

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
CONSTRUCTION INDUSTRY LICENSING)
BOARD,)
)
Petitioner,)
)
vs.) Case No. 06-1531PL
)
FRANK JOSEPH POLACEK, V,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case before Larry J. Sartin, an Administrative Law Judge of the Division of Administrative Hearings, on July 12, 2006, in West Palm Beach, Florida.

APPEARANCES

For Petitioner: Jeffrey J. Kelly, Esquire
Department of Business and
Professional Regulation
Post Office Box 1489
Tallahassee, Florida 32302

For Respondent: Frank Joseph Polacek, V, pro se
5245 Center Street
Jupiter, Florida 33401

STATEMENT OF THE ISSUE

The issue in this case is whether Respondent, Frank J. Polacek, V, committed the violations alleged in an

Administrative Complaint filed with Petitioner March 15, 2006, DBPR Case Nos. 2005-036101, 2005-035843, 2004-056690, 2005-045647, and 2005-034560, and, if so, what disciplinary action should be taken against him.

PRELIMINARY STATEMENT

In an Administrative Complaint dated March 2, 2006, and filed on March 15, 2006, with the Department of Business and Professional Regulation, Frank Joseph Polacek, V, was charged with having violated statutory and rule provisions governing the conduct of Florida certified general contractors. Mr. Polacek timely disputed the factual allegations in the Administrative Complaint by executing an Election of Rights form. Mr. Polacek also made the following request in the Election of Rights form: "These cases are pending in the Palm Beach Court System. I would ask the board to place my lic. in active probation pending the final outcome."

Not honoring Mr. Polacek's request, the Administrative Complaint and the Election of Rights form he filed were forwarded to the Division of Administrative Hearings for the assignment of an administrative law judge to conduct an evidentiary hearing. The matter was designated DOAH Case No. 06-1531PL and was assigned to the undersigned.

By Notice of Hearing entered May 8, 2006, the final hearing of this case was scheduled for June 15 and 16, 2006.

At the final hearing, Petitioner presented the testimony of Diane Jackson, Richard Brooks, Nancy Sarro, Terri Ferrando, and A. Carter Pottash, M.D. Petitioner also had admitted 43 Exhibits. Respondent offered no evidence. He was, however, allowed, without objection, to file a letter of reference after the close of the final hearing. That letter, from John Zuccarelli, III, was filed on June 21, 2006. It has been marked as Respondent's Exhibit 1.

By Notice of Filing of Transcript issued July 12, 2006, the parties were informed that the Transcript of the final hearing had been filed on July 12, 2006. The parties were also informed that they had until August 11, 2006, to file proposed recommended orders. Petitioner filed Petitioner's Proposed Recommended Order on August 11, 2006. Respondent filed a letter on the same day. Both pleadings have been fully considered in rendering this Recommended Order.

All references to Florida Statutes and the Florida Administrative Code are to those laws in effect at the time of the events at issue in this matter unless otherwise noted.

FINDINGS OF FACT

A. The Parties.

1. Petitioner, the Department of Business and Professional Regulation (hereinafter referred to as the "Department"), is the agency of the State of Florida charged with the responsibility

for, among other things, the licensure of individuals who wish to engage in contracting in the State of Florida; and the investigation and prosecution of complaints against individuals who have been so licensed. See Ch. 689, Fla. Stat.

2. Respondent, Frank J. Polacek, V, is and has been at all times material hereto a licensed certified general contractor in Florida.

3. Mr. Polacek's license number is CG C059603. At all times material hereto, the status of his license has been "Current, Active."

4. At all times material, Mr. Polacek was certified as doing business as Endeavor Development, Inc (hereinafter referred to as "Endeavor"), a Florida corporation. Endeavor possessed a certificate of authority as a qualified business organization.

5. The Department has jurisdiction over Mr. Polacek's license.

B. Dalton Design, Inc.; Department Case No. 2004-056690.

6. On June 29, 2004, Terri Ferrando, owner of Dalton Design, Inc. (hereinafter referred to as "Dalton Design"), entered into a contract with Mr. Polacek, acting as Endeavor (hereinafter referred to as the "Dalton Design Contract").

7. Pursuant to the Dalton Design Contract, Mr. Polacek agreed to renovate a bathroom of an apartment owned by a client of Dalton. The apartment is located in Delray Beach, Florida.

8. Dalton Design agreed to pay Mr. Polacek \$15,871.00 in exchange for his services.

9. Mr. Polacek failed to include notification of the existence and availability of the Construction Industry Recovery Fund in the Dalton Design Contract. See § 489.1425(a), Fla. Stat.

