STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, CONSTRUCTION INDUSTRY LICENSING BOARD,	)	
Petitioner,	)	
vs.	)	Case No. 98-4610
RICHARD J. KOSALKA,	)	
Respondent.	)	

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case in accordance with the provisions of Section 120.57(1), Florida Statutes, on April 9 and 23, 1999, by video teleconference at sites in West Palm Beach and Tallahassee, Florida, before Stuart M. Lerner, 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
Ruth Rohde Building
401 Northwest Second Avenue, Suite N-607
Miami, Florida 33128

For Respondent: Richard Kosalka, pro se 1/
150 Southwest Port St. Lucie Boulevard
Port St. Lucie, Florida 34984

STATEMENT OF THE ISSUES

1. Whether Respondent committed the violations alleged in the Administrative Complaint?

2. If so, what punitive action should be taken against Respondent?

PRELIMINARY STATEMENT

On May 26, 1998, the Department of Business and Professional Regulation (Department) issued an 11-count Administrative Complaint in which it alleged that Respondent violated: Section 489.129(1)(j), Florida Statutes, "in that he held himself out to be and/or acted as a roofing contractor in the context of his contractual relationship with [Rita] Maciuba," contrary to the provisions of Section 489.113(3)(g), Florida Statutes, "and related provisions of Part I of Chapter 489, Florida Statutes" (Count I); Section 489.129(1)(g), Florida Statutes, "by acting in the capacity of a contractor under any certificate or registration issued under Chapter 489 except in the name of the certificateholder or registrant as set forth on the issued certificate or registration in the context of his contractual relationship with [Rita] Maciuba" (Count II); Section 489.129(1)(h)1, Florida Statutes, "by committing financial mismanagement or misconduct in the context of his contractual relationship with [Rita] Maciuba" (Count III); Section 489.129(1)(j), Florida Statutes, "in that he held himself out to be and/or acted as a roofing contractor in the context of his

contractual relationship with [Larkin] Dunbar," contrary to the provisions of Section 489.113(3)(g), Florida Statutes, "and related provisions of Part I of Chapter 489, Florida Statutes" (Count IV); Section 489.129(1)(g), Florida Statutes, "by acting in the capacity of a contractor under any certificate or registration issued under Chapter 489 except in the name of the certificateholder or registrant as set forth on the issued certificate or registration in the context of his contractual relationship with [Larkin] Dunbar" (Count V); Section 489.129(1)(j), Florida Statutes, "in that he held himself out to be a roofing contractor in the context [of] . . . 'yellow pages' advertisements," contrary to the provisions of Section 489.113(3)(g), Florida Statutes, "and related provisions of Part I of Chapter 489, Florida Statutes" (Count VI); Section 489.129(1)(g), Florida Statutes, "by acting in the capacity of a contractor under any certificate or registration issued under Chapter 489 except in the name of the certificateholder or registrant as set forth on the issued certificate or registration in the context of the above-noted 'yellow pages' advertisements" (Count VII); Section 489.129(1)(j), Florida Statutes, "in that he held himself out to be and/or acted as a roofing contractor in the context of his contractual relationship with [Clara] Masters," contrary to the provisions of Section 489.113(3)(g), Florida Statutes, "and related provisions of Part I of Chapter 489, Florida Statutes" (Count VIII); Section 489.129(1)(g),

Florida Statutes, "by acting in the capacity of a contractor under any certificate or registration issued under Chapter 489 except in the name of the certificateholder or registrant as set forth on the issued certificate or registration in the context of his contractual relationship with [Clara] Masters" (Count IX); Section 489.129(1)(l), Florida Statutes, "by signing a statement with respect to a project or contract falsely indicating that payment has been made for all subcontracted work, labor and materials, which results in financial loss to the owner, purchaser, or contractor" (Count X); and Section 489.129(1)(h)1, Florida Statutes, "by committing financial mismanagement or misconduct in the context of his contractual relationship with [Clara] Masters" (Count XI).

Respondent subsequently executed an Election of Rights form disputing the allegations made in the Administrative Complaint. On October 16, 1998, the matter was referred to the Division of Administrative Hearings for the assignment of an Administrative Law Judge to conduct a hearing on the matter pursuant to Section 120.57(1), Florida Statutes.

As noted above, the hearing was held on April 9 and 23, 1999. The following witnesses testified at the hearing: David Harris, Rita Maciuba, Edward Garcia, Respondent, Joseph Masters, and Larry Thomas. In addition to the testimony of these witnesses, the following exhibits were offered and received into

evidence: Petitioner's Exhibits 1-5, 8-13, 15-23, 25-30, and 32; and Respondent's Exhibits 1, 3-13, 15, 24-26, and 28-30.

