

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)	
PROFESSIONAL REGULATION,)	
CONSTRUCTION INDUSTRY)	
LICENSING BOARD,)	
)	
Petitioner,)	
)	
vs.)	Case Nos. 98-4859
)	99-0261
LUCIUS P. CLARK,)	
)	
Respondent.)	
_____)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on October 15, 1999, by video teleconference with connecting sites at Miami and Tallahassee, Florida, and on December 9, 1999, February 4, 2000, and May 3, 2000, at Miami, Florida, before Errol H. Powell, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Diane Snell Perera, Esquire
Department of Business and
Professional Regulation
401 Northwest 2nd Avenue, Suite N607
Miami, Florida 33128

For Respondent: Richard F. Hayes, Esquire
10300 Sunset Drive, No. 499
Miami, Florida 33173

STATEMENT OF THE ISSUE

The issue for determination is whether Respondent committed the offenses set forth in the Administrative Complaints and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On April 27, 1998, the Department of Business and Professional Regulation, Construction Industry Licensing Board (Petitioner) filed a two-count Administrative Complaint (Petitioner's Case No. 97-21762) against Lucius P. Clark (Respondent). Petitioner charged Respondent with the following: Count I--violating Subsection 489.129(1)(k), Florida Statutes (1995) [sic], by abandoning a construction project in which the contractor is engaged or under contract as a contractor; and Count II--violating Subsection 489.129(1)(d), Florida Statutes (1995) [sic], by knowingly violating the applicable building codes or laws of the state or of any municipalities or counties thereof. Respondent disputed the allegations of fact of the Administrative Complaint and requested a hearing. On October 29, 1998, this matter was referred to the Division of Administrative Hearings (DOAH) and assigned DOAH Case No. 98-4859.

On November 25, 1998, Petitioner filed an Administrative Complaint (Petitioner's Case No. 98-19860) against (Respondent). Petitioner charged Respondent with violating Subsection 489.129(1)(e), Florida Statutes (1997), 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. Respondent disputed the allegations of fact of the Administrative Complaint and requested a hearing. On January 19, 1999, this matter was referred to DOAH and assigned DOAH Case No. 99-0261.

By Order dated February 5, 1999, Case Nos. 98-4859 and 99-0261 were consolidated.

At hearing, the parties agreed that Case No. 99-0261 would be presented first. For Case No. 99-0261, Petitioner presented the testimony of three witnesses and entered 7 exhibits (Petitioner's Exhibits numbered 1-6 and 8) into evidence. Respondent testified on his own behalf, presented the testimony of one witness, and entered one exhibit (Respondent's Exhibit numbered 1) into evidence.

For Case No. 98-4859, Petitioner presented the testimony of four witnesses and entered 18 exhibits (Petitioner's Exhibits numbered 1-15 and 17-19) into evidence. (Petitioner's Exhibit numbered 18 is the same as Petitioner's Exhibit numbered 1 in Case No. 99-0261.) Petitioner's Exhibit numbered 16 was rejected. Respondent testified on his own behalf, presented the testimony of one witness, and entered no exhibits into evidence.

A transcript of the hearing was ordered. At the request of the parties, the time for filing post-hearing submissions was set for more than ten days following the filing of the transcript.

The Transcript, consisting of four volumes, was filed on January 7, 2000, January 13, 2000, April 3, 2000, and May 16, 2000. Respondent was granted an extension of time to file his post-hearing submission. The parties timely filed their post-hearing submissions, which were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. It is undisputed that at all times material hereto, Respondent was licensed by the State of Florida as a Certified General Contractor, having been issued license number CG C58099. Respondent passed the licensing examination in August 1995.

Case No. 99-0261

2. Respondent is not a licensed roofing contractor.

3. Respondent's Certified General Contractor's license did not and does not permit him to obtain roofing permits to perform any type of work on roofs. Respondent's Certified General Contractor's license number was not low enough for him to be grandfathered in by the State to allow him to lawfully perform roofing work with his Certified General Contractor's license.

4. On or about February 23, 1998, Delfina Valdes contracted with Johnny Hatcher, d/b/a Hatcher's Roofing, to repair the roof

on her residence located at 18101 Northwest 32 Avenue, Miami, Florida. They contracted for Hatcher to remove Valdes' old roof and install a new roof at a cost of \$4,000.

5. Valdes paid Hatcher \$2,000 as a down payment toward the cost of the roof's repair.

6. At no time material hereto was Hatcher a licensed roofing contractor. Furthermore, at no time material hereto was Hatcher's Roofing qualified by the State of Florida to perform contracting.

