

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND )  
PROFESSIONAL REGULATION, )  
CONSTRUCTION INDUSTRY LICENSING )  
BOARD, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 08-5456PL  
 )  
RICHARD H. LINDLEY d/b/a HCL, )  
INC., )  
 )  
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 January 7, 2009, by video teleconference at sites in West Palm Beach and Tallahassee, Florida.

APPEARANCES

For Petitioner: Kyle Christopher  
Lisa Comingore  
Assistants General Counsel  
Department of Business and  
Professional Regulation  
1940 North Monroe Street  
Tallahassee, Florida 32399

For Respondent: Richard Lindley, pro se  
Richard H. Lindley, d/b/a HCL, Inc.  
9146 Arrowhead Drive  
Greenacres, Florida 33467-1060

## STATEMENT OF THE ISSUES

The issues in this case are whether Respondent, Richard Lindley, committed the offenses alleged in a four-count Administrative Complaint filed with Petitioner, the Department of Business and Professional Regulation, on March 20, 2008, and, if so, what penalty should be imposed.

## PRELIMINARY STATEMENT

On March 20, 2008, Petitioner issued a four-count Administrative Complaint in DBPR Case No. 2007-018062, 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)(g)2., Florida Statutes, by "committing mismanagement or misconduct in the practice of contracting that caused financial harm to a customer" (Count I); Section 489.129(1)(j), Florida Statutes, "by abandoning a construction project in which the contractor is engaged or under contract as a contractor" (Count II); Section 489.129(1)(o), Florida Statutes, "by proceeding on any job without obtaining applicable local building department permits and inspections" (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).

A copy of the Administrative Complaint and Election of Rights form were filed with the Division of Administrative Hearings on October 31, 2008. The matter was designated DOAH Case No. 08-5456PL and was assigned to the undersigned.

The final hearing was scheduled for January 7, 2009, by Notice of Hearing by Video Teleconference entered November 14, 2008.

At the final hearing, Petitioner presented the testimony of Myra Love and James Brown. Petitioner also had 11 exhibits, marked Petitioner's Exhibits A through K, admitted. Respondent testified on his own behalf and had two exhibits, marked Respondent's Exhibits 1 and 2, admitted.

On January 28, 2009, a Notice of Filing Transcript was issued informing the parties that the one-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 9, 2009.

Petitioner filed Petitioner's Proposed Recommended Order on February 6, 2009. Respondent filed a Proposed Recommended Order

on February 9, 2009. 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 2006, 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, Richard Lindley, is and has been at all times material hereto a certified building contractor in Florida, having been issued license number CB C060555. Mr. Lindley is also a Certified Roofing Contractor, having been issued license number CC C1326286. Both licenses were issued by the Construction Industry Licensing Board (hereinafter referred to as the "Board").

3. At all times material, Mr. Lindley was the primary qualifying agent for HCL, Inc. (hereinafter referred to as "HCL"). HCL has a certificate of authority, QB number 20599.

4. On or about June 8, 2005, Mr. Lindley, doing business as HCL, entered into a written contract (hereinafter referred to as the "Contract") with Myra Love to re-roof her residence located at 765 Windermere Way, Palm Beach Gardens, Florida 33418 (hereinafter referred to as the "Subject Property").

5. Pursuant to the Contract, Ms. Love agreed to pay HCL a total of \$8,125.00, as follows: \$1,625.00 upon signing the Contract; \$2,843.75 upon "roof dri in"; \$2,843.75 upon "roof load"; and \$812.50 upon "final inspection."

6. Consistent with the Contract, Ms. Love paid HCL \$1,625.00 by check dated June 8, 2005, upon entering into the Contract.

7. On June 9, 2005, Mr. Lindley applied for a building permit for the work to be performed pursuant to the Contract. The permit was issued, but expired for lack of final inspection.

8. Ms. Love next paid HCL \$2,843.75 by check dated October 20, 2005, upon being informed that the roof had been dried in. Despite having paid for the dry in of the roof, it continued to leak.

9. After making the second payment to HCL in October 2005, no work was performed pursuant to the Contract and all efforts by Ms. Love to contact Mr. Lindley failed.

10. On April 24, 2006, Ms. Love wrote to Mr. Lindley complaining about the condition of her roof and his lack of

response to her telephone calls to him. This letter was delivered by certified mail, return receipt. Mr. Lindley did not respond to Ms. Love's April 24, 2006, letter.

