

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
CONSTRUCTION INDUSTRY LICENSING)
BOARD,)
)
Petitioner,) Case Nos. 97-1435
) 97-1436
vs.) 97-2998
)
ARTHUR SIGNORE,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on September 2, 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: Sean J. Green, Esquire
Benjamin R. Jacobi, Esquire
1313 Northeast 125th Street
North Miami, Florida 33161

STATEMENT OF THE ISSUES

The issue for determination is whether Arthur Signore committed the offenses set forth in the administrative complaints 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 (Petitioner) filed two two-count administrative complaints against Arthur Signore (Respondent). The Petitioner charged Respondent in each administrative complaint with the following: Count I--with violating Subsection 489.129(1)(e), Florida Statutes (1993), by performing any act which assists a person or entity in engaging in the prohibited uncertified and unregistered practice of contracting, if the certificateholder or registrant knows or has reasonable grounds to know that the person or entity was uncertified and unregistered; and Count II--with violating Subsection 489.129(1)(c), Florida Statutes (1993), by violating any provision of Chapter 455, Florida Statutes, through the making of misleading, deceptive, untrue, or fraudulent representations in the practice of his profession in violation of Subsection 455.227(1)(a), Florida Statutes (1993). By Election of Rights, Respondent disputed the allegations of fact and requested a formal hearing. On March 21, 1997, these matters were referred to the Division of Administrative Hearings (DOAH) and assigned Case Nos. 97-1435 and 97-1436.

By Order dated April 21, 1997, the two cases were consolidated. The two cases were scheduled for formal hearing. Subsequently, the hearing was continued predicated on the filing of an additional administrative complaint by the Petitioner

against Respondent.

On May 30, 1997, the Petitioner filed a three-count administrative complaint against Respondent. The Petitioner charged Respondent with the following: Count I--with violating Subsection 489.129(1)(e), Florida Statutes (1995), by performing any act which assists a person or entity in engaging in the prohibited uncertified and unregistered practice of contracting, if the certificateholder or registrant knows or has reasonable grounds to know that the person or entity was uncertified and unregistered; Count II--with violating Subsection 489.1265(3), Florida Statutes (1995), by obtaining a building permit for construction work without having entered into a contract to make improvements to, or perform the contracting at, the real property specified in the permit, and with violating Subsection 489.129(1)(j), Florida Statutes (1995), by failing in any material respect to comply with the provisions of Part I of Chapter 489, Florida Statutes, or violating a rule or lawful order of the Petitioner; and Count III--with violating Subsection 489.129(1)(c), Florida Statutes (1995), by violating any provision of Chapter 455, Florida Statutes. On June 24, 1997, Respondent forwarded an answer to the administrative complaint denying the alleged violations. On July 2, 1997, this matter was referred to DOAH and assigned Case No. 97-2998.

By Order dated July 10, 1997, the three cases were consolidated. The cases were scheduled for formal hearing.

At hearing, the Petitioner presented the testimony of six witnesses and entered eighteen exhibits into evidence. Respondent testified in his own behalf, presented the testimony of one witness and entered three exhibits into evidence.

A 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 filing of the transcript. The parties filed post-hearing submissions which have been duly considered.

FINDINGS OF FACT

1. At all times material hereto, Arthur Signore (Respondent) was licensed by the Department of Business and Professional Regulation, Construction Industry Licensing Board (Petitioner) as a certified general contractor. He received his license in 1969, qualifying Deluccia Construction. Respondent was issued license number CG CA01004.

2. Subsequently, in 1976, Respondent qualified Construction By Scott (CBS). He was issued license number CG CB01004. At all times material hereto, Respondent has been the qualifier of CBS, and the sole owner and president of CBS.

3. At all times material hereto, Respondent's belief was that Petitioner permitted a general contractor to use his/her license to obtain building permits for construction projects for which the general contractor had no contracts through the business that he/she qualified. Respondent practiced his belief

frequently by applying for and obtaining building permits for construction projects for which companies or individuals other than CBS had contracts.

