Final Order No. BPR-2008-06339 Date: 8-4-08
FILED
Department of Business and Professional Regulation
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DIVISION OF ADMINISTRATIVE HEARINGS

STATE OF FLORIDA
CONSTRUCTION INDUSTRY LICENSING BOARD

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION,
Petitioner,

vs.

CASE NO.:2006-045914
LICENSE NO.: RG 291103667

JUAN CARLOS CUELLAR,
Respondent.
_____/

FINAL ORDER

THIS MATTER came before the Construction Industry Licensing Board (hereinafter referred to as the "Board") pursuant to Section 120.57(4), Florida Statutes, on April 10, 2008 in Orlando, Florida, for consideration of a Settlement Agreement (attached hereto as Exhibit A) entered into between the parties in the above-styled cause, in lieu of the Board considering the administrative law judge's Recommended Order and the related exceptions. At the hearing the parties agreed to amend the settlement agreement as follows:

A. The fine was amended to $7,500.00, payable in three installments of $2,500.00 each, with the first payment due within 30 days of this Final Order, the second payment due within 60 days of this Final Order, and the third payment due within 90 days of this Final Order .

Upon consideration of the Settlement Agreement, the documents submitted in support thereof, and being otherwise advised in the premises, **it is hereby ordered and**

adjudged:

(1) The Settlement Agreement as orally amended is hereby approved, adopted, and incorporated herein by reference. Accordingly, the parties shall adhere to and abide by all the terms of the Settlement Agreement, including payment of the agreed upon fine of $7,500.00 in three equal installments; and payment of costs in the amount of 132.94 within 30 days. Respondent is required to pay interest on the fine and costs due to the Board at a rate of 18% per annum, beginning on the first day after the respective due dates.

This Final Order shall become effective upon filing with the Clerk of the Department of Business and Professional Regulation.

DONE AND ORDERED this 24TH day of July, 2008.

RAYMOND R. HOLLOWAY, Chair
Construction Industry Licensing Board

NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION AND A SECOND COPY, ACCOMPANIED BY FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, OR WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN THIRTY (30) DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order has been provided by Certified Mail to: Juan Carlos Cuellar, 4730 SW 74th Avenue, Miami, Florida 33155; Timothy Atkinson, Esquire, P.O. Box 1110, Tallahassee, Florida 32302; and Richard A. Alayon, Esquire, 4551 Ponce De Leon Boulevard, Coral Gables, Florida 33146 and by hand/interoffice delivery to the Construction Industry Licensing Board, 1940 N. Monroe Street MS#N14, Tallahassee, Florida 32399-1039; Jeff Kelly, Esq., Chief Construction Attorney, Office of the General Counsel, 1940 N. Monroe St., Ste. 60, Tallahassee, Florida 32399-2202; Larry J. Sartin, Administrative Law Judge, Division of Administrative Hearings,1230 Apalachee Parkway, Tallahassee, FL 32399-1550; and Daniel Biggins, Assistant Attorney General, PL-01, The Capitol, Tallahassee, Florida 32399-1050, on or before 5:00 p.m., this 4th day of ~~July~~ August, 2008.

Brandon M. Nichols

STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
CONSTRUCTION INDUSTRY LICENSING BOARD
DIVISION I

DEPARTMENT OF BUSINESS &
PROFESSIONAL REGULATION,
CONSTRUCTION INDUSTRY LICENSING
BOARD,

Petitioner,

v. CASE NO.: 07-2823PL

JUAN CARLOS CUELLAR,

Respondent.
_____/

RESPONDENT JUAN CARLOS CUELLAR'S
EXCEPTIONS TO RECOMMENDED ORDER

Pursuant to Section 120.57(1)(b), and (l), Florida Statutes, and Uniform Rule of Procedure 28-106.217, Fla. Admin. Code, Respondent, JUAN CARLOS CUELLAR, hereby submits the following exceptions to the Recommended Order entered on Thursday, December 13, 2007, by the Administrative Law Judge in this matter:

Exceptions Regarding ALJ's conclusion that Respondent violated Section 489.129(1)(a), Florida Statutes

1. The ALJ erred in Conclusions of Law Paragraph 27 and 28, which state:

> 27. Florida Administrative Code Rule 61G4-15.008, in defining what constitutes the act of "[o]btaining a certificate, registration, or certificate of authority by ... misrepresentation" eliminates the need for the Department to prove any knowledge on the part of Respondent that he has made a material misrepresentation or any intent on the part of Respondent to rely upon a material misrepresentation. All that is required is proof that a material representation was made and that the representation was false.
>
> 28. The parties have stipulated that Respondent obtained his license and a certificate of authority for CCD based upon a false information. Therefore, the Department has proved that he obtained his license through a material misrepresentation in violation of Section 489.129(1)(a), Florida Statutes.

Section 489.129(1)(a) allows the Board to impose discipline against a licensee for obtaining a license by "fraud or misrepresentation." However, in Conclusions of Law Paragraph 27, the ALJ held that Rule 61G4-15.008, Fla. Admin. Code, eliminates the need for the Department to prove that Respondent had knowledge that he made a material representation and that the representation was false. In Conclusions of Law Paragraph 28, the ALJ applied Rule 61G4-15.008 to the construction of Section 489.129(1)(a), Florida Statutes, which resulted in a narrow construction of Section 489.129(1)(a), in derogation of Florida law and previous Board practice. The ALJ's construction of Section 489.129(1)(a) and Rule 61G4-15.008 was erroneous for several reasons.

2. **Exception 1**: The ALJ erred in Paragraphs 27 and 28 because the Board did not charge Respondent with a violation of Rule 61G4-15.008, Fla. Admin. Code, in the Administrative Complaint. As noted by the ALJ in Paragraph 25, the Administrative Complaint did not charge Respondent with a violation of Rule 61G4-15.008. Nonetheless, the ALJ erroneously applied Rule 61G4-15.008 to determine that an element of intent is not needed to find that a licensee committed "fraud or misrepresentation" in violation of Section 489.129(1)(a). As such, the Department was required to show that Respondent violated Section 489.129(1)(a), Florida Statutes, not Rule 61G4-15.008. Unlike Rule 61G4-15.008, Section 489.129(1)(a) includes an element of intent. However, as determined by the ALJ in Paragraph 45, "The suggestion that any fine should be imposed in this case is without any justification or merit and ignores the facts stipulated to by the Department: that Respondent did not act fraudulently or with any ill intent and that he was without any knowledge that he was obtaining a license improperly." As such, the Department failed to prove by clear and convincing evidence that that

Respondent obtained a license through an intentional misrepresentation. Therefore, the Board should reject the ALJ's findings and conclusions in Paragraphs 27 and 28.

3. **Exception 2**: The ALJ also erred in Paragraphs 27 and 28 in relying on Rule 61G4-15.008, because the Board did not charge Respondent with a violation of Rule 61G4-15.008, Fla. Admin. Code, in the Administrative Complaint. As noted by the ALJ in Paragraph 25, the Administrative Complaint did not charge Respondent with a violation of Rule 61G4-15.008. The ALJ's application of Rule 61G4-15.008 also violated Respondent's due process rights. Section 120.60(5), Florida Statutes, states:

> No revocation, suspension, annulment, or withdrawal of any license is lawful unless, prior to the entry of a final order, the agency has served, by personal service or certified mail, an administrative complaint which affords reasonable notice to the licensee of facts or conduct which warrant the intended action and unless the licensee has been given an adequate opportunity to request a proceeding pursuant to ss. 120.569 and 120.57.

In Cottrill v. Dep't of Ins., 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996), the agency's administrative complaint referenced several statutes but failed to allege an act or omission in violation of those statutes. The District Court held that the agency failed to provide "reasonable notice to the licensee of facts or conduct" that warrant the disciplinary action imposed. Id. Here, the administrative complaint did not allege that Respondent violated Rule 61G4-15.008, and thus the Board failed to provide Respondent with reasonable notice of the charges against him. Therefore, the Board should reject the ALJ's findings and conclusions in Paragraphs 27 and 28.

