

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND )  
PROFESSIONAL REGULATION, )  
CONSTRUCTION INDUSTRY )  
LICENSING BOARD, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 98-1266  
 )  
STEVE G. PETERS, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on January 13, 1999, in Fort Lauderdale, Florida, before Patricia Hart Malono, a duly-designated administrative law judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Theodore R. Gay, Esquire  
Department of Business and  
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401 Northwest Second Avenue  
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Miami, Florida 33128

For Respondent: John P. Seiler, Esquire  
Law Offices of Seiler & Sautter  
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STATEMENT OF THE ISSUE

Whether the Respondent committed the violations alleged in the Amended Administrative Complaint dated July 15, 1998, and, if so, the penalty that should be imposed.

PRELIMINARY STATEMENT

This case was originally referred to the Division of Administrative Hearings on March 13, 1998, by the Department of Business and Professional Regulation ("Department") for assignment of an administrative law judge to conduct a formal hearing involving an Administrative Complaint dated May 31, 1996, charging Steve G. Peters with various violations of Section 489.129, Florida Statutes (1993). Mr. Peters denied the allegations in the Administrative Complaint and requested a formal hearing. Accordingly, the Department referred the matter to the Division of Administrative Hearings for assignment of an administrative law judge. On April 13, 1998, the Department filed a Motion for Relinquishment of Jurisdiction, to which Mr. Peters did not object. In an order entered April 28, 1998, the motion was granted, the file of the Division of Administrative Hearings was closed, and the matter was returned to the Department.

On August 27, 1998, the Department filed a Motion to Reopen File, Amend Administrative Complaint, and to Schedule Hearing. The Respondent did not file a response in opposition to this motion, the motion was granted in an order entered October 2, 1998, and the file of the Division of Administrative Hearings was reopened. In the seven-count Amended Administrative Complaint dated July 15, 1998, the Department of Business and Professional Regulation ("Department") charged Mr. Peters with violating

Sections 489.119(2) and 489.129(1)(e), (f), (h)2., (k), (n), and (r), Florida Statutes (1993). These charges are based on Mr. Peters' acts and omissions with respect to the re-roofing of a residence owned by Victor Sher and on Mr. Peters' failure to satisfy a final judgment that was entered against him in a lawsuit brought by Mr. Sher arising out of the re-roofing project.

At the hearing, the Department presented the testimony of Victor Sher and of Mr. Sher's attorney, David Tangora. The Department's Exhibits 1 through 13 were offered into evidence; the Department's Exhibits 4 through 13 were received into evidence at the hearing, and ruling was withheld on the Department's Exhibits 1 through 3. Mr. Peters testified in his own behalf, and the Respondent's Exhibits 1 through 4 were offered and received into evidence.

Mr. Peters objected to the admission into evidence of the Department's Exhibits 1, 2, and 3 on the grounds that they were not properly authenticated. Ruling was withheld on the admissibility of these three exhibits to allow the parties the opportunity to present further legal argument. The Department's Exhibit 1 purports to be copies of records on file with the Construction Industry Licensing Board ("Board"); a certificate of authenticity is attached to the records, which is signed by Rodney L. Hurst, who identifies himself as the Executive Director and Records Custodian of the Board. In the certificate,

Mr. Hurst states that the documents attached to the certificate are true and correct copies of records on file with the Board. Finally, Mr. Hurst's signature is preceded by the following attestation: "Witness my hand and the official seal of the Construction Industry Licensing Board . . . ." The document is under seal.

Mr. Peters maintains that, in addition to the above information, a public record is not properly authenticated unless it contains a final certification of a second official, given under oath, attesting to the genuineness of the signature, to the official position of the person signing the certificate of authenticity, and to the genuineness of the seal placed on the certificate. This argument is rejected. The certificate of authenticity comprising part of the Department's Exhibit 1 satisfies the requirements for self-authentication of copies of public records set forth in Section 90.902(1) and (4), Florida Statutes. In addition, Section 489.113(8), Florida Statutes, constitutes specific legislative authorization for the admissibility of the Department's Exhibit 1 and provides as follows: "Any public record of the [Construction Industry Licensing] board, when certified by the executive director of the board or his representative, may be received as prima facie evidence in any administrative or judicial proceeding." The Department's Exhibit 1 is received into evidence.

