

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
)
Petitioner,)
)
vs.) Case No. 01-4893
)
PHILIP TAYLOR,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on February 5, 2002, in Miami, Florida, before Patricia Hart Malono, a duly-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 Second Avenue
Suite N-607
Miami, Florida 33128

For Respondent: Herbert B. Dell, Esquire
4801 South University Drive
Suite 103
Fort Lauderdale, Florida 33328

STATEMENT OF THE ISSUE

Whether the Respondent committed the violation alleged in the Administrative Complaint dated September 25, 2001, and, if so, the penalty that should be imposed.

PRELIMINARY STATEMENT

In an Administrative Complaint dated September 25, 2001, the Department of Business and Professional Regulation ("Department") charged Philip Taylor with a violation of Section 489.127(1)(f), Florida Statutes (1999), asserting that he had engaged in the business of contracting without being duly registered or certified to act in the capacity of a contractor. In support of this charge, the Department alleged in the Administrative Complaint that Mr. Taylor entered into a construction contract and received a deposit to begin construction at a time when he was not certified as a contractor and that he did not begin construction and failed to refund the deposit. The Department requested entry of an order recommending imposition of an administrative fine and assessing costs incurred in the investigation and prosecution of this matter.

Mr. Taylor timely disputed the factual allegations in the Administrative Complaint and requested an administrative hearing. The Department forwarded the case to the Division of Administrative Hearings for assignment of an administrative law

judge. Pursuant to notice, a final hearing was held in Miami, Florida, on February 5, 2002.

At the hearing, the Department presented the testimony of Hensel Reid, Jose Mitrani, and Ovilio Suarez. Petitioner's Exhibits 1 through 6 were offered and received into evidence; Exhibit 1 was received subject to the limitations on the use of hearsay evidence set forth in Section 120.57(1)(c), Florida Statutes. The Respondent did not present the testimony of any witnesses or offer any exhibits into evidence.

The one-volume transcript of the proceedings was filed with the Division of Administrative Hearings on February 21, 2002, and the Department timely filed proposed findings of fact and conclusions of law, which have been considered in preparing this Recommended Order. Mr. Taylor did not file any post-hearing submittal.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing and on the entire record of this proceeding, the following findings of fact are made:

1. The Department is the state agency charged with investigating and prosecuting the unlicensed practice of contracting and may impose a penalty in accordance with the provisions of Chapter 120, Florida Statutes. Sections 455.228(1) and 489.127(1)(f), Florida Statutes.

2. At the times material to this proceeding, Mr. Taylor did business as A Tova Developers, Inc. Neither Mr. Taylor nor A Tova Developers, Inc., was certified or registered to do business as a contractor in the State of Florida at any time material to this proceeding.

3. On or about September 10, 1998, Mr. Taylor, as "President" of A Tova Developers, Inc., and Hensel Reid as "Owner" entered into a contract for the construction of a new sanctuary for the Banner of Love Church, to be located at 16930 Northwest 17th Avenue in Miami, Florida. The contract price was \$311,500.00, and the contract provided that a deposit was to be paid in the amount of \$23,362.00.

4. The contract incorporated a separate written estimate identifying specifically the work to be done. The name and address of A Tova Developers, Inc., the designation "Contractor # CGC 041569," and the words "Licensed and Insured" appeared on the estimate.

5. Mr. Reid paid the required deposit by check dated September 10, 1998, made payable to A Tova Developers, Inc., in the amount of \$23,362.00.

6. Although a survey was done to determine which trees could not be cut on the property on which the sanctuary was to be built, the property was never cleared and no construction was begun pursuant to the contract. Mr. Taylor did place a

construction trailer on the property, which he later abandoned. A citation was issued to the church for the abandoned trailer.

7. In March 1999, Mr. Reid, on behalf of the church, sought arbitration under the September 10, 1998, contract. In September 1999, an arbitration award was entered in which, among other things, A Tova Developers, Inc., was ordered to pay to the Banner of Love Church, Inc., the amount of \$23,362.00 and Mr. Taylor and A Tova Developers, Inc., were ordered to remove the trailer from church property within seven days of the date of the award.

8. Mr. Taylor did not remove the trailer as ordered, and, after Mr. Reid tried unsuccessfully to contact Mr. Taylor, the church paid the fine and the costs of removing the trailer from the property.

9. On or about February 22, 2000, after A Tova Developers, Inc., had failed to pay the church the amounts awarded in arbitration, a Final Judgment on Arbitration Award was entered by the Circuit Court of the 11th Judicial Circuit, in which A Tova Developers, Inc., was ordered to pay the Banner of Love Church the amount of \$23,362.00, together with interest. In addition, Mr. Taylor and A Tova Developers, Inc., were jointly ordered to pay an additional \$750.00 and \$222.00 in court costs.

10. After Mr. Taylor and A Tova Developers, Inc., failed to pay the amounts awarded in the final judgment, Mr. Reid filed

a criminal complaint against Mr. Taylor. The State Attorney filed an information charging Mr. Taylor with grand theft and with contracting without a license. Mr. Taylor entered a plea of guilty, and he was sentenced to fifteen years' probation on the grand theft charge; the sentence for the charge of contracting without a license was suspended. As a condition of probation, Mr. Taylor was ordered to pay restitution to the Banner of Love Church in the amount of \$33,838.00.

11. On or about October 27, 2000, Mr. Taylor made a restitution payment to the Banner of Love Church in the amount of \$5,000, and he has continued making monthly restitution payments in varying amounts through the State of Florida since that time. At the time of the final hearing, he had paid the church approximately \$9,000.

CONCLUSIONS OF LAW

12. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2001).

