STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, CONSTRUCTION INDUSTRY LICENSING BOARD,	)	
Petitioner,	)	
vs.	)	Case No. 07-0052PL
RALPH BATTAGLIA,	)	
Respondent.	)	

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case pursuant to Sections 120.569 and 120.57(1), Florida Statutes,[1] before Stuart M. Lerner, a duly-designated administrative law judge of the Division of Administrative Hearings (DOAH), on March 7, 2007, by video teleconference at sites in West Palm Beach and Tallahassee, Florida.

APPEARANCES

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

For Respondent: Ralph N. Battaglia, pro se
9284 Vista Del Lago Drive, Apt. 34-A
Boca Raton, Florida 33428

STATEMENT OF THE ISSUE

Whether Respondent committed the violations alleged in the Amended Administrative Complaint issued against him and, if so, what disciplinary action should be taken.

PRELIMINARY STATEMENT

Petitioner has issued a four-count Amended Administrative Complaint against Respondent alleging that, in his capacity as the primary qualifying agent for Intercontinental Construction Corporation (ICC), he engaged in disciplinable wrongdoing in connection with a residential construction project undertaken by ICC pursuant to a contract with Michael Skiera and his wife. Count I alleges Respondent "violated Section 489.129(1)(i), Florida Statutes, . . . by having violated [S]ection 489.1425(1), Florida Statutes" (requiring that residential construction contracts in excess of $2,500.00 "contain a written statement explaining the consumer's rights under [what was then known as] the [Construction Industries] [R]ecovery [F]und"). Count II alleges that Respondent committed "mismanagement or misconduct in the practice of contracting that cause[d] financial harm to a customer" in violation of Section 489.129(1)(g)1., Florida Statutes. Count III alleges that Respondent committed "mismanagement or misconduct in the practice of contracting that cause[d] financial harm to a customer" in violation of Section 489.129(1)(g)3., Florida

Statutes. Count IV alleges that "Respondent violated Section 489.129(1)(m), Florida Statutes, by committing incompetency or mismanagement in the practice of contracting."

By filing with Petitioner a completed "Election of Rights" form (with an attachment), Respondent requested a "hearing involving disputed issues of material fact before an administrative law judge with the Division of Administrative Hearings, pursuant to Section 120.57(1), Florida Statutes." On January 4, 2007, the matter was referred to DOAH.

As noted above, the final hearing in this case was held on March 7, 2007. At the outset of the hearing, on the record, the parties stipulated to the following facts:

> 1. Respondent is now, and was at all material times, licensed as a certified general contractor with Petitioner, possessing license number 041817.
>
> 2. Respondent is now, and was at all material times, the licensed qualifier for Intercontinental Construction Corporation.
>
> 3. The Department's investigative costs for this case are $428.95.
>
> 4. Respondent's license is currently suspended and he has been disciplined previously in other cases.
>
> 5. Chris Stasinos was at all material times a corporate officer (vice-president) of Intercontinental Construction Corporation.
>
> 6. The original contract price for the home that Intercontinental Construction

Corporation agreed to build for the Skieras was $366,080.00.

7. There were subsequent change orders that increased the contract price for the construction of the home by $12,206.20 to $378,286.20.

8. The Skieras paid Intercontinental Construction Corporation a total of $304,766.20 for work on the home.

9. There were eight valid claims of lien filed against the property by subcontractors for work that was within the scope of the contract (including change orders).

10. The Skieras paid a total of $57,316.62 to satisfy those liens.

11. Intercontinental Construction Corporation filed for bankruptcy on July 24, 2001.

12. The Skieras were listed as creditors in the bankruptcy filing, as were the following subcontractors who performed work on the home Intercontinental Construction Corporation contracted to build for the Skieras: American Stairs; L & W Supply Corp. d/b/a Seacoast Supply; Astro Air; B.T. Glass & Mirror, Inc.; Boca Raton Decorating Center Company; Gulf Stream Lumber Company; and Waste Management of Palm Beach.

13. The Certificate of Occupancy for the home that Intercontinental Construction Corporation contracted to build for the Skieras was issued on October 4, 2001.

14. On September 20, 2001, the Skieras received a check in the amount of $10,000.00 from Andover Construction, Inc. Chris Stasinos was, at that time, the licensed qualifier for Andover Construction, Inc.

Two witnesses, Michael Skiera and Respondent, testified at the hearing. In addition to Mr. Skiera's and Respondent's testimony, 15 exhibits, Petitioner's Exhibits A through O, were offered and received into evidence.

The deadline for the filing of proposed recommended orders was set at 30 days from the date of the filing with DOAH of the hearing transcript.

The hearing Transcript (consisting of one volume) was filed with DOAH on March 23, 2007.

Petitioner filed its Proposed Recommended Order on April 23, 2007. To date, Respondent has not filed any post-hearing submittal.

FINDINGS OF FACT

Based on the evidence adduced at hearing, and the record as a whole, the following findings of fact are made to supplement and clarify the facts to which the parties stipulated at the outset of the final hearing (Parties' Stipulations)[2]:

1. The contract referenced in the Parties' Stipulations (Building Contract) was signed by Mr. Stasinos (on behalf of ICC) and Mr. Skiera (on behalf of himself and his wife) on June 29, 2000.

2. The home that ICC agreed to build for the Skieras (Skiera Residence) was described in the Building Contract as a "[c]ustom two-story residence with detached garage and riding

cor[r]al for a total of 5,370 square feet." It was to be constructed on a tract of land owned by the Skieras in Boynton, Beach, Florida.

