STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, CONSTRUCTION INDUSTRY LICENSING BOARD,	)	
Petitioner,	)	
vs.	)	Case No. 08-2398PL
GAETAN MALSCHALCK,	)	
Respondent.	)	

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case pursuant to Sections 120.569 and 120.57(1), Florida Statutes,[1] before Stuart M. Lerner, a duly-designated Administrative Law Judge of the Division of Administrative Hearings (DOAH), on July 17, 2008, by video teleconference at sites in West Palm Beach and Tallahassee, Florida.

APPEARANCES

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

For Respondent: No Appearance

STATEMENT OF THE ISSUE

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

PRELIMINARY STATEMENT

In December 2007, Petitioner issued a four-count Administrative Complaint alleging that Respondent, in his capacity as the primary qualifying agent for GM General Contractor, Inc. (GGC), engaged in disciplinable wrongdoing in connection with a residential construction project undertaken by GGC pursuant to a contract with Assad and Millicent Thompson. Count I alleged that Respondent committed "mismanagement or misconduct in the practice of contracting that cause[d] financial harm to a customer," in violation of Section 489.129(1)(g)2., Florida Statutes. Count II alleged that "Respondent violated Section 489.129(1)(j), Florida Statutes, by abandoning the construction project." Count III alleged that "Respondent violated Section 489.129(1)(o), Florida Statutes, by failing to obtain the necessary permits, pass all inspections and finalize the necessary permits." Count IV alleged that "Respondent violated Section 489.129(1)(m), Florida Statutes, by committing incompetence or mismanagement in the practice of contracting."

By filing with Petitioner a completed "Election of Rights" form, Respondent requested a "Final Hearing before an Administrative Law Judge of the Division of Administrative Hearings." On May 19, 2008, the matter was referred to DOAH.

The hearing that Respondent requested was scheduled for July 17, 2008. Petitioner and Respondent were provided with written notice of the hearing in accordance with Section 120.569(2)(b), Florida Statutes. The notice was in the form of Notice of Hearing by Video Teleconference mailed May 29, 2008, to Petitioner's counsel of record and to Respondent.

Petitioner appeared at the hearing, which was held as scheduled on July 17, 2008, through its counsel of record. Respondent, on the other hand, did not make an appearance at the hearing, either in person or through counsel or any other authorized representative.

At the hearing, Petitioner presented the testimony of two witnesses: Brad Brown of the Palm Beach County Planning, Zoning, and Building Department; and Millicent Thompson. In addition, it offered into evidence 15 exhibits (Petitioner's Exhibits 1 through 11, 13, 14, 16, and 17). All of these exhibits were admitted.

At the close of the taking of evidence, the undersigned established a deadline (15 days from the date of the filing with DOAH of the hearing transcript) for the filing of proposed recommended orders.

The Transcript of the hearing (consisting of one volume) was filed with DOAH on August 11, 2008.

Petitioner filed its Proposed Recommended Order on August 8, 2008. To date, Respondent has not filed any post-hearing submittal.

FINDINGS OF FACT

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

1. Respondent is now, and has been at all times material to the instant case, a Florida-licensed roofing contractor and general contractor. He received his roofing contractor's license on August 10, 2004, and his general contractor's license on October 13, 2005.

2. At all times material to the instant case, GGC has held a certificate of authority authorizing it to engage in contracting in Florida through a qualifying agent.

3. At all times material to the instant case, Respondent has been the primary qualifying agent for GGC.

4. On January 5, 2007, GGC, through Respondent, entered into a written contract with Assad and Millicent Thompson, agreeing, for $37,135.00, to construct a rear porch lanai

addition to the Thompsons' single family home in Royal Palm Beach, Florida (Project).

5. The Thompsons paid GGC (by check) $11,140.50 at the time they entered into the contract. They made three subsequent payments to GGC (by check) totaling $21,232.50. The last of these payments was made on or about April 17, 2007.

