

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
CONSTRUCTION INDUSTRY)
LICENSING BOARD,)
)
Petitioner,)
)
vs.) Case No. 07-2501PL
)
ONEIDO GONZALEZ,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case pursuant to Sections 120.569 and 120.57(1), Florida Statutes, before Stuart M. Lerner, a duly-designated administrative law judge of the Division of Administrative Hearings (DOAH), on August 14, 2007, by video teleconference at sites in Miami and Tallahassee, Florida.

APPEARANCES

For Petitioner: P. Brian Coats, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-2202

For Respondent: Yehuda D. B. Bruck, Esquire
Schwartz and Associates
200 Southeast 1st Street, Suite 801
Miami, Florida 33131

STATEMENT OF THE ISSUE

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

PRELIMINARY STATEMENT

In December 2006, the Department of Business and Professional Regulation issued a four-count Administrative Complaint against Respondent, a Florida-registered mechanical contractor. Count I alleged that "Respondent violated Section 489.129(1)(a), Florida Statutes, by obtaining a certificate, registration, or certificate of authority by fraud or misrepresentation." Count II alleged that Respondent violated Section 489.129(1)(i), Florida Statutes, by "knowingly giv[ing] false or forged evidence to the board or a member thereof" in violation of Section 489.127(1)(d), Florida Statutes. Count III alleged that "Respondent violated Section 455.227(1)(h), Florida Statutes, by attempting to obtain, obtaining, or renewing a license to practice a profession by bribery, by fraudulent misrepresentation, or through an error of the department or the board." Count IV alleged that Respondent "violated Section 489.129(1)(m), Florida Statutes, by committing incompetency or misconduct in the practice of contracting."

On or about January 9, 2007, Respondent requested a hearing on the charges against him. On June 5, 2007, the matter was referred to DOAH.

As noted above, the final hearing in this case was held on August 14, 2007. Three witnesses, Jose Lezcano, Andrew Janecek, and Respondent, testified at the hearing. In addition to the testimony of these three witnesses, five exhibits (Petitioner's Exhibits 1 through 5) were offered and received into evidence.

The deadline for the filing of proposed recommended orders was set at 21 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 September 25, 2007.

Respondent and the Department filed their Proposed Recommended Orders on October 9, 2007, and October 15, 2007, respectively.

FINDINGS OF FACT

Based on the evidence adduced at hearing, and the record as a whole, the following findings of fact are made:

1. Respondent is a Spanish-speaking native of Cuba with little or no understanding of the English language. He has resided in Miami-Dade County since coming to this country 18 or 19 years ago.

2. In or around 2006, Respondent decided he wanted to start an air conditioning contracting business in Miami-Dade County, and he went to the downtown Miami location of the Miami-Dade County Code Compliance Office (Compliance Office) to inquire about the licensing requirements with which he would have to comply to legally operate such a business in the county.

3. The Compliance Office is responsible for licensing construction contractors (in various trades) operating in Miami-Dade County.

4. The contractors whom the Compliance Office licenses include mechanical contractors doing air conditioning work.

5. Individuals who desire to go into the air conditioning contracting business in Miami-Dade County must complete and submit to the Compliance Office an eight-page "initial application," accompanied by "letters of experience" and a \$315.00 application fee. The application is reviewed by the Miami-Dade County Construction Trades Qualifying Board (CTQB). If the CTQB determines that the applicant is qualified to take the licensure examination, the applicant is allowed to sit for the examination. Passing the examination is a prerequisite to licensure. If a passing score is attained, the applicant is notified by the Compliance Office and given the opportunity to submit a "business application" and supporting material (including proof of liability insurance and workers'

compensation coverage), accompanied by another \$315.00 application fee. If the CTQB approves the "business application," the "applicant is issued a contractor's license number" and given a "competency card" (reflecting such licensure) by the Compliance Office. The applicant then must register with the Department before being able to engage in any contracting work in the county.

