

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
CONSTRUCTION INDUSTRY LICENSING)
BOARD,)
)
Petitioner,)
)
vs.) Case No. 09-0121
)
FRED BOWYER, d/b/a PROTEAM AND)
ASSOCIATES, INC.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held before Daniel M. Kilbride, Administrative Law Judge of the Division of Administrative Hearings (DOAH), by video teleconference in the above-styled case on March 18, 2009, between Tallahassee, Florida, and Tampa, Florida.

APPEARANCES

For Petitioner: Kyle Christopher, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street, Suite 42
Tallahassee, Florida 32399

Latoyia Adams
Qualified Representative
Department of Business and
Professional Regulation
1940 North Monroe Street, Suite 42
Tallahassee, Florida 32399

For Respondent: (No appearance)

STATEMENT OF THE ISSUE

Whether disciplinary action should be taken against Respondent's licenses to practice contracting, license numbers CGC057941, CGC1509240 and QB37866, based on alleged violations of Section 489.1425, and Subsections 489.129(1)(g)1., 489.129(1)(g)2., 489.129(1)(g)3., 489.129(1)(j), 489.129(1)(m), and 489.129(1)(o), Florida Statutes (2007),¹ as charged in the Administrative Complaint filed against Respondent in this proceeding.

PRELIMINARY STATEMENT

On July 11, 2008, Petitioner filed a nine-count Administrative Complaint alleging that Respondent had violated laws regulating professional activities as a certified contractor in the State of Florida. Respondent disputed the allegations contained in the Administrative Complaint and elected to have a formal administrative hearing. Consequently, the case was referred to the DOAH to conduct a hearing pursuant to Section 120.57, Florida Statutes. The Initial Order and subsequent notices and discovery requests were sent to the last known address provided by Respondent. The formal hearing in this matter was subsequently set for video teleconference between Tallahassee and Tampa. The live witnesses appeared at the Tampa location. Diligent search and inquiry was made to determine the whereabouts of Respondent, but he could not be

located. After waiting a reasonable period of time, the hearing was conducted.

At the hearing, Petitioner offered the testimony of three witnesses: Ms. Kelly Berry (Berry), Mr. Rune Lero (Lero) and Ms. Cecile Van Winkle (Van Winkle). Petitioner introduced 11 exhibits designated 1 through 11, all of which were entered into evidence. The Transcript of the hearing was filed on March 30, 2009. Petitioner filed its Proposed Recommended Order on April 9, 2009. Respondent has not filed post-hearing submittals as of the date of the Recommended Order.

FINDINGS OF FACT

Based on the evidence and testimony of the witnesses presented and the entire record in this proceeding, the following facts are found.

1. Respondent is and has been, at all times material hereto, a certified general contractor in the State of Florida, having been issued license numbers CGC057941 and CGC1509240.

2. At all times material hereto, Respondent was the primary qualifying agent for ProTeam and Associates, Inc. (ProTeam), which has a certificate of authority, QB number 37866.

3. Respondent alleged in his request for a formal hearing that he sold ProTeam on August 11, 2005, and removed his name as qualifying agent on the same date. However, no proof of such

sale and withdrawal was offered in evidence. In addition, Respondent claimed to have placed his two contractors' licenses on inactive status in April 2007. The records of Petitioner show that the licensure status of Respondent's Certified General Contractor license numbers CGC057941 and CGC1504240 is "Delinquent Inactive." These licenses expired on September 30, 2008, and became delinquent on October 1, 2008, upon failure to renew by the date of expiration.

Facts Pertaining to Counts I - IV
Petitioner's Case No. 2007-022091

4. On or about November 8, 2006, Van Winkle entered into a contract with ProTeam to repair water damage to Van Winkle's residence located at 3620 Ironwood Circle, Building O, Unit 402, Bradenton, Florida.

5. The contracted price for the construction, including change orders, was \$18,358.50, of which amount ProTeam accepted approximately \$15,604.71.

6. The contract did not contain a statement explaining the consumer's rights under the Florida Homeowners' Construction Recovery Fund.

7. Construction commenced on or about November 15, 2006, and continued until ProTeam abandoned the project.

8. At the time ProTeam abandoned the project, the percentage of completion was less than the percentage of the total contract price paid by Van Winkle.

