STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, CONSTRUCTION INDUSTRY LICENSING BOARD,	)	
Petitioner,	)	Case No. 97-1370
vs.	)	
ARGADYS T. IGLESIAS,	)	
Respondent.	)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on July 8, 1997, at Miami, Florida, before Errol H. Powell, a duly designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Theodore R. Gay, Esquire
Department of Business and Professional Regulation
401 Northwest 2nd Avenue
Suite N-607
Miami, Florida 33128

For Respondent: Argadys T. Iglesias, pro se
3091 Southwest 85th Avenue
Miami, Florida 33155

STATEMENT OF THE ISSUE

The issue for determination is whether Respondent committed the offenses set forth in the Administrative Complaint and, if so, what action should be taken.

PRELIMINARY STATEMENT

On November 26, 1996, the Department of Business and Professional Regulation, Construction Industry Licensing Board, hereinafter Petitioner, filed an Administrative Complaint against Argadys T. Iglesias, hereinafter Respondent. Petitioner charged Respondent with violating Subsection 489.129(1)(r), Florida Statutes (1993), by 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. By an Election of Rights form, Respondent disputed the allegations of fact and requested a formal hearing. On March 17, 1997, this matter was referred to the Division of Administrative Hearings.

This case was consolidated with Case No. 97-1369. However, prior to hearing, the two cases were severed.

At hearing, Petitioner presented the testimony of two witnesses and entered eight exhibits into evidence. Respondent testified in his own behalf and entered no exhibits into evidence.[1]

However, Respondent was permitted to late-file on or before July 16, 1997, a copy of the Town of Surfside's building permit records, as an exhibit. Respondent filed the records on July 23, 1997. Petitioner did not file an objection to the records being filed beyond July 16, 1997. The building permit records of the Town of Surfside are hereby accepted into evidence as

Respondent's Composite Exhibit No. 1.[2]

No transcript of the hearing was ordered. At the request of the parties, the time for filing post-hearing submissions was set for more than ten days following the hearing. The parties filed post-hearing submissions which have been considered in this recommended order.

FINDINGS OF FACT

1. At all times material hereto, Argadys T. Iglesias, hereinafter Respondent, was licensed as a certified general contractor by the Department of Business and Professional Regulation, Construction Industry Licensing Board, hereinafter Petitioner. In February 1991, Petitioner issued Respondent license number CG C052822 and placed the license on an inactive status.

2. Effective February 23, 1993, Respondent's license status was changed to active; and Petitioner became the qualifying agent for Miami Construction Enterprises, Inc., hereinafter Miami Construction. Since in or around August 1994, Respondent's license has been on a delinquent status.

3. As qualifier, Miami Construction authorized Respondent to act for it in matters concerning contracting and to supervise construction undertaken by it.

4. At all times material hereto, Respondent was the primary qualifying agent for Miami Construction.

5. At no time material hereto did Respondent have ownership

interest in Miami Construction. Juan Carlos Rodriguez was the sole owner, having 100 per cent interest in Miami Construction, and was its president.

6. At no time material hereto was Respondent a signatory on any bank account maintained by Miami Construction.

7. At all times material hereto, Respondent was employed full-time with Dade County, Florida, as a housing inspector.

8. On or about May 28, 1993, Miami Construction entered into a written contract with Juan Marulanda for repair work on a home at a cost of $14,520. The home, located at 8951 Hawthorne Avenue, Surfside, Dade County, Florida, was owned by Mr. Marulanda and his wife, Mildred Marulanda, and had been damaged by Hurricane Andrew.

9. Juan Carlos Rodriguez entered into the contract on behalf of Miami Construction. Mr. Rodriguez represented to Mr. Marulanda that Miami Construction was licensed and insured.

10. On or about July 20, 1993, after demolition of the existing damage to the home, building permit no. 24326 was issued by the Town of Surfside for the repair work.

11. On or about August 20, 1993, Mr. Marulanda entered into a second written contract with Miami Construction for work on his home at a cost of $51,080. This second contract included change orders, some of which Respondent was unaware of.

12. It is inferred and a finding is made that the contract dated August 20, 1993, hereinafter the second contract,

superseded the contract dated May 28, 1993.

13. No subsequent building permit was issued for the work under the second contract. It is inferred and a finding is made that building permit no. 24326 also covered work performed in accordance with the second contract.

