

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)	
PROFESSIONAL REGULATION,)	
CONSTRUCTION INDUSTRY)	
LICENSING BOARD,)	
)	
Petitioner,)	
)	
vs.)	Case No. 98-4260
)	
JUAN RODRIGUEZ,)	
)	
Respondent.)	
_____)	

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings by Administrative Law Judge William J. Kendrick, held a formal hearing in the above-styled case on February 2, 1999, in Miami, Florida.

APPEARANCES

For Petitioner:	Theodore R. Gay, Esquire Department of Business and Professional Regulation 401 Northwest Second Avenue Suite N-607 Miami, Florida 33128
For Respondent:	Jorge E. Otero, Esquire Tomlin & Tomlin, P.A. 75 Valencia Avenue, 4th Floor Coral Gables, Florida 33134

STATEMENT OF THE ISSUES

At issue in this proceeding is whether Respondent committed the offenses set forth in the Administrative Complaint and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On February 18, 1998, Petitioner issued a three-count Administrative Complaint against Respondent which charged that Respondent, a certified general contractor, committed certain acts or omissions which subjected him to disciplinary action under the provisions of Chapter 489, Part I, Florida Statutes. Count I alleged that Respondent violated the provisions of Subsection 489.129(1)(e), Florida Statutes, "by performing an act which assists a person or entity in engaging in the prohibited uncertified and unregistered practice of contracting . . . [when] the certificateholder or registrant knows or has reasonable grounds to know that the person or entity was uncertified and unregistered." Count II alleged that Respondent violated the provisions of Section 489.1265, Florida Statutes (1995), now codified at Subsection 489.127(4), Florida Statutes, and, therefore, Subsection 489.129(1)(j), Florida Statutes, "by allowing and/or agreeing to allow an unlicensed contractor to use his license number and/or by obtaining a building permit for construction work without having entered into a contract to make improvements to, or perform the contacting at, the real property specified in the permit." Count III alleged that Respondent failed to "continually maintain liability and property damage insurance," as required by Rule 61G4-15.003(1), Florida Administrative Code, and was, therefore, guilty of "misconduct or incompetency in the practice of contacting," as defined by Rule

61G4-17.001(14)(b), Florida Administrative Code, and as proscribed by Subsection 489.129(1)(n), Florida Statutes.

Respondent filed an answer to the Administrative Complaint which raised disputed issues of fact. Consequently, on September 21, 1998, Petitioner referred the matter to the Division of Administrative Hearings for the assignment of an administrative law judge to conduct a formal hearing pursuant to Sections 120.569, 120.57(1), and 120.60(5), Florida Statutes.

At hearing, Petitioner called Joseph Wilson, Oscar Zapata, and Consuelo Zapata as witnesses, and Petitioner's Exhibits 1 through 11 were received into evidence. Respondent testified on his own behalf, but offered no additional proof.

The transcript of hearing was filed April 12, 1999, and the parties were initially accorded 10 days from that date to file proposed recommended orders; however, at Respondent's request the time for filing was extend to May 7, 1999. Any proposal filed prior to the entry of this order has been duly-considered.

FINDINGS OF FACT

Preliminary matters

1. At all times material hereto, Respondent, Juan Rodriguez, was licensed by Petitioner, Department of Business and Professional Regulation, Construction Industry Licensing Board (Department), as a certified general contractor, having been issued license number CG C005171. Respondent was licensed as an

individual and not as the qualifying agent of any corporation or other business organization.

2. At all times material hereto, Henry Pena was the sole officer and director of U.S.A. Henry Roofing Corp., a Florida corporation. Neither Henry Pena nor U.S.A. Henry Roofing Corp. (hereinafter jointly referred to as "Pena"), were registered, certified, or otherwise qualified under the provisions of Chapter 489, Florida Statutes, to engage in contracting in the State of Florida. Respondent was clearly aware of Pena's lack of licensure.¹

The Zapata job

3. Pertinent to this case, Oscar and Consuelo Zapata owned a one-story commercial building located at 59 Beacom Boulevard, Miami, Florida.

4. On August 1, 1996,² Mr. Pena, on behalf of U.S.A. Henry Roofing Corp., and Mr. Zapata entered into an agreement whereby U.S.A. Henry Roofing Corp. would replace the roof on the building in exchange for an agreed price of \$18,200. A first payment of \$8,000 was to be paid after the first inspection, and the balance of \$10,200 was to be paid following the final inspection.

