

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
CONSTRUCTION INDUSTRY LICENSING)
BOARD,)
)
Petitioner,)
) Case No. 96-4845
vs.)
)
JOHN A. TAGLIAFERRO,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on January 16, 1998, via video teleconference, with the parties appearing in Miami, Florida, before Patricia Hart Malono, a duly designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Ruby Seymour-Barr, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street, Suite 60
Tallahassee, Florida 32399

For Respondent: John A. Tagliaferro, pro se
601 Northwest 103 Avenue, No. 357
Pembroke Pines, Florida 33026-6023

STATEMENT OF THE ISSUE

Whether the Respondent committed the acts alleged in the Administrative Complaint and, if so, the penalty which should be imposed.

PRELIMINARY STATEMENT

In a four-count Administrative Complaint dated June 25, 1996, the Department of Business and Professional Regulation ("Department"), charged, in Count I, that John A. Tagliaferro violated Section 489.129(1)(h)2., Florida Statutes (1995), by committing mismanagement or misconduct in the practice of contracting which caused financial harm to a customer; in Count II, that Mr. Tagliaferro violated Section 489.129(1)(k) by abandoning a construction project in which he was engaged as a contractor; in Count III, that Mr. Tagliaferro violated Section 489.129(1)(n) by committing incompetency or misconduct in contracting; and, in Count IV, that Mr. Tagliaferro violated Section 489.129(1)(r) by failing to satisfy within a reasonable time a civil judgment against him and the business organization he qualified which relates to the practice of contracting. Mr. Tagliaferro timely requested a formal administrative hearing, and the Department forwarded the request to the Division of Administrative Hearings for assignment of an administrative law judge. After one continuance, the case was heard on January 16, 1998.

The Department presented the testimony of Mirna Espina and Petitioner's Exhibits A, B, C, E, and F were offered and received into evidence. Mr. Tagliaferro testified in his own behalf but offered no exhibits into evidence.

A transcript was filed with the Division of Administrative

Hearings on February 11, 1998, and the Department timely filed its proposed recommended order, which has been duly considered.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing and on the entire record of this proceeding, the following findings of fact are made:

1. The Department of Business and Professional Regulation is the state agency responsible for investigating and prosecuting complaints made to the Department for violations of Chapter 489, Part I, Florida Statutes. Sections 489.131(7)(e); 455.225, Florida Statutes. Pursuant to Section 489.129(1), the Construction Industry Licensing Board ("Board") is the entity responsible for imposing discipline for any of the violations set forth in that section.

2. At the times material to this proceeding, Mr. Tagliaferro has been licensed by the Department as a certified building contractor, having been assigned license number CB C020944 by the Board. His license is currently suspended for failure to make payments pursuant to the terms of a stipulation adopted in a final order of the Board effective June 20, 1994.

3. At all times material to this proceeding, Mr. Tagliaferro was the licensed qualifying agent for C. J. Construction Corporation.

4. On or about May 15, 1994, Mr. Tagliaferro, d/b/a C. J.

Construction Corporation, entered into a contract with Mr. Esteban Garcia to build a second-floor addition to Mr. Garcia's home located at 7541 Northwest 1st Court, Pembroke Pines, Florida.

5. The contract specified that C. J. Construction Corporation would construct an area approximately 24' x 17', and the scope of the work included installing roof shingles to match the existing roof, new windows, a stairway to the new second-floor addition, a new entrance door, new electrical wiring for the second-floor addition, and new plywood flooring over the existing roof. No completion date was specified in the contract.

6. The price stated in the contract for this construction was \$17,000, with one-third of the price due on signing the contract and the remainder due as the job progressed. On May 16, 1994, the date the contract was signed, Mr. Tagliaferro received payment of \$5,000.

7. The building plans were approved on or about August 11, 1994, and Mr. Tagliaferro began construction immediately thereafter.

8. Payments were made to Mr. Tagliaferro by checks dated August 30, 1994, September 22, 1994, and October 21, 1994, in the amounts of \$5,000, \$3,000, and \$2,000, respectively.

9. Mr. Tagliaferro found that it was necessary to change the dimensions of the addition from 24' x 17' to 24' x 24' to accommodate the stairway to be built to the second floor. Had

the addition been built to the original dimensions, the stairway would have covered a window. Mr. Tagliaferro prepared a written change order, with an estimate of \$6500 to construct the addition to the increased specifications. Although the change order was never signed, Mr. Tagliaferro framed the addition at 24' x 24'.

10. Mr. Tagliaferro installed the plywood flooring over the existing roof, framed the addition, installed the roof trusses, installed plywood sheeting on the exterior walls and roof, installed the new staircase, and tin-tagged the roof.

11. Mr. Tagliaferro called for an inspection of the framing on October 27, 1994. The framing did not pass inspection because there was no approved copy of the plans on site, as required. Mr. Tagliaferro did not remove the plans from the site prior to the inspection.

12. After the failed inspection on October 27, 1994, a member of Mr. Tagliaferro's family died, and it was necessary for him to go to New York, where he remained for three or four days. Mr. Tagliaferro telephoned Mr. Garcia's daughter, Mirna Espina, and told her that he was in New York to take care of personal matters.

