

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)	
PROFESSIONAL REGULATION,)	
)	
Petitioner,)	
)	
vs.)	Case No. 05-1668
)	
CURT L. MCKAY, d/b/a MCKAY)	
ENGINEERING SERVICE, INC.,)	
)	
Respondent.)	
_____)	

RECOMMENDED ORDER

On June 23, 2005, a final hearing was held pursuant to notice in Tampa, Florida, before Bram D. E. Canter, Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Brian Elzweig, Esquire
Department of Business and
Professional Regulation
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-2202

For Respondent: No appearance

STATEMENT OF THE ISSUE

The issue in the case is whether the Respondent violated Subsections 489.129(1)(g)2., 489.129(1)(j), 489.129(1)(i), 489.129(1)(m), and 489.129(1)(o), Florida Statutes (2002), as

alleged in the Petitioner's Administrative Complaint, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

The Petitioner, Department of Business and Professional Regulation, filed an Administrative Complaint alleging that the Respondent, Curt L. McKay, d/b/a McKay Engineering Services, Inc., had violated certain state laws regulating the practices of contractors. The Respondent disputed the allegations and requested an administrative hearing. The Petitioner referred the matter to the Division of Administrative Hearings, which scheduled and conducted a hearing.

At the hearing, the Petitioner presented the testimony of one witness, Mack Hayes. The Petitioner's Exhibits 1 through 11 were admitted into evidence. The Respondent did not make an appearance at the hearing and no evidence on his behalf was presented for the record.

The one-volume Transcript of the hearing was filed on July 8, 2005. The Petitioner timely submitted a proposed recommended order, and it was considered in the preparation of this Recommended Order. Nothing was submitted by the Respondent.

FINDINGS OF FACT

1. The Petitioner is a state agency charged with the licensing and regulation of building contractors pursuant to Chapter 489, Florida Statutes.

2. The Respondent is a Florida State Certified Building Contractor who holds license number CBC053702.

3. On December 9, 2002, Mack Hayes entered into a contract with "McKay Engineering/Construction" to build an addition to the Hayes residence located at 3011 East Deleuil Avenue in Tampa, Florida.

4. Although the contract refers to McKay Engineering/Construction rather than McKay Engineering Services, Inc., subsequent change orders to the contract show the Respondent's license number in the letterhead. In correspondence to the Petitioner, the Respondent also acknowledged that he was the contractor on the Hayes project.

5. The Hayes contract did not contain a statement explaining the consumers' rights under the Construction Industries Recovery Fund. Counsel for the Petitioner, however, stated that Mr. Hayes remains eligible for assistance from the Fund.

6. The original contract price for the construction was \$54,700. Change orders created an adjusted price of \$57,450.

7. During the course of the construction, Mr. Hayes made four payments to the Respondent totaling \$49,000.

8. Not long after the construction commenced in January 2003, Mr. Hayes and his wife became frustrated with the slow pace of the construction. Mr. Hayes originally understood that the work would take about 90 days. Instead, the construction remained uncompleted after nine months.

9. In July 2003, the pace of work on the Hayes' addition slowed substantially and in October, the Respondent ceased work altogether. The Respondent ceased work on the project despite the fact that he had not been fired or otherwise given a reason to cease work.

10. In order to facilitate progress on the construction, Mr. Hayes paid the air conditioning subcontractor \$1,836, the electrical subcontractor \$1,000, and the stucco subcontractor \$800, even though it was the Respondent's responsibility under the parties' contract to pay the subcontractors.

11. The Respondent's construction of the new roof of the residence was of particular concern to Mr. Hayes. The tie-in of new roof framing with the existing roof was misaligned and otherwise improperly installed which caused the new roof to sag.

12. The records of the City of Tampa indicate that the Respondent did not obtain a permit from the City for the roofing work at the Hayes residence.

13. In an attempt to repair the roof, large holes were cut in the ceiling to gain access for cutting some of the rafters. The holes in the ceiling were not repaired by the Respondent.