5. Later in the month of August, Mr. Pena presented a building and zoning permit application, as well as a request for permit, to Mr. Zapata (as owner of the property) for signature. (Petitioner's Exhibit 8.) Following Mr. Zapata's signing, Mr. Pena delivered the forms to Respondent who signed as the

contractor. Thereafter, on or about September 3, 1996, Respondent submitted the forms to the City of Miami to obtain a building permit for the re-roofing job. Respondent was not then, nor was he ever, under contract to make improvements to the Zapata property, and his sole involvement was to obtain a permit so Pena could proceed with the job. The permit was issued on or about September 5, 1996.³

6. On September 17, 1996, Pena began work on the roof, and ceased work the same day when the roof collapsed.⁴ With the discovery that Pena was not licensed or insured, Mr. Zapata ultimately contracted with another company (that was licensed) to re-roof the building for \$16,000. That contract was duly fulfilled, and the re-roofing of the Zapata building was accomplished (notwithstanding the roof collapse) without financial loss to the Zapatas.⁵

Respondent's lapse of insurance coverage

7. Respondent's liability and property damage insurance policy was terminated June 25, 1996, and was not reinstated until September 19, 1996. Respondent does not dispute the lapse in insurance coverage. (Petitioner's Exhibits 6 and 10, and Transcript, at pages 76-77, and 80-81.)

The costs of investigation and prosecution

8. At hearing, the Department offered proof, without objection, that its costs of investigation and prosecution,

excluding costs associated with any attorney's time, totalled \$306.09, as of January 27, 1999. (Petitioner's Exhibit 7.)

Previous disciplinary action

9. On January 18, 1996, the Department entered a final order which found the Respondent guilty of the violations set forth in a two-count Administrative Complaint issued March 25, 1993. (Petitioner's Exhibit 1.) In that complaint, the Department charged (in Count I) that Respondent violated the provisions of Subsection 489.129(1)(e), Florida Statutes, "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 (in Count II) that Respondent violated the provisions of Subsection 489.129(1)(m), Florida Statutes, "by being found guilty of fraud, deceit, or of gross negligence, incompetency, or misconduct in the practice of contracting." Such charges were premised on a renovation contract Respondent held wherein he "subcontracted Nelson Echeverria [who was not a state licensed electrical contractor] to perform electrical work at customer's home for approximately \$4,500.00." The final order found Respondent guilty of the charges, and imposed an administrative fine of \$1,500 and costs of \$1,433.03, to be paid within 30 days. On March 8, 1996, Respondent's license was suspended for failure to satisfy the

penalty imposed by the final order; however, the penalty was then apparently satisfied and on June 19, 1996, the suspension was lifted and Respondent's license was reinstated.

CONCLUSIONS OF LAW

10. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings. Sections 120.569, 120.57(1), and 120.60(5), Florida Statutes.

11. Where, as here, the Department proposes to take punitive action against a licensee, it must establish grounds for disciplinary action by clear and convincing evidence. Section 120.57(1)(h), Florida Statutes (1997), and Department of Banking and Finance v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996). That standard 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." Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

12. Regardless of the disciplinary action sought to be taken, it may be based only upon the offenses specifically alleged in the administrative complaint. See Kinney v.

Department of State, 501 So. 2d 129 (Fla. 5th DCA 1987);
Sternberg v. Department of Professional Regulation, Board of
Medical Examiners, 465 So. 2d 1324 (Fla. 1st DCA 1985); and
Hunter v. Department of Professional Regulation, 458 So. 2d 844
(Fla. 2d DCA 1984). Moreover, in determining whether Respondent
violated the provisions of Section 489.129(1), Florida Statutes,
as alleged in the Administrative Complaint, one "must bear in
mind that it is, in effect, a penal statute. . . . This being
true, the statute must be strictly construed and no conduct is to
be regarded as included within it that is not reasonably
proscribed by it." Lester v. Department of Professional and
Occupational Regulations, 348 So. 2d 923, 925 (Fla. 1st DCA
1977).