3. The Building Contract provided for the following allowances: $20,000.00 for "electrical"; $17,000.00 for "plumbing"; $15,000 for "HVAC"; a "door hardware allowance" of "$50.00 per [interior] door"; $6,000.00 for a "stacked stone veneer" exterior; an "entry door hardware allowance" of "$100.00 per door"; $15,000.00 for "kitchen cabinetry and vanity"; $8,000.00 for "counter tops and vanity tops"; $9,000.00 for "landscaping," including "trees, shrubs, sod, automatic time clock, [and an] operated irrigation system with rain sensor"; and $7,000 for "driveways, walkways, [and] flatwork."

4. There was no written statement in the Building Contract explaining a consumer's rights under the Construction Industries Recovery Fund, as then required by Section 489.1425, Florida Statutes.

5. The Building Contract contained a "[p]ayment [d]raw [s]chedule," which provided as follows:

> Upon execution of contract: 10%- $36,608.00
>
> Thereafter, progress payments based on schedule of values.

6. This "schedule of values" (referred to in the "[p]ayment [d]raw [s]chedule") contained the following "scheduled values" (excluding change orders):

1.	Permits	$21,600.00
2.	Clearing/Grading/Fill	$10,800.00
3.	Foot'gs. Undgr Plumb, Soil Treatmt	$23,000.00
4.	Foundation/Slab poured	$32,760.00
5.	Exterior Walls/Tie Beam	$26,600.00
6.	Roof Trusses	$26,600.00
7.	Roof Sheathing/Felt	$19,400.00
8.	Interior Framing Complete	$14,000.00
9.	Windows/Exterior Door Frames Set	$14,400.00
10.	2nd Plumbing/Tub Set	$7,200.00
11.	Wiring Rough-In	$14,400.00
12.	HVAC Ducts Installed	$7,200.00
13.	Roof Shingles/Tiles Installed	$14,400.00
14.	Insulation (wall & ceiling)	$4,200.00
15.	Exterior Trim/Soffits	$11,800.00
16.	Drywall Hung	$14,400.00
17.	Drywall Finish	$10,800.00
18.	Interior Trim/Interior Doors Installed	$13,400.00
19.	Interior Paint	$8,800.00
20.	Siding/Stucco	$14,400.00
21.	Exterior Paint Complete	$8,800.00
22.	Exterior Doors & Garage Door Install	$6,200.00
23.	Cabinets/Countertops Installed	$10,000.00
24.	Plumbing Finish	$3,600.00
25.	Electrical Finish	$5,600.00
26.	HVAC-Compressor/A.H. Installed	$10,920.00
27.	Driveway/Walks Installed	$3,600.00
28.	Landscaping/Irrigation	$7,200.00

7. There were six separate change orders. They were dated August 20, 2000 (Change Order No. 001), August 29, 2000 (Change Order No. 002), September 26, 2000 (Change Order No. 003),

October 15, 2000 (Change Order No. 004), October 15, 2000 (Change Order No. 005), and November 10, 2000 (Change Order No. 006).

8. As of December 21, 2000, ICC had been paid in full for all six change orders, as well as for items 1 through 8 on the "schedule of values."

9. As of February 27, 2001, ICC had received additional monies from the Skieras: payment in full for items 9 through 12 and 15 on the "schedule of values" and partial (50 percent) payment for items 13 and 20 on the "schedule of values."

10. As of April 10, 2001, ICC had been paid a total of $287,966.20 (all from the proceeds of a mortgage loan the Skieras had obtained from Admiralty Bank) for work done on the Skiera Residence.

11. On May 1, 2001, the Skieras paid ICC an additional $16,800.00 for drywall work, bringing the total amount of payments that ICC had received from (or on behalf of) the Skieras, as of that date, to $304,766.20. The Skieras made no further payments to ICC.

12. The "eight valid claims of lien" referenced in the Parties' Stipulations were filed by eight different subcontractors, all of whom had been hired by ICC to work on the Skiera Residence: Boca Concrete Pumping, Inc.; Gulf Stream Lumber Company; L & W Supply Corp., d/b/a Seacoast Supply; Waste

Management of Palm Beach; B.T. Glass & Mirror, Inc.; Boca Raton Decorating Center Company; American Stairs; and Broten Garage Door Sales Inc.[3]

13. Boca Concrete Pumping was the "very first" subcontractor to work on the construction of the Skiera Residence. It did the "slab work, the foundation" (referenced in item 4 of "schedule of values"). Its lien was recorded on December 6, 2000. The lien was in the amount of $1,001.25, and it indicated, on its face, that it was for unpaid "concrete pumping" that had been furnished between September 8, 2000, and September 22, 2000. A satisfaction of this lien, dated March 8, 2001, was filed March 24, 2001.

14. Gulf Stream Lumber's original lien was recorded February 15, 2001. It was in the amount of $67,872.59, and it indicated, on its face, that it was for unpaid "building material" that had been furnished between August 15, 2000, and January 24, 2001. An amended claim of lien was recorded May 3, 2001, in the amount of $36,530.59 for unpaid "building material" that, according to the lien, had been furnished between August 25, 2000, and March 27, 2001. A satisfaction of the original lien and amended claim of lien, dated November 30, 2001, was filed December 5, 2001. The liens were satisfied, pursuant to the terms of a Settlement Stipulation, upon the Skieras' payment of $39,579.28 to Gulf Stream Lumber.

15. L & W Supply's lien was recorded April 30, 2001. It was in the amount of $4,536.98, and it indicated, on its face, that it was for unpaid "building materials [and] related items" that had been furnished between December 16, 2000, and January 30, 2001. A satisfaction of this lien, dated October 11, 2001, was filed November 7, 2001. The lien was satisfied by the payment of $10.00 "and other good and valuable consideration" (which was the payment of an additional $2,850.00 by check dated October 11, 2001).

