

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
CONSTRUCTION INDUSTRY)
LICENSING BOARD,)
)
Petitioner,)
)
vs.) Case No. 99-2640
)
JAMES EDWARD FOSTER,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Upon due notice, this cause came on for a disputed-fact hearing on February 28, 2000, in Jacksonville, Florida, before Ella Jane P. Davis, a duly-assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Laurie B. Woodham, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-2202

For Respondent: No Appearance

STATEMENT OF THE ISSUE

Respondent was charged in a November 19, 1998, Administrative Complaint, filed December 7, 1998, with ten counts of professional violations.

The statutory violations alleged are:

Count I: Section 489.129(1)(a), Florida Statutes (1995), obtaining a certificate or registration as a Certified Roofing Contractor by fraud or misrepresentation;

Count II: Section 489.129(1)(h)2, Florida Statutes (1995), by committing mismanagement or misconduct in the practice of contracting that caused financial harm to a customer;

Count III: Section 489.129(1)(k), Florida Statutes (1995), by abandoning a construction project in which the contractor is engaged or under contract as a contractor;

Count IV: Section 489.129(1)(m), Florida Statutes (1995), by committing fraud or deceit in the practice of contracting;

Count V: Section 489.129(1)(n), Florida Statutes (1995), by committing incompetency or misconduct in the practice of contracting;

Count VI: Section 489.129(1)(p), Florida Statutes (1995), by proceeding on a job without obtaining the applicable local building department plumbing permits and inspection;

Count VII: Section 489.129(1)(p), Florida Statutes (1995), by proceeding on a job without obtaining the applicable local building department electrical permits and inspection;

Count VIII: Section 489.129(1)(p), Florida Statutes (1995), by proceeding on a job without obtaining the applicable local building department framing, insulation, and/or final inspections;

Count IX: Section 489.129(1)(o), Florida Statutes (1995), by committing gross negligence, repeated negligence, or negligence resulting in a significant danger to life or property; and

Count X: Section 389.129(1)(c), Florida Statutes (1995), by violating any provision of Chapter 455, to wit, Section 455.227(1)(o), practicing beyond the scope permitted by law and performing professional responsibilities the licensee knows, or has reason to know, he is not competent to perform.

PRELIMINARY STATEMENT

The Administrative Complaint was filed December 7, 1998. Respondent disputed its allegations and petitioned for a formal hearing involving disputed issues of material fact. The case was referred to the Division of Administrative Hearings on or about June 18, 1999.

Respondent repeatedly failed to respond to discovery. By an Order entered November 22, 1999, Respondent's failure to timely admit or deny Petitioner's Requests for Admission was deemed to conclusively establish the material facts alleged in paragraphs 2, 3, 9, 10, 11, 12, 13, 17, 19, 25a-p, 27, 28, 47, 50, 51, 52, 54, 62, 74, 76, 78 up to the first semi-colon and after the second semi-colon, and 83, of the Administrative Complaint.

Although Petitioner had other options, Petitioner elected to proceed to hearing on all remaining allegations.¹

At the time and place noticed for hearing, Respondent failed to appear.

Petitioner presented the oral testimony of Reuben and Samelia Adams (the homeowners), Tim McCaulley (Agency investigator), Roy Brand (expert in building construction) Raymond Smith (City of Jacksonville Building Inspector), and Douglas Arnold (builder who completed work on the Adamses' home). Petitioner had 17 exhibits admitted in evidence.² The statutory sections charged in the Administrative Complaint and Rules 64G4-12.002 through 64G4-23.001, Florida Administrative Code, were officially recognized.

A Transcript was filed on March 17, 2000. On March 28, 2000, Petitioner filed its Proposed Recommended Order, which has been considered. Respondent has filed no proposal.

FINDINGS OF FACT

1. At all times material to the allegations of the Administrative Complaint, Respondent was a Certified Residential Contractor, having been issued license number CR C057235, by the Florida Construction Industry Licensing Board. At the time of hearing, Respondent's license had been suspended.