7. Hatcher removed the roof from Valdes' residence. After removing the roof, he did not perform any more work.

8. Respondent met with Valdes and represented to her that Hatcher was working for him. Respondent further represented that he would obtain the permit for the roofing work.

9. Respondent paid Cayetano Alfonso to obtain a roofing permit for the work on Valdes' roof. On or about March 26, 1998, Alfonso made application to Metropolitan Dade County, Department of Planning, Development and Regulation for the roofing permit, which was subsequently issued.

10. Alfonso was a Certified General Contractor who was licensed to perform roofing work. Alfonso's Certified General Contractor's license number was low enough for him to be grandfathered in by the State to allow him to lawfully perform roofing work with his Certified General Contractor's license.

11. Alfonso was not the qualifier for Hatcher's Roofing nor was he Respondent's qualifier. Alfonso did not enter into the contract with Valdes for repairing her roof. Alfonso was not a party to the contract for repairing Valdes' roof.

12. An inference is drawn and a finding of fact is made that Hatcher was not acting on behalf of Alfonso when he entered into the contract with Valdes. An inference is drawn and a finding of fact is made that Respondent was not acting on behalf of Alfonso when he represented to Valdes that he would obtain the permit for the roofing work.

13. When Respondent discovered that Hatcher had received a \$2,000 deposit from Valdes, he requested Alfonso to cancel the permit. On or about April 20, 1998, Alfonso cancelled the roofing permit.

14. On or about June 5, 1998, Valdes cancelled the contract between her and Hatcher Roofing.

15. Valdes received a refund of the \$2,000 from Hatcher, through a third party, that she had paid him.

Case No. 98-4859

16. On or about April 9, 1995, Respondent entered into a contract with Susan Casper to construct an addition to her residence located at 17350 Northeast 12th Court, North Miami Beach, Florida, at a cost of \$38,135. Casper paid Respondent

\$36,285.00 toward the cost of the addition. Respondent was not licensed at the time that he entered into the contract.

17. On or about March 20, 1996, Respondent obtained a permit from the Metropolitan Dade County, Department of Planning, Development and Regulation for the work on the addition.

18. Several delays were encountered during the performance of the work. Some of the delays resulted from changes by Casper, which changes required approval by Metropolitan Dade County, Department of Planning, Development and Regulation; however, most of the delays were Respondent's own doing.

19. In October 1996, Casper paid \$2,588 to Best Truss Company for a claim of lien filed on her residence, associated with the work being performed on her residence.

20. Respondent worked sporadically on Casper's addition through April 1997. He would inform her at times that he was returning but failed to return.

21. At one point, Casper's children constructed a sign in their own handwriting, instructing Respondent to keep out and indicating that there was no trespassing by him. The sign was posted on the door of Casper's residence. Casper informed Respondent that her children constructed the sign. It was obvious that the keep out, no trespassing sign was constructed by children. Respondent's assertion that he was kept away from Casper's residence by the children's sign is not credible.

22. Even after the children's sign was posted on the front door of Casper's residence, Respondent agreed with Casper to resume work, and he did so. However, his work was sporadic.

23. In or around June 1997, Casper sought assistance from the Metropolitan Dade County, Department of Planning, Development and Regulation to get Respondent to complete the work. In July 1997, Respondent obtained a window permit for the work on Casper's residence.

24. After July 1997, Respondent ceased working on Casper's residence. He did not provide Casper with any notice that he was ceasing work. Respondent had no valid reason for ceasing the work.

25. In September 1997, Casper transferred the permit for the work on her residence from Respondent's name to her name.

26. Respondent failed to perform all the work under the contract. Some of the work performed by Respondent or caused to be performed by Respondent contained code violations and needed correcting.

27. Certain work performed by Respondent or caused to be performed by Respondent needed correcting. Wood doors, glass block, electrical work, and a sprinkler were in need of correction. Casper bore the expense of the corrections. The corrective work was completed at a cost of \$1,675.00.

28. The value of the work performed by Respondent on Casper's residence was \$18,272, minus the cost of the corrective work of \$1,675, which equals a total value of the work at \$16,597. This cost value includes overhead and profit. Even though the value of the work by Respondent was \$16,597, Casper paid Respondent \$36,285, a difference of \$19,688.

29. Casper hired a new contractor on or about September 17, 1997, to complete the construction on her residence at a cost of \$16,350.

30. As to Case No. 98-4859, as of January 26, 1999, Petitioner incurred a cost of \$1,108.76 for the investigation and prosecution of Respondent.

31. Petitioner previously disciplined Respondent for violating Chapter 489, Florida Statutes (1995), including violating Subsection 489.127(1)(k), Florida Statutes (1995), abandonment of a construction project.