6. When Respondent went to the Compliance Office's location in downtown Miami, he was approached by a man carrying a clipboard who spoke Spanish. Respondent was led to believe by the man that he worked for the county (although the man did not present any identification verifying his employment status). The man offered to help Respondent apply for a license, an offer Respondent accepted. After obtaining information from Respondent, the man filled out an application form (which was in English) for Respondent and "kept" the completed form. He then collected from Respondent \$350.00. The man told Respondent that Respondent would be receiving his license "by mail."

7. Respondent did nothing further (including taking the licensure examination) to obtain a Compliance Office-issued license for his air conditioning contracting business. Given what he was told by the man (whom he trusted) at the Compliance Office's downtown Miami location, Respondent did not think anything else was required of him, and he acted accordingly.

8. Approximately a month after his visit to the Compliance Office, Respondent received what, on its face, appeared to be a Compliance Office-issued "competency card" indicating that his business, G & G Air Conditioning, Inc., had been issued an "A/C UNLTD" license, License No. 05M000987, with an expiration date of September 30, 2007, and that he was the "qualifying agent" for the business.

9. Although Respondent did not realize it at the time, the "competency card" was a "fraudulent document." The Compliance Office had never in fact issued any license to Respondent or his air conditioning contracting business. Indeed, the Compliance Office had not even received a licensure application, or, for that matter, anything else, from Respondent (including the \$350.00 he had paid for what he thought was an application fee).

10. Reasonably, but erroneously, believing that the "competency card" was authentic, Respondent, with the assistance of a friend able to read and write English, completed and submitted the paperwork necessary to register with the Department so that he would be able to engage in the business of air conditioning contracting in Miami-Dade County. Respondent had picked up the application packet (the contents of which were in English) when he had visited the Compliance Office's downtown Miami location. Respondent's friend translated the contents of the application materials for Respondent. For each item

requiring a response, Respondent told his friend what entry to make. The final page of the application materials contained the following "Attest Statement," which Respondent signed (after it was translated for him by his friend):

I have read the questions in this application and have answered them completely and truthfully to the best of my knowledge.

I have successfully completed the education, if any, required for the level of licensure, registration, or certification sought.

I have the amount of experience required, if any, for the level of licensure, registration, or certification sought.^[1]

I pledge to comply with the applicable standards of practice upon licensure, registration, or certification.

I understand the types of misconduct for which disciplinary proceedings may be initiated.

Among the representations Respondent made in his completed application was that he possessed a valid "local competency card" issued by the Compliance Office. He believed, in good faith, but again, incorrectly, that the "competency card" he had received in the mail was such a card. In accordance with the instructions in the application materials, Respondent attached a copy of this card to his application.

11. The Department received Respondent's completed application for registration on April 20, 2006.

12. On May 23, 2006, the Department issued the registration for which Respondent had applied.

13. Had the Department known that the "competency card" Respondent had attached to his application and had falsely, but not fraudulently, claimed to be valid was in fact a counterfeit that did not accurately represent the local licensure status of Respondent and his business, the Department would have denied Respondent's application for registration.

14. Following a police investigation, two Compliance Office employees, along with a former Compliance Office employee, were arrested for selling "fraudulent licenses."

15. The police alerted the Compliance Office of the results of its investigation in or around July 2006 (after the Department had already granted Respondent's application for registration).

16. The Compliance Office thereupon conducted an audit, which revealed that Respondent was among those who had received a "fraudulent competency card" from the arrestees.

17. Respondent was so notified by letter (sent by the Compliance Office).

18. Prior to his receipt of the letter, Respondent had no idea that the "competency card" he had received in the mail was not what it purported to be. Had he known it was a "fraudulent

document" he would have never applied for registration with the Department.

19. The total investigative and prosecutorial costs incurred by the Department in connection with the instant case (excluding costs associated with any attorney's time) was \$32.66.

CONCLUSIONS OF LAW

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

21. "No person^[2] may engage in the business of contracting in this state without first being certified or registered in the proper classification" by the Department. § 489.115(1), Fla. Stat.

22. To "engage in contracting on a statewide basis" a person must be certified. "Any person who desires to engage in contracting on other than a statewide basis [must], as a prerequisite thereto, be registered" § 489.113(1), Fla. Stat.