4. **Exception 3**: The ALJ erred in Paragraphs 27 and 28 because the Department was required to show that Respondent violated Section 489.129(1)(a), which requires that the Department prove by clear and convincing evidence that a licensee intended or should have known of the "fraud or misrepresentation." Both "fraud" and "misrepresentation" include an element of intent. Black's Law Dictionary defines "fraud" as "[a]n intentional perversion of

truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right." Black's Law Dictionary 660 (6th ed. 1990). (emphasis supplied) See also, Parker v. Board of Regents ex rel. Florida State University, 724 So. 2d 163, 168 (Fla. 1st DCA 1998), and Alfonso v. CILB, DOAH Case No. 05-4711. Similarly, Black's Law Dictionary defines "misrepresentation" as "material representation of presently existing or past fact, made with knowledge of its falsity, and with intention that other party rely thereon, resulting in reliance by that party to his detriment." Black's Law Dictionary 1001 (6th ed. 1990). (emphasis supplied) Under Section 489.129(1)(a), the act of filing a materially false statement (the representation) is one element of "fraud" and one part of "misrepresentation." The other element is the *mens rea* requirement that the actor have knowledge of the falsity when filing. Thus, in order to prove the allegations underlying Section 489.129(1)(a), Petitioner was required to prove by clear and convincing evidence that Respondent understood and intended to commit misrepresentation. The facts found by the ALJ show that Respondent did not have any intent or understanding that he submitted false or inaccurate information. In fact, in Paragraph 45 the ALJ held: "The suggestion that any fine should be imposed in this case is without any justification or merit and ignores the facts stipulated to by the Department: that Respondent did not act fraudulently or with any ill intent and that he was without any knowledge that he was obtaining a license improperly."

5. Even though the statute does not define the word "fraud" or the word "misrepresentation," these words must be given their plain, ordinary meaning. In the absence of any express, affirmative statement to the contrary, the use of the word "fraud" and the word "misrepresentation" set forth in Section 489.129(1)(a) should be consistent with the ordinary statutory use of the terms. It is beyond discussion or dispute that "fraud" includes an element of

intent. Similarly, "misrepresentation" must also include an element of intent. The question here is whether the Florida Legislature has given the Agency authority to eliminate this element of intent from the statute. Moreover, the real question, then, is whether the Agency's rule acts to eliminate this element of intent. It would be incongruous for the Agency to have eliminated the element of intent from "misrepresentation," but not "fraud," without a clear statement that this was the case. Rule 61G4-15.008 does not make this distinction.

6. Rule 61G4-15.008 merely provides a partial description of the requisite elements of fraud or misrepresentation. The element of intent remains with the charge of "fraud or misrepresentation," notwithstanding the language of the rule. Moreover, the Agency does not have the authority to modify the statutory charge of "fraud or misrepresentation." Section 489.129(3), Florida Statutes, grants limited authority to ". . . specify by rule the acts or omissions which constitute violations of this section." However, this statute does not provide the Agency with the authority to circumvent the more requirements of Section 489.129(1)(a), which include element of intent regarding "fraud or misrepresentation." The rule, 61G4-15.008, does not change or eliminate this statutory element of intent.

7. As such, the Petitioner failed to prove by clear and convincing evidence that that Respondent obtained a license through an intentional misrepresentation. Therefore, the Board should reject the ALJ's findings and conclusions in Paragraphs 27 and 28.

8. **Exception 4**: The ALJ also erred in Paragraphs 27 and 28 by holding that Section 489.129(1)(a), Florida Statutes, does not require an element of intent, as the Administrative Complaint failed to allege that Respondent unwittingly and without any knowledge submitted inaccurate information. The relevant portions of the Administrative Complaint rely solely on allegations of intentional conduct and fraud:

10. In or about June 2005, at the time Respondent submitted the application, Respondent knew or reasonably knew that Respondent's Competency Card was fraudulent and the attest statement signed by Respondent was false.

11. The fraudulent Competency Card and attest statement were material information submitted by Respondent to the Department.

12. In or about June 2005, at the time Respondent filled out the application, Respondent knew or reasonably knew that the Department would rely on the fraudulent Competency Card and attest statement in the application in its decision to issue Respondent a Registration and Qualifying Business License.

13. In or about September 2005, based upon the submission of Respondent's fraudulent Competency Card and false attest statement, the Department issued Respondent a Registration and Qualifying Business License.

As such, the Board was limited to the issues of fraud which were pled in the Administrative Complaint. The Administrative Complaint did not allege that Respondent unwittingly or and without knowledge submitted inaccurate information. As such, Petitioner failed to provide Respondent with notice of the issues that would determine his substantive rights.

Section 120.60(5), Florida Statutes, states:

> No revocation, suspension, annulment, or withdrawal of any license is lawful unless, prior to the entry of a final order, the agency has served, by personal service or certified mail, an administrative complaint which affords reasonable notice to the licensee of facts or conduct which warrant the intended action and unless the licensee has been given an adequate opportunity to request a proceeding pursuant to ss. 120.569 and 120.57.

Florida law is very clear that it is improper and a violation of due process for an agency to consider matters not formally addressed in the administrative complaint. Chrysler v. Dep't of Prof'l Regulation, 627 So. 2d 31 (Fla. 1st DCA 1993); see also Ceyala v. Dep't of Prof'l Regulation, Bd. of Medicine, 560 So. 2d 383, 384 (Fla. 3d DCA 1990) (by questioning licensee's ability to practice medicine, "a matter not alleged in the administrative complaint, the Board violated [licensee's] due process right to be notified of the charges against him"); Cottrill v. Dep't of Ins., 685 So. 2d 1371 (Fla. 1st DCA 1996) (although administrative complaint

referenced particular statutory provisions, the complaint failed to allege violation thereof, and thus failed to provide licensee with reasonable notice); Wray v. Dep't of Prof'l Regulation, 435 So. 2d 312, 315 (Fla. 1st DCA 1983) (finding licensee guilty of an offense with which he was not charged by the administrative complaint constituted a denial of due process).

9. **Exception 5**: The ALJ also erred in Conclusions of Law Paragraph 28 by holding that the "parties have stipulated that Respondent obtained his license and a certificate of authority for CCD based upon a false information." Emphasis supplied. Thus, the ALJ did not find any fact that established that Respondent obtained anything based upon a false information. Certainly, the record below does not contain any such stipulation by the parties. There is no competent substantial record evidence in the stipulated findings of fact or the Administrative Law Judge's own findings of fact that Respondent submitted "a false information." Therefore, the Board should reject the ALJ's holding in Paragraph 28 that Respondent obtained a certificate of authority based upon "a false information."

10. **Exception 6**: The ALJ erred in Paragraphs 27 and 28 by holding that Respondent violated Section 489.129(1)(a), Florida Statutes, as it was impossible for Respondent to comply with Section 489.129(1)(a), as interpreted by the Board. Petitioner argued, and the ALJ held, that any material false statement submitted on an application warrants disciplinary action under Section 489.129(1)(a), regardless of the applicant's knowledge of the truthfulness of the statement. Such an interpretation places an impossible burden of compliance upon Respondent in violation of Florida law. This is especially true where Respondent had no knowledge that any statement submitted was false.

11. In Rupp v. Dep't of Health, 963 So. 2d 790 (Fla. 3d DCA 2007), the agency imposed discipline on a licensee for failure to report disciplinary action of which the licensee was unaware. There, the ALJ held:

> Dr. Rupp physically did not receive notice of disciplinary action taken against her until almost two months after the order was entered. Therefore, she could not have notified the Department within 30 days of the date the order was entered. She did provide notice to the Department within 30 days of the date that she received notice from Virginia [as required by Section 458.331(1)(kk), Florida Statutes].

