1. Respondent is a building contractor.
2. He obtained his license (License Number CB C028158) to engage in the contracting business in the State of Florida in 1984.
3. Respondent's license expired on August 31, 1996, without Respondent having made any effort to renew it.
4. On September 1, 1996, the Department placed Respondent's license on "a delinquent status for non-renewal." 5/ It considers the license to be invalid for the 1996-98 licensing period.
5. At all times material to the instant case, Respondent was the primary qualifying agent for Loma Linda Homes Corporation (Loma Linda).
6. In late 1993 or early 1994, Loma Linda entered into a written contract (Contract) with Carmen Bennett and her daughter-in-law, Virginia Bennett, in which it agreed to construct a residence for the Bennetts at 5403 Loma Vista Loop in the Loma Vista subdivision in Davenport, Florida.

7. The Contract had a "[t]ime is of the essence" provision. 6/

8. The Contract further provided that it was "conditioned upon Purchaser[s, the Bennetts] obtaining a mortgage loan commitment within sixty days from the date of this contract for a term not to exceed thirty (30) years at the prevailing market interest rate at time of closing." The Bennetts timely obtained such a commitment.

9. Prior to the execution of the Contract, Loma Linda had received a \$1,000.00 deposit from the Bennetts.

10. At or around the time the Contract was executed, the Bennetts provided Loma Linda with an additional deposit in the amount of \$9,813.00.

11. The Contract provided that "[i]f Seller [Loma Linda] fails, neglects, or refuses to perform this Contract, the Purchasers [the Bennetts] shall receive the return of all sums paid to the Seller."

12. Loma Linda failed to meet its obligations under the Contract.

13. Construction of the residence that Loma Linda agreed to build for the Bennetts never commenced. All that Loma Linda did in furtherance of its contractual obligations was to clear the lot on which the home was to be built.

14. The Bennetts have not received back any of the \$10,813.00 in deposit monies that they paid Loma Linda.

CONCLUSIONS OF LAW

15. The Department has been vested with the statutory authority to issue licenses to those qualified applicants seeking to engage in the construction contracting business in the State of Florida. Section 489.115, Fla. Stat.

16. A business entity, like Loma Linda, may obtain such a license, but only through a licensed "qualifying agent." Section 489.119, Fla. Stat.

17. There are two types of "qualifying agents:" "primary qualifying agents" and "secondary qualifying agents."

18. A "primary qualifying agent" is defined in subsection (4) of Section 489.105, Florida Statutes, as follows:

"Primary qualifying agent" means a person who possesses the requisite skill, knowledge, and experience, and has the responsibility to supervise, direct, manage and control the contracting activities of the business organization with which he is connected; who has the responsibility to supervise, direct, manage, and control construction activities on a job for which he has obtained the building permit; and whose technical and personal qualifications have been determined by investigation and examination as provided in this part, as attested by the [D]epartment.

19. A "secondary qualifying agent" is defined in subsection (5) of Section 489.105, Florida Statutes, as follows:

"Secondary qualifying agent" means a person who possesses the requisite skill, knowledge, and experience, and has the responsibility to supervise, direct, manage, and control construction activities on a job for which he has obtained a permit, and whose technical and personal qualifications have been determined by investigation and examination as provided in this part, as attested by the [D]epartment.

20. The "responsibilities" of "qualifying agents" are further described in Section 489.1195, Florida Statutes, which provides, in pertinent part, as follows:

(1) A qualifying agent is a primary qualifying agent unless he is a secondary qualifying agent under this section.

(a) All primary qualifying agents for a business organization are jointly and equally responsible for supervision of all operations of the business organization; for all field work at all sites; and for financial matters, both for the organization in general and for each specific job. . . .

(3)(d) Any change in the status of a qualifying agent is prospective only. A qualifying agent is not responsible for his predecessor's actions but is responsible, even after a change in status, for matters for which he was responsible while in a particular status.