At the conclusion of the evidentiary portion of the hearing, the undersigned, on the record, announced that proposed recommended orders had to be filed no later than 30 days from the date of the filing of the complete transcript of the hearing. The complete transcript of the hearing was filed on June 10, 1999. The deadline for the filing of proposed recommended orders was twice extended (first to August 11, 1999, and then to August 20, 1999), upon Respondent's written requests (filed July 8, 1999, and August 11, 1999). The Department and Respondent filed their proposed recommended orders on August 20, 1999, and August 23, 1999, respectively. These post-hearing submittals have been carefully considered by the undersigned.

FINDINGS OF FACT

Based upon the evidence adduced at hearing, and the record as a whole, the following findings of fact are made:

1. Respondent is now, and has been since 1981, a Florida-licensed general contractor (holding license number CG C019787).

2. At all times material to the instant case, Respondent has been licensed as an individual in his own name, not as a qualifying agent 3/ or under a fictitious name.

3. At no time has Respondent been licensed in the State of Florida as a roofing contractor or as any other type of contractor other than a general contractor.

4. Larry Thomas is now, and has been at all times material to the instant case, the sole owner and president of Home Improvement Time, Inc. (HIT), a corporation that he formed in or around December of 1995. Mr. Thomas, in naming his company, hoped that the public, when hearing the company's name, would associate it with the popular "Home Improvement" television program.

5. There are not now, nor have there ever been, any other owners, officers, or directors of the company.

6. Until late in 1998, HIT was actively engaged in the business of soliciting home improvement work, including room additions and the installation of roofs, hurricane shutters, and screens. To solicit such work, HIT used telemarketers who contacted homeowners over the telephone from HIT's office (located in a shopping center in Jensen Beach, Florida and having the mailing address of 867 Northeast Jensen Beach Boulevard, Jensen Beach, Florida), and it also employed salespersons who visited homeowners at their homes. Among the salespersons who worked for HIT were Vince Ketchum and Bob Andrews.

7. At no time material to the instant case did HIT have a licensed contractor serve as its certified qualifying agent. 4/

8. Mr. Thomas has never been licensed as a general contractor. Some time after 1996, he obtained aluminum structure and concrete contracting licenses from the City of Port St. Lucie and from Martin County.

9. In or around January of 1996, shortly after the formation of HIT, Respondent met with Mr. Thomas at HIT's office and observed HIT's operations.

10. As a result of this meeting, Respondent hired HIT, on a commission basis, to solicit home improvement work for him.

11. Respondent was the only general contractor for whom HIT solicited business.

12. When a HIT telemarketer made contact with a prospect, the telemarketer indicated that he or she was with HIT. If asked who would be doing the home improvement work, the telemarketer advised the prospect that the work would be done by Respondent.

13. If a prospect contacted by a HIT telemarketer was interested in having home improvement work done, a HIT salesperson was dispatched to the prospect's home.

14. Respondent provided HIT salespersons with training and instructions as to what to do when calling on prospects.

15. On their visits to prospects' homes, the salespersons brought with them preprinted form contracts for the prospects to sign. These form contracts were jointly developed by Mr. Thomas and Respondent (using, as a model, a form contract that was published in a "Better Homes and Gardens" magazine article).

16. On the top right hand corner of these form contracts were the words "licensed" and "insured." To the left of these words, in large, stylized lettering, were either the words "Home Improvement," "Home Improvement Inc.," "Home Improvement Time,

Inc.," or "Home Improvement by Richard Kosalka" (depending on the time frame). These words were included on the form because Respondent wanted homeowners to make the connection between him and HIT and the television program after which HIT was named. Underneath these words appeared the following:

> 667 N.E. Jensen Beach Boulevard
> Jensen Beach, FL 34957
>
> Richard Kosalka State License # CGCO19787

17. Among the provisions in the form contracts was the clause, "This agreement subject to office approval."

18. When they returned from their sales calls, the salespersons brought any signed contract to Mr. Thomas at HIT's office. Depending on the nature of the work involved, Mr. Thomas approved or disapproved the contract himself or he gave the contract to Respondent 5/ to approve or disapprove (pursuant to the "subject to office approval" clause in the contract). Any contract that Respondent approved became Respondent's contract to perform. Although he did perform some contract work himself, most often he used subcontractors who worked under his general supervision.

19. HIT received a commission for every approved contract its salespersons procured for Respondent. Its commission (the amount of which was established by agreement between Mr. Thomas and Respondent) was included in the contract price offered to the homeowner. Typically, payment from the homeowner was not due until the contract work was completed. Payment was made by the

homeowner to HIT, which then paid Respondent by check in an amount equal to the contract price minus HIT's previously established commission.

20. In an effort to make the public aware of the services it offered, HIT, in or around August of 1996, placed an advertisement in the Bell South Yellow Pages for Port St. Lucie and Stuart. In the advertisement, which was placed without Respondent's knowledge or authorization, HIT's name and telephone number appeared, along with a listing of home improvement services. Among the services listed was "roofing." Appearing at the bottom of the advertisement was the following: "Licensed & Insured KOSALKA CGC 019787."