14. Miami Construction performed the work on Mr. Marulanda's home under Respondent's supervision.

15. At three different times during the construction on his home, Mr. Marulanda observed Respondent examining the work being performed. During one of Respondent's visits, Mr. Rodriguez introduced Mr. Marulanda to Respondent, as the person who was in charge of the construction.

16. The Marulandas paid for part of the construction being performed on their home.[3]

17. In addition to performing work on the Marulandas' home, Miami Construction performed work on Mr. Marulanda's business without the knowledge of Respondent.

18. At some point during the construction on his home, Mr. Marulanda became dissatisfied with the work being performed. On December 2, 1993, Mr. Marulanda informed the Town of Surfside that he wanted to cancel building permit no. 24326 based upon "Irreconcilible [sic] differences" and that he wanted an owner's building permit. On December 2, 1993, the Town of Surfside issued Mr. Marulanda an owner's building permit for "nonstructural" work.

19. Respondent did not receive notification of Mr. Marulanda's cancellation of the building permit even though Mr. Marulanda notified Miami Construction. When Respondent eventually became aware of the building permit's cancellation, he considered Mr. Marulanda's action as firing him and Miami Construction from the job.

20. Mr. Marulanda obtained the services of an attorney and in 1994 filed a civil complaint in the Eleventh Judicial Circuit, Dade County, Florida, Case No. 94-3201-CA-01, against Miami Construction and Mr. Rodriguez for alleged violations of the second contract. Respondent was not named as a defendant. The complaint alleged, among other things, breach of agreement, unjust enrichment, fraud, and conversion.

21. In or around February 1994, after operating for approximately one year, Miami Construction ceased doing business.

22. On February 25, 1994, a copy of the complaint was served upon Respondent, through service of process, as a director of Miami Construction.

23. No direct evidence was presented at hearing to show that Respondent was a director of Miami Construction.[4]

24. Respondent did not defend the lawsuit. Respondent believed that, since he was not named in the lawsuit, he could not defend it without the cooperation of Mr. Rodriguez, which he did not have. Additionally, after having communicated with the attorney representing Mr. Marulanda in the court action,

Respondent believed erroneously that only Miami Construction and Mr. Rodriguez would be affected by the outcome of the court case.

25. On October 12, 1994, Mr. Marulanda obtained a default final judgment against Mr. Rodriguez and Miami Construction from the Circuit Court.[5] The default final judgment ordered the following:

> 1. That a final judgment be and the same is hereby entered in favor of PLAINTIFF and against the DEFENDANTS, jointly and severally, in the amount of $43,304.06.
>
> 2. That PLAINTIFF additionally recover from said DEFENDANT [sic] costs herein taxed in the sum of $197.00.
>
> 3. That PLAINTIFF recover from said DEFENDANT [sic] attorney's fees herein taxed in the sum of $3,012.50.
>
> for all of which let execution issue.

26. The default final judgment does not show that a copy of it was furnished to Respondent, but does show that a copy was furnished to the named defendants, Mr. Rodriguez and Miami Construction.

27. The default final judgment has not been set-aside, vacated, appealed, satisfied, or discharged in bankruptcy in whole or in part.

28. Respondent has not made a single payment toward satisfaction of the default final judgment or offered to negotiate a payment plan.[6]

29. Since in or around August 1994, Respondent's license has been on a delinquent status.

30. Respondent is no longer a housing inspector with Dade County; however, he remains employed with Dade County. Respondent is required to have his license to continue his employment with Dade County in his present position.

CONCLUSIONS OF LAW

31. Pursuant to Section 120.569, Florida Statutes (Supp. 1996) and Subsection 120.57(1), Florida Statutes (Supp. 1996), the Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the parties thereto.

32. License revocation proceedings are penal in nature. The burden of proof is on the Petitioner to establish the truthfulness of the allegations of the Administrative Complaint by clear and convincing evidence. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

33. Section 489.129, Florida Statutes (1993), provides in pertinent part:

> (1) The board may take any of the following actions against any certificateholder [sic] or registrant: place on probation or reprimand the license, revoke, suspend, . . ., require financial restitution to a consumer, impose an administrative fine not to exceed $5,000 per violation, . . ., or assess costs associated with investigation and prosecution, if the contractor, . . ., or business organization for which the contractor is a primary qualifying agent or is a secondary qualifying agent responsible

under s. 489.1195 is found guilty of any of the following acts:

* * *

(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.

34. Section 489.1195, Florida Statutes (1993), provides in pertinent part:

(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.