13. When he returned, he contacted the architect to have another set of plans drawn up so he could re-submit them for approval and continue construction.

14. Ms. Espina telephoned Mr. Tagliaferro numerous times after October 27 to ask when he intended to return to complete

the construction. She received no answer and left messages on the answering machine. Mr. Tagliaferro did not return her calls.

15. At some point after October 27, Ms. Espina went to the police department and asked that a police officer accompany her to Mr. Tagliaferro's house so she could talk to him and ask when he intended to return to complete the construction.

Mr. Tagliaferro answered the door and, when the police officer asked when he was going to finish the construction job, Mr. Tagliaferro explained that he had a problem but intended to return to complete the job. When the police officer told him to tell the truth about whether he intended to complete the job, Mr. Tagliaferro did not respond and closed his door. Mr. Garcia, Ms. Espina, and her husband decided to complete the project themselves in early-to-mid December 1994.

16. Although he eventually obtained another set of plans, Mr. Tagliaferro did not return to the Garcia house to complete the addition. As of October 21, 1994, when he was last on the job, Mr. Tagliaferro had not installed roof shingles, new windows, an entrance door, wirelath or stucco on the exterior walls, electrical wiring, sheet rock with popcorn ceiling, or insulation, and he had not extended the air conditioning ductwork to the new addition.

17. A proposal for the installation of wirelath and stucco, dated December 10, 1994, was prepared by Repairs Unlimited, Inc., and was accepted by Mr. Garcia. On January 11 and 30, 1995,

respectively, Mr. Garcia also accepted proposals from Miller Roofing to install asphalt shingles on the roof and from Cayamas Electric Corporation to do the electrical work in the addition. Numerous receipts from building supply stores attest to the materials purchased by Mr. Garcia to complete the project, and a statement dated January 30, 1995, indicates that repair and reinstallation work was performed for Mr. Garcia by Samuel Benson on January 15, 22, and 29. These contracts total \$5,421.00.

18. Mr. Garcia hired an attorney on December 16, 1994, and filed suit against Mr. Tagliaferro in circuit court. A hearing was held, which Mr. Tagliaferro attended. On May 18, 1995, a final judgment was entered against Mr. Tagliaferro directing him to pay to Mr. Garcia and Ms. Espina \$15,000 and costs of \$250, with interest accruing at the rate of eight percent per annum.

19. Mr. Tagliaferro has not satisfied the judgment and has not engaged in any discussions with Mr. Garcia or Ms. Espina to arrange for payment of the judgment.

20. The evidence presented by the Department is not sufficient to support a finding of fact that Mr. Tagliaferro abandoned the Garcia construction project. The only evidence presented to support such a finding was the hearsay-within-hearsay testimony of Ms. Espina that her father, Mr. Garcia, told her that Mr. Tagliaferro told him that he did not intend to complete the project. The evidence is sufficient, however, to permit the inference that Mr. Tagliaferro was precluded from

completing work on the project prior to the expiration of ninety days from October 21, 1994, when he last worked on the project.

21. Although the evidence establishes that Mr. Garcia was harmed financially by Mr. Tagliaferro's failure to complete the addition, no evidence was presented by the Department to support a finding of fact that Mr. Tagliaferro caused the financial harm by mismanaging the construction project or by engaging in misconduct. Specifically, the Department presented no evidence to support its assertion that Mr. Tagliaferro completed only thirty percent of the job before Mr. Garcia took over the construction. Therefore, it failed to establish that the amount paid to Mr. Tagliaferro exceeded the percentage of completion.

22. Additionally, the Department presented no evidence to establish the relevant standards of competency in the practice of contracting or the manner in which Mr. Tagliaferro failed to meet those standards in the work done on the Garcia project.

23. It is, however, uncontroverted that Mr. Tagliaferro has not satisfied a judgment entered against him and C. J. Construction Corporation in May 1995 in favor of Mr. Garcia and Ms. Espina.

CONCLUSIONS OF LAW

24. The Division of Administrative hearings has jurisdiction over the subject matter of this proceeding and of the parties pursuant to Section 120.569(1), Florida Statutes (1997).

25. In its Administrative Complaint, the Department seeks penalties which include suspension or revocation of Mr. Tagliaferro's license and/or the imposition of an administrative fine. Therefore, it has the burden of proving by clear and convincing evidence that Mr. Tagliaferro committed the violations alleged in the Administrative Complaint. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

26. In Evans Packing Co. v. Department of Agriculture and Consumer Services, 550 So. 2d 112, 116, n. 5 (Fla. 1st DCA 1989), the court explained:

[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 conviction, without hesitancy, as to the truth of the allegations sought to be established. Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

27. Section 489.129(1), Florida Statutes, provides in pertinent part:

(1) The board may take any of the following actions against any certificateholder or registrant: place on probation or reprimand the licensee, revoke, suspend, or deny the issuance or renewal of the certificate, registration, or certificate of authority, require financial restitution to a consumer for financial harm directly related to a violation of a provision of this part, impose an administrative fine not to exceed \$5,000 per violation, require continuing education, or assess costs associated with investigation and prosecution, if the contractor, financially responsible officer, or business organization for which the contractor is a primary qualifying agent, a financially responsible officer, or a secondary qualifying agent responsible under s. 489.1195 is found guilty of any of the following acts:

(h) Committing mismanagement or misconduct in the practice of contracting that causes financial harm to a customer. 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;

(k) Abandoning 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.