Collins Job (Case No. 97-1436)

4. Sometime after Hurricane Andrew in 1992, Respondent made an oral agreement with Harold Bader to go into partnership with Bader and form a construction company, with Respondent qualifying the company. Respondent provided his name, his company's name (CBS), and his license number to Bader in order for the qualifying documents to be completed and submitted to the Petitioner. However, the company was not formed and the qualifying documents were never submitted.

5. At no time material hereto was Bader licensed by the Petitioner to engage in the practice of contracting. Respondent knew or should have known that Bader was not licensed by the Petitioner.

6. In March 1994, Thomas Sherry of American Building Industries, Inc. (ABI), began negotiating with Maria and Wayne Collins, husband and wife, for the remodeling of their home, located at 7417 SW 140th Court, Miami, Florida. On March 24, 1994, the Collins entered into a contract with ABI for the remodeling of their home at a cost of \$12,500.

7. Bader was the owner of ABI. Sherry was a salesperson for Bader.

8. Sherry provided the Collins with a business card which

showed, among other things, ABI's name, address and telephone number, and license number. The license number on the business card was Respondent's license number.

9. All business cards were provided to Sherry by Bader.

10. At no time material hereto, did Sherry talk with or meet Respondent.

11. The records of the Metropolitan Dade County, Building and Zoning Department reflect, among other things, Respondent's name, his company's name (CBS) and license number on the building permit application for the construction to the Collins' home. However, the address listed for Respondent and his company was the address for ABI. Further, the said records reflect, among other things, that aforementioned information provided, as to Respondent, was used to obtain the building permit.

12. Respondent did not complete the permit application for the building permit to remodel the Collins' home.

13. The Collins paid \$6,875 to ABI. Any and all checks were made payable to ABI. No money for the construction on the Collins' home was paid to or received by Respondent.

14. In May 1994, problems developed on the job site between the Collins and ABI. The work performed by ABI failed numerous inspections. Mr. Collins wanted to talk with Respondent who was listed as the contractor on the permit and requested Bader to contact Respondent. Bader refused, indicating to Mr. Collins that all communication should be with him (Bader).

15. Finally, in August 1994 the Collins fired ABI after more problems had developed. At that time ABI had completed some of the work.

16. On August 29, 1994, Mr. Collins met with Respondent at Respondent's place of business. Prior to the meeting, Mr. Collins had called Respondent numerous times regarding his problems with ABI and Bader and requesting assistance from Respondent. Each time Respondent denied having any knowledge of the work being performed.

17. When Mr. Collins met with Respondent, Mr. Collins discussed the problems that he had experienced with ABI and Bader. Respondent continued to deny knowing anything about the construction project but agreed to send his employees to examine the job and determine what could be done, if anything. The following day two of Respondent's workers came to the Collins' home and examined the work completed and the work remaining.

18. Subsequently, Respondent contacted Mr. Collins. Respondent indicated to Mr. Collins that he could complete the job for \$5,000. Mr. Collins refused to pay the additional monies since it would extend the remodeling cost beyond the contracted cost and since he was now directly paying the subcontractors.

19. At no time did Respondent or his business (CBS) have a contract with the Collins.

20. Until being contacted by the Collins, Respondent had no knowledge that Bader used his name, business name and license

number to contract with the Collins and to obtain the building permit for the remodeling of their home.

21. However, prior to being contacted by the Collins, Respondent had been contacted by other persons who had contracts with ABI, who had been informed by Bader that Respondent was the contractor for their jobs, who had problems with ABI, and who wanted assistance from Respondent. Furthermore, the building permits for the construction jobs of those persons reflected Respondent and Respondent's company as the contractor.

22. At no time material hereto was Bader or ABI licensed by the Petitioner to engage in the practice of contracting.

23. Respondent knew or should have known that neither Bader nor ABI was licensed by the Petitioner to engage in the practice of contracting. Respondent was placed on notice of their unlicensed activity after the contacts by the homeowners prior to the contact by the Collins.

24. Even with the knowledge of the homeowners' complaints prior to the Collins' complaints, at no time did Respondent notify Bader to stop using his (Respondent's) name, company's name and license number. Further, at no time did Respondent notify the Metropolitan Dade County, Building and Zoning Department of Bader's misuse of his (Respondent's) name, company's name, and license number or to no longer issue permits to ABI under his (Respondent's) name, company and license.

