

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
CONSTRUCTION INDUSTRY)
LICENSING BOARD,)
)
Petitioner,)
)
vs.) Case No. 07-5493PL
)
RANDY FALLS,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held on February 6, 2008, in Deland, Florida, before the Division of Administrative Hearings by its designated Administrative Law Judge, Barbara J. Staros.

APPEARANCES

For Petitioner: Collin W. L. McLeod, Esquire
Wright, Fulford, Moorhead & Brown, P.A.
145 North Magnolia Avenue
Post Office Box 2828
Orlando, Florida 32803

For Respondent: Randy Falls, pro se
1250 Scottsdale Drive
Ormond Beach, Florida 32164

STATEMENT OF THE ISSUE

At issue is whether Respondent committed the offenses set forth in the Administrative Complaint and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

Petitioner, Department of Business and Professional Regulation, Construction Industry Licensing Board (Department), filed an Administrative Complaint on April 19, 2007, which contained three counts of professional violations against Respondent, Randy Falls. Specifically, the Department charged Respondent with violations of Subsections 489.129(1)(d),(e) and (m), Florida Statutes, by assisting an unlicensed contractor in engaging in the unauthorized practice of contracting; and by committing incompetency or misconduct in the practice of contracting.

Respondent disputed the allegations of the Administrative Complaint and requested an administrative hearing. The case was referred to the Division of Administrative Hearings on or about December 5, 2007, and assigned to Administrative Law Judge Charles C. Adams. A formal hearing was set for February 6, 2008.

Prior to hearing, the case was transferred to the undersigned who presided at the scheduled hearing. At hearing, Petitioner presented the testimony of Marvin Harris, Paul Ross, Maybeth Irizarry-Binon, and Kathy Arundel. Petitioner's Exhibits numbered 1 through 14 were admitted into evidence.

Respondent testified on his own behalf. Respondent's Exhibits numbered 1 and 2 were admitted into evidence.

A Transcript, consisting of one volume, was filed on February 18, 2008. The Department timely filed a Proposed Recommended Order, and Respondent timely filed a post-hearing letter, which have been considered in the preparation of this Recommended Order. All citations are to Florida Statutes (2004) unless otherwise indicated.

FINDINGS OF FACT

1. Petitioner, the Department, is the state agency charged with the duty and responsibility of regulating the practice of contracting pursuant to Chapters 20, 455 and 489.

2. At all times material to the allegations of the Administrative Complaint, Randy Falls, d/b/a DRC Contractors LLC, was licensed as a Florida State Certified Building Contractor, having been issued license number CGC 1507600 on August 12, 2004. His licensure status is designated as "Current, Active."

3. Kingston Shores Condominiums (Kingston Shores) is located in Ormond Beach, Florida. Several condominiums in Kingston Shores were badly damaged in Hurricane Charlie in 2004.

4. Marvin Harris is the president of the condominium association of Kingston Shores. Following Hurricane Charlie, Mr. Harris was approached by Kerry Brooks of JTC Reconstruction and Restoration Services (JTC). Mr. Brooks proposed that his company perform repairs and reconstruction services to Kingston Shores.

5. Mr. Harris asked Mr. Brooks for the license number of the general contractor under whom JTC would be working, so it could be posted in the condominium offices. Initially, Mr. Brooks provided a license number of a general contractor who, when contacted by Mr. Harris, informed Mr. Harris that he knew nothing of JTC. Mr. Harris again asked Mr. Brooks for the license number of the general contractor and was given the license number of Respondent, Mr. Falls. Mr. Harris checked with "the department of licensing" to be sure Mr. Falls' license was valid, but did not contact Mr. Falls to make sure he was aware of the work being done by JTC.

6. The work performed by JTC was "extremely shoddy substandard work." After performing unacceptable work for approximately one year, JTC abandoned the project leaving the work unfinished.

7. In addition to the work done by JTC for Kingston Shores, at least one individual condominium owner, Paul Ross, contracted with JTC to perform restoration and repairs of his condominium unit. The contract between Mr. Ross and JTC, dated May 11, 2005, does not mention Mr. Falls or his company, DRC General Contractors. The contract was for a total of \$28,464.85. Mr. Ross confirmed through personal research that JTC was a Georgia company located outside of Atlanta and that Mr. Falls held a valid Florida general contractor's license.

