

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
)
Petitioner,)
)
vs.) Case No. 05-1963PL
)
JOSHUA BARRETT WOODRUFF,)
)
Respondent.)
_____)

AMENDED RECOMMENDED ORDER

On August 9, 2005, a final hearing was held pursuant to notice in Tallahassee, Florida, before Bram D. E. Canter, Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Charles J. Pelligrini, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-2202

For Respondent: Jeffrey T. Kipi, Esquire
100 West Citrus Street
Altamonte Springs, Florida 32714

STATEMENT OF THE ISSUES

The issues in the case are whether the Respondent violated Subsections 455.227(1)(h) and 489.129(1)(a), Florida Statutes

(2003), 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 (Department), filed a three-count Administrative Complaint on June 25, 2004, alleging that the Respondent, Joshua Woodruff, had violated certain state laws regulating the licensure of contractors. Count I charged Mr. Woodruff with violating Subsection 489.129(1)(a), Florida Statutes (2003), by obtaining a certificate by fraud or misrepresentation. Count II charged Mr. Woodruff with violating Subsection 455.227(1)(h), Florida Statutes (2003), by attempting to obtain a license by bribery, fraudulent misrepresentation, or through an error of the Department. Count III charged Mr. Woodruff with violating Subsection 489.129(1)(i), Florida Statutes (2003), by failing to obtain a license for Mr. Woodruff's business, Simply Aluminum.

Mr. Woodruff disputed the allegations and requested an administrative hearing. The Department referred the matter to the Division of Administrative Hearings, which scheduled and conducted a hearing.

At the beginning of the hearing, the Department announced that it was withdrawing Count III of its Administrative Complaint. Neither party called a witness. The Department's Exhibit 1 was admitted into evidence. The Department's request

for official recognition of Chapters 489, 455, 893, 943, and Sections 120.57 and 120.569, Florida Statutes (2004), was granted. The Department's request for official recognition of certain records of the Ninth Judicial Circuit Court for Orange County, Florida, pertaining to the Respondent's court appearances, was also granted. The Respondent offered no exhibits into evidence. Mr. Woodruff did not appear at the hearing.

The one-volume Transcript of the hearing was filed on August 23, 2005. The Department and the Respondent submitted Proposed Recommended Orders, and they were considered in the preparation of this Amended Recommended Order.

FINDINGS OF FACT

1. The Department is the state agency charged with the licensing and regulation of building contractors pursuant to Chapters 455 and 489, Florida Statutes (2004).

2. Joshua Woodruff is a Florida Specialty Structure Contractor who holds license number SC C131149603. He owns a business called Simply Aluminum. His last-known residence is in Winter Springs, Florida.

3. On June 19, 2003, Mr. Woodruff submitted an application for the Specialty Structure Contractor license he now holds. On page six of the application form, question 1 under "BACKGROUND INFORMATION" asked the applicant whether he or she has ever been

convicted of a crime, found guilty, or entered a plea of guilty or nolo contendere to a criminal charge. At the end of the question, in larger print, is the following statement:

THIS QUESTION WILL BE CHECKED AGAINST LOCAL, STATE AND FEDERAL RECORDS. FAILURE TO ANSWER THIS QUESTION ACCURATELY MAY RESULT IN THE DENIAL OR REVOCATION OF YOUR LICENSE. IF YOU DO NOT FULLY UNDERSTAND THIS QUESTION, CONSULT WITH AN ATTORNEY OR CONTACT THE DEPARTMENT.

Mr. Woodruff checked the "Yes" box for this question.

4. The application form directed any person answering, "Yes," to complete form 0050-1. Form 0050-1 is included as page 14 of the license application. In the space on the form with the heading, "Offense," Mr. Woodruff wrote "Sale and Delivery." In the space with the heading, "Penalty/Disposition," Mr. Woodruff wrote, "2 months county jail, 6 months @ Bridge Program."

5. On page 13 of the license application, question number 3 under "FINANCIAL RESPONSIBILITY/BACKGROUND QUESTIONS," asks the applicant whether he or she has ever:

Undertaken construction contracts or work which resulted in liens, suits or judgments being filed? (If yes, you must attach a copy of the Notice of Lien and any payment agreement, satisfaction, Release of Lien or other proof of payment.)

Mr. Woodruff answered this question, "No."

6. The Department contends that Mr. Woodruff's responses on the license application form constituted misrepresentations because Mr. Woodruff failed to disclose that he had been adjudicated guilty in Orange County for possession of drug paraphernalia, and failed to disclose that he had filed a claim of lien on a construction project.

Criminal History

7. There is no dispute with regard to Mr. Woodruff's disclosure of the felony of "sale and delivery" (of a controlled substance) that he noted in his license application. Mr. Woodruff entered a plea of guilty to this offense on January 13, 2000, but adjudication of guilt was withheld.

8. The official records of the Ninth Judicial Circuit Court for Orange County indicate that Mr. Woodruff was adjudicated guilty on July 25, 2002, of possession of paraphernalia, a first degree misdemeanor under Subsection 893.147(1), Florida Statutes (2002).

9. The Respondent argues that his sentence on the conviction for possession of paraphernalia (two days in jail, fines and court costs of \$371, 180 days probation) was not rendered until July 23, 2004, more than a year after he submitted his license application to the Department. However, the application form clearly requested Mr. Woodruff to describe whether he had ever been convicted of a crime, found guilty, or

entered a plea of guilty or nolo contendere to a criminal charge. With regard to Mr. Woodruff's misdemeanor, all of these events occurred approximately one year before he submitted the license application.

Claim of Lien

10. On or about June 11, 2003, Mr. Woodruff filed a Claim of Lien against Itzhak and Ayala Stark for \$5,600 for work commenced in March 2003.