10. As contemplated by the Dalton Design Contract, Dalton Design paid \$7,935.50, or 50 percent of the total contract price, to Mr. Polacek as a deposit. The deposit was paid via check dated June 29, 2004.

11. A small amount of work, consisting of demolition, was commenced on the Dalton Design Contract by Mr. Polacek. The demolition work was the only work performed by Mr. Polacek. The work performed by Mr. Polacek was significantly less than the amount he had been paid by Dalton Design.

12. On or about May 16, 2005, Mr. Polacek abandoned the Dalton Design Contract when he wrote a letter to Ms. Ferrando and Dalton Design. Mr. Polacek stated the following in the letter:

Please acknowledge this written notice that as a result of hurricane Frances we will be unable to provide Dalton designs [sic] or

their related customers with construction services this will be effective immediately and a partial refund of construction moneys will be refunded within one week.

The refund was never made, despite efforts of Ms. Ferrando to contact Mr. Polacek by telephone, in writing, and in person.

13. The Dalton Design Contract provided that "August 20, 2004, is the last day for work, and everything must be completed at that time." Because Mr. Polacek failed to perform work on the project and in light of his termination letter, Ms. Ferrando arranged to have the project completed by another contractor. That contractor performed the same work formerly agreed to by Mr. Polacek.

14. The total costs of completing the Dalton Design Contract work was \$16,877.33 and was paid by Dalton Design.

15. Damages sustained by Dalton Design as a result of Mr. Polacek's abandonment of the Dalton Design Contract include the \$7,935.50 deposit plus the amount of \$1,006.33 paid to complete the project in excess of the original contract price (\$16,877.33 minus \$15,871.00) or a total of \$8,941.83.

16. The Department incurred costs investigating Case No. 2004-056690 of \$616.88.

17. The evidence failed to prove that Mr. Polacek failed to obtain the necessary permits or inspections for the work performed on the Dalton Design Contract.

C. Palm Beach Biltmore Condominium Association; Department Case No. 2005-045647.

18. In August 2004, Richard Brooks, the manager of the Palm Beach Biltmore Condominium Association (hereinafter referred to as the "Biltmore"), entered into a contract with Mr. Polacek, doing business as Endeavor (hereinafter referred to as the "Biltmore Contract").

19. The Biltmore Contract provided, in pertinent part, that Mr. Polacek would provide the following services to Biltmore:

Propose to remove and replace two matching exterior access ladders to elevator service shafts. Remove all existing steel support brackets and prepare new surface for the installation of the new aluminum ladders. . . . Provide and install new 16' custom fabricated alluminum [sic] ladders same locations with no powder coated finish.

20. In exchange for the foregoing services, Biltmore agreed to pay Mr. Polacek \$5,000.00, "50% of the total sum due upon agreement; 50% of total sum due promptly upon completion."

21. Biltmore paid Mr. Polacek \$2,500.00 via check on August 18, 2004.

22. Despite having been paid half the Biltmore Contract price, Mr. Polacek performed none of the services he had agreed to perform. Mr. Brooks made several efforts to communicate with Mr. Polacek by telephone and mail, but was unsuccessful.

23. Mr. Polacek abandoned the Biltmore Contract for well in excess of 90 days.

24. Mr. Polacek failed to refund any amount of the \$2,500.00 down-payment paid to him by Biltmore. Thus Biltmore suffered damages of \$2,500.00.

25. The Department incurred costs investigating Case No. 2005-045647 of \$266.33.

D. A. Carter Pottash; Department Case No. 2005-034560.

26. On August 9, 2004, A. Carter Pottash, M.D., entered into a contract with Dr. Polacek, doing business as Endeavor (hereinafter referred to as the "Pottash Contract").

27. The Pottash Contract provided, in pertinent part, that Mr. Polacek would remodel three condominium apartments owned by Dr. Pottash, converting the three apartments into one living space.

28. In exchange for his services Mr. Polacek agreed to provide under the Pottash Contract, Dr. Pottash agreed to pay Mr. Polacek \$170,821.00, "50% of the total due upon agreement; 35% of total sum due at 50% of completion; 15% of total sum due upon completion."

29. Mr. Polacek failed to include notification of the existence and availability of the Construction Industry Recovery Fund in the Pottash Contract. See § 489.1425(a), Fla. Stat.

30. As contemplated by the Pottash Contract, Dr. Pottash paid Mr. Polacek a total of \$155,322.50, or 90 percent of the total contract price, between August 19, 2004, and October 22, 2004. The payments were made via check and wire transfer.

31. Mr. Polacek commenced work on the Pottash Contract by performing demolition work, installing drywall, and performing some but not all of the finishing work. After November 1, 2004, no work was performed on the Pottash Contract by Mr. Polacek.

