

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
CONSTRUCTION INDUSTRY)
LICENSING BOARD,)
)
Petitioner,)
)
vs.) Case No. 08-4836
)
FREDERICK B. NOWELL, SR.,)
d/b/a WELLING CONSTRUCTION,)
INC./REDLAND COMPANY, INC.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

On November 19, 2008, pursuant to notice, a hearing was held in Tallahassee, Florida, by Lisa Shearer Nelson, Administrative Law Judge of the Division of Administrative Hearings. Respondent participated by means of teleconferencing from the Anteaus Federal Medical Center in Lexington, Kentucky.

APPEARANCES

For Petitioner: Kyle Christopher, Esquire
Paul Rendleman, Qualified Representative
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399

For Respondent: Frederick B. Nowell, Sr., pro se
#79553-004 Anteaus Unit
Federal Medical Center
Post Office Box 14500
Lexington, Kentucky 40512-4500

STATEMENT OF THE ISSUE

The issue to be determined is whether Respondent has committed the acts alleged in the Administrative Complaint and if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On September 12, 2008, the Department of Business and Professional Regulation (DBPR or the Department) filed a two-count Amended Administrative Complaint against Respondent, Frederick B. Nowell, Sr., alleging in Count I that Respondent violated Section 489.129(1)(b), Florida Statutes, and in Count II that he violated Section 455.227(1)(c), Florida Statutes, both by virtue of his being found guilty of mail fraud in the United States District Court, Southern District of Florida. Respondent filed a Response in Opposition to the Amended Administrative Complaint, and an Election of Rights, disputing the allegations in the Amended Administrative Complaint and requesting a hearing pursuant to Section 120.57(1), Florida Statutes. The case was referred to the Division of Administrative Hearings on September 29, 2008, for the assignment of an administrative law judge.

The case was noticed for hearing to be conducted November 19, 2008, in Tallahassee, Florida. Because Respondent is incarcerated in federal prison outside the State of Florida, arrangements were made pursuant to his request, for him to participate in the hearing via telephone. At hearing, the

Department presented the testimony of two witnesses and Petitioner's Exhibits numbered 1 through 8 were admitted into evidence. Petitioner's Exhibit 9 was offered and ruling on its admissibility was deferred until Respondent received the entire exhibit and had the opportunity to object to the exhibit. No objection was received, and Petitioner's Exhibit 9 is now admitted. Respondent chose not to testify or submit exhibits, but made legal argument at the conclusion of the hearing.

The proceedings were recorded and the transcript was filed with the Division on December 5, 2008. Because it was anticipated that Respondent's incarceration would make it difficult for him to review the transcript and file a proposed order within ten days, the parties were given until January 5, 2009, to submit proposed recommended orders. Both submissions were timely filed and have been carefully considered in the preparation of this Recommended Order. All references are to the 2006 version of the Florida Statutes unless otherwise indicated.

FINDINGS OF FACT

1. At all times material to the Amended Administrative Complaint, Respondent was a certified general contractor, holding license numbers CGC 1505096 (d/b/a Redland Company, Inc.), and CGC 1507772 (d/b/a Welling Construction, Inc.). Respondent was also licensed as a certified utility and excavation contractor, holding license numbers 1223883 (d/b/a Redland Company, Inc.), CUC 1224007 (d/b/a Welling Construction, Inc.).

2. At all times material to the Amended Administrative Complaint, Respondent was a primary qualifying agent for Redland Company, Inc., which held a certificate of authority license number QB 0009978. Respondent was also a primary qualifying agent for Welling Construction Company, which held certificate of authority license number QB 34340.

3. On or around June 21, 2007, Respondent executed a plea agreement in Case No. 07-20415-CR-MARTINEZ, in the United States District Court for the Southern District of Florida. In the plea agreement, Respondent pled guilty to an Information which charged him with one count of mail fraud in violation of 18 U.S.C. § 1341.

4. On that same day, the plea agreement was considered and accepted by the Honorable Jose Martinez. Before acceptance of the plea agreement, the following colloquy occurred:

COURT: Mr. Nowell, before you signed this document, did you have the opportunity to discuss it with your lawyer?

