

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
CONSTRUCTION INDUSTRY LICENSING)
BOARD,)
)
Petitioner,)
)
vs.) Case No. 08-4771PL
)
DANIEL F. ACEVEDO,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case before Larry J. Sartin, an Administrative Law Judge of the Division of Administrative Hearings, on November 5 and December 17, 2008, by video teleconference at sites in Miami and Tallahassee, Florida.

APPEARANCES

For Petitioner: Brian Coats
Assistant General Counsel
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399

For Respondent: Kenneth Stein, Esquire
8436 West Oakland Park Boulevard
Sunrise, Florida 33351

STATEMENT OF THE ISSUES

The issues in this case are whether Respondent, Daniel F. Acevedo, committed the offenses alleged in a four-count Administrative Complaint filed with Petitioner, the Department of Business and Professional Regulation, on July 11, 2008, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On July 11, 2008, a four-count Administrative Complaint was filed with Petitioner in DBPR Case No. 2006-003454, alleging that Respondent had violated certain statutory provisions governing the conduct of individuals in Florida licensed by the Construction Industry Licensing Board. In particular, it is alleged in the Administrative Complaint that Respondent violated Section 489.129(1)(i), Florida Statutes, by failing to renew his certificate of authority as required by Section 489.119(2)(d), Florida Statutes (Count I); Section 489.129(1)(i), Florida Statutes, by having violated Section 489.127(4)(c), Florida Statutes (Count II); Section 489.129(1)(d), Florida Statutes, "by performing any act which assists a person or entity in engaging in the prohibited uncertified and unregistered practice of contracting" (Count III); and Section 489.129(1)(m), Florida Statutes, "by committing incompetency or misconduct in the practice of contracting" (Count IV).

Respondent, by executing an Election of Rights form, 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 (2008).

Copies of the Administrative Complaint and Election of Rights form were filed with the Division of Administrative Hearings on September 24, 2008. The matter was designated DOAH Case No. 08-4771PL and was assigned to the undersigned.

The final hearing was scheduled for November 5, 2008, by Notice of Hearing entered October 3, 2008. An Amended Notice of Hearing by Video Teleconference was entered on October 28, 2008, notifying the parties that the hearing would be held by video teleconference between Tallahassee and Miami, Florida.

On October 8, 2008, counsel for Respondent, Kenneth Stein, Esquire, filed a Motion to Withdraw. That Motion, which was not opposed by Petitioner as long as the final hearing proceeded as scheduled, was granted by an Order entered October 22, 2008.

On November 4, 2008, Mr. Stein filed a "Re-Notice of Appearance" and an Emergency Motion for Continuance. A hearing was conducted by telephone on the Motion. After hearing argument of the parties, the Motion was denied. It was ordered, however, that Petitioner would present its case as scheduled and that the record would be held open to give Respondent an

opportunity to prepare and present his case at a later, agreed upon date. It was also ordered that Petitioner would be given an opportunity to respond to Respondent's case.

At the portion of the final hearing held on November 5, 2008, Petitioner presented the testimony of Raul Rodriguez and Grace Esposito. Petitioner also had 17 exhibits admitted.

By Notice of Hearing by Video Teleconference November 21, 2008, the hearing was scheduled to recommence on December 17, 2008. At that portion of the final hearing, Respondent testified on his own behalf and presented the testimony of Kevin Vincent Breault. Respondent offered no exhibits. Petitioner recalled Ms. Esposito.

On February 6, 2009, a Notice of Filing Transcript was issued informing the parties that the final volume of the two-volume Transcript of the final hearing had been filed. The parties were also informed that their proposed recommended orders were to be filed on or before February 25, 2009.

Petitioner filed Petitioner's Proposed Recommended Order on February 25, 2009. Respondent filed a Proposed Recommended Order on February 26, 2009, at 8:00 a.m. Both proposed recommended orders have been fully considered in preparing this Recommended Order.

All references to the Florida Statutes in this Recommended Order are to the codification applicable to the years in which

the events alleged in the Administrative Complaint took place, 2005 and 2007, unless otherwise noted.

FINDINGS OF FACT

1. Petitioner, the Department of Business and Professional Regulation (hereinafter referred to as the "Department"), is the agency of the State of Florida charged with the responsibility for, among other things, the licensure of individuals who wish to engage in contracting in the State of Florida; and the investigation and prosecution of complaints against individuals who have been so licensed. See Chs. 455 and 489, Fla. Stat.

2. Respondent, Daniel F. Acevedo, is and has been at all times material hereto a certified general contractor in Florida, having been issued license number CGC 1506071. Mr. Acevedo is also a Certified Roofing Contractor, having been issued license number CCC 1326888. Both licenses were issued by the Construction Industry Licensing Board (hereinafter referred to as the "Board) and are in "current active" status.

