

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND	)	
PROFESSIONAL REGULATION,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 97-0906
	)	
JOHN RANDOLPH O'BRIEN, <sup>1</sup>	)	
	)	
Respondent.	)	
_____	)	

RECOMMENDED ORDER

Pursuant to notice, a Section 120.57(1) hearing was held in this case on June 11, 1997, by video teleconference at sites in Fort Lauderdale and Tallahassee, Florida, before Stuart M. Lerner, a duly designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Ruby Seymour-Barr, Senior Attorney  
Department of Business and  
Professional Regulation  
1940 North Monroe Street  
Tallahassee, Florida 32399-0792

For Respondent: No Appearance

STATEMENT OF THE ISSUES

1. Whether Respondent committed the violations alleged in the Amended Administrative Complaint?
2. If so, what punitive action should be taken against Respondent?

PRELIMINARY STATEMENT

On November 13, 1995, the Department of Business and Professional Regulation (Department) issued a two-count Amended Administrative Complaint against Respondent. The Amended Administrative Complaint alleged that, in his capacity as the primary qualifying agent for a business organization, A'Aabbott Plumbing, Inc. (A'Aabbott), which had entered into a written agreement with Nereo Agostinelli to install a drain field on Agostinelli's property, Respondent engaged in conduct, (in connection with that project) in violation of Section 489.129(1)(n), Florida Statutes, (Count I) and Section 489.119(5)(b), Florida Statutes, and therefore also Section 489.129(1)(j), Florida Statutes, (Count II). On February 27, 1997, the matter was referred to the Division of Administrative Hearings for the assignment of an Administrative Law Judge to conduct a Section 120.57(1) hearing on the allegations against Respondent.

The hearing was scheduled for June 11, 1997. The Department and Respondent were provided with written notice of the hearing in accordance with Section 120.569(2)(b), Florida Statutes.<sup>2</sup>

The Department appeared at the hearing, which was held as scheduled on June 11, 1997, through one of its Senior Attorney, Ruby Seymour-Barr, Esquire. Respondent did not make an appearance, either in person or through counsel or an authorized representative.

At the hearing, the Department presented the testimony of one witness, Nereo Agostinelli. It also offered into evidence nine exhibits (Petitioner's Exhibit's 2, 3, 9 through 13, 15, and 16). All nine exhibits were received by the undersigned.

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 June 27, 1997. On July 8, 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.<sup>3</sup> 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 plumbing contractor.
2. He is now, and has been at all times material to the instant case, licensed to engage in the plumbing contracting business in the State of Florida.
3. His license number is CF C020307.
4. At all times material to the instant case, Respondent was the primary qualifying agent for A'Aabbott, a plumbing

contracting business located in Fort Lauderdale, Florida.

5. In August of 1992, A'Aabbott entered into a written contract (Contract) with Nereo Agostinelli in which it agreed, for \$3,225.00, "[t]o furnish labor and materials to install [on Agostinelli's property in Plantation, Florida a] 600 sq. ft. drain field to all codes at standard practice." Respondent signed the Contract on behalf A'Aabbott. His license number, however, was not written or otherwise displayed on the Contract.

6. The Contract contained the following warranty provision: "3 year conditional warranty-must upkeep interior plumbing."

7. Agostinelli paid the \$3,225.00 Contract price by check.

8. A'Aabbott thereafter installed a 600 square foot drain field on Agostinelli's property, as it had agreed to do.

9. Approximately two days after it had been installed (which was within the three-year warranty period), the system failed and raw sewage backed up into Agostinelli's residence on the property.

10. The system failed because pipe that A'Aabbott had installed as part of the project had been cracked during installation by a large rock and had become clogged with soil and therefore could not carry effluent to the drain field.

11. The "interior plumbing" that Agostinelli was required maintain as a prerequisite to his receiving the benefit of the Contract's "3 year conditional warranty" did not cause the failure of the system.

12. Agostinelli made numerous attempts to contact A'Aabbott and request that it fix the problem, as A'Aabbott was required to do under the Contract.

13. When Agostinelli spoke with Respondent, Respondent told him that A'Aabbott had no intention of doing anything further for him.

14. Although A'Aabbott was made aware of the system's failure, it failed to take any action to repair the system.

15. Sewage continued to back up into Agostinelli's residence. On three occasions, Agostinelli had Raider Rooter Sewer and Drain Cleaning, Inc., (Raider Rooter) come to his residence and remove sewage. The total cost to Agostinelli of Raider Rooter's services was \$355.00. Agostinelli would not have incurred these costs had the system installed by A'Aabbott not failed.

16. Having been unsuccessful in his efforts to have A'Aabbott honor its warranty under the Contract, Agostinelli contracted with B and N Dozing and Bobcat Service (B and N), on or about March 23, 1993, to make the necessary repairs to the system.

17. He paid B and N \$670.00 to make these repairs.

18. There have not been any problems with the system since it was repaired by B and N.

#### CONCLUSIONS OF LAW

19. The Department has been vested with the statutory

authority to issue licenses to those qualified applicants seeking to engage in the plumbing contracting business in the State of Florida. Section 489.115, Florida Statutes.