Id. at 792. As a result, the ALJ found a violation of Section 458.331(1)(kk), and the Board agreed, and imposed penalties on Dr. Rupp. The District Court reversed the ALJ's recommended order and Board's final order, holding:

> Florida law is clear that the law does not impose penalties upon an individual for failing to take certain actions which it is physically impossible for that individual to take. *See Shevin v. Int'l Inventors, Inc., 353 So. 2d 89, 93 (Fla. 1977)* (invalidating regulatory statute due to its "substantial impossibility of compliance"); *Ford v. State, 801 So. 2d 318, 321 (Fla. 1st DCA 2001)*("[R]equiring the state to prove *which* crime caused a defendant to flee 'would place upon the State an impossible burden to prove that one charged with multiple violations of the law fled solely because of his consciousness that he committed one particular crime.' "); *Aspen-Tarpon Springs Ltd v. Stuart, 635 So. 2d 61, 67-8 (Fla. 1st DCA 1994)*(finding that regulatory scheme constituted an unconstitutional taking because it prohibits landowners' use of their property unless the landowner satisfies impossible requirements); *Freeman v. Freeman, 615 So. 2d 225, 226 (Fla. 5th DCA 1993)*("[W]e hold that in the context of child support modification, the requirement that the change of circumstances is permanent does not require a showing that the change is forever. That would be an impossible burden because no one can testify to the future; ..."); *Indian Trail Homeowners Ass'n., Inc. v. Roberts, 577 So. 2d 998, 999 (Fla. 4th DCA 1991)*("...a party cannot be required to do the impossible."); *Abbey Park Homeowners Ass'n. v. Bowen, 508 So. 2d 554, 555 (Fla. 4th DCA 1987)*(reversing order granting injunction because "Abbey Park does not have the ability to comply with the injunction, and therefore, the injunction is improper."); *Ivaran Lines, Inc. v. Waicman, 461 So. 2d 123, 125 (Fla. 3d DCA 1984)* ("The law does not require the performance of impossibilities as a condition to assertion of acknowledged rights, and if a statute requires performance of something which cannot be performed, the court may hold it inoperative.").

> Here, the Judge's Recommended Order is incorrect because it seeks to impose liability upon Dr. Rupp for not doing what was impossible for her to do. The Recommended Order specifically finds that Dr. Rupp should be punished for failing to do that which the Judge's own Recommended Order specifically acknowledges could not be done. The Recommended Order thus seeks to punish Dr. Rupp for non-compliance with the notification requirements of *section 458.331(1)(kk), Florida Statutes*, despite the fact that Dr. Rupp was physically unable to comply with these requirements. It simply defies logic that Dr. Rupp's noncompliance with the notice requirements would not be excused when she did not know, nor could she have known, that the Virginia action had taken place

Id. at 793. Like Dr. Rupp, who had a "substantial impossibility of compliance," Respondent here "did not act fraudulently or with any ill intent and that he was without any knowledge that he was obtaining a license improperly." See Recommended Order, Paragraph 45. Section 489.129(1)(a) essentially mandates that applicants submit accurate and truthful information, otherwise be subject to disciplinary action by the Board. However, it was impossible for Respondent to comply with this requirement because he was defrauded by Miami-Dade County employees, see Recommended Order, Paragraph 8. As such, the ALJ's recommended order is invalid because it imposes sanctions for what amounts to a substantial impossibility of compliance. Like the District Court's opinion in Rupp, it simply defies logic that Respondent's alleged noncompliance with Section 489.129(1)(a) would not be excused when he did not know, nor could have known, that the underlying local government's competency card was not genuine. Therefore, the Board should reject the ALJ's holding in Paragraphs 27 and 28 that Respondent obtained a certificate of authority through misrepresentation.

12. **Exception 7**: The ALJ erred in Paragraphs 27 and 28, as the ALJ and Board's interpretation of Section 489.129(1)(a) violates the principle that statutes should be interpreted to avoid "unreasonable, harsh, or absurd consequences." Thompson v. State, 695 So. 2d 691, 693 (Fla. 1997). Here, it would be unreasonable, harsh, and absurd for Respondent to be guilty of "misrepresentation" even though Respondent had no knowledge that he submitted a competency

card that was not genuine, and was defrauded by the Miami-Dade County employees. See Recommended Order, Paragraphs 6 through 13. As such, the Board should reject the ALJ's holding in Paragraphs 27 and 28 that Respondent obtained a license through misrepresentation.

Exceptions Regarding ALJ's conclusion that Respondent violated Section 455.227(1)(h), Florida Statutes

13. The Administrative Law Judge erred in construing Section 455.227(1)(h), Florida Statutes, which precludes a person from "[a]ttempting 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." Regarding Section 455.227(1)(h), the ALJ held:

> 31. In support of this alleged violation, the Department has argued that Respondent obtained his license "through an error of the department . . . ." That "error" was the Department's reliance upon an improperly issued Miami-Dade building business Certificate of Competency.
>
> 32. The evidence proved clearly and convincingly that the Department issued the Respondent's license in "error." While it is true that Respondent did not intentionally cause or even know of the error, the Department reasonably takes the position that Respondent obtained his license nonetheless as a result of this error and that is all that Section 455.227(1)(h), Florida Statutes.
>
> 33. The Department has proved clearly and convincingly that Respondent violated Section 455.227(1)(h), Florida Statutes.

14. **Exception 8**: The ALJ erred in Paragraphs 31 through 33, as Petitioner failed to prove by clear and convincing evidence that Respondent obtained a license through an error of the Department under Section 455.227(1)(h), which require proof that Respondent is guilty of intentional misconduct. Any "error" to which Section 455.227(1)(h) refers requires that a licensee have knowledge that the Board was issuing the license to him based on an error. The statute precludes a person from obtaining a license through "bribery, by fraudulent misrepresentation, or through an error of the department or the board." The canon of statutory construction *ejusdem generis* illustrates that the legislature intended "error" to include an

element of scienter by including it within a list of items which all require a scienter element. Florida courts also recognize a similar canon of statutory construction that "phrases within a statute are not to bread in isolation, but rather should be construed within the context of the entire section." Thompson v. State, 695 So. 2d 691, 692 (Fla. 1997). Moreover, the nature of the ALJ's ruling in Paragraph 33—that "Respondent violated Section 455.227(1)(h), Florida Statutes"—necessarily requires that Respondent engage in an intentional action which violates Florida law. How can it be reasonably concluded that Respondent violated the statute when he did not commit an error and he was unaware of any error made by the Department or Board? Therefore, the Petitioner failed to prove by clear and convincing evidence that a licenseholder has knowledge that he or she obtained a license through an error of the Board. However, the ALJ found the opposite in Paragraph 32 of the Recommended Order, holding that "Respondent did not intentionally cause or even know of the error." As such, the Board must reverse the ALJ's determination in Paragraphs 31 through 33 that Respondent violated Section 455.227(1)(h).

15. **Exception 9**: The ALJ erred in Paragraphs 31 through 33 in that there was no competent substantial evidence that the Department issued the license in error. Paragraph 14 of the Recommended Order specifically states that the Department did not issue the competency card in error:

> At the time the Department issued the registered contractor's license and subsequent certificate of authority on the sole basis of the Miami-Dade Building Business Certificate of Competency presented by Respondent, the Department properly issued the registered contractor's license based on the information submitted to it.

(Emphasis supplied) As such, it is apparent that the Department properly processed the application with the facts known to it at the time the license was issued. There was no error in

the issuance of the license. The Department did what it was supposed to do. Therefore, the issuance of the license could not be a Departmental error, of which Respondent had any knowledge, which would result in a violation of Section 455.227(1)(h). Therefore, the Board must reverse the ALJ's determination in Paragraphs 31 through 33 that the Board provided competent substantial evidence that the license was issued in error.

16. **Exception 10**: The ALJ also erred in Conclusions of Law Paragraphs 31 through 33 by concluding that Section 455.227(1)(h) supported discipline against Respondent, as the allegations of the administrative complaint failed to allege that Respondent obtained his license through error of the Board. In fact, the relevant allegations of the administrative complaint allege that Respondent obtained his license through a fraudulent action:

> 10. In or about June 2005, at the time Respondent submitted the application, Respondent knew or reasonably knew that Respondent's Competency Card was fraudulent and the attest statement signed by Respondent was false.
>
> 11. The fraudulent Competency Card and attest statement were material information submitted by Respondent to the Department.
>
> 12. In or about June 2005, at the time Respondent filled out the application, Respondent knew or reasonably knew that the Department would rely on the fraudulent Competency Card and attest statement in the application in its decision to issue Respondent a Registration and Qualifying Business License.
>
> 13. In or about September 2005, based upon the submission of Respondent's fraudulent Competency Card and false attest statement, the Department issued Respondent a Registration and Qualifying Business License.

Thus, the Administrative Complaint frames the action against Respondent in terms of fraudulent behavior. Section 120.60(5), Florida Statutes, states:

> No revocation, suspension, annulment, or withdrawal of any license is lawful unless, prior to the entry of a final order, the agency has served, by personal service or certified mail, an administrative complaint which affords reasonable notice to the licensee of facts or conduct which warrant the intended action and unless the licensee has been given an adequate opportunity to request a proceeding pursuant to ss. 120.569 and 120.57.