16. Waste Management of Palm Beach's lien was recorded May 31, 2001. It was in the amount of $1,665.89, and it indicated, on its face, that it was for unpaid "[w]aste [r]emoval [s]ervices" that had been furnished between August 30, 2000, and April 5, 2001. A satisfaction of this lien, dated October 19, 2001, was filed November 13, 2001.

17. B.T. Glass & Mirror's lien was recorded June 29, 2001. It was in the amount of $3,560.00, and it indicated, on its face, that it was for an unpaid "glass/mirror package" that had been furnished between May 3, 2001, and May 31, 2001. A satisfaction of this lien, dated October 19, 2001, was filed November 13, 2001. The lien was satisfied by the payment of $1,600.00 (by check dated November 10, 2001), plus an agreement to provide "$2,000.00 in gazebo or arbor products from the Hitching Post," the Skieras' family business.

18. Boca Raton Decorating Center's lien was recorded May 19, 2001. It was in the amount of $1,218.79, and it indicated, on its face, that it was for unpaid "paint, sealers [and] sundries" that had been furnished between May 1, 2001, to May 2, 2001. A satisfaction of this lien, dated October 11, 2001, was filed November 7, 2001.

19. American Stairs' lien was recorded August 16, 2001. It was in the amount of $4,188.00, and it indicated, on its face, that it was for unpaid "[s]tairs and [r]ailings" that had been furnished between June 8, 2001, and June 15, 2001. A satisfaction of this lien was executed on October 15, 2001.

20. Broten Garage Door Sales' lien was recorded September 5, 2001. It was in the amount of $3,214.00, and it indicated, on its face, that it was for the unpaid "sale and installation of garage doors and openers," which took place between June 25, 2001, and July 17, 2001. A satisfaction of this lien, dated January 31, 2002, was filed on February 5, 2002.

21. At a meeting "in the early part of August [2001]" attended by Respondent, Mr. Stasinos, the Skieras, and the president of the bank from which the Skieras had borrowed the money to pay for the construction of their residence, Respondent announced that, on behalf of ICC, "he was filing [for] bankruptcy."[4]

22. ICC stopped working on the Skiera Residence after this meeting. At the time, the Skiera Residence was approximately 70 to 80 percent completed (and the Skieras had paid ICC a total of $304,766.20, or approximately 80 percent of the total contract price (including change orders) of $378,286.20[5]).

23. In addition to paying $57,316.62 to satisfy the "eight valid claims of lien" referenced in the Parties' Stipulations, the Skieras paid approximately an additional $57,000.00 to other subcontractors who provided goods and/or services "needed to complete the house."

24. The $10,000.00 check referred to in the Parties' Stipulation 14 (that the Skieras received from Andover Construction, Inc.) did not "represent any kind of final settlement" between the Skieras and ICC.

25. The October 4, 2001, Certificate of Occupancy for the Skiera Residence referred to in the Parties' Stipulations indicated, on its face, that ICC was the contractor, notwithstanding that ICC had abandoned the project "in the early part of August [2001]."

26. Respondent has been a Florida-licensed general contractor since July 29, 1987.

27. In his capacity as ICC's licensed qualifier, he has previously (by Final Order filed in DBPR Case Nos. 2001-03283 and 2001-03284 on December 23, 2003) been found guilty of, and

disciplined for, violating (in connection with two residential construction projects undertaken by ICC for A. Richard Nernberg) the same subsections of Section 489.129(1), Florida Statutes (Subsections (1)(g), (i), and (m)) that he is accused of violating in the instant case. In these prior disciplinary proceedings, Respondent's license was suspended for two years, and he was fined $6,000.00 and required to pay $958.30 in investigative costs.

28. Administrative complaints were also filed against Respondent in DBPR Case Nos. 94-15958 and 97-17352. Both of these cases were resolved by settlement stipulations in which Respondent "neither admit[ted] [nor] denie[d] the allegations of fact contained in the [a]dministrative [c]omplaint[s]."

CONCLUSIONS OF LAW

29. DOAH has jurisdiction over the subject matter of the instant proceeding and of the parties hereto pursuant to Chapter 120, Florida Statutes.

30. No "person"[6] may engage in the business of contracting in Florida without holding a valid license to do so. § 489.115(1), Fla. Stat.

31. A business organization, like ICC, may obtain such a license, but only through a licensed "qualifying agent." § 489.119, Fla. Stat.; see also Murthy v. N. Sinha Corp., 644 So. 2d 983, 984 n.1 (Fla. 1994)("Chapter 489 requires a

corporation or other business entity seeking to become a contractor to procure an individual licensed contractor as its qualifying agent."); and Shimkus v. Department of Business and Professional Regulation, Construction Industry Licensing Board, 932 So. 2d 223, 223-224 (Fla. 4th DCA 2005)("The statute [Section 489.119, Florida Statutes] requires corporations engaged in construction to have licensed individuals serving as their qualifying agents.").

32. There are two types of "qualifying agents": "primary qualifying agents," and "secondary qualifying agents." § 489.1195(1), Fla. Stat. At all times material to the instant case, Respondent was the "primary qualifying agent" for ICC.

33. "All primary qualifying agents for a business organization are jointly and equally responsible for supervision of all operations of the business organization; for all field work at all sites; and for financial matters, both for the organization in general and for each specific job." § 489.1195(1)(a), Fla. Stat.; see also § 489.105(4), Fla. Stat. ("'Primary qualifying agent' means a person who . . . has the responsibility, to supervise, direct, manage, and control the contracting activities of the business organization with which he or she is connected; who has the responsibility to supervise, direct, manage, and control construction activities on a job for which he or she has obtained the building permit; . . . .").