3. At all times material, Mr. Acevedo was the primary qualifying agent for All Design Systems, Inc. (hereinafter referred to as "All Design"). All Design is a Florida corporation. Mr. Acevedo is an officer of the corporation.

4. All Design's certificate of authority, License Number QB 26737, was issued on September 4, 2003. The license expired on August 31, 2007, and was in delinquent status from

September 1, 2007, to May 14, 2008. Mr. Acevedo remained the qualifying agent during the delinquent period.

5. All Design employed three to four sales agents who "sold" construction projects to commercial and residential property owners on behalf of All Design. All Design utilized these individuals because it believed they had experience in the construction industry and that they held licenses or certifications which would allow them to perform estimates on construction projects and make appropriate bids. The sales agents were to find customers for All Design and enter into contracts with them on behalf and in the name of All Design.

6. In August of 2005, Mr. Acevedo was approached by Eduardo Rodriguez. Mr. Rodriguez offered to locate potential home remodeling customers for All Design in exchange for a percentage commission. Mr. Acevedo agreed.

7. At no time relevant to this matter was Mr. Rodriguez licensed in Florida to engage in contracting as a state certified or registered contractor. Nor was Mr. Rodriguez's business entity, Eduardo's Construction, Inc. (hereinafter referred to as "Eduardo's Construction"), licensed with a certificate of authority as a contractor qualified business. Mr. Rodriguez was the president and sole officer of Eduardo's Construction.

8. Eduardo's Construction was not incorporated in Florida.

9. Some time during 2005, Grace Esposito obtained a business card for Eduardo's Construction. She obtained the card after discussing with a neighbor construction work that was being performed by Eduardo's Construction on the neighbor's residence. The neighbor informed her that Mr. Rodriguez was the contractor performing the work. The business card incorrectly represented that Mr. Rodriguez was licensed and insured.

10. Ms. Esposito called the number listed for Eduardo's Construction and spoke with a man who identified himself as Eduardo Rodriguez.

11. In August 2005, Mr. Rodriguez met with Ms. Esposito at her condominium residence, located at 20301 West Country Club Drive, Aventura, Florida (hereinafter referred to as the "Subject Property"). Ms. Esposito discussed with Mr. Rodriguez the work which she desired. Based upon representations from Mr. Rodriguez, Ms. Esposito believed that he was licensed to perform the work being discussed.

12. The evidence failed to prove, as suggested by Mr. Acevedo, that Mr. Rodriguez "bid on the Esposito job, [and] orally agreed to essential terms with Esposito on behalf of All Design Systems, Inc., Respondent's Firm." Mr. Acevedo's testimony in this regard was uncorroborated hearsay and was contradicted by the credible testimony of Ms. Esposito.

13. On September 5, 2005, Ms. Esposito entered into a written contract with Mr. Rodriguez, doing business as Eduardo's Construction, for the remodeling of the Subject Property (hereinafter referred to as the "Contract"). Ms. Esposito agreed in the Contract to pay \$24,000.00 for the remodeling.

14. Upon execution of the Contract, Ms. Esposito paid Eduardo's Construction with three checks totaling \$12,000.00 for the remodeling.

15. Mr. Rodriguez informed Mr. Acevedo of the project in September 2005. At that time, without reviewing the Contract, Mr. Acevedo executed a building permit application which Mr. Rodriguez provided him for the project. The permit application had not been signed by Ms. Esposito.

16. In October 2005, Mr. Rodriguez presented the building permit application to Ms. Esposito for her signature. The permit application was then submitted to the building department.

17. The building permit was subsequently approved and issued under Mr. Acevedo's license and in the name of All Design.

18. Ms. Esposito had been told that part of the work would be completed in October. When this representation proved untrue, she began contacting Mr. Rodriguez. Mr. Rodriguez told her that it was taking time to get the permit due to delays at

the building department. Eventually, when she was no longer able to contact Mr. Rodriguez, Ms. Esposito went directly to the building department where she learned that All Design was the contactor of record and not Eduardo's Construction.

20. On or about October 31, 2005, Ms. Esposito telephoned All Design and spoke with Mr. Acevedo. She informed Mr. Acevedo about the Contract. Mr. Acevedo agreed to meet with her.

21. On November 1, 2005, Mr. Acevedo visited Ms. Esposito at the Subject Property. She showed him the work that had been performed and explained the details of the Contract and what had transpired with Mr. Rodriguez. Mr. Acevedo told Ms. Esposito that his relationship with Mr. Rodriguez was that he merely allowed Mr. Rodriguez to use his license to pull permits in exchange for \$150.00. Mr. Acevedo told Ms. Esposito that he would attempt to get Mr. Rodriguez to complete the job. This meeting was memorialized in a letter to Mr. Acevedo written by Ms. Esposito.