The Department's Exhibits 2 and 3 consist of certificates signed by Rodney L. Hurst, who identifies himself as the Executive Director and Records Custodian of the Board, in which he certifies that a diligent search of the records of the Board revealed that the two persons who were the subjects of the certificates were not then and never had been licensed as state-certified or state-registered contractors in Florida.

Mr. Hurst's signature is preceded by the following attestation:

"Witness my hand and the official seal of the Construction Industry Licensing Board . . . ." The document is under seal.

These certificates satisfy the requirements for self-authentication set forth in Section 90.902(1) and (4), Florida Statutes. The Department's Exhibits 2 and 3 are received into evidence.

After the Department rested its case-in-chief, Mr. Peters made a motion for a directed verdict, asserting that the Department had failed to submit sufficient evidence to support any of the counts in the Amended Administrative Complaint. Before Mr. Peters could present argument in support of the motion, the Department interjected that such a motion is inappropriate because, once a case such as this goes to final hearing, an administrative law judge of the Division of Administrative Hearings has authority only to enter a recommended order for the Department's consideration. The Department's counsel further stated that the Department would not "nolle

prosequi" any of the counts in the Amended Administrative Complaint. Because the Department is correct that an administrative law judge cannot enter a "directed verdict" at the close of the Department's case, the motion was denied. See Section 120.57(1)(k), Florida Statutes (Supp. 1998).

The transcript of the hearing was filed with the Division of Administrative Hearings, and the Department timely filed proposed findings of fact and conclusions of law. Even though he requested and was granted an extension of time in which to file proposed findings of fact and conclusions of law, Mr. Peters did not do so.

#### 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) and 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 all times material to this proceeding, Mr. Peters was licensed by the Board as a certified roofing contractor, having

been issued license number CC C029551. This license authorized him to engage in business as a roofing contractor as an individual and not as the qualifying agent of any business entity.

3. Victor Sher owned and resided in a home located at 400 East Tropical Way in Plantation, Broward County, Florida. On or about June 9, 1993, and July 1, 1993, Mr. Sher accepted two written proposals to replace the roof on his home, which proposals were submitted to him by R. J. Bonneau on behalf of RJB International. The proposals were signed by Mr. Sher and by "R. J. Bonneau, P.E., for the firm." Pursuant to these contracts, Mr. Sher paid a deposit in the amount of \$5,500 to RJB International by check dated June 7, 1993; and, by check dated July 1, 1993, Mr. Sher paid RJB International an additional \$800. Also, by check dated July 1, 1993, Mr. Sher paid Monier, a roof tile supplier, \$5,738.35 for materials.

4. At some point after the first contract between Mr. Sher and RJB International was executed, Mr. Bonneau asked Mr. Peters to submit an estimate of the cost of re-roofing Mr. Sher's house. Mr. Peters submitted an estimate of \$16,520 based on specifications provided by Mr. Bonneau,<sup>1</sup> and Mr. Bonneau accepted the estimate. It was Mr. Peters' understanding that RJB International was the general contractor for the project, operating under a contract with Mr. Sher, and that he was the roofing subcontractor for the project, operating under a



"contract" with RJB International based on Mr. Bonneau's acceptance of his estimate for the re-roofing work. He expected to be paid by RJB International.

5. On or about June 22, 1993, Mr. Peters obtained a building permit from the City of Plantation for the roof replacement project on Mr. Sher's residence. Mr. Peters began working on the Sher re-roofing project on or about June 23, 1993.

6. By checks dated July 23, August 16, August 19, and August 23, 1993, Mr. Sher paid Mr. Peters \$800, \$2,432, \$2,000, and \$1,000, respectively, totaling \$6,232. Mr. Peters was surprised to receive payment directly from Mr. Sher, but he assumed that that was the arrangement between Mr. Sher and RJB International. He never received any of the \$6,200 Mr. Sher paid to RJB International.