6. On January 9, 2007, GGC, through Respondent, applied for a permit from the Palm Beach County Planning, Zoning, and Building Department to perform the work it had agreed to do on the Thompsons' home. The permit was subsequently issued.

7. In or around March of 2007, GGC began work on the Project.

8. Dissatisfied with the progress GGC was making on the Project, the Thompsons, on June 5, 2007, sent the following letter to Respondent:

> With reference to the delay in completing the above construction, we are writing to request your immediate attention.
>
> We would like to know specifically:
>
> - The reason for the delay[.]
> - Your intention in writing as to your estimated time of completion of [the] specified project.
>
> Please note we have not physically seen you since April 19, 2007. We understand that inspection of the roof on May 10th resulted in certain violations and as per your conversation with Assad [Mr. Thompson] (when he called you on May 20th), you had problems

> contacting the Engineer. Please note that his name, telephone and fax are clearly indicated on the plan[s]. Per telephone conversation with him, he has not heard from you recently. You have indicated impatience and anxiety on our part, quite frankly the patience of JOB would have run out long ago. The pile of rubbish is a breeding room for all kinds of creatures and has been a disgusting sight not only for us, but for our neighbors. The open roof has created a vulnerable situation for us and can only deteriorate as we are now in hurricane season.
>
> We urge you to contact us urgently with your plan of action.

9. Not having received a written response from Respondent, the Thompsons, on June 25, 2007, sent a follow-up letter to Respondent, which read as follows

> We note that you have ignored our previous letter of June 5th and you have also failed to honor your telephone promises of June 8th and June 19th to proceed with stucco/electric/rubbish removal etc. In fact absolutely nothing has been done on this job since May 18th. This is totally unacceptable. We have arrangements in place for use of the patio July 14th, cancellation of which will result in serious inconvenience for us.
>
> Please be advised that if no progress is made by June 30, 2007, we will be forced to seek all measures at our disposal to have the patio satisfactorily completed. We once again request your urgent co-operation in this matter.

10. The next day, June 26, 2007, the Thompsons received a letter from Respondent (sent by facsimile transmission)

acknowledging his receipt of the Thompsons' June 25, 2007, letter. In his letter, Respondent explained that he was "in a bad situation financially" due to circumstances "out of [his] control" related to another project, and he asked the Thompsons to "help [him] resolve[] this matter" by paying the "stucco man" $1,000.00 for materials and an additional $1,000.00 "when [the stucco work] was completed," as well as paying $400.00 for a dumpster to be brought to the Project site (which payments would go towards the monies the Thompsons had to pay for the Project under their contract with GGC).

11. The Thompsons wrote back to Respondent that same day (June 26, 2007), advising him that they would pay for the materials for the stucco work "upon presentation of the invoice, then pay $1,000 for the job on completion as [Respondent had] requested," and that they also would "pay the dumpster charges on completion of the clean-up."

12. Ernest Joseph was the "stucco man" that GGC sent to the Thompsons' home to work on the Project. He last worked on the Project in mid-July 2007. The Thompsons paid Mr. Joseph (by check) a total of $2,000.00 for labor and materials. They also paid Onyx Waste Services (by check) $416.91 to have a dumpster brought to the Project site.

13. Neither GGC, nor anyone acting on its behalf, did any work on the Project after Mr. Joseph left the site in mid-July 2007. The Project was incomplete when the work ceased.[2]

14. GGC provided the Thompsons no explanation for the stoppage. In fact, the Thompsons did not hear from GGC at all.

15. The Thompsons were anxious for the Project to be completed, and they did nothing to prevent GGC from accomplishing this objective.

16. After more than 90 consecutive days had passed without any work having been done on the Project, the Thompsons hired another contractor to finish the Project.