22. At some time in November, work recommenced on the project. Within approximately three days, however, work stopped.

23. Ms. Esposito sent four emails to Mr. Acevedo describing the work performed and the cessation of the project. Ms. Esposito made a final request that the project be completed. Mr. Acevedo did not respond to the emails.

24. On or about November 17, 2005, Ms. Esposito sent a letter to Mr. Acevedo outlining the events, requesting termination of the Contract, and the removal of Mr. Acevedo from the building permit. Mr. Acevedo did not respond to this letter.

25. The building permit was cancelled by Mr. Acevedo in December 2005.

26. The total investigation costs incurred by the Department, excluding those costs associated with any attorney's time, was \$381.83.

27. Mr. Acevedo has not previously been disciplined by the Board.

CONCLUSIONS OF LAW

A. Jurisdiction.

28. 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 (2008).

B. The Burden and Standard of Proof.

29. The Department seeks to impose penalties against Mr. Acevedo through the Administrative Complaint that include mandatory and discretionary suspension or revocation of his licenses. 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).

30. 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.

31. 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.

32. In this matter, it has been alleged that Mr. Acevedo committed offenses described in Section 489.129(1)(d), (i) and (m), Florida Statutes, which provides:

(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:

. . . .

(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.

. . . .

(i) Failing in any material respect to comply with the provisions of this part or

violating a rule or lawful order of the board.

. . . .

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

33. 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)(i), Florida Statutes.

34. In support of the allegation of Count I that Mr. Acevedo violated Section 489.129(1)(i), Florida Statutes, it is

alleged that Mr. Acevedo violated Section 489.119(2)(d), Florida Statutes:

(d) A certificate of authority must be renewed every 2 years. If there is a change in any information that is required to be stated on the application, the business organization shall, within 45 days after such change occurs, mail the correct information to the department.

35. The evidence proved clearly and convincingly that Mr. Acevedo committed this violation when he failed to ensure that the certificate of authority for All Design was renewed between September 1, 2007 and May 14, 2007. The Department has, therefore, proved that Mr. Acevedo is in violation of Section 489.129(1)(i), Florida Statutes, by violation Section 489.119(2)(d), Florida Statutes, as alleged in Count I of the Administrative Complaint.

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

36. In support of the allegation of Count II that Mr. Acevedo violated Section 489.129(1)(i), Florida Statutes, it is alleged that Mr. Acevedo violated Section 489.127(4)(c), Florida Statutes:

(c) A certified or registered contractor, or contractor authorized by a local construction regulation board to do contracting, may not apply for or obtain a building permit for construction work unless the certified or registered contractor, or contractor authorized by a local construction regulation board to do contracting, or business organization duly

qualified by said contractor, has entered into a contract to make improvements to, or perform the contracting at, the real property specified in the application or permit. This paragraph does not prohibit a contractor from applying for or obtaining a building permit to allow the contractor to perform work for another person without compensation or to perform work on property that is owned by the contractor.

37. Mr. Acevedo, by signing a building permit application which was used by Mr. Rodriguez to fulfill a contract entered into by Eduardo's Construction and not All Design clearly violated Section 489.127(4)(c), Florida Statutes. While Mr. Acevedo may not have known that the Contract and work thereunder was being performed by Mr. Rodriguez and Eduardo's Construction, he did not take the steps which he could have to ensure that the permitted work was to be performed by All Design.

38. The Department has proved clearly and convincingly that Mr. Acevedo violated Section 489.129(1)(i), Florida Statutes, by violation Section 489.127(4)(c), Florida Statutes, as alleged in Count II of the Administrative Complaint.

F. Count III; Section 489.129(1)(d), Florida Statutes.

39. Based upon the credible testimony of Ms. Esposito that Mr. Acevedo admitted to her that he was simply pulling permits for Mr. Rodriguez in exchange for a fee, Mr. Acevedo knew that

he was assisting an unlicensed and uncertified person engage in the practice of contracting.

40. Even if he actually had not been aware that Mr. Rodriguez was unlicensed and uncertified or that he was performing the work rather than allowing All Design to do so, which the evidence did not prove, he could have taken steps to ensure that he did not facilitate Mr. Rodriguez's unlicensed work. Merely signing a building permit application without following up to determine if it was being used properly was not reasonable. Had he followed up, Mr. Acevedo would have reasonably known what Mr. Rodriguez was up to.

41. The Department has proved clearly and convincingly that Mr. Acevedo violated Section 489.129(1)(d), Florida Statutes, as alleged in Count III of the Administrative Complaint.