2. Since January 27, 1998, Respondent also has been a Certified Roofing Contractor, having been issued license number CC C057649, by the Florida Construction Industry Licensing Board.

3. At no time material was Respondent licensed, registered, or certified to perform electrical work.

4. At no time material was Respondent licensed, registered, or certified to perform plumbing work.

5. On or about February 27, 1997, Respondent entered into a \$39,050.40, contract with Reuben M. Adams to restore and repair the Adamses' home at 7037 Mark Street in Jacksonville, Florida, which had been destroyed by fire on February 1, 1997.

6. The work contracted-for included complete restoration of the living room, kitchen, two hallways, two bathrooms, four bedrooms, a laundry room, and a dining room; restoration of heat and air conditioning; and a virtually new roof. Among the electrical and plumbing restoration involved, Respondent specifically agreed to install a ceiling fan and a light kit in the living room; install a sink and faucet for the sink and a ceiling light fixture and vented range hood in the kitchen; install a ceiling light fixture in a hallway; remove floor mounted with tank commode and reinstall a floor mounted with tank commode; replace commode sink, remove and reinstall sink, install new faucet for the sink, install shower head and faucet set for bathtub, install bathroom exhaust fan and light kit for ceiling fan in the bathroom; install ceiling fan and light kit in bedrooms; replace faucet for sink and provide a shower head, faucet set and install a ceiling light fixture in the second bathroom; install a ceiling fan and light kit in the third and fourth bedrooms and dining room and hallway; install 960 square foot electrical and provide temporary utilities for dimensions

of 40 feet by 24 feet by eight feet. These types of activities require electrical and plumbing licensure.

7. On or about April 15, 1997, Respondent received and endorsed the first draw check of \$22,245.23 from the Adamses.

8. In May 1997, Respondent's site supervisor, Aaron Mitchell, requested that Mr. Adams give him \$1500.00, cash to buy materials because Respondent was out of town and Mitchell could not perform the work without the materials. Mr. Adams paid this amount in cash to Mr. Mitchell but was never reimbursed by either Mr. Mitchell or Respondent.

9. In early June 1997, the Adamses became concerned because little work had been completed on the restoration of their home. The house had been cleaned out and gutted and the slab for the room addition had been poured.

10. Mr. Adams contacted Respondent several times about the lack of work being performed on the home.

11. Between mid-June and early July 1997, Respondent completed the framing and installed the roof.

12. On or about July 24, 1997, the Adamses released the second draw of \$11,122.62 to Respondent, and Respondent deposited the money into his bank account.

13. In approximately August 1997, Respondent ran electrical wire in the roof, installed electrical outlets in the walls, and completed the electrical work, including installing electrical outlets in the walls. Mr. Adams

personally observed Respondent and his workers performing electrical wiring.

14. The electrical work performed by Respondent required licensure as an electrical contractor, that a permit be obtained prior to the electrical work being performed, and that inspections of the electrical work be made before the walls were sealed up over the electrical work.

15. Respondent failed to obtain a permit or to have an electrical inspection performed. Respondent completed the electrical work and covered up the electrical work with the walls without an inspection being performed.

16. Respondent performed plumbing work on the Adamses' home, although he held no plumbing license. Respondent failed to pull a permit for the plumbing work and failed to call for the required inspections. Ultimately, he covered up the plumbing work with the walls without an inspection having been performed. The City of Jacksonville "red-tagged" the home for this reason. The effect of "red-tagging" was to prevent occupancy until compliance with the building code was assured. Such assurance required inspection, which in turn, ultimately required that at least the interior walls be taken down.

17. Respondent also never obtained a framing, insulation or final inspection on the project.

18. In October 1997, the Adamses filed complaints against the Respondent with the State Attorney's Office and the

Department of Business and Professional Regulation (Case No. 97-18544).