7. Mr. Peters worked on the project until late August or early September 1993, when he stopped working on the project because he had not received payment for the work completed to date. Mr. Peters requested payment from Mr. Sher, only to be referred to RJB International, which in turn, referred him to Mr. Sher. When Mr. Peters stopped working on the Sher residence, he advised Mr. Sher that he would complete the work as soon as he received the payments he considered due. Mr. Peters estimated that, when he left the job, \$1,000 to \$1,500 worth of work remained to complete the re-roofing project. He did not hear

anything more from Mr. Sher or RJB International, and, in 1995, he moved to Ohio.

8. After Mr. Peters stopped work on Mr. Sher's roof, Mr. Sher obtained an owner's building permit and completed the project.

9. In September 1994, Mr. Sher filed a five-count complaint against Mr. Peters and Rosaire J. Bonneau d/b/a RJB International in the Circuit Court of the Seventeenth Judicial Circuit in Broward County, Florida, in which he sought to recover damages he allegedly suffered as a result of re-roofing project; three counts of the complaint, breach of contract, negligence, and conversion, named only Mr. Peters as defendant.

10. A default was entered against Mr. Peters, and, in a final judgment entered on the default on May 19, 1995, Mr. Peters was ordered to pay to Mr. Sher \$28,142.70 in damages, plus \$1,740.00 in attorney's fees and costs, for a total of \$29,882.70, with interest accruing on this sum at the rate of eight percent per year. In addition, Mr. Peters was assessed \$4,447.45 in prejudgment interest. Mr. Peters was listed on the judgment as a person to whom a copy was furnished, but he did not receive the copy.

11. Mr. Peters first learned of the existence of the judgment in October 1997, when he received a copy of the Department's Administrative Complaint dated May 31, 1996. In late 1997 or early 1998, Mr. Peters received notification of the

judgment from another source, and he also received a letter from Mr. Sher's insurance company advising him that they had paid Mr. Sher approximately \$30,000 in damages and were looking to Mr. Peters for reimbursement.

12. Mr. Peters subsequently retained an attorney to try to negotiate with Mr. Sher. Mr. Peters was willing to pay \$1,000 to satisfy the judgment because he believed that the roof could have been finished for that amount. Mr. Sher did not accept the offer.

13. In a letter to Mr. Peter's attorney dated August 26, 1998, Mr. Sher's attorney enclosed a copy of the judgment against Mr. Peters and indicated that his client would be willing to negotiate a payment arrangement with Mr. Peters.

14. At the time of the final hearing, Mr. Peters had not satisfied the judgment in whole or in part or made any arrangements with Mr. Sher for payment of the award; Mr. Peters had not moved to set aside, vacate, or discharge the judgment in bankruptcy; and he had not appealed the judgment.<sup>2</sup>

15. Mr. Peters has been subject to two previous disciplinary actions relating to his state certification as a roofing contractor. The first disciplinary action against Mr. Peters resulted in entry of a final order in January 1988, in which he was found guilty of contracting in a name not on his license and of failing to qualify a business organization; an administrative fine of \$1,000 was imposed. The second

disciplinary action resulted in entry of a final order in January 1994, in which he was found guilty of failing to have his license number on a contract and imposing an administrative fine of \$100.

16. The Department provided an affidavit at the hearing in which it claimed that it had incurred costs of investigating and prosecuting this case totaling \$879.35, excluding legal costs.

#### CONCLUSIONS OF LAW

17. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties pursuant to Sections 120.569 and .57(1), Florida Statutes (1997).

18. In its Amended Administrative Complaint, the Department seeks to impose penalties on Mr. Peters which include revocation or suspension of his certification as a roofing contractor and the imposition of an administrative fine. Accordingly, the Department has the burden of proving by clear and convincing evidence that Mr. Peters committed the offenses alleged in the Amended Administrative Complaint. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932, 933-34 (Fla. 1996).

19. The Department conceded in the proposed conclusions of law filed with the Division of Administrative Hearings that it failed to prove by clear and convincing evidence that Mr. Peters committed the violations alleged in Counts I through VI of the

Amended Administrative Complaint. Therefore, the only remaining dispute concerns Count VII of the complaint, in which the Department has alleged that Mr. Peters violated Section 489.129(1)(r), Florida Statutes.