20. A business entity, like A'Aabbott, may obtain such a license, but only through a licensed "qualifying agent." Section 489.119, Florida Statutes.

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

22. 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.

23. 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.

24. 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.

25. 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), Florida Statutes("[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, 685 So. 2d 1371, 1372 (Fla. 1st DCA 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).

26. The Amended Administrative Complaint issued in the instant case alleges that punitive action should be taken against Respondent for violations of Section 489.129(1)(n), Florida Statutes (Count I) and Section 489.119(5)(b), Florida Statutes, and therefore also Section 489.129(1)(j), Florida Statutes (Count II), which were committed in connection with a drain field installation project that A'Aabbott undertook and completed for Nereo Agostinelli at a time when Respondent was A'Aabbott's primary qualifying agent.

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.

"[I]ncompetency or misconduct in the practice of contracting," as used Section 489.129(1)(n), Florida Statutes, includes the "[f]ailure to honor a warranty." Rule 61G4-17.001(14)(a), Florida Administrative Code.

28. 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 Amended Administrative Complaint issued in this case, among "the provisions of this part" (Part I of Chapter 489, Florida Statutes) in effect at the time A'Abbott and Agostinelli entered into the Contract was the provision (in Section 489.119(5)(b), Florida Statutes) requiring that "the registration or certification number of each contractor . . . appear in any . . . advertising medium used by the contractor." At all times material to the instant case, former Rule 21E-12.011 (now Rule 61G4-12.011), Florida Administrative Code, provided, in pertinent part, that, as used in Chapter 489, Florida Statutes, "the terms 'advertise' and 'advertises' shall apply to . . . contracts."

29. 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, 680 So. 2d 528, 531 (Fla. 1st DCA 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").

30. An examination of the evidentiary record in the instant case reveals that the Department has clearly and convincingly established that Respondent, in his capacity as A'Aabbott's primary qualifying agent, committed the violations alleged in Counts I and II of the Amended Administrative Complaint. Punitive action against Respondent is therefore warranted.

31. In determining the particular punitive action the Board should take against Respondent for having committed these violations, 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)(an agency is required to comply with its disciplinary guidelines in taking disciplinary

action against its employees).

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

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. . . .

(10) 489.129(1)(j): Failing in any material respect to comply with the provisions of Part I of Chapter 489. . . .

(e) 489.119: License number not appearing in advertisement. First violation, \$100; repeat violation, reprimand and \$250 to \$1,000 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. . . .

(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.

(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. . .

33. "Repeat violation," as used in Chapter 61G4-17, Florida Administrative Code, is described in Rule 61G4-17.003, Florida Administrative Code, 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 \$1,100.00, to pay the amount of \$1,025.00 in restitution to Agostinelli, 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 the Amended Administrative Complaint,<sup>4</sup> and (b) for all reasonable costs associated with its successful prosecution of these charges.<sup>5</sup>

#### RECOMMENDATION

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

RECOMMENDED that the Department issue a final order: (1) finding Respondent guilty of the violations of Chapter 489, Florida Statutes, alleged in Counts I and II of the Amended Administrative Complaint, and (2) fining Respondent \$1,100.00 for having committed these violations and requiring him to pay \$1,025.00 to Agostinelli in restitution and to reimburse the Department for all reasonable costs associated with the Department's investigation and prosecution of the charges set forth in the Amended Administrative Complaint.

DONE AND ENTERED this 16th day of July, 1997, in  
Tallahassee, Leon County, Florida.

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STUART M. LERNER  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(904) 488-9675 SUNCOM 278-9675  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 16th day of July, 1997.

ENDNOTES

<sup>1</sup> At the outset of the final hearing, pursuant to Petitioner's request, the style of the instant case was amended to reflect that Respondent's first name is John, not James.

<sup>2</sup> Such notice was in the form of a Notice of Hearing by Video Teleconference mailed to the Department and Respondent on March 28, 1997.

<sup>3</sup> The body of the affidavit reads as follows:

1. I, Kelly Goodman, am employed by the Department of Business and Professional Regulation and my duties include responsibilities as the custodian of the Complaint Cost Management System Complaint Cost Summary Report records.

2. I have conducted a diligent search of the official records of the Department pertaining to Costs incurred by the Department pursuant to Complaint Number 93-16388, Licensee Name: John R. O'Brien; Complainant(s) Name(s): Nereo F. Agostinelli.

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 total costs recorded in the amount of \$401.48 as of this date July 8, 1997.

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.

<sup>4</sup> 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.

<sup>5</sup> The undersigned disagrees with the suggestion made by the Department in its proposed recommended order that there is reason to deviate from the "normal penalty ranges" in the instant case and revoke Respondent's license. The Department has not shown that the circumstances surrounding Respondent's violations are significantly more "aggravating" than those which are typically present when a contractor fails to honor a warranty in violation of Section 489.129(1)(n), Florida Statutes, and fails to include his license number on a contract in violation of Section 489.119(5)(b), Florida Statutes, and therefore also Section 489.129(1)(j), Florida Statutes.

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.