By failing to factually allege that Respondent obtained a license by Departmental error, Petitioner failed to provide Respondent with notice of the issues that would determine his substantive rights. Florida law is very clear that it is improper and a violation of due process for an agency to consider matters not formally addressed in the administrative complaint. Chrysler v. Dep't of Prof'l Regulation, 627 So. 2d 31 (Fla. 1st DCA 1993); see also Ceyala v. Dep't of Prof'l Regulation, Bd. of Medicine, 560 So. 2d 383, 384 (Fla. 3d DCA 1990) (by questioning licensee's ability to practice medicine, "a matter not alleged in the administrative complaint, the Board violated [licensee's] due process right to be notified of the charges against him"); Cottrill v. Dep't of Ins., 685 So. 2d 1371 (Fla. 1st DCA 1996) (although administrative complaint referenced particular statutory provisions, the complaint failed to allege violation thereof, and thus failed to provide licensee with reasonable notice); Wray v. Dep't of Prof'l Regulation, 435 So. 2d 312, 315 (Fla. 1st DCA 1983) (finding licensee guilty of an offense with which he was not charged by the administrative complaint constituted a denial of due process). Therefore, the Board must reverse the ALJ's determination in Paragraphs 31 through 33 that Respondent violated Section 455.227(1)(h).

17. **Exception 11**: The ALJ erred in Paragraphs 31 through 33 by holding that Respondent violated Section 455.227(1)(h), Florida Statutes, as it was impossible for Respondent to somehow ensure that the Department issue a license without error as required by Section 455.227(1)(h). It is the Petitioner's position that any inaccurate information submitted on an application warrants disciplinary action under Section 489.129(1)(a), regardless of the applicant's knowledge of the inaccuracy. Such an erroneous interpretation places an impossible burden of compliance upon Respondent.

18. In Rupp v. Dep't of Health, 963 So. 2d 790 (Fla. 3d DCA 2007), the agency imposed discipline on a licensee for failure to report disciplinary action of which the licensee was unaware. There, the ALJ held:

> Dr. Rupp physically did not receive notice of disciplinary action taken against her until almost two months after the order was entered. Therefore, she could not have notified the Department within 30 days of the date the order was entered. She did provide notice to the Department within 30 days of the date that she received notice from Virginia [as required by Section 458.331(1)(kk), Florida Statutes].

Id. at 792. As a result, the ALJ found a violation of Section 458.331(1)(kk), and the Board agreed, and imposed penalties on Dr. Rupp. The District Court reversed the ALJ's recommended order and Board's final order, holding:

> Florida law is clear that the law does not impose penalties upon an individual for failing to take certain actions which it is physically impossible for that individual to take. See Shevin v. Int'l Inventors, Inc., 353 So. 2d 89, 93 (Fla. 1977) (invalidating regulatory statute due to its "substantial impossibility of compliance"); Ford v. State, 801 So. 2d 318, 321 (Fla. 1st DCA 2001)("[R]equiring the state to prove which crime caused a defendant to flee 'would place upon the State an impossible burden to prove that one charged with multiple violations of the law fled solely because of his consciousness that he committed one particular crime.' "); Aspen-Tarpon Springs Ltd v. Stuart, 635 So. 2d 61, 67-8 (Fla. 1st DCA 1994)(finding that regulatory scheme constituted an unconstitutional taking because it prohibits landowners' use of their property unless the landowner satisfies impossible requirements); Freeman v. Freeman, 615 So. 2d 225, 226 (Fla. 5th DCA 1993)("[W]e hold that in the context of child support modification, the requirement that the change of circumstances is permanent does not require a showing that the change is forever. That would be an impossible burden because no one can testify to the future; ..."); Indian Trail Homeowners Ass'n., Inc. v. Roberts, 577 So. 2d 998, 999 (Fla. 4th DCA 1991)("...a party cannot be required to do the impossible."); Abbey Park Homeowners Ass'n. v. Bowen, 508 So. 2d 554, 555 (Fla. 4th DCA 1987)(reversing order granting injunction because "Abbey Park does not have the ability to comply with the injunction, and therefore, the injunction is improper."); Ivaran Lines, Inc. v. Waicman, 461 So. 2d 123, 125 (Fla. 3d DCA 1984) ("The law does not require the performance of impossibilities as a condition to assertion of acknowledged rights, and if a statute requires performance of something which cannot be performed, the court may hold it inoperative.").

> Here, the Judge's Recommended Order is incorrect because it seeks to impose liability upon Dr. Rupp for not doing what was impossible for her to do. The Recommended Order specifically finds that Dr. Rupp should be punished for failing to do that which the Judge's own Recommended Order specifically acknowledges could not be done. The Recommended Order thus seeks to punish Dr. Rupp for non-compliance with the notification requirements of section 458.331(1)(kk), Florida Statutes, despite the fact that Dr. Rupp was physically unable to comply with these requirements. It simply defies logic that Dr. Rupp's noncompliance with the notice requirements would not be excused when she did not know, nor could she have known, that the Virginia action had taken place.

Id. at 793. Like Dr. Rupp, who had a "substantial impossibility of compliance," Respondent here "did not act fraudulently or with any ill intent and that he was without any knowledge that he was obtaining a license improperly." See Recommended Order, Paragraph 45. Section 455.227(1)(h) prohibits an applicant from knowingly obtaining a license through error of the Department, otherwise be subject to disciplinary action by the Board. However, it was impossible for Respondent to comply with Section 455.227(1)(h) because Respondent "was without any knowledge that he was obtaining a license improperly." As such, the ALJ's recommended order is invalid because it imposes sanctions for a substantial impossibility of compliance. Like the District Court's opinion in Rupp, it simply defies logic that Respondent's noncompliance with Section 455.227(1)(h) would not be excused when he did not know, nor could have known, that the Board issued the license in error. Therefore, the Board should reject the ALJ's holding in Paragraphs 31 through 33 that Respondent obtained a license through error of the Department.

19. **Exception 12**: The ALJ erred in Paragraphs 31 through 33, as the ALJ and Board's interpretation of Section 455.227(1)(h) violates the canon of statutory construction that statutes should be interpreted to avoid "unreasonable, harsh, or absurd consequences." Thompson v. State, 695 So. 2d 691, 693 (Fla. 1997). Here, it would be unreasonable, harsh, and absurd for a licensee to be guilty of the Department's erroneous issuance of a license. Stated

another way, how can the Board impose discipline against a licensee for an action taken by the Department? As such, the Board should reject the ALJ's holding in Paragraphs 31 through 33 that Respondent obtained a license through error of the Department.

Exceptions Regarding ALJ's conclusion that Respondent violated Section 489.129(1)(m), Florida Statutes

20. The ALJ erred in concluding that Respondent violated Section 489.129(1)(m), Florida Statutes. Specifically, in Conclusions of Law Paragraphs 34 and 35, the ALJ held:

> 34. Count IV involves an allegation that Respondent has committed "misconduct or incompetency in the practice of contracting." In support of this charge, the Department has cited Florida Administrative Code Rule 61G4-17.001(1), which provides discipline guidelines for violations of Section 489.129(1)(m), Florida Statutes. In particular, Florida Administrative Code Rule 61G4-17.001(1)(m) breaks the discipline guidelines for a violation of Section 489.129(m), Florida Statutes, into two parts. In the second part, it provides for discipline where there has been a "[v]iolation of any provision of . . . Chapter 489, Part I, F.S." which suggests that any violation of Chapter 489, Florida Statutes, constitutes "misconduct or incompetency in the practice of contracting" as prohibited in Section 489.129(1)(m), Florida Statutes.
>
> 35. Based upon the foregoing, the Department suggests that Respondent, by having violated Section 489.129(1)(a), Florida Statutes, has violated Section 489.129(1)(m), Florida Statutes. The evidence clearly and convincingly supports the Department's position.

21. **Exception 13**: The ALJ erred in Paragraphs 34 and 35 by concluding that Respondent violated Section 489.129(1)(m), Florida Statutes. As discussed in Paragraphs 1 through 19, above, there is no competent and substantial record evidence that Respondent committed incompetency or misconduct, as Respondent did not violate Sections 489.129(1)(a) or 455.227(1)(h), Florida Statutes. Moreover, the ALJ held that Respondent "did not act fraudulently or with any ill intent and that he was without any knowledge that he was obtaining a license improperly." See Recommended Order, Paragraph 45. As such, Petitioner failed to prove by clear and convincing evidence that Respondent violated Section 489.129(1)(m).