9. Van Winkle had paid monies in the amount of \$15,604.71, an amount sufficient to cover the first three draws of the contract, which should have included all aspects of the project except for the cabinet installation and punchlist. Respondent received draws to complete the painting and to order and deliver cabinets and vanities, but failed to do so. Respondent accepted 85 percent of the contract price for Van Winkle's restoration project and provided only demolition and preparation work, carpet and an unfinished paint job. There is no evidence in the record to suggest that Respondent provided Van Winkle with any refund within 30 days after the job was abandoned, and, given that the paint was unfinished and the vanities and cabinets were not provided there is no evidence that Respondent was entitled to keep the amount of funds received under the terms of the contract. The excess amounted to \$6,425.47

10. On or about January 25, 2007, a lien was filed against Van Winkle's property by Carpet Corner, Inc. for unpaid services in the amount of \$1,745.09. The valid lien was recorded against Van Winkle's property for carpeting ordered by Respondent for Van Winkle's job.

11. Respondent received funds from Van Winkle to pay for the carpet, but Respondent failed to apply those funds towards full payment of the carpet subcontractor. The lien was filed on January 29, 2007, and was not released until Van Winkle paid \$1,745.09 to the carpet subcontractor on August 23, 2007, a period greater than 75 days.

12. Van Winkle's testimony seems, at times, to confuse the amount of the lien and the amount paid to release it with the amount paid by Respondent to the carpet subcontractor. However, her testimony also indicates that Respondent only paid \$1,000.00 to the carpet subcontractor out of a \$2,745.09 total contract. It is clear that the amount of the lien, and the amount paid by Van Winkle to release the lien, was \$1,745.09, as indicated in the records of the Manatee County Clerk of Circuit Court.

13. The total investigative costs to Petitioner, excluding costs associated with an attorney's time, for Petitioner's case number 2007-022091, was \$253.42.

Facts Pertaining to Counts VI - IX
Petitioner's Case No. 2007-039332

14. On or about August 29, 2006, Berry entered into a contract with ProTeam to repair water damage to Berry's residence located at 4152 Whittner Drive, Land O'Lakes, Florida.

15. The contracted price for the construction, including change orders, was \$17,921.33.

16. ProTeam accepted approximately \$18,908.74 from Berry for the project.

17. The contract did not contain a statement explaining the consumer's rights under the Florida Homeowners' Construction Recovery Fund.

18. No permit was obtained for the project. However, the job was completed. A permit was required for Berry's project due to the fact that the contract called for the replacement of a shower pan and removal of a structural element. A thorough search of Pasco County records indicated that Respondent did not obtain a permit for this project.

19. The new stucco did not match the old stucco and needed to be redone, and Berry had to pay an additional \$988.40 to have the stucco repaired and repainted.

20. The total investigative costs to Petitioner, excluding costs associated with an attorney's time, for Petitioner's case number 2007-039332, was \$285.51.

CONCLUSIONS OF LAW

21. The DOAH has jurisdiction over the parties and subject matter of this proceeding, pursuant to Section 120.57, Florida Statutes.

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

23. Pursuant to Section 489.129, Florida Statutes, the Board is empowered to revoke, suspend or otherwise discipline the license of a contractor who is found guilty of any of the grounds enumerated in Subsection 489.129(1), Florida Statutes.

24. Petitioner has the burden of proving by clear and convincing evidence the allegations against Respondent. § 120.57(1)(j), Fla. Stat.; Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); Department of Banking and Finance v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996).

25. Evans Packing Co. v. Department of Agriculture and Consumer Services, 550 So. 2d 112, 116, fn. 5 (Fla. 1st DCA 1989), provides the following guidance regarding the clear and convincing evidence standard:

That standard has been described 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 of (sic) 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).

26. The Administrative Complaint alleges that Respondent is guilty of having violated Section 489.1425, Florida Statutes, which provides, in pertinent part, as follows:

(1) Any agreement or contract for repair, restoration, improvement, or construction to residential real property must contain a statement explaining the consumer's rights under the recovery fund, except where the value of all labor and materials does not exceed \$2,500.00.

27. Subsections 489.129(1)(g)1., 2., and 3.; (j); (m) and (o), Florida Statutes, provide in pertinent part, as follows:

(1) The Board may take any of the following actions against any certificate holder or registrant: place on probation or reprimand the licensee, revoke, suspend, or deny the issuance or renewal of the certificate, registration or certificate of authenticity, 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 . . . or business organization for which the contractor is a primary qualifying agent . . . 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:

1. Valid liens have been recorded against the property of a contractor's customer for supplies or services by the contractor for the customer's job; the contractor has received funds from the customer to pay for the supplies or services; and the contractor has not had the liens removed from the

property, by payment or by bond, within 75 days after the date of such liens;

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 at 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

3. The contractor's job has been completed, and it is shown that the customer has had to pay more for the contracted job than the original contract price . . .