21. Among the homeowners who had signed the above-described preprinted form contracts that HIT's salesperson's brought back, for "office approval," to the HIT office in 1996 were the following three Port St. Lucie residents: Larkin Dunbar (whose residence was located at 114 Dorchester); Clara Masters (whose residence was located at 246 Northeast Mainsail); and Rita Maciuba (whose residence was located at 733 Southwest Curry Street).

22. The Dunbar, Masters and Maciuba contracts were dated February 19, 1996, May 28, 1996, and June 14, 1996, respectively.

23. On the top of the Dunbar contract, in large stylized lettering, were the words "Home Improvement Inc."

24. On the top of both the Masters and Maciuba contracts, in the same large stylized lettering, were the words "Home Improvement by Richard Kosalka."

25. The Dunbar contract provided for the "furnish[ing of] the following materials, improvements, labor, and/or services" for the price of $3,600.00: the installation of a "new fascia and soffit system," the "repair [of the] master bedroom walls," the "repair [of] roof leaks," and the "paint[ing of the] gutter and garage door to match [the] fascia and soffit."

26. No work was performed pursuant to this contract (nor is there any evidence that the homeowner made any payments for the performance of such work).

27. The Masters contract was signed by Ms. Masters and Vince Ketchum, the HIT salesperson who had negotiated with her at her home.

28. At the time she signed the contract, Ms. Masters was approximately 85 years of age.

29. The contract provided for the "furnish[ing of] the following materials, improvements, labor, and/or services": installation of a "new roof" with "shingles to be selected by Clara Masters" for $3,255.00; the repair and painting of the "interior ceiling" for $627.00; and the "pressure clean[ing] and paint[ing] of [the] exterior of [the] home" and the driveway for $2,628.00.

30. After his mother had signed the contract (and before any contract work had started), Ms. Masters' son, Joseph Masters, who lived next door to his elderly mother and looked after her business affairs, telephoned Respondent, who was an acquaintance of his. Mr. Masters asked Respondent to come by his mother's home to discuss the contract his mother had signed.

31. Respondent went to Ms. Masters' home as Mr. Masters had requested. Upon Respondent's arrival, Mr. Masters informed Respondent that he (Mr. Masters) and his mother wanted the roof work to be done first.

32. Respondent and Mr. Masters then discussed the matter further. Their discussions lead to the contract being modified to provide that only the roof work would be done (for a price of $3,255.00).

33. The modification was made by lining out the other work listed in the contract, having Ms. Masters put her initials next to the line-outs, and adding contract language to reflect that the total contract price was $3,225.00 for the "roof only."

34. Before leaving Ms. Masters' home, Respondent told Mr. Masters that he would have "some roofers [come] around to get the estimate on the roof." Mr. Masters assumed that these roofers would be subcontractors.

35. Respondent brought the modified contract back to the HIT office.

36. The Sunday after his visit to Ms. Masters' home, Respondent's wife suffered a stroke and was hospitalized. Respondent remained in the hospital with his wife and stayed there for three days.

37. David Harris is a licensed general, residential, and roofing contractor and the owner of David Harris Construction (DHC). He has had his roofing license (for work in Martin and St. Lucie Counties) since 1992.

38. In 1996, and for several years prior thereto, Respondent used Mr. Harris as a subcontractor for concrete and roofing work (mostly on new residential construction).

39. At the time he reviewed the modified Masters contract, Mr. Thomas was familiar with Mr. Harris and DHC. Mr. Harris used HIT to follow up on leads generated by DHC's Yellow Pages' advertising. Moreover, Respondent had spoken favorably to Mr. Thomas about Mr. Harris as a roofer. Accordingly, Mr. Thomas telephoned Mr. Harris and told him about the Masters re-roofing project.

40. On the Monday after Respondent's wife was admitted to the hospital, DHC workers went to Ms. Masters' home and began to remove the old roof. A young child (around nine or ten years of age) was on the roof with the workers. Some time later that day, while the workers were still removing the old roof, Mr. Masters came by his mother's house and noticed the workers and the child on the roof. Mr. Masters was dissatisfied with the manner in

which the workers were acting and with the quality of their work. He therefore "chased" them off the roof and told them to leave the property. Mr. Harris was not at the site at the time the workers (and the child) were directed to leave, but he later telephoned Mr. Masters "want[ing] to know what was wrong." Mr. Masters told Mr. Harris why he had removed the workers from the property. He further advised Mr. Harris to "not come back anymore," explaining that he would hire another roofer to complete the job (which he subsequently did). Mr. Masters assured Mr. Harris that payment would be made for the work that had been done by DHC on the roof that day, but there was no agreement reached as to the amount of the payment.

41. A few days later, Mr. Harris telephoned Mr. Masters again, inquiring "if he [Mr. Harris] was going to get paid." In response to this inquiry, Mr. Masters replied that he was "going to get with [Respondent] to figure out the amount of work that was done" and he (Mr. Masters) would pay Mr. Harris accordingly.