21. The Construction Industry Licensing Board (Board) may take any of the following punitive actions against a contractor serving as the "primary qualifying agent" for a business entity if: (a) an administrative complaint is filed alleging that the contractor or the business entity committed any of the acts proscribed by Section 489.129(1), Florida Statutes; and (b) it is shown that the allegations of the complaint are true: revoke or suspend the contractor's license; place the contractor on probation; reprimand the contractor; deny the renewal of the contractor's license; impose an administrative fine not to exceed \$5,000.00 per violation; require financial restitution to the victimized consumer(s); require the contractor to take continuing education courses; or assess costs associated with the Department's investigation and prosecution. Proof greater than a mere preponderance of the evidence must be submitted. Clear and convincing evidence is required. See *Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company*, 670 So.2d 932, 935 (Fla. 1996); *Ferris v. Turlington*, 510 So.2d 292 (Fla. 1987); *McKinney v. Castor*, 667 So.2d 387, 388 (Fla. 1st DCA 1995); *Tenbroeck v. Castor*, 640 So.2d 164, 167 (Fla. 1st DCA 1994); *Nair v. Department of Business and Professional Regulation*, 654 So.2d 205, 207 (Fla. 1st DCA 1995); *Pic N' Save v. Department of Business Regulation*, 601 So.2d 245 (Fla. 1st DCA 1992); *Munch v. Department of Professional Regulation*, 592 So.2d 1136 (Fla. 1st DCA 1992); *Newberry v. Florida Department*

of Law Enforcement, 585 So.2d 500 (Fla. 3d DCA 1991); Pascale v. Department of Insurance, 525 So.2d 922 (Fla. 3d DCA 1988); Section 120.57(1)(h), Fla. Stat. (Supp. 1996)("[f]indings of fact shall be based on a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute"). "'[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 testimony 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 a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.'" In re Davey, 645 So.2d 398, 404 (Fla. 1994), quoting, with approval, from Slomowitz v. Walker, 429 So.2d 797, 800 (Fla. 4th DCA 1983). Furthermore, the punitive action taken against the contractor may be based only upon those offenses specifically alleged in the administrative complaint. See Cottrill v. Department of Insurance, 21 Fla. L. Weekly D2630 (Fla. 1st DCA December 12, 1996); Kinney v. Department of State, 501 So.2d 129, 133 (Fla. 5th DCA 1987); Hunter v. Department of Professional Regulation, 458 So.2d 842, 844 (Fla. 2d DCA 1984).

22. The Administrative Complaint issued in the instant case alleges that punitive action should be taken against Respondent for violations of Section 489.129(1)(h)2, Florida Statutes (Count I), Section 489.129(1)(j), Florida Statutes (Count II), Section 489.129(1)(k), Florida Statutes (Count III), Section 489.129(1)(m), Florida Statutes (Count IV) and Section 489.129(1)(n), Florida Statutes (Count V) which were committed in connection with a construction project that Loma Linda agreed to undertake for Carmen and Virginia Bennett at a time when Respondent was Loma Linda's primary qualifying agent.

23. At all times material to the instant case, Section 489.129(1)(h)2, Florida Statutes, has authorized the Board to take punitive action against a contractor if the contractor or the business entity for which the contractor is a primary qualifying agent:

Commit[s] mismanagement or misconduct in the practice of contracting. Financial mismanagement or misconduct occurs when:

2. The contractor has abandoned a customer's job and the percentage of completion is less than the percentage of the total contract price paid to the contractor as of the time of abandonment, unless the contractor is entitled to retain such funds under the terms of the contract or refunds the excess funds within 30 days after the date the job is abandoned.

24. At all times material to the instant case, Section 489.129(1)(j), Florida Statutes, has authorized the Board to take punitive action against a contractor if the contractor or the business entity for which the contractor is a primary qualifying agent:

Fail[s] in any material respect to comply with the provisions of this part or violat[es] a rule or lawful order of the [B]oard.