"To allow a contractor to be the 'qualifying agent' for a company without placing any requirement on the contractor to exercise any supervision over the company's work done under his license would permit a contractor to loan or rent his license to the company. This would completely circumvent the legislative intent that an individual, certified as competent, be professionally responsible for supervising construction work on jobs requiring a licensed contractor." Alles v. Department of Professional Regulation, 423 So. 2d 624, 626 (Fla. 5th DCA 1982).

34. The Construction Industry Licensing Board (Board) may take disciplinary action against a licensed contractor serving as the "primary qualifying agent" for a business organization for violations of Section 489.129(1), Florida Statutes, committed by either "the contractor . . . or business organization for which the contractor is a primary qualifying agent." The contractor "may not avoid responsibility [for any such violation] by stating that he had nothing to do with the project" in connection with which the violation was committed. Hunt v. Department of Professional Regulation, Construction Industry Licensing Board, 444 So. 2d 997, 999 (Fla. 1st DCA 1983); see also Camejo v. Department of Business and Professional Regulation, 812 So. 2d 583, 584 (Fla. 3d DCA 2002)("Camejo's defense in the disciplinary proceeding, and his

argument on appeal, is that he cannot be held accountable pursuant to section 489.129, Florida Statutes (1999) for work not performed, or poorly performed, pursuant to building permits he never signed. We disagree. . . . Section 489.129 does not carve out an exception for qualifying agents who fail to maintain control over the use of their certificates. For this court to do so by judicial fiat would weaken the authority of the Construction Industry Licensing Board to govern the industry and protect the public.").

35. At all times material to the instant case, the disciplinary action the Board was statutorily authorized to take against a licensed contractor for a violation of Section 489.129(1), Florida Statutes, was limited to the following: revoking or suspending the contractor's license; placing the contractor on probation; reprimanding the contractor; denying the renewal of the contractor's license; imposing an administrative fine not to exceed $5,000.00 per violation[7]; requiring financial restitution to the victimized consumer(s); requiring the contractor to take continuing education courses; and assessing costs associated with the investigation and prosecution. See Department of Environmental Regulation v. Puckett Oil Co., 577 So. 2d 988, 992 (Fla. 1st DCA 1991)("[A]n agency possesses no inherent power to impose sanctions,

and . . . any such power must be expressly delegated by statute.").

36. The Board may take such disciplinary action only after the licensee has been given reasonable written notice of the charges and an adequate opportunity to request a proceeding pursuant to Sections 120.569 and 120.57, Florida Statutes.

37. An evidentiary hearing must be held if requested by the licensee when there are disputed issues of material fact. §§ 120.569(1) and 120.57(1), Fla. Stat.

38. At the hearing, the Department of Business and Professional Regulation (Department) bears the burden of proving that the licensee engaged in the conduct, and thereby committed the violations, alleged in the charging instrument. Proof greater than a mere preponderance of the evidence must be presented by the Department to meet its burden of proof. Clear and convincing evidence of the licensee's guilt is required. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932, 935 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292, 294 (Fla. 1987); and § 120.57(1)(j), Fla. Stat. ("Findings of fact shall be based upon a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute . . . .").

39. Clear and convincing evidence is an "intermediate standard," "requir[ing] more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" In re Graziano, 696 So. 2d 744, 753 (Fla. 1997). For proof to be considered "'clear and convincing' . . . 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." In re Davey, 645 So. 2d 398, 404 (Fla. 1994), quoting, with approval, from Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983). "Although this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous." Westinghouse Electric Corporation, Inc. v. Shuler Bros., Inc., 590 So. 2d 986, 989 (Fla. 1st DCA 1991).

40. In determining whether the Department has met its burden of proof, it is necessary to evaluate its evidentiary presentation in light of the specific allegations of wrongdoing made in the charging instrument. Due process prohibits an agency from taking penal action against a licensee based on matters not specifically alleged in the charging instrument,

unless those matters have been tried by consent. See Shore Village Property Owners' Association, Inc. v. Department of Environmental Protection, 824 So. 2d 208, 210 (Fla. 4th DCA 2002); Lusskin v. Agency for Health Care Administration, 731 So. 2d 67, 69 (Fla. 4th DCA 1999); Cottrill v. Department of Insurance, 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996); and Delk v. Department of Professional Regulation, 595 So. 2d 966, 967 (Fla. 5th DCA 1992).

41. The charging instrument in the instant case, the Amended Administrative Complaint, contains four counts: Count I, alleging a violation of Section 489.129(1)(i), Florida Statutes, "by having violated [S]ection 489.1425(1), Florida Statutes"; Count II, alleging a violation of Section 489.129(1)(g)1., Florida Statutes; Count III, alleging a violation of Section 489.129(1)(g)3., Florida Statutes; and Count IV, alleging a violation of Section 489.129(1)(m), Florida Statutes.

42. At all times material to the instant case, Section 489.129(1)(g), (i), and (m), Florida Statutes, provided that the following were disciplinable acts:

> (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;

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[8]; or

3. The contractor's job has been completed, and it is shown that the customer has had to pay more for the contracted job than the original contract price, as adjusted for subsequent change orders, unless such increase in cost was the result of circumstances beyond the control of the contractor, was the result of circumstances caused by the customer, or was otherwise permitted by the terms of the contract between the contractor and the customer.[9]

* * *

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

* * *

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

43. At all times material to the instant case, the "[f]ail[ure] in any material respect to comply with the

[following] provisions" of Section 489.1425(1), Florida Statutes, constituted wrongdoing of the type described in Section 489.129(1)(i), Florida Statutes:

> 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 Construction Industries Recovery Fund[10], except where the value of all labor and materials does not exceed $2,500. The written statement must be substantially in the following form:
>
> CONSTRUCTION INDUSTRIES RECOVERY FUND
>
> PAYMENT MAY BE AVAILABLE FROM THE CONSTRUCTION INDUSTRIES RECOVERY FUND IF YOU LOSE MONEY ON A PROJECT PERFORMED UNDER CONTRACT, WHERE THE LOSS RESULTS FROM SPECIFIED VIOLATIONS OF FLORIDA LAW BY A STATE-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.