Walsh Job (Case No. 97-1435)

25. In the Fall of 1995, Patrick and Susan Walsh entered into an oral agreement with John Petracelli for an addition to and the remodeling of their home, located at 761 Glen Ridge Road, Key Biscayne, Florida.

26. On October 16, 1995, the Walshes entered into a verbal agreement with Petracelli for an engineer to produce a set of plans at a cost of \$2,250 for the construction to their home. The Walshes paid Petracelli the \$2,250 on October 16, 1995.

27. On December 7, 1995, the Walshes entered into a written agreement with Petracelli for the construction work on their home at a cost of \$84,000. Pursuant to this written agreement, the Walshes paid Petracelli \$16,800 on December 7, 1995.

28. Petracelli contacted Respondent and requested Respondent to be the contractor for the construction work on the Walshes' home. Respondent and Petracelli had met one another previously when Petracelli was a salesperson for Bader. Petracelli informed Respondent that he (Petracelli) had already told the Walshes that Respondent was the contractor. To the contrary, Petracelli had not informed the Walshes that Respondent was involved in the construction to their home.

29. Respondent agreed to be the contractor but informed Petracelli that, until a set of plans was approved by the Village of Key Biscayne Building Division (Building Division), he could not provide Petracelli with a cost figure for the construction work. Petracelli informed Respondent that the plans were being

prepared, but did not inform Respondent that the Walshes had paid for the preparation of the plans.

30. Respondent agreed further to submit the completed plans to the Building Division for a "dry run" only. After the dry run, Respondent would provide a cost figure for the construction work.

31. A dry run is a process in which a contractor, who has a complicated job which requires an engineer, submits a set of plans, together with an application for a building permit, to the Building Division for approval. The plans may be subject to several modifications requested by the Building Division before they are approved. As a result, the contractor does not know the estimated cost of a job until the plans have gone through the requested modifications, if any, and approved by the Building Division. After the plans are approved by the Building Division, the contractor is notified to come to the Building Division and sign for and obtain the building permit.

32. Pursuant to the agreement between Respondent and Petracelli, on or about December 11, 1995, Respondent completed an application for a building permit for the addition to and the remodeling of the Walshes' home and gave it to Petracelli. The application reflected, among other things, CBS (Respondent's company) as the contractor, and Respondent as the qualifier. Respondent provided the application to Petracelli for the dry run process only.

33. Further, Respondent reiterated to Petracelli that, once the plans were approved by the Building Division, he (Respondent) would meet with the Walshes and agree on a cost for the construction work on their home and that, after agreeing on the cost he (Respondent) would sign for and obtain the building permit for the construction to begin. Respondent was not aware that Petracelli and the Walshes had a signed agreement for the construction work.

34. Petracelli submitted the plans, along with the permit application, to the Building Division for approval. The plans were modified several times to meet the approval of the Building Division, but were never approved. The Building Division considered the plans submitted to be substandard. Since no plans were approved, no building permit was issued.

35. On or about January 3, 1996, the Walshes met at the Building Division with some of the Building Division's officials, Petracelli, and the engineer who prepared the plans. As a result of the meeting, among other things, the Walshes were able to review the permit application and discovered that Respondent, not Petracelli, was licensed and the contractor for the construction work; concluded that the engineer's work was considered so substandard by the Building Division that any modification produced by the engineer would not be approved by the Building Division; and determined that they no longer wanted Petracelli to perform the construction work on their home.

36. Within 24 hours of the meeting, the Walshes telephoned Petracelli and terminated his services. Also, the Walshes requested the return of all of the monies paid to Petracelli by them; however, Petracelli did not return any of their money.

37. At no time material hereto was Petracelli licensed by the Petitioner to engage in the practice of contracting. Respondent knew or should have known that Petracelli was not licensed by the Petitioner.

38. At no time material hereto did Respondent or his company (CBS) have a contract with the Walshes. At no time material hereto did Respondent have any communication or contact with the Walshes.