As noted in the Administrative Complaint issued in this case, among "the provisions of this part" (Part I of Chapter 489, Florida Statutes) is the

provision (in Section 489.119(5)(b), Florida Statutes) requiring that "the registration or certification number of each contractor . . . appear in each . . . contract . . . used by that contractor in the business of contracting."

25. At all times material to the instant case, Section 489.129(1)(k), Florida Statutes, has authorized the Board to take punitive action against a contractor if the contractor or the business entity for which the contractor is a primary qualifying agent:

Abandon[s] a construction project in which the contractor is engaged or under contract as a contractor. A project may be presumed abandoned after 90 days if the contractor terminates the project without just cause or without proper notification to the owner, including the reason for termination, or fails to perform work without just cause for 90 consecutive days.

26. At all times material to the instant case, Section 489.129(1)(m), Florida Statutes, has authorized the Board to take punitive action against a contractor if the contractor or the business entity for which the contractor is a primary qualifying agent:

Commit[s] fraud or deceit in the practice of contracting.

A representation constitutes "fraud or deceit in the practice of contracting" in violation of Section 489.129(1)(m), Florida Statutes, only if it concerns a past or existing fact. See *Palmer v. Santa Fe Healthcare Systems, Inc.*, 582 So.2d 1234, 1236 (Fla. 1st DCA 1991). Mere proof that there has been a failure to perform a promise (unaccompanied by a showing that there was no intention to fulfill the promise at the time the promise was made) is insufficient to establish a violation of Section 489.129(1)(m), Florida Statutes. See *John Brown Automation, Inc., v. Nobles*, 537 So.2d 614, 618 (Fla. 2d DCA 1988).

27. At all times material to the instant case, Section 489.129(1)(n), Florida Statutes, has authorized the Board to take punitive action against a contractor if the contractor or the business entity for which the contractor is a primary qualifying agent:

Commit[s] incompetency or misconduct in the practice of contracting.

28. The foregoing statutory provisions are "in effect, . . . penal statute[s] . . . This being true the[y] must be strictly construed and no conduct is to be regarded as included within [them] that is not reasonably proscribed by [them]. Furthermore, if there are any ambiguities included such must be construed in favor of the . . . licensee." *Lester v. Department of Professional and Occupational Regulations*, 348 So.2d 923, 925 (Fla. 1st DCA 1977); see also *Whitaker v. Department of Insurance and Treasurer*, 21 Fla. L. Weekly D1353, D1354 (Fla. 1st DCA June 13, 1996)("[b]ecause the statute [Section 626.954(1)(x)4, Florida Statutes] is penal in nature, it must be strictly construed with any doubt resolved in favor of the licensee").

29. An examination of the evidentiary record in the instant case reveals that the Department did not establish, by even a preponderance of the evidence,

that Respondent "fail[ed] to include his license number on the [C]ontract," in violation of Section 489.119(5)(b), Florida Statutes (and therefore also in violation of Section 489.129(1)(j) Florida Statutes), as alleged in Count II of the Administrative Complaint; 7/ nor did the Department establish that Respondent "committ[ed] fraud or deceit in the practice of contracting," as alleged in Count IV of the Administrative Complaint. 8/ Consequently, Counts II and IV of the Administrative Complaint should be dismissed.

30. The Department, however, clearly and convincingly proved the violations alleged in the remaining counts of the Administrative Complaint (Count I, alleging a violation of Section 489.129(1)(h)2, Florida Statutes, Count III, alleging a violation of Section 489.129(1)(k), Florida Statutes, and Count V, alleging a violation of Section 489.129(1)(n), Florida Statutes). Punitive action against Respondent is therefore warranted.