23. "To be initially registered, the applicant [must] submit the required fee and file evidence, in a form provided by the [D]epartment, of holding a current local occupational license required by any municipality, county, or development district, if any, for the type of work for which registration is

desired and evidence of successful compliance with the local examination and licensing requirements, if any, in the area for which registration is desired." § 489.117(1)(a), Fla. Stat. "Registration allows the registrant to engage in contracting only in the counties, municipalities, or development districts where he or she has complied with all local licensing requirements and only for the type of work covered by the registration." § 489.117(1)(b), Fla. Stat.; see also Deep South Systems, Inc. v. Heath, 843 So. 2d 378, 379 n.1 (Fla. 2d DCA 2003)("Florida law classifies construction contractors into two groups: certified contractors or registered contractors. The two groups differ in the requirements for licensure. A certified contractor may perform construction work anywhere in Florida, while a registered contractor may only perform work covered by the registration in the county, municipality, or development district for which the registration applies.")(citations omitted).

24. Among the "type[s] of work" a registration may cover is "mechanical contracting" work. See § 489.105(3)(i), Fla. Stat. ("'Mechanical contractor' means a contractor whose services are unlimited in the execution of contracts requiring the experience, knowledge, and skill to install, maintain, repair, fabricate, alter, extend, or design, when not prohibited by law, central air-conditioning, refrigeration, heating, and

ventilating systems, including duct work in connection with a complete system only to the extent such duct work is performed by the contractor as is necessary to make complete an air-distribution system, boiler and unfired pressure vessel systems, lift station equipment and piping, and all appurtenances, apparatus, or equipment used in connection therewith, and any duct cleaning and equipment sanitizing which requires at least a partial disassembling of the system; to install, maintain, repair, fabricate, alter, extend, or design, when not prohibited by law, piping, insulation of pipes, vessels and ducts, pressure and process piping, pneumatic control piping, gasoline tanks and pump installations and piping for same, standpipes, air piping, vacuum line piping, oxygen lines, nitrous oxide piping, ink and chemical lines, fuel transmission lines, liquefied petroleum gas lines within buildings, and natural gas fuel lines within buildings; to replace, disconnect, or reconnect power wiring on the load side of the dedicated existing electrical disconnect switch; to install, disconnect, and reconnect low voltage heating, ventilating, and air-conditioning control wiring; and to install a condensate drain from an air-conditioning unit to an existing safe waste or other approved disposal other than a direct connection to a sanitary system. The scope of work for such contractor shall also include any excavation work incidental thereto, but shall not include any work such as

potable water lines or connections thereto, sanitary sewer lines, swimming pool piping and filters, or electrical power wiring.").

25. A business organization, like G & G Air Conditioning, Inc., may engage in "mechanical contracting" work only if it has obtained from the Department a "certificate of authority through a qualifying agent." § 489.119, Fla. Stat. "The qualifying agent [must] be certified or registered . . . in order for the business organization to be issued a certificate of authority in the category of the business conducted for which the qualifying agent is certified or registered." § 489.119(3)(a), 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."); 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."); and Mivan (Florida), Inc. v. Metric Constructors, Inc., 857 So. 2d 901, 903 (Fla. 5th DCA 2003)("The qualifying agent must be certified or registered in order for the business organization to obtain a certificate of authority to conduct the type of contracting

business for which the qualifying agent is certified or registered.").

26. The Construction Industry Licensing Board (Board) may take disciplinary action "against any certificateholder or registrant" for violations of Sections 455.227(1) and 489.129(1), Florida Statutes, for which the certificateholder or registrant is responsible. At all times material to the instant case, the disciplinary action the Board was statutorily authorized to take was limited to the following: revoking or suspending the contractor's certificate, registration, or certificate of authority; placing the contractor on probation; reprimanding the contractor; denying the renewal of the contractor's certificate, registration, or certificate of authority; imposing an administrative fine not to exceed \$5,000.00 per violation in the case of a violation of Section 455.227(1) and not to exceed \$10,000.00 per violation in the case of a violation of Section 489.129(1); taking "corrective action" in the case of a violation of Section 455.227(1) and requiring financial restitution to any victimized consumer in the case of a violation of Section 489.129(1); requiring the contractor to take continuing education courses; and assessing costs associated with the investigation and prosecution. See §§ 455.227 and 489.129(1), Fla. Stat.; see also 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.").