Therefore, the Board should reject the ALJ's holding in Paragraphs 34 and 35 that Respondent violated Section 489.129(1)(m).

Exceptions Regarding ALJ's conclusion regarding "The Appropriate Penalty"

22. Conclusions of Law Paragraphs 36 through 47 provide:

> 36. The only issue remaining for consideration is the appropriate 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 "disciplinary guidelines" of the Construction Industry Licensing Board (hereinafter referred to as the "Board"). Those guidelines are set forth in Florida Administrative Code Chapter 61G4-17, and they effectively place restrictions and limitations on the exercise of the Board's 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.").
>
> 37. In Florida Administrative Code Rule 61G4-17.001, the Board has announced the "Normal Penalty Ranges" within which its disciplinary action against contractors will fall, absent aggravating or mitigating circumstances, for specified violations.
>
> 38. 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 "Normal Penalty Ranges" 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.

39. 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.

40. Of the "offenses" specifically addressed in the Rule, the one "most closely resembling" a violation of Section 455.227(1)(h) is obtaining a license through fraud or misrepresentation in violation of Section 489.129(1)(a), Florida Statutes. Accordingly, the guideline penalty range for this offense applies 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).

41. 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 "Normal Penalty Ranges" 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.

42. 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."

43. Florida Administrative Code Rule 61G4-17.002 lists "Aggravating and Mitigating circumstances" to be considered in determining whether a departure from the "Normal Penalty Range" is warranted in a particular case. These aggravating and mitigating 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.

44. In Petitioner's Proposed Recommended Order, the Department has suggested, without any discussion of aggravating or mitigating circumstances, that Respondent should be found to have violated Sections 489.129(1)(a) and (m), and 455.227(1)(h), Florida Statutes, that his license be revoked (based upon the violation of Sections 489.129(1)(a) and 455.227(1)(h), Florida Statutes), and that he be required to pay the following fines: $5,000.00 for the violation of Section 489.129(1)(a), Florida Statutes; $5,000.00 for the violation of Section 455.227(1)(h), Florida Statutes; and $2,500.00 for the violation of Section 489.129(1)(m), Florida Statutes.

45. The suggestion that any fine should be imposed in this case is without any justification or merit and ignores the facts stipulated to by the Department: that Respondent did not act fraudulently or with any ill intent and that he was

without any knowledge that he was obtaining a license improperly. Additionally, imposing any fine for the violation of Section 489.129(1)(m), Florida Statutes, ignores the fact that the violation is a technical one, predicated solely upon the violation of Section 489.129(1)(a), Florida Statutes. To impose a fine for both violations would be to punish Respondent monetarily twice for the same act.

46. As to the suggested revocation of Respondent's license, it is concluded that before imposing this remedy, which the Department is technically entitled to do, the Department should first give Respondent an opportunity to voluntarily relinquish his license. Such action would take into account the stipulated facts concerning Respondent's lack of intent or knowledge. It would also place Respondent in essentially the same position that he was in before he was defrauded by employees of the BCCO: that of a licensee applicant. If Respondent is given an opportunity to voluntarily relinquish his license but fails to do so, then and only then, should the Department revoke his license.

47. Again, the Department has stipulated that Respondent did nothing improperly in this case. Additionally, both parties have stipulated that Respondent is not entitled to his license and that it was obtained based upon false information from the BCCO. Under these circumstances, Respondent is clearly not entitled to his license. To punish him, however, by "revoking" his license without giving him the opportunity to voluntarily relinquish his license and requiring that he pay a fine ignores the facts agreed to by both parties.

23. **Exception 14**: The ALJ erred in Conclusions of Law Paragraphs 36 through 47 of the Recommended Order by applying the Board's disciplinary guidelines to Respondent. As discussed in Paragraphs 1 through 21, above, Respondent did not violate any Florida Statutes or rules, and therefore no penalty can be assessed against Respondent under Florida law. Therefore, the Board should reject the ALJ's holding in Paragraphs 36 through 47 that any disciplinary action should be taken against Respondent.

24. **Exception 15**: The ALJ erred in Conclusions of Law Paragraphs 36 through 47 by applying the Board's disciplinary guidelines to Respondent. Such a conclusion violates the principle that statutes should be interpreted to avoid "unreasonable, harsh, or absurd consequences." Thompson v. State, 695 So. 2d 691, 693 (Fla. 1997). Here, it would be unreasonable, harsh, and absurd for Respondent to be guilty of "misrepresentation" even though

Respondent had no knowledge that he submitted documents which were not genuine. As such, the Board should reject the ALJ's holding in Paragraphs 36 through 47 that Respondent obtained a license through misrepresentation.

25. **Exception 16**: The ALJ erred in Conclusions of Law Paragraph 36 by holding that "only issue remaining for consideration is the appropriate disciplinary action should be taken against Respondent for the alleged violations that were proven by the Department." The Board failed to prove that Respondent violated Florida law, and Respondent was therefore not subject to disciplinary action. Therefore, the Board should reject the ALJ's holding in Paragraph 36 that disciplinary action should be taken against Respondent.

26. **Exception 17**: The ALJ erred in Conclusions of Law Paragraph 36 by holding that the Board's "disciplinary guidelines" are triggered in this matter. The Board failed to prove that Respondent violated Florida law and, therefore, the disciplinary guidelines are inapplicable in this matter. Therefore, the Board should reject the ALJ's holding in Paragraph 36 that the Board's "disciplinary guidelines" are appropriately applied in this matter.

27. **Exception 18**: The ALJ erred in Conclusions of Law Paragraph 45 by holding that Respondent's actions were a "technical" violation of Section 489.129(1)(a). As discussed in Paragraphs 1 through 12, above, Respondent did not violate Section 489.129(1)(a). Moreover, the ALJ held that Respondent "did not act fraudulently or with any ill intent and that he was without any knowledge that he was obtaining a license improperly." See Recommended Order, Paragraph 45. Therefore, the Board should reject the ALJ's holding in Paragraph 45 that the Respondent's actions were a "technical" violation of Section 489.129(1)(a).

28. **Exception 19**: The ALJ erred in Conclusions of Law Paragraph 46 by stating that the Department is "technically entitled" to revoke Respondent's license. As discussed in

Paragraphs 1 through 21, above, Respondent did not violate Florida law and, therefore, the Department does not have the authority to revoke Respondent's license. Moreover, the ALJ held that Respondent "did not act fraudulently or with any ill intent and that he was without any knowledge that he was obtaining a license improperly." See Recommended Order, Paragraph 45. Therefore, the Board should reject the ALJ's holding in Paragraph 46 that the Department is "technically entitled" to revoke Respondent's license.

29. **Exception 20**: The ALJ erred in Conclusions of Law Paragraph 46 by finding that Respondent must "relinquish" his license. A "relinquishment" is penal in nature. By the very terms of the stipulated facts and the ALJ's findings in his conclusions of law, it is undisputed that "Respondent did nothing improperly in this case." See Paragraph 47 of the Recommended Order. Moreover, the ALJ held that Respondent "did not act fraudulently or with any ill intent and that he was without any knowledge that he was obtaining a license improperly." See Recommended Order, Paragraph 45. As such, Respondent did not act in a manner that should subject him to any punishment, including relinquishment. Therefore, the Board should reject the ALJ's holding in Paragraph 46 that Respondent must relinquish his license.

30. **Exception 21**: The ALJ erred in Conclusions of Law Paragraph 46 by finding that the relinquishment of Respondent's license would "place Respondent in essentially the same position that he was in before he was defrauded by employees of the BCCO: that of a licensee applicant." However, this holding is erroneous, as Rule 61G4-12.017(3)(a), Fla. Admin. Code, allows the Board to deny a licensee from re-applying after the relinquishment of a license. Moreover, it should be noted that the Board takes the position that an individual whose license has been relinquished cannot re-apply for five years.

31. Regardless of the Respondent's view that the Board lacks authority to apply a five-year re-application bar to relinquishment cases, it is Respondent's understanding that the Board will still seek to impose a penalty on Respondent that he not re-apply for five years should he voluntarily or otherwise relinquish his license. Therefore, the Board should reject the ALJ's holding in Paragraph 46 that the relinquishment of Respondent's license would "place Respondent in essentially the same position that he was in before he was defrauded by employees of the BCCO: that of a licensee applicant."