* * *

(j) Abandoning a construction project in which the contractor is engaged or under contract as a contractor. A project may be presumed to be 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;

28. Petitioner has proven by clear and convincing evidence that Respondent violated Section 489.1425, Florida Statutes, Counts One and Six of the Administrative Complaint, by failing

to include a statement explaining the consumer's rights under the recovery fund in a contract for repair, restoration, improvement, or construction to residential real property. Both contracts pertained to residential property and were in excess of \$2,500.00, and Respondent did not include the recovery fund statement, as set forth in Subsection 489.1425(1), Florida Statutes, in either the Van Winkle contract or the Berry contract.

29. Petitioner has proven by clear and convincing evidence that Respondent violated Subsection 489.129(1)(g)1., Florida Statutes, Count Two of the Administrative Complaint, by committing mismanagement or misconduct (valid liens filed) in the practice of contracting that causes financial harm to a customer.

30. Petitioner has proven by clear and convincing evidence that Respondent violated Subsection 489.129(1)(g)2., Florida Statutes, Count Three of the Administrative Complaint, by committing mismanagement or misconduct in the practice of contracting that causes financial harm to a customer, and Respondent abandoned Van Winkle's job.

31. Petitioner has proven by clear and convincing evidence that Respondent violated Subsection 489.129(1)(j), Florida Statutes, Count Four of the Administrative Complaint, by abandoning a construction project in which the contractor is

engaged or under contract as a contractor. Respondent ceased work and abandoned Van Winkle's job after completing only preparation and cosmetic work. To date, Respondent has not returned to complete the project, and, given that Respondent received payments for all aspects of the project except cabinet installation and punchlist items, there is no evidence in the record that Respondent had just cause to cease work on the project.

32. Petitioner has proven by clear and convincing evidence that Respondent violated Subsection 489.129(1)(m), Florida Statutes, Count Five of the Administrative Complaint, by committing misconduct or incompetency in the practice of contracting. Florida Administrative Code Rule 61G4-17.001(1)(m)2. provides that misconduct or incompetency in the practice of contracting, shall include, but is not limited to, violation of any provision of Florida Administrative Code Chapter 61G4 or Chapter 489, Part I, Florida Statutes.

33. Petitioner has proven by clear and convincing evidence that Respondent violated Subsection 489.129(1)(g)3., Florida Statutes, Count Seven of the Administrative Complaint, by committing mismanagement or misconduct in the practice of contracting that causes financial harm to a customer. Berry's project was completed with the exception of a section of stucco which was not the correct color. This is a cosmetic preference

and/or workmanship defect which does not indicate that Respondent failed to complete the project. Berry's total contract price was \$17,921.33, but Berry paid Respondent \$18,908.74. Respondent presented no evidence to indicate that the additional payment was the result of change orders, circumstances beyond Respondent's control, circumstances caused by Berry or was otherwise permitted by the terms of the contract.

34. Petitioner has proven by clear and convincing evidence that Respondent violated Subsection 489.129(1)(o), Florida Statutes, Count Eight of the Administrative Complaint, by proceeding on a job without obtaining applicable local building department permits and inspections.

35. Respondent is subject to disciplinary action by the Board pursuant to Section 489.129, Florida Statutes. The disciplinary action under this statute includes, but is not limited to, placing the license on probation, reprimanding the licensee, revoking, suspending, denying the issuance or renewal of the certificate or registration, requiring financial restitution to the consumer, imposing an administrative fine, requiring continuing education and assessing costs associated with investigation and prosecution.

36. Subsection 455.2273(5), Florida Statutes, states that 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.

37. Florida Administrative Code Rule 61G4-17.002 provides, in pertinent part, the following:

Circumstances which may be considered for the purposes of mitigation or aggravation of penalty shall include, but are not limited to, 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. Florida Administrative Code Rule 61G4-17.001, as amended January 24, 2005, provides, in pertinent part, the following guidelines that are applicable to case number 2007-0022091 for violations under Section 489.129, Florida Statutes:

(1) The following guidelines shall be used in disciplinary cases, absent aggravating or mitigating circumstances and subject to other provisions of this chapter.

* * *

(g) Section 489.129(1)(g), F. S.: Mismanagement or misconduct causing financial harm to the customer. First violation, \$1,500 to \$2,500 fine, restitution and/or probation.

* * *

(i) Section 489.129(1)(i), F.S.: Failing in any material respect to comply with the provisions of Part I of Chapter 489, Florida Statutes.

* * *

4. Section 489.1425, F.S.: Failure to notify residential property owner of recovery fund. First violation, \$250 to \$2,000 fine . . .