35. A primary qualifying agent is defined in Section 489.105, Florida Statutes (1993), as follows:

(4) "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 department.

36. Rule 61G4-17.001(23), Florida Administrative Code, defines "reasonable time" for the purposes of Subsection

489.129(1)(r). Although the said Rule was promulgated subsequent to Respondent's conduct, the Rule is applicable to the instant case.[7] The said Rule defines "reasonable time" as follows:

> "[N]inety (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."

At the time of hearing, no payment plan had been agreed upon and not a single payment had been made in an effort to satisfy the default final judgment. Almost two years and nine months had elapsed since the default final judgment had been entered, and it had not been satisfied. The default final judgment has not been satisfied within a reasonable time. Even assuming that the definition was not applicable, failure to satisfy the civil money judgment after almost two years and nine months have elapsed is beyond a reasonable time.

37. Respondent is prohibited from challenging the correctness or validity of the default final judgment. When a judgment or decree, including a default judgment, has been rendered by a court of competent jurisdiction and the judgment or decree has not been reversed, neither party to that judgment or decree is allowed to challenge its correctness or validity. Department of Health and Rehabilitative Services v. Wood, 600 So. 2d 1298, 1300 (Fla. 5th DCA 1992); McGraw v. Department of State, Division of Licensing, 491 So. 2d 1193, 1195 (Fla. 1st DCA 1986); AGB Oil Company v. Crystal Exploration and Production

Company, 406 So. 2d 1165, 1167 (Fla. 3d DCA 1981), rev. denied 413 So. 2d 875 (Fla. 1982); The Florida Bar v. Vernell, 374 So. 2d 473, 475 (Fla. 1979); The Florida Bar v. Onett, 504 So. 2d 388, 390 (Fla. 1987). The undersigned is prohibited from going behind the default final judgment; however, mitigating circumstances may be presented to show that discipline should not be imposed. Vernell, supra; Onett, supra.

38. The default judgment obtained by the Mr. Marulanda is against Miami Construction and Mr. Rodriguez. Respondent is the primary qualifier of Miami Construction. As the primary qualifier, Respondent, as well as Miami Construction, is statutorily responsible for the financial matters of Miami Construction and for the satisfaction of any civil judgment obtained against Miami Construction. Even though Respondent has created a grave concern as to whether the construction damages ordered in the final default judgment are correct or valid, Respondent may not challenge the correctness or validity of the default judgment against Miami Construction and, in turn, the undersigned is prohibited from going behind the default judgment. However, Respondent may present mitigating circumstances as to disciplinary action against him.

39. Petitioner has demonstrated that Respondent violated Subsection 489.129(1)(r) by failing to satisfy, within a reasonable time, the terms of a civil judgment obtained against the business organization qualified by the licensee, relating to

the practice of the licensee's profession.

40. Regarding penalty, Rule 61G4-17.001, Florida Administrative Code, provides guidelines for disciplinary action and provides in pertinent part:

> (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 . . . .
>
> * * *
>
> (20) For any violation occurring after October 1, 1989, the board 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, 1988, the board 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 by these guidelines without demonstration of aggravating factors set forth in rule 61G4-17.002, and to the extend [sic] that such order does not contravene federal bankruptcy law.
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> * * *
>
> (23) [T]he board will consider a mutually agreed upon payment plan as satisfaction of such a judgment so long as the payments are current.

41. Rule 61G4-17.001 was not in effect at the time of Respondent's conduct, and the rule, which was in effect at the time of Respondent's conduct, did not contain a reference to

Subsection 489.129(1)(r). Petitioner's argument in determining the approach and rationale to use in addressing this circumstance is persuasive. Although there was an absence of a reference to Subsection 489.129(1)(r), the rule in effect did contain language currently found in Rule 61G4-17.001(22), Florida Administrative Code, which authorizes the use of the penalty guideline prescribed for the violation most closely resembling the violation in question. Applying Rule 61G4-17.001(22) to the instant case, the violation most closely resembling a violation of Subsection 489.129(1)(r) is a violation of Subsection 489.129(1)(h), Florida Statutes, (mismanagement or misconduct causing financial harm to a customer). The penalty guideline for a violation of Subsection 489.129(1)(h) is found at Rule 61G4-17.001(8), Florida Administrative Code, which provides, as a first violation, a fine of $750 to $1,500 and/or probation.