Biscayne Kennel Club Job (Case No. 97-2998)

39. The Biscayne Kennel Club (BKC), located at 320 NW 115th Street, Miami Shores, Florida, was a track for greyhound racing. On October 30, 1995, the last race was run at BKC. In February 1996, the BKC sold its Pari-Mutuel license.

40. On or about December 11, 1996, the BKC, by and through its representative, Carl Spitzer, entered into a written contract with Cuyahoga Wrecking Corporation (CWC), by and through its representative, Thomas Schwab, for, among other things, the removal of asbestos and the demolition and removal of BKC's grandstand structure and viewing area. The contract was prepared by Schwab, who had 25 years of experience in the demolition business, with 20 years of that experience in the State of

Florida.

41. All contract negotiations were between Schwab and Spitzer. At no time was the President and CEO of BKC, Kay Spitzer, involved in the contract negotiations.

42. As to cost, the contract provided at Article 4 that the cost was \$37,500 and that the \$37,500 was "dedicated to the removal of the described ACM." Further, Article 4 provided that the "balance of the work to be paid for by the sale of the ferrous and non-ferrous metals by the contractor."

43. In addition, the contract provided in Article 7 that, among other things, all permits were included in the contract price and that BKC and the "contractor" would share "equally all the proceeds of the non-ferrous metals minus whatever costs are incurred bringing it to market."

44. The contract did not restrict or prohibit CWC from engaging the services of any individual or subcontractor to perform the work required in the contract.

45. The grandstand structure and viewing area were one structure. Attached to the roof of the structure was a small building which was used by BKC personnel for viewing the races. The roof was the highest part of the structure, except for the small building. The distance from ground level to the top of the roof was 69 feet and 10 inches; and the top of the small building was approximately 15 feet higher than the top of the roof.

46. CWC contracted with Sal's Abatement to perform the

asbestos removal.

47. Schwab was licensed by Dade County, Florida, as a specialty contractor. He was notified that the work for the BKC job was outside the scope of his license and that a contractor, licensed by the Petitioner, was required for the BKC job. Schwab contacted Respondent to be the general contractor. Schwab had worked with Respondent before on other, but smaller, jobs.

48. Respondent agreed to be the general contractor in return for a percentage of the contract. Per the agreement, Respondent would obtain the necessary permits, provide the equipment necessary for the demolition, and supervise the workers on the job.

49. On March 6, 1997, Respondent completed an application for a building permit with Miami Shores Village, Florida, for the demolition of the BKC grandstand. The application reflected Respondent's company (CBS) as the contracting company and Respondent as the qualifier. Carl Spitzer signed the permit application on behalf of BKC.

50. On March 17, 1997, a building permit (permit number 41084) was issued by the Village of Miami Shores for the demolition of BKC's grandstand. On April 29, 1997, the cost of the permit, \$566.50, was paid.

51. At no time material hereto was Schwab or CWC licensed by Petitioner to engage in the practice of contracting. Respondent knew or should have known that neither Schwab nor CWC

were licensed by Petitioner.

52. At no time did a contract exist between Respondent or his company with BKC for the demolition job.

53. Respondent supervised CWC's preparation of the grandstand for demolition. In preparing the grandstand for demolition, Respondent and Schwab met at the site at least 3 times to discuss the demolition and its progress.

54. On May 16, 1997, the grandstand was scheduled to be demolished.

55. On the morning of May 16th, as Schwab was leaving BKC, Respondent arrived. Shortly thereafter, the grandstand accidentally collapsed--the beams supporting the roof of the grandstand failed, and the roof collapsed. Two of CWC's workers were killed and three were seriously injured.

56. After the collapse, BKC contracted with another company, Omega Contracting, to complete the demolition job.

57. The Petitioner submitted documents reflecting that its costs of investigation and prosecution of the complaints against Respondent, excluding costs associated with attorney's time, to be \$1,017.25.

58. On May 22, 1997, pursuant to an Emergency Suspension Order, on May 22, 1997, the Petitioner suspended Respondent's license.