Subsection (2) of Section 489.1425 provided that such wrongdoing was punishable as follows:

> (2)(a) Upon finding a first violation of subsection (1), the board may fine the contractor up to $500, and the moneys must be deposited into the Construction Industries Recovery Fund.
>
> (b) Upon finding a second or subsequent violation of subsection (1), the board shall fine the contractor $1,000 per violation,[11]

> and the moneys must be deposited into the Construction Industries Recovery Fund.[12]

44. At all times material to the instant case, Florida Administrative Code Rule 61G4-17.001(1)(m)2. provided that "[m]isconduct or incompetency in the practice of contracting, shall include, but is not limited to: Violation of any provision of . . . Chapter 489, Part I., F.S."

45. Because of their penal nature, the foregoing statutory and rule provisions must be strictly construed, with any reasonable doubts as to their meaning being resolved in favor of the licensee. See Jonas v. Florida Department of Business and Professional Regulation, 746 So. 2d 1261, 1262 (Fla. 3d DCA 2000)("[S]tatutes such as those at issue authorizing the imposition of discipline upon licensed contractors are in the nature of penal statutes, which should be strictly construed."); and Capital National Financial Corporation v. Department of Insurance, 690 So. 2d 1335, 1337 (Fla. 3d DCA 1997)("Section 627.8405 is a penal statute and therefore must be strictly construed: . . . . 'When a statute imposes a penalty, any doubt as to its meaning must be resolved in favor of a strict construction so that those covered by the statute have clear notice of what conduct the statute proscribes.'").

46. The Department proved by clear and convincing evidence that, as alleged in Count I of the Amended Administrative

Complaint, ICC committed a violation of Section 489.1425(1), Florida Statutes, for which Respondent, as ICC's "primary qualifying agent," was responsible, by failing to include in the Building Contract the "written statement" required by this statutory provision. This being "a second or subsequent violation of [S]ubsection (1)," the Board has no discretion, in light of the mandatory language in Subsection (2) of the statute, but to fine Respondent $1,000.00 for this violation. See J. I. S. v. State, 930 So. 2d 587, 591 (Fla. 2006)("Relying on the mandatory language of this provision, this Court has held that 'a sentence that does not mandate credit for time served would be illegal since a trial court has no discretion to impose a sentence without crediting a defendant with time served.'").

47. The Department proved by clear and convincing evidence that, as alleged in Count II of the Amended Administrative Complaint, ICC engaged in "[f]inancial mismanagement or misconduct" in violation of Section 489.129(1)(g)1., Florida Statutes, for which Respondent, as ICC's "primary qualifying agent," was responsible, by failing to have Boca Concrete Pumping's December 6, 2000, $1,001.25 lien timely removed. The record (including the Parties' Stipulations, Mr. Skiera's testimony at pages 47 and 48 of the hearing Transcript, and Petitioner's Exhibits H, J, and K) clearly and convincingly establishes that this was a "valid lien" recorded against the

Skieras' property for ICC-ordered "foundation" and "slab work" that was within the scope of the Building Contract and that ICC failed to have the lien removed within 75 days despite having had received money from the Skieras to pay for this work. The Department, however, failed to clearly and convincingly prove that there was any "[f]inancial mismanagement or misconduct" of the type described in Section 489.129(1)(g)1. in connection with any other lien recorded against the Skieras' property. While there were, as the parties have stipulated, seven other "valid claims of lien filed against the [Skieras'] property by subcontractors for work that was within the scope of the contract" (Seven Other Liens), it is unclear from the Department's proof whether ICC had received funds from the Skieras to pay for any of this work. Clarity and lack of ambiguity in the evidence on this point are required for a finding to be made that there was a violation of Section 489.129(1)(g)1. based on ICC's failure to have these Seven Other Liens removed within the statutorily-prescribed time frame.[13] Moreover, two of these Seven Other Liens (L & W Supply's and American Stairs' liens) were removed "within 75 days after the date of such liens" (albeit not as the result of any action taken by ICC).[14]

48. The Department also failed to clearly and convincing prove Respondent's guilt of the violation of Section

489.129(1)(g)3., Florida Statutes, alleged in Count III of the Amended Administrative Complaint, inasmuch as the record affirmatively establishes that ICC abandoned the Skiera Residence project before the project had been completed. Under a strict construction of Section 489.129(1)(g)3. (which is required due to the statute's penal nature), "[f]inancial mismanagement or misconduct" of the type described therein can occur only if the contractor has completed its job, which did not happen in the instant case.[15]

49. Through the same proof that clearly and convincingly established the violations of Sections 489.129(1)(i) and 489.1425(1), Florida Statutes, alleged in Count I of the Amended Administrative Complaint, and the violation of Section 489.129(1)(g)1., Florida Statutes, relating to Boca Concrete Pumping's December 6, 2000, $1,001.25 lien, alleged in Count II of the Amended Administrative Complaint, the Department also clearly and convincingly established the derivative violation of Section 489.129(1)(m), Florida Statutes, alleged in Count IV of the Amended Administrative Complaint. This violation of Section 489.129(1)(m), Florida Statutes, however, is "subsumed in the violation[s] of Section 489.129(1)(g)[1.] and (i), Florida Statutes," and cannot be separately punished. Department of Business and Professional Regulation, Construction Industry Licensing Board, v. Battaglia, No. 03-1224PL, slip op. at 13-14

(Fla. DOAH August 11, 2003)(Recommended Order), adopted in toto, (DBPR, CILB, December 23, 2003); cf. State v. Weller, 590 So. 2d 923, 926 (Fla. 1991)("If two statutory offenses are not 'separate' under the Blockburger test, then the 'lesser' offense is deemed to be subsumed within the greater. This is simple logic. When the commission of one offense always results in the commission of another, then the latter is an inherent component of the former.")