8. Mr. Ross and his wife initially paid JTC \$5,652 for some work which was performed. He later paid JTC \$8,607, for which no work was performed. As with the work done for Kingston Shores, the work performed by JTC was unacceptable and incomplete when JTC abandoned the job. While Mr. Ross assumed that JTC was operating under the auspices of Mr. Falls and that Mr. Falls would be overseeing the work, he never paid any money to Mr. Falls.

9. About the time Mr. Harris was contacted by Mr. Brooks, Respondent was contacted by Jack Turner of JTC. According to Mr. Falls, Mr. Turner identified himself as a representative of Kingston Shores. Mr. Turner proposed that they (Falls and Turner) would sign a contract for work after Mr. Turner dealt with insurance companies, and that Mr. Falls would get a percentage of the money up front. At that point, Mr. Falls "pulled the permit." That is, on October 7, 2004, Mr. Falls completed, signed, and submitted a Volusia County Commercial Permit Application for Kingston Shores. The appropriate permit or permits were issued by Volusia County on November 30, 2004. Sometime thereafter, Mr. Falls moved to Pensacola and apparently did not have any more contact with Jack Turner.

10. At the time he pulled the permit, Mr. Falls did not have a contract with JTC, Kingston Shores, or any individual condominium owner. At no time material to this proceeding was Respondent involved in the supervision of the individuals who

performed the work done on the Kingston Shores property nor did he supply any of the workers who performed the work on the subject property.

11. On July 20, 2005, Mr. Falls wrote to Volusia County requesting that the construction permit(s) be deactivated "due to nonpayment to contractor."

12. Mr. Harris then contacted Mr. Falls who informed Mr. Harris that JTC owed him money, and that he would need \$12,000 to reinstate the permit(s). Mr. Harris did not agree to paying that amount and threatened legal action. According to Mr. Falls, he requested the \$12,000 because "they had done work without me knowing."

13. On October 26, 2005, Mr. Falls wrote to Volusia County requesting reinstatement of the construction permit "for final inspections."

14. After the permit(s) were reinstated, construction work resumed. It is unclear from the record who performed the work at that point, although Mr. Harris referred to having "other contractors come in." However, it was Mr. Falls who obtained the certificate of occupancy from Volusia County which is dated January 23, 2006.

15. Mr. Falls did not receive any payment from JTC for any work done at Kingston Shores. He acknowledges that pulling a permit without a contract or a letter of intent was "sheer stupidity I mean, I had just got my license, you know,

I just got it. So I was an idiot. I did something stupid, and unfortunately people got hurt over it." Mr. Falls shows genuine remorse for the consequences of his actions.

16. On January 24, 2006, Mr. Harris executed a General Release which states as follows:

Know all men by these presents that Marvin Harris, serving as representative for Kingston Shores Condominium Inc. (First Party) in consideration and [sic] services received, specifically re-applying for six (6) building permits, and passing the final inspection for C.O. Occupancy on all six (6) from DRC General Contractors, LLC and Randy Falls (Second Party) receipt of which is hereby acknowledged release the second party from any suits, damages relating to materials, or workmanship by Second Party at Kingston Shores Condominium, Inc. at 5500 Ocean Shore Blvd., Ormond Beach, Florida 32176.

17. Respondent is no longer in the construction business. He currently earns \$24,000 a year as an EMT and is studying to be a paramedic.

18. The amount of the Department's costs of investigation and prosecution is not in evidence

CONCLUSIONS OF LAW

19. The Division of Administrative Hearings has jurisdiction over the parties and subject matter in this case. §§ 120.569, 120.57(1), and 120.60(5), Fla. Stat. (2007)

20. Petitioner has the burden of proving by clear and convincing evidence the specific allegations of the

Administrative Complaint. See Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); Department of Banking and Finance v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996).

21. Subsection 489.129(1) reads in pertinent part as follows:

(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 \$5,000 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:

* * *

(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.

(e) Knowingly combining or conspiring with an uncertified or unregistered person by allowing his or her certificate, registration, or certificate of authority to be used by the uncertified or unregistered person with intent to evade the provisions of this part. When a certificateholder or registrant allows his or her certificate or registration to be used by one or more

business organizations without having any active participation in the operations, management, or control of such business organizations, such act constitutes prima facie evidence of an intent to evade the provisions of this part.