A. I did.

Q. Did you, in fact discuss it with your lawyer?

A. I did.

Q. Did you review it with him and do you feel that you fully understood it at the time you executed it?

A. Yes, sir.

THE COURT: Counsel, do you believe your client fully understood this document before he executed it?

MR. ZIMMERMAN: Yes, Your Honor.

* * *

BY THE COURT: But let me ask you, Mr. Nowell: Is there anything other than what is contained in this eight pages that has been promised to you or made known to you? Do you have any additional promises or assurances of any kind in an effort to induce you to enter into a plea of guilty other than what is contained in those eight pages?

A. No, sir.

Q. Has anyone attempted in any way to force you to plead guilty, threatened or coerced you?

A. No, sir.

Q. Do you understand that if I don't accept the sentence recommendation in your plea agreement, you will still be bound by your plea and have no right to withdraw it?

A. Yes, sir.

Q. Do you understand that if the sentence is more severe than you expected it, you will still be bound by your plea and have no right to withdraw it?

A. Yes, sir.

Q. How do you now plead to the information pending against you?

A. Guilty.

THE COURT: It is the finding of the Court in the case of U.S.A. vs. Frederick Bradley Nowell, Sr. that the defendant is fully competent and capable of entering an informed plea, that his plea of guilty is a knowing and voluntary plea supported by an independent basis in fact, containing each of the essential elements of the offense.

His plea is therefore accepted. He is now adjudged guilty of that offense.

5. Attached to the plea agreement signed by Respondent was an Agreed Statement of Facts. Those facts supporting the plea provide in pertinent part:

1. The Redland Company, Inc., (hereinafter referred to as "Redland Company"), a Florida corporation, was an engineering construction company [in] Homestead, Florida. The Redland Company provided a broad range of services in the South Florida area, including road, bridge and sewage work, and excavation.

2. Defendant Frederick Bradley Nowell, Sr. was hired by the Redland Company . . . with various duties including the preparation of work estimates, the negotiation of contracts and subcontracts, and the approval of invoices and payments. . . .

3. The Redland Company maintained its operating account at Community Bank of Florida, in Homestead, Florida. [Nowell] had signatory authority over the Redland Company operating account.

4. In or around October 1992, [Nowell] established Nowell Group, Inc., a Florida corporation of which he was president.

* * *

6. In or around November 1997 through in or around October 2006, . . . [Nowell] did knowingly and with intent to defraud devise and intend to devise a scheme and artifice to defraud and to obtain money and property from the Redland Company by means of materially false and fraudulent pretenses, representations, and promises, knowing that they were false and fraudulent when made, and knowingly caused to be delivered certain mail matter by United States Mail and by a private and commercial interstate carrier, . . . for the purpose of executing the scheme.

* * *

9. [Nowell], having control of the payment of vendor invoices at the Redland Company and signatory authority over the company's operating bank account, issued and signed numerous unauthorized Redland Company checks payable to NGI Marine. In one instance, Nowell made the unauthorized Redland Company check payable to Welling Construction, a construction company owned by his wife.

10. [Nowell] would deposit the unauthorized Redland Company checks made payable to "NGI Marine" and "Welling Construction" into his Nowell Group, Inc. bank account. Through this scheme, Nowell was able to defraud the Redland Company of approximately \$11,441,100 dollars, which monies Nowell used for travel, gambling, and his general personal benefit.

11. [Nowell] concealed the issuance of the unauthorized checks by writing "NGI Marine" or "Welling Construction" only on the negotiable copy of the check, while falsifying the corresponding duplicates of the check to make it appear that the original check had been made payable to an established Redland Company vendor. Nowell would then [sic] attach old, legitimate vendor's invoices to the false duplicates as purported support for the checks, and place and cause to be placed the fraudulent documents in company files.

12. To further conceal the fraud, [Nowell] would review the monthly Community Bank of Florida bank account statements for the Redland Company and remove evidence of his wrongdoing. Where the bank statements reflected checks issued to NGI Marine, Nowell would alter the documents to make it falsely appear that the checks had been issued to legitimate vendors.