32. Between November 1, 2004, and January 5, 2005, having invested a significant amount of money in the project, Dr. Pottash made numerous unsuccessful attempts via telephone, personal visits, and in writing to contact Mr. Polacek.

33. As a result of the work Mr. Polacek did perform, he incurred financial obligations to sub-contractors. Some of the obligations were not paid by Mr. Polacek, resulting in three Claims of Liens being filed against Dr. Pottash's property. The liens, each one for \$2,166.50, were filed by T & F General Contracting, Inc. (hereinafter referred to as "T & F"). T & F had performed some of the finishing work on the project.

34. On or about March 22, 2005, Mr. Polacek abandoned the Pottash Contract when he wrote a letter to Dr. Pottash, in which he stated the following:

Please acknowledge this written notice
that ENDEAVOR DEV. INC. will no longer be
performing any construction related services

to you at the Palm Bch. Biltmore. By law I am bound to cancel all my permits or transfer them to your new contractor. I will inform the Palm Bch. Bldg. Dept. in writing. I am truley [sic] sorry for the problems we have had between us. I want to do whatever is possible to resolve this situation in your favor. Please respond if you are willing.

35. Mr. Polacek did nothing to resolve his failure to perform. Nor did he make any refund of the moneys paid to him under the Pottash Contract, which exceeded the amount paid by Dr. Pottash to Mr. Polacek.

36. Due to Mr. Polacek's failure to perform, Dr. Pottash had to hire other contractors to complete the project. He did so, acting as his own general contractor, completing the project in essentially the same manner contemplated by the Pottash Contract.

37. Dr. Pottash incurred costs to complete the Pottash Contract totaling \$90,280.77. These costs were paid by checks (\$58,716.48) and credit card (\$31,564.29).

38. Dr. Pottash also paid a total of \$3,653.50 to remove one of the three T & F liens.

39. The total cost of completing the Pottash Contract incurred by Dr. Pottash was \$93,934.27.

40. Damages sustained by Dr. Pottash as a result of Mr. Polacek's abandonment of the Pottash Contract total \$78,435.77, calculated as follows:

Total Contract Price:	\$170,821.00
Amount Paid:	<u>155,322.50</u>
Amount To Be Paid:	\$ 15,498.50
Amount Paid To Complete:	\$ 93,934,27
Amount To Be Paid:	<u>15,498.50</u>
Total Financial Harm:	\$ 78,435.77

41. The Department incurred costs investigating Case No. 2005-034560 of \$565.61.

E. Alexander Rentz and Diane Jackson; Department Case No. 2005-036101.

42. On January 13, 2005, Alexander Rentz and Diane Jackson, entered into a contract with Mr. Polacek, doing business as Endeavor (hereinafter referred to as the "Rentz/Jackson Contract").

43. The Rentz/Jackson Contract provided, in pertinent part, that Mr. Polacek would make repairs to their Lake Park, Florida, home caused by hurricane damage.

44. In exchange for Mr. Polacek's services, Mr. Rentz and Ms. Jackson agreed to pay him \$26,346.10, "1/3 upon agreement/ 1/3 at 50%/ 1/3 at complete."

45. On January 14, 2005, an addendum to the Rentz/Jackson Contract was executed by Mr. Polacek whereby he agreed to remove and replace carpeting and padding. In exchange for these services, Mr. Rentz and Ms. Jackson agreed to pay an additional \$1,520.00.

46. Mr. Polacek failed to include notification of the existence and availability of the Construction Industry Recovery Fund in the Rentz/Jackson Contract. See § 489.1425(a), Fla. Stat.

47. Mr. Rentz and Ms. Jackson paid Mr. Polacek a total of \$13,933.05 via three checks issued on January 13, 2005, February 1, 2005, and February 11, 2005.

48. Mr. Polacek commenced work on the Rentz/Jackson Contract by partially taking down a wooden fence on the property. After taking down the fence, no work, not even the removal of the fencing material, was performed on the Rentz/Jackson Contract by Mr. Polacek.

49. On February 22, 2005, after efforts to get Mr. Polacek to return to the job failed, Mr. Polacek wrote a letter to Mr. Rentz and Ms. Jackson in which he abandoned the Rentz/Jackson Contract, stating:

Please acknowledge this written notice. Since we have not heard from you w/ a decision on whether to proceed w/your job we can only assume you want to terminate the contract. Out last conversation on 2-15-05 Ms. Jackson was irate and threatened to sue our Co. if we could not produce roofing shingles. All supply Co's are on a back log and shingles are being allocated. We do not controll [sic] the production of shingles and we warned you of this problem at the start of our engagement. Fax us a letter of termination and the total of all \$ will be returned in 30 days.

