

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

MICHAEL RICHARDS, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 01-0791  
 )  
 DEPARTMENT OF BUSINESS AND )  
 PROFESSIONAL REGULATION, )  
 CONSTRUCTION INDUSTRY LICENSING )  
 BOARD, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a hearing was held in this case in accordance with Section 120.57(1), Florida Statutes, on April 11, 2001, 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: Michael Richards, pro se  
3802 Lakewood Road  
Lake Worth, Florida 33461

For Respondent: Charles F. Tunnickliff, Esquire  
Department of Business and  
Professional Regulation  
1940 North Monroe Street  
Tallahassee, Florida 32399-2202

STATEMENT OF THE ISSUE

Whether Petitioner's challenge to the failing grade he received on the contract administration portion of the October 2000 General Contractor Examination should be sustained.

PRELIMINARY STATEMENT

By letter to Respondent dated February 8, 2001, Petitioner requested a hearing to contest the failing score that he had received on the contract administration portion of the October 2000 General Contractor Examination.

On February 27, 2001, Respondent referred the matter to the Division of Administrative Hearings (Division) for the assignment of an Administrative Law Judge to conduct the hearing Petitioner had requested.

As noted above, the hearing was held on April 11, 2001. At the outset of the hearing, the parties stipulated that the only questions (on the contract administration portion of the October 2000 General Contractor Examination) in dispute were Questions 2, 9, 29, and 38.

During the evidentiary portion of the hearing, Petitioner testified on his own behalf, and Fae Mellichamp and William Palm testified on behalf of Respondent. No other testimony was presented. In addition to the testimony of these three witnesses, eight exhibits (Petitioner's Exhibit 1 and

Respondent's Exhibits 1, 2, 5, 6, 7, 10, and 11) were offered and received into evidence.

At the conclusion of the evidentiary portion of the hearing, the undersigned announced, on the record, that post-hearing submittals had to be filed no later than ten days following the date of the filing of the transcript of the hearing. The hearing Transcript (consisting of one volume) was filed on April 25, 2001.

On May 2, 2001, Respondent timely filed a Proposed Recommended Order, which the undersigned has carefully considered. To date, Respondent has not filed any post-hearing submittal.

#### FINDINGS OF FACT

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

1. Petitioner sat for the contract administration portion of the Florida certification examination for general contractors administered in October 2000 (Contract Administration Examination).

2. The Contract Administration Examination consisted of 60 multiple-choice questions of equal value, worth a total of 100 points.

3. To attain a passing score on the Contract Administration Examination, candidates needed to receive a total of 70 points.

4. Of the 378 candidates who took the Contract Administration Examination, 156 received passing scores.

5. Petitioner was not among this group of successful candidates. He received a failing score of 66.67 on the examination.

6. Question 2 of the Contract Administration Examination was a clear and unambiguous multiple-choice question that required the candidate to determine, based upon the information given, on what workday (not calendar day) the pouring of concrete footings for a residential construction project would begin.

7. There was only one correct answer to this question.

8. Approximately 50 percent of the candidates chose this correct response.

9. Petitioner chose another answer that was clearly incorrect because it represented the calendar day (not the workday) on which the pouring would begin.

11. He therefore appropriately received no credit for his answer.

12. Question 9 of the Contract Administration Examination was a clear and unambiguous multiple-choice question that fairly

tested the candidate's knowledge of the requirements of Section 489.113(3), Florida Statutes, which provides 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, and any certified general contractor or certified underground utility and excavation contractor may perform clearing and grubbing, grading, excavation, and other site work for any construction project in the state. Any certified building contractor or certified residential contractor may perform clearing and grubbing, grading, excavation, and other site work for any construction project in this state, limited to the lot on which any specific building is located.

(b) A general, building, or residential contractor shall not be required to subcontract the installation, or repair made under warranty, of wood shingles, wood shakes, or asphalt or fiberglass shingle roofing materials on a new building of his or her own construction.

(c) A general contractor shall not be required to subcontract structural swimming pool work.

(d) A general contractor, on new site development work, site redevelopment work, mobile home parks, and commercial properties, shall not be required to subcontract the construction of the main sanitary sewer collection system, the storm

collection system, and the water distribution system, not including the continuation of utility lines from the mains to the buildings.