13. On or about January 16, 2003, [Nowell], for the purpose of executing and in furtherance of the aforesaid scheme and artifice to defraud and to obtain money and

property from others by means of materially and false and fraudulent pretenses, representations, and promises, and attempting to do so, did knowingly cause to be delivered by United States Mail or a commercial interstate carrier, a 2003 Uniform Business Report on behalf of Nowell Group, Inc., sent from the Southern District of Florida to the Florida Secretary of State in Tallahassee, Florida.

6. The transfer of funds and the receipt and issuance of checks are essential to the practice of contracting.

7. Financial responsibility is inextricably intertwined in the practice of contracting. In this case, the acts to which Respondent stipulated involved defrauding the company for which Respondent was a primary qualifying agent.

8. Respondent was adjudicated guilty of a crime directly related to the practice of or the ability to practice contracting.

9. Respondent has challenged the propriety of his guilty plea in the federal courts. To date, his challenges have been unsuccessful.

10. The total investigative costs of this case incurred by the Department, excluding costs associated with any attorney's time, was \$223.21.

CONCLUSIONS OF LAW

11. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with Sections 120.569 and 120.57(1), Florida Statutes (2008).

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

13. In this penal proceeding, Petitioner has the burden of proving the allegations in the Administrative Complaint by clear and convincing evidence. Department of Banking and Finance v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); §120.57(1)(j), Fla. Stat. (2008). Clear and convincing evidence is defined as follows:

Clear 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 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, Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

14. Count I of the Amended Administrative Complaint charged Respondent with violating Section 489.129(1)(b), Florida Statutes. Count II charged a violation of Section 489.129(1)(c), Florida Statutes, by virtue of violating Section 455.227(1)(c), Florida Statutes. Those statutes provide in pertinent part:

455.227 Grounds for discipline; penalties; enforcement.--

(1) The following acts shall constitute grounds for which the disciplinary actions specified in subsection (2) may be taken;

* * *

(c) Being convicted or found guilty of, or entering a plea of nolo contendere to, regardless of adjudication, a crime in any jurisdiction which relates to the practice of, or the ability to practice, a licensee's profession.

* * *

(2) When the board, or the department when there is no board, finds any person guilty of the grounds set forth in subsection (1) or of any grounds set forth in the applicable practice act, including conduct constituting a substantial violation of subsection (1) or a violation of the applicable practice act which occurred prior to obtaining a license, it may enter an order imposing one or more of the following penalties:

(a) Refusal to certify, or to certify with restrictions, an application for a license.

(b) Suspension or permanent revocation of a license.

(c) Restriction of practice.

(d) Imposition of administrative fine not to exceed \$5,000 for each count or separate offense.

(e) Issuance of a reprimand.

(f) Placement of the licensee on probation for a period of time and subject to such conditions as the board, or the department when there is no board, may specify. Those conditions may include, but are not limited to, requiring the licensee to undergo treatment, attend continuing education course, submit to be reexamined, work under

the supervision of another licensee, or satisfy any terms which are reasonably tailored to the violations found.

(g) Corrective action.

* * *

489.129 Disciplinary proceedings.--

(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 if found guilty of any of the following acts:

* * *

(b) Being convicted or found guilty of, or entering a plea of nolo contendere to, regardless of adjudication, a crime in any jurisdiction which directly related to the practice of contracting or the ability to practice contracting.

(c) Violating any provision of chapter 455.

15. In this case, the Department has established by clear and convincing evidence that Respondent pled guilty to mail fraud and was adjudicated guilty of said crime in federal district court. The pivotal question is whether the crime committed is a

crime directly related to the practice or the ability to practice contracting.

16. Section 489.105(3), Florida Statutes, defines the term "contractor" as follows:

The person who is qualified for, and shall be responsible for, the project contracted for and means, except as exempted in this part, the person who, for compensation, undertakes to, submits a bid to, or does himself or by others contract, repair, alter, remodel, add to, demolish, subtract from, or improve any building or structure, including related improvements to real estate (Emphasis supplied).

17. Because this is a penal proceeding, the statute is strictly construed in favor of the licensee. Elmariah v. Department of Professional Regulation, 574 So. 2d 164 (Fla. 1st DCA 1990). In this case, the crime committed dealt with the fraudulent payment of invoices for financial gain and the alteration of records to accomplish that financial gain.