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

42. Finally, Count IV alleges that Mr. Acevedo committed "incompetency or misconduct in the practice of contracting" in violation of Section 489.129(1)(m), Florida Statutes. In support of this allegation, the Department relies upon Florida Administrative Code Rule 61G4-17.001(1)(m)2., which defines misconduct or incompetency in the practice of contracting to include the violation of any provision of Chapter 489, Part I, Florida Statutes. Thus, by having violated Section

489.129(1)(d) and (i), Florida Statutes, the Department argues that Mr. Acevedo is also guilty of misconduct or incompetency in his practice of contracting.

43. It having been found that Mr. Acevedo has committed the violations alleged in Counts I, II, and III of the Administrative Complaint, Mr. Acevedo is technically also in violation of Section 489.129(1)(m), Florida Statutes, as alleged in Count IV.

H. The Appropriate Penalty.

44. The only issue remaining for consideration is the appropriate disciplinary action which should be taken against Mr. Acevedo for the violations that were proven by the Department. To answer this question it is necessary to consult the "disciplinary guidelines" of 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.").

45. 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.

46. Violations of Section 489.129(1)(d), (i), and (m), Florida Statutes, the violations proved in this case, are specifically addressed in Subsection (1) of Florida Administrative Code Rule 61G4-17.001.

47. No guideline is specifically provided for the Count I, first time, violation of Section 489.129(1)(i), Florida Statutes, by reason of having violated Section 489.119(2)(d), Florida Statutes. Florida Administrative Code Rule 61G4-17.001(6), however, provides that the absence of a specific guideline should be viewed as an oversight and not that it is intended that no penalty be imposed. Instead, the penalty specified for an offense most closely resembling the violation for which a penalty has been omitted is to be utilized.

48. In its Proposed Recommended Order, the Department has reasonably suggested that the penalty guideline for a violation of Section 489.119, Florida Statutes, for failing to register a qualified business organization, including obtaining a permit

late, should be referred to for the Count I violation. That penalty range for a first offense of obtaining a late permit is an administrative fine of \$250.00 to \$1,000.00. Fla. Admin. Code R. 61G4-17.001(1)(i)8.

49. No guideline is specifically provided for the Count II first time violation of Section 489.129(1)(i), Florida Statutes, by reason of having violated Section 489.127(4)(c), Florida Statutes. In its Proposed Recommended Order, the Department has reasonably suggested that the penalty guideline for a violation of Section 489.129(1)(o), Florida Statutes, should be referred to for the Count II violation. That penalty range for a first offense of obtaining a late permit is an administrative fine of \$250.00 to \$1,000.00. Fla. Admin. Code R. 61G4-17.001(1)(o)1.

50. The normal penalty range for the Count III first time violation of Section 489.129(1)(d), Florida Statutes, is an administrative fine of \$1,000.00 to \$2,500.00 and/or probation or suspension. Fla. Admin. Code R. 61G4-17.001(1)(d).

51. Finally, the normal penalty range for the Count IV first time violation of Section 489.129(1)(m), Florida Statutes, is an administrative fine of \$1,000.00 to \$2,500.00. Fla. Admin. Code R. 61G4-17.001(1)(m)2. and 4.b.

52. 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.

53. The Department has suggested that Mr. Acevedo's licenses be placed on probation for two years and that he be required to pay fines totaling \$3,250.00.

54. While the total fine requested by the Department is reasonable, no amount of fine should be imposed for the violation of Section 489.129(1)(m), Florida Statutes. Imposing any fine for this violation ignores the fact that the violation is a technical one, predicated solely upon the other three violations. To impose a fine for this violation, would, therefore, punish Mr. Acevedo twice for the same acts.

55. Finally Florida Administrative Code Rule 61G4-17.001(4) provides that, in addition to any other disciplinary action it may impose, the Board will also "assess the costs of investigation and prosecution, excluding costs related to attorney time." That amount is \$381.83 in this case.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered finding that Daniel F. Acevedo violated the provisions of Section 489.129(1)(d), (i), and (m), Florida Statutes, as alleged in Counts I, II, III, and IV of the Administrative Complaint; imposing fines of \$250.00 for Count I, \$1,000.00 for Count II, and \$2,000.00 for Count III; requiring that Mr. Acevedo pay the costs incurred by the Department in investigating and prosecuting this matter; placing Mr. Acevedo's licenses on probation for a period of two years, conditioned upon his payment of the fines, payment of the costs incurred by the

Department; and any other conditions determined to be necessary by the Board.

DONE AND ENTERED this 11th day of March, 2009, in Tallahassee, Leon County, Florida.



LARRY J. SARTIN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 11th day of March, 2009.

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.