

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GOLD COAST SCHOOL OF)
CONSTRUCTION, INC., AND DOUGLAS)
L. GAMESTER,)
)
Petitioners,)
)
vs.) Case No. 04-0692RP
)
DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
CONSTRUCTION INDUSTRY LICENSING)
BOARD,)
)
Respondent.)
_____)

FINAL ORDER

Robert E. Meale, Administrative Law Judge of the Division
of Administrative Hearings, conducted the final hearing in
Tallahassee, Florida, on April 5, 2004.

APPEARANCES

For Petitioners: Timothy P. Atkinson
Segundo J. Fernandez
Oertel, Fernandez, Cole & Bryant, P.A.
Post Office Box 1110
Tallahassee, Florida 32302

For Respondent: Diane L. Guillemette
Lee Ann Gustafson
Office of the Attorney General
The Capitol, Suite PL-01
Tallahassee, Florida 32399-1050

STATEMENT OF THE ISSUES

The issues are whether the existing and proposed provisions of Florida Administrative Code Rule 61G4-15.005, as identified in the next paragraph, are invalid exercises of delegated legislative authority.

PRELIMINARY STATEMENT

By Petition for Administrative Determination of the Invalidity of an Existing Rule and Proposed Rule filed February 27, 2004, Petitioners challenged existing Florida Administrative Code Rule 61G4-15.005(3)(a) and changes to this rule proposed by Respondent on February 6, 2004, in Florida Administrative Weekly, Volume 30, Number 6. Florida Administrative Code Rule 60G4-15.005(3)(a) imposes net-worth requirements upon persons seeking certification as contractors. As amended, Florida Administrative Code Rule 61G4-15.003(3)(a) would raise the net-worth requirements imposed on general and building contractors from \$20,000 each to \$80,000 and \$40,000, respectively, and would raise the net-worth requirements imposed on other contractors by lesser amounts.

The petition alleges that Petitioner Gold Coast School of Construction, Inc., is a school for individuals seeking to become certified or registered contractors. The petition alleges that the proposed increases in net worth will adversely affect Gold Coast's substantial interests by reducing the

student pool due to the reduced number of students who will be able to meet the increased net-worth requirements.

The petition alleges that Petitioner Douglas L. Gamester has applied to Respondent for his general contractor's certificate. The petition alleges that Mr. Gamester has already passed the required examination and is substantially affected by the proposed rule because he will be unable to meet the increased net-worth requirements.

The petition alleges that the existing and proposed rule provisions are invalid because Respondent has exceeded its grant of rulemaking authority; the existing and proposed rule provisions enlarge, modify, or contravene the specific provisions of law implemented; and the proposed rule is arbitrary or capricious. (At the hearing, Petitioners withdrew their allegations that the existing and proposed rule provisions impose regulatory costs that could be reduced by the adoption of less costly alternatives that would accomplish substantially the statutory objectives.)

The petition also requests reasonable costs and attorneys' fees, pursuant to Section 120.595(2), Florida Statutes.

At the hearing, Petitioners called four witnesses and offered into evidence four exhibits: Petitioners Exhibits 1-4. Respondent called two witnesses and offered into evidence no exhibits. All exhibits were admitted.

The court reporter filed the transcript on April 20, 2004. The parties filed their proposed final orders on April 30, 2004.

FINDINGS OF FACT

1. Petitioner Gold Coast School of Construction, Inc. (Gold Coast), engages in the business of offering courses to individuals who seek to become certified or registered contractors in Florida. Gold Coast offers prelicensing courses for prospective general contractors, building contractors, residential contractors, Class A air conditioning contractors, Class B air conditioning contractors, Class C air conditioning contractors, and roofing contractors. Enrollment in these classes ranges from 200-600 students annually.

2. For the trades in which Gold Coast offers prelicensing courses, Gold Coast is substantially affected by the proposed rule, which would substantially raise the net-worth requirements imposed on prospective contractors, reduce the number of persons who could qualify for certification, and reduce the number of persons who would enroll in Gold Coast's prelicensing courses.

3. Petitioner Douglas L. Gamester (Gamester) has passed the Construction Industry Licensing Board (Respondent) examination for certification as a general contractor. After he filed his rule challenge, Respondent granted him a general contractor's certificate and approved his qualification of a business entity. Gamester is not substantially affected by the

rule or proposed changes to the rule. Although Gamester may, in the future, attempt to obtain other contracting certificates in other trades, any finding of such plans at present would be based entirely on speculation.