13. Pertinent to this case, Section 489.129, Florida
Statutes, provides:

(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 for
financial harm directly related to a
violation of a provision of this part, impose
an administrative fine not to exceed \$5,000
per violation, require continuing education,
or assess costs associated with investigation
and prosecution, if the contractor,
financially responsible officer, or business
organization for which the contractor is a
primary qualifying agent, a financially
responsible officer, or a secondary
qualifying agent responsible under s.
489.1195 is found guilty of any of the
following acts:

* * *

(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.

* * *

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

14. In resolving whether Respondent assisted a person or entity to engage in the prohibited uncertified and unregistered practice of contacting, as alleged in Count I of the Administrative Complaint and proscribed by Subsection 489.129(1)(e), Florida Statutes, the following definition should be considered:

(6) "Contracting" means, except as exempted in this part, engaging in business as a contractor and includes, but is not limited to, performance of any of the acts as set forth in subsection (3) which define types of contractors. The attempted sale of contracting services and the negotiation or bid for a contract on these services also constitutes contracting. If the services offered require licensure or agent qualification, the offering, negotiation for

a bid, or attempted sale of these services requires the corresponding licensure. . . .

Section 489.105(6), Florida Statutes.

15. Subsection 489.105, Florida Statutes, defines the following types of contractors:

(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 herself 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 or she may do, except as provided in this part.

* * *

(e) "Roofing contractor" means a contractor whose services are unlimited in the roofing trade and who has the experience, knowledge, and skill to install, maintain, repair, alter, extend, or design, when not prohibited by law, and use materials and items used in the installation, maintenance, extension, and alteration of all kinds of roofing, waterproofing, and coating, except when coating is not represented to protect, repair, waterproof, stop leaks, or extend the life of the roof.

16. Also pertinent to Count I, Section 489.113, Florida Statutes, imposes the following restriction on a general contractor's practice:

(3) A contractor shall subcontract all electrical, mechanical, plumbing, roofing, sheet metal, swimming pool, and air-conditioning work, unless such contractor holds a state certificate or registration in the respective trade category, however:

* * *

(g) No general, building, or residential contractor certified after 1973 shall act as, hold himself or herself out to be, or advertise himself or herself to be a roofing contractor unless he or she is certified or registered as a roofing contractor.

17. Given the facts, as found, it cannot be subject to serious debate that, with regard to the Zapata project, Pena engaged in contracting, and that Respondent assisted or abetted that activity by procuring the building permit for the project. Consequently, Respondent is guilty of having violated Section 489.129(1)(e), Florida Statutes, as alleged in Count I of the Administrative Complaint.

18. To support its contention that Respondent failed to comply with the provisions of Chapter 489, Part I, Florida Statutes, as alleged in Count II of the Administrative Complaint and as proscribed by Subsection 489.129(1)(e), Florida Statutes, the Department relies on Subsection 489.127(4)(c), Florida Statutes, previously 489.1265, Florida Statutes (1995), which provides as follows:

(c) 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 paragraph 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.

19. Here, the proof demonstrated, with the requisite degree of certainty, that Respondent, within the meaning of Subsection 489.127(4)(c), applied for or obtained a building permit for construction work for which he had no contract to perform improvements to the real property specified in the application or permit. Consequently, Respondent is guilty of violating the provisions of Subsection 489.129(1)(j), Florida Statutes, as alleged in Count II of the Administrative Complaint.

20. To support its contention that Respondent committed incompetency or misconduct in the practice of contracting, as alleged in Count III of the Administrative Complaint and proscribed by Subsection 489.129(1)(n), Florida Statutes, the Department relies on the provisions of Chapter 61G4, Florida Administrative Code. Pertinent to this issue, Rule 61G4-15.003(1), Florida Administrative Code, provides:

(1) As a prerequisite to the initial issuance, or the renewal of an active certificate or registration or a change in the status of an active certificate or registration, the applicant shall submit a signed affidavit attesting to the fact that

the applicant has obtained and will maintain public liability and property damage insurance, in the amounts stated herein for the life of an active certificate or registration and for the safety and welfare of the public. It shall be a violation of this rule for any licensee to fail to continually maintain liability and property damage insurance in amounts set forth herein.