59. Respondent has no prior disciplinary action taken against him by the Petitioner.

CONCLUSIONS OF LAW

60. Pursuant to Section 120.569 and Subsection 120.57(1), Florida Statutes, the Division of Administrative Hearings has jurisdiction over the subject of these proceedings and the parties thereto.

61. License revocation proceedings are penal in nature. The burden of proof is on Petitioner to establish the truthfulness of the allegations of the administrative complaints 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).

62. Section 489.129, Florida Statutes (1993), 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 or registration, require financial restitution to a consumer, 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 or is a secondary qualifying agent responsible under s. 489.1195 is found guilty of any of the following acts:

* * *

(c) Violating any provision of chapter 455.

* * *

(e) Performing any act which assists a person or entity in engaging in the prohibited uncertified and unregistered practice of contracting, if the certificateholder or registrant knows or has reasonable grounds to know that the person or entity was uncertified and unregistered.

63. Section 455.227, Florida Statutes (1993), provides in pertinent part:

(1) The board shall have the power to revoke, suspend, or deny the renewal of the license, or to reprimand, censure, or otherwise discipline a licensee, if the board finds that:

(a) The licensee has made misleading, deceptive, untrue, or fraudulent representations in the practice of his profession.

* * *

(2) In addition to, or in lieu of any other discipline imposed pursuant to this section, the board may impose an administrative fine not to exceed \$1,000 for each violation. . . .

64. Section 489.105, Florida Statutes (1993), provides a definition for contractor and provides in pertinent part:

(3) "Contractor" means the person who is qualified for, and shall only be responsible for, the project contracted for and means, except as exempted in this part, the person who, for compensation, undertakes to, submits a bid to, or does himself or by others construct, repair, alter, remodel, add to, demolish, subtract from, or improve any building or structure, including related improvements to real estate, for others or for resale to others; and whose job scope is substantially similar to the job scope described in one of the subsequent paragraphs of this subsection.

(a) "General contractor" means a contractor whose services are unlimited as to the type of work which he may do, except as provided in this part.

Collins Job (Case No. 97-1436)

65. Petitioner has failed to demonstrate that Respondent violated Subsection 489.129(1)(e). The facts alleged by Petitioner in its Administrative Complaint to form a basis for and to support a violation is that "Respondent obtained the permit" for the job for the unlicensed contractor, i.e., Bader.¹ The evidence shows that Respondent did not obtain the permit.

66. However, the evidence shows that Respondent had prior notice of the conduct by Bader, who was unlicensed, in using Respondent's name, his company's name and his license number to obtain building permits for construction jobs contracted by ABI, which was also unlicensed. Moreover, the evidence shows that once Respondent became aware of Bader's conduct, Respondent made no attempt to prevent Bader from continuing his conduct; and that Respondent's failure to act when he received prior notice of Bader's conduct assisted Bader in obtaining a building permit for the Collins job. Notwithstanding, Petitioner failed to allege sufficient facts in its Administrative Complaint or to amend its Administrative Complaint to present such conduct as a basis for disciplinary action.

67. Petitioner has failed to demonstrate a violation of Subsection 489.129(1)(c). Furthermore, Petitioner suggests in

its post-hearing submission that a violation of Subsection 489.129(1)(c) was not committed by Respondent.

Walsh Job (Case No. 97-1435)

68. Petitioner has failed to demonstrate that Respondent violated Subsection 489.129(1)(e). The facts alleged by Petitioner in its Administrative Complaint to form a basis for and to support a violation is that "Respondent obtained the permit" for the job for the unlicensed contractor, i.e., Petracelli.² The evidence shows that Respondent did not obtain the permit.

69. Rather, the evidence shows that Respondent completed a building permit application, representing on the application that his business was the contractor and indicating his license number as the qualifier. The permit application was given to Petracelli, who filed it with the building department. The permit application was filed prior to Respondent obtaining an agreement with the Walshes that he would be the contractor for the job. By making application for the building permit, Respondent may have been assisting Petracelli, who was unlicensed, in engaging in the practice of contracting. (See discussion below.) However, Petitioner failed to allege those facts in its Administrative Complaint or to amend its Administrative Complaint to allege those facts as a basis for disciplinary action.