19. On or about October 31, 1997, Respondent signed a Letter of Intent with Mr. and Mrs. Adams agreeing to have their home ready for occupancy no later than December 1, 1997, and promising that Respondent would be responsible for all permits and inspections necessary for the project to be considered complete. At that time, Respondent apologized for all of the delays, the decline in their relationship, and the stress he had caused. Respondent and Mrs. Adams prayed together, and Respondent promised that from that day forward, the Adamses would see progress on their home every day until it was finished.

20. Respondent did not abide by the requirements set forth in the Letter of Intent. Specifically, he never obtained the required permits and inspections. Mr. Adams confronted Respondent about the permits and the inspections, and the Respondent indicated that he had the permits at his office. He assured Mr. Adams that he was taking care of the electrical permit.

21. In December 1997, Respondent requested that Mr. and Mrs. Adams drop their complaint with Petitioner Department of Business and Professional Regulation because he had applied for his roofing license and the complaint was holding up that roofing license being granted. Respondent told the Adamses

that if they would drop their complaint, he could obtain his roofing license, which would allow him to generate money to complete their project.

22. Around mid-January 1998, Respondent requested that the Adamses release the final construction draw and drop their complaints with Petitioner and the State Attorney. Respondent stated that if they paid him the final draw of \$5,682.55, he would work every day on their project and have it ready for them to move in no later than February 4, 1998.

23. The Adamses paid Respondent the remaining construction draw of \$5,682.55, and withdrew their complaint with Petitioner. Respondent accepted the final draw on or about January 27, 1998.

24. Respondent obtained his roofing license after the Adamses withdrew their complaint with Petitioner.

25. After receiving the final construction draw, Respondent did minimal work on the project in January.

26. On or about February 23, 1998, the Adamses reinstated their complaint with Petitioner against Respondent, resulting in the instant case.

27. Respondent has not returned to work on the Adamses' project since March 1998.

28. As of March 1998, Respondent had been paid the full contract price, but the home remained uninhabitable. The

workmanship was substandard and the project was less than 100 percent complete.

29. As a result of Respondent's unlicensed electrical and plumbing work on the Adamses' home and his covering-up his work with the walls, the Adamses were unable to obtain an inspection without the walls being taken down. This in turn, required that the walls be rebuilt.

30. In addition to the money paid to Respondent for work improperly done or not done at all, the Adamses had to pay another builder \$14,900.00, to remove the walls, re-install the electrical wiring and plumbing which had been completed or partially completed by the Respondent, and complete the renovation.

31. Testimony of Roy Brand, Raymond Smith, and Douglas Arnold supports a finding that Respondent committed repeated negligence and created a dangerous condition when he performed electrical and plumbing work which he was not licensed to do and which he did not have the knowledge to perform. Particularly upon the testimony of Mr. Brand, it is clear that three types of very serious electrical installation errors or omissions had been performed once or more than once by Respondent. At least one of these would have been sufficient, under certain circumstances, to burn down the entire house. By installing electrical universal polyethylene boxes and using them as junction boxes, a purpose for which they were not

designed, Respondent created what Mr. Brand described as "short of a 'Molotov Cocktail' that would burn your house down just about as quick." Likewise, one serious error occurred in the type of glue Respondent used on plumbing pipe throughout the home.

32. Mr. Brand gave credible expert evidence that the construction undertaken by Respondent was undertaken for a reasonable amount of \$39,050.40, and that a reasonable time to construct the entire contract would have been two and one half to three months after permitting.

33. In addition to the money Mr. and Mrs. Adams paid to Respondent and the substitute contractor, Douglas Arnold, they incurred additional expenses and spent additional time out of their home as a result of Respondent's shoddy workmanship and unlicensed electrical and plumbing work.

34. The Adamses also had to take out a second mortgage of \$18,800.00 at 16.3 percent interest for 15 years in order to finance the repairs necessitated by Respondent's substandard and incompetent work, so that they could move back into their home.