4. Florida Administrative Code Rule 61G4-15.005 provides:

61G4-15.005 Requirements for Certification and Registration.

In order that the Board may carry out its statutory duty to investigate the financial responsibility, credit, and business reputation of a new applicant for certification or registration or a change of status of a certification or registration, an applicant shall be required to forward the following to the Department for a review by the Board:

(1) A credit report from any nationally recognized credit agency as defined in subsections 61G4-12.011(13) and (14), F.A.C.

(2) A financial statement, not older than 12 months, which shall contain information indicating the current assets, current liabilities, total assets, total liabilities, and total net worth, and which shall report all material financial changes occurring between the date of the financial statement and the date of the application.

(3) As a prerequisite to issuance of a certificate, an applicant shall, in addition to the submissions required in subsections (1) and (2) above, submit competent, substantial evidence to the Florida Construction Industry Licensing Board demonstrating the following:

(a) Net worth as listed below for the following categories of contractors:

1. General Contractor, \$20,000;
2. Building Contractor, \$20,000;

3. Residential Contractor, \$20,000;
4. Sheet Metal Contractor, \$10,000;
5. Roofing Contractor, \$10,000;
6. Class A Air Conditioning Contractor, \$10,000;
7. Class B Air Conditioning Contractor, \$10,000;
8. Class C Air Conditioning Contractor, \$10,000;
9. Mechanical Contractor, \$10,000;
10. Commercial Pool/Spa Contractor, \$10,000;
11. Residential Pool/Spa Contractor, \$10,000;
12. Swimming Pool/Spa Servicing Contractor, \$2,500;
13. Plumbing Contractor, \$10,000;
14. Underground Utility and Excavation Contractor, \$10,000;
15. Solar Contractor, \$10,000;
16. Residential Solar Water Heating Specialty Contractor, \$2,500;
17. Specialty Structure Contractor, \$10,000;
18. Pollutant Storage System Specialty Contractor, \$10,000;
19. Gypsum Drywall Specialty Contractor, \$2,500;
20. Gas Line Specialty Contractor, \$10,000; or
21. Glass and Glazing Specialty Contractor, \$10,000.

(b) Possession of either a letter of credit or a compliance bond established to reimburse the appropriate parties for diversion of funds, abandonment, and all other statutory violations, said instruments to be issued in the same license classification to dollar ratio listed in paragraph (a), above. The aforementioned instruments are not to be construed as performance bonds.

(c) Net worth shall be defined to require a showing for all contractor licensure categories that the applicant has a minimum of 50 percent (%) of the amount in cash.

(d) Cash shall be defined to include a line of credit.

5. On February 6, 2004, Respondent published in the Florida Administrative Weekly, Volume 30, Number 6, proposed changes to Florida Administrative Code 61G4-15.005(3)(a), so that the new net-worth requirements would be as follows (new language is underlined and old language is stricken):

(a) Net worth as listed below for the following categories of contractors:

1. General Contractor, \$80,000
~~20,000~~;
2. Building Contractor, \$40,000
~~20,000~~;
3. Residential Contractor, \$20,000;
4. Sheet Metal Contractor, \$20,000
~~10,000~~;
5. Roofing Contractor, \$20,000
~~10,000~~;
6. Class A Air Conditioning Contractor, \$20,000 ~~10,000~~;
7. Class B Air Conditioning Contractor, \$20,000 ~~10,000~~;
8. Class C Air Conditioning Contractor, \$20,000 ~~10,000~~;
9. Mechanical Contractor, \$20,000
~~10,000~~;
10. Commercial Pool/Spa Contractor, \$20,000 ~~10,000~~;
11. Residential Pool/Spa Contractor, \$20,000 ~~10,000~~;
12. Swimming Pool/Spa Servicing Contractor, \$10,000 ~~2,500~~;
13. Plumbing Contractor, \$20,000
~~10,000~~;
14. Underground Utility and Excavation Contractor, \$20,000 ~~10,000~~;
15. Solar Contractor, \$20,000
~~10,000~~;
16. Residential Solar Water Heating Specialty Contractor, \$5,000 ~~2,500~~;

- 17. Specialty Structure Contractor,
\$20,000; ~~10,000~~;
- 18. Pollutant Storage System
Specialty Contractor, \$20,000; ~~10,000~~;
- 19. Gypsum Drywall Specialty
Contractor, \$5,000; ~~2,500~~;
- 20. Gas Line Specialty Contractor,
\$20,000 ~~10,000~~; or [sic].