32. **Exception 22**: The ALJ erred in Conclusions of Law Paragraph 46 by finding that the Department should revoke Respondent's license if Respondent does not "voluntarily relinquish" his license. As discussed in Paragraphs 1 through 21, above, Respondent did not violate Florida law. The ALJ held that Respondent "did not act fraudulently or with any ill intent and that he was without any knowledge that he was obtaining a license improperly." See Recommended Order, Paragraph 45. Therefore, the Department does not have the authority to revoke Respondent's license, and Respondent should not be penalized by either relinquishment or revocation because Respondent did not violate Florida law. As such, the only appropriate outcome is that the license be made null and void by the Department, or that Respondent be allowed to apply for his license (without any bar from reapplying for a license), resulting in the merger of the existing license with the future license. Therefore, the Board should reject the ALJ's holding in Paragraph 46 that the Department should revoke Respondent's license if Respondent does not "voluntarily relinquish" his license.

33. **Exception 23**: The ALJ also erred in Conclusions of Law Paragraph 47 by holding that "both parties have stipulated that ... [the license] was obtained based upon false information." The ALJ did not find any fact that established that Respondent obtained anything

based upon a false information. Certainly, the record below does not contain any such stipulation by the parties. There is no competent substantial record evidence in the stipulated findings of fact or the Administrative Law Judge's own findings of fact that Respondent submitted "false information." Therefore, the Board should reject the ALJ's holding in Paragraph 47 that Respondent obtained a certificate of authority based upon "false information."

Exceptions Regarding ALJ's conclusion regarding the Recommendation

34. The ALJ erred in his final recommendation, which states:

> Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered by the Department finding that Juan Carlos Cuellar violated the provisions of Sections 489.129(1)(a) and (m), and 455.227(1)(h), Florida Statutes, as alleged in Counts I, III, and IV of the Administrative Complaint; dismissing Count II of the Administrative Complaint; requiring that Respondent pay the costs incurred by the Department in investigating and prosecuting this matter; giving Respondent 30 days to voluntarily relinquish his license; and revoking Respondent's license if he fails to voluntarily relinquish it within 30 days of the final order.

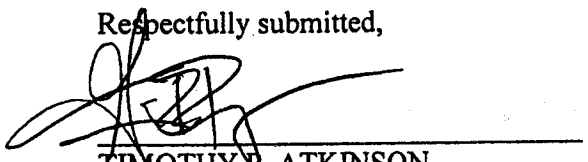
35. **Exception 24**: The ALJ erred in the "Recommendation" by determining that Respondent violated Sections 489.129(1)(a), 489.129(1)(m), and 455.227(1)(h), Florida Statutes, as alleged in Counts I, III, and IV of the Administrative Complaint. As discussed in Paragraphs 1 through 21, above, Respondent did not violate Sections 489.129(1)(a), 489.129(1)(m), or 455.227(1)(h). Therefore, the Board should reject the ALJ's conclusion and recommendation that Respondent violated Sections 489.129(1)(a), 489.129(1)(m), and 455.227(1)(h), Florida Statutes.

36. **Exception 25**: The ALJ erred in the "Recommendation" holding that Respondent must relinquish his license or have his license revoked. As noted above, it is undisputed that Respondent did not act improperly in this case. As discussed in Paragraphs 1 through 21, above, Respondent did not violate Florida law and, therefore, the Department does not have the

authority to revoke Respondent's license, and Respondent should not be penalized by either relinquishment or revocation because Respondent did not violate Florida law. As such, the only appropriate outcome is that the license be made null and void by the Department, or that Respondent be allowed to apply for his license, resulting in the merger of the existing license with the future license.

37. **Exception 26**: The ALJ erred in the "Recommendation" holding that Respondent must relinquish his license or have his license revoked. As noted above, it is undisputed that Respondent did not act improperly in this case. As discussed in Paragraphs 1 through 21, above, Respondent did not violate Florida law and, therefore, the Department does not have the authority to revoke Respondent's license, and Respondent should not be penalized by either relinquishment or revocation because Respondent did not violate Florida law. To conclude otherwise violates the canon of statutory construction that statutes should be interpreted to avoid "unreasonable, harsh, or absurd consequences." Thompson v. State, 695 So. 2d 691, 693 (Fla. 1997). Here, it would be unreasonable, harsh, and absurd for Respondent to be guilty of "misrepresentation" even though Respondent had no knowledge that he submitted documents which were not genuine. As such, the Board should reject the ALJ's "Recommendation."

Respectfully submitted,



TIMOTHY F. ATKINSON
Florida Bar No.: 982260
GAVIN D. BURGESS
Florida Bar No.: 13311

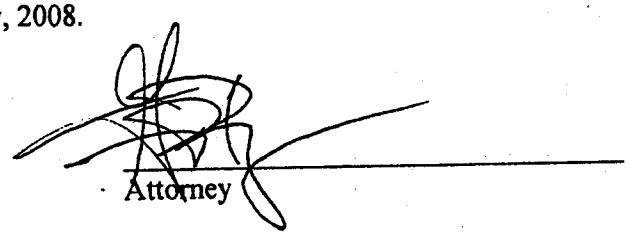
OERTEL, FERNANDEZ, COLE & BRYANT, P.A.
P.O. Box 1110
Tallahassee, Florida 32302-1110
(850) 521-0700
(850) 521-0720 Facsimile

tatkinson@ohfc.com
gburgess@ohfc.com

Attorneys for Respondent Juan Carlos Cuellar

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document has been filed via Hand Delivery with the Agency Clerk, Florida Department of Business & Professional Regulation, 1940 North Monroe Street, Tallahassee, Florida 32399; a copy by U.S. Mail and Facsimile Transmission to P. Brian Coates and Matthew Morton, Office of General Counsel, Florida Department of Business & Professional Regulation, 1940 North Monroe Street, Suite 42, Tallahassee, Florida 32399, a copy by U.S. Mail and Facsimile Transmission to Richard Alayon, Alayon & Associates, 4551 Ponce de Leon Boulevard, Coral Gables, Florida 33146, and a copy by Hand Delivery to G.W. Harrell, Executive Director, Construction Industry Licensing Board, Florida Department of Business & Professional Regulation, 1940 North Monroe Street, Tallahassee, Florida 32399, on this 18th day of January, 2008.



Attorney

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STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
CONSTRUCTION INDUSTRY LICENSING BOARD
DIVISION I

FILED
Department of Business and Professional Regulation
DEPUTY CLERK
CLERK Brandon M. Nichols
DATE 1-16-2008

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION,

Petitioner,

v.

DBPR Case No. 2006-045914
DOAH Case No. 07-2823PL

JUAN CARLOS CUELLAR,

Respondent.
_____/

PETITIONER'S EXCEPTION TO THE RECOMMENDED ORDER

COMES NOW, The Department of Business and Professional Regulation, ("Petitioner"), by and through its undersigned counsel, and files Petitioner's Exception to the Recommended Order issued on December 13, 2007, by Administrative Law Judge Larry J. Sartin ("ALJ") of the Division of Administrative Hearings (See attached as Exhibit 1) pursuant to §120.57(1)(k), *Florida Statutes*, and in support thereof states as follows:

1. Petitioner takes exception to the recommended penalty of the Recommended Order contained on page 20, which states in its entirety:

> Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered by the Department finding that Juan Carlos Cuellar violated the provisions of Sections 489.129(1)(a) and (m), and 455.227(1)(h), Florida Statutes, as alleged in Counts I, III, and IV of the Administrative Complaint; dismissing Count II of the Administrative Complaint; requiring that Respondent pay the costs incurred by the Department in investigating and prosecuting this matter; giving Respondent 30 days to voluntarily relinquish his license; and revoking Respondent's license if he fails to voluntarily relinquish it within 30 days of the final order.

2. Section 120.57(1)(l), *Florida Statutes*, provides:

> The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. *The agency may accept the recommended penalty in a recommended order, but may not reduce or increase it without a review of the complete record and without stating with particularity its reasons therefor in the order, by citing to the record in justifying the action.*

(emphasis added)

3. As long as a professional regulatory agency or board provides guidelines for imposing penalties, the agency complies with Section 120.57(1), Florida Statutes,[1] and the increased penalty falls within the guidelines established by its statute, the agency or board may adopt the hearing officer's findings of fact and conclusions of law, but reduce or increase the recommended penalty. Criminal Justice Standards and Training Commission v. Bradley, 596 So. 2d 661 (Fla. 1992).