35. Mr. and Mrs. Adams and their child had to live somewhere during construction. Their insurance company paid them \$750.00, for each of three months. However, they were unable to move back into their home from August 1997 until November 1998, as a direct result of Respondent's incompetence

and misconduct.³ During this fifteen-month period, the Adamses paid \$300.00 rent per month to Mrs. Adams' mother, plus an additional \$100.00 per month for water and utilities, and storage fees of \$119.00 per month to a storage facility for keeping their items which had not been destroyed by the fire

36. The Adamses also incurred an additional expense of \$1,500.00, for an air conditioning unit which Respondent was to have purchased under their contract with him.

CONCLUSIONS OF LAW

37. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this cause, pursuant to Section 120.57, Florida Statutes.

38. Petitioner has the burden of proving by clear and convincing evidence the specific allegations of the Administrative Complaint. See Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); Evans Packing Co. v. Department of Agriculture and Consumer Services, 550 So. 2d 112 (Fla. 1st DCA 1989); 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); Hunter v. Department of Professional Regulation, 458 So. 2d 842, (Fla. 2d DCA 1984).

39. Section 489.129(1), Florida Statutes, (1995), provides, in pertinent part,

(1) The board may take any of the following actions against any certificateholder or

registrant: place on probation or reprimand the licensee, revoke, suspend, or deny the issuance or renewal of the certificate or registration, require financial restitution to a consumer, impose an administrative fine not to exceed \$5,000 per violation, require continuing education, or assess costs associated with the investigation and prosecution, if the contractor, financially responsible officer, or business organization for which the contractor is primary qualifying agent or is a secondary qualifying agent responsible under s. 489.1195, is found guilty of any of the following acts⁴:

(a) Obtaining a certificate, registration, or certificate of authority by fraud or misrepresentation.

* * *

(c) Violating any provision of Chapter 455.

* * *

(h) Committing mismanagement or misconduct in the practice of contracting that causes financial harm to a customer. Financial mismanagement or misconduct occurs when:
2. The contractor has abandoned a customer's job and the percentage of completion is less than the percentage of the total contract price paid to the contractor as of the time of abandonment, unless the contractor is entitled to retain such funds under the terms of the contract or refunds the excess funds within 30 days after the date the job is abandoned

* * *

(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.

* * *

(m) Committing fraud or deceit in the practice of contracting.

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

(o) Committing gross negligence, repeated negligence, or negligence resulting in a significant danger to life or property.

(p) Proceeding on any job without obtaining applicable local building department permits and inspections.

40. Petitioner proved that Respondent contracted to renovate and repair the Adamses' fire-damaged home, and despite numerous complaints and contacts by Mr. and Mrs. Adams, Respondent failed to complete any substantive work on their home as of October 1997, more than eight months after the contract was signed. Only when the Adamses filed their complaint with Petitioner did Respondent attempt to appease them. Then he took advantage of their desperation and religious good will, made promises to them to persuade them to drop their complaint, and assured them that once he obtained his roofing license, he would have the money he needed to complete their home. Based on Respondent's representations, Mr. and Mrs. Adams dropped their complaint with Petitioner, and Petitioner issued his roofing contractor's license shortly thereafter. However, Petitioner has not met its burden of

proving, pursuant to Count I of the Administrative Complaint, that Respondent violated Section 489.129(1)(a), Florida Statutes (1995). Respondent did not obtain his roofing license by fraud or misrepresentation upon the Board but by fraud and misrepresentation to the complaining witnesses. This type of conduct, although completely reprehensible, is not the type of conduct proscribed under Section 489.129(1)(a), Florida Statutes (1995).

41. On the other hand, Petitioner has met its burden of proving, pursuant to Count II of the Administrative Complaint, that Respondent violated Section 489.129(1)(h)(2), Florida Statutes (1995), by committing financial misconduct in the practice of contracting which resulted in financial harm to a customer, by abandonment of the job when the percentage of completion was less than the percentage of the total contract price paid to him. Respondent received 100 percent of the \$39,050.40, contract price. What he accomplished was far less than 100 percent and most of that had to be torn out and replaced due to his incompetence.