11. No work was performed by Mr. Lindley through October 2006 on the Subject Property, at least a year after work on the Subject Property stopped. Therefore, Ms. Love sent a letter dated October 31, 2006, by certified mail, return receipt, to Mr. Lindley. Ms. Love stated in the letter that "since you abandoned the contract on 6/8/05, and failed to show up on the job, I consider the contract null and void because of your nonperformance. You and your employees are hereby notified to stay off my property."

12. On November 4, 2006, after informing Mr. Lindley that she considered the Contract null and void, Ms. Love contracted with Gold Coast Roofing to complete the re-roofing of the Subject Property.

13. Ms. Love paid Gold Coast Roofing \$14,900.00 for the completion of the re-roofing. Essentially, Gold Coast Roofing, due to the time that had expired since work was abandoned, had to essentially start over on the re-roofing of the Subject Property.

14. The total investigative costs for this matter incurred by the Department, excluding costs associated with any attorney's time, was \$258.56.

CONCLUSIONS OF LAW

A. Jurisdiction.

15. 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.

16. The Department seeks to impose penalties against Mr. Lindley through the Administrative Complaint that include the 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).

17. 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.

18. 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.

19. In this matter, it has been alleged that Respondent committed the offenses described in Section 489.129(1)(g)2., (j) (m) and (o), Florida Statutes:

(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:

. . . .

(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.

. . . .

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

(o) Proceeding on any job without obtaining applicable local building department permits and inspections.

20. 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.'").

21. As the primary qualifying agent for HCL, Mr. Lindley is jointly and equally responsible for all business operations of Alpha. See § 489.1195(1)(a), Fla. Stat.

D. Counts I, and II; Sections 489.129(1)(g)2., and (j), Florida Statutes.

22. The violations alleged in Counts I and II essentially turn on the issue of whether HCL abandoned the construction project it agreed to carry out on the Subject Property for Ms. Love. Whether Mr. Lindley is also guilty of the violation alleged in Count IV also depends, at least in part, on whether HCL abandoned the construction project.

23. First, Count I alleges that Mr. Lindley violated Section 489.129(1)(g)2., Florida Statutes, by committing mismanagement or misconduct in the practice of contracting that caused financial harm to a customer. Financial mismanagement or misconduct are specifically defined to include the abandonment of a job when the percentage of the job completed is less than the percentage of the contract price paid, "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."

24. Count II alleges that Mr. Lindley violated Section 489.129(1)(j), Florida Statutes, by "[a]bandoning a construction project in which the contractor is engaged or under contract as a contractor." This provision goes on to provided that "[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." (Emphasis added).

25. The facts proved clearly and convincingly that no work was performed on the Subject Property between October 2005 and October 2006. Clearly, Mr. Lindley abandoned the project without "just cause" to do so.

26. The evidence failed to prove, however, that the percentage of the job that had been completed when he abandoned the project was less than the percentage of the contract price paid. The evidence did prove that the total amount paid by Ms. Love of \$4,468.75, was 55% of the total Contract price, but the Department failed to present sufficient evidence to prove that less than 55% of the Contract had been completed at the time of abandonment. While there was testimony that the roof continued to leak after "dry-in," there was no other evidence presented from which it can be determined what percentage of the job dry-in constituted, what other work had been done, if any, and the extent to which dry-in was not successful.

27. Based upon the foregoing, it is concluded that the evidence failed to prove clearly and convincingly that Mr. Lindley is in violation of Section 489.129(1)(g)2., Florida Statutes, as alleged in Count I of the Administrative Complaint.

28. The evidence did, however, prove clearly and convincingly that Mr. Lindley is in violation of Section 489.129(1)(j), Florida Statutes, because he abandoned the project for in excess of 90 days.

E. Count III; Section 489.129(1)(o), Florida Statutes.

29. The Department did not prove that Mr. Lindley performed any work on the Subject Property prior to obtaining a permit. While Mr. Lindley failed to obtain a final inspection on the permit he obtained for the Subject Property, no evidence as presented to prove that he did any work on the project when inspections were required. He cannot, therefore, be said to have "proceeded" in any way on the job without obtaining any inspections.

30. The Department has, therefore, failed to prove clearly and convincingly that Mr. Lindley violated Section 489.129(1)(o), Florida Statutes.

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

31. Finally, Count IV alleges that Mr. Lindley committed "incompetency or misconduct in the practice of contracting" in violation of Section 489.129(1)(m), Florida Statutes.