18. In Elmariah, the court construed the phrase "fraudulent representations in the practice of medicine" as opposed to some action "directly related to the practice" of a profession. Section 489.105(3) expressly acknowledges that contracting involves activities performed for compensation, and recognizes that a contractor is one who may undertake responsibility for a job to be performed by others, such as subcontractors.

19. The recent decision in Doll v. Department of Health, 969 So. 2d 1103, 1106 (Fla. 1st DCA 2007), controls the resolution of the issue of whether Respondent's adjudication of

guilt for mail fraud is within the scope of Section 489.129(1)(c). The First District stated:

Several cases demonstrate that, although the statutory definition of a particular profession does not specifically refer to acts involved in the crime committed, the crime may nevertheless relate to the profession. In Greenwald v. Department of Professional Regulation, the court affirmed the revocation of a medical doctor's license after the doctor was convicted of solicitation to commit first-degree murder. 501 So. 2d 740 (Fla. 3d DCA 1987). The Fifth District Court of Appeal has held that although an accountant's fraudulent acts involving gambling did not relate to his technical ability to practice public accounting, the acts did justify revocation of the accountant's license for being convicted of a crime that directly relates to the practice of public accounting. Ashe v. Dep't of Prof'l Regulation, Bd. of Accountancy, 467 So. 2d 814 (Fla. 5th DCA 1985). We held in Rush v. Department of Professional Regulation, Board of Podiatry, that a conviction for conspiracy to import marijuana is directly related to the practice or ability to practice podiatry. 448 So. 2d 26 (Fla. 1st DCA 1984). These cases demonstrate, in our view, that appellee did not err by concluding Doll's conviction was "related to" the practice of chiropractic medicine or the ability to practice chiropractic medicine.

20. Finally, Respondent is a primary qualifying agent for both Redland Company, Inc., and Welling Construction, Inc., one of which was the victim of his crime. Primary qualifying agents are "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." It is clear that by committing mail fraud as

set out in the Agreed Statement of Facts, and transferring funds for his own benefit when he was not entitled to those funds, Respondent breached his responsibility to the companies he qualified. It is therefore found that mail fraud based upon the facts demonstrated in this case is a crime directly related to the practice of contracting or the ability to practice contracting.

21. Respondent argues that his licenses should not be subject to discipline at this time because he is still engaged in attempts to attack his judgment and sentence. Respondent's argument is without merit. A similar argument was made in Department of Professional Regulation, Board of Medical Examiners v. Azima, DOAH No. 84-2536 (Recommended Order April 25, 1985; Final Order June 21, 1985). In that case, the respondent was found guilty by a jury verdict of culpable negligence and the trial court withheld adjudication. He appealed the verdict and while that appeal was pending, proceedings were instituted against his medical license. Azima argued, as does Mr. Nowell, that no action should be taken against his license while the appeal remained pending. The hearing officer rejected this argument and stated:

12. Respondent was not "convicted" within the meaning of this statute, since a judgment of guilt was not entered by the court. See, Delta Truck Brokers, Inc. v. King, 142 So. 2d 273, 275 (Fla. 1962):

The term "conviction" has an accepted meaning in applying statutes of this

nature. It simply means a determination of guilt and a judgment of guilt by a court of competent jurisdiction in a criminal proceeding.
[Citations omitted].

Also, 9 Fla. Jur., Sec. 11, p. 34.

13. It is evident, however, that he was found guilty by a jury of committing a crime directly relating to the practice of medicine. Respondent argues that the statute should be construed to require, as a prerequisite, that the conviction or finding of guilt be final and that any appellate remedy pursued must first be exhausted. Such a construction would engraft a new requirement on the statute, one not expressed or necessarily implied. In Delta Truck Brokers, Inc., *supra*, the Court's definition of "conviction" as used in licensing statutes, made no mention of finality or the need for appellate remedies to be exhausted.

* * *

15. When an accused is convicted or found guilty of a crime in a trial court, the "robe of innocence" is stripped from him. . . . Section 458.331(1)(c) proscribes the fact of a conviction, or the fact of a finding of guilt, regardless of its ultimate veracity. Such fact is not negated or annulled by an appeal, taken either directly or collaterally. . . . The enforcement of the statutes would be frustrated if Respondent's argument is given its logical effect: The Department would be prevented from disciplining a licensee during the years it may take to exhaust all available direct and collateral appeals. . . .