42. Upon the same facts, Petitioner has met its burden of proving Count III of the Administrative Complaint, that Respondent violated Section 489.129(1)(k), Florida Statutes (1995), that Respondent abandoned a construction project in which the contractor was engaged or under contract. More than the statutory 90 days passed without any effective return to

work by Respondent, and he left the project without just cause or proper notification to the owner.

43. Petitioner also has met its burden of proof pursuant to Count IV of the Administrative Complaint, that Respondent violated Section 489.129(1)(m), Florida Statutes (1995), by committing fraud or deceit in the practice of contracting. In addition to the discussion above in Conclusion of Law No. 40, regarding Respondent's fraudulently inducing Mr. and Mrs. Adams to drop their complaint to Petitioner, it was clearly and convincingly proven that Respondent continued to receive construction draws from Mr. and Mrs. Adams without performing any work, or performing only minimal work. Respondent also promised to complete their home if they would release the final draw and drop their complaints with the State Attorney's Office. He made numerous promises to get what he wanted, but followed through on none of them. Further, Respondent falsely represented to Mr. and Mrs. Adams that he had the proper permits in his possession and that everything was taken care of. Respondent repeatedly lied to and defrauded Mr. and Mrs. Adams.

44. Petitioner also has met its burden of proof pursuant to Count V of the Administrative Complaint, that Respondent violated Section 489.129(1)(n), Florida Statutes, by committing incompetency or misconduct in the practice of contracting. The work performed by Respondent, specifically the plumbing and

electrical work, was substandard and created dangerous conditions contrary to the local building code. Respondent clearly was not competent to perform the electrical and plumbing work he did. Furthermore, Respondent knew that he was not competent to perform electrical and plumbing work, since he had no licenses in those fields, and he committed further fraud when he covered up such shoddy work with walls and floors so that it could not be inspected.

45. Petitioner has met its burden of proof pursuant to Counts VI, VII, and VIII, of the Administrative Complaint, that the Respondent violated Section 489.129(1)(p), Florida Statutes (1995), by proceeding on a job without obtaining applicable local building department plumbing permits and inspections, without obtaining local building department electrical permits and inspections, and without obtaining local building department framing, insulation, and/or final inspections. Because Respondent was not licensed to perform plumbing, electrical, or framing work, he was unable to pull these permits without hiring an appropriately licensed subcontractor, which he failed to do. Respondent failed to obtain a permit or have the required electrical inspections performed. Instead, he completed the electrical work and covered it up with the walls, all without the benefit of required building department inspections. No inspections had been performed when Respondent left the job in March 1998. Although divided into three counts

in the Administrative Complaint, I conclude that Respondent's failure to pull any permits and to call for any inspections on a single job constitutes only one offense under Section 489.129(1)(p), Florida Statutes (1995).

46. Upon all the foregoing Conclusions of Law, but most notably upon the discussion in Conclusion of Law No. 44, it is further concluded that Petitioner has met its burden of proof pursuant to Count IX of the Administrative Complaint, that Respondent violated Section 489.129(1)(o), Florida Statutes (1995), by committing gross negligence and negligence resulting in significant danger to life or property. Respondent created a seriously dangerous electrical condition.

47. Petitioner has also met its burden of proof pursuant to Count X of the Administrative Complaint, that Respondent violated Section 489.129(1)(c), Florida Statutes (1995), by violating a provision of Chapter 455, specifically Section 455.227(1)(o), Florida Statutes (1995), which provided that it shall constitute grounds for discipline for a licensee to practice or offer to practice beyond the scope permitted by law or to accept and perform professional responsibilities the licensee knows, or has reason to know, the licensee is not competent to perform. Respondent violated Section 455.227(1)(o), Florida Statutes, by practicing contracting outside the scope of his license. Under Section 489.105(3)(c), Florida Statutes (1995), "'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." Respondent knew he did not meet the statutory definitions or necessary criteria for other licenses. The definitions of a plumbing contractor and an electrical contractor are set forth in Sections 489.105(3)(m) and 489.505(12), Florida Statutes (1995), respectively. At no time material hereto, had Respondent met the necessary criteria for these licenses. Section 489.113(3), Florida Statutes (1995), provides that 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." Respondent clearly performed the work himself and did not subcontract out the electrical and plumbing work as required. He thus acted outside the scope of his licensure.