20. Section 489.129(1) provides in pertinent part:

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 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.

21. Rule 61G4-17.001(23), Florida Administrative Code, defines "reasonable time" for the purposes of Section 489.129(1)(r) 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."

22. Based on the findings of fact herein, the Department has met its burden of proving by clear and convincing evidence that Mr. Peters has violated Section 489.129(1)(r). Although the rule defining "reasonable time" was promulgated subsequent to entry of the final judgment against Mr. Peters, the rule definition applies in this case because Mr. Peters' obligation to pay the judgment within a "reasonable time" is a continuing obligation. Even though Mr. Peters learned of the judgment in late 1997 or early 1998, the judgment obtained by Mr. Sher in May 1995 had not been vacated or reversed as of January 13, 1999, nor had Mr. Peters satisfied the judgment or devised a payment plan acceptable to Mr. Sher.

23. Rule 61G4-17.001, Florida Administrative Code, sets forth penalty guidelines for disciplinary action and 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.

\* \* \*

(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, suspension or revocation.

\* \* \*

(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.

24. Rule 61G4-17.003, Florida Administrative Code, provides in pertinent part:

(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.

Mr. Peters was subject to disciplinary action in 1988 and 1994, albeit for relatively minor offenses. Pursuant to Rule 61G4-17.003(1), the violation of Section 489.129(1)(r) must be considered a repeat violation.

25. Rule 61G4-17.002, Florida Administrative Code, sets forth the mitigating and aggravating circumstances to be considered in determining the appropriate penalty to be imposed

in this case:



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.

26. In the proposed recommendation submitted with the Department's proposed findings of fact and conclusions of law, the Department has suggested that Mr. Peters be found guilty only "of having violated Section 489.129(1)(r), as alleged in Count VII of the Amended Administrative Complaint," and the Department has suggested the disciplinary action it considers appropriate for this violation. With the exception of the Department's recommendation that Mr. Peters be required to pay \$879.35, plus further costs accrued prior to the Board's entering its final

order, as costs for the investigation and prosecution of this case,<sup>3</sup> the Department's suggested penalties are reasonable in light of the permitted penalties set forth in Section 489.129(1), of the range of penalties set forth in Rule 61G4-17.001(18) for a repeat offense, and of the aggravating and mitigating factors established by the Board in Rule 61G4-17.002.

#### 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 Counts I through VI of the Amended Administrative Complaint against Steve G. Peters;
2. Finding Mr. Peters guilty of having violated Section 489.129(1)(r), Florida Statutes, as alleged in Count VII of the Amended Administrative Complaint;
3. Imposing an administrative fine on Mr. Peters in the amount of \$2,000;
4. Requiring that Mr. Peters 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 Amended Administrative Complaint; and
5. Requiring that Mr. Peters either pay restitution to Victor Sher in the amount of \$28,142.70 or, in the alternative, provide proof of satisfaction of the May 9, 1995, civil judgment.

DONE AND ENTERED this 16th day of August, 1999, in  
Tallahassee, Leon County, Florida.

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PATRICIA HART MALONO  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 16th day of August, 1999.

ENDNOTES

<sup>1/</sup> Mr. Peters never saw the contracts between Mr. Sher and RJB International.

<sup>2/</sup> Mr. Peters presented testimony at the final hearing regarding the legal sufficiency of service of process of the complaint filed in the circuit court, the validity of the allegations stated in the complaint, and his failure to receive a copy of the judgment at the time it was entered. These issues cannot be resolved in this forum. Mr. Peters 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).

<sup>3/</sup> Rule 61G4-12.018, Florida Administrative Code, requires the Department to "submit to the [appropriate] 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 Mr. Peters the opportunity to dispute the accuracy and/or reasonableness of the costs claimed by the Department before the Board determines the amount of costs he 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.

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<sup>1</sup> Mr. Peters never saw the contracts between Mr. Sher and RJB International.

<sup>2</sup> Mr. Peters raised questions at the final hearing regarding the legal sufficiency of service of process of the complaint, the validity of the allegations stated in the complaint, and his failure to receive a copy of the judgment at the time it was entered. These issues cannot be resolved in this forum.

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

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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.