17. The Project was ultimately completed.

18. The Thompsons paid $17,540.00 for the additional work that was necessary to complete the Project.

19. The total amount that the Thompsons paid for the Project was $52,329.91 ($32,373 to GGC; $2,000 to Mr. Joseph; $416.91 to Onyx Waste Services; and $17,540.00 to finish the work GGC had failed to do). This was $15,194.91 more than the contract price.

20. Petitioner has incurred a total of $182.90 in investigative and prosecutorial costs in connection with the instant case (excluding costs associated with any attorney's time).

CONCLUSIONS OF LAW

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

22. No "person"[3] may engage in the business of contracting in Florida without holding a valid license to do so. § 489.115(1), Fla. Stat.

23. A business organization, like GGC, may obtain such a license, but only through a licensed "qualifying agent." § 489.119, Fla. Stat.; see also Murthy v. N. Sinha Corp., 644 So. 2d 983, 984 n.1 (Fla. 1994)("Chapter 489 requires a corporation or other business entity seeking to become a contractor to procure an individual licensed contractor as its qualifying agent."); and Shimkus v. Department of Business and Professional Regulation, Construction Industry Licensing Board, 932 So. 2d 223, 223-224 (Fla. 4th DCA 2005)("The statute [Section 489.119, Florida Statutes] requires corporations engaged in construction to have licensed individuals serving as their qualifying agents.").

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

25. "All primary qualifying agents for a business organization are jointly and equally responsible for supervision of all operations of the business organization; for all field work at all sites; and for financial matters, both for the organization in general and for each specific job." § 489.1195(1)(a), Fla. Stat.; see also § 489.105(4), Fla. Stat. ("'Primary qualifying agent' means a person who . . . has the responsibility, to supervise, direct, manage, and control the contracting activities of the business organization with which he or she is connected; who has the responsibility to supervise, direct, manage, and control construction activities on a job for which he or she has obtained the building permit; . . . ."). "To allow a contractor to be the 'qualifying agent' for a company without placing any requirement on the contractor to exercise any supervision over the company's work done under his license would permit a contractor to loan or rent his license to the company. This would completely circumvent the legislative intent that an individual, certified as competent, be professionally responsible for supervising construction work on jobs requiring a licensed contractor." Alles v. Department of Professional Regulation, 423 So. 2d 624, 626 (Fla. 5th DCA 1982).

26. The Construction Industry Licensing Board (Board) may take disciplinary action against a licensed contractor serving

as the "primary qualifying agent" for a business organization for violations of Section 489.129(1), Florida Statutes, committed by either "the contractor . . . or business organization for which the contractor is a primary qualifying agent." The contractor "may not avoid responsibility [for any such violation] by stating that he had nothing to do with the project" in connection with which the violation was committed. Hunt v. Department of Professional Regulation, Construction Industry Licensing Board, 444 So. 2d 997, 999 (Fla. 1st DCA 1983); see also Camejo v. Department of Business and Professional Regulation, 812 So. 2d 583, 584 (Fla. 3d DCA 2002)("Camejo's defense in the disciplinary proceeding, and his argument on appeal, is that he cannot be held accountable pursuant to section 489.129, Florida Statutes (1999) for work not performed, or poorly performed, pursuant to building permits he never signed. We disagree. . . . Section 489.129 does not carve out an exception for qualifying agents who fail to maintain control over the use of their certificates. For this court to do so by judicial fiat would weaken the authority of the Construction Industry Licensing Board to govern the industry and protect the public.").

27. At the time of the alleged misconduct in the instant case, the disciplinary action the Board was statutorily authorized to take against a licensed contractor for a violation

of Section 489.129(1), Florida Statutes, was limited to the following: revoking or suspending the contractor's license; placing the contractor on probation; reprimanding the contractor; denying the renewal of the contractor's license; imposing an administrative fine not to exceed $10,000.00 per violation; requiring financial restitution to the victimized consumer(s); requiring the contractor to take continuing education courses; and assessing costs associated with the investigation and prosecution. See Childers v. Department of Environmental Protection, 696 So. 2d 962, 964 (Fla. 1st DCA 1997)("The version of a statute in effect at the time grounds for disciplinary action arise controls."); and Department of Environmental Regulation v. Puckett Oil Co., 577 So. 2d 988, 992 (Fla. 1st DCA 1991)("[A]n agency possesses no inherent power to impose sanctions, and . . . any such power must be expressly delegated by statute.").