6. Section 489.105(3), Florida Statutes, divides contractors into Division I and Division II. Division I contractors are general, building, and residential contractors. Division II contractors are all other contractors.

7. Section 489.105(3), Florida Statutes, defines Division I contractors as follows:

(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.

(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.

8. In contrast to building and residential contractors, a general contractor is unlimited in the scope of work that he or she may under take, subject to Section 489.113(3), Florida Statutes, which requires a contractor to subcontract out electrical, mechanical, plumbing, roofing, sheet metal, swimming pool, and air conditioning work, unless the contractor is certified or registered in the particular trade.

9. Building contractors may undertake work on residential or commercial structures not more than three stories high, and residential contractors may undertake work on limited residential structures not more than two stories high. Although Petitioners identify various small jobs that require a general contractor's certificate or registration, such as the construction of small communications towers, balcony repairs in parking garages, and door repairs in high-rise apartments, the record generally supports the finding that the scope of jobs undertaken by general contractors is more extensive than the scope of jobs undertaken by building contractors, and the scope of jobs undertaken by building contractors is more extensive than the scope of jobs undertaken by residential contractors.

10. This case involves one of the requirements imposed on persons seeking to become certified as contractors in specific

trades. Certification is distinct from registration. Section 489.105(7) and (8), Florida Statutes, defines "certificate" as a certificate of competency issued by Respondent and a "certified contractor" as a contractor who may practice anywhere in the state. Section 489.105(9) and (10), Florida Statutes, defines "registration" as registration with Respondent and a "registered contractor" as a contractor who may practice only in the local jurisdiction for which the registration is issued.

11. Section 489.115(1), Florida Statutes, prohibits any person from engaging in the practice of contracting without first obtaining a certificate or registration in the appropriate trade.

12. Section 489.115(5)(b) and (6), Florida Statutes, provides:

(b) In addition to the affidavit of insurance, as a prerequisite to the initial issuance of a certificate, the applicant shall furnish a credit report from a nationally recognized credit agency that reflects the financial responsibility of the applicant and evidence of financial responsibility, credit, and business reputation of either himself or herself or the business organization he or she desires to qualify. The board shall adopt rules defining financial responsibility based upon the applicant's credit history, ability to be bonded, and any history of bankruptcy or assignment of receivers. Such rules shall specify the financial responsibility grounds on which the board may refuse to qualify an applicant for certification.

* * *

(6) An initial applicant shall, along with the application, and a certificateholder or registrant shall, upon requesting a change of status, submit to the board a credit report from a nationally recognized credit agency that reflects the financial responsibility of the applicant or certificateholder or registrant. The credit report required for the initial applicant shall be considered the minimum evidence necessary to satisfy the board that he or she is financially responsible to be certified, has the necessary credit and business reputation to engage in contracting in the state, and has the minimum financial stability necessary to avoid the problem of financial mismanagement or misconduct. The board shall, by rule, adopt guidelines for determination of financial stability

13. Although testimony at the hearing suggested that "history of bankruptcy" meant an inability to generate sufficient cash flow to pay debts owed, it is more likely that a "history of bankruptcy" is a record of filing for bankruptcy. Like the appointment of a receiver, the filing of a petition for bankruptcy is an action that is easily detected, as opposed to the inability to pay debts as they matured or the existence of liabilities in excess of assets--either of which, for most natural persons, is difficult to determine, especially historically.

14. The "credit report" mentioned in Section 489.115(5)(b), Florida Statutes, and the "credit report" mentioned in Section 489.115(6), Florida Statutes, is the same

credit report. Florida Administrative Code Rule 61G4-12.011(11)

and (12) defines the credit report as follows:

(11) A "credit report from a nationally recognized credit agency that reflects the financial responsibility of the applicant, certificateholder or registrant", shall for the purposes of Section 489.115(6), F.S., mean a credit report that provides full, accurate, current, and complete information on the following items in a manner which allows the Board to determine the credit worthiness of the applicant:

(a) Payment history;

(b) Credit rating;

(c) Public filings in county, state and federal courts;

(d) Bankruptcies, business history, suits, liens, and judgments, all on a nationwide basis;

(e) Location of business, number of years in business;

(f) Social security numbers, if available, of all corporate officers, owners and partners, and all federal employer identification numbers, if available, held by the applicant or any business entity that he currently qualifies or is applying to qualify; and

(g) UCC filings.

