

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND )  
PROFESSIONAL REGULATION, )  
CONSTRUCTION INDUSTRY LICENSING )  
BOARD, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 10-1244  
 )  
TRACY M. THOMAS, d/b/a )  
PARTNERSHIP REMODELING AND )  
ROOFING SERVICES, INC., )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held before Daniel M. Kilbride, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, on May 28, 2010, by video teleconference between sites in Fort Myers, Florida, and Tallahassee, Florida.

APPEARANCES

For Petitioner: Sorin Ardelean, Esquire  
Department of Business and  
Professional Regulation  
1940 North Monroe Street  
Tallahassee, Florida 32399

For Respondent: Tracy Thomas, pro se  
Tracy M. Thomas d/b/a Partnership  
Remodeling and Roofing Services, Inc.  
1810 Frontier Circle  
La Belle, Florida 33935

## STATEMENT OF THE ISSUES

Whether disciplinary action should be taken against Respondent's license to practice contracting, as charged in the three-count Administrative Complaint filed against Respondent in this proceeding, which alleged that Respondent violated Subsection 489.129(1)(g)2., Florida Statutes (2009),<sup>1</sup> by committing mismanagement or misconduct in the practice of contracting that causes financial harm to a customer; Subsection 489.129(1)(j), Florida Statutes, by abandoning a construction project in which the contractor is engaged or under contract as a contractor; and Subsection 489.129(1)(m), Florida Statutes, by committing incompetency or misconduct in the practice of contracting; and, if so, what penalty should be assessed.

## PRELIMINARY STATEMENT

On December 18, 2009, the Department of Business and Professional Regulation ("Petitioner"), filed a three-count Administrative Complaint alleging Tracy M. Thompson ("Respondent") violated the laws regulating his professional activities as a certified roofing contractor in the State of Florida. Respondent disputed the allegations contained in the Administrative Complaint and elected to have a formal administrative hearing. As a result, the case was transferred to the Division of Administrative Hearings to conduct a hearing pursuant to Subsection 120.57(1), Florida Statutes.

At the hearing, Petitioner offered the testimony of two witnesses: Angela Desmond and William Heston; and introduced five exhibits, each of which was entered into evidence. Respondent testified in his own behalf and introduced no other witnesses or exhibits into evidence.

A Transcript of the hearing was prepared and filed on June 16, 2010. Petitioner filed its Proposed Recommended Order on June 25, 2010. Respondent, although advised that he may do so, has not filed his proposals as of the date of this Recommended Order.

#### FINDINGS OF FACT

1. Petitioner is the state agency charged with regulating the practice of contracting, including roofing contractors, in the State of Florida.

2. At all times material, Respondent was a certified roofing contractor, having been issued License No. CCC 1328032 by the Florida Construction Industry Licensing Board ("CILB"). Respondent was the qualifier of Partnership Remodeling and Roofing Services, Inc.

3. On February 10, 2009, Respondent entered into a contract with William Heston to re-roof Heston's home located at 6002 Cocos Drive, Fort Myers, Florida 33908. The agreed price of the contract was \$13,970.00.

4. On or about February 10, 2009, Heston gave Respondent a check in the amount of \$7,000.00 as a deposit, payable to Partnership Roofing Services.

5. After being paid the deposit, Respondent did obtain a permit and filed a Notice of Commencement, but Respondent failed to commence work according to the contract.

6. Heston attempted to contact Respondent numerous times to prompt him to start performing the work, to no avail.

7. On March 6, 2009, Heston sent a letter to Respondent asking for the return of his deposit.

8. Although Respondent claims that he had other financial obligations which prevented him from making restitution to the homeowner, Respondent verbally agreed numerous times to return the deposit to Heston, but he failed to do so.

9. The percentage of contracted work completed was zero, while the percentage of the contract price paid to Respondent was 50 percent.

10. The total investigative costs of this case to Petitioner, excluding costs associated with any attorney's time, was \$427.00.

11. Respondent has not had a prior disciplinary action filed against his license.

CONCLUSIONS OF LAW

12. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding pursuant to Section 120.569 and Subsection 120.57(1), Florida Statutes.

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

14. Pursuant to Section 489.129, Florida Statutes, the CILB 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.

15. Petitioner has the burden of providing by clear and convincing evidence the allegations filed against Respondent in the Administrative Complaint. § 120.57(1)(j), Fla. Stat.; Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne, Stern and Co., 670 So. 2d 932 (Fla. 1996).

16. 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

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 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).

17. The Administrative Complaint alleges that Respondent is guilty of violating Subsections 489.129(1)(g)2., (j), (m), Florida Statutes, which 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 or registration, require financial restitution to a consumer, impose and administrative fine not to exceed \$5,000 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 cause 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 contractor or refunds the excess funds within 30 days after the date the job is abandoned;

\* \* \*

(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 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.

18. Petitioner has proven by clear and convincing evidence that Respondent violated Subsection 489.129(1)(g)2., Florida Statutes (Count I of the Administrative Complaint), by committing mismanagement or misconduct in the practice of contracting that causes financial harm to a customer. Respondent accepted the deposit from Heston under the contract and completed no work. Respondent claimed that he was unable to return the money, yet provided no accounting as to where or how the money was expended. Failure to account TO Mr. Heston is mismanagement and misconduct in the practice of contracting.