(e) A general contractor shall not be required to subcontract the continuation of utility lines from the mains in mobile home parks, and such continuations are to be considered a part of the main sewer collection and main water distribution systems.

(f) A solar contractor shall not be required to subcontract minor, as defined by board rule, electrical, mechanical, plumbing, or roofing work so long as that work is within the scope of the license held by the solar contractor and where such work exclusively pertains to the installation of residential solar energy equipment as defined by rules of the board adopted in conjunction with the Electrical Contracting Licensing Board.

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

13. There was only one correct answer to this question.

14. Approximately 65 percent of the candidates chose this correct response.

15. Petitioner chose another answer that was clearly incorrect inasmuch as a newly licensed general contractor is not free, pursuant to Section 489.113(3)(b), Florida Statutes, to install or repair wood shake roofs on existing buildings constructed by other contractors.

16. Petitioner therefore appropriately received no credit for his answer.

17. Question 29 of the Contract Administration Examination was a clear and unambiguous multiple-choice question that fairly tested the candidate's ability to calculate, based upon the information given, the cost of delivering 28,000 lineal feet of #5 bars of reinforcing steel.

18. There was only one correct answer to this question .

19. Approximately 67 percent of the candidates chose this correct response.

20. Petitioner chose another answer that was clearly incorrect.

21. He therefore appropriately received no credit for his answer.

22. Question 38 of the Contract Administration Examination was a clear and unambiguous multiple-choice question that fairly tested the candidate's ability to distinguish between unit price contracts and other types of contracts, including lump sum contracts.

23. Approximately 82 percent of the candidates chose this correct response.

24. Petitioner chose another answer that was clearly incorrect.

25. He therefore appropriately received no credit for his answer.

CONCLUSIONS OF LAW

26. Any person seeking certification to engage in contracting on a statewide basis in the State of Florida must apply to the Department of Business and Professional Regulation to take the certification examination. Section 489.111, Florida Statutes.

27. The certification examination for general contractors consists of three tests: Test 1, which covers business and financial administration; Test 2, which covers contract administration; and Test 3, which covers project management. Rule 61G4-16.001(1)(a), (b) and (c), Florida Administrative Code.

28. Test 2 is the test at issue in the instant case.

29. The "content areas to be covered [in Test 2] and the approximate weights to be assigned to said areas" are set forth in Rule 61G4-16.001(1)(b), Florida Administrative Code, as follows:

1. 27% Preconstruction Activities
2. 40% Project Contracts
3. 20% Obtaining Licenses, Permits and Approvals



4. 13% Construction Procedures and Operations

30. The following requirements imposed by Rule 61-11.010(1)(b), Florida Administrative Code, must be followed in grading Test 2:

Departmentally developed objective, multiple-choice examinations shall be graded by the Department or its designee. After an examination has been administered the Board shall reject any questions which do not reliably measure the general areas of competency specified in the rules of the Board. The Department shall review the item analysis and any statistically questionable items after the examination has been administered. Based upon this review, the Department shall adjust the scoring key by totally disregarding the questionable items for grading purposes, or by multi-keying, giving credit for more than one correct answer per question. All questions which do not adequately and reliably measure the applicant's ability to practice the profession shall be rejected. The Department shall calculate each candidate's grade utilizing the scoring key or adjusted scoring key, if applicable, and shall provide each candidate a grade report.

31. A candidate must receive a grade of at least 70 percent (out of 100 percent) on Test 2 to pass the examination. Rule 61G4-16.001(21), Florida Administrative Code.

32. A candidate who fails to attain a passing score on the test is entitled to a "post-examination review" in accordance with Rule 61-11.017, Florida Administrative Code, which provides as follows:

(1) Pursuant to section 455.217(1)(d), Florida Statutes, a candidate who has taken and failed a departmentally developed objective multiple-choice examination, a departmentally developed practical examination, or an examination developed for the department by a professional testing company shall have the right to review the examination questions, answers, papers, grades, and grade keys for the parts of the examination failed or the questions the candidate answered incorrectly only. Review of examinations developed by or for a national council, association, society (herein after referred as national organization) shall be conducted in accordance with national examination security guidelines.

(2) Examination reviews shall be conducted in the presence of a representative of the Department at its Tallahassee headquarters during regular working hours which are defined as 8:00 a.m. through 4:30 p.m., Monday through Friday, excluding official state holidays.