28. The Board may take such disciplinary action only after the licensee has been given reasonable written notice of the charges and an adequate opportunity to request a proceeding pursuant to Sections 120.569 and 120.57, Florida Statutes. See § 120.60(5), Fla. Stat.

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

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

31. Clear and convincing evidence is an "intermediate standard," "requir[ing] more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" In re Graziano, 696 So. 2d 744, 753 (Fla. 1997). For proof to be considered "'clear and convincing' . . . the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to

the truth of the allegations sought to be established." In re Davey, 645 So. 2d 398, 404 (Fla. 1994), quoting, with approval, from Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983); see also In re Adoption of Baby E. A. W., 658 So. 2d 961, 967 (Fla. 1995)("The evidence [in order to be clear and convincing] must be sufficient to convince the trier of fact without hesitancy."). "Although this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous." Westinghouse Electric Corporation, Inc. v. Shuler Bros., Inc., 590 So. 2d 986, 989 (Fla. 1st DCA 1991).

32. In determining whether the Department has met its burden of proof, it is necessary to evaluate its evidentiary presentation in light of the specific allegations of wrongdoing made in the charging instrument. Due process prohibits an agency from taking penal action against a licensee based on matters not specifically alleged in the charging instrument, unless those matters have been tried by consent. See Trevisani v. Department of Health, 908 So. 2d 1108, 1109 (Fla. 1st DCA 2005); Aldrete v. Department of Health, Board of Medicine, 879 So. 2d 1244, 1246 (Fla. 1st DCA 2004); and Shore Village Property Owners' Association, Inc. v. Department of

Environmental Protection, 824 So. 2d 208, 210 (Fla. 4th DCA 2002).

33. The charging instrument in the instant case, the Administrative Complaint, contains four counts: Count I, alleging a violation of Section 489.129(1)(g)2, Florida Statutes; Count II, alleging a violation of Section 489.129(1)(j), Florida Statutes; Count III, alleging a violation of Section 489.129(1)(o), Florida Statutes; and Count IV, alleging a violation of Section 489.129(1)(m), Florida Statutes.

34. At all times material to the instant case, Section 489.129(1)(g)2, (j), (m), and (o), Florida Statutes, provided that the following were disciplinable acts:

> (g) Committing mismanagement or misconduct in the practice of contracting that causes financial harm to a customer. Financial mismanagement or misconduct occurs when:
>
> * * *
>
> 2. The contractor has abandoned a customer's job and the percentage of completion is less than the percentage of the total contract price paid to the contractor as of the time of abandonment, unless the contractor is entitled to retain such funds under the terms of the contract or refunds the excess funds within 30 days after the date the job is abandoned; or
>
> * * *
>
> (j) Abandoning a construction project in which the contractor is engaged or under contract as a contractor. A project may be presumed abandoned after 90 days if the

> contractor terminates the project without just cause or without proper notification to the owner, including the reason for termination, or fails to perform work without just cause for 90 consecutive days.
>
> * * *
>
> (o) Proceeding on any job without obtaining applicable local building department permits and inspections.
>
> * * *
>
> (m) Committing incompetency or misconduct in the practice of contracting.

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

36. Because of their penal nature, the foregoing statutory and rule provisions must be strictly construed, with any reasonable doubts as to their meaning being resolved in favor of the licensee. See Camejo v. Department of Business and Professional Regulation, 812 So. 2d 583, 583-584 (Fla. 3d DCA 2002)("'Statutes 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 Jonas v. Florida Department of Business and

Professional Regulation, 746 So. 2d 1261, 1262 (Fla. 3d DCA 2000)(same).