31. In determining the particular punitive action the Department should take against Respondent for having committed the violations alleged in Counts I, III and V of the Administrative Complaint, it is necessary to consult Chapter 61G4-17, Florida Administrative Code, which contains the Board's "penalty guidelines." Cf. Williams v. Department of Transportation, 531 So.2d 994, 996 (Fla. 1st DCA 1988)(agency is required to comply with its disciplinary guidelines in taking disciplinary action against its employees).

32. Florida Administrative Code Rule 61G4-17.001 provides in pertinent part:

Normal Penalty Ranges. The following guidelines shall be used in disciplinary cases, absent aggravating or mitigating circumstances and subject to the other provisions of this Chapter. . . .

(8) 489.129(1)(h): Mismanagement or misconduct causing financial harm to the customer. First violation, \$750 to \$1,500 fine and/or probation; repeat violation, \$1,500 to \$5,000 fine and/or probation, suspension, or revocation. . . .

(11) 489.129(1)(k): Abandonment. First violation, \$500 to \$2,000 fine; repeat violation, revocation and \$5,000 fine. . . .

(14) Misconduct or incompetency in the practice of contracting as set forth in Section 489.129(1)(n), Florida Statutes, shall include, but is not limited to:

(a) Failure to honor a warranty.

(b) Violation of any provision of Chapter 61G4, Florida Administrative Code, or Chapter 489, Part I., F.S.

(c) Failure to abide by the terms of a mediation agreement.

(d) The following guidelines shall apply to cases involving misconduct or incompetency in the practice of contracting, absent aggravating or mitigating circumstances:

1. Misconduct by failure to honor warranty. First violation, \$500 to \$1,000 fine; repeat violation, \$1,000 to \$2,000 fine and/or

probation, suspension, or revocation.

2. Violation of any provision of Chapter 61G4, Florida Administrative Code, or Chapter 489, Part I, F.S. First violation, \$500 to \$1,000 fine; repeat violations, \$1,000 to \$5,000 fine and/or probation, suspension, or revocation.

3. Any other form of misconduct or incompetency. First violation, \$250 to \$1,000 fine and/or probation; repeat violations, \$1,000 to \$5,000 fine and/or probation, suspension, or revocation. . . .

(20) For any violation occurring after October 1, 1989, the [B]oard may assess the costs of investigation and prosecution. The assessment of such costs may be made in addition to the penalties provided by these guidelines without demonstration of aggravating factors set forth in rule 61G4-17.002.

(21) For any violation occurring after October 1, 1989, the [B]oard may order the contractor to make restitution in the amount of financial loss suffered by the consumer. Such restitution may be ordered in addition to the penalties provided in these guidelines without demonstration of aggravating factors set forth in rule 61G4-17.002, and to the extent that such order does not contravene federal bankruptcy law.

(22) The absence of any violation from this Chapter shall be viewed as an oversight, and shall not be construed as an indication that no penalty is to be assessed. The Guideline penalty for the offense most closely resembling the omitted violation shall apply.

33. "Repeat violation," as used in Chapter 61G4-17, Florida Administrative Code, is described in Florida Administrative Code Rule 61G4-17.003 as follows:

(1) As used in this rule, a repeat violation is any violation on which disciplinary action is being taken where the same licensee had previously had disciplinary action taken against him or received a letter of guidance in a prior case; and said definition is to apply (i) regardless of the chronological relationship of the acts underlying the various disciplinary actions, and (ii) regardless of whether the violations in the present or prior disciplinary actions are of the same or different subsections of the disciplinary statutes.

(2) The penalty given in the above list for repeat violations is intended to apply only to situations where the repeat violation

is of a different subsection of Chapter 489 than the first violation. Where, on the other hand, the repeat violation is the very same type of violation as the first violation, the penalty set out above will generally be increased over what is otherwise shown for repeat violations on the above list.

34. Rule 61G4-17.005, Florida Administrative Code, provides that "[w]here several of the . . . violations [enumerated in Rule 61G4-17.001, Florida Administrative Code] shall occur in one or several cases being considered together, the penalties shall normally be cumulative and consecutive."