42. Subsequently (some time on or after June 4, 1996), Mr. Masters received in his mailbox a copy of an "invoice" (in an unstamped, unsealed envelope) from DHC which read as follows:

> DAVID HARRIS CONSTRUCTION
>
> TO: Home Improvement
>
> Date: 6/4/96
>
> RE: 246 NE Mainsail, PSL (Masters)

DESCRIPTION: Labor & Materials 1 DAY

PRICE: $863.39

43. Thereafter, Mr. Masters telephoned Respondent and told Respondent about the bill he had received (the amount of which Mr. Masters thought was excessive).

44. In response to Mr. Masters' telephone call, Respondent, on June 18, 1996, visited with Mr. Masters and his mother at the latter's home. There, Mr. Masters showed Respondent the copy of the "invoice" he (Mr. Masters) had received. Based upon his knowledge of the prices that Mr. Harris typically charged, Respondent determined that a fair price for the work that the DHC workers had done on Ms. Masters' roof was only $480.00. Respondent so advised Mr. Masters and then telephoned Mr. Harris (from Ms. Masters' home) in an effort to persuade Mr. Harris to accept that amount. Respondent and Mr. Harris, however, were unable to reach agreement on the matter. After hanging up, Respondent told the Masters that he and Mr. Harris "would work something out and get it straightened out." Thereafter, at Respondent's suggestion, Ms. Masters made out and signed a check to "Home Improvement" in the amount of $480.00, which she gave to Respondent, who told the Masters that he would "take care of" the matter. In addition to giving the Masters this assurance, Respondent also provided Ms. Masters, in exchange for the $480.00 check, a receipt marked "paid in full" and a release of lien signed by him. In the release of lien, Respondent identified

himself as "Richard Kosalka of Home Improvement, a Florida corporation doing business in the State of Florida."

45. Respondent delivered Ms. Masters' $480.00 check to Mr. Thomas and asked Mr. Thomas to issue an HIT check in that same amount payable to DHC.

46. Mr. Thomas did as he was requested by Respondent. The $480.00 check signed by Mr. Thomas was received and deposited by DHC.

47. Nonetheless, thereafter, on August 19, 1996, DHC filed a claim of lien for $383.39 (the difference between $480.00 and the amount of DHC's original invoice) on Ms. Masters' home. The $383.39 (which DHC claimed it was owed) was never paid; however, DHC took no action with respect to the lien and the lien expired.

48. The Maciuba contract was signed by Ms. Maciuba and Bob Andrews, the HIT salesperson who had negotiated with her at her home. It provided for the "furnish[ing of] the following materials, improvements, labor, and/or services" for the price of $3,600.00: "Tear off existing shingles- Replace rotten facia and roof sheets. Shingle color: Shasta white (lightest color). 4 lengths of ridge vents."

49. HIT contacted DHC to do the work described in the contract. DHC obtained a re-roofing permit for the work on June 21, 1996.

50. DHC hired Jerry Poston to work as subcontractor on the project. Mr. Poston and his crew worked on the project during

the period from June 21 through July 29, 1996. Mr. Harris also made an appearance at the work site.

51. Ms. Maciuba made an initial down payment of $300.00, which she gave to Mr. Thomas. Subsequently, after the work had been completed, she gave Mr. Thomas three checks that were payable to herself and which she endorsed. Two of these checks were for $1,000.00, and the remaining check was for $800.00, for a total payment, including the down payment she had made, of $3,100.00, which was less than the $3,600.00 contract price. Ms. Maciuba refused to pay any more because of the damage she claimed her property had sustained as a result of re-roofing work.

52. On August 23, 1996, Mr. Harris filed a claim of lien on Ms. Maciuba's home, in which he alleged that, "in accordance with a contract with Home Improvement Time, Inc.," he had "furnished labor, services or materials" in the amount of $2,565.00, and had not received any payment therefor. On October 15, 1996, Mr. Harris executed a Sworn Statement of Account acknowledging that he was owed only $1,873.18 inasmuch as the "contractor" had made direct payments to Mr. Harris' suppliers, thereby reducing the amount he (Mr. Harris) was owed.

53. Ms. Maciuba, in small claims court, sought to have the lien removed. On November 19, 1996, a mediation session was held at which Ms. Maciuba, Mr. Harris, Mr. Thomas, and Respondent were present. At the session, Mr. Harris agreed to remove the lien in exchange for $1,450.00, of which amount $800.00 was to be paid by

Ms. Maciuba and the remaining $650.00 was to be paid by HIT. That very same day, November 19, 1996, Ms. Maciuba and HIT made these agreed-upon payments, and Mr. Harris executed and recorded a release of lien.

54. Ms. Masters and Ms. Maciuba filed complaints that were investigated by Edward Garcia, an investigator with the Department.