13. A "contractor" is defined in pertinent part in Section 489.105(3), Florida Statutes, as follows:

(3) "Contractor" means the person who is qualified for, and shall only be responsible for, the project contracted for and means, except as exempted in this part, the person who, for compensation, undertakes to,

submits a bid to, or does himself or herself or by others construct, repair, alter, remodel, add to, demolish, subtract from, or improve any building or structure, including related improvements to real estate, for others or for resale to others; and whose job scope is substantially similar to the job scope described in one of the subsequent paragraphs of this subsection. . . .

Contractors are subdivided into two divisions, Division I, consisting of those contractors defined in paragraphs (a)-(c), and Division II, consisting of those contractors defined in paragraphs (d)-(q):

(a) "General contractor" means a contractor whose services are unlimited as to the type of work which he or she may do, who may contract for any activity requiring licensure under this part, and who may perform any work requiring licensure under this part, except as otherwise expressly provided in s. 489.113.

(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.

14. "Contracting" is defined in pertinent part in Section 489.105(6), Florida Statutes (1999), as

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 such 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. . . .

15. On the basis of the findings of fact herein, the Department has satisfied its burden of proving by clear and convincing evidence that Mr. Taylor engaged in the business of contracting when he negotiated and signed a contract for the construction of a church sanctuary and that Mr. Taylor did so although neither he nor A Tova Developers, Inc., was certified or registered as a contractor pursuant to Chapter 489, Florida Statutes. Mr. Taylor, therefore, acted in violation of Section 489.113(2), Florida Statutes (1999), which provides that, with some exceptions not pertinent here, "[n]o person who is not certified or registered shall engage in the business of contracting in this state" and of Section 120.127(1)(f), Florida Statutes (1999), which prohibits a person from "[e]ngag[ing] in the business of contracting or act[ing] in the capacity of a contractor or advertis[ing] himself or herself or a business organization as available to engage in the business or act in the capacity of a contractor without being duly registered or certified or having a certificate of authority."

16. The Department has authority over persons who practice contracting without a license pursuant to Section 455.228, Florida Statutes (1999), as follows:.

(1) When the department has probable cause to believe that any person not licensed by the department, or the appropriate regulatory board within the department, has violated any provision of this chapter or any statute that relates to the practice of a profession regulated by the department, or any rule adopted pursuant thereto, the department may issue and deliver to such person a notice to cease and desist from such violation. In addition, the department may issue and deliver a notice to cease and desist to any person who aids and abets the unlicensed practice of a profession by employing such unlicensed person. The issuance of a notice to cease and desist shall not constitute agency action for which a hearing under ss. 120.569 and 120.57 may be sought. For the purpose of enforcing a cease and desist order, the department may file a proceeding in the name of the state seeking issuance of an injunction or a writ of mandamus against any person who violates any provisions of such order. In addition to the foregoing remedies, the department may impose an administrative penalty not to exceed \$5,000 per incident pursuant to the provisions of chapter 120 or may issue a citation pursuant to the provisions of subsection (3). If the department is required to seek enforcement of the order for a penalty pursuant to s. 120.569, it shall be entitled to collect its attorney's fees and costs, together with any cost of collection.

(Emphasis added.)

17. The Department has chosen to impose an administrative penalty on Mr. Taylor for engaging in the business of

contracting without a license, and it suggests that a penalty of \$5,000.00 would be appropriate. The Department has proven by clear and convincing evidence that the Banner of Love Church has suffered a monetary loss as a result of Mr. Taylor's actions in taking a deposit but failing to do any work under the contract; the church will not, at the current rate of restitution, be made whole for many years. And, although the Department did not charge Mr. Taylor with having falsely held himself or his company out as a certified contractor, see Section 489.127(1)(a), Florida Statutes (1999), the Department has proven by clear and convincing evidence that Mr. Taylor represented to Mr. Reid that A Tova Developers, Inc., as a certified contractor by virtue of the information contained on the estimate incorporated into the contract. The Department has, therefore, established aggravating factors that would justify imposition of the maximum administrative penalty permitted under Section 455.228(1), Florida Statutes (1999),.

18. In its Administrative Complaint, the Department requested that the costs of investigation and prosecution of this case be assessed against Mr. Taylor. No statutory authority was cited in the Administrative Complaint to support the request, but in its Proposed Recommended Order, the Department indicated that its request was based on the following provision in Section 455.228(3)(c), Florida Statutes (1999):

"The department shall be entitled to recover the costs of investigation, in addition to any penalty provided according to department rule as part of the penalty levied pursuant to the citation." By its terms and by its context in the subsection of Section 455.228 dealing with procedures for the issuance of citations, this provision does not authorize recovery of investigative and prosecution costs when the Department has chosen to impose an administrative penalty pursuant to the provisions of Chapter 120, Florida Statutes. Accordingly, even if the issue were an appropriate one to present in this forum,¹ the Department has not established a statutory basis for an assessment of investigation and prosecution costs.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Business and Professional Regulation enter a final order finding that Philip Taylor violated Section 489.127(1)(f), Florida Statutes (1999) and imposing an administrative fine against Mr. Taylor in the amount of \$5,000.00.

DONE AND ENTERED this 28th day of March, 2002, in
Tallahassee, Leon County, Florida.

PATRICIA HART MALONO
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of March, 2002.

ENDNOTE

¹ It can be argued that the Division of Administrative Hearings has no authority to recommend assessment of investigative and prosecution costs even when authorized by statute or to determine as a factual matter the amount of costs incurred. It would seem that the jurisdiction of the Division of Administrative Hearings in a case such as the instant case is to resolve the disputed issues of material fact arising from the allegations in an Administrative Complaint and to recommend an appropriate penalty if the proof establishes a rule or statutory 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.