48. Accordingly, it is concluded that Respondent is guilty of one violation each of the following statutory sections: 489.129(1)(h)(2); (1)(k); (1)(m); (1)(n); (1)(p); (1)(o); and (1)(c), Florida Statutes (1995).

49. Rule 61G4-17.001, Florida Administrative Code, provides, in pertinent part,

61G3-17.001 Normal Penalty Ranges.

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

(1) 489.129(1)(a): Obtaining license through fraud or misrepresentation. Revocation and/or \$5000 fine.

* * *

(3) 489.129(1)(c): Violating any part of Chapter 455. Penalty within ranges prescribed by Section 455.227, unless otherwise prescribed herein. (10)(d) 489.117, 489.113: Contracting beyond scope of license, safety hazard is created. First violation, \$1000 to \$2500 fine; repeat violation, \$2500 to \$5000 fine and/or probation, suspension, or revocation.

* * *

(8) 489.129(1)(h): Mismanagement or misconduct causing financial harm to the customer. First violation, \$750 to \$1500 fine and/or probation; repeat violation, \$1500 to \$5000 fine and/or probation, suspension or revocation.

* * *

(11) 489.129(1)(k): Abandonment. First violation, \$500 to \$2000 fine; repeat violation, revocation and \$5000.

* * *

(13) 489.129(1)(m): Committing fraud or deceit in the practice of contracting.
(a) Causing no monetary or other harm to licensee's customer, and no physical harm to any person. First violation, \$500 to \$1000 fine; repeat violation, \$1000 to \$1500 fine and/or probation, suspension, or revocation.
(b) Causing monetary or other harm to licensee's customer or physical harm to any person. First violation, \$500 to \$2000 fine

and/or probation, suspension or revocation;
repeat violation, \$2000 to \$5000 fine and/or
probation, suspension, or revocation;

(14) Misconduct or incompetency in the
practice as set forth in Section 489.129(n),
Florida Statutes, shall be defined as:

(b) Violation of any provision of Chapter
61G4, Florida Administrative Code.

(c) Failure to abide by the terms of a
medication agreement.

(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. First
violation, \$500 to \$1000 fine; repeat
violations, \$1000 to \$5000 fine and/or
probation, suspension or revocation.

3. Any other form of misconduct or
incompetency. First violation, \$250 to \$1000
fine and/or probation; repeat violations
\$1000 to \$5000 fine and/or probation,
suspension or revocation.

(15) 489.129(1)(o): Being found guilty of
gross negligence, repeated negligence, or
negligence resulting in a significant danger
to life or property. First violation, \$500
to \$1500 fine and/or probation, suspension or
revocation; repeat violation, \$1500 to \$5000
fine and/or probation, suspension, or
revocation.

(16) 489.129(1)(p): Proceeding on any job
without obtaining applicable local building
department permits and/or inspections.

(b) Failure to call for inspections. First
violation, \$100 fine; repeat violation, \$500
to \$2500 fine and probation, suspension, or
revocation.

(c) Job finished without permit having been
pulled, or no permit until caught after job,
or late permit during the job resulting in
missed inspection or inspections. First
violation, \$500 to \$1500 fine; repeat

violation \$1000 to \$2500 fine and/or probation, suspension or revocation.

50. Rule 61G4-17.002, Florida Administrative Code, provides that,

61G4-17.002 Aggravating and Mitigating Circumstances.

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, 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.