Mr. Polacek's explanation concerning the unavailability of shingles, even if it had been supported by evidence at the final hearing, which it was not, fails to explain why none of the other work called for in the Rentz/Jackson Contract was performed.

50. Mr. Rentz and Ms. Jackson did not at anytime terminate their contract. Instead, they made numerous efforts to get Mr. Polacek to carry out the terms of their agreement. Efforts to discuss the matter with Mr. Polacek were ultimately unsuccessful.

51. Due to Mr. Polacek's failure to perform, Mr. Rentz and Ms. Jackson were required to hire another contractor, Built Right Construction, Inc. (hereinafter referred to as "Built Right"), to complete the project. The same services contemplated by the Rentz/Jackson Contract were ultimately performed by Built Right.

52. The contract price for Built Right's services, including contract addendums, totaled \$33,293.95. This amount was paid via checks by Mr. Rentz and Ms. Jackson.

53. Damages sustained by Mr. Rentz and Ms. Jackson as a result of Mr. Polacek's abandonment of the Rentz/Jackson Contract totaled \$19,360.90, calculated as follows:

Total Contract Price:	\$27,866.10
Amount Paid:	<u>13,933.05</u>
Amount To Be Paid:	\$13,933.05
Amount Paid To Complete	\$33,293.95
Amount To Be Paid:	<u>13,933.05</u>
Total Financial Harm:	\$19,360.90

54. The Department incurred costs investigating Case No. 2005-036101 of \$457.00.

55. The evidence failed to prove that Mr. Polacek failed to apply for any permits required by the Rentz/Jackson Contract or that Endeavor was not in compliance with fictitious-name statutes.

F. Nancy Sarro; Department Case No. 2005-035843.

56. On April 17, 2005, Nancy Sarro, entered into a contract with Mr. Polacek, doing business as Endeavor (hereinafter referred to as the "Sarro Contract").

57. The Sarro Contract provided, in pertinent part, that Mr. Polacek would remodel the Sarro residence located in Jupiter, Florida.

58. In exchange for Mr. Polacek's services, the Sarros agreed to pay Mr. Polacek \$23,919.75, "50% of total sum upon agreement; 25% of total sum at 50% complete; 15% of total sum at 75% complete; 10% of total sum at 100% complete."

59. Mr. Polacek failed to include notification of the existence and availability of the Construction Industry Recovery Fund in the Sarro Contract. See § 489.1425(a), Fla. Stat.

60. Ms. Sarro paid Mr. Polacek a total of \$11,039.87, or 46 percent of the total contract price, via check issued April 17, 2005.

61. Mr. Polacek commenced work on the Sarro Contract by demolishing a small wooden deck at the rear of the Sarro residence and removing the front door of the residence, leaving the residence without a front door. After taking performing the foregoing work, no further work was performed on the Sarro Contract by Mr. Polacek.

62. On May 16, 2005, after efforts to get Mr. Polacek to return to the job failed, Mr. Polacek wrote a letter to Ms. Sarro in which he abandoned the Sarro Contract, stating:

Please acknowledge this written notice that Endeavor Dev. Inc. will no longer be providing construction services to you at . . . My attorney will contact you to discuss the matter of our deposit.

Do not attempt to contact Ms. Jessica Jolley or her family members regarding this matter. They are going to press charges against you for harassment.

Endeavor Dev. Ind. Has had no in-tent [sic] to defraud or abandone [sic] your job and Ms. Jolley is not an employee of the Co. nor did she recieve [sic] anymoneys from you

so please leave my girlfriend out of this matter.

I will be contacting you via my attorney.

63. Ms. Sarro made attempts to contact Mr. Polacek, but was unsuccessful. At no time, however, did Ms. Sarro abandon or otherwise attempt to terminate the Sarro Contract.

64. Mr. Polacek subsequently sent a second letter to Ms. Sarro promising that the money paid as a deposit on the Sarro Contract would be refunded. Mr. Polacek did not, however, return any moneys to Ms. Sarro or complete any further work on the Sarro Contract.

65. Damages sustained by Ms. Sarro as a result of Mr. Polacek's abandonment of the Sarro Contract totaled \$11,039.87.

66. The Department incurred costs investigating Case No. 2005-035843 of \$368.76.

G. Incompetency or Mismanagement in the Practice of Contracting.

67. Mr. Polacek caused damages on the five contracts at issue in this case totaling \$120,278.37. He did so without explanation to the individuals for whom he had contracted with.

CONCLUSIONS OF LAW

A. Jurisdiction.

68. 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 (2006).