14. The plywood and other wood used on the unfinished eaves was left exposed to weather for months, which has resulted in water damage to the wood that will necessitate that it be replaced.

15. Mr. Hayes obtained cost estimates from two other contractors to repair the roof, gables, and eaves installed by the Respondent. One estimate was \$17,490 (including materials) and the other estimate was \$15,550 (without materials).

16. Numerous aspects of the construction project were never started or were started and then abandoned, including the gables and eaves, the door trim and hardware, internal electrical box, attic access, plumbing, and front trim. Mack Hayes paid \$2,500 to Ezekial Bain and \$2,500 to Drains, Etc. to finish some of this work after the Respondent abandoned the project.

17. Taking into account the adjusted contract price of the construction, the amount paid to the Respondent by Mr. Hayes, the direct costs paid to subcontractors by Mr. Hayes, and the reasonable estimated costs for repair of the roof, gables, and eaves, the total financial damages that the Respondent caused to Mr. Hayes is \$17,676.

18. The Petitioner did not present expert testimony regarding the competency of the Respondent as a building contractor. Without such testimony, the record evidence is not sufficient to clearly and convincingly demonstrate that the problems associated with this particular project were due to incompetence. The problems could have been caused solely by the Respondent's mismanagement and misconduct.

19. The Petitioner incurred investigative costs of \$817.66 for the investigation and prosecution of this case.

CONCLUSIONS OF LAW

20. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter in this case. §§ 120.569 and 120.57(1), Fla. Stat. (2004).

21. Pursuant to Subsection 489.129(1), Florida Statutes (2002), the Construction Industry Licensing Board may impose penalties for violations of Chapter 489, Florida Statutes, including placement on probation, reprimand, suspension, or revocation of the Respondent's contractor certificate, and an administrative fine not to exceed \$5,000 per violation.

22. Subsection 489.129(1), Florida Statutes (2002), sets forth the wrongful acts that will subject a licensed contractor to penalty. The provisions pertinent to the allegations asserted in the Petitioner's Administrative Complaint are as follows:

(g) Committing mismanagement or misconduct in the practice of contracting that causes financial harm to a customer or misconduct. Financial mismanagement 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; or

* * *

(i) Failing in any material respect to comply with the provisions of this part or violating a rule or lawful order of the board.

(j) 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 incompetency or misconduct in the practice of contracting.

* * *

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

23. Because Section 489.129, Florida Statutes (2002), is a penal statute, and the Petitioner is seeking to impose a penal sanction, the Petitioner has the burden of proving the specific allegations set forth in its Administrative Complaint by clear and convincing evidence. See, e.g., Department of Banking and Finance v. Osbourne Stern & Co., 670 So. 2d 932 (Fla. 1996).

24. The clear and convincing evidence standard has been described as follows:

[C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the evidence must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact the firm belief without hesitancy, as to the truth of the allegations sought to be established.

Evans Packing Co. v. Department of Agriculture and Consumer Services, 550 So. 2d 112, 116 (Fla. 1st DCA 1989).

25. In determining an appropriate penalty in this case, consideration has been given to the disciplinary guidelines set forth in Florida Administrative Code Rule 61G4-17.001.

26. There being no evidence of a previous violation by the Respondent, the guidelines applicable to first-time violations are applicable.

27. In Count I of its Administrative Complaint, the Petitioner charges the Respondent with violation of Subsection

489.129(1)(g)2., Florida Statutes (2002), for committing mismanagement of the Hayes project that caused financial harm to Mack Hayes. The Petitioner met its burden to demonstrate that this violation occurred. The Petitioner's proposed administrative fine of \$1,000 is fair and reasonable under the circumstances.

28. In Count II of its Administrative Complaint, the Petitioner charges the Respondent with violation of Subsection 489.129(1)(j), Florida Statutes (2002), for abandoning the Hayes project. The Petitioner met its burden to demonstrate that this violation occurred. The Petitioner's proposed administrative fine of \$1,500 is fair and reasonable under the circumstances.