Pursuant to subparagraph (2)(h) of the foregoing Rule, a general contractor must maintain public liability insurance and property damage insurance in the amount of \$300,000 and \$50,000, respectively. Under the provisions of Rules 61G4-17.001(4)(b) and 61G4-17.009, Florida Administrative Code, a violation of any provision of Chapter 61G4, Florida Administrative Code, is considered a violation of Subsection 489.129(1)(n), Florida Statutes. Consequently, by having failed to maintain liability and property damage insurance as required by Rule 61G4-15.003, Florida Administrative Code, Respondent has been shown to have committed incompetency or misconduct in the practice of contracting as alleged in Count III of the Administrative Complaint and proscribed by Subsection 489.129(1)(n), Florida Statutes.

21. Having reached the foregoing conclusions, it remains to resolve the appropriate penalty that should be imposed. Pertinent to this issue, Rule 61G4-17.001, Florida Administrative Code, provides the following guidelines to be used in disciplinary cases under Chapter 489, absent aggravating or mitigating circumstances:

(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 suspension, or revocation.

* * *

(14) Misconduct or incompetency in the practice of contracting as set forth in Section 489.129(1)(n), Florida Statutes, shall include, but is not limited to:

* * *

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

* * *

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

* * *

2. Violation of any provision of Chapter 61G4, Florida Administrative Code, or Chapter 489, Part I, F.S. First violation, \$500 to \$1,000 fine; repeat violations \$1,000 to \$5,000 fine and 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 61G4-17.002.⁶

The Rule does not provide a specific penalty to address a violation of Subsection 489.129(j), Florida Statutes, based on violation of Section 489.127(4), Florida Statutes. See Rule

61G4-17.001(10), Florida Administrative Code. However, Rule 61G4-17.001(22), Florida Administrative Code, provides that "[t]he 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 offense shall apply."

22. According to Rule 61G4-17.002, Florida Administrative Code, the circumstances which may be considered in mitigation or aggravation of the penalty 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.

23. The Department's proposed recommended order suggests, as a penalty for the violations found, the imposition of a \$5,000 administrative fine; assessment of the costs of investigation and prosecution of \$306.09; and, the suspension of Respondent's license for a period of one year, followed by a two-year term of probation. Given the repetitive nature of Respondent's violation, the Department's proposal is consistent with the provisions of Section 489.129(1), Florida Statutes, the penalty guidelines established by Rule 61G4-17.001, Florida Administrative Code, and the mitigation and aggravation factors established by Rule 61G4-17.002, Florida Administrative Code. Consequently, the Department's recommendation is accepted as appropriate under the circumstances of this case.

RECOMMENDATION

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

RECOMMENDED that a final order be entered finding Respondent guilty of the violations alleged in Counts I through III of the Administrative Complaint and imposing, as a penalty for such violations, an administrative fine in the sum of \$5,000; assessing costs of investigation and prosecution in the sum of \$306.09; and, suspending Respondent's licensure for a period of one year, followed by a two-year term of probation subject to such reasonable terms and conditions as the Construction Industry Licensing Board may impose.

DONE AND ENTERED this 12th day of May, 1999, in Tallahassee,
Leon County, Florida.

WILLIAM J. KENDRICK
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of May, 1999.

ENDNOTES

1/ Such conclusion is supported by the menial nature of the tasks Respondent had historically employed Pena to perform ("hot mop" roofs) and, most importantly, when Respondent applied for and obtained the building permit (at the request of Pena) for the Zapata job, discussed infra. Clearly, had Pena been licensed, it would have been unnecessary for Respondent to pull the permit. Notably, Respondent offered no proof to the contrary at hearing.

2/ The agreement (Petitioner's Exhibit 9) reveals a date of "01/08/96" which should be read day/month/year.

3/ The permit erroneously noted the job address as 39 Beacom Boulevard, as opposed to 59 Beacom Boulevard. (Petitioner's Exhibit 8.)

4/ No proof was offered to establish the cause of the roof collapse.

5/ The only monies Mr. Zapata expended were for some roofing materials ordered by Mr. Pena, and which Mr. Pena removed from the job site. No proof was offered at hearing regarding the cost or value of those materials.

6/ Consistent with the provisions of Section 489.129(1), Florida Statutes, Rule 61G4-17.001(21), Florida Administrative Code, provides "the board may order the contractor to make restitution in the amount of financial loss suffered by the consumer." Here,

the proof does not demonstrate that the customer suffered any financial loss and, consequently, the Department seeks no such requirement.

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.