B. The Burden and Standard of Proof.

69. In the Administrative Complaint, the Construction Industry Licensing Board (hereinafter referred to as the "Board") is seeking the imposition of, among other penalties, the revocation or suspension of Mr. Polacek's certification as a general contractor. Therefore, the Board has the burden of proving the allegations in the Administrative Complaint by clear and convincing evidence. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); and McKinney v. Castor, 667 So. 2d 387 (Fla. 1st DCA 1995).

70. Clear and Convincing evidence has been defined as evidence which:

requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony 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 a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

71. The grounds proven in support of the Board's assertion that Mr. Polacek's certificate should be revoked or suspended are limited to those specifically alleged in the Administrative Complaint. See, e.g., Cottrill v. Department of Insurance, 685 So. 2d 1371 (Fla. 1st DCA 1996); Kinney v. Department of State, 501 So. 2d 129 (Fla. 5th DCA 1987); and Hunter v. Department of Professional Regulation, 458 So. 2d 842 (Fla. 2nd DCA 1984).

C. The Department's Authority to Discipline General Contractors; The Charges Against Mr. Polacek.

72. Section 489.129(1), Florida Statutes, gives the Board the authority to revoke or suspend the license of any general contractor, if he or she commits certain acts specified in the statute.

73. In this case, Mr. Polacek has been alleged to have violated the following acts proscribed by Section 489.129(1), Florida Statutes:

a. One count in the Pottash Contract case of violating Section 489.129(1)(g)1., Florida Statutes;

b. On count each in the Dalton Design Contract case, the Biltmore Contract case, the Pottash Contract case, the

Rentz/Jackson Contract case, and the Sarro Contract case of violating Section 489.129(1)(g)2, Florida Statutes;

c. One count in the Rentz/Jackson Contract case of violating Section 489.129(1)(i), Florida Statutes, by failing to comply with Section 489.119(2)(b), Florida Statutes;

d. One count each in the Dalton Design Contract case, the Rentz/Jackson Contract case, and the Sarro Contract case of violating Section 489.129(1)(i), Florida Statutes, by failing to comply with Section 489.126(2)(a), Florida Statutes;

e. One count each in the Dalton Design Contract case, the Pottash Contract case, the Rentz/Jackson Contract case, and the Sarro Contract case of violating Section 489.129(1)(i), Florida Statutes, by failing to comply with Section 489.1425(1), Florida Statutes;

f. One count each in the Dalton Design Contract case, the Biltmore Contract case, the Pottash Contract case, the Rentz/Jackson Contract case, and the Sarro Contract case of violating Section 489.129(1)(j), Florida Statutes;

g. One count each in the Dalton Design Contract case, the Biltmore Contract case, the Pottash Contract case, the Rentz/Jackson Contract case, and the Sarro Contract case of violating Section 489.129(1)(m), Florida Statutes; and

h. One count in the Dalton Design Contract case of violating Section 489.129(1)(o), Florida Statutes.

D. Section 489.129(1)(g)1., Florida Statutes.

74. Section 489.129(1)(g)1., Florida Statutes, provides that disciplinary action may be taken by the Board if a general contractor is guilty of:

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

(1) Valid liens have been recorded against the property of a contractor's customer for supplies or services ordered by the contractor for the customer's job; the contractor has received funds from the customer to pay for the supplies or services; and the contractor has not had the liens removed from the property, by payment or by bond, within 75 days after the date of such liens; or

. . . .

75. The evidence in this case proved clearly and convincingly that Mr. Polacek violated Section 489.129(1)(g)1., Florida Statutes, with regard to the Pottash Contract. Three valid liens were recorded against Dr. Pottash's property by T & F as a result of Mr. Polacek's failure to pay T & F.

E. Section 489.129(1)(g)2., Florida Statutes.

76. Section 489.129(1)(g)2., Florida Statutes, provides that disciplinary action may be taken by the Board if a general contractor is guilty of:

(g) Committing mismanagement or misconduct in the practice of contracting

that causes financial harm to a customer.
Financial mismanagement or misconduct 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

. . . .

77. The evidence in this case proved clearly and convincingly that Mr. Polacek violated Section 489.129(1)(g)2., Florida Statutes with regard to all five contracts.

78. A total of 46 percent of the Sarro Contract was paid to Mr. Polacek, but virtually no work was performed; 50 percent of the Dalton Design Contract, the Biltmore Contract, and the Rentz/Jackson Contract was paid to Mr. Polacek with no work performed on two of the contracts and little work being performed on the Rentz/Jackson Contract; and 90 percent of the Pottash Contract was paid to Mr. Polacek, well below the percent of work performed by Mr. Polacek.