29. In Count III of its Administrative Complaint, the Petitioner charges the Respondent with violation of Subsection 489.129(1)(m), Florida Statutes (2002), for committing incompetency or misconduct in the practice of contracting. "Incompetency" is defined in Black's Law Dictionary as "lack of ability, knowledge, legal qualification, or fitness to discharge the required duty or professional obligation." "Misconduct" is defined in Black's Law Dictionary as "a dereliction of duty, willful in character."

30. The Petitioner did not meet its burden to demonstrate by clear and convincing evidence that the Respondent was incompetent. The Petitioner met its burden to demonstrate

misconduct, but only as to the violations charged in the other counts of the Administrative Complaint. Therefore, no separate penalty is warranted by the violation charged in Count III.

31. In Count IV of its Administrative Complaint, the Petitioner charges the Respondent with violation of Subsection 489.129(1)(i), Florida Statutes (2002), which requires compliance with the provisions of Chapter 489, Part I, because the Respondent failed to apply for a certificate of authority for McKay Engineering Services, Inc., as required by Subsection 489.119(2), Florida Statutes. There being no record evidence on this issue, the Petitioner has not met its burden to demonstrate that this violation occurred.

32. In Count V of its Administrative Complaint, the Petitioner charges the Respondent with violation of Subsection 489.129(1)(i), Florida Statutes (2002), which requires compliance with the provisions of Chapter 489, Part I, Florida Statutes, because the Respondent failed to include a notice in the Hayes contract regarding the Construction Industries Recovery Fund as required by Subsection 489.1425(1). The Petitioner met its burden to demonstrate that this violation occurred. The Petitioner's proposed administrative fine of \$200 is fair and reasonable under the circumstances.

33. In Count VI of its Administrative Complaint, the Petitioner charges the Respondent with violation of Subsection

489.129(1)(o), Florida Statutes (2002), for proceeding on the Hayes project without all required local building permits. The Petitioner has met its burden to demonstrate that this violation occurred. The Petitioner's proposed administrative fine of \$1,500 is fair and reasonable under the circumstances.

34. Subsection 455.227(3)(a), Florida Statutes (2002), provides that the Construction Industry Licensing Board may assess costs related to the investigation and prosecution of cases, excluding costs associated with attorney time.

35. The Petitioner's proposal that the Respondent pay financial restitution to Mack Hayes in the amount of \$17,676 is fair and reasonable under the circumstances.

36. The Petitioner's proposal that the Respondent be ordered to obtain seven hours of continuing education in the area of Chapter 489, Part I, Florida Statutes (2002), in addition to the hours required for renewal of the Respondent's certification is fair and reasonable under the circumstances.

37. The Respondent's unprofessional conduct and mismanagement of a job under a state license clearly justifies the suspension of the license. The Petitioner has recommended that the Respondent's license be suspended for two years. The suspension of the Respondent's license is a serious disciplinary action that will prevent him from obtaining income from his profession as a contractor. It would be an excessive penalty to

combine the two-year suspension with all the other penalties proposed by the Petitioner. Therefore, in the recommendation that follows, the administrative fine is omitted.

RECOMMENDATION

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

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

1. that the Respondent pay financial restitution to the Hayes of \$17,676;
2. that the Respondent obtain seven hours of continuing education in the area of Chapter 489, Part I, Florida Statutes, in addition to the hours required for renewal of the Respondent's certification;
3. that the Respondent's license be suspended for two years; and
4. that the Respondent reimburse the Petitioner for its investigative costs of \$817.66.

DONE AND ENTERED this 18th day of July, 2005, in
Tallahassee, Leon County, Florida.



BRAM D. E. CANTER
Administrative Law Judge
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Filed with the Clerk of the
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this 18th day of July, 2005.

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.