35. The aggravating and mitigating circumstances which are to be considered before a particular penalty is chosen are listed in Rule 61G4-17.002, Florida Administrative Code. They are as follows:

- (1) Monetary or other damage to the licensee's customer, in any way associated with the violation, which damage the licensee has not relieved, as of the time the penalty is to be assessed. (This provision shall not be given effect to the extent it would contravene federal bankruptcy law.)
- (2) Actual job-site violations of building codes, or conditions exhibiting gross negligence, incompetence, or misconduct by the licensee, which have not been corrected as of the time the penalty is being assessed.
- (3) The severity of the offense.
- (4) The danger to the public.
- (5) The number of repetitions of offenses.
- (6) The number of complaints filed against the licensee.
- (7) The length of time the licensee has practiced.
- (8) The actual damage, physical or otherwise, to the licensee's customer.
- (9) The deterrent effect of the penalty imposed.
- (10) The effect of the penalty upon the licensee's livelihood.
- (11) Any efforts at rehabilitation.
- (12) Any other mitigating or aggravating circumstances.

36. Having considered the facts of the instant case in light of the provisions of Chapter 61G4-17, Florida Administrative Code, it is the view of the undersigned that the appropriate punitive action to take against Respondent in the instant case is to require him to pay a fine in the amount of \$1,000.00, to pay \$10,813.00 in restitution to the Bennetts, and to reimburse the Department (a) for all reasonable costs associated with the investigation that led to the filing of the charges set forth in Counts I, III and V of the Administrative Complaint; and (b) for all reasonable costs associated with its successful prosecution of these charges, excluding attorney's fees. 9/

RECOMMENDATION

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

RECOMMENDED that the Board enter a final order: (1) finding Respondent guilty of the violations alleged in Counts I, III and V of the Administrative Complaint; (2) penalizing Respondent for having committed these violations by imposing on him a fine in the amount of \$1,000.00 and requiring him to pay \$10,813.00 in restitution to the Bennetts and to reimburse the Department for all reasonable costs, excluding attorney's fees, associated with the Department's investigation and prosecution of the charges set forth in Counts I, III and V of the Administrative Complaint; 10/ and (3) dismissing Counts II and IV of the Administrative Complaint.

DONE AND ENTERED in Tallahassee, Leon County, Florida, this 9th day of January, 1997.

STUART M. LERNER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675 SUNCOM 278-9675
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Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of January, 1997.

ENDNOTES

1/ At the time of his assignment to this case, the undersigned's title was "Hearing Officer." It was not until October 1, 1996, that the title of the undersigned (and of all other Hearing Officers of the Division of Administrative Hearings) was changed to "Administrative Law Judge" (pursuant to Chapter 96-159, Laws of Florida).

2/ It is not apparent from the record why this case was not referred to the Division sooner.

3/ Such notice was in the form of a Notice of Hearing mailed to the Department and Respondent on October 18, 1996.

4/ The body of the affidavit reads as follows:

1. I, Kelly Goodman, am employed by the Department of Business and Professional Regulation as the custodian of the Complaint Cost Summary Report records.

2. I have conducted a diligent search of the official electronic records of the Department pertaining to the costs associated with the investigation and prosecution of

Complaint Number 94-19734, Licensee Name:
Philip A. Diorio; Complainants Names:
Carmen and Virginia Bennett.

3. In my capacity as custodian of the records, I hereby certify that the attached page entitled Complaint Management System, Complaint Cost Summary is a true and correct copy of the cost summary data compilation on file with the Department.

4. The enclosed data compilation reflects Complaint Processing and Investigative Costs recorded in a total amount of \$988.26 as of this date January 6, 1997. While the enclosed data compilation also records legal costs, the Department does not seek to recover legal costs from the Respondent in this case.