(12) A "nationally recognized credit agency" shall mean a credit agency that:

(a) Obtains credit information both within and outside the State of Florida;

(b) Validates, updates, and maintains the accuracy of credit information obtained; and

(c) Obtains credit reports from at least two (2) credit bureaus.

15. The statutory requirement of a credit report focuses upon an individual's creditworthiness, based on his or her use or abuse of credit and payment history. The closest that these

statutes come to specifying net worth as a criterion of certification are the requirements of "financial. . . responsib[ility]" and "the minimum financial stability necessary to avoid the problem of financial mismanagement or misconduct," which is the cause of about 70 percent of all disciplinary proceedings against contractors. However, these statutory references guide Respondent in the authorized use of the credit report, which does not warrant the imposition of a net-worth requirement. First, the credit report lacks net-worth information. Second, the credit report presents a subject's financial history--most of which is of no use in establishing the subject's present net worth.

16. In contrast to these provisions in Section 489.115(5)(b) and (6), Florida Statutes, Section 489.1195(1)(d), Florida Statutes, expressly authorizes Respondent to adopt rules imposing "net worth" and "cash" requirements on individuals seeking to qualify as financially responsible officers (FROs) for construction businesses. The Legislature clearly evidenced its ability to require net worth as a condition to certification as an FRO, which are not involved in this case, and obviously elected not to impose as onerous a requirement upon contractors themselves.

17. Respondent determined the new net-worth requirements in the proposed rule by two means. Respondent had not changed

the net-worth requirements for Division II contractors for 20 years, so Respondent estimated that the effects of inflation justified the increases set forth in the proposed rule. Respondent had raised the net-worth requirements for Division I contractors from \$10,000 to \$20,000 in 1998. Respondent derived the new net-worth requirements for general and building contractors based on estimates of weekly salaries for these respective contractors, not inflation.

18. The present record contains no evidence of the rate of inflation during any relevant period of time, nor any evidence of average weekly salaries paid by Division I contractors. Nor does it appear that Respondent considered such data when determining the new net-worth requirements in the proposed rule.

CONCLUSIONS OF LAW

19. The Division of Administrative Hearings has jurisdiction over the subject matter. §§ 120.56 and 120.569 Fla. Stat. (2003).

20. Section 120.56(1)(a), Florida Statutes, provides: "Any person substantially affected by a rule or a proposed rule may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority."

21. Section 120.52(8), Florida Statutes, defines "invalid exercise of delegated legislative authority" as:

(8) "Invalid exercise of delegated legislative authority" means action which goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:

* * *

(b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;

(c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.;

* * *

(e) The rule is arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational[.]

A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the same statute

22. Section 120.56(1)(e), Florida Statutes, provides that hearings in rule challenges shall be de novo, and the standard

of proof shall be a preponderance of the evidence. Section 120.56(2), Florida Statutes, provides that, in challenges of proposed rules, the agency has the burden of proving by a preponderance of the evidence that the rule is not an invalid exercise of delegated legislative authority as to the objections established by the challenger. Section 120.56(3)(a), Florida Statutes, provides that, in challenges of existing rules, the challenger has the burden of proving by a preponderance of the evidence that the rule is an invalid exercise of delegated legislative authority.

23. Subject to one limitation, Gold Coast has standing to challenge the existing and proposed rule provisions. See, e.g., Department of Professional Regulation, Board of Chiropractic v. Sherman College of Straight Chiropractic, 682 So. 2d 559 (Fla. 1st DCA 1995) (school had standing to challenge rule requiring that licensure applicants show that school had certain accreditation). As noted in Florida Board of Medicine v. Florida Academy of Cosmetic Surgery, Inc., 808 so. 2d 243, 251 (Fla. 1st DCA 2002), a party may have standing to challenge a rule that does not regulate the party's profession, per se, but has a "collateral financial impact on the challenger's business." See also Televisual Communications, Inc. v. Florida Department of Labor and Employment Security, 667 So. 2d 372

(Fla. 1st DCA 1995); Department of Health and Rehabilitative Services v. Alice P., 367 So. 2d 1045 (Fla. 1st DCA 1979).