CONCLUSIONS OF LAW

11. 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).

12. Subsection 455.227(1)(h), Florida Statutes (2003), identifies one of the grounds for which disciplinary action may be taken against a person holding a license as:

Attempting to obtain, obtaining, or renewing a license to practice a profession by bribery, fraudulent misrepresentation, or through an error of the department or the board.

13. Subsection 489.129(1)(a), Florida Statutes (2003), sets forth, as one of the wrongful acts that will subject a licensed contractor to disciplinary action, the following:

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

14. Because Sections 455.227 and 489.129, Florida Statutes (2003), are penal statutes, and the Department is seeking to impose a penal sanction, the Department has the burden of proving the specific allegations of its Administrative Complaint by clear and convincing evidence. Department of Banking and Finance v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996).

15. 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 of conviction, 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).

16. Florida recognizes two separate theories of recovery for a misrepresentation. One basis of recovery is for fraud (fraudulent misrepresentation) and the other is for negligent misrepresentation. The elements of fraudulent misrepresentation are: 1) a false statement concerning a material fact; 2) the representor's knowledge that the representation is false; 3) an intention that the representation induce another to act on it;

and 4) consequent injury by the party acting in reliance on the representation. Johnson v. Davis, 480 So. 2d 625 (Fla. 1985).

17. The elements of a negligent misrepresentation are essentially the same as for a fraudulent misrepresentation except that it is not necessary to prove the representor intended to mislead, but only that the circumstances were such that the representor should have known the statement was false. Atlantic National Bank v. Vest, 480 So. 2d 1328 (Fla. 2d DCA 1985), review denied, 491 So. 2d 281 (Fla. 1986). This cause of action is sometimes referred to simply as misrepresentation. See Saunders Leasing System, Inc. v. Gulf Central Distribution Center, Inc., 513 So. 2d 1303 (Fla. 2d DCA 1987).

18. It is not disputed that Mr. Woodruff made the representations in his license application for the purpose of inducing the Department to issue him a license.

19. Mr. Woodruff's answer on form 0050-1 regarding his criminal background was false because it was incomplete and, therefore, inaccurate.

20. Counsel for the Respondent argued that the intent required for misrepresentation was not established on this record, presumably because there was no direct testimony from Mr. Woodruff about his understanding and intent at the time he submitted the license application. However, if wrongful intent could only be established by the admission of a respondent, the

charge of misrepresentation could always be overcome by the respondent's simple denial. In this case, the undisputed facts are sufficient to establish that Mr. Woodruff knew that his answers on the license application form were false.

21. Mr. Woodruff's arrest and incarceration for possession of drug paraphernalia occurred only a year before he submitted his application for the Specialty Structure Contractor license. It was the more recent of only two occasions when Mr. Woodruff was arrested and incarcerated for a crime.

22. It was admitted that Mr. Woodruff filed a claim of lien just eight days before he submitted the license application form.

23. The evidence is clear and convincing, therefore, that Mr. Woodruff knew when he submitted the license application that he had been adjudicated guilty of possession of drug paraphernalia and had filed a claim of lien. He knew his answers on the form were false because they omitted information about these matters.

24. Based on the foregoing, the Department proved by clear and convincing evidence that Mr. Woodruff violated Subsection 455.277(1)(h), Florida Statutes (2003), for "attempting to obtain" a license by fraudulent misrepresentation.

25. The offense described in Subsection 489.129(1)(a), Florida Statutes (2003), refers to a license "obtained" by fraud

or misrepresentation. In many cases, the difference between "attempting to obtain" and "obtained" will be of no consequence, and the facts establishing one offense will be sufficient to establish the other. However, in this case, counsel for the Department stated that the Department would not necessarily have denied the license to Mr. Woodruff if he had made a full disclosure on his application. Thus, while Mr. Woodruff "attempted to obtain" his license through misrepresentation, it does not appear on this record that he "obtained" his license as a result of misrepresentation, in violation of Subsection 489.129(1)(a), Florida Statutes (2003).

26. 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. No guideline is provided for a violation of Subsection 455.227(1)(h), Florida Statutes. In the absence of a specific guideline, Florida Administrative Rule 61G4-17.001(6) provides that the penalty for the most similar offense shall be used.

27. It is not altogether clear what offense most closely resembles the violation of attempting to obtain a license through misrepresentation. The offense of obtaining a license through misrepresentation (penalty: revocation and \$5,000 fine) is very similar, at least in wording. However, there is a substantial difference between obtaining a license that would

not have been issued but for a misrepresentation, and making a misrepresentation that would not have affected the issuance of the license. The penalty of revocation and a \$5,000 fine is too harsh a penalty for the latter offense.

28. Under the circumstances in this case, the offense most closely resembling Mr. Woodruff's offense is the one stated in Subsection 455.227(1)(a), Florida Statutes (2003): making a fraudulent representation in or related to the practice of the licensee's profession. The penalty guideline for this offense is a fine of \$2,000 to \$5,000 and suspension or revocation of the license, for each such offense.

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:

1. finding that Joshua Woodruff violated Subsection 455.227(1)(h), Florida Statutes (2003), by failing to disclose a misdemeanor conviction and a claim of lien on his license application, and
2. imposing a fine against Mr. Woodruff of \$4000, and
3. suspending his license for 60 days.

DONE AND ENTERED this 12th day of September, 2005, in
Tallahassee, Leon County, Florida.



BRAM D. E. CANTER
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 12th day of September, 2005.

COPIES FURNISHED:

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

Jeffery T. Kipi, Esquire
100 West Citrus Street
Altamonte Springs, Florida 32714

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

Tim Vaccaro, Executive Director
Construction Industry Licensing Board
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-0792

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.