5. It is the regular practice of the Department to maintain Cost Summary Reports on each complaint filed with the Department. These Cost Summary reports are kept in the regular course of business of the Department, and are based upon information transmitted by employees assigned to investigate, file, and pursue the complaint through the Administrative Complaint process contained in Florida Statutes 120.57, and Florida Statutes 455 and 489.

5/ The subject of such "delinquent status" is addressed in Section 489.116(4) and (5), Florida Statutes, which provide as follows:

(4) A certificateholder or registrant shall apply with a completed application, as determined by board rule, to renew an active or inactive status certificate or registration before the certificate or registration expires. Failure of a certificateholder or registrant to so apply shall cause the certificate or registration to become a delinquent certificate or registration. Further, any delinquent certificateholder or registrant who fails to apply to renew licensure on either active or inactive status before expiration of the current licensure cycle must reapply in the same manner as an applicant for initial certification or registration.

(5) A delinquent status certificateholder or registrant must apply with a completed application, as determined by board rule, for active or inactive status during the current licensure cycle. Failure by a delinquent status certificateholder or registrant to become active or inactive before the expiration of the current licensure cycle renders the certificate or registration void, and any subsequent licensure shall be subject to all procedures and requirements imposed on an applicant for initial licensure.

Pursuant to Section 489.116(8)(b), Florida Statutes, "[a]t least 60 days prior to the end of a licensure cycle, the [D]epartment [is required to] forward: A notice of pending cancellation of licensure to a delinquent status certificateholder or registrant at the certificateholder's or registrant's address of record."

6/ Verbal representations were made to the Bennetts that the home would be completed within 90 to 120 days.

7/ While there is no license number on the Bennetts' (carbon) copy of the Purchase Agreement that was offered and received into evidence as Petitioner's Exhibit 3, the exhibit, by the admission of the Department's own witness, Carmen Bennett, does not reflect all of the handwritten entries that were made on the original. Although Ms. Bennett did not testify that there was a license number on the original, neither did she testify that there was no license number on the original.

8/ The evidence does clearly and convincingly establish that, as alleged in the Administrative Complaint, Loma Linda failed to do what it had promised in the Contract. The failure to fulfill a promise, however, does not constitute a violation of Section 489.129(1)(m), Florida Statutes, unless there was never any intention to perform the promised act. See *John Brown Automation, Inc., v. Nobles*, 537 So.2d 614, 618 (Fla. 2d DCA 1988). In the instant case, there was no allegation made in the Administrative Complaint, nor sufficient proof presented at hearing, that there was such bad faith on the part of Loma Linda or Respondent at the time of the Contract. Furthermore, although the Department argues in its proposed recommended order that Loma Linda made certain post-Contract misrepresentations to Carmen Bennett (for which, according to the Department, Respondent should be held responsible) that amounted to "fraud or deceit in the practice of contracting," these alleged misrepresentations were not referenced anywhere in the Administrative Complaint and they therefore cannot form the basis for any punitive action taken against Respondent in the instant case. See *Cottrill v. Department of Insurance*, 21 Fla. L. Weekly D2630 (Fla. 1st DCA December 12, 1996); *Kinney v. Department of State*, 501 So.2d 129, 133 (Fla. 5th DCA 1987); *Hunter v. Department of Professional Regulation*, 458 So.2d 842, 844 (Fla. 2d DCA 1984).

9/ The Department has indicated that it is not seeking to recover from Respondent those "costs associated with [its] attorney's time."

10/ Pursuant to Rule 61G4-12.018, Florida Administrative Code, the Department is required

to submit to the Board an itemized listing
of all costs related to investigation and
prosecution of an administrative complaint
when said complaint is brought before the
Board for final agency action.

Fundamental fairness requires that the Board provide a respondent with an opportunity to dispute and challenge the accuracy and/or reasonableness of the Department's itemization of investigative and prosecutorial costs before determining the amount of costs a respondent will be required to pay.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.