55. As part of his investigation, Mr. Garcia spoke with Respondent by telephone on November 7, 1996. Respondent told Mr. Garcia that HIT was a telemarketing business owned by Mr. Thomas; he (Respondent) hired HIT to solicit business for him; he (Respondent) advertised as "Home Improvement" in order to "play off the name of Home Improvement Time"; the contract with Ms. Maciuba was for a re-roofing project and he (Respondent) subcontracted the work to DHC; and he (Respondent) was not aware, that he was not authorized, as a licensed general contractor, to enter into contracts for re-roofing projects.

56. Mr. Garcia also visited HIT's office and met with Mr. Thomas. During this meeting, Mr. Thomas signed a document agreeing not to violate the provisions of Chapter 489, Part I, Florida Statutes, by engaging contracting activities without an appropriate license.

CONCLUSIONS OF LAW

57. The Department has been vested with the statutory authority to issue licenses to those qualified applicants seeking

to engage, on a statewide basis, in the building contracting business in the State of Florida. Section 489.115, Florida Statutes.

58. At all times material to the instant case, the term "contracting," as used in Chapter 489, Part I, Florida Statutes, was defined in Section 489.105(6), Florida Statutes, as follows:

> "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. However, the term "contracting" shall not extend to an individual, partnership, corporation, trust, or other legal entity that offers to sell or sells completed residences on property on which the individual or business entity has any legal or equitable interest, if the services of a qualified contractor certified or registered pursuant to the requirements of this chapter have been or will be retained for the purpose of constructing such residences.

59. At all times material to the instant case, subsection (3) of Section 489.105, Florida Statutes, provided, in pertinent part, as follows:

> "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.

(b) "Building contractor" means a contractor whose services are limited to construction of commercial buildings and single-dwelling or multiple-dwelling residential buildings, which commercial or residential buildings do not exceed three stories in height, and accessory use structures in connection therewith or a contractor whose services are limited to remodeling, repair, or improvement of any size building if the services do not affect the structural members of the building.

(c) "Residential contractor" means a contractor whose services are limited to construction, remodeling, repair, or improvement of one-family, two-family, or three-family residences not exceeding two habitable stories above no more than one uninhabitable story and accessory use structures in connection therewith. . .

(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. . . .

60. As a reading of the foregoing statutory definitions reveal, the mere attempt or offer to sell contracting services (even if it does not result in a binding contract) constitutes "contracting" activity for which an appropriate "contractor" license is required.

61. A business entity, like HIT or DHC, may obtain a building contracting license, but only through a licensed "qualifying agent." Section 489.119, Florida Statutes.

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

63. At all times material to the instant case, "primary qualifying agent" was defined in subsection (4) of Section 489.105, Florida Statutes, as follows:

> "Primary qualifying agent" means a person who possesses the requisite skill, knowledge, and experience, and has the responsibility, to supervise, direct, manage, and control the contracting activities of the business organization with which he is connected; who has the responsibility to supervise, direct, manage, and control construction activities on a job for which he has obtained the building permit; and whose technical and personal qualifications have been determined by investigation and examination as provided in this part, as attested by the [D]epartment.

64. At all times material to the instant case, "secondary qualifying agent" was defined in subsection (5) of Section 489.105, Florida Statutes, as follows:

> "Secondary qualifying agent" means a person who possesses the requisite skill, knowledge, and experience, and has the responsibility to

> supervise, direct, manage, and control construction activities on a job for which he has obtained a permit, and whose technical and personal qualifications have been determined by investigation and examination as provided in this part, as attested by the [D]epartment.

65. The "responsibilities" of "qualifying agents" were, at all times material to the instant case, further described in Section 489.1195, Florida Statutes, in pertinent part, as follows:

> (1) A qualifying agent is a primary qualifying agent unless he is a secondary qualifying agent under this section.
>
> (a) All primary qualifying agents for a business organization are jointly and equally responsible for supervision of all operations of the business organization; for all field work at all sites; and for financial matters, both for the organization in general and for each specific job.

66. Subsection (3) of Section 489.113, Florida Statutes, imposes certain restrictions on the activities in which licensed contractors may engage. At all times material to the instant case, it provided, in pertinent part, as follows:

> 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:
>
> (a) A general, building, or residential contractor, except as otherwise provided in this part, shall be responsible for any construction or alteration of a structural component of a building or structure . . . .

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

67. At all times material to the instant case, subsection (9) of Section 489.113, Florida Statutes, provided as follows:

> Nothing in this part shall be construed to prevent any contractor from acting as a prime contractor where the majority of the work to be performed under the contract is within the scope of his license and from subcontracting to other licensed contractors that remaining work which is part of the project contracted.