4. The standard of review is that the agency or board may not increase or reduce the recommended penalty in a recommended order without a review of the complete record and without stating its reasons therefore in the order by citing to the record in justifying the action. Section 120.57(1)(l), Florida Statutes; Fowler v. Dep't of Health, Board Optometry, 821 So. 2d

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[1] Criminal Justice Standards and Training Commission v. Bradley, 596 So. 2d 661, at 663, refers to Section 120.57(1)(b)(10), *Florida Statues*, which is now substantially similar to Section 120.57(1)(l), *Florida Statutes*.

1246 (Fla. 1st DCA 2002). The agency must review the transcript of the hearing. Roberts v. Dep't of Corrections, 690 So. 2d 1383 (Fla. 1st DCA 1997).

5. Petitioner asserts that the ALJ understood what constituted the proper penalty pursuant to the disciplinary guidelines established by the Construction Industry licensing Board ("Board") when he noted in Paragraph 46 of the Recommended Order that: "As to the suggested revocation of Respondent's license, it is concluded that before imposing this remedy, which the Department is technically entitled to do . . ."

6. The Recommended Order then proceeds to recommend that the Board allow the Respondent to voluntarily relinquish his license, establishing what the ALJ perceives to be a substantial difference between a voluntary relinquishment of his license by Respondent and the revocation of Respondent's license.

7. There is no prescribed mechanism for voluntary relinquishment of a license to the Board in Chapters 455 and 489, Florida Statutes, or the penalty guidelines established by the Board in Chapter 61G4, Florida Administrative Code.

8. The only mechanism for voluntary relinquishment of a license such as that held by Respondent is through agreement of the Respondent and the Board.

9. An ALJ does not have the authority to order that the parties to a case before him agree to settle the case in a specific manner. Neither Florida Statutes nor the Board's disciplinary guidelines establish that forced agreement of the parties to facilitate relinquishment of a license constitutes appropriate discipline.

10. The ALJ in this case is attempting to have a final order issued ordering that the Department and Respondent enter into an agreement and then order that the Board be required to accept such agreement.

11. This is not a case of increasing the penalties provided in the Recommended Order as the Recommended Order provides for the revocation of respondent's license if he fails to voluntarily relinquish his license; however, the ALJ attempts to create or fashion a remedy not authorized by statute or the disciplinary guidelines by ordering that Respondent and the Board be forced to agree to the voluntary relinquishment of Respondent's license.

12. Section 455.2273(5), Florida Statutes, provides as follows: "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."

13. There are no provisions in either statute or rule establishing that forced agreement of the parties to facilitate voluntary relinquishment of a license is an appropriate form of discipline. Florida law does not even provide a method by which voluntary relinquishment would occur in cases such as the one at issue.

14. Forced agreement of the parties to facilitate voluntary relinquishment of a license is simply not an appropriate or even defined method of punishment available to the Department. *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 Section 455.2273(5), Florida Statutes ("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).

15. As such, Petitioner requests that the Board adopt the ALJ's findings of fact in their entirety, the conclusions of law in their entirety and all other recommendations of the Recommended Order with the exception of exercising the penalty of revocation of Respondent's license as authorized in Paragraph 46 of the Recommended Order and deleting the language giving Respondent 30 days to voluntarily relinquish his license.

WHEREFORE, for all of the foregoing reasons, Petitioner urges the Board to take exception to the Recommended Order only as to the inclusion of a penalty not explicitly set forth in either Florida Statutes or Florida Administrative Code. Petitioner requests that the Board adopt the ALJ's findings of fact in their entirety, the conclusions of law in their entirety and all recommendations of the Recommended Order with the exception of the recommendation that Respondent be given thirty days to voluntarily relinquish his license. Petitioner urges the Board to follow its disciplinary guidelines and impose a penalty of revocation of Respondent's license in addition to the other recommendations of the Recommended Order, including requiring

Respondent to pay investigative costs to the Department in the amount of $132.94.

Respectfully Submitted,

Matthew D. Morton, Esq.
Assistant General Counsel
Dept. of Business & Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32388-2202
Phone No: (850) 414-8132
Fla. Bar No: 0415332

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by e-mail to Timothy Atkinson and Richard Alayon this 16th day of January, 2008.

Matthew D. Morton, Esq.

STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
CONSTRUCTION INDUSTRY LICENSING BOARD
DIVISION I

DEPARTMENT OF BUSINESS AND
PROFESSIONAL REGULATION,

Petitioner,

vs. Case No. 2006-045914

JUAN CARLOS CUELLAR,

Respondent.

_____/

ADMINISTRATIVE COMPLAINT

Petitioner, DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, ("Petitioner"), files this Administrative Complaint before the Construction Industry Licensing Board, against JUAN CARLOS CUELLAR, ("Respondent"), and says:

1. Petitioner is the state agency charged with regulating the practice of contracting pursuant to Section 20.165, Florida Statutes, and Chapters 455 and 489, Florida Statutes.

2. Respondent is a Registered General Contractor in the State of Florida, having been issued license number RG291103667.

3. Respondent is registered as doing business as Cuellar Construction & Drywall, Inc. Cuellar Construction & Drywall, Inc. is a qualified business in the State of Florida, having been issued license number QB41342.

4. Respondent's address of record is 4730 SW 74th Ave., Miami, Florida 33155.

EXHIBIT
A

5. The Construction Trades and Qualifying Board for the Miami-Dade County Code Compliance Office (hereinafter "BCCO") are charged with licensing contractors who practice solely within the jurisdiction of Miami-Dade County, Florida.

6. The BCCO requires all persons engaging in construction contracting in Miami-Dade County, Florida to successfully obtain a Competency Card from the BCCO. To obtain a Competency Card an applicant must submit an application, successfully pass a contractor's exam or show proof of adequate experience in lieu of a successful examination score, show proof of good credit and insurance coverage, and be approved by the qualifying board of the BCCO.

7. Respondent obtained a fraudulent Competency Card from employees of the BCCO. Respondent failed to submit an application for a Competency Card with the BCCO. Respondent did not take a contractor's exam or provide proof of experience in lieu of the exam, or provide proof of good credit and insurance coverage. In addition, Respondent was not approved by the qualifying board of the BCCO for a Competency Card.

8. In or about June 2005, Respondent submitted to the Department an application for Registration and Qualifying Business License.

9. As part of the application process, the Department required Respondent to submit a copy of his Competency Card from the BCCO, and sign the attest statement on the application that Respondent had successfully completed and attained the requisite education and experience for the Registration and Qualifying Business License.

10. In or about June 2005, at the time Respondent submitted the application, Respondent knew or reasonably knew that Respondent's Competency Card was fraudulent and the attest statement signed by Respondent was false.

11. The fraudulent Competency Card and attest statement were material information submitted by Respondent to the Department.

12. In or about June 2005, at the time Respondent filled out the application, Respondent knew or reasonably knew the Department would rely on the fraudulent Competency Card and attest statement in the application in its decision to issue Respondent a Registration and Qualifying Business License.

13. In or about June 2005, based upon the submission of Respondent's fraudulent Competency Card and false attest statement, the Department issued Respondent a Registration and Qualifying Business License.

COUNT I

14. Petitioner realleges and incorporates the allegations set forth in paragraphs one through thirteen as though fully set forth herein.

15. Rule 61G4-15.008, Florida Administrative Code, states in part that material false statements or information submitted by applicant for registration, or renewal for renewal of registration or submitted for any reissuance of registration, shall constitute a violation of Section 489.129(1)(a), Florida Statutes, and shall result in suspension or revocation of the registration.

16. Based on the Foregoing, Respondent violated Section 489.129(1)(a), Florida Statutes, by obtaining a certificate, registration, or certificate of authority by fraud or misrepresentation.

COUNT II

17. Petitioner realleges and incorporates the allegations set forth in paragraphs one through thirteen as though fully set forth herein.

18. Section 489.127(1)(d), Florida Statutes, provides in part that no person shall knowingly give false or forged evidence to the board or a member thereof.

19. Based on the foregoing, Respondent violated Section 489.129(1)(i), Florida Statutes, by failing in any material respect to comply with the provisions of this part or violating a rule or lawful order of the board, by having violated Section 489.127(1)(d), Florida Statutes.

COUNT III

20. Petitioner realleges and incorporates the allegations set forth in paragraphs one through thirteen as though fully set forth herein.