* * *

(j) Section 489.129(1)(j), F.S.:
Abandonment. First violation, \$5,000 to
\$1,000 fine and/or probation . . .

* * *

(m) Misconduct or incompetence in the
practice of contracting, shall include, but
is not limited to:

* * *

2. Violation of any provision of Chapter
61G4, F.A.C., or Chapter 489, Part I, F.S.

* * *

4. The following guidelines shall apply to
cases involving misconduct or incompetency
in the practice of contracting, absent
aggravating or mitigating circumstances:

* * *

b. Violation of any provision
of Chapter 61G4, F.A.C., or Chapter 489,
Part I, F.S. First violation, \$1,000 to
\$2,500 fine . . .

39. Florida Administrative Code Rule 61G4-17.001, as
amended November 2, 2006, provides, in pertinent part, the
following guidelines that are applicable to case number 2007-
039332 for violations under Section 489.129, Florida Statutes:

(1) The following guidelines shall be used
in disciplinary cases, absent aggravating or
mitigating circumstances and subject to
other provisions of this chapter.

* * *

(g) Section 489.129(1)(g), F. S.:
Mismanagement or misconduct causing
financial harm to the customer. First

offense, \$1,500 fine and/or probation or suspension to \$5,000 fine, and/or probation or suspension.

* * *

(i) Section 489.129(1)(i), F.S.: Failing in any material respect to comply with the provisions of Part I of Chapter 489, Florida Statutes.

4. Section 489.1425, F.S.: Failure to notify residential property owner of recovery fund. First offense, \$250 to \$500 fine . . .

* * *

(m) Misconduct or incompetence in the practice of contracting, shall include, but is not limited to:

* * *

2. Violation of any provision of Chapter 61G4, F.A.C., or Chapter 489, Part I, F.S. First violation, \$1,000 fine and/or probation or suspension to \$2,500 fine and/or probation or suspension.

* * *

(o) Section 489.129(1)(o), F.S.: Proceeding on any job without obtaining applicable local building department permits and/or inspections.

* * *

3. Job finished without a permit having been pulled, or no permit until caught after job, or late permit during the job resulting in missed inspection or inspections. First offense, \$1,000 fine to \$5,000 fine and/or probation . . .

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that an order be rendered as follows:

1. Finding Respondent guilty of having violated Section 489.1425, Florida Statutes, Count One of the Administrative Complaint, and imposing as a penalty an administrative fine of \$2,000.00.

2. Finding Respondent guilty of having violated Subsection 489.129(1)(g)1., Florida Statutes, Count Two of the Administrative Complaint; imposing as a penalty an administrative fine of \$2,500.00 and restitution in the amount of \$1,745.09;² and placing Respondent's licenses (License Nos. CGC057941, GCG1509240, and QB37866) on probation for a period of four years.

3. Finding Respondent guilty of having violated Subsections 489.129(1)(g)2. and (1)(o), Florida Statutes, Count Three of the Administrative Complaint, and imposing as a penalty an administrative fine of \$2,500.00 and restitution in the amount of \$6,425.47.³

4. Finding Respondent guilty of having violated Subsection 489.129(1)(j), Florida Statutes, Count Four of the Administrative Complaint, and imposing as a penalty an administrative fine of \$5,000.00

5. Finding Respondent guilty of having violated Subsection 489.129(1)(m), Florida Statutes, Count Five of the Administrative Complaint, and imposing as a penalty an administrative fine of \$2,500.00.

6. Finding Respondent guilty of having violated Section 489.1425, Florida Statutes, Count Six of the Administrative Complaint, and imposing as a penalty an administrative fine of \$500.00.

7. Finding Respondent guilty of having violated Subsection 489.129(1)(g)3., Florida Statutes, Count Seven of the Administrative Complaint, and imposing as a penalty an administrative fine of \$5,000.00 and restitution in the amount of \$1,975.81.⁴

8. Requiring Respondent to pay Petitioner's costs of investigation and prosecution, excluding costs associated with an attorney's time, in the amount of \$511.93.

DONE AND ENTERED this 6th day of May, 2009, in Tallahassee,
Leon County, Florida.



DANIEL M. KILBRIDE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 6th day of May, 2009.

ENDNOTES

- ^{1/} All references to Florida Statutes are to Florida Statutes (2007), unless otherwise indicated.
- ^{2/} Amount paid to remove lien filed by Carpet Corner, Inc.
- ^{3/} Amount of third draw, for which no work was performed.
- ^{4/} Amount paid in excess of contract price plus amounts paid to correct stucco and painting.

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.