24. The limitation to Gold Coast's standing is that it may challenge only those existing and proposed rule provisions that affect its enrollment in prelicensing courses. As previously noted, Gold Coast offers such courses only in the Division I trades and the following Division II trades: Class A air conditioning contractors, Class B air conditioning contractors, Class C air conditioning contractors, and roofing contractors. Gold Coast has argued that its enrollment would be affected in its broader range of continuing education courses, but this argument is based on the mistaken premise that Respondent imposes the net-worth requirements on contractors seeking to renew their certificates at the end of the two-year term.

25. Gamester is not substantially affected by the existing or proposed rule provisions.

26. Gold Coast has proved that Florida Administrative Code Rule 61G4-15.005(3)(a) enlarges, modifies, or contravenes existing law. The statutes provide Respondent with no authority to impose net-worth requirements on persons seeking contractor certificates.

27. Gold Coast has gone forward with the evidence to identify its objections to the proposed Florida Administrative Code Rule 61G4-15.005(3)(a) and its proposed new net-worth

requirements. Respondent has failed to prove that the proposed provisions do not enlarge, modify, or contravene existing law. Likewise, Respondent has failed to prove that the proposed provisions are not arbitrary; the increased net worths lack factual support both as to Division I and Division II contractors.

28. Section 120.595(2), Florida Statutes, provides:

If the court or administrative law judge declares a proposed rule or portion of a proposed rule invalid pursuant to s. 120.56(2), a judgment or order shall be rendered against the agency for reasonable costs and reasonable attorney's fees, unless the agency demonstrates that its actions were substantially justified or special circumstances exist which would make the award unjust. An agency's actions are "substantially justified" if there was a reasonable basis in law and fact at the time the actions were taken by the agency. If the agency prevails in the proceedings, the court or administrative law judge shall award reasonable costs and reasonable attorney's fees against a party if the court or administrative law judge determines that a party participated in the proceedings for an improper purpose as defined by paragraph (1)(e). No award of attorney's fees as provided by this subsection shall exceed \$15,000.

29. If a proposed rule is invalidated, as here, the award of attorneys' fees and costs under Section 120.595(2), Florida Statutes, is mandatory, unless Respondent shows that its actions were substantially justified or special circumstances exist which would make the award unjust. The Administrative Law Judge

reserves jurisdiction to conduct further proceedings pursuant to Section 120.595(2), Florida Statutes. If the parties are unable to negotiate an agreement concerning Gold Coast's claim for attorneys' fees and costs, then Gold Coast may file a request for an evidentiary hearing on this matter. However, if Gold Coast fails to file such a request within 120 days of this Final Order, it shall have waived its right to pursue attorneys' fees and costs pursuant to Section 120.595(2), Florida Statutes.

ORDER

It is

ORDERED that Gamester's rule challenge is dismissed for lack of standing; Gold Coast's rule challenge is sustained and Florida Administrative Code Rule 61G4-15.005(3)(a)1, 2, 3, 5, 6, 7, and 8 and proposed Florida Administrative Code Rule 61G4-15.005(3)(a)1, 2, 3, 5, 6, 7, and 8 are invalidated as invalid exercises of delegated legislative authority; the remainder of Gold Coast's rule challenge is dismissed for lack of standing; and the Administrative Law Judge reserves jurisdiction over Gold Coast's request for attorneys' fees and costs, pursuant to Section 120.595(2), Florida Statutes, for further proceedings, as described in paragraph 27 above.

DONE AND ORDERED this 30th day of June, 2004, in
Tallahassee, Leon County, Florida.



ROBERT E. MEALE
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 30th day of June, 2004.

COPIES FURNISHED:

Tim Vaccaro, Director
Construction Industry Licensing Board
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-0792

Leon Biegalski, General Counsel
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-2202

Timothy P. Atkinson, Esquire
Oertel, Hoffman, Fernandez & Cole, P.A.
Post Office Box 1110
Tallahassee, Florida 32302-1110

Diane L. Guillemette
Office of the Attorney General
The Capitol, Plaza Level 01
Tallahassee, Florida 32399-1050

James E. Cunningham, President
Mid Florida Utilities & Transportation
Contractors Association, Inc.
231 West Bay Avenue
Longwood, Florida 32750-4125

John K. Moyant, President
Contractors Exam School, Inc.
6750 Pembroke Road
Hollywood, Florida 33023

NOTICE OF RIGHT OF JUDICIAL REVIEW

A party who is adversely affected by this final order is entitled to judicial review. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a Notice of Appeal with the agency clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the appellate district where the party resides. The Notice of Appeal must be filed within 30 days of rendition of the order to be reviewed.