79. In all five cases, Mr. Polacek failed to return any of the money he received on the five contracts.

F. Section 489.129(1)(i), Florida Statutes.

80. Section 489.129(1)(i), Florida Statutes, provides that disciplinary action may be taken by the Board if a general contractor is guilty of:

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

81. It has been alleged that Mr. Polacek violated this provision by having violated three sections of Chapter 489, Florida Statutes: Section 489.119(2)(b); Section 489.126(2)(a); and 489.1425(1).

82. It has been alleged that Mr. Polacek violated Section 489.129(1)(i), Florida Statutes, by reason of having failed to comply with Section 489.119(2)(b), Florida Statutes, with regard to the Rentz/Jackson Contract. Section 489.119(2)(b), Florida Statutes, provides, in pertinent part:

(2) If the applicant proposes to engage in contracting as a business organization, including any partnership, corporation, business trust, or other legal entity, or in any name other than the applicant's legal name or a fictitious name where the applicant is doing business as a sole proprietorship, the business organization must apply for a certificate of authority through a qualifying agent and under the fictitious name, if any.

. . . .

(b) The applicant must furnish evidence of statutory compliance if a fictitious name

is used, the provisions of s. 865.09(7) notwithstanding.

83. The evidence failed to prove that Mr. Polacek failed to comply with Section 489.119(2)(b), Florida Statutes.

84. It has been alleged that Mr. Polacek violated Section 489.129(1)(i), Florida Statutes, by reason of having failed to comply with Section 489.126(2)(a), Florida Statutes, with regard to the Rentz/Jackson Contract, the Sarro Contract, and the Dalton Design Contact. Section 489.126(2)(a), Florida Statutes, provides, in pertinent part:

(2) A contractor who receives, as initial payment, money totaling more than 10 percent of the contract price for repair, restoration, improvement, or construction to residential real property must:

(a) Apply for permits necessary to do work within 30 days after the date payment is made, except where the work does not require a permit under the applicable codes and ordinances, and

. . . .

85. The Department failed to present competent substantial evidence sufficient to prove the alleged violations of Section 489.126(2)(a), Florida Statutes. As to the Rentz/Jackson Contract, no evidence on this issue was presented, a fact which the Department concedes in its Proposed Recommended Order. As to the Sarro Contract and the Dalton Design Contract, the only testimony presented was testimony from Ms. Sarro and

Ms. Ferrando that they were not aware of any permits being obtained. They were not, however, in a position to testify conclusively that no permits were obtained. Such proof would have to come from Mr. Polacek or the officials in charge of issuing permits. The Department, therefore, failed to prove that Mr. Polacek violated Section 489.129(1)(i), Florida Statutes, by failing to comply with Section 489.126(2)(a), Florida Statutes.

86. Finally, it has been alleged that Mr. Polacek violated Section 489.129(1)(i), Florida Statutes, by reason of having failed to comply with Section 489.1425(1), Florida Statutes, with regard to the Rentz/Jackson Contract, the Sarro Contract, the Dalton Design Contract, and the Pottash Contract.

87. Section 489.1425(1), Florida Statutes, provides, in pertinent part:

(1) Any agreement or contract for repair, restoration, improvement, or construction to residential real property must contain a written statement explaining the consumer's rights under the recovery fund, except where the value of all labor and materials does not exceed \$2,500. The written statement must be substantially in the following form:

FLORIDA HOMEOWNERS' CONSTRUCTION
RECOVERY FUND

PAYMENT MAY BE AVAILABLE FROM THE
FLORIDA HOMEOWNERS' CONSTRUCTION
RECOVERY FUND IF YOU LOSE MONEY ON A
PROJECT PERFORMED UNDER CONTRACT, WHERE
THE LOSS RESULTS FROM SPECIFIED

VIOLATIONS OF FLORIDA LAW BY A LICENSED CONTRACTOR. FOR INFORMATION ABOUT THE RECOVERY FUND AND FILING A CLAIM, CONTACT THE FLORIDA CONSTRUCTION INDUSTRY LICENSING BOARD AT THE FOLLOWING TELEPHONE NUMBER AND ADDRESS:

The statement shall be immediately followed by the board's address and telephone number as established by board rule.

88. The evidence proved clearly and convincingly that Mr. Polacek violated Section 489.129(1)(i), Florida Statutes, with regard to the Rentz/Jackson Contract, the Sarro Contract, the Dalton Design Contract, and the Pottash Contract by failing to comply with Section 489.1425(1), Florida Statutes. All of these contracts involved residential property and none of them contained the statement required by Section 489.1425(1).