27. The Board may take such disciplinary action only after the certificateholder or registrant 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.

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

29. At the hearing, the Department (as the prosecuting agency) bears the burden of proving that the certificateholder or registrant 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 certificateholder's or registrant'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").

30. 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).

31. 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 the Board from taking penal action against a certificateholder or registrant based on matters not specifically alleged in the charging instrument, unless those matters have been tried by consent. See Trevisani v. Department of Health, 908 So. 2d 1108, 1109 (Fla. 1st DCA 2005); 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; and Ghani v. Department of Health, 714 So. 2d 1113, 1115 (Fla. 1st DCA 1998).

32. Furthermore, "the conduct proved must legally fall within the statute or rule claimed [in the charging instrument] to have been violated." Delk v. Department of Professional Regulation, 595 So. 2d 966, 967 (Fla. 5th DCA 1992).

33. The charging instrument in the instant case, the Administrative Complaint, contains four counts: Count I, alleging a violation of Section 489.129(1)(a), Florida Statutes, "by obtaining a certificate, registration, or certificate of authority by fraud or misrepresentation"; Count II, alleging a violation of Section 489.129(1)(i), Florida Statutes, by "knowingly giv[ing] false or forged evidence to the board or a member thereof" in violation of Section 489.127(1)(d), Florida Statutes; Count III, alleging a violation of Section

455.227(1)(h), Florida Statutes, "by attempting to obtain, obtaining, or renewing a license to practice a profession by bribery, by fraudulent misrepresentation, or through an error of the department or the board"; and Count IV alleging a violation of Section 489.129(1)(m), Florida Statutes, "by committing incompetency or misconduct in the practice of contracting."

34. At all times material to the instant case, Section 489.129(1)(a), (i), and (m), Florida Statutes, has provided that the following are disciplinable acts:

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

* * *

(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.

35. At all times material to the instant case, Florida Administrative Code Rule 61G4-15.008 has contained the following interpretation of what constitutes "[o]btaining a certificate, registration, or certificate of authority by . . . misrepresentation" in violation of Section 489.129(1)(a), Florida Statutes:

Material false statements or information submitted by an applicant for certification or registration, or submitted for renewal of certification or registration, or submitted for any reissuance of certification or registration, shall constitute a violation of Section 489.129(1)(a), F.S., and shall result in suspension or revocation of the certificate or registration.[³]

Under this interpretation, knowledge of the falsity of the statements or information submitted in connection with the application need not be shown to establish a disciplinable "misrepresentation" in violation of the statute.

36. Contrastingly, establishing that a certificateholder or registrant violated Section 489.129(1)(a), Florida Statutes, by "[o]btaining a certificate, registration, or certificate of authority by fraud" (as opposed to by mere "misrepresentation"), does require proof of guilty knowledge. Cf. Parker v. Board of Regents ex rel. Florida State University, 724 So. 2d 163, 168 (Fla. 1st DCA 1998)("A false representation of a material fact, made with knowledge of its falsity, to a person ignorant thereof, with intention that i[t] shall be acted upon, followed by reliance upon and by action thereon amounting to substantial change of position, is a fraud of which the law will take cognizance.").

37. At all times material to the instant case, a certificateholder's or registrant's "[k]nowingly giv[ing] false or forged evidence to the [B]oard or a member thereof," as

prohibited by Section 489.127(1)(d), Florida Statutes, has constituted wrongdoing of the type described in Section 489.129(1)(i), Florida Statutes.

38. At all times material to the instant case, Florida Administrative Code Rule 61G4-17.001(1)(m)2. has provided that "[m]isconduct or incompetency in the practice of contracting [as prohibited by Section 489.129(1)(m), Florida Statutes], shall include, but is not limited to: Violation of any provision of . . . Chapter 489, Part I., F.S."