CONCLUSIONS OF LAW

32. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the parties thereto pursuant to Section 120.569 and Subsection 120.57(1), Florida Statutes.

33. License revocation proceedings are penal in nature. The burden of proof is on Petitioner to establish by clear and convincing evidence the truthfulness of the allegations in the

Administrative Complaint. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996); and Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

34. A licensee is charged with knowing the practice act that governs his/her license. Wallen v. Florida Department of Professional Regulation, Division of Real Estate, 568 So. 2d 975 (Fla. 3d DCA 1990).

Case No. 99-0261

35. A business engaging in contracting must do so through a qualifying agent licensed by Petitioner; without a qualifying agent, a business cannot engage in contracting. Subsection 489.119, Florida Statutes (1997).

36. Section 489.129, Florida Statutes (1997), provides in pertinent part:

(1) The board may take any of the following actions against any certificateholder or registrant: place on probation or reprimand the licensee, revoke, suspend, or deny the issuance or renewal of the certificate, registration, or certificate of authority, 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.

37. Petitioner demonstrated that Respondent violated Subsection 489.129(1)(e), Florida Statutes (1997).

Case No. 98-4859

38. Section 489.129, Florida Statutes (1997), provides in pertinent part:

(1) The board may take any of the following actions against any certificateholder or registrant: place on probation or reprimand the licensee, revoke, suspend, or deny the issuance or renewal of the certificate, registration, or certificate of authority, 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:

* * *

(d) Knowingly violating the applicable building codes or laws of the state or of any municipalities or counties thereof.

* * *

(k) Abandoning a construction project in which the contractor is engaged or under contract as a contractor. A project may be presumed abandoned after 90 days if the contractor terminates the project without just cause or without proper notification to the owner, including the reason for termination, or fails to perform work without just cause for 90 consecutive days.

39. Petitioner is dismissing Count II of the Administrative Complaint, charging Respondent with violating Subsection 489.129(1)(d), Florida Statutes.

40. Petitioner demonstrated that Respondent violated Subsection 489.129(1)(k), Florida Statutes.

Penalty for both cases

41. As to penalty, Rule 61G4-17.001, Florida Administrative Code, provides guidelines for violations of Section 489.129. Rule 61G4-17.001, Florida Administrative Code, provides in pertinent part:

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

* * *

(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.

* * *

(11) 489.129(1)(k): Abandonment. First violation, \$500 to \$2,000 fine; repeat violation, revocation and \$5,000 fine.

* * *

(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 extent that such order does not contravene federal bankruptcy law.

42. As to aggravating or mitigating circumstances, Rule 61G4-17.002, Florida Administrative Code, provides in pertinent part:

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.

43. As to repeat violations, 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.

(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 in the above list.

44. Several factors should be considered as aggravating and mitigating circumstances. Considerable monetary damage was suffered by Susan Casper. In the instant cases, Respondent has two complaints filed against him. Respondent has been licensed for a short period of time. A severe penalty would adversely affect Respondent's livelihood; however, the damage suffered by his customers adversely affected them economically. Respondent has been previously disciplined by Petitioner, in which one of the charges was a violation of Subsection 489.127(1)(k), Florida Statutes (1995), abandonment of a construction project.

45. As to costs for investigation and prosecution, the total costs have not been computed as yet. Fairness requires that Respondent be provided an opportunity to address the issue of costs when the costs have been finalized, which opportunity may be provided to Respondent at the time that Petitioner considers the instant cases for final agency action.

RECOMMENDATION

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

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

1. As to Case No. 99-0261, finding that Respondent violated Subsection 489.129(1)(e), Florida Statutes (1997).

2. As to Case No. 98-4859, finding that Respondent violated Subsection 489.129(1)(k), Florida Statutes (1997), in Count I; and dismissing Count II.

3. Revoking Respondent's license.

4. Ordering Respondent to pay restitution to Susan Casper in the amount of \$19,688.00.

DONE AND ENTERED this 31st day of October, 2000, in Tallahassee, Leon County, Florida.

ERROL H. POWELL
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of October, 2000.

COPIES FURNISHED:

Diane Snell Perera, Esquire
Department of Business and
Professional Regulation
401 Northwest 2nd Avenue, Suite N607
Miami, Florida 33128

Richard F. Hayes, Esquire
10300 Sunset Drive, No. 499
Miami, Florida 33173

Rodney L. Hurst, Executive Director
Construction Industry Licensing Board
Department of Business and
Professional Regulation
7960 Arlington Expressway, Suite 300
Jacksonville, Florida 32211-7467

Barbara D. Auger, General Counsel
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-0792

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.