G. Section 489.129(1)(j), Florida Statutes.

89. Section 489.129(1)(j), Florida Statutes, provides that disciplinary action may be taken by the Board if a general contractor is guilty of:

(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.

90. The evidence proved clearly and convincingly that Mr. Polacek violated Section 489.129(1)(j), Florida Statutes, when he abandoned the five contracts at issue in this matter.

H. Section 489.129(1)(m), Florida Statutes.

91. Section 489.129(1)(m), Florida Statutes, provides that disciplinary action may be taken by the Board if a general contractor is guilty of:

(m) Committing incompetency or misconduct in the practice of contracting.

92. The evidence proved clearly and convincingly that Mr. Polacek violated Section 489.129(1)(m), Florida Statutes, with regard to all five contracts. Mr. Polacek abandoned all five contracts without explanation, causing damages totaling more than \$120,000.00. His conduct constitutes incompetency or misconduct.

I. Section 489.129(1)(o), Florida Statutes.

93. Section 489.129(1)(o), Florida Statutes, provides that disciplinary action may be taken by the Board if a general contractor is guilty of:

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

94. The allegation that Mr. Polacek violated this provision, limited to the Dalton Design Contract, was not proved clearly and convincingly by the evidence.

J. The Appropriate Penalty.

95. The Department is authorized, upon finding a violation of Section 489.129(1), Florida Statutes, to impose discipline upon a general contractor's license. In particular, the Board is authorized to take any of the following actions:

. . . place on probation or reprimand the licensee, revoke, suspend, or deny the issuance or renewal of the certificate, registration, or certificate of authority, require financial restitution to a consumer for financial harm directly related to a violation of a provision of this part, impose an administrative fine not to exceed \$10,000 per violation, require continuing education, or assess costs associated with investigation and prosecution, if the contractor, financially responsible officer, or business organization for which the contractor is a primary qualifying agent, a financially responsible officer, or a secondary qualifying agent responsible under s. 489.1195

96. Section 455.2273(5), Florida Statutes, requires that the penalty guidelines of the Board must be followed in determining what disciplinary action to take under Section 489.129(1), Florida Statutes. Those guidelines are set out in Florida Administrative Code Chapter 61G4-17.

97. In relevant part, Florida Administrative Code Rule 61G4-17.001 provides the following:

(1) The following guidelines shall be used in disciplinary cases, absent aggravating or mitigating circumstances and subject to other provisions of this chapter.

. . . .

(g) Section 489.129(1)(g), F.S.: Mismanagement or misconduct causing financial harm. First violation, \$750 to \$1,500 fine and/or probation; repeat violation, \$1,500 to \$5,000 fine and/or probation, suspension, or revocation.

. . . .

(i) Section 489.129(1)(i), F.S.: Failing in any material respect to comply with the provisions of Part I of Chapter 489, F.S.

. . . .

Section 489.1425, F.S.: Failure to notify residential property owner of recovery fund. First violation, \$250 to \$500 fine; repeat violation, \$500 to \$1,000 fine and/or probation, suspension, or revocation.

Section 489.119(2), F.S.: Failure to register qualified business organization. First violation, \$250 to \$500 fine; repeat violation \$500 to \$1,000 fine and/or probation, suspension or revocation.

Section 489.126(2)(a), F.S.: Failure to obtain permit within 30 days of receiving ten percent of the contract price. First violation, \$250 to \$1,000 fine; repeat violation, \$1,000 to \$3,000 fine and/or probation.

. . . .

(j) Section 489.129(1)(j), F.S.: Abandonment, first violation, \$500 to \$2,000; repeat violation, revocation, and \$5,000.

. . . .

(m) Misconduct or incompetency in the practice of contracting as set forth in

Section 489.129(1)(n)[sic], shall include, but is not limited to:

. . . .

2. Violation of any provision of Chapter 61G4, F.A.C., or Chapter 489, Part I, F.S.

. . . .

4. The following guidelines shall apply to cases involving misconduct or incompetency in the practice of contracting, absent aggravating or mitigating circumstances:

. . . .

b. Violation of any provision of Chapter 61G4, F.A.C. or Chapter 489, Part I, F.S. First violation, \$500 to \$1,000 fine; repeat violations, \$1,000 to \$5,000 fine and suspension or revocation.

c. Any other form of misconduct or incompetency. First violation, \$250 to \$1,000 fine and probation; repeat violations \$1,000 to \$5,000 fine and suspension or revocation.

. . . .

(o) Section 489.129(1)(o), F.S.: Proceeding on any job without obtaining applicable local building department permits and/or inspections.

. . . .