(n) Committing incompetency or misconduct in the practice of contracting.

(r) Failing to satisfy within a reasonable time, the terms of a civil judgment obtained against the licensee, or the business organization qualified by the licensee, relating to the practice of the licensee's profession.

28. Rule 61G4-17.001(23), Florida Administrative Code, provides that "[f]or purposes of Section 489.129(1)(r), F.S., "reasonable time" means ninety (90) days following the entry of a civil judgment that is not appealed. The Board will consider a mutually agreed upon payment plan as satisfaction of such a judgment so long as the payments are current."

29. Based on the findings of fact herein, the Department has proven by clear and convincing evidence that Mr. Tagliaferro is guilty of violating Section 489.129(1)(r).

30. Pursuant to Rule 61G4-17.001(14)(b), "misconduct," as that term is used in Section 489.129(1)(n), includes a violation of any provision of Chapter 489, Part I, Florida Statutes. Consequently, based on the findings of facts herein and the conclusion of law that Mr. Tagliaferro is guilty of violating

Section 489.129(1)(r), the Department has proven by clear and convincing evidence that Mr. Tagliaferro violated Section 489.129(1)(n).

31. Based on the findings of fact herein, the Department has failed to prove by clear and convincing evidence that Mr. Tagliaferro violated Section 489.129(1)(h)2. or Section 489.129(1)(k), and Counts I and II of the Administrative Complaint should be dismissed.

32. The range of penalties which may be imposed on Mr. Tagliaferro for violating Sections 489.129(1)(n) and (r) are set forth in Rule 61G4-17.001 as follows:

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

(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:

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

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

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.

(18) Failure to satisfy a civil judgment obtained against the licensee or the business organization qualified by the licensee within a reasonable time. First violation, \$500 to \$1,000 fine and/or proof of satisfaction of civil judgment; repeat violation, \$1,000 to \$5,000 fine and/or proof of satisfaction of civil judgment, probation, suspension or revocation.

33. Rule 61G4-17.003 provides:

(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 regardless of whether the violations in the present and prior disciplinary actions are of the same or different subsections of the disciplinary statutes.

(2) The penalty given in the above list [in Rule 61G4-17.001] 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 in the above list.

Based on the findings of facts herein, the Department has proven that Mr. Tagliaferro has had disciplinary action taken against him for previous violations of Chapter 489. Therefore, the

penalty ranges given in Rule 61G4-17.001 for repeat violations should be used in determining the appropriate penalties in this case.

34. In Section 489.129(1) and Rule 61G4-17.001(20), the Board is authorized to assess the costs of investigation and prosecution, in addition to the penalties imposed. The Department presented no evidence to establish the amount of costs at the formal hearing but, rather, cited Rule 61G4-12.018 in its proposed recommended order to support its requests that such costs be assessed and that the record be kept open for presentation of the statement of costs to the Board. Rule 61G4-12.018 provides that "[t]he Department shall 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." There is nothing in this rule to suggest that the fact-finding role of the administrative law judge is transferred to the Board with regard to the determination of the amount of the costs to be assessed. Therefore, the assessment of such costs in this case is not appropriate given the lack of proof of the amount claimed and the corresponding inability of Mr. Tagliaferro to challenge the Department's statement of costs.

35. Rule 61G4-17.002, Florida Administrative Code, sets forth the aggravating and mitigating circumstances which may be

considered for the purposes of mitigation or aggravation of penalty. The rule provides that the factors

shall include, but are not limited to, the following:

- (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. The penalty guidelines and aggravating and mitigating factors have been evaluated in light of the facts found herein in determining the recommended penalty.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Construction Industry Licensing Board enter a Final Order:

(1) Finding John A. Tagliaferro guilty of having violated Section 489.129(1)(n) and Section 489.129(1)(r), Florida Statutes;

(2) Dismissing Counts I and II of the Administrative Complaint;

(3) Imposing an administrative fine of \$4,000; and

(4) Suspending Mr. Tagliaferro's license as a building contractor until he submits proof that he has satisfied the judgment entered against him on May 18, 1995, in Case No. 94-15660 (21), in the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida.

DONE AND ENTERED this 6th day of April, 1998, in Tallahassee, Leon County, Florida.

PATRICIA HART MALONO
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847

Filed with the Clerk of the
Division of Administrative Hearings
this 6th day of April, 1998.

COPIES FURNISHED:

Ruby Seymour-Barr, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street, Suite 60
Tallahassee, Florida 32399

John A. Tagliaferro, pro se
601 Northwest 103 Avenue
No. 357
Pembroke Pines, Florida 33026-6023

Lynda L. Goodgame, General Counsel
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-0792

Rodney Hurst, Executive Director
Construction Industry Licensing Board
7960 Arlington Expressway, Suite 300
Jacksonville, Florida 32211-7467

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.