

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
CONSTRUCTION INDUSTRY LICENSING)
BOARD,)
)
Petitioner,)
)
vs.) Case No. 07-2824PL
)
LUIS GARCIA,)
)
Respondent.)
_____)

RECOMMENDED ORDER

This case came before Larry J. Sartin, an Administrative Law Judge of the Division of Administrative Hearings, on a factual record stipulated to by the parties.

APPEARANCES

For Petitioner: Matthew D. Morton
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For Respondent: Timothy Atkinson, Esquire
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STATEMENT OF THE ISSUES

The issues in this case are whether Respondent, Luis Garcia, committed the offenses alleged in an Administrative Complaint issued by Petitioner, the Department of Business and Professional Regulation, on December 6, 2006, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On or about December 6, 2006, Petitioner issued a four-count Administrative Complaint, DBPR Case No. 2006-048994, alleging that Mr. Garcia had violated certain statutory provisions governing the conduct of individuals in Florida licensed by the Construction Industry Licensing Board. Mr. Garcia, through counsel, disputed the factual allegations of the Administrative Complaint and requested "a hearing before an administrative law judge before the Division of Administrative Hearings" pursuant to Section 120.57(1), Florida Statutes (2007).

A copy of the Administrative Complaint and the letter requesting a formal hearing was filed with the Division of Administrative Hearings on June 26, 2007. The matter was designated DOAH Case No. 07-2824PL and was assigned to the undersigned.

The final hearing was scheduled for August 31, 2007, by Notice of Hearing by Video Teleconference entered July 10, 2007.

After continuing the hearing to September 26, 2007, the parties filed a Joint Motion to Cancel Hearing. In this Motion the parties represented that they had stipulated to the pertinent facts in this case and had agreed to proceeding without a formal administrative hearing. The parties, however, also requested that they be given an opportunity to present oral argument, file proposed recommended orders, and that a recommended order be entered.

The Joint Motion to Cancel Hearing was granted by an Order entered September 20, 2007. Oral argument, to be heard by telephone, was scheduled for October 10, 2007, and the parties were given until November 5, 2007, to file proposed recommended orders.

Oral argument was subsequently rescheduled and held on November 8, 2007. During that hearing, in addition to hearing argument on the issues involved in this case, the date for filing proposed recommended orders was extended to November 15, 2007.

Both parties timely filed proposed recommended orders, which have been fully considered in rendering this Recommended Order.

All references to the Florida Statutes in this Recommended Order are to the codification applicable to the year(s) in which

the events alleged in the Administrative Complaint took place, unless otherwise noted.

STIPULATED FINDINGS OF FACT

1. Prior to June 2005, Respondent received what appeared to be a valid Miami-Dade Building Business Certificate of Competency.

2. Upon receipt, Respondent applied to the Department of Business and Professional Regulation (hereinafter referred to as the "Department") to obtain a registered contractor's license using the Certificate of Competency.

3. Based on the Certificate of Competency, the Department issued Respondent a registered contractor's license bearing license number RF11067267.

4. Respondent also applied for a certificate of authority for his business, A.P.A. Plumbing Corporation (hereinafter referred to as "APA").

5. Based on the Certificate of Competency and the registered contractor's license being granted, the Department issued a certificate of authority to APA, QB 42763.

6. Subsequent to the Department's issuance of both the registered contractor's license to Respondent and the certificate of authority for APA, Respondent and the Department learned that the Miami-Dade Building Business Certificate of

Competency (hereinafter referred to as the "BCCO") obtained by Respondent was not a valid certificate.

7. Respondent's actions were not as a result of any fraud or intentional action on the part of Respondent; however, it is acknowledged by all parties that the Miami-Dade Building Business Certificate of Competency obtained by Respondent was not valid.

8. At no time during the application process or upon attesting to the qualified business license application did Respondent have knowledge that the Miami-Dade BCCO employees were engaged in a scheme to defraud the public.

9. At no time during the application process or upon attesting to the qualified business license application did Respondent have knowledge that Respondent obtained the BCCO Competency Card in deviation of any state laws or rules, or local ordinances.

10. At no time during the application process or upon attesting to the qualified business license application did Respondent have knowledge that the BCCO Competency Card was not a valid certificate.

11. At no time during the application process or upon attesting to the qualified business license application did Respondent have knowledge that Respondent's attestation on the application was inaccurate.