50. The lone issue remaining for consideration is what disciplinary action should be taken against Respondent for his violation of Section 489.129(1)(g)1., Florida Statutes, relating to Boca Concrete Pumping's December 6, 2000, $1,001.25 lien. To answer this question it is necessary to consult the Board's "disciplinary guidelines" set forth Florida Administrative Code Chapter 61G4-17, which impose restrictions and limitations on the exercise of its disciplinary authority. See Parrot Heads, Inc. v. Department of Business and Professional Regulation, 741 So. 2d 1231, 1233 (Fla. 5th DCA 1999)("An administrative agency is bound by its own rules . . . creat[ing] guidelines for disciplinary penalties."); and § 455.2273(5), Fla. Stat. ("The administrative law judge, in recommending penalties in any recommended order, must follow the penalty guidelines established by the board or department and must state in writing the mitigating or aggravating circumstances upon which the

recommended penalty is based."); cf. State v. Jenkins, 469 So. 2d 733, 734 (Fla. 1985)("[A]gency rules and regulations, duly promulgated under the authority of law, have the effect of law."); Buffa v. Singletary, 652 So. 2d 885, 886 (Fla. 1st DCA 1995)("An agency must comply with its own rules."); Decarion v. Martinez, 537 So. 2d 1083, 1084 (Fla. 1st 1989)("Until amended or abrogated, an agency must honor its rules."); and Williams v. Department of Transportation, 531 So. 2d 994, 996 (Fla. 1st DCA 1988)(agency is required to comply with its disciplinary guidelines in taking disciplinary action against its employees).

51. In Florida Administrative Code Rule 61G4-17.001, the Board has announced the "[n]ormal [p]enalty [r]anges" within which its disciplinary action against contractors will fall, absent aggravating or mitigating circumstances, for specified violations. When Respondent committed the violation of Section 489.129(1)(g)1., Florida Statutes, found in the instant case, Florida Administrative Code Rule 61G4-17.001 provided, in pertinent part, that for a "repeat violation" of Section 489.129(1)(g), a violator could expect, absent aggravating or mitigating circumstances, to receive a penalty of a "$1500 to $5000 fine and/or probation, suspension or revocation." The rule has since been amended, and it now provides that the "[n]ormal [p]enalty [r]ange" for such a "repeat violation" extends from a "minimum" of a "$2,500 fine and/or probation, or

suspension" to a "maximum" of a "$10,000 fine and/or probation, or suspension." In determining what discipline to impose in the instant case, the Board is bound by the current version of the rule (which makes no distinction between violations based on when they were committed), except to the extent that application of the rule would violate ex post facto principles.[16] See Parrot Heads, 741 So. 2d at 1233; Arias v. Department of Business and Professional Regulation, Division of Real Estate, 710 So. 2d 655, 661 (Fla. 3d DCA 1998)("[B]ecause any future creation and application of penalty guidelines and application of those guidelines to this litigant would constitute an ex post facto application of law, remand for further agency action is not a viable option."); and § 455.2273(5), Fla. Stat.

52. Florida Administrative Code Rule 61G4-17.001 further gives notice, as it has at all times material to the instant case, of the Board's additional authority to "assess the costs of investigation and prosecution" and "order the contractor to make restitution in the amount of financial loss suffered by the consumer."

53. Florida Administrative Code Rule 61G4-17.002 lists "[a]ggravating and [m]itigating circumstances" to be considered in determining whether a departure from the "[n]ormal [p]enalty [r]ange" is warranted in a particular case. Since prior to Respondent's commission of the violation of Section

489.129(1)(g)1., Florida Statutes, found in the instant case, these "[a]ggravating and [m]itigating circumstances" have included 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. (This provision shall not be given effect to the extent it would contravene federal bankruptcy law.)
>
> (2) Actual job-site violations of building codes, or conditions exhibiting gross negligence, incompetence, or misconduct by the licensee, which have not been corrected as of the time the penalty is being assessed.
>
> (3) The danger to the public.
>
> (4) The number of complaints filed against the licensee.
>
> (5) The length of time the licensee has practiced.
>
> (6) The actual damage, physical or otherwise, to the licensee's customer.
>
> (7) The deterrent effect of the penalty imposed.
>
> (8) The effect of the penalty upon the licensee's livelihood.
>
> (9) Any efforts at rehabilitation.
>
> (10) Any other mitigating or aggravating circumstances.

54. Florida Administrative Code Rule 61G4-17.003 describes what constitutes a "repeat violation," as that term is used in

Florida Administrative Code Rule 61G4-17.001. Since prior to Respondent's commission of the violation of Section 489.129(1)(g)1., Florida Statutes, found in the instant case, Florida Administrative Code Rule 61G4-17.003 has provided as follows:

> (1) As used in this rule, a repeat violation is any violation on which disciplinary action is being taken where the same licensee had previously had disciplinary action taken against him or received a letter of guidance in a prior case; and said definition is to apply regardless of whether the violations in the present and prior disciplinary actions are of the same or different subsections of the disciplinary statutes.
>
> (2) The penalty given in the above list for repeat violations is intended to apply only to situations where the repeat violation is of a different subsection of Chapter 489, F.S., than the first violation. Where, on the other hand, the repeat violation is the very same type of violation as the first violation, the penalty set out above will generally be increased over what is otherwise shown for repeat violations in the above list.