* * *

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

22. The Administrative Complaint charges Respondent with violating Subsection 489.129(1)(d), Florida Statutes, by assisting JTC, an unlicensed entity, to engage in the uncertified and unregistered practice of contracting. The evidence established that Respondent applied for and obtained the construction permit(s) and then did not do any work on the job. The evidence does not establish that Respondent knew that Jack Turner was uncertified or unregistered. However, as a general contractor, he should have known or at least attempted to find out, that the persons who contacted him to use his license number were unregistered or uncertified.

23. The Administrative Complaint charges Respondent with violating Subsection 489.129(1)(e), Florida Statutes, by allowing his certificate or registration to be used by one or more business organizations without having any active participation in the operations, management or control of such business operations. Under the express language of the statute, Respondent's actions of "pulling the permit" under his general contractor's license, which resulted in an unlicensed entity

engaging in construction activities, constitutes prima facie evidence of this violation. Accordingly, Petitioner has met its burden that Respondent violated this provision.

24. The Administrative Complaint charges Respondent with violating Subsection 489.129(1)(m), Florida Statutes, by committing incompetency or misconduct in the practice of contracting. The Department takes the position that Respondent's actions of deactivating the building permit for the project and requesting that the condominium association pay \$12,000; failing to perform the duties required of a contractor by failing to contract directly with the property owner; and failing to supervise the work performed on said property, constitute incompetency or misconduct. The Department has met its burden regarding this allegation.

25. The Department seeks imposition of fines in the total amount of \$6,000.00, restitution, and a requirement that Respondent attend a minimum of seven additional hours of continuing education classes, "live and in person." The fines sought by the Department are as follows: \$2,500 for violation of Subsection 489.129(1)(d); \$2,500 for violation of 489.129(1)(e); and \$1,000 for violation of 489.129(1)(m), Florida Statutes.

26. Florida Administrative Code Rule 61G4-17.001 (2005), sets forth guidelines for violations that are alleged in this case, absent aggravating or mitigating circumstances. The range

of penalties for a first violation of Subsection 489.129(1)(d), Florida Statutes, is a fine of \$1,000 to \$2,500 and/or probation.

27. The range of penalties for a first violation of Subsection 489.129(1)(e), Florida Statutes, is a fine of \$1,000 to \$3,500 and/or probation.

28. The range of penalties for a first-time violation of Subsection 489.129(1)(m), Florida Statutes, for violation of any provision of Florida Administrative code Chapter 61G4 or of Chapter 489, Florida Statutes, is a fine of \$1,000 to \$2,500.

29. Florida Administrative Code Rule 61G4-17.002 sets forth circumstances which may be considered for the purpose of mitigation or aggravation of penalty. Included are: danger to the public; the number of complaints filed against the licensee; the length of time the licensee has practiced; the effect of the penalty on the licensee's livelihood; monetary damage to the licensee's customer; any efforts at rehabilitation, and any other mitigating or aggravating circumstances. Respondent is out of the construction business. He presents no danger to the public. There is no evidence of any prior complaints filed against Respondent. Any penalty will cause a hardship on Respondent as he has gone out of business and earns \$24,000 a year. Further, Respondent shows genuine remorse that his actions or lack thereof caused harm to people. Finally, the real wrongdoers, i.e., those individuals associated with JTC who dreamed up this scheme, are

nowhere to be found. Accordingly, lesser fines than those suggested by the Department are more appropriate here.

30. Florida Administrative Code Rule 61G4-17.001(5) requires the board to order the contractor to make restitution in the amount of financial loss suffered by the consumer. The evidence supports restitution in the amount of \$8,607.00, the amount requested by the Department.

31. The Department proposes that Respondent pay investigative costs in the amount of \$378.27. However, the amount of investigative costs is not in evidence. Therefore, imposing this is not supported by the evidence of record. § 120.57(1)(j), Fla. Stat.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law set forth herein, it is

RECOMMENDED:

That the Construction Industry Licensing Board enter a final order imposing fines in the amount of \$1,000 for violation of Subsection 489.129(1)(d); \$1,000 for violation of Subsection 489.129(1)(e); and \$1,000 violation of Subsection 489.129(1)(m), Florida Statutes; pay \$8,607.00 in restitution; and require Respondent to attend seven additional hours of continuing education classes.

DONE AND ENTERED this 24th day of March, 2008, in
Tallahassee, Leon County, Florida.

Barbara J. Staros

BARBARA J. STAROS
Administrative Law Judge
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Filed with the Clerk of the
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this 24th day of March, 2008.

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.