2. Failure to obtain inspections. Repeat violation, \$500 to \$2,500 fine and suspension or revocation.

3. Job finished without a permit having been pulled, or no permit until caught after job, or late permit during the job resulting in missed inspection or inspections. First

violation, \$500 to \$1,500 fine and/or probation; repeat violation, \$1,000 to \$2,500 fine and suspension or revocation.

98. Florida Administrative Code Rule 61G4-17.001 goes on to provide the following guidelines relevant to this case:

(3) For purposes of these guidelines, violations for which the Respondent has previously been issued a citation pursuant to Section 455.224, F.S., and Rule 61G4-19.001, F.A.C., shall be considered repeat violations.

(4) For any violation occurring after October 1, 1989, the board may assess the costs of investigation and prosecution. The assessment of such costs may be made in addition to the penalties provided by these guidelines without demonstration of aggravating factors set forth in Rule 61G4-17.002, F.A.C.

(5) For any violation occurring after October 1, 1988, the board shall order the contractor to make restitution in the amount of financial loss suffered by the consumer. Such restitution shall be ordered in addition to the penalties provided by these guidelines upon demonstration of aggravating factors set forth in subsection 61G4-17.002(1), F.A.C., and to the extent that such order does not contravene federal bankruptcy law.

99. Florida Administrative Code Rule 61G4-17.002 provides for the consideration of the following relevant aggravating and mitigating circumstances in determining what penalty to impose on a licensee:

Circumstance which may be considered for the purpose of mitigation or aggravation of

penalty shall include, but are not limited to the following:

(1) Monetary or other damage to the licensee's customer, in any way associated with the violation, which damage the licensee has not relieved, as of the time the penalty is to be assessed. . . .

. . . .

(3) The severity of the offense.

(4) The danger to the public.

(5) The number or repetitions of offenses.

(6) The number of complaints filed against the licensee.

(7) the length of time the licensee has practiced.

(8) The actual damage, physical or otherwise, to the licensee's customer.

(9) The deterrent effect of the penalty imposed.

(10) The effect of the penalty upon the licensee's livelihood.

(11) Any efforts at rehabilitation.

(12) Any other mitigating or aggravating circumstances.

100. The Department has proved the violations alleged in 20 of the 25 counts alleged in the Administrative Complaint; one violation of Section 489.129(1)(g)1., Florida Statutes; five violations of Section 489.129(1)(g)2., Florida Statutes; four violations of Section 489.129(1)(i), by failing to comply with

Section 489.1425(1), Florida Statutes; five violations of Section 489.129(1)(j), Florida Statutes; and five violations of Section 489.129(1)(m), Florida Statutes. The Department has suggested the following penalties for these violations:

a. For the six violations of Section 489.129(1)(g), Florida Statutes (Counts V, X, XVI, XIX, XXIII, and XXIV) the minimum administrative fine of \$1,500.00 for each violation or a total of \$9,000.00;

b. For the four violations of Section 489.129(1)(i), Florida Statutes, by failing to comply with Section 489.1425(1), Florida Statutes (Counts I, VII, XII, and XXI) the minimum administrative fine of \$500.00 for each violation or a total of \$2,000.00;

c. For the five violations of Section 489.129(j), Florida Statutes (Counts IV, IX, XV, and XVIII) the minimum administrative fine of \$2,000.00 for each violation or a total of \$10,000.00;

d. For the five violations of Section 489.129(m), Florida Statutes (Counts VI, XI, XVII, XX, and XXV) the minimum administrative fine of \$1,000.00 for each violation or a total of \$5,000.00; and

e. For all the violations, the permanent revocation of Mr. Polacek's contracting license.

101. The Department's recommended penalties are within the guidelines for the violations Mr. Polacek committed and are, therefore, adopted.

102. The Department has also suggested that Mr. Polacek be required to pay restitution on all five contracts equal to the damages sustained under the contracts and pay the costs of the investigation and prosecution of the five contracts. These recommendations are also adopted.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered by the Department:

1. Finding that Frank Joseph Polacek, V, committed the violations alleged in Counts I, IV through VII, IX through XII, and XV through XXV of the Administrative Complaint;

2. Dismissing Counts II, III, VIII, XIII, and XIV of the Administrative Complaint; and

3. Imposing an administrative fine in the total amount of \$26,000.00; requiring that Mr. Polacek pay restitution on the five contracts equal to the amount of damages found in this Recommended Order; requiring that Mr. Polacek pay \$2,275.58 as the costs of the investigation and prosecution of this matter; and that his license be permanently revoked.

DONE AND ENTERED this 20th day of September, 2006, in
Tallahassee, Leon County, Florida.



LARRY J. SARTIN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of September, 2006.

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.