55. Having considered the facts of the instant case in light of the pertinent and applicable provisions of Florida Administrative Code Chapter 61G4-17, it is the view of the undersigned that the following is the appropriate disciplinary action to take against Respondent in the instant case for his violation of Section 489.129(1)(g)1., Florida Statutes (which is a "repeat violation" of the type described in the second

sentence of Florida Administrative Code Rule 61G4-17.003(2), thus warranting an enhanced penalty, greater than the penalty he would receive if it were merely a "repeat violation" of the type described in the first sentence of that rule provision):
(1) suspend his license for four years (with such suspension to run consecutively with his current suspension); (2) fine him $5,000.00; (3) require him to pay restitution in the amount of $1,001.25 to the Skieras; and (4) order him to reimburse the Department for all reasonable costs associated with the investigation that led to the filing of the charge that he committed this violation and for all reasonable costs associated with the Department's successful prosecution of this charge (excluding costs related to attorney time).

RECOMMENDATION

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

RECOMMENDED that the Board issue a Final Order:
(1) finding Respondent guilty of violating Section 489.1425(1), Florida Statutes, as alleged in Count I of the Amended Administrative Complaint, and fining him $1,000.00 for this violation; (2) finding Respondent guilty of the violation of Section 489.129(1)(g)1., Florida Statutes, relating to Boca Concrete Pumping's December 6, 2000, $1,001.25 lien, alleged in Count II of the Amended Administrative Complaint, and taking the

following disciplinary action against him for this violation: (a) suspending his license for four years (with such suspension to run consecutively with his current suspension); (b) fining him $5,000.00; (c) requiring him to pay restitution in the amount of $1,001.25 to the Skieras; and (c) ordering him to reimburse the Department for all reasonable investigative and prosecutorial costs (excluding costs related to attorney time) incurred by the Department; and (3) dismissing all other charges in the Amended Administrative Complaint.

DONE AND ENTERED this 8th day of May, 2007, in Tallahassee, Leon County, Florida.

S

STUART M. LERNER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of May, 2007.

ENDNOTES

[1] Unless otherwise noted, all references in this Recommended Order to Florida Statutes are to Florida Statutes (2006).

[2] The undersigned has accepted these factual stipulations. See Columbia Bank for Cooperatives v. Okeelanta Sugar Cooperative, 52 So. 2d 670, 673 (Fla. 1951)("When a case is tried upon stipulated facts the stipulation is conclusive upon both the trial and appellate courts in respect to matters which may validly be made the subject of stipulation."); Schrimsher v. School Board of Palm Beach County, 694 So. 2d 856, 863 (Fla. 4th DCA 1997)("The hearing officer is bound by the parties' stipulations."); and Palm Beach Community College v. Department of Administration, Division of Retirement, 579 So. 2d 300, 302 (Fla. 4th DCA 1991)("When the parties agree that a case is to be tried upon stipulated facts, the stipulation is binding not only upon the parties but also upon the trial and reviewing courts. In addition, no other or different facts will be presumed to exist.").

[3] No representative of any of these lienors testified at the final hearing.

[4] According to the Parties' Stipulation 11, at the time of this meeting, ICC had already filed for bankruptcy.

[5] In its Proposed Recommended Order, Petitioner contends that the total contract price (including change orders) was actually $331,286.00 (or $47,000.00 less than the $378,286.20 the parties had stipulated to in the Parties' Stipulations), explaining as follows:

> Although a balance of $73,520.00 remained on the contract, Respondent testified that certain items such as the air conditioning (HVAC), landscaping, and cabinets and countertops were removed from the scope of the contract and that the Skieras would complete these items themselves. According to the contract, allowances were made for each of the aforementioned items as follows: $15,000.00 for HVAC; $15,000.00 for kitchen cabinetry; $8,000.00 for countertops; and $9,000.00 for landscaping. The total amount of these aforementioned items is $47,000.00. Consequently, the balance of the contract price of $73,520.00 [$378,286.20 minus the $304,766.20 the Skieras had paid ICC] that would have been owed to Respondent should

have been reduced by $47,000 for a total balance of $26,520.00.

The undersigned declines to make such a finding. Respondent did testify that "air conditioning (HVAC), landscaping, and cabinets and countertops were removed from the scope of the contract," but he later revealed that, in so testifying, he was only relating what he had been told by Mr. Stasinos and added, "I can't believe anything he tells me . . . ." Significantly, Respondent never testified to having knowledge of any downward adjustments made to the contract price as a result of the "remov[als] from the scope of the contract" about which Mr. Stasinos had supposedly told him. Respondent was specifically asked, during his testimony, whether there were any such downward adjustments, and his response was, "I don't know that." Neither Respondent, nor counsel for Petitioner, said or did anything during the course of the hearing to rescind the Parties' Stipulation that the total contract price was $378,286.20. Accordingly, the undersigned is bound by this factual stipulation. See Columbia Bank for Cooperatives, 52 So. 2d at 673; Schrimsher, 694 So. 2d at 863; and Palm Beach Community College, 579 So. 2d at 302.

[6] A "person," as that term is used in Florida Statutes, "includes individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations." § 1.01(3), Fla. Stat.