39. At all times material to the instant case, Section 455.227(1)(h), Florida Statutes, has provided that the following is a disciplinable act:

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

Obtaining a certificate or registration in error as a result of a misrepresentation made during the application process is conduct proscribed by Section 455.227(1)(h), regardless of whether the misrepresentation was fraudulently or innocently made.

40. 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 certificateholder or registrant. 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.'").

41. The Department met its burden of proof as to some, but not all, of the allegations of wrongdoing made in the four counts of the instant Administrative Complaint.

42. It proved by clear and convincing evidence that Respondent violated Section 489.129(1)(a), Florida Statutes (as alleged in Count I of the Administrative Complaint), Section 455.227(1)(h), Florida Statutes (as alleged in Count III of the Administrative Complaint), and, derivatively, Section 489.129(1)(m), Florida Statutes (as alleged in Count IV of the Administrative Complaint) by obtaining an erroneously issued registration from the Department (to which he was not entitled) as a result of his having made a material misrepresentation

concerning his possessing a valid "local competency card" evidencing his "successful compliance with the local examination and licensing requirements" governing air conditioning contractors in Miami-Dade County.

43. The Department, however, failed to present clear and convincing evidence that Respondent obtained the registration "by fraud" (as alternatively alleged in Count I of the Administrative Complaint) or "by bribery" or "by fraudulent misrepresentation" (as alternatively alleged in Count III of the Administrative Complaint) or that he "knowingly gave false or forged evidence to the [B]oard or member thereof" in violation of Section 489.127(1)(d), Florida Statutes, and (therefore also) Section 489.129(1)(i), Florida Statutes (as alleged in Count II of the Administrative Complaint). The Department offered no evidence to refute the plausible testimony given by Respondent concerning his reasonably founded belief, at the time he submitted his registration application to the Department, that the "competency card" referenced in and attached to the application was what it appeared to be and not a "fraudulent document."⁴

44. Remaining for consideration is what disciplinary action should be taken against Respondent for the alleged violations that were proven by the Department. 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).

45. 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.

46. Violations of Section 489.129(1)(a), Florida Statutes, are specifically addressed in Subsection (1)(a) of Florida Administrative Code Rule 61G4-17.001, which provides the following "[n]ormal [p]enalty [r]anges" for such violations:

Section 489.129(1)(a), F.S. Obtaining license through fraud or misrepresentation.

If misrepresentation:

PENALTY RANGE:

MINIMUM: \$5,000 fine and/or probation, suspension, and/or revocation.

MAXIMUM: \$10,000 fine and revocation.

If fraud:

PENALTY RANGE

MINIMUM: \$5,000 fine and revocation

MAXIMUM: \$10,000 fine and revocation.

47. Violations of Section 489.129(1)(m), Florida Statutes, are specifically addressed in Subsection (1)(m) of Florida Administrative Code Rule 61G4-17.001, which provides the following "[n]ormal [p]enalty [r]anges" for such violations committed by first time offenders like Respondent:

Misconduct or incompetency in the practice of contracting, 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.

FIRST OFFENSE:

PENALTY RANGE:

MINIMUM: \$1,000 fine and/or probation, or suspension.

MAXIMUM: \$2,500 fine and/or probation, or suspension.

48. Violations of Section 455.227(1)(h), Florida Statutes, are not specifically addressed in Florida Administrative Code Rule 61G4-17.001. Subsection (6) of the rule, however, provides as follows:

The absence of any violation from this Chapter shall be viewed as an oversight, and shall not be construed as an indication that no penalty is to be assessed. The Guideline penalty for the offense most closely resembling the omitted violation shall apply.

Of the "offenses" specifically addressed in the rule, the one "most closely resembling" a violation of Section 455.227(1)(h) is "[o]btaining [a] license through fraud or misrepresentation" in violation of Section 489.129(1)(a), Florida Statutes. Accordingly, the "[g]uideline penalty [range]" for this "offense" "appl[ies]" to violations of Section 455.227(1)(h), except to the extent that that "guideline penalty [range]" includes the imposition of a fine in excess of the statutory maximum (\$5,000.00) for a violation of Section 455.227(1)(h).