(a) All examination reviews shall be conducted in accordance with that examination's administration procedures to the extent possible and feasible.

(b) All security rules defined in Rule 61-11.007, Florida Administrative Code, shall apply to all review sessions. Any candidate violating said rule shall be dismissed from the review session and may be subject to other sanctions as determined by the Board.

(c) All examination reviews by candidates shall be scheduled and completed no later than sixty (60) days subsequent to the date on the grade notification. However reviews will not be conducted during the thirty (30) day period immediately prior to the next examination.

(d) A representative from the Bureau of Testing shall remain with all candidates throughout all examination reviews. The representative shall inform candidates that the representative cannot defend the examination or attempt to answer any examination questions during the review. Prior to the review candidates shall be provided written instructions titled "Review Candidates Instructions" form number BPR-TLT-002 incorporated herein by reference and dated 08/01/96 and "Guidelines Governing Examination Reviews" form number BPR-TLT-001, incorporated herein by reference and dated 08/01/96, concerning the conduct rules and guidelines for the review. Prior to any review, all candidates shall acknowledge receipt of these rules and affirm to abide by all such rules in writing.

(e) Upon completion of all reviews, all candidates shall acknowledge in writing the review's start time, the review's end time, all materials reviewed, and other relevant review information (Acknowledgment of Grade Review).

(3) In addition to the provisions of (2)(a) through (2)(e), examination candidates shall be prohibited from leaving any review with any written challenges, grade sheets, or any other examination materials, unless the respective Board determines by rule that examination security will not be undermined by doing so.

(4) For a practical examination, unless examination security is involved, a candidate may obtain by mail a copy of his/her grade sheets resulting from a practical examination. The request must be made in writing, signed by the candidate and state the address to which the grade sheets are to be mailed.

33. Following the "post examination review," the candidate "may petition for a formal hearing before the Division of Administrative Hearings." Rule 61-11.012, Florida Administrative Code.

34. The burden is on the candidate at the "formal hearing" to establish by a preponderance of the evidence that his examination was erroneously or improperly graded. See Harac v. Department of Professional Regulation, Board of Architecture, 484 So. 2d 1333, 1338 (Fla. 3d DCA 1986); and Florida Department of Health and Rehabilitative Services v. Career Service Commission, 289 So. 2d 412, 414 (Fla. 4th DCA 1974).

35. In the instant case, Petitioner requested a hearing to contest the failing score he attained on the contract administration portion (Test 2) of the certification examination for general contractors that he took in October 2000. His challenge is directed to his failure to have received credit for the answers he gave in response to Questions 2, 9, 29, and 38.

36. A review of the record evidence reveals that Petitioner has not made a sufficient showing in support of his position that he was erroneously or improperly denied credit for his answers to these questions.

37. Petitioner has failed to show that any of these questions was unclear, ambiguous or in any other respect unfair

or unreasonable. Neither has he established that he correctly answered these multiple-choice questions.

38. Accordingly, in declining to award him any credit for his answers to these questions, those grading his examination did not act arbitrarily or without reason or logic.

39. In view of the foregoing, Petitioner's challenge to the failing score he received on the contract administration portion of the October 2000 certification examination for general contractors is without merit.

RECOMMENDATION

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

RECOMMENDED that a final order be entered rejecting Petitioner's challenge to the failing score he received on the contract administration portion of the October 2000 certification examination for general contractors.

DONE AND ENTERED this 11th day of May, 2001, in Tallahassee, Leon County, Florida.

---

STUART M. LERNER  
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](http://www.doah.state.fl.us)

Filed with the Clerk of the  
Division of Administrative Hearings  
this 11th day of May, 2001.

COPIES FURNISHED:

Michael Richards  
3802 Lakewood Road  
Lake Worth, Florida 33461

Charles F. Tunnicliff, Esquire  
Department of Business and  
Professional Regulation  
1940 North Monroe Street  
Tallahassee, Florida 32399-2202

Kathleen O'Dowd, Executive Director  
Construction Industry Licensing Board  
Department of Business and  
Professional Regulation  
7960 Arlington Expressway, Suite 300  
Jacksonville, Florida 32211-7467

Hardy L. Roberts III, General Counsel  
Department of Business and  
Professional Regulation  
Northwood Centre  
1940 North Monroe Street  
Tallahassee, Florida 32399-2202

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.