42. The mitigating and aggravating circumstances to be considered are found at Rule 61G4-17.002, Florida Administrative Code,[8] and 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.

43. Having considered the totality of the circumstances of the case at hand in light of the guidelines for disciplinary action, it is the view of the undersigned that Petitioner require Respondent to do the following as discipline: (a) pay a $1,000 administrative fine; (b) pay restitution or, in the alternative, to provide proof of satisfaction of the final default judgment; and pay costs of investigation and prosecution by Petitioner.

RECOMMENDATION

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

RECOMMENDED that the Department of Business and Professional Regulation, Construction Industry Licensing Board enter a final

order:

1. Finding that Argadys T. Iglesias violated Subsection 489.129(1)(r), Florida Statutes.;

2. Imposing a $1,000 administrative fine;

3. Requiring Argadys T. Iglesias to pay restitution to Juan Marulanda for the monetary damages awarded in the default final judgment entered in the Eleventh Judicial Circuit, Dade County, Florida, Case No. 94-3201-CA-01 on October 12, 1994, or, in the alternative, to provide proof of satisfaction of the said default final judgment; and

4. Requiring Argadys T. Iglesias to pay all reasonable costs of investigation and prosecution associated with the Department of Business and Professional Regulation's investigation and prosecution of the charges set forth in the Administrative Complaint.[9]

DONE AND ENTERED this 5th day of November, 1997, in Tallahassee, Leon County, Florida.

ERROL H. POWELL
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
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Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of November, 1997.

ENDNOTES

[1/] At hearing, Respondent made an ore tenus motion for continuance based upon his counsel being unavailable for hearing. Petitioner objected to a continuance. After hearing arguments, the motion was denied.

[2/] The cover letter accompanying Respondent's Composite Exhibit No. 1 is not a part of the Exhibit and is considered to be additional argument by Respondent. Moreover, the Exhibit contains some hand-written notes in pencil on the homeowner's permit issued December 2, 1993. It is evident that these notes are not a part of the document, but have been added. Therefore, the hand-written notes are not considered in this recommended order.

[3/] The record in these proceedings includes cancelled checks from the Marulandas, with some of the checks being made payable to Miami Construction, Inc. and some to Juan Carlos Rodriguez, personally. These cancelled checks were not entered into evidence at hearing by either party, but they are a part of the record, having been filed with the Division of Administrative Hearings at the time of referral of this case.

[4/] Petitioner entered into evidence a computer printout of the corporate record of Miami Construction from the Department of State, Division of Corporations. The printout clearly states that it is not an official record. The printout is hearsay

evidence. No direct evidence was presented at hearing for the hearsay evidence to supplement or explain. The printout is not an exception to the hearsay rule of evidence. Therefore, pursuant to Chapter 120, Florida Statutes, the printout is insufficient to establish a finding a fact.

[5/] In Petitioner's Exhibit No. 5, Mr. Marulanda's affidavit of damages submitted to the circuit court contains two items that are not included in the second contract (the superseding contract) between Mr. Marulanda and Miami Construction. Those items are the "Air conditioning" and the "Gate".

[6/] In his proposed recommended order, Respondent states that he made an attempt to correct "any short comings" by Mr. Rodriguez and to "rehabilitate" by spending "over $8,000.00" to "fix" Mr. Marulanda's home after the permit was cancelled by Mr. Marulanda. At hearing, no testimony was presented regarding such efforts by Respondent, and, therefore, these representations by Respondent are not considered in this recommended order.

[7/] Because Rule 61G4-17.001(23), Florida Administrative Code, clarified existing law by defining "reasonable time," the definition may be applied to cases where the alleged violation of Subsection 489.129(1)r, Florida Statutes, occurred prior to the said Rule's effective date. Cf. Agency for Health Care Administration v. Associated Industries of Florida, Inc., 678 So. 2d 1239, 1256 (Fla. 1996); Nussbaum v. Mortgage Service America Company, 913 F.Supp. 1548, 1557 (S.D. Fla. 1995).

[8/] At the time of Respondent's conduct, the wording of the rule in effect was the same as Rule 61G4-17.002, Florida Administrative Code, only the numbering was different.

[9/] Rule 61G4-12.018, Florida Administrative Code, requires the Department of Business and Professional Regulation 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 Respondent an opportunity to dispute and challenge the accuracy and/or reasonableness of the itemization of investigative and prosecutorial costs before the Board determines the amount of costs 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.