37. The Department proved by clear and convincing evidence that, as alleged in Count II of the Administrative Complaint, GGC committed a violation of Section 489.129(1)(j), Florida Statutes, for which Respondent, as GGC's "primary qualifying agent," was responsible, by failing to perform work on the Project without just cause for in excess of 90 consecutive days.

38. Through the same proof that clearly and convincingly established the violation of Section 489.129(1)(j), Florida Statutes, alleged in Count II of the Administrative Complaint, the Department also clearly and convincingly established the derivative violation of Section 489.129(1)(m), Florida Statutes, alleged in Count IV of the Administrative Complaint. This violation of Section 489.129(1)(m), however, is "subsumed" in the violation of Section 489.129(1)(j) and cannot be separately punished. Department of Business and Professional Regulation, Construction Industry Licensing Board, v. Battaglia, No. 03-1224PL, slip op. at 13-14 (Fla. DOAH August 11, 2003)(Recommended Order), adopted in toto, (DBPR, CILB, December 3, 2003); cf. State v. Weller, 590 So. 2d 923, 926 (Fla. 1991)("If two statutory offenses are not 'separate' under the Blockburger test, then the 'lesser' offense is deemed to be subsumed within the greater. This is simple logic. When the

commission of one offense always results in the commission of another, then the latter is an inherent component of the former.")

39. The Department did not clearly and convincingly prove Respondent's guilt of the violations alleged in Counts I and III of the Administrative Complaint.[4]

40. The lone issue remaining for consideration is what disciplinary action should be taken against Respondent for his violation of Section 489.129(1)(j), Florida Statutes. To answer this question it is necessary to consult the Board's "disciplinary guidelines" set forth Florida Administrative Code Chapter 61G4-17, which impose restrictions and limitations on the exercise of its disciplinary authority. See Parrot Heads, Inc. v. Department of Business and Professional Regulation, 741 So. 2d 1231, 1233 (Fla. 5th DCA 1999)("An administrative agency is bound by its own rules . . . creat[ing] guidelines for disciplinary penalties."); and § 455.2273(5), Fla. Stat. ("The administrative law judge, in recommending penalties in any recommended order, must follow the penalty guidelines established by the board or department and must state in writing the mitigating or aggravating circumstances upon which the recommended penalty is based."); cf. State v. Jenkins, 469 So. 2d 733, 734 (Fla. 1985)("[A]gency rules and regulations, duly promulgated under the authority of law, have the effect of

law."); Buffa v. Singletary, 652 So. 2d 885, 886 (Fla. 1st DCA 1995)("An agency must comply with its own rules."); Decarion v. Martinez, 537 So. 2d 1083, 1084 (Fla. 1st 1989)("Until amended or abrogated, an agency must honor its rules."); and Williams v. Department of Transportation, 531 So. 2d 994, 996 (Fla. 1st DCA 1988)(agency is required to comply with its disciplinary guidelines in taking disciplinary action against its employees).

41. In Florida Administrative Code Rule 61G4-17.001, the Board has announced the "[n]ormal [p]enalty [r]anges" within which its disciplinary action against contractors will fall, absent aggravating or mitigating circumstances, for specified violations.

42. At all times material to the instant case, Florida Administrative Code Rule 61G4-17.001 has provided, in pertinent part, that for a "first offense" of Section 489.129(1)(j), Florida Statutes,[5] a violator could expect, absent aggravating or mitigating circumstances, to receive a penalty ranging from a "minimum" of a "$2,500 fine and/or probation, or suspension" to a maximum of a "$7,500 fine and/or probation, or suspension." Furthermore, it has given notice of the Board's additional authority to "assess the costs of investigation and prosecution" and "order the contractor to make restitution in the amount of financial loss suffered by the consumer."