22. The same can be said here. The violation of Sections 455.227(1)(c) and 489.129(1)(b) is triggered by the trial court's finding of guilt after Respondent's entering a guilty plea to the crime of mail fraud. Nothing in either statute requires that the

Board wait until that finding is affirmed on appeal or until all available collateral challenges have been exhausted. Compare Rife v. Department of Professional Regulation, 638 So. 2d 542, 543 (Fla. 2d DCA 1994)(discipline based on action against appellant's license in another state authorized where appellate proceedings still pending in Vermont).

23. Florida Administrative Code Rule 61G4-17.001 sets out the normal penalty ranges for penalties imposed for violations of Sections 489.129 and 455.227, Florida Statutes. For both violations charged in the Amended Administrative Complaint, the minimum penalty listed is a \$2,500 fine and/or probation, or suspension. The maximum penalty is a \$10,000 fine and revocation. The Department acknowledges, however, that with respect to the violation in Count II, Section 455.227 only authorizes a fine of \$5,000.

24. Florida Administrative Code Rule 61G4-17.002 provides that factors in mitigation or aggravation of penalty shall 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.

25. Respondent presented no evidence of any kind at hearing, including any evidence of mitigation. However, the Department stipulated at hearing that this was a first offense for Respondent. Only factors (3), (5), (7) and (10) have any application in this case.^{1/} There is a substantial danger to the public where funds deposited in good faith with a contracting company are transferred for the personal use of a licensee instead of being used for the contracted purpose. It is not entirely clear how long Respondent has been licensed, but licensure records indicate that he has been a primary qualifying agent for Redland Company since August of 1988. The evidence shows that the scheme resulting in his guilty plea existed for the duration of the time he qualified Redland Company. It is axiomatic that the potential loss of a license should have a

deterrent effect on those who misuse their licenses for personal gain. Finally, the amount of money diverted from the Redland Company is substantial. Not only did Respondent divert money to which he was not entitled, but he violated the trust that was placed in him to be responsible for the financial aspects of the company. This type of behavior cannot be tolerated or excused.

26. The Department asserts that, in addition to revocation, Respondent should be ordered to pay restitution in the amount of \$11,441,100.99 to the Redland Company or submit proof that all orders imposed in United States District Court, Southern District of Florida, Miami Division, Case No. 07-20415-CR-JAM have been satisfied. The Department requests this penalty component "in order to prevent Respondent from reapplying for licensure prior to having complied with the judgment" in the criminal proceeding.

27. The judgment in the criminal proceeding was not offered into evidence in this case. While the amount of money transferred from Redland Company is included in the Agreed Statement of Facts attached to the plea agreement, there is no evidence that the amount required for restitution in the criminal judgment is the same amount. It would be inappropriate to consider enforcement of its terms, whatever they may be, in the recommended penalty when the order is not in the record in this case. Moreover, to include this requirement would be a deviation from the Disciplinary Guidelines.

RECOMMENDATION

Upon consideration of the facts found and conclusions of law reached, it is

RECOMMENDED:

That a final order be entered:

1. Finding that Respondent violated Section 489.129(1)(c), Florida Statutes, as charged in Count I of the Amended Administrative Complaint;

2. Finding that Respondent violated Section 489.129(1)(c), by violation of Section 455.227(1)(c), Florida Statutes, as charged in Count II of the Amended Administrative Complaint;

3. Revoking Respondent's certifications and certificates of authority, and imposing a fine of \$10,000 for the violation of Count I of the Amended Administrative Complaint; imposing an additional fine of \$5,000 for Count II of the Amended Administrative Complaint; and imposing costs in the amount of \$223.21.

DONE AND ENTERED this 27th day of January 2009, in Tallahassee, Leon County, Florida.



LISA SHEARER NELSON
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 January, 2009.

ENDNOTE

^{1/} While Rule 61G4-17.002(1) and (6) speak in terms of monetary or other damage inflicted, it is damage to the licensee's customer. Here, the damage was not to a specific customer, but to the company for which Respondent was a primary qualifying agent.

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.