68. At all times material to the instant case, the Construction Industry Licensing Board (Board) has been authorized to take any of the following punitive actions against a licensed contractor if (a) an administrative complaint is filed alleging that the contractor (or the business entity the contractor qualified) committed any of the acts proscribed by Section 489.129(1), Florida Statutes, and (b) it is shown that the allegations of the complaint are true: revoke or suspend the contractor's license; place the contractor on probation; reprimand the contractor; deny the renewal of the contractor's license; impose an administrative fine not to exceed $5,000.00 per violation; require financial restitution to the victimized consumer(s); require the contractor to take continuing education courses; or assess costs associated with the Department's investigation and prosecution. Proof greater than a mere

preponderance of the evidence must be submitted. Clear and convincing evidence of the contractor's guilt is required. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932, 935 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); McKinney v. Castor, 667 So. 2d 387, 388 (Fla. 1st DCA 1995); Tenbroeck v. Castor, 640 So. 2d 164, 167 (Fla. 1st DCA 1994); Nair v. Department of Business and Professional Regulation, 654 So. 2d 205, 207 (Fla. 1st DCA 1995); Pic N' Save v. Department of Business Regulation, 601 So. 2d 245 (Fla. 1st DCA 1992); Munch v. Department of Professional Regulation, 592 So. 2d 1136 (Fla. 1st DCA 1992); Newberry v. Florida Department of Law Enforcement, 585 So. 2d 500 (Fla. 3d DCA 1991); Pascale v. Department of Insurance, 525 So. 2d 922 (Fla. 3d DCA 1988); Section 120.57(1)(h), Florida Statutes ("Findings of fact shall be based on a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute."). "'[C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be

established.'" In re Davey, 645 So. 2d 398, 404 (Fla. 1994), quoting, with approval, from Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983). Furthermore, the punitive action taken against the contractor may be based only upon those offenses specifically alleged in the administrative complaint. See Cottrill v. Department of Insurance, 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996); Chrysler v. Department of Professional Regulation, 627 So. 2d 31 (Fla. 1st DCA 1993); Klein v. Department of Business and Professional Regulation, 625 So. 2d 1237, 1238-39 (Fla. 2d DCA 1993); Arpayoglou v. Department of Professional Regulation, 603 So. 2d 8 (Fla. 1st DCA 1992); Willner v. Department of Professional Regulation, Board of Medicine, 563 So. 2d 805, 806 (Fla. 1st DCA 1992); Celaya v. Department of Professional Regulation, Board of Medicine, 560 So. 2d 383, 384 (Fla. 3d DCA 1990); Kinney v. Department of State, 501 So. 2d 129, 133 (Fla. 5th DCA 1987); Sternberg v. Department of Professional Regulation, 465 So. 2d 1324, 1325 (Fla. 1st DCA 1985); Hunter v. Department of Professional Regulation, 458 So. 2d 842, 844 (Fla. 2d DCA 1984).

69. The Administrative Complaint issued in the instant case alleges that punitive action should be taken against Respondent for violations of Section 489.129(1)(g), Florida Statutes (Counts II, V, VII, and IX), Section 489.129(1)(h)1, Florida Statutes (Counts III and XI), Section 489.113(3)(g), Florida Statutes, and therefore Section 489.129(1)(j), Florida Statutes (Counts I, IV,

VI, and VIII), and Section 489.129(1)(l), Florida Statutes (Count X), as more specifically described in the Preliminary Statement contained in this Recommended Order.

70. In its Proposed Recommended Order, the Department concedes that the evidence adduced at hearing was "insufficient to sustain" the allegations made in Counts III, IV, VI, VII, X, and XI of the Administrative Complaint. Inasmuch as both parties are in agreement that these counts of the Administrative Complaint should be dismissed, no further discussion on the matter is warranted.

71. At all times material to the instant case, Section 489.129(1)(g), Florida Statutes, has authorized the Board to take punitive action against a contractor if the contractor or the business entity the contractor qualified is found guilty of:

> Acting in the capacity of a contractor under any certificate or registration issued hereunder except in the name of the certificateholder or registrant as set forth on the issued certificate or registration, or in accordance with the personnel of the certificateholder or registrant as set forth in the application for the certificate or registration, or as later changed as provided in this part.

72. At all times material to the instant case, Section 489.129(1)(j), Florida Statutes, has authorized the Board to take punitive action against a contractor if the contractor or the business entity the contractor qualified is found guilty of "[f]ailing in any material respect to comply with the provisions

of [Part I of Section 489, Florida Statutes]," including those in Section 489.113(3)(g), Florida Statutes, set forth above.

73. The foregoing statutory provisions are "in effect, . . . penal statute[s] . . . This being true the[y] must be strictly construed and no conduct is to be regarded as included within [them] that is not reasonably proscribed by [them]. Furthermore, if there are any ambiguities included such must be construed in favor of the . . . licensee." Lester v. Department of Professional and Occupational Regulations, 348 So. 2d 923, 925 (Fla. 1st DCA 1977); see also Whitaker v. Department of Insurance and Treasurer, 680 So. 2d 528, 531 (Fla. 1st DCA 1996)("Because the statute [Section 626.954(1)(x)4, Florida Statutes] is penal in nature, it must be strictly construed with any doubt resolved in favor of the licensee.").