43. Florida Administrative Code Rule 61G4-17.002 lists "[a]ggravating and [m]itigating circumstances" to be considered in determining whether a departure from the "[n]ormal [p]enalty [r]ange" is warranted in a particular case. At all times material to the instant case, these "[a]ggravating and [m]itigating circumstances" have included the following:

> (1) Monetary or other damage to the licensee's customer, in any way associated with the violation, which damage the licensee has not relieved, as of the time the penalty is to be assessed. (This provision shall not be given effect to the extent it would contravene federal bankruptcy law.)
>
> (2) Actual job-site violations of building codes, or conditions exhibiting gross negligence, incompetence, or misconduct by the licensee, which have not been corrected as of the time the penalty is being assessed.
>
> (3) The danger to the public.
>
> (4) The number of complaints filed against the licensee.
>
> (5) The length of time the licensee has practiced.
>
> (6) The actual damage, physical or otherwise, to the licensee's customer.
>
> (7) The deterrent effect of the penalty imposed.
>
> (8) The effect of the penalty upon the licensee's livelihood.
>
> (9) Any efforts at rehabilitation.

(10) Any other mitigating or aggravating circumstances.

44. As the Department points out in its Proposed Recommended Order, there is an aggravating circumstance present in the instant case in that GGC's unlawful abandonment of the Project caused the Thompsons to have pay $15,194.91 more than the contract price for the completion of the Project.

45. Having considered the facts of the instant case (including the foregoing aggravating circumstance) in light of the pertinent and applicable provisions of Florida Administrative Code Chapter 61G4-17, it is the view of the undersigned that the following is the appropriate disciplinary action that should be taken against Respondent in the instant case for his violation of Section 489.129(1)(j), Florida Statutes: (1) suspend his licenses for a period of two years; (2) fine him $7,500.00;[6] (3) require him to pay restitution in the amount of $15,194.91 to the Thompsons; and (4) order him to reimburse the Department $182.90 for investigative and prosecutorial costs.

RECOMMENDATION

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

RECOMMENDED that the Board issue a Final Order: (1) finding Respondent guilty of violating Section 489.129(1)(j)

and (m), as alleged in Counts II and IV, respectively, of the Administrative Complaint; (2) suspending his license for a period of two years; (3) fining him $7,500.00; (4) requiring him to pay restitution in the amount of $15,194.91 to the Thompsons; (4) ordering him to reimburse the Department $182.90 for investigative and prosecutorial costs; and (5) dismissing Counts I and III of the Administrative Complaint.

DONE AND ENTERED this 27th day of August, 2008, in Tallahassee, Leon County, Florida.

STUART M. LERNER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of August, 2008.

ENDNOTES

[1] Unless otherwise noted, all references in this Recommended Order to Florida Statutes are to Florida Statutes (2007).

[2] It is unclear from the evidence presented at hearing whether, at the time GGC stopped working on the Project, the percentage of completion was less than the percentage of the total contract price the Thompsons had paid GGC.

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

[4] Nowhere in its Proposed Recommended Order does the Department argue that it presented such clear and convincing proof.

[5] There is no record evidence that Respondent has been previously disciplined by the Board.

[6] Fining Respondent, in addition to suspending his licenses, would be outside the "[n]ormal [p]enalty [r]ange" for a first time violation of Section 489.129(1)(j), Florida Statutes. (The "[n]ormal [p]enalty [r]ange" for such a violation is a fine (up to $7,500.00) and/or probation, or a suspension.) An upward departure from this "[n]ormal [p]enalty [r]ange," of the magnitude recommended by the undersigned, is warranted in the instant case because of the monetary harm suffered by the Thompsons as a result of Respondent's violation. An upward departure of any greater magnitude, however, in the opinion of the undersigned, would be unjustifiable in light of the apparently isolated nature of Respondent's wrongdoing. Accordingly, the undersigned has declined to follow the suggestion made by the Department in its Proposed Recommended Order that the undersigned recommend that Respondent's licenses be revoked and that he be fined a total of $10,000.00.

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.