70. Petitioner has failed to demonstrate that Respondent

violated Subsection 489.129(1)(c) by falsely representing on the application for the building permit that he was the contractor for the job. To the contrary, the evidence shows that Respondent's intent and purpose was to submit the permit application and plans to the building department for a "dry run" only. If the plans were approved, Respondent's intent was to meet with the Walshes to discuss the contract for the work to be performed. After agreeing on contract terms, Respondent's intent was to sign and obtain the building permit. The Petitioner presented no evidence showing that such process by Respondent was not an accepted practice or not proper or inappropriate.

Biscayne Kennel Club Job (Case No. 97-2998)

71. Section 489.129, Florida Statutes (1995), 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 or registration, require financial restitution to a consumer, 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 or is a secondary qualifying agent responsible under s. 489.1195 is found guilty of any of the following acts:

* * *

(c) Violating any provision of chapter 455.

* * *

(e) Performing any act which assists a person or entity in engaging in the prohibited uncertified and unregistered practice of contracting, if the certificateholder or registrant knows or has reasonable grounds to know that the person or entity was uncertified and unregistered.

* * *

(j) Failing in any material respect to comply with the provisions of this part or violating a rule or lawful order of the board.

72. Section 455.227, Florida Statutes (1995), provides in pertinent part:

(1) The following acts shall constitute grounds for which the disciplinary actions specified in subsection (2) may be taken:

(a) Making misleading, deceptive, or fraudulent representations in or related to the practice of the licensee's profession.

* * *

(2) When the board, or the department when there is no board, finds any person guilty of the grounds set forth in subsection (1) or of any grounds set forth in the applicable practice act, including conduct constituting a substantial violation of subsection (1) or a violation of the applicable practice act which occurred prior to obtaining a license, it may enter an order imposing one or more of the following penalties:

(a) Refusal to certify, or to certify with restrictions, an application for a license.

(b) Suspension or permanent revocation of a license.

(c) Restriction of practice.

(d) Imposition of an administrative fine not

to exceed \$5,000 for each count or separate offense.

(e) Issuance of a reprimand.

(f) Placement of the licensee on probation for a period of time and subject to such conditions as the board, or the department when there is no board, may specify. Those conditions may include, but are not limited to, requiring the licensee to undergo treatment, attend continuing education courses, submit to be reexamined, work under the supervision of another licensee, or satisfy any terms which are reasonably tailored to the violations found.

(g) Corrective action.

73. Section 489.1265, Florida Statutes (1995), provides, among other things, prohibited acts by licensed contractors and provides in pertinent part:

(3) A certified or registered contractor, or contractor authorized by a local construction regulation board to do contracting, may not apply for or obtain a building permit for construction work unless the certified or registered contractor, or contractor authorized by a local construction regulation board to do contracting, or business organization duly qualified by said contractor, has entered into a contract to make improvements to, or perform the contracting at, the real property specified in the application or permit. This subsection does not prohibit a contractor from applying for or obtaining a building permit to allow the contractor to perform work for another person without compensation or to perform work on property that is owned by the contractor.

74. Section 489.105, Florida Statutes (1995), provides a definition for contractor and provides in pertinent part:

(3) "Contractor" means the person who is

qualified for, and shall only be responsible for, the project contracted for and means, except as exempted in this part, the person who, for compensation, undertakes to, submits a bid to, or does himself or by others construct, repair, alter, remodel, add to, demolish, subtract from, or improve any building or structure, including related improvements to real estate, for others or for resale to others; and whose job scope is substantially similar to the job scope described in one of the subsequent paragraphs of this subsection. For the purposes of regulation under this part, "demolish" applies only to demolition of steel tanks over 50 feet in height; towers over 50 feet in height; other structures over 50 feet in height, other than buildings or residences over three stories tall; and buildings or residences over three stories tall. . . .:

(a) "General contractor" means a contractor whose services are unlimited as to the type of work which he may do, except as provided in this part.

75. A general contractor's license was required for the BKC job for it involved the demolition of a structure over 50 feet tall. The services of a general contractor are unlimited. Schwab, who contracted with BKC, was notified of this requirement and contacted Respondent to be the general contractor for the job.