12. At no time during the application process or upon attesting to the qualified business license application did Respondent have knowledge that the approved BCCO qualifying board did not approve the Competency Card.

13. At no time did Respondent have knowledge that any documents Respondent submitted to the Department contained false, forged, or otherwise inaccurate information or material.

14. 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.

15. The parties stipulated that the Respondent was not entitled to the registered contractor's license and certificate of authority because the Miami-Dade Building Business Certificate of Competency was not a valid certificate.

16. At the time of application to the Department, Respondent was not qualified by any local jurisdiction or any other method necessary to receive a registered contractor's license from the Department.

17. Subsequent to Respondent's initial application and receipt of registered contractor's license RF11067267,

Respondent has taken the competency test required to be properly licensed through the Department.

18. Respondent asserts that he has passed the test. The Department will not dispute this if he is able to provide verification that he did receive a passing score.

CONCLUSIONS OF LAW

A. Jurisdiction.

19. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2007).

B. The Burden and Standard of Proof.

20. The Department seeks to impose penalties against Respondent through the Administrative Complaint that include mandatory and discretionary suspension or revocation of his general contractor's license. Therefore, the Department has the burden of proving the specific allegations of fact that support its charges by clear and convincing evidence. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); and Pou v. Department of Insurance and Treasurer, 707 So. 2d 941 (Fla. 3d DCA 1998).

21. What constitutes "clear and convincing" evidence was described by the court in Evans Packing Co. v. Department of Agriculture and Consumer Services, 550 So. 2d 112, 116, n. 5 (Fla. 1st DCA 1989), as follows:

. . . [C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the evidence must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact the firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established. Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

See also In re Graziano, 696 So. 2d 744 (Fla. 1997); In re Davey, 645 So. 2d 398 (Fla. 1994); and Walker v. Florida Department of Business and Professional Regulation, 705 So. 2d 652 (Fla. 5th DCA 1998)(Sharp, J., dissenting).

C. The Charges of the Administrative Complaint.

22. Section 489.129, Florida Statutes, provides that disciplinary action may be taken against a certificateholder, registrant, or licensee if it is found that the individual has committed certain enumerated offenses. In this matter, it has been alleged in Counts I, II, and IV, that Respondent committed the offenses described in Subsections 489.129(1)(a), (d), and (m), Florida Statutes, which provide:

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

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

. . . .

(d) Performing any act which assists a person or entity in engaging in the prohibited uncertified and unregistered practice of contracting, if the certificateholder or registrant knows or has reasonable grounds to know that the person or entity was uncertified and unregistered.

. . . .

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

23. In Count III of the Administrative Complaint it is alleged that Respondent violated Section 455.227(1)(h), Florida

Statutes, which provides that the following act constitutes grounds for which disciplinary action may be taken:

(h) 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.

24. Because of their penal nature, the foregoing statutory 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.'").

D. Count I; Section 489.129(1)(a), Florida Statutes.

25. While Respondent has not been specifically charged with a violation of Florida Administrative Code Rule 61G4-

15.008, the Department cited the Rule, which contains 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, in support of Count I of the Administrative Complaint:

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.

26. It is the Department's position, that despite the fact that Respondent did not commit "fraud" in obtaining his license and a certificate of authority for APA, and, in fact, did not knowingly submit false information to the Department in obtaining his license and the certificate of competency, "[m]aterial false statements or information" were nonetheless submitted by Respondent in support thereof.

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 APA 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.

E. Count II; Section 489.129(1)(d), Florida Statutes.

29. In order to prove a violation of Section 489.129(1)(d), Florida Statutes, the Department was required to prove that "false or forged evidence" was given to the "board or a member thereof" "knowingly" by the Respondent.

30. The Department has conceded in Petitioner's Proposed Recommended Order that it failed to prove this violation. Based upon the facts stipulated to by the parties, Respondent was without knowledge that any information submitted to the Department or "board" was "false or forged."

F. Count III; Section 455.227(1)(h), Florida Statutes.

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.

G. Count IV; Section 489.129(1)(m), Florida Statutes.

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.

H. The Appropriate Penalty.

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.

RECOMMENDATION

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 Luis Garcia 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.

DONE AND ENTERED this 13th day of December, 2007, in
Tallahassee, Leon County, Florida.



LARRY J. SARTIN
Administrative Law Judge
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Filed with the Clerk of the
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this 13th day of December, 2007.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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