[7] Section 489.129(1), Florida Statutes, was amended, effective October 1, 2005, by Chapter 2005-227, to increase the maximum amount the Board could fine a contractor from $5,000.00 to $10,000.00 per violation. The Board, however, does not have the authority to impose a fine in excess of $5,000.00 per violation in the instant case inasmuch as the statutory amendment took effect after the events that led to the filing of the Amended Administrative Complaint against Respondent. See Childers v. Department of Environmental Protection, 696 So. 2d 962, 964 (Fla. 1st DCA 1997)("The version of a statute in effect at the time grounds for disciplinary action arise controls."); and Willner v. Department of Professional Regulation, Board of Medicine, 563 So. 2d 805, 806 (Fla. 1st DCA 1990)("In 1986, Section 458.331(2)(d), Florida Statutes, was amended to increase the amount of the maximum administrative fine which could be assessed by appellee for violations of Section 458.331(1), Florida Statutes. . . . The 1986 amendment increased the

maximum fine from $1,000 per violation to $5,000 per violation. Since all the violations for which appellant was found guilty occurred prior to the effective date of the 1986 amendment, the maximum fine which could lawfully be imposed by appellee was $1,000 per violation.").

[8] At all times material to the instant case, the mere abandonment of a project, regardless of the "percentage of completion," was punishable under another subsection of the statute, Section 489.129(1)(j), Florida Statutes (which prohibited a contractor from "[a]bandoning a construction project in which the contractor is engaged or under contract as a contractor"). Whether there was an abandonment of any type in the instant case that would subject Respondent to discipline is a question before neither the undersigned nor the Board inasmuch as Respondent has not been charged with violating either Subsection (1)(g)2. or Subsection (1)(j) of Section 489.129.

Respondent has not been charged with, and therefore cannot be found guilty of and punished for, abandonment under either subsection, regardless of what the evidence may show. See Trevisani v. Department of Health, 908 So. 2d 1108, 1109 (Fla. 1st DCA 2005) ("A physician may not be disciplined for an offense not charged in the complaint."); and Aldrete v. Department of Health, Board of Medicine, 879 So. 2d 1244, 1246 (Fla. 1st DCA 2004)("Dr. Aldrete next alleges he was found to have violated the standard of care by leaving J.S. in the care of an unqualified nurse, an uncharged offense. We agree this offense was not charged in the complaint and Dr. Aldrete cannot be disciplined on this ground.").

[9] To meet its burden of proving a violation of Section 489.129(1)(g)3., the Department must establish that the "contractor's job ha[d] been completed, and . . . that the customer ha[d] had to pay more for the contracted job than the original contract price, as adjusted for subsequent change orders." Once it makes such a showing, the burden shifts to the licensee to demonstrate that "such increase in cost was the result of circumstances beyond the control of the contractor, was the result of circumstances caused by the customer, or was otherwise permitted by the terms of the contract between the contractor and the customer." See State v. Hicks, 421 So. 2d 510, 511 (Fla. 1982)("We find that as used in section 810.02(1), the word 'unless' is a qualifier to the primary sentence of the statute, separating the consent phrase from the enacting clause and making consent an affirmative defense."); Baeumel v. State,

7 So. 371, 372 (Fla. 1890)("[I]f there is an exception in the enacting clause, the party pleading must show that his adversary is not within the exception; but, if there be an exception in a subsequent clause, or a subsequent statute, that is [a] matter of defen[s]e, and is to be shown by the other party.")(internal quotations omitted); and Royal v. State, 784 So. 2d 1210, 1211 (Fla. 5th DCA 2001)("It has long been the rule that if there is an exception in an enacting clause, the party pleading must show that his adversary is not within the exception. If the exception is found in a subsequent clause or statute, however, it is a matter of defense.")(citations omitted).

[10] The "Construction Industries Recovery Fund" is now the "Florida Homeowners' Construction Recovery Fund." § 489.140, Fla. Stat.

[11] Section 489.1425(2), Florida Statutes, still provides for a mandatory $1,000.00 fine for a "second or subsequent violation of [S]ubsection (1)" of the statute.

[12] Florida Administrative Code Rule 61G4-17.001(1)(i)4. provides that, absent aggravating or mitigating circumstances, the "normal penalty range" for a repeat violation of Section 489.1425(1), Florida Statutes, is a "minimum" of a $250.00 fine to a "maximum" of a $500.00 fine. Since this rule provision, on its face, directly conflicts with the clear mandate of Section 489.1425(2)(b), Florida Statutes, it must give way to the latter. See Broward Children's Center, Inc. v. Hall, 859 So. 2d 623, 627 (Fla. 1st DCA 2003)("Where an agency adopts a rule that conflicts with a statute, the statute prevails."); Johnson v. Department of Highway Safety and Motor Vehicles, Division of Driver's Licenses, 709 So. 2d 623, 624 (Fla. 4th DCA 1998)("We agree that, when a rule is in direct conflict with a statute, the latter must control."); and Star Employment Service, Inc. v. Florida Industrial Commission, 109 So. 2d 608, 610 (Fla. 3d DCA 1959)("To the extent, of course, that the rule conflicts with the statute, the latter must under familiar principles, govern.").

[13] "The Skieras paid [ICC] a total of $304,766.20 for work on the home" (as the parties have stipulated), $73,520.00 less than the $378,286.20 total contract price. The money was paid in installments pursuant to a "[p]ayment [d]raw [s]chedule." Having carefully reviewed the record evidence, the undersigned cannot state, "without hesitancy," that the $304,766.20 ICC

received from the Skieras was for any of the allegedly unpaid items described in the Seven Other Liens.

[14] Five of these Seven Other Liens were filed either after, or less than 75 days before, ICC filed for bankruptcy. What effect, if any, this bankruptcy filing had on these liens the undersigned need not, and therefore will not, decide.

[15] A contractor who does not complete a project may be subject to disciplinary action for abandonment, but not pursuant to Section 489.129(1)(g)3., Florida Statutes.

[16] Imposing a fine in excess of $5,000.00 would constitute an ex post facto violation.

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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.