21. Based on the foregoing, 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

22. Petitioner realleges and incorporates the allegations set forth in paragraphs one through thirteen as though fully set forth herein.

23. Based on the foregoing, the Respondent has violated Section 489.129(1)(m), Florida Statutes, by committing incompetency or misconduct in the practice of contracting.

Wherefore, Petitioner respectfully requests the Construction Industry Licensing Board enter an Order imposing one or more of the following penalties: place on probation, reprimand the licensee, revoke, suspend, deny the issuance or renewal of the certificate or registration, require financial restitution to a consumer, impose an administrative fine not to exceed $10,000 per violation, require continuing education, assess costs associated with investigation and prosecution, impose any or all penalties delineated within Section 455.227(2), Florida Statutes,

and/or any other relief that the Board is authorized to impose pursuant to Chapters 455, 489, Florida Statutes, and/or the rules promulgated thereunder.

Signed this 6th day of December, 2006.

P. Brian Coats
Assistant General Counsel

Counsel for Department:

Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, FL 32399-2202

FILED
Department of Business and Professional Regulation
AGENCY CLERK

CLERK Sarah L. Workman
DATE 12-8-2006

Case No. 2006-045914

PC Found: December 5, 2006
Division I: Del Vecchio & Cox

STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION

Final Order No. BPR-2006-09217 Date: 12-8-06
FILED
Department of Business and Professional Regulation
AGENCY CLERK
Sarah Wachman, Agency Clerk
By: Blanda M. Nichols

IN RE:

The Emergency Suspension of the Registered General Contractor's license of JUAN CARLOS CUELLAR,

License No.: RG291103667

/

CASE NO.: 2006-045914

ORDER OF EMERGENCY SUSPENSION OF LICENSE

Simone Marstiller, Secretary of the Department of Business and Professional Regulation, pursuant to the legislative authority granted by section 120.60(6), Florida Statutes, hereby orders the emergency suspension of Juan Carlos Cuellar's license to general contracting, license number RG291103667. The emergency suspension of Juan Carlos Cuellar's license is supported by the following facts and reasons:

1. Department of Business and Professional Regulation is the state agency charged with regulating the practice of contracting, pursuant to section 20.165, Florida Statutes, and Chapters 455 and 489, Part I, Florida Statutes.

2. Section 455.225(8), Florida Statutes, empowers the Secretary of the Department of Business and Professional Regulation to summarily suspend a license in accordance with Section 120.60(6), Florida Statutes when the Secretary finds that licensee's practice constitutes an immediate serious danger to public health, safety, or welfare.

3. Juan Carlos Cuellar received a fraudulent Miami–Dade building contractor's business competency card 05B000077 from two employees of the Miami-Dade Building Code Compliance Office.

4. In order to properly receive a Miami-Dade Building Business Certificate of Competency, a person must: submit a completed application, take and passed a general contractors' examination administered by an authorized testing vendor or provide proof of general construction experience in lieu of the examination requirements, and then be approved by the Miami-Dade County Construction Trades and Qualifying Board.

5. Juan Carlos Cuellar did not submit the required application in order to lawfully receive Miami-Dade County Building Code Compliance Office business certification of competency card 05B000077.

6. Juan Carlos Cuellar did not take or pass an approved Miami-Dade County general contractor's examination administered by the authorized testing facility for the Miami-Dade County Building Code Compliance Office, or in lieu of the testing requirement provide proof of adequate experience in general construction.

7. Juan Carlos Cuellar was never approved by the Miami-Dade County Construction Trades and Qualifying Board to be issued a Miami-Dade Business Certificate of Competency card to engage in general contracting.

8. In June 2005, Juan Carlos Cuellar submitted an application to the Department of Business and Professional Regulation (hereinafter "Department") to register his fraudulent Miami–Dade general contractor's business competency card 05B000077 and receive a registered general contractor's license number from the Department.

9. Section 489.117(1), Florida Statutes, requires that an applicant for a Registration submit the required fee and file evidence, in a form provided by the Department, of holding a current local occupational license required by any municipality, county, or development district, if any, for the type of work for which the 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.

10. Juan Carlos Cuellar did not submit evidence indicating successful compliance with the local licensing requirements. Juan Carlos Cuellar submitted a fraudulent competency card issued by two employees of the Miami-Dade County Building Code Compliance without authority from Miami-Dade county as evidence of compliance with the local licensing requirements.

11. Juan Carlos Cuellar is not qualified by experience, examination, or licensure to engage in the practice of general contracting in the State of Florida as a registered general contractor.

12. As a general contractor in the State of Florida, Juan Carlos Cuellar is permitted to perform wide variety of construction services including the construction of commercial and multi-dwelling residential buildings up to three stories in height. Such work includes the construction, manipulation, and installation of the structural members for such buildings. In addition, Juan Carlos Cuellar is permitted to construct sanitary sewer systems, storm collection systems, and water distribution systems for public and private properties. Malfunction of either of these activities can result in serious injury or death to human life. Therefore, such work constitutes a life safety concern for the citizens of the State of Florida.

13. Juan Carlos Cuellar's demonstrated lack of qualification and inability to meet the requirements to hold a registered general contractor's license indicates that he is incapable of practicing general contracting with a reasonable degree of skill and safety necessary to ensure the safety and welfare of the public. Juan Carlos Cuellar's continued practice of general contracting constitutes an immediate threat to the health, safety and welfare of the public.

14. Suspension of Juan Carlos Cuellar's license to practice general contracting is the least restrictive means of immediately protecting the health, safety, and welfare of the public.

15. The Department has moved to institute proceedings pursuant to Section 120.569 and Chapter 120.57(1), Florida Statutes, by requesting a meeting of the Probable Cause Panel for the Florida Construction Industry Licensing Board on December 5, 2006.

CONCLUSIONS OF LAW

16. The Secretary of the Department of Business and Professional Regulation has jurisdiction over this matter, pursuant to Section 455.225(8), Florida Statutes.

17. The procedure instituted in this matter provides Juan Carlos Cuellar at least the same protections as is given by other statutes, the State Constitution, or the United States Constitution.

18. Sections 120.60(6) and 455.225(8), Florida Statutes, provide authority for the Secretary to issue an Emergency Suspension Order when she determines that an immediate serious danger to the public health, safety, or welfare requires emergency suspension, restriction, or limitation of a license and such action is the least restrictive means necessary to protect the health, safety, and welfare of the public.

19. Based on the foregoing, the Secretary finds that Juan Carlos Cuellar is unable to practice general contracting with the requisite reasonable skill or safety to ensure the safety of the public and that his continued practice of general contracting constitutes an immediate and serious danger to the public health, safety, and welfare.

20. Further, the Secretary finds that this summary suspension is fair under the circumstances and necessary to adequately protect the public.

WHEREFORE, in accordance with Sections 120.60(6), 120.569, and 120.57(1), Florida Statutes, it is THEREFORE ORDERED THAT:

1. Juan Carlos Cuellar's registered general contractors' license RG291103667 is hereby IMMEDIATELY SUSPENDED.

2. A proceeding seeking formal suspension or revocation of Juan Carlos Cuellar's registered general contractor's license will be promptly instituted and acted upon in compliance with the provisions of Sections 120.60(6) and 120.57, Florida Statutes, and this Order shall be filed in accordance with Sections 120.54(4), 120.569, and 120.57(1), Florida Statutes.

DONE AND ORDERED this 24th day of October, 2006.

SIMONE MARSTILLER
SECRETARY

COUNSEL FOR THE DEPARTMENT:

Brian Coats
Assistant General Counsel
Fla. Bar No. 0829811
Department of Business
and Professional Regulation
1940 N. Monroe St.
Tallahassee, FL 32399-2202
Phone: (850) 488-0062
Fax: (850) 921-9186

NOTICE OF APPELLATE RIGHTS

Pursuant to Section 120.54(9)(a), Florida Statutes, the agency's findings of immediate danger, necessity, and procedural fairness shall be judicially reviewable.

A review of these proceedings is governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a Notice of Appeal in accordance with Rule 9.100, Florida Rules of Appellate Procedure, with the clerk of the Department of Business and Professional Regulation, and a second copy of the petition accompanied by the filing fee prescribed by law with the District Court of Appeal within 30 days of the date this Order is filed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order of Emergency Suspension has been furnished by B Calderon to Juan Carlos Cuellar, at 4730 SW 74th Ave., Miami, FL 33155 on this 19 day of December, 2006.

For the Department