51. Petitioner correctly asserts that aggravating circumstances present in this case are: (1), (2), (3), (4), and (8). The Adamses have sustained significant monetary damage as a direct result of the Respondent's violations, and Respondent has not relieved any of this damage. Actual job-site violations of building codes occurred while the Respondent worked on the project. He failed to obtain the appropriate permits and inspections. His work was so substandard that the walls had to be torn out and the work begun over again by another contractor who pulled the appropriate permits and obtained the required inspections. Respondent made no effort to correct these violations, which were dangerous and severe. Respondent knowingly acted outside the scope of his residential contractor's license when he performed plumbing and electrical work.

52. With regard to aggravating circumstance(s), there are two prior Final Orders of the Construction Industry Licensing Board which have been considered only after determining whether or not violations occurred. In these Final Orders, the Board fined Respondent and suspended Respondent's licenses for having violated a variety of statutes; among them, Sections 489.129(1)(h)2, (k), (m), (n), (o), and (p). In one instance, Respondent received money from a homeowner, performed

electrical work without a license, failed to obtain the proper permits and inspections, and abandoned the job. With regard to aggravating circumstances (6) and (7), Respondent has had formal chargers filed against him on at least five occasions, including this proceeding, and he has had serious discipline imposed in the three-and-a-half years he has been contracting.

53. Petitioner's licenses should be revoked.

54. Maximum fines should be imposed for the violations proven which are also repeated violations. (See Conclusions of Law Nos. 48, 49, and 51). For Section 489.129(1)(c), Florida Statutes, an appropriate fine is another \$2500.

55. Petitioner seeks an order requiring that Respondent pay restitution to Mr. and Mrs. Adams. Applying the mathematics described in Findings of Fact Nos. 8, 30, and 34-36, that amount should be \$49,835.00 (\$39,050.40 paid to Respondent; \$6,000.00 paid to Mrs. Adams' mother; \$1,785.00 paid for rental shed; \$1,500.00 cash paid to Respondent's Agency Mitchell and \$1,500.00 cash paid to Respondent's agent Mitchell; \$1,500.00 paid for air conditioning unit).

56. Section 489.129(1), Florida Statutes, and Rule 61G4-17.001(19), Florida Administrative Code, authorize Petitioner to assess costs of investigation and prosecution of violations on or after October 1, 1989, in addition to the penalties provided above. Section 61G4-12.018, Florida Administrative Code, requires Respondent to submit to the

Construction Industry Licensing Board a listing of all costs related to investigation and prosecution of the Administrative Complaint at the time it is presented to the Board for final agency action. This is a matter for the Board.

RECOMMENDATION

Upon the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Construction Industry Licensing Board enter a final order that:

(1) Finds Respondent guilty of one violation of each of the following: Sections 489.129(1)(h)(2); (1)(k); (1)(m); (1)(n); (1)(p); (1)(o); and (1)(c), Florida Statutes (1995);

(2) Revokes Respondent's General Contractor's and Roofing Contractor's licenses;

(3) Imposes a total fine for all violations, in the amount of \$30,000.00; and

(4) Requires Respondent to pay restitution to Mr. and Mrs. Adams in the amount of \$49,835.00.

DONE AND ENTERED this 1st day of May, 2000, in Tallahassee, Leon County, Florida.

ELLA JANE P. DAVIS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of May, 2000.

ENDNOTES

^{1/} Because Petitioner went forward to present evidence on all issues, including "proving-up" some of the facts admitted through the Requests for Admission, this Recommended Order does not "track" the Requests for Admission word-for-word in its Findings of Fact. Rather, it incorporates them with facts proven at hearing in clear and readable prose.

^{2/} Final Orders of the Construction Industry Licensing Board disciplining Respondent have been considered only for purposes of aggravation/mitigation of penalty after the issues of commission of violation were determined.

^{3/} The Adamses signed with Respondent in late February 1997. The substituted contractor worked on the project between July 1998 and November 1998 (4 months). Considering the foregoing, together with Mr. Brand's testimony that three months to complete the project after permitting is a reasonable construction period, it is reasonable to assume that Respondent should have completed construction that was "up to Code" by August 1998.

^{4/} In the absence of contrary legal argument, the undersigned reads this statute to permit revocation etc., fine, and restitution for each violation.

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.