74. An examination of the evidentiary record in the instant case reveals that the Department clearly and convincingly proved that the violations alleged in Counts I, II, V, VIII, 6/ and IX of the Administrative Complaint were committed either by Respondent personally or by authorized agents acting, within the scope of their authority, on Respondent's behalf . Punitive action against Respondent is therefore warranted. 7/ Cf. Tampa Sand and Material Company v. Davis, 125 So. 2d 126, 127 (Fla. 2d DCA 1960)("The power of an agent to bind his principal may rest on real or actual authority conferred in fact by the principal or may be founded on apparent or ostensible authority arising when

the principal allows or causes others to believe the agent possesses such authority, as where the principal knowingly permits the agent to assume such authority or where the principal by his actions or words holds the agent out as possessing it.").

75. In determining the particular punitive action the Department should take against Respondent for having committed these proven violations, it is necessary to consult Chapter 61G4-17, Florida Administrative Code, which contains the Board's "disciplinary guidelines." Cf. Williams v. Department of Transportation, 531 So. 2d 994, 996 (Fla. 1st DCA 1988)(agency required to comply with its disciplinary guidelines when taking disciplinary action against its employees).

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

> Normal Penalty Ranges. The following guidelines shall be used in disciplinary cases, absent aggravating or mitigating circumstances and subject to the other provisions of this Chapter. . . .
>
> (7) 489.129(1)(g), 489.119: Failure to qualify a firm, and/or acting under a name not on license. Repeat violation $750 to $1,500 fine. 8/ . . .
>
> (10) 489.129(1)(j): Failing in any material respect to comply with the provisions of Part I of Chapter 489. . . .
>
> (b) 489.113, 489.117: Contracting beyond scope of practice allowed by license, no safety hazard. First violation, $500 fine, repeat violation, $500 to $2,500 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.

77. "Repeat violation," as used in Chapter 61G4-17, Florida Administrative Code, is described in Rule 61G4-17.003, Florida Administrative Code, as follows:

> (1) As used in this rule, a repeat violation is any violation on which disciplinary action is being taken where the same licensee had previously had disciplinary action taken against him or received a letter of guidance in a prior case; and said definition is to apply (i) regardless of the chronological relationship of the acts underlying the various disciplinary actions, and (ii) regardless of whether the violations in the present or prior disciplinary actions are of the same or different subsections of the disciplinary statutes.
>
> (2) The penalty given in the above list for repeat violations is intended to apply only to situations where the repeat violation is of a different subsection of Chapter 489 than the first violation. Where, on the other hand, the repeat violation is the very same type of violation as the first violation, the penalty set out above will generally be increased over what is otherwise shown for repeat violations on the above list.

78. Rule 61G4-17.005, Florida Administrative Code, provides that "[w]here several of the . . . violations [enumerated in Rule 61G4-17.001, Florida Administrative Code] shall occur in one or several cases being considered together, the penalties shall normally be cumulative and consecutive."

79. The aggravating and mitigating circumstances which are to be considered before a particular penalty is chosen are listed in Rule 61G4-17.002, Florida Administrative Code. They are as follows:

> (1) Monetary or other damage to the licensee's customer, in any way associated with the violation, which damage the licensee has not relieved, as of the time the penalty is to be assessed. (This provision shall not be given effect to the extent it would contravene federal bankruptcy law.)
>
> (2) Actual job-site violations of building codes, or conditions exhibiting gross negligence, incompetence, or misconduct by the licensee, which have not been corrected as of the time the penalty is being assessed.
>
> (3) The severity of the offense.
>
> (4) The danger to the public.
>
> (5) The number of repetitions of offenses.
>
> (6) The number of complaints filed against the licensee.
>
> (7) The length of time the licensee has practiced.
>
> (8) The actual damage, physical or otherwise, to the licensee's customer.
>
> (9) The deterrent effect of the penalty imposed.
>
> (10) The effect of the penalty upon the licensee's livelihood.
>
> (11) Any efforts at rehabilitation.
>
> (12) Any other mitigating or aggravating circumstances. 9/

80. Having considered the facts of the instant case in light of the provisions of Chapter 61G4-17, Florida Administrative Code, it is the view of the undersigned that there is no reason to deviate from the "normal penalty ranges" prescribed by Rule 61G4-17.001, Florida Administrative Code. 10/ Accordingly, the undersigned finds that the appropriate punitive action to take against Respondent in the instant case is to require him to: (a) pay a fine in the amount of $1,000.00 ($500.00 for each violation of Section 489.113(3)(g), Florida Statutes, alleged and proven); and (b) reimburse the Department for all reasonable costs associated with the investigation that led to the filing of the charges set forth in the Administrative Complaint 11/ and for all reasonable costs associated with its successful prosecution of these charges. (Because Respondent's violations of Section 489.129(1)(g), Florida Statutes, appear to be "first violations," he should receive no formal discipline therefor; however, Respondent should be advised that any subsequent violation of this statutory provision will be treated as a "repeat violation," as described in Rule 61G4-17.003, Florida Administrative Code, and punished accordingly.)