19. Petitioner has proven by clear and convincing evidence that Respondent violated Subsection 489.129(1)(j), Florida Statutes (Count II of the Administrative Complaint), by abandoning a construction project in which the contractor is engaged or under contract. Respondent took a deposit of 50 percent of the contract price on February 10, 2009, and did not perform any work at all, even after the homeowner demanded Respondent honor his contract. Neither did Respondent provide any notification to Heston that the work had stopped. Further, Respondent's explanation at the hearing as to the reason for his failure to perform was indefinite and did not show mitigation.

20. Petitioner has proven by clear and convincing evidence that Respondent violated Subsection 489.129(1)(m), Florida Statutes (Count III of the Administrative Complaint), by divesting the deposit money for the Heston project for purposes other than completing the re-roofing of Heston's house. Florida Administrative Code Rule 61G4-17.001(1)(m)2. provides that misconduct or incompetency in the practice of contracting shall include violating any provision of Florida Administrative Code Chapter 61G4, or Chapter 489, Part I, Florida Statutes. Respondent violated Subsection 489.129(1)(m), Florida Statutes, by violating Subsections 489.129(1)(g)2. and (j), Florida Statutes, as provided in paragraphs six and seven above.



21. Respondent is subject to disciplinary action by the CILB pursuant to Sections 455.227 and 489.129, Florida Statutes. The disciplinary action under these statutes includes revoking, suspending, and denying the issuance or renewal of the certificate or registration; requiring financial restitution to the consumer; imposing an administrative fine not to exceed \$5,000.00 per violation; requiring continuing education; and assessing costs associated with investigation and prosecution.

22. Subsection 455.2273(5), Florida Statutes, states that the Administrative Law Judge, in recommending penalties in a recommended order, must follow the penalty guidelines established by the CILB or the Department and must state, in writing, the mitigating or aggravating circumstances upon which the recommended penalty is based.

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

Circumstances which may be considered for the purpose 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.

24. Pursuant to Florida Administrative Code Rule 61G4-17.003, a repeat violation is any violation on which disciplinary action is being taken where the same licensee had disciplinary action taken against him regardless of whether the violations in the present and prior disciplinary actions are of the same or different subsections of the disciplinary statutes. Additionally, if the repeat violation is the very same type of violation, the penalty set out above will generally be increased

over what is otherwise shown for repeat violations in the above list.

25. Florida Administrative Code Rule 61G4-17.001 provides the following guidelines that are pertinent to this proceeding:

(1) The following guidelines shall be used in disciplinary cases, absent aggravating or mitigating circumstances and subject to the 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 \$5,000 fine, suspension and/or probation.

\* \* \*

(j) Section 489.129(1)(j) F.S.: Abandonment. First violation \$2,500 to \$7,500 fine; probation or suspension.

\* \* \*

(m) Misconduct or incompetency 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, \$1,500.00 to \$2,500.00 fine; and probation or suspension.

26. There is no evidence that Respondent has been previously disciplined for violations under Chapters 489 or 455, Florida Statutes, therefore, the penalty guidelines that should be used are for a first violation. In addition, this was the only complaint filed against Respondent.

27. Respondent's explanation as to his inability to return the deposit made by the homeowner is not persuasive. However, Respondent's offer to make restitution appears to be genuine.

RECOMMENDATION

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

RECOMMENDED that Petitioner, Department of Business and Professional Regulation, Construction Industry Licensing Board, issue a final order, as follows:

1. Finding Respondent guilty of having violated Subsection 489.129(1)(g)2., Florida Statutes, as alleged in Count I of the Administrative Complaint, and imposing as a penalty an administrative fine in the amount of \$1,500.00.

2. Finding Respondent guilty of having violated Subsection 489.129(1)(j), Florida Statutes, as alleged in Count II of the

Administrative Complaint, and imposing as a penalty an administrative fine in the amount of \$2,500.00.

3. Finding Respondent guilty of having violated Subsection 489.129(1)(m), Florida Statutes, as alleged in Count III of the Administrative Complaint, and imposing as a penalty an administrative fine in the amount of \$1,500.00.

4. Ordering Respondent to pay financial restitution to the consumer, William Heston, in the amount of \$7,000.00, representing the deposit paid to Respondent.

5. Requiring Respondent to pay Petitioner's costs of investigation and prosecution, excluding costs associated with an attorney's time, in the amount of \$427.12.

6. Suspending Respondent's license to practice contracting (No. CCC 1328032) for a period of one year, followed by probation for two years.

DONE AND ENTERED this 19th day of July, 2010, in Tallahassee, Leon County, Florida.



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DANIEL M. KILBRIDE  
Administrative Law Judge  
Division of Administrative Hearings  
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1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 19th day of July, 2010.

ENDNOTE

<sup>1/</sup> All statutory references are to Florida Statutes (2009),  
unless otherwise noted.

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.