32. Florida Administrative Code Rule 61G4-17.001(1)(m)2. provides that misconduct or incompetency in the practice of contracting includes the violation of any provision of Chapter 489, Part I, Florida Statutes. Thus, by having violated Section

489.129(1)(j), Florida Statutes, Mr. Lindley is technically guilty of misconduct or incompetency in his practice of contracting.

33. It having been found that Mr. Lindley has committed the violation alleged in Count II of the Administrative Complaint, Mr. Lindley is in violation of Section 489.129(1)(m), Florida Statutes, as alleged in Count IV.

G. The Appropriate Penalty.

34. The only issue remaining for consideration is the appropriate disciplinary action which should be taken against Mr. Lindley 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." ).

35. 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.

36. Violations of Section 489.129(1)(j), Florida Statutes, the violations proved in this case, are specifically addressed in Subsection (1) of Florida Administrative Code Rule 61G4-17.001, which provides the "Normal Penalty Ranges" for such this violation is a "\$2,500 fine and/or probation or suspension." Fla. Admin. Code R. 61G4-17.001(1)(j). The range for a violation of Section 489.129(1)(m), Florida Statutes, is a "\$1,000 fine and/or probation or suspension."

37. 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.

38. The Department has suggested that Mr. Lindley be placed on probation for two years, required to pay a fine of \$2,500.00, and make restitution in the amount of \$4,468.75 to Ms. Love for the violation of Section 489.129(1)(g)2., Florida Statutes; be placed on probation for an additional two years and be required to pay a fine of \$5,000.00 for the violation of Section 489.129(1)(j), Florida Statutes; and be required to pay



a fine of \$2,500.00 for the violation of Section 489.129(1)(m), Florida Statutes.

39. Based upon all the facts of this case, it is concluded that the top of the penalty range for the various violations for a first offense is appropriate. Additionally, it is concluded that imposing any fine for the violation of Section 489.129(1)(m), Florida Statutes, ignores the fact that the violation is a technical one, predicated solely upon the other two violations. To impose a fine for this violation, would, therefore, punish Mr. Lindley twice for the same act.

40. In addition to any penalty imposed upon Mr. Lindley, Florida Administrative Code Rule 61G4-17.001(5) provides that "the board shall order the contractor to make restitution in the amount of financial loss suffered by the consumer to the extent that such order does not contravene federal bankruptcy law." Given the fact that Ms. Love was required to pay in excess of the original Contract price to complete the project, the evidence has proved that Mr. Lindley caused a loss to her of the amount paid to him under the Contract: \$4,468.75.

41. 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 \$258.56 in this case.

## RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered:

1. Finding that Richard Lindley violated the provisions of Section 489.129(1)(j) and (m), Florida Statutes, as alleged in Counts II and IV of the Administrative Complaint; imposing a fine of \$2,500.00 and placing Mr. Lindley's licenses on probation for a period of four years conditioned upon his payment of the fines, restitution and the costs incurred by the Department, and any other conditions determined to be necessary by the Board, for the Count II violation; requiring that Mr. Lindley make restitution in the amount of \$4,468.75 to Ms. Love; and requiring that Mr. Lindley pay the costs incurred by the Department in investigating and prosecuting this matter; and

2. Dismissing Counts I and III of the Administrative Complaint.

DONE AND ENTERED this 12th day of March, 2009, in  
Tallahassee, Leon County, Florida.



---

LARRY J. SARTIN  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(850) 488-9675 SUNCOM 278-9675  
Fax Filing (850) 921-6847  
www.doah.state.fl.us

Filed with the Clerk of the  
Division of Administrative Hearings  
this 12th day of March, 2009.

COPIES FURNISHED:

Lisa A. Comingore, Esquire  
Department of Business and  
Professional Regulation  
1940 North Monroe Street, Suite 42  
Tallahassee, Florida 32399-2202

Richard H. Lindley  
Richard H. Lindley, d/b/a HCL, Inc.  
9146 Arrowhead Drive  
Greenacres, Florida 33467-1060

Kyle Christopher, Esquire  
Department of Business &  
Professional Regulation  
1940 North Monroe Street, Suite 42  
Tallahassee, Florida 32399-2202

G. W. Harrell, Executive Director  
Construction Industry Licensing Board  
Department of Business and  
Professional Regulation  
Northwood Centre  
1940 North Monroe Street  
Tallahassee, Florida 32399-0792

Ned Luczynski, General Counsel  
Department of Business and  
Professional Regulation  
Northwood Centre  
1940 North Monroe Street  
Tallahassee, Florida 32399-0792

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.