RECOMMENDATION

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

RECOMMENDED that the Department issue a final order (1) finding Respondent guilty of the violations alleged in Counts I, II, V, VIII, and IX of the Administrative Complaint; (2) disciplining Respondent for having committed these violations by requiring him to pay a fine in the amount of $1,000.00 and to reimburse the Department for all reasonable costs associated with the Department's investigation and prosecution of these charges; and (3) dismissing the remaining counts of the Administrative Complaint.

DONE AND ENTERED this 29th day of September, 1999, in Tallahassee, Leon County, Florida.

STUART M. LERNER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of September, 1999.

ENDNOTES

1/ Johnathan Ferguson, Esquire, filed a notice of appearance on behalf of Respondent on August 11, 1999, after the conclusion of the final hearing in this case, and he subsequently filed a Proposed Recommended Order on Respondent's behalf.

2/ The hearing was originally scheduled to commence on December 22, 1998, but was continued, at Respondent's request.

3/ From August 24, 1988, to April 11, 1991, prior to the events that are the subject of the instant case, Respondent was the certified qualifying agent for Flamingo Builders, Inc.

4/ On an occupational license (to conduct marketing activities) that Mr. Thomas received from Martin County for his company, Respondent was mistakenly listed as the company's qualifying agent. Although Mr. Thomas and Respondent at one time did discuss the possibility of Respondent becoming HIT's certified qualifying agent, they ultimately decided not to pursue such a course of action.

5/ There was a box in HIT's office where Mr. Thomas placed all signed contracts that Respondent needed to review and to accept or reject.

6/ It is not inconsistent to find Respondent guilty of Counts I and VIII, but not Count IV, of the Administrative Complaint. As the Department explained in its Proposed Recommended Order:

> It should be noted that although the Dunbar agreement also included roof work ("repair roof leaks"), under Section 489.113(9), Florida Statutes, a general contractor could lawfully enter into a contract of this nature and subcontract the roof work as long as ". . . the majority of the work to be performed under the contract is within the scope of . . ." the general contractor's license. In the Maciuba and Masters contracts, however, Section 489.113(9), Florida Statutes, has no application because none of the work to be performed under those contracts was within the scope of the Respondent's general contracting license.

7/ The undersigned finds persuasive the following argument made by the Department in its Proposed Recommended Order concerning these counts of the Administrative Complaint:

> According to the statutory definition of contracting set forth above, the offering or attempted sale of contracting services is itself an activity which constitutes the practice of contracting. Under the factual circumstances of this case the Respondent "marketed" (i.e., offered or attempted to sell) contracting services and therefore acted in the capacity of a contractor, using names (Home Improvement Time, Inc., Home

> Improvement, Inc., and/or Home Improvement by Richard Kosalka) other than the name on his license, and he is thus subject to discipline by the CILB as alleged in Counts II, V, and IX of the Administrative Complaint, for violation of Section 489.129 (1)(g), Florida Statutes. In addition' with respect to the Clara Masters and Rita Maciuba transactions, the contracting services which the Respondent sold or attempted to sell were services which required licensure as a roofing contractor. Accordingly, the Respondent is also subject to discipline by the CILB for violation of Section 489.113(3)(g) and 489.129(1)(j), Florida Statutes, as alleged in Counts I and VIII of the Administrative Complaint.

8/ There is no penalty prescribed for a "first violation" of these statutory provisions. This is of significance in the instant case because there is no evidence that the violations of Section 489.129(1)(g), Florida Statutes, alleged in Counts II, V, and IX of the Administrative Complaint (which the evidence clearly and convincingly establishes that Respondent committed) are "repeat violations," as described in Rule 61G4-17.003, Florida Administrative Code.

9/ A licensee's penalty may not be increased beyond the "normal penalty ranges" based upon acts of misconduct that are not alleged in the administrative complaint. See Klein v. Department of Business and Processional Regulation, 625 So. 2d 1237, 1238-39 (Fla. 2d DCA 1993); Bernal v. Department of Professional Regulation, Board of Medicine, 517 So. 2d 113, 114 (Fla. 3d DCA 1987), approved, 531 So. 2d 967 (Fla. 1988).

10/ The Department has not shown that the circumstances surrounding Respondent's violations are significantly more "aggravating" than those which are typically present when a contractor engages in the type of misconduct in which it has been alleged and proven Respondent has engaged.

11/ Pursuant to Rule 61G4-12.018, Florida Administrative Code, the Department is required

> to submit to the Board an itemized listing of all costs related to investigation and prosecution of an administrative complaint when said complaint is brought before the Board for final agency action.

Fundamental fairness requires that the Board provide a respondent with an opportunity to dispute and challenge the accuracy and/or

reasonableness of the Department's itemization of investigative and prosecutorial costs before determining the amount of costs a respondent will be required to pay.

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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.