76. Petitioner has demonstrated that Respondent violated Subsections 455.227(1)(a), 489.129(1)(c), (e), and (j), and 489.1265(3). The contract for the demolition of the BKC structure was between BKC, the owner of the structure, and the unlicensed person or entity, not between BKC and Respondent who was licensed as a general contractor. The unlicensed person or

entity engaged in the practice of contracting. Moreover, after the contract for the demolition was entered into, Respondent made an agreement with the unlicensed person, not the owner of the structure, to be the contractor on the job. Respondent made application for the building permit, representing that his company was the contractor for the job, obtained the permit, and supervised the demolition. Without Respondent's license the unlicensed person or entity could not have obtained the permit and engaged in the demolition of the structure. Respondent knew or should have known that the unlicensed person was not licensed to perform the demolition of the structure.

77. Regarding penalty, Rule 61G4-17.001, Florida Administrative Code, provides in pertinent part:

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

* * *

(3) 489.129(1)(c): Violating any part of Chapter 455. Penalty within ranges prescribed by Section 455.227, unless otherwise prescribed herein.

(a) 455.227(1)(a): Fraud, deceit, misleading, or untrue representations. First violation, \$1,000 to \$3,000 fine and/or probation, suspension, or revocation; repeat violation, revocation and \$5,000 fine.

* * *

(5) 489.129(1)(e): Assisting unlicensed person to evade provision of Chapter 489. First violation, \$500 to \$2,500 fine; repeat violation, \$2,500 to \$5,000 fine and/or

probation, suspension, or revocation.

* * *

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

78. No specific penalty guideline is set forth in the Rule for a violation of Subsection 489.129(1)(j) which coincides with the grounds specified in the administrative complaint. Further, the Rule does not set forth a guideline for a violation of Subsection 489.1265(3).

79. However, Rule 61G4-17.001 provides further in pertinent part:

(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.

80. The offense most closely resembling the omitted violation of Subsection 489.1265(3) is a violation of Subsection 489.129(1)(e). The conduct of Respondent obtaining a building permit for the demolition job when he had not entered into a contract with the owner of the structure to be demolished closely resembles the act of assisting an unlicensed person or entity to engage in the practice of contracting.

81. Pursuant to Rule 61G4-17.002, Florida Administrative Code, Petitioner may consider aggravating and mitigating circumstances. Rule 61G4-17.002 provides:

Circumstances which may be considered for the

purposes of mitigation or aggravation of penalty 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.

82. As aggravating factors, circumstances (3), (4), and (11) should be considered. Respondent has expressed his belief and practice that a licensed contractor can obtain a building

permit for a job that neither the contractor nor the company that the contractor qualifies has entered into a contract with the property owner. Respondent maintained this position up to and during hearing. Such practice is contrary to the practice act for contracting. Respondent's willingness to conduct himself contrary to the practice act for contracting presents a danger to the public and fails to demonstrate any rehabilitation on the part of Respondent.

83. As a mitigating factor, circumstance (7) should be considered. Respondent has been licensed for approximately 28 years with no disciplinary action by Petitioner.

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. Dismissing all counts in Case Nos. 97-1435 and 97-1436.

2. Finding that Arthur Signore violated Subsections 489.129(1)(c), (e), and (j), 489.1265(3), and 455.227(1)(a), Florida Statutes (1995).

3. Revoking Arthur Signore's certified general contractor's license.

4. Requiring Arthur Signore 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 of Case No. 97-2998.³

DONE AND ENTERED this 13th day of January, 1998, 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
(850) 488-9675 SUNCOM 278-9675
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Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of January, 1998.

ENDNOTES

^{1/} Petitioner alleged in Count I, paragraph number 8 of the Administrative Complaint the following: "8. On or about April 26, 1994, the Respondent obtained the permit for the Customer's project."

^{2/} Petitioner alleged in Count I, paragraph numbered 8 of the Administrative Complaint the following: "8. On or about December 11, 1995, the Respondent obtained the permit for the Customer's project from the Village of Key Biscayne."

^{3/} 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.