49. Subsection (4) of Florida Administrative Code Rule 61G4-17.001 gives notice that, in addition to any other disciplinary action it may impose upon a wrongdoer, the Board will also "assess the costs of investigation and prosecution, excluding costs related to attorney time."

50. 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. These "[a]ggravating and [m]itigating circumstances" include 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.

51. Having considered the facts of the instant case in light of the pertinent and applicable provisions of Florida Administrative Code Chapter 61G4-17, as well as Florida Administrative Code 61G4-15.008 (which provides for mandatory "suspension or revocation of the certificate or registration" as punishment for a certificateholder's or registrant's having made "[m]aterial false statements" in the application for the certificate or registration), it is the view of the undersigned that the appropriate disciplinary action to take against Respondent in the instant case for his violation of Section 489.129(1)(a), Florida Statutes, Section 455.227(1)(h), Florida Statutes, and Section 489.129(1)(m), Florida Statutes, is 1) the revocation of his registration (to which he was not entitled and which he received only because of his having misrepresented, in his application for registration, his local licensure status); and (2) requiring him to pay \$32.66 to reimburse the Department for its investigative and prosecutorial costs. The imposition

of any additional punishment is unwarranted, given that Respondent reasonably believed that the information he provided in his registration application concerning his local licensure status was in fact true and accurate.

RECOMMENDATION

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

RECOMMENDED that the Board issue a Final Order revoking Respondent's registration and requiring him to pay the Department \$32.66 (representing the Department's investigative and prosecutorial costs, excluding costs associated with attorney time) for the violation of Section 489.129(1)(a), Florida Statutes, Section 455.227(1)(h), Florida Statutes, and Section 489.129(1)(m), Florida Statutes, described above that the Department alleged in its Administrative Complaint and subsequently proved by clear and convincing evidence at the final hearing.

DONE AND ENTERED this 22nd day of October, 2007, in
Tallahassee, Leon County, Florida.



STUART M. LERNER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of October, 2007.

ENDNOTES

¹ Whether Respondent met whatever, if any, experience and/or education requirements there might have been for the "registration . . . sought," the evidentiary record does not reveal.

² 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.

³ Florida Administrative Code Rule 61G4-15.008 was adopted pursuant to the rulemaking authority granted the Board pursuant to Section 489.129(3), Florida Statutes, which provides that "[t]he [B]oard may specify by rule the acts or omissions which constitute violations of this section."

⁴ Even if the Department had clearly and convincingly demonstrated that Respondent did know, at the time he submitted his application, that the "competency card" was a "fraudulent document," there would still be no basis to find that he violated Section 489.127(1)(d), Florida Statutes, inasmuch as

the "competency card" was given, not to the Board or a member of the Board, but to the Department. See Department of Business and Professional Regulation, Construction Industry Licensing Board v. Perez, No. 07-2500PL, 2007 Fla. Div. Adm. Hear. LEXIS 502 *11-12 (Fla. DOAH September 6, 2007)(Recommended Order)("Count II alleges that Respondent violated Section 489.127(1)(d), Florida Statutes, which prohibits knowingly giving false or forged evidence to the board or a member of the board, thereby violating Section 489.129(1)(i), which prohibits failing to comply with Part I of Chapter 489 or violating a rule or lawful order of the board. There is no showing that Respondent gave false or forged evidence to the board or a member of the board. The evidence is that he gave fraudulent information to the Department. The Department, therefore, has failed to prove the allegations of Count II.").

COPIES FURNISHED:

P. Brian Coats, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-2202

Yehuda D. B. Bruck, Esquire
200 Southeast 1st Street, Suite 801
Miami, Florida 33131

G. W. Harrell, Executive Director
Construction Industry Licensing Board
Department of Business and
Professional Regulation
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-0792

Ned Luczynski, General Counsel
Department of Business and
Professional Regulation
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-0792

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.